CAPITAL CASE

No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OSCAR SMITH,

Petitioner,

vs.

STATE OF TENNESSEE

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

AMY D. HARWELL
Assistant Chief Capital Habeas Unit
**Counsel of Record*

KATHERINE M. DIX
Assistant Federal Defender

ASHLEY WEST THOMPSON
Research & Writing Attorney

FEDERAL PUBLIC DEFENDER
Middle District of Tennessee
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
Amy_Harwell@fd.org

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Whether a state court violates the federal due process rights of a death-sentenced prisoner who has asserted a colorable claim of juror bias and/or misconduct when it interprets and applies procedural rules in a manner that deprives the prisoner of any of process to prove that his fundamental right to a fair and impartial jury has been violated?

RELATED PROCEEDINGS

State v. Smith, 868 S.W.2d 561 (Tenn. 1993) (affirming conviction on direct appeal).

Smith v. State, No. 01C01-9702-CR-0048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998) (affirming dismissal of state postconviction petition).

Smith v. Bell, No. 3:99-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005) (dismissing federal petition for writ of habeas corpus).

Smith v. Bell, 381 F. App'x 547 (6th Cir. 2010) (affirming district court's dismissal of federal habeas petition).

Smith v. Colson, 566 U.S. 901 (granting petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012)), *rehearing denied by* 566 U.S. 1005 (2012).

Smith v. State, No. M2016-01869-CCA-R28-PD (Tenn. Crim. App. Oct. 19, 2016) (denying application for permission to appeal denial of motion to reopen state postconviction proceedings).

Smith v. Carpenter, No. 3:99-cv-0731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018) (denying federal habeas relief due to *Martinez v. Ryan*, 566 U.S. 1 (2012) on remand).

Smith v. Mays, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018) (denying certificate of appealability for district court's denial on remand).

Smith v. Mays, 139 S. Ct. 2693 (2019) (denying petition for writ of certiorari).

Smith v. State, No. M2020-00493-CCA-R28-PD (Tenn. Crim. App. May 1, 2020) (denying permission to appeal denial of omnibus motion for relief on juror claims with respect to motion to reopen post-conviction petition).

Smith v. State, No. M2020-00485-CCA-R3-ECN, 2020 WL 5870566 (Tenn. Crim. App. Oct. 2, 2020) (denying appeal of omnibus motion for relief on juror claims on all remaining grounds).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Oscar Smith respectfully petitions for writ of certiorari to review the judgment of the Tennessee Supreme Court.

OPINIONS AND ORDERS BELOW

The December 3, 2020 opinion of the Tennessee Supreme Court, which is the subject of this Petition, is unreported, *Smith v. State of Tennessee*, No. M2020-00485-SC-R11-ECN (Tenn. Dec. 3, 2020), and reproduced at Appendix ("App.") A. The order of the Tennessee Court of Criminal Appeals denying Mr. Smith's Motion is unreported and available on Westlaw, *Smith v. State of Tennessee*, No. M2020-00485-CCA-R3-ECN, 2020 WL 5870566 (Tenn. Crim. App. Oct. 2, 2020), and reproduced at App. B.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The Tennessee Court of Criminal Appeals entered judgment on October 2, 2020. Mr. Smith timely filed an application for permission to appeal to the Tennessee Supreme Court on October 14, 2020. The Tennessee Supreme Court denied that application on December 3, 2020. Pursuant to the Court's March 19, 2020 Order, and Rule 30.1, this Petition is due on May 3, 2021. Thus, this Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial by a fair and impartial jury and the right to confront witnesses and evidence against him.

The Eighth Amendment to the United States Constitution guarantees a capital defendant the right to an individualized sentencing determination.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the states cannot deprive citizens of life or liberty "without due process of law."

INTRODUCTION

This Court has repeatedly held that the appropriate remedy for allegations of juror partiality that abridge the Sixth and Fourteenth Amendments to the U.S Constitution is an evidentiary hearing in which the defendant has the opportunity to prove actual bias and/or prejudice. In this case, the facts are undisputed: Mr. Smith was sentenced to death by a Tennessee jury; years later, credible evidence came to light regarding numerous and compounding instances of juror partiality. Despite finding the claims "disturbing" and of the type that would have warranted a new trial had the supporting evidence come to light prior to the finality of judgment, Tennessee's courts declined to either modify their interpretations of any existing state procedural vehicle or create a new procedure by which to review Mr. Smith's claims. As such, Mr. Smith has never received that which the federal Due Process Clause requires: an evidentiary hearing to prove that his right to a fair and impartial jury was abridged by his capital jury. This Court should accordingly grant certiorari to clarify that a state court abridges the federal due process rights of a death-sentenced prisoner who has asserted a colorable claim of juror partiality

when it interprets and applies its procedural rules in a manner that deprives him of any of process to prove his fundamental constitutional claim.

