IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

LEE HALL,	)	
	)	**No. E1997–00344–SC–DDT–DD**
Petitioner,	)	
	)	**Hamilton Co. Nos. 308968 (PC),**
v.	)	**308969 (ECN), and 222931 (MTR)**
	)	
STATE OF TENNESSEE,	)	**(CAPITAL CASE)**
	)	
Respondent.	)	**Execution Set for Dec. 5, 2019**

LEE HALL'S MOTION TO STAY HIS EXECUTION
PENDING APPEALS OF RIGHT REGARDING BIASED JUROR

This Court decides who lives and dies. In wielding this power, the Court has the responsibility of considering matters of life or death with great care and attention. Lee Hall's life, and the critical question of whether his foundational constitutional right to a fair and impartial jury was denied, arrives at this Court later than anyone would hope. But it is not too late for the Court to pause to consider whether Lee Hall was fairly tried given that a juror who convicted and sentenced him to death failed to disclose a history of severe domestic abuse and admits that she "hated" Mr. Hall and was "biased" against him during his trial.

Mr. Hall moves this Court for a stay of execution while he pursues appeals of right from denial of his petition for writ of error coram nobis and second post-conviction petition, both of which were filed on October

17, 2019 and were based upon newly available evidence.[1] Counsel learned on September 26, 2019 that one of Mr. Hall's jurors, "Juror A," suffered traumatic domestic violence prior to her jury service which mirrors evidence presented at trial; that she failed to disclose this information when asked several questions on her jury questionnaire, and in voir dire, reasonably designed to elicit the information; and that she "hated" Lee Hall when he testified because it triggered her deeply painful memories and emotions from her first marriage. The trial court dismissed both cases, in orders entered November 6 and November 19, 2019, on procedural grounds, but, in a rushed hearing—due to the imminent execution date—heard an offer of proof regarding the biased juror claim. On appeal, Mr. Hall will seek a remand for a full and fair evidentiary hearing.

This Court zealously guards the right to a fair and impartial tribunal—to protect not only the right of a litigant to a fair trial but also to provide the public with the assurance of a fair and impartial justice system. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013). This right is most imperative in capital cases. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital

[1] Mr. Hall also intends to appeal the November 6, 2019 denial of his Motion to Reopen Post-Conviction Petition. Petitioner filed an application in the Court of Criminal Appeals which was denied on November 8, 2019, due to failure to meet procedural requirements. Petitioner is filing another application forthwith.

cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'").

Juror A's service on Mr. Hall's capital jury is the greatest magnitude of constitutional violation—a structural error—which requires that Mr. Hall's convictions and sentence be vacated. *See Faulkner v. State*, W2012–00612–CCA–R3–PD, 2014 WL 4267460 (Tenn. Crim. App. August 29, 2014) (holding that the service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused the right to a fair and impartial jury, a structural error requiring "automatic reversal").

As it stands, Mr. Hall will instead be executed in the electric chair on December 5, 2019 if the merits of his claim are not allowed to be fully litigated.

Structural errors require reversal because they cannot be remedied. Here, the equities weigh in favor of a stay to allow the Court time to consider Mr. Hall's claim because it will be impossible to afford him the required relief after December 5th. It is not uncommon for structural errors to be recognized only after an appellate court has reviewed the claims. For example, Steven Rollins,[2] Robert Faulkner,[3] and Glenn

[2] *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (capital case in which a new trial was granted due to the presence of a biased juror).

[3] *Faulkner v. State*, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014) (capital case in which a new trial was

Sexton[4] all lost their biased juror claims in the trial courts before receiving appellate relief. This Court should stay the execution and let the appellate courts address the consequences of Juror A's concealment of her traumatic domestic violence experience until September 26, 2019.

PROCEDURAL HISTORY

Lee Hall was tried on charges of first-degree murder and aggravated arson in the death of his estranged girlfriend, Traci Crozier, in March of 1992. *See* Hamilton County Case Nos. 188000 and 188001. Potential jurors completed jury questionnaires with questions about crime victimization, experience calling the police, and experience with spouses or family members charged with a crime. During voir dire, jurors were questioned about their experience with domestic violence. The jurors selected to serve—based on their answers to those questions—convicted Mr. Hall of arson and first-degree murder and sentenced him to death.

