

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON, TENNESSEE

GARY BRADFORD CONE,)
)
 Applicant-Appellant) No. _____
)
 v.) CCA No. 02C01-9403-CR-00052
)
 STATE OF TENNESSEE,)
)
 Respondent-Appellee)

GARY BRADFORD CONE'S
APPLICATION FOR PERMISSION TO APPEAL

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APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Tenn. R. App. P. 11, Applicant Gary Bradford Cone respectfully requests that this Honorable Court grant him permission to appeal the Court of Criminal Appeals' judgment in State of Tennessee v. Gary Bradford Cone, No. 02C01-9403-CR-00052 (Tenn. Cr. App. Mar. 22, 1995) (Appendix A).

I.

REQUIRED INFORMATION

The judgment of the Court of Criminal Appeals was entered on March 22, 1995. Appendix A. The Court of Criminal Appeals denied rehearing by order dated May 10, 1995. Appendix B.

II.

QUESTIONS PRESENTED FOR REVIEW

1. Under Tenn. Code Ann. § 40-30-112(b): (a) What constitutes a "knowing and understanding" waiver of a claim; (b) Can an attorney waive a claim for a petitioner, or must waiver be made personally by the petitioner; and (c) When is a post-conviction petitioner entitled to a hearing on the issue of waiver?

2. May a capital post-conviction petitioner proceed *ex parte* to seek funds for investigative and expert assistance, and what showing must the petitioner make to establish his entitlement to such funds?

3. Is Petitioner entitled to a hearing on his Brady claims, where he first received access to Brady documents in the District Attorney's file following the completion of his first post-conviction proceeding?

4. Does it violate Article I § 17 of the Tennessee Constitution and/or the Eighth and Fourteenth Amendments to the United States Constitution, for a jury to impose a death sentence by finding, as an aggravating circumstance, that a murder was "heinous, atrocious, or cruel in that it involved torture or depravity of mind"?

5. Were Petitioner's conviction and death sentence imposed in violation of the Tennessee and United States Constitutions?

III.

STATEMENT OF FACTS

Petitioner Gary Bradford Cone was convicted of first-degree murder and sentenced to death by the Criminal Court of Shelby County, Tennessee. On direct appeal, this Court affirmed. Cone v. State, 665 S.W.2d 87 (Tenn. 1984). Cone then filed a petition for post-conviction relief, which was denied by the trial court, and affirmed by the Court of Criminal Appeals. Cone v. State, 747 S.W.2d 353 (Tenn. Cr. App. 1987).

Cone subsequently filed a *pro se* petition for post-conviction relief. After the trial court dismissed the petition without appointment of counsel, the Court of Criminal Appeals reversed, and remanded for appointment of counsel and for further proceedings to enable Cone to overcome any presumption of waiver. Gary Bradford Cone v. State of Tennessee, C.C.A. No. 48 (Tenn. Cr. App. May 15, 1991); (R. 3).¹

¹ Petitioner will cite the record in the Court of Criminal Appeals as (R. ____).

A.

THE ISSUE OF WAIVER

On remand, Cone filed an amended petition. (R. 64-84). After further review of the record and review of documents just obtained from the file of the District Attorney General through the Tennessee Public Records Act, counsel further amended the petition in 1993 to include several additional claims, including a claim that the prosecution had withheld documents demonstrating that, contrary to the prosecution's theory at trial, Cone was in fact intoxicated and suffering from drug problems, withdrawal, and/or psychosis at the time of the alleged offense, and therefore not guilty of first-degree murder. (R. 139-144, ¶ 41). In addition, Cone amended his petition to include detailed allegations demonstrating that he had not waived any claims in his petition. (R. 146-152). Cone alleged:

Petitioner has not waived any claims allegedly waived, because he did not knowingly and understandingly fail to present and develop all such claims in any earlier proceeding. During all such proceedings (including trial, direct appeal or post-conviction proceedings) Petitioner either had no knowledge of the facts or law relating to the claim, or received or was provided no knowledge of the facts or law or legal significance of the claim from prior counsel through full discussion and disclosure, either because counsel lacked knowledge of the facts and legal significance of such facts underlying the claims or ineffectively failed to investigate, evaluate and properly raise such claim based upon a full understanding of the facts and the governing legal standards, either through inadvertence, ignorance of the law, or oversight, rather than by any strategic choice made after carefully considering the nature of claim and then affirmatively choosing to relinquish such claim. Petitioner thus has had no opportunity to, and has never made, any informed and deliberate decision to forgo any such claim. When counsel failed to raise any such claim at trial, on appeal, or in post-conviction proceedings, Petitioner was

