IN THE CRIMINAL COURT OF KNOX COUNTY, TENNESSEE
DIVISION ONE

FILED
BY JOY R. [illegible]
2010 NOV 10 AM 10:26
KNOX COUNTY CRIMINAL COURT
KNOXVILLE, TN

STATE OF TENNESSEE	)	
	)	
v.	)	No. 24527
	)	(Writ of Error Coram Nobis)
BILLY RAY IRICK	)	Death Penalty

ORDER

This matter is before the court on Billy Ray Irick's petition for a writ for error coram nobis filed on October 14, 2010, the State's response filed on November 1, 2010, and the arguments of counsel from the hearing held on November 5, 2010.

PROCEDURAL HISTORY

The Petitioner was convicted by a jury of the first degree felony murder, and the anal and vaginal rape of seven year old Paula Dyer on November 1, 1986, and the jury sentenced the Petitioner to death on November 3, 1986, for the murder. On December 1, 1986, the trial court denied the Petitioner's motion for a new trial. The Petitioner's convictions were affirmed on appeal by the Tennessee Supreme Court on November 11, 1988. The Tennessee Supreme Court summarized the evidence presented:

> ... In summary the State's proof was that Billy Ray Irick was a friend of the child's mother and step-father. 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

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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.

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.

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. ... It also established beyond question that the child was alive at the time the described events occurred.

State v. Irick, 762 S.W.2d 121, 133-34 (Tenn. 1988). Additional summarized facts included in the record indicate that

After the victim was taken to the emergency room, Mr. Irick left the

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victim's home and was located by the police the next day hiding beneath a bridge. When apprehended, Mr. Irick stated; "I have been hiding under the bridge all day, and several police cars have gone by and I had thought about turning myself in." [762 S.W.2d] at 126. After his arrest, Mr. Irick gave a statement to the police, in which he admitted killing the victim. Id. Mr. Irick "was responsive to questions asked of him," and "[h]e made a number of changes on his written statement before signing it." Id. While Mr. Irick "was upset and emotional, . . . he was coherent at all times." Id. State v. Billy Ray Irick, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 22, 2010). The United States Supreme Court denied certiorari on the Petitioner's direct appeal on January 5, 1989.

Petitioner subsequently unsuccessfully challenged his convictions and sentences in state post-conviction proceedings. The post-conviction appellate opinion affirming the denial of relief at the trial court level was filed on January 14, 1998, and the Tennessee Supreme Court denied permission to appeal on June 15, 1998. The United States Supreme Court denied certiorari on October 5, 1998.

Following his unsuccessful challenge in state court to his convictions and sentences, the Petitioner attempted to challenge his convictions and sentences in federal court through federal habeas corpus proceedings which he filed in 1999. The District Court dismissed the habeas proceedings on March 30, 2001, and the Sixth Circuit Court of Appeals affirmed the trial court's dismissal of the petitions on May 12, 2009, and then denied a request for a rehearing on July 27, 2009. The United States Supreme Court denied certiorari on February 22, 2010, and then denied a rehearing on April 19, 2010.

The Petitioner then returned to state court and filed an unsuccessful motion to

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reopen his petition for post-conviction relief on June 28, 2010, alleging essentially the same factual issues he now raises in this petition for writ of error coram nobis. On September 16, 2010, the Tennessee Court of Criminal Appeals denied his application for an appeal from the trial court's order denying his motion to reopen his post-conviction petition. The petitioner then filed a Rule 11 application for appeal on October 18, 2010, which is currently pending before the Tennessee Supreme Court.

The Petitioner also recently raised a claim of incompetency to be executed which was denied by the trial court and affirmed by the Tennessee Supreme Court on appeal. State v. Billy Ray Irick, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 22, 2010). The Petitioner is currently scheduled for execution on December 7, 2010.

On October 14, 2010, the Petitioner filed the Petition for Writ of Error Coram Nobis currently before this Court. On November 1, 2010, the State filed its response to the petition and on November 5, 2010, this Court held a hearing on this matter. The parties relied upon the records attached to their pleadings and this Court also took judicial notice of all proceedings and records in the Petitioner's case.

STANDARDS

Recently, in Harris v. State, 301 S.W.3d 141 (Tenn. 2010), our Tennessee Supreme Court addressed the standards applicable to a petition for a writ of error coram nobis.

