

DW.  
10  
St. 12-10-93

FILED

93 NOV 12 AM 9:46

M.J. JOHNSON, CLERK

BY C. Cawell

IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

GARY BRADFORD CONE,	*	
	*	
Petitioner,	*	
	*	
vs.	*	No. P-06874
	*	
STATE OF TENNESSEE,	*	
	*	
Respondent.	*	

**AMENDMENT TO PETITION FOR  
POST CONVICTION RELIEF AND MEMORANDUM CONCERNING  
PERSONAL NATURE OF WAIVER UNDER TENN. CODE ANN. §40-30-112(B)**

Comes now the Petitioner, Gary Bradford Cone, and pursuant to this Court's instruction during the October 15, 1993, status conference in the above-captioned action, hereby amends his petition for post-conviction relief and avers that Tenn. Code Ann. 40-30-112(b) permits a finding of waiver only upon a showing that the Petitioner personally made a knowing and understanding waiver of any such issues allegedly waived. Petitioner has never personally made any such knowing or understanding waiver of any grounds for relief contained in his post-conviction petition and has provided reasons why there has been no "knowing and understanding" waiver of any such issues. Petitioner must therefore be accorded a hearing at which he may present evidence demonstrating the absence of waiver, and a hearing at which he can demonstrate the validity of his constitutional claims.

I.

**ONLY THE PETITIONER CAN WAIVE A CLAIM FOR RELIEF**

Tenn. Code Ann. §40-30-112(b)(1) was passed by the Tennessee Legislature in 1967 and states in its entirety, "A ground for

relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." (emphasis supplied).

It is the solemn duty of the Tennessee judiciary to faithfully interpret the laws passed by the Tennessee legislature and thereby effectuate the will of the People. These, in interpreting statutes, "Where the legislature has used words of plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it had expressed." *Heiskell v. Lowe*, 126 Tenn. 475, 499-500, 153 S.W. 284, 290 (1912), citing *Dwarris On Statutes*, 702, 703, quoted in *State v. Alley*, 594 S.W. 381 (Tenn. 1980) (Fones, J., dissenting). It is beyond dispute that when words of a statute are plain and unambiguous, the judiciary must be faithful to the principle that the "legislature intended what it wrote and meant what it said." *Federal Express Corp. v. Woods*, 569 S.W.2d 408, 411 (Tenn. 1978).

Indeed, "Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." *Carson Creek Vacation Resorts v. State*, 1993 Tenn. Lexis 370 citing *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66 (Tenn. 1991). "A statute must be constructed so as to ascertain and give effect to the intent and purpose of the legislation considering the statute as a whole and

giving words their common and ordinary meaning." *Crowe v. Ferguson*, 814 S.W.2d 721, 723 (Tenn. 1991) citing *Marion County Board of Commissioners v. Marion County Election Commission*, 594 S.W.2d 681, 684-685 (Tenn. 1980). In construing a statute, words are to taken in their natural and ordinary sense. *Mercy v. Olsen*, 672 S.W. 2d 196, 198 (Tenn. 1984), quoting *Oliver v. King*, 612 S.W.2d 152 (Tenn. 1981); *United Cannery v. King*, 696 S.W.2d 525, 527 (Tenn. 1985), quoting *Burks v. State*, 194 Tenn. 675, 254 S.W.2d 970 (1953); *AFG Industries v. Cardwell*, 835 S.W.2d 538, 485 (Tenn. 1992); *Bowater North American Corp. v. Jackson*, 685 S.W.2d 637 (Tenn. 1985); *Hall Contracting Corp. v. Tidwell*, 507 S.W.2d 697 (Tenn. 1974).

Applying these well-settled principles of statutory construction in this case, it is clear that the terms of Tenn. Code Ann. §40-30-112(b)(2) "are unambiguous and, therefore, must be interpreted according to their plain meanings." *Safeco Ins. Co. v. State*, 840 S.W.2d 355, 357 (Tenn. 1992), citing *Federal Express Corp. v. Woods*, 569 S.W.2d at 411. See also *McClain v. Siegel Co.*, 834 S.W.2d 295, 296 (Tenn. 1992). ("The statute is unambiguous and, therefore, must be interpreted according to its plain meaning.").

By its very terms, §40-30-112(b)(2) provides that a claim is waived if, and only if, "the petitioner knowingly and understandingly failed to present it for determination" in prior proceedings. *Id.* There is nothing ambiguous about these words, which mean what they say. They strictly provide that only the petitioner himself can waive a claim for relief. The statute says

nothing about permitting counsel to make such waivers for a petitioner. The statute specifically states that it is "the petitioner" alone who must knowingly and understandingly waive his claims before they are waived in a post-conviction proceeding. By these clear words, the "legislature intended what it wrote and meant what it said," and this Court must, therefore, adhere to and apply the exact words of the statute. *Federal Express*, 569 S.W.2d at 411.

Accordingly, to determine the question of waiver, this Court must determine whether, by his actions, the petitioner himself "knowingly and understandingly" waived his claims. As Petitioner has asserted, and as his proof at hearing will demonstrate, Petitioner has never made any such "knowing and understanding" waiver of his claims for relief. Petitioner Gary Bradford Cone must be accorded a hearing on this issue of waiver, an hearing on the merits of his claims, and must, in accordance with his petition, be granted relief from his conviction and sentence of death.