STATEMENT OF THE CASE

A. Procedural Background

A jury sentenced Mr. Smith to death in 1990, and the Tennessee Supreme Court affirmed his convictions and sentences on direct appeal. *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993). Mr. Smith's state postconviction petition was filed in 1997 and was denied by the trial court, and the Tennessee Court of Criminal Appeals affirmed. *Smith v. State*, No. 01C01-9702-CR-0048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), *perm. app. denied*, (Tenn. Jan. 25, 1999).

Mr. Smith thereafter filed a timely federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition, *Smith v. Bell*, No. 3:99-cv-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005), and the United States Court of Appeals for the Sixth Circuit subsequently affirmed the judgment, *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010).

This Court later remanded the case for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012). *Smith v. Colson*, 566 U.S. 901, *reh'g denied*, 566 U.S. 1005 (2012). On remand, the district court analyzed Mr. Smith's claims under *Martinez* and once again determined that he was not entitled to relief. *Smith v. Carpenter*, No. 3:99-cv-731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018). The Sixth Circuit denied him a certificate of appealability and dismissed the case. *Smith v. Mays*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018), *cert. denied*, 139 S.

Ct. 2693 (2019). Soon after, Tennessee's Attorney General moved the Tennessee Supreme Court to set an execution date for Mr. Smith. *See* App. B, 2020 WL 5870566.

B. 2019 Juror Declarations

In the final two months of 2019, Mr. Smith obtained declarations from three member of his capital jury, documenting and recounting several discrete yet compounding instances of bias and misconduct. App. C. First, "Juror A" declared, in relevant part:

> [] At the time I was called to serve on Mr. Smith's jury, I believed that anytime someone killed a person on purpose they should get the death penalty. That was my belief then and I still believe that today.
>
> …
>
> [] At the time of the trial, … [m]y boss did not want me to be away from work. At one point, I was late for court and the Judge scolded me for being late. He told me that my boss was not the boss in his courtroom. The Judge said, "I am!" He told me I better be on time next time. Before I was selected, the Judge talked to me in the courtroom about my views on the death penalty. When I was being questioned personally by the Judge, I felt like he did not like my answers. I was confused by what the Judge was saying to me, so I just went along with him. In fact, I have never believed a person should get a life sentence if they meant to kill someone. There was not anything Mr. Smith's lawyers could have said that would have made me change my opinion.

App. C. A review of the voir dire transcript supports Juror A's declaration that he was clearly biased in favor of sentencing Mr. Smith to death and that he concealed that bias upon questioning by the trial court:

> [Defense Counsel] Mr. Newman: Okay. And would the fact that there are three people killed, would that in any way inhibit you from considering life imprisonment as opposed to the death penalty? Or do you consider that any person who is convicted of three crimes or murder should receive the death penalty automatically?

Juror [A]: If he's proven guilty, he should, yes, sir.

Mr. Newman: Okay. So even though the Judge would instruct you that you are to weigh the factors, is it your position and are you telling the Court that if it is three murders, that you would automatically vote for the death penalty?

Juror [A]: Yes, sir.

Mr. Newman: And that would be despite whatever instructions the Judge may give you because of your personal feelings concerning this type of crime?

Juror [A]: Yes, sir.

Mr. Newman: Your Honor, at this point we'd ask that he be excused.

[Prosecutor] Gen. Blackburn: Well, Your Honor, I'd object at this point. He's already answered the question a different way.

The Court: He answered the question already that if he thought the aggravating factors did not outweigh the mitigating factors that he would impose a life sentence. He has answered that two or three different ways. I think you need to answer the question now, [Juror A], and I understand what his question is, is whether or not, if you did not find that the mitigating – that the aggravating factors outweighed the mitigating factors, in any of the three cases involving the victim of homicide, whether or not you would follow the law and impose a life sentence in each case, or whether he would decide because there were three cases that you would automatically impose the death sentence or something. That's the question.

