

IN THE CRIMINAL COURT OF APPEALS OF TENNESSEE
AT JACKSON

GARY BRADFORD CONE,
Petitioner-Appellant,

v.

STATE OF TENNESSEE,
Respondent-Appellee.

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No. 02-C-01-9403-CR-00052

BRIEF OF PETITIONER-APPELLANT GARY BRADFORD CONE

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE TRIAL COURT'S DISMISSAL OF THE PROPERLY AMENDED PETITION FOR POST-CONVICTION RELIEF WAS INCORRECT.

- II. WHETHER THE TRIAL COURT'S DECISION ON THE MERITS DETERMINING THAT THE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED WAS PREMATURE.

STATEMENT OF THE CASE

Petitioner-Appellant (hereafter appellant), Gary Bradford Cone was convicted of murder and sentenced to death in Shelby County in 1982. Following his direct appeal which resulted in an affirmance of his conviction and sentence, appellant's petition for writ of certiorari was denied by the United States Supreme Court. Appellant then filed a Petition for Post-Conviction Relief on June 22, 1984.

The petition was denied by the trial court and the denial was affirmed by this Court on November 4, 1987. On or about June 15, 1989, appellant filed a pro se Petition for Post-Conviction Relief in the Criminal Court for Shelby County, Tennessee. Approximately one week later appellant filed an amended Petition for Post-Conviction Relief.

On January 2, 1990, the trial court entered an order dismissing the Petition for Post-Conviction Relief. In May 1990, appellant moved to reinstate time for appeal. That motion was granted and the dismissal order entered in the court below was reversed by this Court directing that appellant "...be given an opportunity to overcome any presumption of waiver arising from the previous proceedings." Cone v. State, Court of Criminal Appeals at Jackson, No. 48 at 1 (May 15, 1991), R1-2. The state's application for permission to appeal to the Supreme Court of

Tennessee was denied on August 25, 1992. R1-44.¹

Following issuance of the mandate and remand of the case to the Shelby County Criminal Court, appellant moved to substitute counsel, R1-35, and that motion was granted on March 30, 1992. R1-39. Thereafter, the appellant filed a Second Amended Petition for Post-Conviction Relief, R1-64 through 83. In addition, appellant also filed several motions relating to discovery, R1-86, 90 and sought permission to proceed ex parte to apply for certain resources necessary for proper presentation of the Petition for Post-Conviction Relief. R1-95. Appellant added certain claims to the Second Amended Petition for Post-Conviction Relief, R1-138 and later raised the issue of the personal nature of waiver under Tenn. Code Ann. §40-30-112 (b). R2-164. Appellant also submitted his own thorough affidavit detailing why the claims that had been raised in the successor petition for post-conviction relief, as amended following this Court's remand, had not been waived by him. R2-174 through 214. The state never responded to any of the amendments to appellant's Second Amended Petition for Post-Conviction Relief, although required to do so by Tenn. Code Ann. §40-30-114.

No evidentiary hearing was ever conducted in the court below on the issue upon which this Court reversed in 1991, i.e., to overcome the presumption of waiver. Appellant's factual affidavit concerning the waiver issue was not rebutted in any way. Nevertheless, the trial court denied the Second Petition for Post-

¹ The record on appeal in this case consists of two volumes. All citations to the record are designated by "R - " followed by the volume number, with the page number of the volume appearing after the hyphen.

Conviction Relief without ever conducting an evidentiary hearing. R2-231 through 237. Notice of appeal was given, R2-227 and this Court granted a stay of execution. R2-243. This is the appeal of the decision below.

STATEMENT OF THE FACTS

This case is again before this Court following the trial court's dismissal of appellant's properly amended Petition for Post-Conviction Relief. On ~~May 15, 1991~~, this Court remanded this case which had been dismissed without the appointment of counsel and without an evidentiary hearing. In remanding this case in 1991, this Court observed:

We think this case is controlled by the decision of our Supreme Court in Swanson v. State, 749 S.W.2d 731 (Tenn. 1988). In Swanson, the Supreme Court held a petition for post-conviction relief, which stated a colorable claim for relief, should not be dismissed as having been waived without an opportunity to show the lack of waiver, unless waiver is clear.