The Court of Criminal Appeals and this Court affirmed Mr. Hall's convictions and sentence on direct appeal. *State v. Hall*, No. 03C01–9303–CR–00065, 1996 WL 740822 (Tenn. Crim. App. December 30,

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granted due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

[4] *Sexton v. State*, No. E2018–01864–CCA–R3–PC (Tenn. Crim. App. November 25, 2019) (formerly capital case in which pro se litigant was granted a new trial due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

1996); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). On August 17, 1998, Mr. Hall filed a *pro se* petition for post-conviction relief that was subsequently amended. After an evidentiary hearing, the post-conviction court denied relief. PC TR Vol. 1, 111–28.[5] The Court of Criminal Appeals subsequently affirmed the denial of relief. *Hall v. State*, No. E2004–01635–CCA–R3–PD, 2005 WL 2008176 (Tenn. Crim. App. August 22, 2005). Federal habeas proceedings concluded in 2011. *See Hall v. Bell,* No. 2:06-cv-00056 (E.D. Tenn. Sept. 22, 2011).

Lee Hall is scheduled to be executed on December 5, 2019. *See* Order, *State v. Hall*, E1997–00344–SC–DDT–DD (filed Nov. 16, 2016). He will be electrocuted.

On October 17, 2019, Mr. Hall filed a motion to reopen post-conviction proceedings, a petition for writ of error coram nobis, and a second post-conviction petition (collectively, the "the juror bias filings"), based on newly available evidence that Juror A had failed to truthfully answer material questions on her jury questionnaire and in jury selection, which were designed to elicit whether she had: (1) ever been the victim of any crime, (2) ever had a spouse or family member charged with a crime, or (3) ever called the police about any problem, domestic or

[5] The order was entered on March 4, 2004, nunc pro tunc for January 26, 2004.

criminal. Mr. Hall's filings also alleged actual bias, based upon an October 7, 2019 declaration[6] provided by Juror A which stated, in part:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [My husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [My husband] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.
>
> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. *I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.*

Id. (emphasis added). Juror A did not reveal this information until September 26, 2019, when she met with two members of Mr. Hall's defense team.

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[6] The Hamilton County Criminal Court filed the declaration under seal upon the agreement of the parties to maintain the confidentiality of Juror A.

The parties argued the juror bias filings in the trial court on November 4, 2019. On November 6, 2019, the trial court issued an order dismissing the motion to reopen and petition for writ of error coram nobis. That same day, Mr. Hall filed notices of appeal in the Court of Criminal Appeals.[7]

The November 6 order also directed the parties to file additional briefing on whether due process required the court to hear the merits of Mr. Hall's claim, which the parties submitted on November 13, 2019. Finally, the order set a hearing on the Second Post-Conviction Petition for November 14, 2019.[8]

At the November 14, 2019 hearing, Mr. Hall presented four witnesses: Juror A, who resides out of state, and three investigators who worked on Mr. Hall's case. In addition, Mr. Hall presented an affidavit of former counsel, who also resides out of state, and a declaration by trauma expert Linda Manning, Ph.D.

On November 19, 2019, the trial court dismissed Mr. Hall's second post-conviction petition, finding that only this Court had the authority to address whether due process requires a court to hear the merits of Mr. Hall's biased juror claim in a second post-conviction petition. The court

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[7] As referenced above, Petitioner intends to timely file his application to appeal the denial of his motion to reopen post-conviction.

[8] The order explained that the court would only address the merits of the petition if the second post-conviction petition was properly before the court after reviewing the additional briefing on whether due process so required. Absent such a finding, the court would conduct the hearing as an offer of proof.

distinguished the clear authority for due process tolling the statute of limitations with the ambiguous authority for permitting a second post-conviction petition in light of the single-petition limitation in Tennessee Code Annotated § 40–30–102(c). Due to the finding that the second petition was procedurally barred, the evidence presented on November 14, 2019, is only in the record as an offer of proof. The trial court, in dicta, made various findings about the offer of proof.

The trial court found that investigators with the Office of the Post-Conviction Defender (OPCD) made efforts to locate Juror A during the original post-conviction time frame, and that if they succeeded in speaking with her, she likely would not have told them about her first marriage.[9] The court accepted the juror's testimony in full, except a statement she made, over objection, that her experiences did not affect her insofar as it related to deliberations. The court found this portion of the testimony to be inadmissible pursuant to Tennessee Rule of Evidence 606(b) and *Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005).