denied the effective assistance of counsel. Because he was incarcerated and indigent and had no financial resources, Petitioner also had no ability to fully investigate and/or develop the facts underlying any claims which are not purely legal in nature. Being indigent and incarcerated, Petitioner also had no access to the full record in his case, whereby he could fully consider and evaluate claims arising from the record. In addition, Petitioner is not an attorney and lacked the specific legal knowledge and acumen necessary for properly and fully raising any such claims previously. Under [the] post-conviction act, he was entitled to counsel for such purposes. Had Petitioner (or counsel) fully known the facts and law underlying any allegedly defaulted claims presented in his petition, petitioner would have presented such claim earlier. Petitioner did not knowingly, understandingly, intelligently, or deliberately fail to present or develop any such claim in any earlier proceeding.

R. 150-152 ("Statement And Amendment Regarding Issue Of Waiver").

Cone requested an evidentiary hearing on the issue of waiver. (R. 147-150). Further, as *prima facie* evidence in support of his request for a hearing, Cone submitted an uncontroverted affidavit detailing the various reasons why individual claims could not have been waived. (R. 174-214). Cone also provided the Court a memorandum explaining that, under Tenn. Code Ann. § 40-30-112(b), counsel could not have waived claims, because a claim is waived only if the petitioner personally made a "knowing and understanding" relinquishment of a claim. (R. 164-171).

Without conducting a hearing, the trial court denied the petition. (R. 231-238). The trial court held that numerous grounds for relief had been considered and denied on direct appeal or in the first post-conviction petition. (R. 234). The trial court also concluded that Cone had not overcome any presumption of waiver for claims not found to be "previously determined." (R. 234-236). The

trial court also found that still other claims had been previously determined. (R. 236).

On appeal, the Court of Criminal Appeals affirmed. Cone v. State of Tennessee, No. 02C01-9403-CR-00052 (Tenn. Cr. App. Mar. 22, 1995) (Appendix A). After acknowledging that the trial court had found various claims to have been previously determined, the Court of Criminal Appeals discussed whether other grounds had been "waived." Notwithstanding Cone's detailed allegations, the Court of Criminal Appeals concluded that "the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined. The trial court's decision to dismiss the appellant's petition without an evidentiary hearing was neither improper nor premature." Id., slip op. at 5.

B.

REQUEST FOR AN EX PARTE HEARING AND FOR
INVESTIGATIVE AND EXPERT FUNDS

In the post-conviction trial court, Cone also moved for an *ex parte* hearing in which to seek funds to pay for investigative and expert assistance necessary for the investigation, preparation, and presentation of the post-conviction petition. (R. 95-101). The trial court, however, denied Cone's petition without ever addressing this motion. On appeal, Cone maintained that the matter should be remanded, and that he was entitled to an *ex parte* hearing to request funds for investigative and expert assistance, at which time he could demonstrate his need for funds. Like the trial court, the Court of Criminal Appeals did not address Cone's claim. See

Cone v. State, Appendix A, slip op.

C.

BRADY CLAIM

As noted supra, after Cone received access to the file of the Shelby District Attorney General under the Tennessee Public Records Act, he amended his petition to include Brady claims (R. 139-144, ¶ 41). Cone alleged that the documents contained in the District Attorney General's file and withheld at trial entitled him to post-conviction relief:

41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, because the State withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including, but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Robert H. McKinney, statements of Wyatt Nichols, Ph.D., statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollection of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death.

The trial court, however, denied relief on the claim, and the Court of Criminal Appeals affirmed. Gary Cone was never afforded a hearing on his Brady claims.

D.

THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

In sentencing Gary Cone to death, the jury found as an aggravating circumstance that the offense was "heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tr. 2152, 2153. The post-conviction trial court found the claim to be previously determined, R. 236, and the Court of Criminal Appeals affirmed. See Cone v. State, Appendix A, slip op.

E.