> A proceeding in the nature of a writ of error coram nobis is available to convicted defendants in criminal cases. *Tenn. Code Ann. § 40-26-105(a)* (2006). Whether to grant or deny a petition for writ of error

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coram nobis on its merits rests within the sound discretion of the trial court. *State v. Vasques, 221 S.W.3d 514, 527-28 (Tenn. 2007)*. Coram nobis claims may be based on newly discovered evidence:

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 40-26-105(b).

Coram nobis claims are subject to a one-year statute of limitations. *Tenn. Code Ann. § 27-7-103* (2000) ("The writ of error coram nobis may be had within one (1) year after the judgment becomes final . . . ."). The statute of limitations is computed from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion. *Mixon v. State, 983 S.W.2d 661, 670 (Tenn. 1999)*. ... We construe the coram nobis statute of limitations consistent with the longstanding rule that persons seeking relief under the writ must exercise due diligence in presenting the claim. *Mixon, 983 S.W.2d at 670*. The State bears the burden of raising the bar of the statute of limitations as an affirmative defense. *Harris, 102 S.W.3d at 593*.

...

When a petitioner seeks a writ of error coram nobis based on newly discovered evidence of actual innocence, due process considerations may require tolling of the statute of limitations. *Workman v. State, 41 S.W.3d 100, 101 (Tenn. 2001)*. These due process considerations refer to the principle that "before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the

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presentation of claims at a meaningful time and in a meaningful manner." *Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992).* ...

To determine whether due process requires tolling, a court must weigh the petitioner's interest in obtaining a hearing to present a later-arising ground for relief against the State's interest in preventing stale and groundless claims. *Workman, 41 S.W.3d at 103.* In balancing these interests, a court should utilize a three-step analysis:

> (1) determine when the limitations period would normally have begun to run;
>
> (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and
>
> (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

A writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999); State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002). "[T]he purpose of this remedy 'is to bring to the attention of the [trial] court some fact unknown to the court, which if known would have resulted in a different judgment.'" State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting State ex rel. Carlson v. State, 219 Tenn. 80, 407 S.W.2d 165, 167 (Tenn. 1996)). To establish that he is entitled to a new trial, the Petitioner must show:

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(a) the grounds and the nature of the newly discovered evidence,

(b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial,

© that the Petitioner was without fault in failing to present the newly discovered evidence at the appropriate time, and

(d) the relief sought.

Hart, 911 S.W.2d at 374-75. Affidavits should be filed in support of the petition or at some point in time prior to the hearing. Id. at 375.

> The grounds for seeking a petition for writ of error coram nobis are not limited to specific categories, as are the grounds for reopening a post-conviction petition. Coram nobis claims may be based upon any "newly discovered evidence relating to matters litigated at the trial" so long as the petitioner also establishes that the petitioner was "without fault" in failing to present the evidence at the proper time. Coram nobis claims therefore are singularly fact-intensive. Unlike motions to reopen, coram nobis claims are not easily resolved on the face of the petition and often require a hearing.

Harris v. State, 102 S.W.3d 587, 592-93 (Tenn. 2003).

ISSUES

Petitioner here claims that he is entitled to relief based upon newly discovered evidence and that the prosecution violated due process concerns set forth in Brady v. Maryland, 373 U.S. 83 (1963), related to the failure to disclose exculpatory evidence. Specifically, he asserts that

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(6) During petitioner's federal habeas proceedings, the following categories of evidence were discovered: (a) firsthand accounts of petitioner's mental illness, including hallucinations, command hallucinations, inexplicable and unabashed acts of threatened violence in close proximity to the offense, as well as irrational fears of being attacked and dismembered (discovered on or about July 1, 1999); (b) firsthand accounts of violent child abuse of the petitioner as a teenager (discovered on [or] about July 1, 1999); © a previously withheld psychological assessment from Riverbend Maximum Security Institution which supports and/or is consistent with petitioner's claim of incompetency at the time of the offense and at the time of trial (discovered subsequent to December 16, 2009); (d) an affidavit fro Dr. Clifton Tennison dated February 25, 2010, who was one of two psychiatrists who originally found petitioner to be competent at the time of trial, but who now says that after reviewing the Jeffers' affidavits, a "serious and troubling issue" has been raised as to petitioner's sanity at the time of the offense; and a report)completed in April 2010) and testimony of Dr. Peter Brown during petitioner's competency hearing on August 16, 2010 to the effect that petitioner lacked substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law due to a severe mental illness, thereby rendering him innocent of the offenses by reason of insanity.