The trial court concluded that Mr. Hall failed to establish Juror A was prejudiced against him because she "was unaffected by [her] abuse at trial based in large part on the happy and fulfilling [second] marriage in which she had been involved over a decade as of trial, and the fact that

[9] Juror A acknowledged that she was interviewed by the OPCD in 2014 but could not remember if she was asked about domestic violence at that time. If she had been asked, she was unsure if she would have disclosed her first marriage. Juror A brought up her history of domestic violence in 2019 without being asked and could not explain why she decided to share it now.

any prejudice or hatred she may have felt toward the Petitioner was fleeting at best." Thus, while the court found inadmissible Juror A's testimony regarding whether her experiences affected her deliberations, this inadmissible evidence then drove the court's decision. On appeal, Mr. Hall will both challenge the finding that a merits determination is barred and fully brief the merits of his biased juror claim.

On November 26, Petitioner filed a Motion to Reconsider, with an additional Declaration of Linda Manning, Ph.D., which was denied that day. Mr. Hall filed his notice of appeal from the dismissal of his second post-conviction petition on November 26, 2019. That appeal is Case No. E2019–02094–CCA–R3–PD.[10]

STANDARD FOR GRANTING A STAY

This Court's rules authorize a stay of execution pending resolution of collateral litigation in state court if the person under death sentence "can prove a likelihood of success on the merits of that [collateral] litigation." Tenn. Sup. Ct. R. 12(4)(E). This standard does not require a "significant possibility of success."[11] Instead, a movant proves that he has

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[10] Counsel for Mr. Hall have worked with the court reporter and clerk's office to finalize the record in all cases as quickly as possible. The clerk mailed the record in Case No. E2019–01978–CCA–R3–ECN to the Court of Criminal Appeals for filing on November 26, 2019.

[11] This Court amended the rule, effective July 1, 2015, after rejecting a proposal to change the language to "a significant possibility of success on the merits" in collateral litigation. The Tennessee Bar Association (TBA) opposed imposing the burden of demonstrating a "significant" possibility as a "potential deviation of the long established 'heightened due process

a likelihood of succeeding on the merits of that litigation by showing "more than a mere possibility of success.'" *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). "However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics*, 119 F.3d at 402 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Moreover, this Court's standard, premised on principles of constitutional adjudication and procedural fairness, is coexistent with the application of heightened due process principles in capital cases. As such, this Court has consistently required that constitutional challenges be considered in light of a fully developed record. *See State v. Stephen Michael West,* No. M1987–00130–SC–DPE–DD (Tenn. Nov. 26, 2014) (Order); *State v. Zagorski*, No. M1996–00110–SC–DPE–DD (Tenn. October 22, 2014) (Order); *State v. Irick*, No. M1987–00131–SC–DPE–DD (Tenn. Sept. 25, 2014) (Order); *Donald Wayne Strouth v. State*, No. E1997–00348–SC–DDT–DD (Tenn. April 8, 2014) (Order); *Stephen*

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standards involved in capital cases,'" citing *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011). Comment of the TBA, filed January 20, 2015, at 2. The TBA urged the Court to continue applying heightened due process standards by exercising "discretion on a case by case basis regarding stays sought pending collateral litigation so as to allow the record to fully develop." *Id.*, at 3.

Michael West v. Ray, No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order).

Indeed, in *State v. Workman*, this Court granted a stay of execution pending adjudication of a petition for writ of error coram nobis which had been denied by the lower courts. 41 S.W.3d 100, 103 (Tenn. 2001). And, as this Court emphasized in *Workman*, the condemned man's ability to have substantive constitutional claims adjudicated on the merits outweighed the State's interests in executing the death sentence. *Id.* Likewise, in *State v. West*, this Court explained, "The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges . . . be considered in light of a fully developed record addressing the specific merits of the challenge." No. M1987–00130–SC–DPE–DD (Tenn. Nov. 29, 2010) (Order), at 3. "Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing." *Stephen Michael West v. Ray,* No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order), at 2. Mr. Hall has not had the opportunity to fully investigate and present the merits of his claim because he has been forced to litigate under imminent threat of execution.

Mr. Hall Has Established A Likelihood That He Will Prevail On The Merits Of His Biased Juror Claim.

