ORIGINAL

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant,	)	
	)	KNOX COUNTY
v.	)	NO. E2010-01740-SC-R11-PD
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent-Appellee.	)	

ON APPLICATION FOR PERMISSION TO APPEAL UNDER RULE 28, RULES OF THE SUPREME COURT OF TENNESSEE

RESPONSE IN OPPOSITION TO THE APPLICATION FOR PERMISSION TO APPEAL

Billy Ray Irick ("Irick") approached the trial court with the report of a psychiatrist purporting to opine that he was insane at the time of his offense more than two decades ago. Recognizing that the factual predicate for this opinion was in place in 1999, the trial court determined that Irick had no valid reason for delaying a motion to reopen his post-conviction proceedings until 2010. The Court of Criminal Appeals denied Irick's application for permission to appeal, concluding that his evidence was not really new and that the psychiatrist's opinion did not establish actual innocence.

The lower courts were correct. The presentation of a favorable psychological opinion that is based on facts known for years neither amounts to "new" evidence nor

does it constitute "scientific" evidence that can "establish" actual innocence within the meaning of the Post-Conviction Procedure Act. An exercise of this Court's supervisory authority is not necessary to settle the question. Irick's application for permission to appeal accordingly should be denied.

BACKGROUND

Irick was convicted of the felony murder and aggravated rape of a seven-year-old girl in 1986, at which time he did not contest his sanity. *See State v. Irick*, 762 S.W.2d 121, 124 (Tenn. 1998). In his ensuing petition for post-conviction relief, Irick alleged, among other things, that his trial counsel were ineffective for failing to investigate his personal and medical history, and to obtain adequate expert and investigative assistance. (00387.) In support of this claim, Irick presented the testimony of neuropsychologist Pamela Auble, who testified that Irick had a "serious mixed personality disorder," and that brain damage could not be ruled out. *Irick v. State*, 973 S.W.2d 643, 648 (Tenn. Crim App. 1998). In response, lead defense counsel Kenneth Miller testified that the defense team obtained records of Irick's childhood institutionalizations, had him evaluated by a psychiatrist at the Ridgeview Psychiatric Hospital in Oak Ridge, Tennessee, had him examined by psychologist Diana McCoy, and sought a neuropsychological examination. *See id.* at 650. Mr. Miller indicated that that a strategic decision not to call Dr. McCoy or the psychiatrist had been made because they

had referred to Irick as a sociopath. *Id.* Irick's petition for post-conviction relief was denied, and he abandoned this aspect of his ineffective assistance of counsel claim on appeal to the Court of Criminal Appeals. *See id.* at 651 (summarizing issues raised on appeal respecting ineffective assistance of counsel).

During federal habeas corpus proceedings, Irick pressed a gateway claim of actual innocence to excuse the default of his ineffective assistance of counsel claim. (00657.) In connection with this claim, Irick obtained the 1999 affidavits of lay witnesses averring that Irick mumbled to himself, reported hearing voices, and had acted violently toward others in the days leading up to the murder. (00858-64.) The United States District Court for the Eastern District of Tennessee refused to appoint a mental health expert, concluding on the basis of the state-court record that trial counsel had investigated Irick's psychological condition and determined that it would not be beneficial to introduce the information to the jury. (00735-38.) Irick nevertheless procured the affidavit of Dr. William F. Blackerby, who opined that Irick suffered from a dissociative disorder and was probably psychotic at the time of his offense. (868-69.) After canvassing the reports of Drs. McCoy, Auble, and trial witness Clifton Tennison—who offered diagnoses different from that of Dr. Blackerby—the district court could "not find Petitioner has presented reliable evidence that he is 'actually innocent' of the crime due to a previously undiagnosed mental condition." *Irick v. Bell*, No. 3:98-CV-666 (E.D. Tenn. Mar. 30, 2001) (Docket No. 146, at 62). Both the United States Court of

Appeals for the Sixth Circuit and the United States Supreme Court refused to take up the expert funding or actual innocence claims on appeal.