(7) In the alternative, the later arising evidence of petitioner's severe mental illness, in conjunction with other constitutional errors/violations, is so strong that no reasonable jury would have sentenced him to death.

Petition For Writ of Error Coram Nobis, filed 10/14/2010.

The State has responded and has asserted that the petition is untimely in that it was filed beyond the one-year statute of limitations, and that if timely, any alleged "new"

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evidence fails to establish a reasonable probability that the result of the original trial would have been different.

ANALYSIS

1. **Timeliness**

A. When the limitations period would normally have begun to run.

As set out above, the State has affirmatively claimed that Mr. Irick's petition for writ of error coram nobis is time-barred. Also as stated above, the trial court ruled on the Petitioner's motion for new trial on December 1, 1986. Accordingly, the limitations period in this case normally would have begun to run on December 31, 1986, thirty days after the trial court denied Mr. Irick's motion for a new trial. Therefore, the statute of limitations would have expired on December 31, 1987, almost 23 years before Mr. Irick filed his petition for writ of error coram nobis now before this Court.

B. Whether the grounds for relief actually arose after the limitations period would normally have commenced.

Also as discussed above and as the State concedes in its pleadings, "principles of due process may preclude the use of the statute of limitations to bar a claim in coram nobis." Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001). This Court must next determine whether the Petitioner's grounds for relief actually arose after the limitations period normally would have commenced. Here, the Petitioner has divided the "new evidence" into five categories:

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(a) lay person affidavits of petitioner's behavior in close proximity to the offense, (discovered on or about July 1, 1999);

(b) lay person affidavits of violent child abuse of the petitioner as a teenager (discovered on [or] about July 1, 1999);

© a psychological assessment from Riverbend Maximum Security Institution (discovered subsequent to December 16, 2009);

(d) an affidavit from Dr. Clifton Tennison dated February 25, 2010, who was one of two psychiatrists who originally found petitioner to be competent at the time of trial; and

(e) the report of Dr. Peter Brown from April 2010 after his evaluation of the Petitioner.

The State asserts that none of this information constitutes "new" evidence that would support any relief here. Rather, the State submits that the Petitioner claim is a collection of "cumulative evidence of a long abandoned mental health defense and [that he has] recycled it with yet another mental health professional." The new psychological report and affidavit described in sections (d) and (e) are based on the lay person affidavits described in sections (a) and (b).

The parties agreed that the Petitioner was relying upon the evidence also presented at the hearing this Court held on the issue of the Petitioner's competency to be executed. The Tennessee Supreme Court summarized that evidence as follows:

> Dr. Brown evaluated Mr. Irick on December 7, 2009, and January 21, 2010, meeting with Mr. Irick for almost six hours. In addition to his own meetings with Mr. Irick, Dr. Brown also relied upon the

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neuropsychological testing and evaluation of Mr. Irick performed by Dr. D. Malcolm Spica, a licensed clinical psychologist and neuropsychologist, in November and December of 2009. Furthermore, Dr. Brown had reviewed Mr. Irick's school records, records from the various mental health facilities in which Mr. Irick had been institutionalized, records from the various mental health professionals who had treated and/or evaluated Mr. Irick during his life, portions of the transcripts and evidence offered at Mr. Irick's trial, portions of the proof introduced at the state post-conviction and federal habeas corpus proceedings, and records from the correctional facilities in which Mr. Irick has been incarcerated.

Dr. Brown candidly testified that the purpose of his evaluation had been to determine Mr. Irick's mental status at the time of the murder and to identify any mitigating circumstances. ... Dr. Brown confirmed, however, that Mr. Irick was able to engage in a coherent conversation. Additionally, Dr. Brown agreed that a seven-to-nine-year-old child[1] understands the concepts of doing wrong and receiving punishment.

Concerning Mr. Irick's mental condition generally, Dr. Brown testified that Mr. Irick has suffered from a lifelong severe psychiatric illness and that at the time of the offense he was suffering from psychosis. Through Dr. Brown, Mr. Irick introduced evidence concerning his past diagnoses of mental illness, evidence of his potentially violent actions during his teenage years, and evidence of his psychotic behavior around the time of the victim's murder.