In this case, the claims raised are matters which could affect conviction of the petitioner. The trial court did not appoint counsel to assist the petitioner in the case. Under the circumstances, we are of the opinion the petitioner must be given an opportunity to overcome any presumption of waiver arising from the previous proceedings. Cone v. State, Court of Criminal Appeals at Jackson, No. 48 at 1 (May 15, 1991); R1-3.

On or about ~~August 3, 1993~~, petitioner filed a pleading denominated "~~Second Amended Petition for Post-Conviction Relief~~" which served as the newly amended petition which had been the subject of this Court's remand. The "Second Amended Petition" incorporated claims which were presented in the previous, successive petition for post-conviction relief and added a multitude of claims. The State responded to the "Second Amended Petition for Post-Conviction Relief" ~~on August 12, 1993~~, and moved to dismiss alleging, inter alia, that appellant had failed to

overcome the presumption of waiver contained in Tenn.Code Ann. §40-30-112 (b).

On August 10, 1993, appellant moved for the disclosure of certain information for use in the post-conviction proceeding. Appellant also moved for the disclosure of exculpatory evidence for the post-conviction proceeding and also sought to proceed ex parte in seeking necessary resources for presenting his petition for post-conviction relief. No hearing was held on these motions and none was ever ruled upon by the trial court, except for a passing reference to the discovery motion in the court's order dismissing the petition. R2-220, 21.

Following the state's response to the "Second Amended Petition for Post-Conviction Relief", appellant filed another amendment to the pending petition by adding twelve new claims for post-conviction relief. See R1-138 through 144. Further, petitioner replied to the state's response and added an amendment to the petition regarding the issue of waiver. See R2-146 through 152. While both of these amendments were filed on ~~October 5, 1993~~, the state never responded to them. In addition, appellant again amended his petition for post-conviction relief on ~~November 12, 1993~~ by asserting that grounds for post-conviction relief may only be waived personally by the petitioner after a knowing and understanding waiver. R2-164. This amendment was likewise not responded to by the state.

On December 10, 1993, the forty-one page affidavit of the petitioner was filed in the court below. R2-174 through 214. In

that affidavit, with painstaking detail, the appellant clearly demonstrated that the grounds for post-conviction relief, as set forth in the "Second Amended Petition for Post-Conviction Relief" and all of the amendments thereto had not been waived by him. The affidavit sets forth the factual basis for the conclusion that no waiver of the grounds had occurred. No evidence was introduced by the state to rebut the factual showing made by the appellant that there had been no waiver. Despite the factual and procedural posture of the case, the trial court nonetheless determined that the case should be dismissed because the grounds set forth by appellant were ~~either presented on direct appeal, in the initial petition for post-conviction relief, or had been waived.~~ See R2-231 through 238. That decision was erroneous.

SUMMARY OF THE ARGUMENT

When the dismissal of appellant's last petition for post-conviction relief was reversed by this Court it directed that Mr. Cone be afforded the opportunity to overcome the presumption of waiver contained in Tenn. Code Ann. §40-30-112 (b). The Court's remand broke no new legal ground but was consistent with established Tennessee law after Swanson v. States, 749 S.W.2d 731 (Tenn. 1988). This Court has held that the question of whether issues raised in post-conviction petitions have been waived is a factual question which must be resolved following an evidentiary hearing. Parker v. State, Court of Criminal Appeals at Nashville, No. 01-C-019008CR00188 (Feb. 26, 1991) at 2 (permission to appeal denied Sept. 9, 1991) (Attached as Appendix A).

The trial court's error in dismissing the petition is underscored by the fact that the only evidence before it conclusively established that the claims had not been waived. Appellant's detailed, factual affidavit submitted to the trial court explained why there had been no knowing and understanding waiver of the claims advanced in his successive post-conviction petition. The state utterly failed to rebut appellant's strong showing because it presented absolutely no evidence to contradict the evidence demonstrating the absence of waiver. Appellant submitted competent evidence demonstrating that the rebuttable presumption contained in Tenn. Code Ann. §40-30-112 (b)(2) was overcome.