On June 28, 2010, Irick filed a motion to reopen his post-conviction proceedings in the Criminal Court for Knox County. The motion was based on "new scientific evidence in the form of psychiatric test results and opinions reported by Dr. Peter Brown." Dr. Brown's underlying report of April 26, 2010, indicates that his own examination of Irick yielded "no evidence of formal thought disorder." (00920.) Nevertheless, based largely on the lay affidavits first presented during federal habeas proceedings in 1999, Dr. Brown reported that there was "insufficient information to conclude that Mr. Irick was capable of forming specific intent in the commission of his offense," and that "the weight of the available information" indicated that it was "more likely than not" that Irick lacked substantial capacity to appreciate the wrongfulness of his acts. *See Irick v. State*, No. E-2010-01740-CCA-R28-PD, slip op. at 4 (Tenn. Crim. App. Sep. 16, 2010).

The trial court denied the motion to reopen by order dated August 6, 2010. The court found in pertinent part:

> While the Petitioner claims that this "new" scientific evidence was not available until Dr. Peter Brown's evaluation was provided to counsel in April of 2010, this Court cannot agree. From the record, it appears that the affidavits of the mental health professionals in late 1999 and lay persons who had known the Petitioner at the time of the offense would have started the clock running on the Petitioner's time to file a motion to reopen related to the issue [whether Irick was sane at the time of the offense].

(Order of 8/6/10, at 4.) The Court of Criminal Appeals denied permission to appeal pursuant to Tenn. Sup. Ct. R. 28(10)(b). *Irick*, No. E-2010-01740-CCA-R28-PD, slip op. at 1. The court found that the lay affidavits were more appropriately considered the "new" evidence upon which Irick's claims were based, and that the information that they contained "does not constitute 'scientific evidence' making the Petitioner's 'actual innocence' claim an appropriate basis upon which to re-open his prior post-conviction proceedings." *Id.* at 12. Additionally, the court ruled that, "[b]ecause 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 Petitioner's prior post-conviction proceeding." *Id.*

REASONS WHY THE APPLICATION SHOULD BE DENIED

Tennessee Code Annotated section 40-30-117 provides: "(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if ... (2)[t]he 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[.]" Among the character of reasons this Court will consider in determining whether to grant permission to appeal an adverse ruling are the need to secure settlement of important questions of law and the need for the exercise of the Court's supervisory authority.

Tenn. R. App. P. 11(a). In the context of applications for permission to appeal the denial of a motion to reopen post-conviction proceedings, however, permission "will be denied unless it appears that the trial court abused its discretion in denying the motion." Tenn. Sup. Ct. R. 28 § 10(B).

The lower courts did not err in refusing to grant Irick relief because his motion fails to state a claim under the Post-Conviction Procedure Act. Irick's evidence is not new, it is not scientific, and it does not establish his actual innocence. In 1999, Irick's counsel possessed lay affidavits attesting to his behavior near the time of the offense and expert affidavits—albeit by non-examining professionals—averring that he was "probably psychotic." Irick seems to suggest that Dr. Brown's report addressed to the same matters is "new" because Dr. Brown personally examined Irick and funding for the examination was unavailable earlier. (*See* App. at 47.) Those factors may account for the less preliminary character of Dr. Brown's opinion, but they do not imbue it with newness.