Dr. Brown diagnosed Mr. Irick as suffering from a psychotic disorder not otherwise specified. This psychotic disorder is a condition manifested by gross perceptual and thinking deficits, such as hallucinations, delusions, and gross disorganization of behavior. Dr. Brown believed that Mr. Irick's expressed inability to remember the offense was genuine; he did not believe Mr. Irick was malingering or pretending to have lost his memory. Dr. Brown opined that Mr. Irick's

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[1]Dr. Brown stated that the Petitioner's rational understanding of events was that of a seven to nine year old child.

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inability to remember the offense is the result of the psychotic episode Mr. Irick was experiencing at the time of the offense. Dr. Brown explained that persons suffering psychoses typically do not have "good recollection" of events occurring during psychotic episodes. At the same time, Dr. Brown acknowledged that Mr. Irick is able to recall events from his childhood, from the evening of the murder, and from his trial. Dr. Brown also acknowledged that during psychological evaluations conducted not long after the crime, Mr. Irick admitted he had been drinking alcohol on the day of the offense and that he had felt "angry," "enraged," "degraded," and "humiliated" by the family's request for him to babysit the children because he had planned to go out that evening.

Dr. Brown opined that Mr. Irick's mental problems continue to the present time, although he agreed that Mr. Irick showed no evidence of thought disorder, acute hallucinations, or delusions during their interview. Dr. Brown's diagnosis was based on Mr. Irick's history; however, Dr. Brown acknowledged that there have been no documented episodes of psychosis during Mr. Irick's incarceration at the Riverbend Maximum Security Institution. Dr. Brown also acknowledged that Mr. Irick has responded well to the structured environment of prison and that he has not been prescribed anti-psychotic medication since adolescence. Dr. Brown opined that the "best examples" of Mr. Irick's psychotic behavior were contained in the lay affidavits provided by members of the victim's family in 1999 during federal habeas corpus proceedings. These affidavits related that Mr. Irick reported hearing voices, talked to himself, and acted violently toward others in the days leading up to the 1985 rape and murder of the victim. Specifically, the persons providing these affidavits stated that Mr. Irick talked aloud to himself and told family members that he was receiving commands from the devil and hearing other voices telling him what to do. Mr. Irick also professed to hearing police sirens and warned family members to protect themselves because the police were coming to kill them. On another occasion, Mr. Irick was seen "in broad daylight" with a machete chasing a girl with whom he had no relationship down the street. On another occasion, Mr. Irick was found with a machete inside the house where he and the victim's step-father were living and, when asked about the machete, said that he was going to kill his friend, the victim's

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step-father. Dr. Brown agreed that these affidavits constituted the most recent reports of any psychotic episodes.

Dr. Brown acknowledged that Mr. Irick denied having any memory of the events recounted in the affidavits and further denied having any psychological impairment. Dr. Brown explained that a person suffering from paranoia and psychosis has a tendency to minimize or deny symptoms, meaning "the most reliable information" is typically the reports of third parties witnessing the symptoms. In Dr. Brown's view, all the data from Mr. Irick's childhood, including a report that at age six he expressed fear of his own impulses and felt threatened by those in his environment, were consistent with a severe psychiatric condition. Dr. Brown explained that psychotic symptoms tend to wax and wane according to circumstances, with emotional conflict serving as a trigger for a psychotic episode. Dr. Brown opined that the marital strife between the victim's mother and step-father at the time of the murder likely amounted to a trigger for Mr. Irick's pyschosis.

Dr. Brown also diagnosed Mr. Irick as suffering from cognitive disorder not otherwise specified, a condition manifested by significant problems in the processing of information that does not meet the criteria for a specific diagnosis of a dementia, such as Alzheimer's, and that has no alternative explanation. This diagnosis was based upon the neuropsychological testing performed by Dr. Spica and was consistent with Mr. Irick's history. The neuropsychological testing indicated gross impairment in Mr. Irick's executive function, relating to his ability to integrate information from various processes in order to make decisions, to plan, and to control impulses. A person having this disorder, Dr. Brown explained, would not be able to resist paranoid delusions or command hallucinations. Dr. Brown further explained that this condition affects memory. Mr. Irick also has gross deficit in language function, Dr. Brown stated, meaning that his ability to use words as props to structure memory is impaired.