OTHER SUBSTANTIVE CLAIMS RAISED BY THE PETITION

Gary Cone also raised numerous other claims in his post-conviction petition. (R. 67-82); (R. 138-145). A non-exclusive list of such claims includes claims: (a) that counsel was ineffective at trial and at sentencing (R. 69-71); (b) that the prosecution withheld police reports and other evidence demonstrating that Cone did not possess the *mens rea* to be guilty of first-degree murder (R. 139, ¶ 41, 45); (c) that the trial court provided numerous unconstitutional instructions which, for example, relieved the prosecution of proving the element of malice, misdefined reasonable doubt, permitted malice to be inferred from a homicide or use of a deadly weapon, and discounted evidence of intoxication and expert testimony (R. 71-73, ¶ 17a-17o); (d) that the trial court's instructions at sentencing were unconstitutional (R. 73-74, ¶ 18a-18h); (e) that the Tennessee death penalty statute is unconstitutional (R. 76-77, ¶ 20a-20o); (f) that Cone's right against self-incrimination was violated by interviews conducted by

State psychologists (R. 79, ¶ 29); (g) that the prosecution's closing argument was inflammatory and unconstitutional (R. 81-82, ¶ 36); (g) that the death penalty unconstitutionally interferes with Cone's fundamental right to life, and the death penalty does not survive strict scrutiny. (R. 142, ¶ 50). As noted supra, the Court of Criminal Appeals denied relief, affirming the trial court's conclusion that various claims had been previously determined, while other possible claims had been waived. (R. 234-236).

IV.

REASONS SUPPORTING REVIEW BY THIS COURT

A. THE LOWER COURTS' TREATMENT OF THE "KNOWING AND UNDERSTANDING" WAIVER STANDARD OF TENN. CODE ANN. § 40-30-112(b) REQUIRES REVIEW BY THIS COURT

1. To Secure Uniformity Of Decision, This Court Should Grant The Application And/Or Hold The Application Pending This Court's Upcoming Decisions In House v. State, No. 03C01-9110-CR-00326 (Tenn. Cr. App. Mar. 28, 1994) (p.t.a. granted) and Johnson v. State, No. 02C01-9111-CR-237 (Tenn. Cr. App. Mar. 23, 1994) (p.t.a. pending)

In House v. State, No. 03C01-9110-CR-00326 (Tenn. Cr. App. Mar. 28, 1994) (p.t.a. granted) and Johnson v. State, No. 02C01-9111-CR-237 (Tenn. Cr. App. Mar. 23, 1994) (p.t.a. pending), the Court of Criminal Appeals has held that the "knowing and understanding" waiver provision of Tenn. Code Ann. § 40-30-112(b) requires a showing that a claim cannot be waived unless the petitioner personally made a knowing and understanding relinquishment of that claim in prior proceedings. Those cases are both pending before this Court on permission to appeal.

Like Paul Gregory House and Don Johnson, Gary Cone has presented a second petition for post-conviction relief. Like House and Johnson, Cone has alleged that various claims have not been "waived" under § 40-30-112(b), that he has not made a personal waiver of claims, that counsel has not made such a waiver, and that he is therefore entitled to a hearing on the issue of waiver and to a hearing on the merits of his claims.

Because Gary Cone's case presents the identical issue currently before this Court in House and Johnson, in order "to secure uniformity of decision," Tenn. R. App. P. 11(a)(1), this Court should grant Cone's application and/or hold the application pending the disposition of House and Johnson, and then remand to the lower courts for further proceedings.

2. To Secure Uniformity Of Decision And To Resolve Conflicting Pronouncements Of The Court of Criminal Appeals, This Court Should Grant The Application

As the Tennessee Court of Criminal Appeals has just recently explained:

The defense of waiver is available when 'the petitioner knowingly and understandingly,' according to our statute fails to present a particular issue. That is, the petitioner must, with full knowledge, voluntarily relinquish a potential ground for relief.

Wooden v. State, No. 01C01-9310-CR-368, 1994 Tenn. Crim. App. LEXIS 803 (Tenn. Cr. App. Dec. 8, 1994)(Appendix C). Thus, as in House and Johnson, the Court of Criminal Appeals has remanded for waiver hearings under circumstances identical to those presented here, i.e., where the petitioner has alleged that he did not personally waive the claims, and the petitioner's attorney did not

advise the petitioner of the claim in earlier proceedings. See e.g., Wooden, supra; Pendleton v. State, No. 01C01-9305-CR-00149, 1994 Tenn. Crim. App. Lexis 245 (Tenn. Cr. App. Apr. 21, 1994) (Appendix D) (remanding for hearing on allegations of waiver and for hearing on merits, where petition alleged that petitioner lacked knowledge of the law and attorneys did not advise him of claim in earlier proceedings); Carlton v. State, No. 01C01-9206-CC-197, 1993 Tenn. Crim. App. LEXIS 191 (Tenn. Cr. App. 1993) (Appendix E) (remanding for hearing where defendant alleged that prior counsel unprofessionally failed to raise claim in prior post-conviction).