The alternate reason given by the trial court to support the dismissal of the successive post-conviction petition is likewise incorrect. It wrongly believed that those claims which had not been waived had been decided on direct appeal or in appellant's initial post-conviction action. For example, the trial court believed that appellant's claim of trial counsel's constitutional ineffectiveness had been adjudicated in the initial post-conviction petition. An examination of this Court's opinion in appellant's initial post-conviction appeal demonstrates that five (5) areas of trial counsel's ineffectiveness were raised. See Cone v. State, 747 S.W.2d 353,355 (Tenn.Crim.App. 1987). By contrast, the petition in the instant case sets forth thirty-five (35) separate areas in which trial counsel's performance was constitutionally deficient.

Without examining any other new claim, it is clear that appellant set forth a violation of Sandstrom v. Montana, 442 U.S. 510 (1979). Appellant raised the burden-shifting jury instruction issue in the present petition and an examination of the decisions on direct appeal and in the first post-conviction appeal reveals that this issue has never been addressed. Since the evidence discloses that appellant did not waive any claims, dismissal was inappropriate and the trial court's conclusion that the claims were previously determined is simply wrong.

By dismissing the post-conviction petition before that state complied with its obligation to respond to various amendments, the trial court acted prematurely. Amendments to post-conviction

petitions are to be freely allowed, Tenn. Code Ann. §40-30-115 (a), and appellant amended his several times. While the state responded to the "Second Amended Petition for Post-Conviction Relief", it never responded to the amendments despite the requirement of the Tenn. Code Ann. §40-30-114 (a) requiring proper pleading by the district attorney general. Only after there has been a response by the state is a petition for post-conviction relief ripe for decision. Allen v. State, 854 S.W.2d 873 (Tenn. 1993). In ruling on the petition before the state responded to the amendments the trial court acted prematurely.

ARGUMENT

I. THE TRIAL COURT'S DISMISSAL OF THE PROPERLY AMENDED PETITION FOR POST-CONVICTION RELIEF WAS INCORRECT.

A. Appellant's Claims for Post-Conviction Relief Have Not Been Waived.

When this Court remanded the last dismissal of appellant's successive petition for post-conviction relief, it held that dismissal of the pro se petition which set forth colorable claims for relief was improper under Swanson v. State, 749 S.W.2d 731 (Tenn. 1988). When remanding the case in 1991, this Court noted that the "claims raised are matters which could affect the conviction of the petitioner." Cone v. State, Court of Criminal Appeals at Jackson, No. 48 at 1 (May 15, 1991). In remanding this case, this Court held that "the petitioner must be given an opportunity to overcome any presumption of waiver arising from the prior proceedings." Id. In ordering the remand, the Court contemplated that the petitioner would be provided a hearing in which he could "show lack of waiver." Id.

The prior remand in this case is fully consistent with long-standing Tennessee law which recognizes that post-conviction petitions must not be dismissed for technical reasons and that petitioners must be accorded a full opportunity to show the absence of waiver. As the Tennessee Supreme Court held in Swanson:

[A] petition stating a colorable claim for relief or demonstrating an unwaived or undetermined ground for relief is to be considered on its merits. Technical grounds for dismissal are clearly disfavored for such

petitions.

Swanson, 749 S.W.2d at 734. The Court re-emphasized that a petitioner must be given a full and fair opportunity to demonstrate that he has not waived any claims in his petition:

The simple fact that a petitioner has had one bite at the post-conviction apple does not ipso facto preclude another bite when the petitioner can show that no knowing and understanding waiver of a ground for relief was made....

Id. at 735. Consequently, this Court itself has held that the question of waiver is a question properly addressed only through an evidentiary hearing:

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, Court of Criminal Appeals at Nashville, No. 01-C-019008CR00188 (Feb. 26, 1991) at 2 (permission to appeal denied Sept. 9, 1991) (attached as Appendix A). This same holding was expressed in this Court's judgment in Swanson, which was subsequently affirmed by the Tennessee Supreme Court:

[T]he matter of whether the petitioner 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 matters can only be resolved by the reception of evidence on the issues raised.