While Dr. Brown ruled out schizophrenia, he diagnosed Mr. Irick with paranoid and schizoid personality disorders. According to Dr. Brown,

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the paranoid personality disorder manifests itself in Mr. Irick's inability to evaluate people because of "his level of suspiciousness and his tendency to be looking for attacks, verbal, physical, whatever . . . from a variety of different places at different times." Dr. Brown testified that the schizoid personality disorder manifests itself in Mr. Irick's "gross disorganization." Dr. Brown opined that it is "impossible to find a time in Mr. Irick's life when he was succeeding at meeting the goals and standards of his age group and that his primary way of coping" has been to withdraw from people.

Overall, Dr. Brown found evidence of two significant features based on his diagnoses of four psychological disorders. "One is a lifelong severe psychiatric illness and evidence of episodes from reliable reporters of some of the most severe and the most dangerous psychiatric symptoms." The second is the clear evidence of gross impairment of Mr. Irick's "ability to control, plan, and effectively execute or refrain from engaging in behavior with his cognitive disorder." Nevertheless, when Dr. Brown asked Mr. Irick about his general understanding of his present situation, Mr. Irick explained that he was on death row and expected to be executed. Mr. Irick expressed awareness of the offense he had committed and the victim's name, and he understood Dr. Brown's explanation of his own role and the reason Dr. Brown was examining Mr. Irick and preparing a report for the court.

The second witness for Mr. Irick, Nina Braswell Lunn, was a licensed social worker who had interviewed Mr. Irick in 1965, when he was a child. The sole subject of Ms. Lunn's testimony was Mr. Irick's childhood psychiatric problems and institutionalizations. Ms. Lunn had not seen Mr. Irick since 1967.

The State presented one witness at the hearing, Dr. Bruce G. Seidner, a clinical and forensic psychologist. Dr. Seidner interviewed and tested Mr. Irick on August 14 and 15, 2010, the weekend before the hearing, for a total of twelve and a half hours. Dr. Seidner also prepared a written report that the State introduced into evidence. Dr. Seidner explained that the purpose of his examination was to evaluate Mr. Irick's

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competence for execution. Dr. Seidner stated that he had followed the professional guidelines for assessing competence to be executed in conducting his evaluation. Dr. Seidner acknowledged Mr. Irick's long history of mental illness and substance dependence; and he considered Mr. Irick's background of behavioral, psychological, and substance abuse problems when forming his opinion on competence for execution. However, Dr. Seidner's evaluation focused upon Mr. Irick's current mental status, not his mental status at the time of the offense.

According to Dr. Seidner, Mr. Irick was entirely cooperative during the evaluation. Mr. Irick voluntarily and knowingly signed a consent form. When asked if he knew why Dr. Seidner was there, Mr. Irick replied, "Yeah. Yeah. One side wants to kill me, and one side wants to save me, and you know, you're–you're here to interview me to see if I'm competent to be executed." Dr. Seidner had no doubt that Mr. Irick "knew what we were about." Dr. Seidner opined that Mr. Irick fully understood the history of his litigation and felt that substantive errors had been made in his case. Mr. Irick believed, given the structure, and procedure, and rules of court, that he has now "run out of road." Mr. Irick told Dr. Seidner that he intends "to fight to the end," which Mr. Irick views as his execution on December 7, 2010. Dr. Seidner confirmed that Mr. Irick knows the date of his execution, the victim's name, the victim's relationship to her family and to him, and his relationship to the victim's family. Mr. Irick admitted that he had been angry with the family about being asked to babysit on the night of the murder and said that he had been drinking and using marijuana that day. Mr. Irick maintained his innocence of the crime, however, and suggested that the victim's stepfather was the killer. Despite Mr. Irick's profession of innocence, Dr. Seidner opined that there is "no question" Mr. Irick understood that he had been convicted of the victim's murder and that he had received the death penalty as punishment for that crime.

Dr. Seidner and Mr. Irick also talked for some time about the death penalty and the pendency of Mr. Irick's death. Mr. Irick discussed the politics of the death penalty and his trial and expressed concern regarding the inconsistent application and the rationale for the death penalty. Still,

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according to Dr. Seidner, Mr. Irick was well aware of the sense of closure that families of victims might experience and of the justice of "a life for a life." They also discussed Mr. Irick's views of death, which he described as "a process of life." According to Dr. Seidner's report, Mr. Irick had adopted the Lakota Native American spiritual tradition before his incarceration. Mr. Irick believes that everything has a purpose and reason relative to the plans and intentions of the Creator. During his incarceration he has developed himself as an artist, and he is gratified by creating and sharing his paintings as gifts. Mr. Irick expressed his belief that everyone is born with a death sentence, and each person makes the most of life within the constraints and opportunities that originate from the Creator. However, Mr. Irick did not believe in an afterlife and accepted that his life would end with his execution. In Dr. Seidner's words, "He fully understands that if and when he is executed that is the end of his life."