## II.

### WAIVER REQUIRES A KNOWING, UNDERSTANDING, DELIBERATE & INTENTIONAL RELINQUISHMENT OF A CLAIM FOR RELIEF

Given the rules of statutory construction discussed above, this Court cannot assess this issue of waiver without looking to the plain meaning of the words "knowingly and understandingly," as they are used in §40-30-112(b). Such plain meaning can be ascertained through comparison to other statutes and by the regular

usage of such terms.

The term "knowing," for instance, is also used by the legislature in Tenn. Code Ann. §39-11-302(b). This section provides that a person acts "knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Accordingly, Petitioner Gary Bradford Cone could have "knowingly waived" a claim only if he was aware of the claim, and aware that the failure to present the claim would preclude him from later raising the claim. This he has not done. Similarly, the plain meaning of "understandingly waived" requires that there is waiver only if Gary Cone clearly understood that, by failing to raise a claim earlier, he would be precluded from later raising the claim. This also has not occurred. There has been no "knowing and understanding" waiver of any ground for relief. In addition, because the waiver standard of 40-3--112(b) is framed in the conjunctive, requiring both a knowingly and understanding waiver, there can be no waiver absent proof of both "knowing waiver" and "understanding waiver." Neither a "knowing waiver" or an "understanding waiver" standing alone is sufficient; both must be shown. Neither, however, exists here.

Thus, a finding that a petitioner has waived a claim is appropriate only when the petitioner, aware of his claim, nevertheless understandingly and knowingly made the decision not to present the claim earlier, fully aware that by withholding the claim he would forfeit his right to present it at a later date.

The events which led to the passage of §40-30-112(b) confirm this understanding of the statute. In *Fay v. Noia*, 372 U.S. 391 (1963), the United States Supreme Court held that a federal habeas petitioner waived a claim for relief only if he deliberately made the decision not to present his claim at a proper time. As the Court explained:

'[A]n intentional relinquishment or abandonment of a known right or privilege' furnishes the controlling standard. If a habeas applicant, after consulting with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims...whether for strategic, tactical, or any other reasons that can be fairly described as the deliberate by-passing of state procedures, then it is open to the federal court to deny him all relief.... We wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.

*Id.* at 439 .

Just two years later in *Case v. Nebraska*, 381 U.S. 336 (1965), various Supreme Court Justices remarked that all States should adopt some form of post-conviction procedure to enable State prisoners to challenge their convictions in State court, rather than burdening the federal courts with claims that could otherwise be resolved in State court if post-conviction procedures were available. *Id.* at 337-340 (Clark, J., concurring); *Id.* at 340-347 (Brennan, J., concurring). Justice Brennan explicitly indicated that the States should adopt the same waiver standards as those in federal court (i.e. *Fay*), to insure that all claims initially presented in a State court would be fully considered on their merits, and under the same standards, when reviewed in federal court. *Id.* at 347 (Brennan, J., concurring).

Not surprisingly, shortly following *Fay* and *Case*, the Tennessee Legislature passed the Post-Conviction Procedures Act in 1967, enshrining in §40-30-112(b) a waiver standard closely resembling the "deliberate bypass" standard of *Fay v. Noia, supra*. This statutory standard, adopted over a generation ago in light of then-existing federal standards, remains the governing law today. Designed to insure the vindication of both Tennessee and Federal constitutional rights in the courts of the State of Tennessee, §40-30-112(b) was designed to insure that every constitutional claim will be reviewed on its merits, except when the petitioner has expressly decided to forgo the claim, with full knowledge of the claim being relinquished, and full understanding of the consequences of such decision. No such proof exists here.

Indeed, Petitioner has expressly informed the Court of the reasons why he did not present such issues earlier. In a detailed statement, Petitioner has informed the Court that his claims are not waived, because, *inter alia*, he was unaware of such claims in earlier proceedings, due either to the unavailability of the factual predicate of such claims, no knowledge of the legal standards governing his case, and/or the failure to be apprised of the significance, and because he had no understanding that failure to raise such claims would constitute a waiver. See e.g., *Cone v. Tennessee, Criminal Court of Shelby County, Case No. P-06874, Statements and Amendment Concerning Waiver*. He is therefore entitled to a hearing on the issue of waiver, to a finding that there is no waiver, and to judgment in his favor on the merits of

his claims.

CONCLUSION

WHEREFORE, for the reasons stated above, because the waiver standard of 40-30-112(b) requires personal waiver of claims which has not occurred, and requires "knowing and understanding" waiver of claims, which also has not occurred, Petitioner Gary Bradford Cone is entitled to a hearing on the issue of waiver, to a finding that he has not waived his claims, and to judgement in his favor, discharging him from the unconstitutional conviction and sentence of death imposed by this Honorable Court.

Respectfully submitted on this the 12<sup>th</sup> day of November, 1993.

  
KEMPER B. DURAND

  
STEPHEN R. GLASSROTH

Attorneys for Petitioner

OF COUNSEL:

THOMASON, HENDRIX, HARVEY,  
JOHNSON & MITCHELL  
29th Floor, One Commerce Square  
Memphis, Tennessee 38103  
(901) 525-8721

GLASSROTH & ASSOCIATES, P.C.  
615 South McDonough Street  
Post Office Box 910  
Montgomery, Alabama 36101-0910  
(205) 263-9900

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 Popular Avenue, Suite 301, Memphis, Tennessee, 38102, <sup>Hand-Delivery</sup> by ~~placing same in the United States mail, postage prepaid and properly addressed~~ this the 12<sup>th</sup> day of November, 1993.

Raymond B. Duval  
OF COUNSEL