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 REPLY TO STATE'S RESPONSE TO HIS MOTION TO STAY HIS EXECUTION PENDING APPEALS OF RIGHT REGARDING BIASED JUROR

The State's response raises contested factual and legal disputes which can only be properly addressed upon a full evidentiary record, misconstrues the procedural history of the case, and applies a standard higher than likelihood of success when addressing the merits of the claim.

The State mischaracterizes Mr. Hall's attempt to litigate the recently discovered biased juror claim as a delay tactic, criticizing him for taking too long to pursue an appeal in the Court of Criminal Appeals and a stay of execution in this Court. Considering that Mr. Hall filed three separate legal actions within three weeks of discovering the facts underlying the juror bias, and in the month that followed provided additional briefing at the request of the trial court, as well as presented testimony of multiple witnesses and numerous exhibits at an offer of

proof hearing, the State's contention is without merit. Mr. Hall has diligently worked to develop and present as substantial a record as possible in a very short period of time[1] to allow this Court and the Court of Criminal Appeals to make informed legal determinations regarding the stay of execution, the proper procedural vehicles for the claim, and need for any further record development to properly address the structural error recently discovered in his case.

The State appears to be particularly bothered by the fact that Mr. Hall did not immediately file a Notice of Appeal from the dismissal of the second post-conviction petition, but instead chose to first file a motion to reconsider the trial court's decision. However, the motion to reconsider was necessary to present to the trial court, and include as an offer of proof, an additional declaration from a psychologist with opinions specific to Juror A's testimony at the November 14th hearing, which undermine the trial court's finding, in dicta, that Juror A was not affected by her previous victimization at Mr. Hall's trial.

Counsel for Mr. Hall worked diligently to secure the post-hearing declaration from the trauma expert. *See* Attachment 1, November 25,

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[1] Upon receiving the October 17, 2019 pleadings, the trial court set the case for oral argument on November 4, 2019. The court issued its order on November 6 regarding the procedural posture of all three pleadings and set a hearing for November 14, which was an opportunity for counsel to present evidence or an offer of proof. In this short time frame, counsel brought in an out of state witness (Juror A), three witnesses, and hundreds of pages of exhibits. Notably, lead post-conviction counsel for Lee Hall, attorney Paul J. Morrow, Jr., died on November 11, three days before hearing. His co-counsel, Donald E. Dawson, was out of state before and during the hearing.

2019 Declaration of Linda Manning, Ph.D. at ¶ 4 (noting the declaration was based on the court reporter's *draft* of Juror A's testimony, which was received by Mr. Hall's counsel at approximately 9:30pm on Thursday November 21, 2019). As soon as Mr. Hall's counsel received the transcript of Juror A's testimony from the court reporter, they forwarded it to the expert, obtained the affidavit, and drafted the motion to reconsider—all within days of the trial court's dismissal order. The motion to reconsider was emailed to the court and opposing counsel on November 25, 2019 and filed on November 26. The trial court denied the motion to reconsider on November 26, but allowed the declaration as an offer of proof, and Mr. Hall filed a Notice of Appeal *that day*. The trial court clerk is finalizing the record in the second post-conviction case to transmit to the Court of Criminal Appeals today, December 3.

Similarly, the State lacks foundation in its assertion that Mr. Hall's failure to file the motion to stay execution in this Court until November 28 is a delay tactic. In order to obtain a stay of execution, Mr. Hall must show a likelihood of success of his juror bias claim. In order to meet this burden, Mr. Hall had to develop and present to the court as much evidence as possible in support of the claim. Once he was able to finalize his offer of proof with the updated declaration from the psychologist on November 26, he filed the motion to stay execution within the next 48 hours, on November 28.

The State also incorrectly asserts that Mr. Hall did not start investigating the present juror bias claim until September of this year. The State ignores the testimony and over 400 pages of exhibits, accepted as credible by the judge at the November 14th hearing, establishing the

extensive investigation of potential jury-related claims during Mr. Hall's original post-conviction proceedings. The investigators at the time attempted to locate and interviewed all fifteen jurors but were not able to speak with Juror A because she lived out of state, in the far west, and resources to travel were not available.