...

Dr. Seidner administered an IQ test, which revealed that Mr. Irick was of average intelligence (full scale IQ of 97). While Mr. Irick described some memory deficits, Dr. Seidner did not observe any that were outside the range of age-related memory decline. Dr. Seidner found nothing he would describe as an impairment. According to Dr. Seidner, the personality test results did not reflect that Mr. Irick was malingering but instead were indicative of Mr. Irick's tumultuous and traumatic life. Dr. Seidner opined that Mr. Irick "was not an individual who was hallucinating and having . . . delusory experiences." Dr. Seidner explained that Mr. Irick's relative deficits are in the speed of processing information and stated, "He's pretty deliberate . . . . [H]e's not efficient but he's accurate." Dr. Seidner found relative strengths in Mr. Irick's abstract verbal capacity: "He can put together ideas. He can abstract ideas, see their commonalities and differences and carry on pretty high level abstract discussions." ...

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(Footnotes omitted).

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Records indicate that trial counsel did in fact have substantial information related to the Petitioner's mental health history, childhood, and facts related to the Petitioner leading up to trial. The Petitioner was examined by mental health professionals prior to trial. In fact, counsel filed a notice of an insanity defense which was withdrawn prior to trial. At the post-conviction proceedings in this case, counsel stated that he had discussed a mental related defense with the Petitioner. He also stated that the Petitioner had been evaluated at Ridgecrest Psychiatric Hospital and examined by Diana McCoy. Although a neuropsychological evaluation had been obtained, the resulting proof had been presented at trial through Nina Braswell Lunn, a social worker. Counsel testified it was a strategic decision not to call Dr. McCoy or the psychiatrist at trial because they had referred to the Petitioner as a sociopath and counsel did not want the jury to hear this description of the Petitioner. A mental health expert retained for the post-conviction proceedings also could not justify an insanity defense. That expert opined that the Petitioner suffered from a serious mixed personality disorder with strong paranoia features, possible schizoid features and that brain damage could not be ruled out.

It is clear from the records in this case that the Petitioner's history of mental health issues is well documented and dates back to his childhood. This is not a new issue that has not been considered before by any means. Trial counsel certainly testified at the post-conviction proceedings that this issue was considered pretrial and the reasons for abandoning an insanity defense.

While this Court tends to agree with the state that this evidence is not "new" in the sense that the issue was investigated and considered pretrial, the affidavits from trial

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and post-conviction counsel indicate that they were not previously aware of the information from the lay persons or the TDOC report now presented. Clearly, the parties dispute whether the issue is "new" evidence that is later arising. Therefore, after careful consideration, this Court will proceed and will treat the grounds for relief as having arose after the limitations period.

C. If the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

The last step in the timeliness analysis requires a determination of whether the Petitioner was given a reasonable opportunity to present his claims. In applying the due process balancing analysis, courts have declined to create a specific limitations period for later-arising claims. Mr. Irick alleged in his petition for writ of error coram nobis that he did not become aware of the "new" evidence until he received Dr. Brown's report from April of 2010, addressing the alleged importance of the affidavits as it related to the Petitioner's mental capacity at the time of the offenses and Dr. Tennison's affidavit.[2] He also alleges that when he filed his petition for writ of error coram nobis on October 14, 2010, he was acting in a timely manner. This Court cannot agree.

As the Tennessee Court of Criminal Appeals held in the denial of his application

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[2]Although the Petitioner submitted the affidavit of Dr. Tennison as part of his "new" evidence, that affidavit which addressed the new lay person affidavits was not conclusive and speculative at best concerning any effect they might have on Dr. Tennison's prior opinion related to the Petitioner. In addition, no additional evidence or testimony was presented related to Dr. Tennison.