Dr. Brown's opinion does not rest on a new scientific methodology; mental health professionals in 1985 were capable of opining whether a defendant could appreciate the wrongfulness of his conduct. *Cf. Cowan v. State*, No. E2003-00652-CCA-R3-PC, 2003 WL 22945919 (Tenn. Crim. App. Dec. 15, 2003) ("[a]pparently, the current scientific knowledge about the victim's death was available at the time of death or shortly thereafter"), *perm. app. denied*, May 10, 2004. Similarly, Dr. Brown's opinion is not based on new symptomatology; Irick does not presently display any signs of a formal

thought disorder. Rather, as both lower courts recognized, Dr. Brown's opinion is "new" only to the extent that it is founded on a factual predicate first developed by Irick's federal habeas counsel more than a decade ago. That predicate, in the form of lay observations of behavior, is not scientific in nature. *See Dellinger v. State*, 279 S.W.3d 282, 291 n.7 (Tenn. 2009) ("Claims of actual innocence not based on new scientific evidence may be brought in a petition for writ of error coram nobis within one year after the judgment of conviction in the trial court becomes final, or later if the petitioner shows that due process precludes application of the statute of limitations." (citations omitted)).

Indeed, even had Irick promptly moved to reopen his post-conviction proceeding in 1999, the trial court would not have abused its discretion in declining to do so. The Post-Conviction Procedure Act contemplates presentation of the results of a scientific process that are sufficiently determinate that a petitioner can show that he did not commit the crime. *See* 99th General Assembly, 1st Sess., House, Tape # 2, H.B. 0001 (Mar. 29, 1995) ("When some scientific test comes back and proves people to be innocent, there always ought to be some method by which that wrong is corrected.") (remarks of Rep. Buck) (quoted in *Van Tran v. State*, 66 S.W.3d 790, 819 (Tenn. 2001) (Barker, J., concurring and dissenting)); *see also Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (stating that the federal actual innocence exception to the procedural default doctrine "is concerned with actual as compared to legal innocence"). DNA testing is

paradigmatic. Thus, for example, this Court has remarked that the grounds for reopening "can and likely will be proven by documentary evidence alone," that "there will rarely be a factual dispute as to their existence," and that "the factual issue should be relatively uncomplicated." *Harris v. State*, 102 S.W.3d 587, 591 (Tenn. 2003).

Psychological opinion as to a petitioner's state of mind a decade earlier does not meet these requisites. As the United States Court of Appeals for the Ninth Circuit has held:

> "Because psychiatrists disagree widely and frequently on what constitutes mental illness, a defendant could ... always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion." Accordingly, "it is clear that the mere presentation of new psychological evaluations ... does not constitute a colorable showing of actual innocence."

Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005) (citations omitted) (alterations in original). Dr. Brown's report casts these concerns in unusually high relief. While the psychiatrist's diagnoses of cognitive and psychotic disorders "not otherwise specified" may be recognized in the profession (*cf.* App. at 44), his opinion as to their effect on Irick's functioning in 1985 is, of necessity, speculative. As Dr. Brown did not examine Irick in 1985, as his 2010 examination yielded no evidence of a formal thought disorder, and as his opinion is bottomed substantially on the ten-year-old statements of affiants (whom Dr. Brown has apparently never met) recounting events that transpired ten years before that, he can offer only probabilistic statements as to the weight of the available information. Those statements cannot "establish" Irick's state of mind at the time of his

crimes, much less his actual innocence.

The lower courts made no error in declining to reopen Irick's post-conviction proceeding. No judgment denying post-conviction relief would be final if Irick's showing were deemed to amount to "new scientific evidence establishing that the petitioner is actually innocent." Further review of this issue is unwarranted.

CONCLUSION

For the foregoing reasons, the application for permission to appeal should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

JAMES E. GAYLORD
Assistant Attorney General
Attorney of Record
425 Fifth Avenue North
P.O. Box 20207
Nashville, Tennessee 37202-0207
Jim.Gaylord@ag.tn.gov
Phone: (615) 532-7356
Fax: (615) 532-7791

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid on this the 2nd day of November, 2010 to: Howell G. Clements, Clements & Cross, 1010 Market Street, Suite 401, Chattanooga, TN 37402 and C. Eugene Shiles, Spears, Moore, Rebman, & Williams, P.O. Box 1749, Chattanooga, TN 37401.

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by Facsimile at (615) 532-7791.

JAMES E. GAYLORD
Assistant Attorney General