Juror A sat on Mr. Hall's capital murder trial. During jury selection, Juror A denied ever being the victim of any crime, having a spouse or family member charged with a criminal offense, or even calling the police

about any problem, domestic or criminal. Juror A was specifically asked whether she was a victim of domestic violence, but she remained silent both during and after trial.

Two months ago, Juror A revealed that she was the victim of domestic violence prior to Mr. Hall's trial. Specifically, she explained that she was repeatedly raped; the first rape resulted in a pregnancy, which caused her to abandon her college plans and marry her rapist. Juror A's first husband was "very controlling" and "very jealous." He beat her and left her "with a bloody nose and a black eye," and then committed suicide, widowing her. During that marriage, she called the police when he destroyed their home after a fight on her birthday. Her husband was arrested at least once for drunk driving.

Elements of the proof presented at trial parallel some of Juror A's life experiences, causing her to associate Mr. Hall with her first husband. Namely, Traci Crozier lived with Mr. Hall for five years; Juror A was married to her first husband for five years. Both couples lived together in a trailer. The relationship between Mr. Hall and Ms. Crozier was described as "rocky"; Juror A testified that her first marriage was "bad," and involved violence. Juror A's husband called her constantly at work, jeopardizing her job; at trial, witnesses testified that Mr. Hall called Ms. Crozier repeatedly. Juror A testified that she would sometimes "escape" to her husband's grandmother's house. Ms. Crozier moved in with her grandmother after leaving Mr. Hall. Mr. Hall drank over a case of beer the night of the offense, was slurring, and could not walk well. Juror A testified that her husband was a "drunk," who became abusive after

drinking. Like Juror A's first husband, Mr. Hall had been charged with drunk driving.

Alone, Juror A's failure to disclose her relevant, materially significant history is sufficient to show presumed bias pursuant to well-established Tennessee law. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011). In *Smith*, a capital post-conviction case, the Court held:

> In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality....'" *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing *Akins*, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." *Akins*, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 356 (footnotes omitted).

Id. See also Faulkner v. State, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014) (granted new trial due to juror's undisclosed experience with domestic violence); *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (granting new trial due to a biased juror); *Sexton v. State*, No. E2018–01864–CCA–R3–PC (Tenn. Crim. App. November 25, 2019) (double homicide case in which pro se litigant was granted a new trial

due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

Moreover, Juror A signed a declaration *conceding that she was actually biased* against Mr. Hall at the time of the trial and in fact hated him because he reminded her of her abusive husband. During the offer of proof hearing on November 14, Juror A tried to back away from her statement of bias, saying she did not recall saying that or putting it in the declaration, though she also agreed that the declaration contained nothing untrue. During her testimony, she also claimed that she did not reveal the information about her abusive marriage because it was not on her mind at the time of the jury selection; however, she was flooded with memories of her violent husband during the trial and failed to bring that to the court's attention.

Juror A would have been subject to a challenge for cause under federal and state law. Jurors "who have had life experiences or associations which have swayed them 'in response to those natural and human instincts common to mankind,' interfere with the underpinnings of our justice system." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (1945)). "[P]otential bias arises if a juror has been involved in a crime or incident similar to the one on trial." *Smith*, 357 S.W.3d at 347.

The right to a fair and impartial tribunal is deeply rooted in rights embedded in the federal and state constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an

accused a fair hearing violates even the minimal standards of due process."). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Juror A's affirmative misrepresentations and omissions rendered Mr. Hall's capital murder trial fundamentally unfair. The presence of a biased juror constitutes structural error and warrants reversal of conviction and his death sentence. Denial of the right to an impartial jury is a structural constitutional error that compromises the integrity of the judicial process and cannot be treated as harmless error. *State v. Odom*, 336 S.W.3d 541, 556 (Tenn. 2011); *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). Because structural errors deprive a defendant of a right to a fair trial, they are subject to automatic reversal. *Rodriguez*, 254 S.W.3d at 361.

Statutory Limits On Collateral Challenges To Relief Violate Due Process If Interpreted To Bar Mr. Hall From Litigating The Merits Of His Structural Error Claim.