In other words, if in any one of the three cases where there are victims alleged, you thought the aggravating factors outweighed the mitigating factors you would impose the death penalty in that particular case of that particular victim. But if in none of the cases you thought the aggravating factors outweighed the mitigating factors, then you would impose a life sentence in each of those?

Juror [A]: Yes, sir. Yes, sir.

The Court: And not add them up and have a cumulative –

Juror [A]: Right.

The Court: – sort of a –

Juror [A]: Yes sir.

The Court: – finding? Do you understand the point I'm making?

Juror [A]: Yes, sir.

The Court: All right. Now, Understanding that, I'm not trying to interject my question into Mr. Newman's, but I thought based on your earlier answers you may have misunderstood them. If you had, say, Victim A, and you found that the aggravating circumstances did not, beyond a reasonable doubt, outweigh the mitigating circumstances in that case, what would your sentence be?

Juror [A]: Life.

The Court: If you had Victim B, and you thought the aggravating factors did not outweigh beyond a reasonable doubt the mitigating factors as to that victim, what would –

Juror [A]: that would be life.

The Court: – your verdict be? And as to Victim C, if you found that the aggravating factors did not beyond a reasonable doubt outweigh the mitigating factors, what would your verdict be –

Juror [A]: Life

The Court: – in that case? All right. So are you saying if factors did not outweigh – the aggravating factors did not outweigh the mitigating factors, in any of the three victim's case that you would return a verdict of life in this case, assuming –

Juror [A]: Yes, sir.

The Court: – that guilt is proven beyond a reasonable doubt; is that what you're saying.

Juror [A]: Yes, sir.

The Court: Okay. I thought that that was what he was saying, but I'll be glad to let you ask him a follow-up question, but I don't want to have [Juror A] getting maybe a little confused by your question based on what I heard him say two or three different ways in his responses to earlier questions.

Okay. Go ahead.

> Mr. Newman: [Juror A], I'm not trying to confuse you. And if I have, I apologize. What my question concerned was, was the – was the possibility that you may be sitting as a juror trying to decide either death by electrocution or life in prison, would the fact that there would be three victims, would that cause you to have a preconceived notion or an idea that you should vote for death by electrocution?
>
> Juror [A]: No, sir; not just because there was three, no.

App. F, Trial Tr. at 748-52; *see also* App. D (Juror B declared that "one or two" men on the jury "had their minds made up before [the jury] even deliberated," and that "[i]t was clear that nothing would change their minds about giving Mr. Smith the death penalty").

Once the jury was seated, the record shows that the trial court properly instructed the jury at least four times not to consider any information other than that presented in court. App. F, Trial Tr. at 540-41, 543, 2971, 3272. Despite these instructions, both "Juror B" and "Juror C" not only considered facts not in evidence, but also introduced extraneous, prejudicial, and false information into the deliberative process.

Juror B declared:

> 2. Thinking about this case now and knowing what I now know, I wish we had given him life in prison instead of the death penalty. I was just 30 or 31 at that time, and I believed that life in prison was just 13 years. I did not think 13 years was enough time for this crime, so I voted for death.
>
> 3. We went through the voting quite a few times. We wrote down our vote, but everyone knew who was voting against the death penalty.
>
> 4. There was a young girl who was really upset with the idea of the death penalty and electrocution. I talked to her in the jury room privately and assured her that life in prison was only 13 years. We had this conversation off to the side during deliberation. After our discussion, she later changed her vote and the jury became unanimous as to the death

verdict.

> 5. I really didn't think an execution would ever happen, because and I was young and naive. I would now vote for life.

App. D.[1] Juror C declared that he introduced extraneous information into the jury room during its deliberations in Mr. Smith's case:

> In explaining Mr. Smith's alibi for the crime, the defense talked about it being a foggy night and said that thick fog caused Mr. Smith to have to drive slowly. When I was in [ ] High School, I took an aerospace science class taught by the head of local civil aviation. Later, when I was in the Navy [ ], I took a similar course. From those classes, I learned about weather patterns. As I explained to the jury, I knew from my training that the wind, as reported that night, would have cleared the fog enough that a person would not have had to drive as slowly that evening.

App. E.