Swanson v. State, Court of Criminal Appeals, No. 981 (Jan. 8, 1987) at 2, aff'd 749 S.W.2d 731. (Tenn. 1988). Clearly, the trial court's failure to conduct an evidentiary hearing on the issue of waiver flies in the face of the established law of this state.

The trial court's dismissal of the petition on the issue of waiver is even more disconcerting because the only evidence before

it on the issue of waiver was the detailed factual affidavit submitted by the appellant. See R2-174 through 214. The appellant's affidavit clearly demonstrates that there was no knowing and understanding waiver of the claims advanced in the successive petition for post-conviction relief permitting dismissal, as required under Swanson. The only evidence before the trial court on the issue of waiver was appellant's affidavit. Despite this, the trial court substituted its own view of the issue in place of uncontradicted, competent evidence.

Appellant's affidavit conclusively established that he, personally, did not waive the claims advanced in his successive post-conviction petition, as amended. Waiver is personal and the performance of post-conviction counsel is relevant to the question of waiver. Johnson v. State, Court of Criminal Appeals at Jackson, No. 02C01-9111-CR-00237 (March 23, 1994) (application for permission to appeal pending) (attached as Appendix B); House v. State, Court of Criminal Appeals at Knoxville, No. 03-C-01-9110-CR-00326 (March 28, 1994) (permission to appeal granted July 25, 1994) (attached as Appendix C).² It is clear then that the issue of waiver of claims in post-conviction cases cannot be decided without the presentation of evidence in the trial court. In this case, no

² While permission to appeal has been granted in House, it has been consolidated for decision by the Tennessee Supreme Court with Owens v. State, Court of Criminal Appeals at Jackson, No. 02C01-911-CR-00259 and Payne v. State, Court of Criminal Appeals at Jackson, No. 02C01-9204-CR-00094. Owens and Payne had been consolidated before this court and the consolidated appeal was decided on March 25, 1994. Owens and Payne involved the question of funds for expert assistance in post-conviction cases, as did a portion of the decision in House. Johnson did not present the question of funds for expert assistance but concerned solely the issue of the personal nature of waiver.

evidentiary hearing was conducted, however, appellant's unrebutted factual affidavit demonstrated that there was no waiver. If trial courts are to make decisions on the waiver issue based upon evidence and no evidentiary hearing is held, then the evidence of record must be the evidence upon which decisions are based. That did not occur in this case. The evidence concerning the waiver of claims issue shows that appellant rebutted the presumption contained in Tenn. Code Ann. §40-30-112 (b)(2).

B. Claims Were Raised in the Successive Petition for Post-Conviction Relief Which Were Neither Raised On Direct Appeal Nor in the First Petition.

The trial court found that the grounds set forth in the amended petition which was before it contained claims that had either been adjudicated on direct appeal, denied in appellant's first post-conviction petition, or waived by not being raised in the first post-conviction petition. Clearly, this determination by the trial court is erroneous.

The trial court dispensed with petitioner's claim that trial counsel was constitutionally ineffective merely by stating, "[T]his ground was previously denied on direct appeal and the First Petition for Post-Conviction Relief." R2-220. In his first post-conviction petition, appellant set forth five (5) reasons why his trial counsel rendered constitutionally ineffective assistance. See Cone v. State, 747 S.W.2d 353, 355 (Tenn.Crim.App. 1987). The reasons set forth for trial counsel's ineffectiveness concerned: (1) his failure to interview the state's rebuttal witnesses; (2)

his failure to object to improper argument by the prosecutor; (3) his inadequate cross-examination of the state's expert witness; (4) his failure to put on any evidence of mitigation at appellant's sentencing phase; and (5) his failure to make any final argument at the sentencing phase. Id. Those were the sole reasons set forth in the initial petition for post-conviction relief concerning the claim of ineffective assistance of counsel. By contrast, in the amended petition which was before the trial court, appellant set forth thirty-five (35) separate instances concerning trial counsel's constitutionally deficient representation of appellant. See R1-67 through 71. In its order dismissing the successive petition, as amended, the trial court engaged in absolutely no analysis concerning the different claims of constitutional ineffectiveness. It appears that simply because the appellant set forth certain instances under a heading "Ineffective Assistance of Counsel" in his first post-conviction petition the trial court believed that all claims of constitutionally deficient representation were subsumed under that heading. Obviously, that is not the case. These claims are inextricably intertwined with the issue of waiver and, as demonstrated infra, appellant did not waive the issues set forth in the successive petition.