Further, as the Court of Criminal Appeals has elsewhere held, the issue of waiver cannot be addressed without a full evidentiary hearing on this issue:

The question of whether these issues have been waived is a question of fact, which must be determined based upon the evidence introduced at an evidentiary hearing.

Parker v. State, No. 01C01-9008-CR-00188 (Tenn. Cr. App. Feb. 26, 1991) (Appendix F), slip op. at 2. This same holding was expressed in the Court of Criminal Appeals' judgment in Swanson, which was subsequently affirmed by this Court:

[T]he matter of whether the petition knowingly and understandingly waived the . . . issue in previous proceedings or whether the rebuttable presumption of waiver is applicable cannot be determined from the record before us.

Generally, these matter can only be resolved by the reception of evidence on the issues raised.

Swanson v. State, Tenn. C.C.A. No. 981 (Jan. 8, 1987) at 2, aff'd

Given Gary Cone's detailed allegations concerning lack of waiver and his uncontroverted affidavit, he has demonstrated that he is entitled to an evidentiary hearing on the issue of waiver, because he has not personally made any knowing and understanding waiver of claims, and because counsel made no such waiver.

The decision of the Court of Criminal Appeals in Cone's case conflicts with the Court of Criminal Appeals' decisions in Wooden, Pendleton, and Carlton, not to mention House and Johnson, as well as Parker and Swanson, which mandate an evidentiary hearing on the issue of waiver. To resolve this conflict, to insure uniformity of decision, and to resolve this important question in the exercise of this Court's supervisory powers, this Court should grant the application. Tenn. R. App. P. 11(a)(1)-(a)(4).

B. CONE'S ENTITLEMENT TO AN EX PARTE HEARING AND ENTITLEMENT TO EXPERT AND INVESTIGATIVE ASSISTANCE SHOULD BE REVIEWED BY THIS COURT, TO INSURE UNIFORMITY OF DECISION ON THIS VITAL ISSUE

While this Court is currently considering the scope of Tenn. Code Ann. § 40-30-112(b), this Court is also considering: (1) whether a capital post-conviction petitioner may seek funds for expert or investigative assistance in an *ex parte* hearing before

² Evidentiary hearings thus often occur on the issue of waiver. See e.g., Maclin v. State, C.C.A. No. 18 (Tenn. Cr. App. Mar. 28, 1990) (remanding for evidentiary hearing on merits of petition and defenses of waiver and previous determination); Smith v. State, C.C.A. No. 306 (Tenn. Cr. App. Dec. 20, 1989) (remanding to permit petitioner's explanation why claims were not raised previously, including an evidentiary hearing on waiver) See also Nelson v. State, Tenn. C.C.A. No. 267 (Oct. 9, 1990) (noting that trial court held "an evidentiary hearing limited to the issues of previous determination and waiver").

the post-conviction judge; and (2) the standard which governs entitlement to such investigative or expert assistance at any such hearing. These issues are being considered in the companion cases of Owens v. State, No. 02C01-91111-CR-259 (Tenn. Cr. App. Jackson, Mar. 25, 1994) (p.t.a. granted) and Payne v. Tennessee, No. 02C01-9204-CR-94 (Tenn. Cr. App. Jackson, Mar. 25, 1994) (p.t.a. granted).

As noted supra, Gary Cone moved for an *ex parte* hearing to request expert and investigative assistance, and he sought to establish his need for such services. (R. 95-101). The trial court, however, dismissed the petition before considering the motion, and/or permitting Cone the opportunity to demonstrate any need for expert and investigative assistance, either at an *ex parte* hearing or otherwise.

Because this Court is currently considering the identical issues in Owens and Payne, in order to secure uniformity of decision on this important issue of law, this Court should grant Gary Cone's application and/or hold the application pending the outcome of Owens and Payne, with the case then being remanded to the lower courts for further proceedings. Tenn. R. App. P. 11(a)(1), (a)(2), (a)(4).