The record further shows that the trial court clearly instructed the jury that it was not to deliberate prior to the submission of evidence and that the jurors had a duty to deliberate with one another. App. F, Trial Tr. at 1779, 2098, 2215, 2798,

---

[1] Juror C recalls:

> 5. There were two younger [jurors] who really had a hard time voting, because they did not want to give the death penalty….
>
> 6. [The foreperson] talked to us each privately in a quiet voice, when we began deliberating. [The foreperson] talked to most of us for about three minutes, but talked to the two younger [jurors] for at least 15 minutes each privately.
>
> 7. After we all met with the [foreperson], we again met as a group. We went around the table and each gave our reasons for our vote. At some point, the two younger [jurors], who sat next to each other, changed their vote.

App. E. Although Juror B was not the foreperson, Juror C's declaration supports Juror B's averments regarding other jurors privately influencing the youngest member of the jury, who did not want to vote for a sentence of death.

3286-87. But Juror C declared that the jurors and alternates violated these instructions by discussing the evidence and their opinions prior to deliberations, noting: "[We] ate in the courthouse and therefore could speak about things we heard at lunch. When we were eating, the alternates could throw in their opinions. The alternates let us know they also thought Mr. Smith was guilty." App. E. According to Juror B, once the jury was released to deliberate, several jurors again violated the court's instructions by refusing to deliberate:

> There were some hot heads on the jury. Those men just wanted to make a quick decision and go home. I remember one or two of them had their minds made up before we even deliberated. It was clear that nothing would change their minds about giving Mr. Smith the death penalty. Those guys just wanted out of there and didn't participate in the discussion except to hurry us along.

App. E.

Finally, despite the trial court's repeated instructions that the jury was tasked with making a unanimous decision as to a sentence of death or life imprisonment and the relevant legal standards for making such a determination, *see* Trial Tr. at 3266, 3268, 3272-77, 3286, App. F. Juror C declared that because "Mr. Smith was found guilty of three individual murders[,] [y]ou automatically had to give death," App. E.

C. State Court Proceedings on Juror Partiality Claims

In his December 2019 response in opposition to the State's request for an execution date, Mr. Smith raised, *inter alia*, claims under both the Tennessee and United States Constitutions based on this newly-surfaced evidence that bias and misconduct infected his capital jury. *See* App. B, 2020 WL 5870566. On January 15,

2020, the Tennessee Supreme Court set a date for Mr. Smith's execution.[2]

On February 28, 2020, Mr. Smith filed in the trial court an "Omnibus Request for Relief on His Jury Claims," *see* App. B, 2020 WL 5870566, setting forth multiple violations of his constitutional right to a fair and impartial jury and his fundamental right to a fair trial, *inter alia*: (A) his right to be tried by an impartial and unbiased jury (U.S. Const. amend. VI) and to an individualized sentencing (U.S. Const. amend. VIII) were violated by "Juror A," who was biased against Mr. Smith (because he believed the death penalty was the only appropriate sentence for an intentional killing) and who intentionally concealed that bias by failing to answer the trial court's questions truthfully; (B) the jury considered extraneous, inaccurate, and prejudicial information when "Juror B" informed another juror that a life sentence would only result in thirteen years in jail, and both jurors then voted for the death penalty based on this erroneous information, violating Mr. Smith's state and federal constitutional right to due process (U.S. Const. amend. XIV) and to confrontation (U.S. Const. amend. VI); and (C) "Juror C" engaged in misconduct by testifying during deliberations that his knowledge about weather patterns demonstrated that Mr. Smith's alibi was impossible, thereby presenting himself as an expert in matters relating to the proof and offering testimony not subject to cross-examination in violation of the state and federal constitutions (U.S. Const.

---

[2] Since January 15, 2020, Mr. Smith has had a total of three scheduled execution dates; however, the Tennessee Supreme Court has reset and/or stayed each such date due to the COVID-19 pandemic. No execution date is scheduled as of the date of this filing.

amend. VI).

Mr. Smith asserted that these federal constitutional claims could be adjudicated via: (a) writ of error coram nobis under Tennessee Code Annotated § 40-26-105; (b) *Bivens*-like[3] action; (c) motion to reopen the post-conviction petition pursuant to Tennessee Code Annotated § 40-30-117; (d) common law writ of audita querela; (e) motion to correct illegal sentence under Tennessee Rule of Criminal Procedure 36.1; (f) Open Courts Clause of Article I, section 17 of the Tennessee Constitution; (g) Due Process Clause in the Fifth and Fourteenth Amendments of the U.S. Constitution; and/or (h) the Law of the Land provision in Article I, section 8 of the Tennessee Constitution. In the event that the trial court concluded that Mr. Smith could not adjudicate his claims through these procedural avenues, he argued that principles of due process required the state courts to interpret an existing procedure as providing an avenue for hearing and review of his claims or, in the alternative, to create a procedural mechanism to allow his allegations to be reviewed on the merits. *See* App. B, 2020 WL 5870566.