Similarly, the trial court determined that "grounds 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involves a potpourri of various errors by the court at the trial all of which have been considered and denied in direct appeal or the First Post-Conviction Petition." R2-221. As was the case with

the lower court's determination concerning ineffective assistance of counsel, this determination is also incorrect. Instead of addressing each individual issue, a close examination of the issues resolved in the direct appeal, Cone v. State, 665 S.W.2d 87 (Tenn. 1984) and the decision in his first post-conviction appeal, Cone v. State, 747 S.W.2d 353 (Tenn.Crim.App. 1987), clearly shows that the issues were neither presented on direct appeal nor addressed in the initial post-conviction petition.

There is, however, one glaring mistake that amply demonstrates the error committed by the trial court. Petitioner unquestionably set forth an allegation concerning the burden shifting nature of the trial court's jury charge, in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). See R1-71.³ The Sandstrom violation was also set forth as a basis of trial counsel's ineffective assistance. See Second Amended Petition for Post-Conviction Relief at ¶ 15 (s), R1-69.

Without reference to any other of the new claims made by the appellant in his successive petition, as amended, it is clear that his Sandstrom claims should not have been dismissed because it was not advanced on direct appeal, nor a subject of his first petition for post-conviction relief. Further, appellant did not waive any of the claims, see appellant's affidavit at R2-174 through 214, and

³ Paragraph 17 of the Second Petition for Post-Conviction Relief attacked the guilt phase jury instruction as violating various provisions of the United States and Tennessee Constitutions. As to the sandstrom violation, appellant challenged "[I]nstructions which shifted the burden of proof on malice, an element of the crime, to petitioner by presuming malice from a homicide itself and by presuming malice from the use of a deadly weapon, and equating malice with recklessness." R1-71. Such an allegation sets forth a challenge to the burden-shifting instruction.

there was no evidence before the court which showed that waiver did occur.

This case is unlike the decision in Duffell v. State, Court of Criminal Appeals at Nashville, No. 89-30-III (Nov. 7, 1989) (attached as Appendix D). There, this Court affirmed the dismissal of a post-conviction petition, the petitioner's first, but did so only under circumstances where the trial court had appointed counsel to represent the petitioner. The Duffell court also made clear that the appointment of counsel was under circumstances where the trial court gave counsel an opportunity to amend the pleadings to establish any excuse for failure to raise the waived issue but counsel did not do so. Duffell, slip op. at 2.

In reaching the result, this Court reviewed the Supreme Court's decision in Swanson. It stressed the fact that petitioner should be afforded an opportunity to rebut the presumption of waiver.

The operable word in the statute, supported by the holding in Swanson, is "rebuttable." There is a presumption of waiver by the very existence of a first, second or third petition; that the presumption is not conclusive implies that any petitioner with a "colorable claim" should be afforded the opportunity, factual or otherwise to submit his reasons for the failure to present the issue on direct appeal or in an earlier petition for post-conviction relief. Id. at 7.

Applying this principle to Duffell's case, the court affirmed the dismissal of the petition both because he had been represented by appointed counsel and because counsel made no effort to overcome the presumption, either by amending the petition or by providing affidavits. Id. at 8-9. In the present case, while the appellant,

like Duffell, had the assistance of counsel in amending the petition to set forth reasons to overcome the presumption of waiver, unlike Duffell appellant submitted an uncontradicted affidavit setting forth the factual basis for why waiver had not occurred. That is the crucial distinction which so markedly contrasts the present case from Duffell and is why the trial court's action in this present case was erroneous.