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for permission to appeal from this Court's denial of his motion to reopen, Billy Ray Irick v. State, No. E2010-01740-CCA-R28-PD (Tenn. Crim. App. September 16, 2010), the alleged "new" evidence is actually the lay affidavits from 1999 and not the report from Dr. Brown in 2010. The 2010 report merely includes the affidavits, along with all the other mental health history of the Petitioner, in a new mental health evaluation performed by Dr. Brown. In 1999, shortly after receiving the information in the lay affidavits, counsel also showed these same affidavits to two mental health professionals and received affidavits from them which addressed the issues related to any connection between the lay affidavits and any mental health issues and/or insanity issues. The affidavits of the two mental health professionals in 1999 were used in the Petitioner's federal habeas proceedings in an unsuccessful attempt to gain funding for a complete reevaluation of the Petitioner. No state proceedings, however, were ever initiated. Even if you assume that the Petitioner's assertions as true that the lay affidavits needed to be addressed as they related to mental health, this was also first done in 1999 through those affidavits of the two mental health professionals.

Moreover, this Court need not consider Mr. Irick's previous attempts to present the issues and evidence in habeas proceedings, in his motion to reopen his post-conviction petition, and in his competency proceedings in determining whether he has been denied a reasonable opportunity to assert a claim. See Harris, 301 S.W.3d at 146. "No statute in Tennessee nor tolling rule developed at common law provides that the time for filing a cause of action is tolled during the period in which a litigant pursues a related but independent cause of action." Id. Nothing prevented the Petitioner from filing a

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separate petition for writ of error coram nobis action while his federal habeas proceedings were still pending to address these issues.

Accordingly, at best, this Court finds that the filing of the writ of error coram nobis in October of 2010 represents a delay of approximately 11 years with regard to the alleged "new" evidence. Therefore, this Court must conclude that the record does not present a legal basis for overcoming the State's assertion of the statute of limitations. The time within which the Petitioner filed his petition for writ of error coram nobis exceeds the reasonable opportunity afforded by due process. Therefore, as a matter of law and under the circumstances of this case, the Petitioner is not entitled to due process tolling and his petition for writ of error coram nobis is barred by the statute of limitations as it relates to all matters except the TDOC report which was allegedly not discovered until December of 2009.

2. **Merits**

As for the Riverbend classification report which was allegedly discovered in December of 2009, this Court finds that the petition should be dismissed as it does not establish a reasonable probability that the result of the original trial would have been different had the jury had this information. Again, evidence of the Petitioner's mental health issues was investigated and considered by trial counsel. As pointed out by the state, the Petitioner clearly had memory of the events in question close in time to the rapes/murder as evidenced in his statements. At least two of the Petitioner's own mental health experts consulted pretrial and close in time to the time of the classification report

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considered him to be a sociopath. The fact that the evaluation at Riverbend may have been different is not sufficient to grant the petition here. In fact, despite the classification report, the Petitioner has not been treated for mental illness while incarcerated. Mental health experts often disagree on issues and on a particular diagnosis. At the competency hearing, the "experts agreed that Mr. Irick does not currently manifest any symptoms of formal thought disorder, hallucinations, or delusions. Mr. Irick's last alleged psychotic episodes were reported to have occurred in 1985, near the time of the murder. Mr. Irick has not been treated for mental illness during his incarceration, and Mr. Irick has not been prescribed anti-psychotic drugs since adolescence."

After carefully considering all the evidence and records in this matter, this Court finds that the petition should be dismissed as it does not establish a reasonable probability that the result of the original trial would have been different had the jury had this information from the TDOC report.[3]

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[3]Assuming arguendo that this petition for writ of error coram nobis was timely filed as to the lay affidavits and other reports and/or affidavits, based upon the record and the discussion of the related issue, this Court would also find that the petition should be dismissed as it does not establish a reasonable probability that the result of the original trial would have been different based upon this information. This additional information is merely additional evidence related to a previously investigated and previously considered and presented issue of the petitioner's mental health. As stated above, mental health professionals often disagree and the additional lay person affidavits would not be sufficient to grant the petition in this matter.

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3. **Conclusion**

For these reasons set forth above, the petition for writ of error coram nobis is DENIED.

ENTERED THIS 10th DAY OF Nov 2010.

Richard R. Baumgartner
Criminal Court Judge, Div. I

CERTIFICATE OF SERVICE

I, Lori D. Wyatt, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record for the defendant, and the State this the 10 day of November, 2010.

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