On March 10, 2020, the trial court denied the Omnibus Motion without an evidentiary hearing, summarily dismissing each specific procedural vehicle invoked as inapplicable or unavailable for the proposed claims. *See* App. B, 2020 WL 5870566. Mr. Smith filed a timely appeal of the trial court's denial of the Omnibus

---

[3] *Bivens v. Six Unknown named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

motion as to all non-statutory procedural vehicles.[4] On appeal, Mr. Smith – emphasizing the need for an evidentiary hearing as to his credible claims of juror partiality – again asked the state courts to modify an existing procedural vehicle or create a new one to review claims of capital juror misconduct and bias that surface more than one year after the judgment becomes final. *See* App. B, 2020 WL 5870566.

On October 2, 2020, after hearing oral argument, the Tennessee Court of Criminal Appeals denied Mr. Smith's appeal upon a finding that "[a]s an intermediate appellate court, [it] lack[ed] the authority to create a heretofore non-existent procedural mechanism to address the merits of Mr. Smith's substantive claims." App. B, 2020 WL 5870566, at *6 (citing Tenn. Code Ann. § 16-5-108 (describing the jurisdiction of the Tennessee Court of Criminal Appeals); Tenn. Code Ann. § 16-3-402 (granting the Tennessee Supreme Court the authority to prescribe rules of practice and procedure)). Nonetheless, the Court of Criminal Appeals addressed the legal implications of the "disturbing" evidence of juror partiality, noting that if discovered before finality of judgment, a new trial would have been possible:

> The facts set forth in the three statements are disturbing if taken as true, especially the alleged facts of juror bias as set forth in Juror A's

[4] Mr. Smith's appeal of the denial of his motion to reopen the post-conviction petition proceeded on a separate track, as required by statute. *See* Tenn. Code Ann. § 40-30-117(c). Mr. Smith filed that application on March 24, 2020. On May 1, 2020, the Court of Criminal Appeals denied that application. *Smith v. State*, No. M2020-00493-CCA-R28-PD (Tenn. Crim. App. May 1, 2020) (order denying permission to appeal denial of motion to reopen post-conviction petition), *perm. app. denied* (Tenn. Aug. 5, 2020).

> declaration. If those facts had been presented in a motion for new trial and believed by the trial court, it is possible that a new trial would have been granted at least as to sentencing. *See State v. Akins*, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993) ("[w]hen a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may be made as here in a motion for new trial.") *Id.*, at 357. "The integrity of the voir dire process depends upon the venire's free and full responses to questions posed by counsel. When jurors fail to disclose relevant, potentially prejudicial information, counsel are hampered in the jury selection process. As a result, the defendant's right to a trial by a fair and impartial jury is significantly impaired." *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (Tennessee Rule of Evidence 606(b) does not prohibit a juror from testifying about whether extraneous prejudicial information was disclosed by another juror during deliberations, although the effect that the improper extraneous information had on the jurors is not admissible).[5]

Id. at *9. However, the Tennessee Court of Criminal Appeals noted that, under the current state of Tennessee law, "no amount of testimony" from the jurors regarding the bias and misconduct that infected their verdict could change its conclusion because, "at this time no procedural vehicle in Tennessee courts exists for Mr. Smith to present his claims[.]" *Id.* It concluded that "[t]he current laws which this court is obligated to follow make the potential merit of Mr. Smith's substantive issues to be irrelevant as to whether he can have an evidentiary hearing in a state trial court." *Id.* It did not directly address Mr. Smith's arguments regarding the federal Due Process Clause. *See generally id.*

Mr. Smith timely filed an application for permission to appeal to the

---

[5] Several cases discussed *infra* involve interpretation and application of the federal corollary to Tennessee Rule of Evidence 606(b). To the extent that there is any conflict between the scope or breadth of interpretation of Federal Rule of Evidence 606(b) in federal courts and the Tennessee rule in Tennessee courts, Tennessee's interpretation of its own evidentiary rules should be accepted and applied in this case.