**II. THE TRIAL COURT'S DECISION ON THE MERITS
DETERMINING THAT THE SUCCESSIVE PETITION FOR
POST-CONVICTION RELIEF SHOULD BE DISMISSED WAS PREMATURE.**

Petitioner filed the Second Petition for Post-Conviction Relief on August 3, 1993. The state responded to that pleading on August 12, 1993. Later, on October 5, 1993, appellant amended the August 3 pleading by filing "Petitioner's Amendment to Petition for Post-Conviction Relief" R1-138 and also filed "Petitioner's Reply to State's Response and Amendment Regarding Issue of Waiver". R2-146. Further, on November 12, 1993, appellant filed a pleading entitled, "Amendment to Petition and the Memorandum Concerning Personal Nature of Waiver". R2-164. In addition, prior to the trial court's decision dismissing the petition appellant filed a factual affidavit demonstrating that he had not waived the claims set forth in the successive petition, as amended. R2-174. Except for its response to the Second Amended Petition for Post-Conviction Relief, the state never replied to the various amendments filed by appellant to his petition and certainly did not rebut the factual issues overcoming the presumption of waiver contained in

appellant's affidavit.

It is clear that a petitioner for post-conviction relief may amend the petition freely. Pursuant to Tenn.Code Ann. §40-30-115 (a) the trial court "may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief." In addition, the act contemplates that responses to any amendment shall be filed with the court because the act grants the state "a reasonable time to respond to any amendments." Id. Further, Tenn.Code Ann. §40-30-114 (a) dictates that "[T]he district attorney general shall represent the state and respond by proper pleading on behalf of the state..." in post-conviction actions. While the state responded to the ~~Second Amended Petition for Post-Conviction Relief~~, the state never responded to any of the amendments to that petition. Therefore, the trial court's action in dismissing the case was premature because the issues raised by the various amendments were not joined in the absence of responses to those amendments by the state.

The Tennessee Supreme Court "held in Swanson that not only must the State respond to the petition, its response must be adequate before a court may dismiss a petition presenting claims either not existing at the time of the prior petition or presenting reasons why the claims were not presented..." unless the claims are, on their face, incorrect. Allen v. State, 854 S.W.2d 873, 874 (Tenn. 1993). Obviously, when amendments are added to a petition, something contemplated under Tenn. Code Ann. §40-30-115 (a), it is

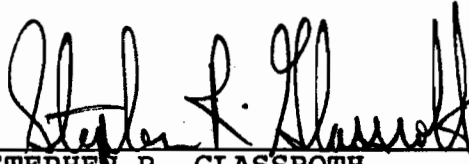
the duty of the state, through the district attorney general, to respond to those amendments. The state failed to respond to any of the amendments, something which the state is required to do. Id. Further, the state's response to the Second Amended Petition for Post-Conviction Relief is nothing more than "...an inadequate, perfunctory pleading..." condemned in Swanson as a basis for dismissal. 749 S.W.2d at 736. Just as the state erred in not responding to the post-conviction petition in Allen, the state here has failed to properly respond to the various amendments. The Tennessee Supreme Court reversed the dismissal in Allen and this case should, likewise, be reversed and remanded to the trial court for further proceedings. "Only after the petition has been amended by appointed counsel, and after the State has complied with its statutory duty to adequately respond to the petition before the trial judge, will this case be developed to the point where consideration of the merits is appropriate." Allen v. State, 854 S.W.2d at 877 (emphasis added). Here, the final adjudication by the trial court was premature because the state failed to respond to the amendments to the petition.⁴ This action by the court below was erroneous.

⁴ The action by trial court was premature for another reason. Appellant moved in the court below for leave to proceed ex parte for necessary resources to assist in developing and presenting his claims. R1-95. No hearing on that motion was held and appellant was given no other opportunity to present reasons why proceeding ex parte would be appropriate. No ruling on this motion was ever entered.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed, and the matter should be remanded for further proceedings consistent with this court's opinion.

Respectfully submitted,



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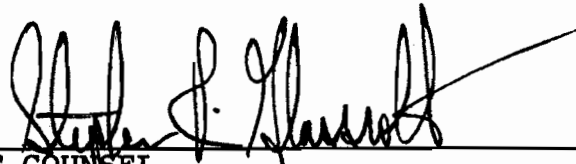
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CERTIFICATE OF SERVICE

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 22nd day of August, 1994.


OF COUNSEL