Due process[12] requires that Mr. Hall be allowed to fully litigate his bias juror claims on the merits through at least one of the three procedural vehicles he filed. Post-conviction petitioners must be afforded an opportunity to seek relief "at a meaningful time and in a meaningful manner." *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992). This Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Id.* (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

In exercising this responsibility to protect the Constitution, this Court has previously found that strict procedural restrictions of the post-

[12] The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides, in part, "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8. The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965).

conviction statute must be relaxed, where "circumstances beyond a petitioner's control" prevented the petitioner from complying with the statutory requirements. *Whitehead v. State*, 402 S.W.3d 615, 622, 625 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Id. See also Seals v. State,* 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's);[13] *Sample v. State*, 82 S.W.3d 267, 269–75 (Tenn. 2002) (court

[13] Similarly, in *Howell,* this Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application."). The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma,* 517 U.S. 348 at 364–65 (1996) (comparing the risk of

was required to reach the merits of petitioner's *Brady* claim in a late and successive post-conviction petition, because others' misconduct prevented him from obtaining the evidence necessary to raise the claim earlier).[14]

The statute of limitations must be weighed against the competing interests identified in the juror bias filings. *See Whitehead*, 402 S.W.3d at 623 (weighing the competing rights at stake in determining whether due process barred strict application of the statute of limitation). The recognized private interest at stake is the "prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process." *Id.* (citing *Burford*, 845 S.W.2d at 207). The government's interest, by contrast, is "'in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* These considerations apply equally to: (1) determining whether due process requires the equitable tolling of statutory time limits in collateral proceedings, and (2) fundamental fairness principles.

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incompetent defendant standing trial versus State's risk of incorrect competency determination)).

[14] Therefore, the fact that Sample waited approximately 16 months after discovering the evidence before raising the issue was unremarkable in the Court's view.

In capital cases,[15] the interest of the condemned weighs strongly against any interests of the State given that life, and not merely liberty is at issue.[16] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004).

Weighed against Mr. Hall's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Here, the biased juror claim is neither groundless nor fruitless—it is a structural constitutional error, striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing

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[15] Mr. Hall is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

[16] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (finding that despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (holding that the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency) (abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010)).

but undiscovered during the 1992 trial. The claim is not stale[17] because Mr. Hall had no control over the facts establishing juror bias—Juror A answered "no" on the questionnaire to important questions; Juror A remained silent and failed to disclose her experience with severe domestic violence when asked, and again, when the memories started flooding her during trial; Juror A did not discuss her rape and abuse openly until undergoing therapy after Mr. Hall's post-conviction proceedings ended; Juror A did not discuss her relevant history with members of Mr. Hall's legal team in a 2014 interview, even though she freely talked about other aspects of her personal life; and Juror A finally revealed these facts in late September 2019.

It is only the conduct of Juror A—failing to disclose her personal history with domestic violence, a key component of the State's case at Mr. Hall's trial—that prevented Mr. Hall from raising the claim in the original post-conviction proceedings or filing a successive petition earlier.

This Court stated in 1826: "The maxim of the law is, that there is no wrong without a remedy . . . ." *Bob, a slave v. The State*, 10 Tenn. 173, 176 (1826). *See also State v. Johnson*, 569 S.W.2d 808, 814 (Tenn. 1978) (relying on *Bob* and applying the same principle). This is particularly true when a life is at stake. "Should error intervene to the prejudice of the

[17] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

person tried, and there be no remedy after judgment, the injury is twofold,—a barbarous example of the execution of a human being . . . or, perhaps some of the thousand accidental errors that are daily committed by higher courts, to whom belongs the administration of this branch of the law." 10 Tenn. at 182. The Tennessee Constitution provides that "all courts shall be open and every man, for an injury done him shall have remedy by due course of law . . . ." Article I, § 17. The open courts provision specifically applies to the right to a fair tribunal. *In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912); *see also State v. Benson*, 973 S.W.2d 202, 205 (Tenn. 1998) ("The right to an impartial judge is also guaranteed by Article I, § 17 of the Tennessee Constitution, . . .").

The trial court's finding that Lee Hall could not avail himself of any of the three procedural vehicles for his structural constitutional error claim cannot stand because it would mean there is no remedy for a grievous constitutional violation.

This Court has stayed routine capital proceedings to permit a death-sentenced petitioner his full and fair opportunity to pursue a permissive appeal. In *Corinio Allen Pruitt v. State*, a death-sentenced litigant sought to disqualify the post-conviction trial judge, alleging that the judge exhibited bias against him and his attorneys. Case No. W2017–00960–SC–T10B–CO. The trial judge declined to recuse himself, and Pruitt appealed. While the appeal was pending, and before the scheduled post-conviction hearing, Pruitt moved the trial judge to delay the evidentiary hearing until the appellate courts had fully considered his judicial bias claims.