C. TO SECURE UNIFORMITY OF DECISION, THIS COURT SHOULD GRANT THE APPLICATION ON THE BRADY ISSUE

As noted supra, Gary Cone raised a Brady claim in 1993 after receiving access to the files of the District Attorney General under the Tennessee Public Records Act, following the 1992 Tennessee Court of Appeals decision in Capital Case Resource Center v. Woodall, No. 01-A-01-9104-CH-00150 (Tenn. App. Nashville, Jan.

29, 1992). In reviewing the file, Cone uncovered various documents which demonstrated that he did not possess the *mens rea* necessary for conviction of first-degree murder, and which conflicted with the prosecution's theory of the case at trial. See R. 138, 139. The trial court, however, never addressed the claim on the merits, and the Court of Criminal Appeals affirmed.

In Caldwell v. State, No. 02C01-9405-CC-00099 (Tenn. Cr. App. Dec. 28, 1994) (Appendix G), the Court of Criminal Appeals held that when a post-conviction petitioner first obtains documents through the Tennessee Public Records Act after filing a prior post-conviction petition, the petitioner's claim is not waived: "If a petitioner was not and could not have been aware of a possible constitutional claim until 1992 [when Woodall was decided] it is doubtful that the defense of waiver would apply." Id. slip op. at 11. Gary Cone, however, did not even receive a hearing on his claim.

This Court, however, has just recently granted application for permission to appeal in State of Tennessee v. Richard Caldwell, Madison County No. 02S01-9505-CC-00044 (Tenn. May 30, 1995) (granting application for permission to appeal), to consider whether "waiver" and/or the post-conviction statute of limitations applies to claims arising from Public Records disclosed after 1992, and after a prior post-conviction petition has been decided.

The trial court's ruling on Gary Cone's claim was erroneous and it conflicts squarely with Caldwell. Gary Cone's petition should be granted, since this Court has also granted review in

Caldwell to review the identical issue. This is necessary to insure uniform application of the law on this vital issue. Tenn. R. App. P. 11(a)(1), (a)(3), (a)(4). Alternatively, this Court should hold the application pending the disposition of Caldwell, and then grant the petition and remand for further proceedings, including an evidentiary hearing.

D. GARY CONE WAS SENTENCED TO DEATH BY A JURY WHICH WEIGHED AN UNCONSTITUTIONAL "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

1. Justice Stevens And The Sixth Circuit Have Found This Aggravating Circumstance To Be Unconstitutional

In Barber v. Tennessee, 115 S.Ct. 1177 (1995) (Stevens, J., concurring in denial of certiorari), Justice Stevens noted that Tennessee's pre-1989 "heinous, atrocious, or cruel" aggravating circumstance, the same circumstance applied in Gary Cone's case, is unconstitutionally vague. Justice Stevens noted that although the jury even received additional instructions to define each of the circumstance's terms,³ those additional instructions did not salvage the vague circumstance considered by the jury:

³ In Barber, the trial court provided the following additional definitions of the terms "heinous," "atrocious," or "cruel", and "torture" or "depravity of mind":

Heinous -- Grossly wicked or reprehensible; abominable; odious; vile.

Atrocious -- Extremely evil or cruel; monstrous; exceptionally bad; abominable

Cruel -- Disposed to inflict pain or suffering; causing suffering; painful

Torture -- The infliction of severe physical pain as a means of punishment or coercion; the experience of this; mental anguish; any method or thing that causes such pain or anguish; to inflict with great physical or mental pain

Depravity -- Moral corruption; wicked or perverse act

Barber, Trial Technical Record 169-170. See Barber v. Tennessee, U.S.No. 94-7254, pet. for cert., p. 3.

In this case ... there are valid reasons for the Court's decision to deny review. But this does not mean petitioner's challenge to his death sentence, based in part upon the trial judge's definition of an aggravating circumstance, lacks merit. Under the trial court's instruction, a jury could find an aggravating circumstance sufficient to impose the death penalty merely by concluding that a murderer's state of mind [depravity of mind] was 'wicked or morally corrupt.' Because such a state of mind is a characteristic of every murder, the instruction is plainly impermissible under this Court's holdings in *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) (striking down instruction allowing jury to find aggravating circumstance if murder was 'outrageously or wantonly vile, horrible and inhuman'), and *Maynard v. Cartwright*, 486 U.S. 356, 363-364 (1988) ('especially heinous, atrocious, or cruel')

Barber v. Tennessee, 115 S.Ct. at 1177 (Stevens, J., concurring).