More importantly, the State ignores Juror A's testimony, and the trial court's finding, that even if the investigators were successful in interviewing her then, she would likely not have told them about her abusive first marriage. After all, she did not even disclose it to her second husband to whom she was still married at that time. In addition, when Mr. Hall's team was finally able to interview Juror A in 2014, she failed to mention anything about her abusive first husband, even though she freely spoke, at length, about her personal life and second marriage. The interview memo from 2014 is among the hundreds of pages of exhibits tendered as an offer of proof, which are critical to a complete understanding of the claims raised by Mr. Hall and the importance of staying his execution so that the courts can fairly consider this important, foundational constitutional claim.

The Supreme Court of the United States reaffirmed in *Peña-Rodriguez* that "[t]he jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S.Ct. 855, 857 (2017). This Court has likewise been clear on the foundational nature of this right. *State v. Smith*, 418 S.W.3d 38, 44 (Tenn. 2013) ("The right to a trial by jury . . . is a foundational right protected by both the federal and state constitutions.") (footnote omitted). "The right to a jury trial envisions that all contested factual issues will be decided by jurors

who are unbiased and impartial." *Smith*, 418 S.W.3d at 45 (citations omitted). "Trial courts must ensure the integrity of the jury system by holding jurors accountable to the highest standards of conduct." *Id.* (citation omitted). Mechanisms in our legal process to ensure juror impartiality protect not only "the fairness of the trial itself" but also serve to "promote[] and preserve[] the public's confidence in the fairness of the system." *Id.* (citations omitted). "Like judges, jurors must be—and must be perceived to be—disinterested and impartial." *Id.* (citation omitted).

When an error occurs with a jury, it crumbles the foundation upon which a criminal trial and conviction are built. For this reason, trial courts are empowered at any point of trial or in a motion for new trial to investigate and take action if it appears that any member of the jury has compromised the process. *See Smith*, 418 S.W.3d 38 at 46 (when misconduct involving a juror is brought to a trial court's attention, "it [is] well within [the judge's] power and authority to launch a full scale investigation by summoning ... all the affiants and other members of the jury, if need be, with a view of getting to the bottom of the matter, and this, if necessary, upon [the judge's] own motion.") (quoting *Shew v. Bailey*, 37 Tenn. App. 40, 54–55, 260 S.W.2d 362, 368 (Tenn. App. 1951).

The trial court had full power and authority to investigate Juror A's untruthful answer to the court's questions in the questionnaire and in voir dire as soon as they were discovered. The trial court had full power and authority to conduct an inquiry if Juror A had come forward when memories and emotions about her first marriage "flooded" her during the course of the trial—and prior to deliberations. She did not. Nor did she

disclose this information in a long, wide-ranging interview with investigators in 2014. It was only in late September 2019 that Juror A finally disclosed the information which would have led to her excusal for cause. Under these circumstances, Mr. Hall has established a likelihood[2] that he will prevail on the merits of his claim.

Respectfully submitted,

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[2] The State's reliance on *Hill v. McDonough*, 547 U.S. 573 (2006) and *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) is unavailing. The federal courts use a "significant" possibility standard, *see Hill*, 547 at 574—which this Court rejected in 2105 when adopting Rule 12(e) in its current iteration. The burden of proof in that case is borne of the federal courts' deference to "the State's strong interest in enforcing its criminal judgments without undue influence from the federal courts." *Hill*, 547 U.S. at 574, citing *Nelson v. Campbell,* 541 U.S. 637 (2004). Federalism concerns are absent in state court litigation. Instead, a life or death decision should reflect a "judgment about how the risk of error should be distributed between the litigants." *See Santosky v. Kramer*, 455 U.S. 745, 755 (1982). The focus should be on making sure all relevant evidence is considered by Tennessee courts prior to allowing an execution to take place.

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 on December 3, 2019.

/s/ Kelly A. Gleason
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