The trial judge denied a continuance of the post-conviction hearing for two primary reasons. First, no harm would come to Pruitt if the trial judge presided over the already scheduled hearing, even if this Court later determined that the trial judge's bias required his removal. The trial court noted that there was an obvious solution if this Court determined that the trial judge should have recused himself—another judge could preside over a second post-conviction hearing. In sum, the trial judge reasoned that if Pruitt prevailed on appeal, he would ultimately suffer no harm because he could receive a do-over.

This Court, however, disagreed with Pruitt's trial judge and stayed the evidentiary hearing.[18] Lee Hall has no such remedy. Executions are final—there are no do-overs.

[18] Days before Pruitt's evidentiary hearing was set to begin, the Court of Criminal Appeals denied Pruitt's Rule 10B appeal. On August 3, 2017, Pruitt filed in this Court his emergency motion for a stay of the capital post-conviction hearing, set to commence on August 7, 2017. Pruitt asserted that this Court should have time to properly consider Pruitt's permissive Rule 10B appeal. He argued that the fundamental constitutional due process right to a tribunal which is not only fair, but bears the appearance of impartiality, required the full attention of this Court to effectuate Pruitt's state and federal constitutional rights, citing *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011). On August 4, 2017, this Court granted a stay of proceedings to postpone the scheduled evidentiary hearing. This Court ultimately declined to grant the application for review by order entered October 17, 2017.

Equal Protection And Eighth Amendment Principles Require That Mr. Hall's Biased Juror Claim Be Considered On The Merits.

If Mr. Hall is not allowed to litigate these claims simply because of when they were discovered, his right to equal protection will be violated, in contravention of Article XI, § 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution. *See Bush v. Gore*, 531 U.S. 98 (2000) (holding that a state court's implementation of voting rights must comport with "the rudimentary requirements of equal treatment and fundamental fairness").

Mr. Hall, like another previously death-sentenced prisoner, was convicted and sentenced to death by a juror who concealed evidence of bias which establishes a structural constitutional error—deprivation of the right to a fair and impartial tribunal. The claims and underlying facts presented by Mr. Faulkner—who was also represented by the OPCD[19]—and Mr. Hall are identical. They became available when the former jurors finally revealed the domestic abuse they suffered, which they failed to disclose on questionnaires and in voir dire. In Mr. Faulkner's case, the juror's deception was discovered at a time that Mr. Faulkner could raise the claim and put on proof at his post-conviction evidentiary hearing. In Mr. Hall's case, the juror's deception was discovered later in the legal

[19] Indeed, two of the three former OPCD investigators who testified during the offer of proof about their efforts to interview Mr. Hall's jurors also testified that they interviewed the biased juror in *Faulkner* whose concealment of her experience with domestic violence resulted in the appellate court granting a new trial.

process, at a time when Mr. Hall has fewer available State court remedies—depending upon this Court's interpretation of law regarding writs of error coram nobis, motions to reopen, and successor post-conviction petitions.

Mr. Faulkner's death sentence was vacated. Mr. Hall is scheduled for execution on December 5. Imposing the death penalty on Mr. Hall, but not on Mr. Faulkner, is arbitrary.[20] The only differences between them, their claims, and their exposure to the death penalty is *when* the jurors finally revealed the domestic abuse they suffered and *where* Mr. Faulkner and Mr. Hall were in the legal process at that time. Mr. Faulkner and Mr. Hall had no control over these factors, which alone may determine Mr. Faulkner lives and Mr. Hall dies.

Respectfully submitted,

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[20] Arbitrary imposition of the death penalty violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Those constitutional provisions, in conjunction with the 14th amendment due process clause and the Tennessee Constitution, Article I, § 8 and § 17, require that, if a state chooses to impose the death penalty, it must do under systems that guaranty, as much as humanly possible, non-arbitrary imposition of the death penalty.

Certificate of Service

I hereby certify that a true and exact copy of this Motion was delivered via email to the following counsel in the Office of the Attorney General: Amy Tarkington, Amy.Tarkington@ag.tn.gov, Leslie Price, Leslie.Price@ag.tn.gov, and Zachary Hinkle, zachary.hinkle@ag.tn.gov.

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