Similarly, in Houston v. Dutton, ___ F.3d ___, No. 94-6064 (6th Cir. Mar. 28, 1995), the Sixth Circuit has held it is unconstitutional to instruct a jury that it can impose the death sentence if it finds that a murder was "heinous, atrocious or cruel in that it involved torture or depravity of mind":

This ["The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind"] was the whole of the instruction given the jury regarding the 'heinous, atrocious, or cruel' aggravator, and the jury found this aggravator as a basis for the death penalty. Under the cases cited in the opening section of this opinion [*Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Richmond v. Lewis*, 113 S.Ct. 528 (1992)], this instruction was constitutional error, and the State concedes the instruction to be erroneous in this case.

Houston, 1995 Fed App. 108 at pp. 11-12; 1995 U.S.App.LEXIS 6156 at p*17.

2. The Aggravating Circumstance Instruction Is Unconstitutionally Vague

a. "Heinous, Atrocious, Or Cruel" Is Unconstitutionally Vague

When considering the constitutional validity of a jury finding

that a murder was "heinous, atrocious, or cruel," "there is no serious argument that this factor is not facially vague." Richmond, 506 U.S. at ____, 113 S.Ct. at 534. The United States Supreme Court has repeatedly and unanimously held that "especially heinous, atrocious, or cruel" constitutes an unconstitutionally vague aggravating factor. Shell v. Mississippi, 498 U.S. at 1; Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); Maynard v. Cartwright, 486 U.S. at 364; see also Richmond v. Lewis, 506 U.S. at ____, 113 S.Ct. at 534 ("especially heinous, cruel, or depraved" unconstitutionally vague).⁴

b. "Torture Or Depravity Of Mind" Is Also Unconstitutionally Vague

Likewise the phrase "torture or depravity of mind" does nothing to cure the constitutional infirmity of the phrase "heinous, atrocious, or cruel." "[V]ague terms do not suddenly become clear when they are defined by reference to other vague terms." Adamson v. Ricketts, 865 F.2d 1011, 1032 (9th Cir. 1988) (en banc), cert. denied 497 U.S. 1031 (1990).

⁴ As held by the Supreme Court in Shell and Cartwright, the term "especially" does nothing to cure the inherent constitutional vagueness of the term "heinous":

The . . . contention that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable. To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Maynard, 486 U.S. at 364, 108 S.Ct. at 1859, citing Godfrey v. Georgia, 446 U.S. at 428-429. See Shell v. Mississippi, 498 U.S. at 1, 111 S.Ct. at 313.

And indeed, Justice Stevens has noted in Barber that "depravity of mind" -- even when further defined as "wicked or morally corrupt" -- does not pass constitutional muster. Barber v. Tennessee, 115 S.Ct. at 1177. This is an unexceptional conclusion, given that the Supreme Court has already found "depraved" to be unconstitutionally vague. Richmond v. Lewis, 506 U.S. at ___, 113 S.Ct. at 534 ("especially heinous, cruel, or depraved"). The Eighth and Ninth Circuits have also concluded that "depravity of mind" is unconstitutionally vague. Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied 497 U.S. 1038 (1990); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989).⁵

"Depravity of mind" is vague precisely because it "could be used by 'a person of ordinary sensibility to fairly characterize almost every murder.'" Shell, 498 U.S. at 3; Maynard, 486 U.S. at 363; Godfrey, 446 U.S. at 428-429 (1980) (striking down 'outrageously or wantonly vile, horrible, and inhuman' aggravating circumstance as unconstitutionally vague); see Shell, 498 U.S. at 1. And, indeed, aside from its holding in Richmond, the Supreme Court has long recognized that "depravity of mind" is vague, because every murder is "depraved": "It is, of course, arguable that any murder involves depravity of mind. . . ." Godfrey, 446

⁵ Vacated on other grounds, 500 U.S. 901 (1991), reinstated on remand 946 F.2d 1443 (9th Cir. 1991), vacated on other grounds, 113 S.Ct. 367 (9th Cir. 1992), reinstated on remand and habeas corpus relief granted, 16 F.3d 981 (9th Cir. 1994).

U.S. at 423, quoting Gregg, 428 U.S. at 201.⁶

Similarly, the unadorned term "torture" also fails to meaningfully restrain the arbitrary imposition of the death penalty, because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is" is "torture." Maynard v. Cartwright, 486 U.S. at 364. The term "could be used by 'a person of ordinary sensibility to fairly characterize almost every murder.'" Shell, 498 U.S. at 3 (Marshall, J, concurring). The fact that a human being has been harmed enough to cause death may be considered "torture" to an average juror.

As held by the Ninth Circuit in Wade v. Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994), an aggravating circumstance of "torture" -- even when further defined in jury instructions as "proof of the infliction of extreme physical pain no matter how long its duration" -- is not constitutional. Wade, 29 F.3d at 1319. Adopting the reasoning of the California Supreme Court, the Ninth Circuit held:

[A] special [or aggravating] circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional first degree murder with the possible

⁶ As the Eighth Circuit has held:

[T]he words 'depravity of mind' . . . are not capable of objective determination. As in Godfrey, 'nothing in these few words, standing alone, . . . implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.'

Newlon v. Armontrout, 885 F.2d at 1334. Similarly, the Ninth Circuit has held:

There is nothing in the definition of depravity of mind that restrains arbitrary imposition of the death penalty.

See Godfrey, 446 U.S. at 428.

Deutscher v. Whitley, 884 F.2d at 1162.

exception on those occasions on which the victim's death was instantaneous. Such a distinction may have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder.

Wade, 29 F.3d at 1319, quoting People v. Davenport, 710 P.2d 861 (Cal. 1985). At a minimum, a "torture" aggravating circumstance passes constitutional muster only if the jury receives additional instructions requiring findings of both "extreme physical pain" and specific intent to inflict such "extreme physical pain." Wade, 29 F.3d at 1319.

Gary Cone's jury was only instructed in the bare term "torture." Tr. 2223. "Torture" was never defined in any manner, let alone as "infliction of extreme physical pain," or as the "intentional infliction of extreme physical pain." The jury was left, unguided, to determine whether "torture" existed. Any reasonable juror could have concluded that the murder -- like any other murder -- involved "torture."

c. The Unconstitutionality Of Any Of The Terms Used In The Jury Instructions Invalidates The Entire Instruction

As noted supra, the jury instructions and jury finding itself were phrased in the disjunctive -- "heinous, atrocious, or cruel" and "torture or depravity of mind." Federal relief is warranted if any of the alternative findings is unconstitutionally vague, because one cannot know which alternative finding was made by the jury. Shell v. Mississippi, 498 U.S. at 2 (Marshall, J., concurring) (where aggravating circumstance phrase in alternative, unconstitutionality of any alternative finding invalidates death

sentence); Zant v. Stephens, 462 U.S. at 881 (when verdict based upon alternate findings, one of which is unconstitutional, verdict cannot be upheld); Stromberg v. California, 283 U.S. 359 (1931).

Because each of the terms -- "heinous," "atrocious," "cruel," and "torture" or "depravity of mind" -- is itself unconstitutionally vague, federal relief is required. See Barber v. Tennessee, 115 S.Ct. at 1177. The instructions "left the jury free to administer the [death penalty] 'in an arbitrary and unpredictable fashion." Newlon v. Armontrout, 885 F.2d at 1334, quoting California v. Brown, 479 U.S. 538 (1987).

E. GARY CONE'S CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONAL

Furthermore, the application should be granted and relief accorded, because there were numerous other constitutional errors which infected Gary Cone's convictions and sentence. While Gary Cone respectfully requests that this Court grant the application and review all claims raised in the petition and grant relief, and/or remand for a hearing on fact-based claims, Gary Cone merely notes several of the more significant claims in his petition which should be addressed by this Court.⁷ By listing the following claims, Gary Cone in no way waives any other claim presented in his petition.

The application should be granted, because the jury received

⁷ Petitioner also notes that the State failed to comply with Allen v. State, 854 S.W.2d 873 (Tenn. 1993), and did not properly file the entire record with the post-conviction court. Under the circumstances, it may be appropriate for the Court to remand for proper filing of the record, to permit effective review of the petition.

an inaccurate and unconstitutional definition of "reasonable doubt." Petition ¶¶ 17b, 17k; Rickman v. Dutton, 864 F.Supp. 686 (M.D.Tenn. 1994). Further, Gary Cone is entitled to relief because the jury was permitted to infer malice merely from the existence of a homicide and/or the use of a deadly weapon. Petition ¶ 17c; Houston v. Dutton, No. 94-6064 (6th Cir. Mar. 28, 1995). He is entitled to relief because the jury imposed the death sentence fully aware that Cone was serving a life sentence. Petition ¶ 21; State v. Smith, 857 S.W.2d 1 (Tenn. 1993). Cone is also entitled to relief because the jury was unconstitutionally denied the opportunity to consider Cone's intoxication as a defense, as it related to the mens rea elements of felony-murder. Petition ¶ 17f, 17h; State v. Erwin, 84 S.W.2d 476 (Mo. 1993). He is entitled to relief based upon the highly prejudicial and inflammatory argument of the prosecutor. Petition ¶ 36. He is entitled to relief because the Tennessee Supreme Court did not properly review the death sentence, even after finding an invalid aggravating circumstance. Petition ¶ 43; Stringer v. Black, 112 S.Ct. 1130 (1992). The jury also considered an aggravating circumstance for which there was insufficient evidence, viz. the avoiding lawful arrest circumstance. Petition ¶ 33; See Lewis v. Jeffers, 497 U.S. 764 (1990). The jury instructions also unconstitutionally required the jury to presume sanity, when sanity was properly an issue for the jury to decide. Petition ¶ 17 g-i. The jury instructions also permitted a finding of felony-murder without any proof of malice or intent to kill, when "malice" and intent to kill were essential

elements of any charge of murder under Tenn. Code Ann. 39-2-201 & 202. Petition ¶ 17n.

For all the reasons set forth in the petition, as amended (R. 64-84, 139-144), and incorporated herein, Gary Bradford Cone was convicted and sentenced to death in violation of Article I §§ 6, 7, 8, 9, 10, 16, 17, 19, and 20 of the Tennessee Constitution and the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution. This Honorable Court should grant the petition, review all such claims, and grant relief from the unconstitutional conviction and sentence of death imposed by the trial court.

CONCLUSION

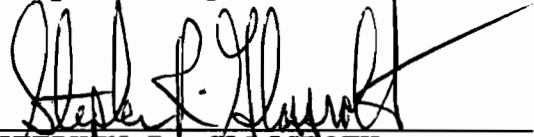
WHEREFORE, for the reasons presented herein and based upon the entire record in this proceeding, this Honorable Court should grant the petition, and/or hold the petition pending the disposition of House v. State, No. 03C01-9110-CR-00326 (Tenn. Cr. App. Mar. 28, 1994) (p.t.a. granted) and Johnson v. State, No. 02C01-9111-CR-237 (Tenn. Cr. App. Mar. 23, 1994) (p.t.a. pending); and Owens v. State, No. 02C01-91111-CR-259 (Tenn. Cr. App. Jackson, Mar. 25, 1994) (p.t.a. granted) and Payne v. Tennessee, No. 02C01-9204-CR-94 (Tenn. Cr. App. Jackson, Mar. 25, 1994) (p.t.a. granted). The petition should be granted and relief accorded by this Court. Alternatively, the petition should be granted and the matter remanded to the lower courts for further proceedings in light of House, Johnson, Owens, or Payne.

The petition should also be granted and/or held and remanded

pending this Court's disposition of State of Tennessee v. Richard Caldwell, Madison County No. 02S01-9505-CC-00044 (Tenn. May 30, 1995) (granting application for permission to appeal).

Moreover, because the conviction and sentence of death were imposed in violation of the Constitution, this Court should grant the petition, review any and all claims raised in the post-conviction petition, and grant Gary Cone post-conviction relief from his unconstitutional conviction and sentence of death.

Respectfully Submitted,



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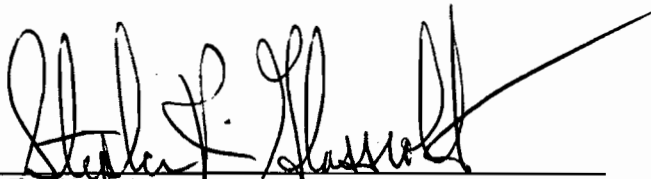
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Office of the District Attorney General, 30th Judicial District, 201 Poplar Avenue, Suite 301, Memphis, Tennessee, 38102, and Gordon W. Smith, Deputy Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, 37243-0493 by placing same in the United States mail, postage prepaid and properly addressed this the 9th day of June, 1995.


OF COUNSEL