Tennessee Supreme Court on October 14, 2020, arguing that his claims are of critical importance, as they strike to the very core of numerous provisions of the United States Constitution and implicate the integrity of the criminal justice system itself. Most crucially for the purpose of this Petition, Mr. Smith argued that the Due Process Clause of the Fourteenth Amendment requires that states provide procedural mechanisms for prisoners to meaningfully present potentially meritorious constitutional claims, including but not limited to evidentiary hearings. On December 3, 2020, the Tennessee Supreme Court entered a cursory per curiam order denying Mr. Smith's request to appeal. App. A. It did not engage with Mr. Smith's primary questions presented: (1) have the current procedural vehicles in Tennessee been limited in a manner that violates U.S. Constitution? and (2) does the Due Process Clause require the creation of a new procedural mechanism for the vindication of claims of bias and misconduct by capital jurors that arise more than one year after finality of judgment? *See id.*

REASONS FOR GRANTING CERTIORARI

Compelling reasons exist which warrant this Court's exercise of discretion to grant certiorari. *See* S. Ct. R. 10. As will be set forth in detail, the State of Tennessee has determined that Mr. Smith is not entitled to any process or review on his credible and substantial claims of bias and misconduct by multiple members of the jury that convicted him and sentenced him to death. In declining to grant Mr. Smith the opportunity for even an evidentiary hearing, the state courts have decided this matter in a way that conflicts with this Court's precedent. *See* S. Ct. R.

10(c). At a minimum, this Court should accept review because this case presents an important federal question that this Court has not decided on the precise factual premise as the present matter. *Id.*

Enshrined in the Sixth Amendment to the U.S. Constitution—and applicable to the States through the Due Process Clause of the Fourteenth Amendment—is the guarantee that a criminal defendant has the rights to: "trial, by an impartial jury," "be confronted with the witnesses against him," and "have compulsory process." U.S. Const. amends. VI, XIV. These requirements "are all of first importance" in ensuring the fundamental fairness of the American criminal justice system. *United States v. Wood*, 299 U.S. 123, 142 (1936); *accord Rivera v. Illinois*, 556 U.S. 148, 158 (2009) ("The Due Process Clause … safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.'") (quoting *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967)). And the rights conferred by the Sixth Amendment apply with even more force when the jury in question must decide whether to impose upon the defendant the ultimate sanction: a sentence of death for his crimes.[6] *Ross v. Oklahoma*, 487 U.S. 81, 85

[6] "[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *Barefoot v. Estelle*, 463 U.S. 880, 924 (1983) (BLACKMUN, J., dissenting) (holding the need for assuring heightened reliability in the capital sentencing determination "is as firmly established as any in our Eighth Amendment jurisprudence"); *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'CONNOR, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); *Godfrey v. Georgia*, 446 U.S. 420, 443 (1980) (BURGER, C.J.,

(1988) ("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury.") (cleaned up); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (noting that it is well-settled that the Due Process Clause of the Fourteenth Amendment applies to the sentencing phase of capital trials).

This Court has emphasized that, in the criminal context, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *cf. Dietz v. Bouldin*, 136 S. Ct. 1885, 1897 (2016) (Thomas, J., dissenting) ("Jurors, as the judges of fact, must avoid the possibility of prejudice."). "As Blackstone explained, no person could be found guilty of a serious crime unless the truth of every accusation should be confirmed by the unanimous suffrage of twelve of his equals and neighbors, *indifferently chosen, and superior to all suspicion*." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (cleaned up) (emphasis added); *see also Wood*, 299 U.S. at 142 (because of "the firm place which the jury as a fact-finding body holds in our history and jurisprudence," this Court insists that "safeguarding the complete integrity of the jury in the full sense of the Constitution is not to be gainsaid").

---

dissenting) ("[I]n capital cases we must see to it that the jury has rendered its decision with meticulous care.")).

Because "[a] verdict, taken from eleven, [i]s no verdict at all," *Ramos*, 140 S. Ct. at 1395, the presence of even one juror who harbors a bias that renders him incapable or unwilling to determine the defendant's fate in a fair and impartial manner violates the defendant's constitutional rights, *see, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (noting that the Sixth Amendment's guarantee of a fair and impartial jury means that a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *United States v. Brooks*, 569 F.3d 1284, 1288 (10th Cir. 2009) (because the Sixth Amendment right to trial by an impartial jury includes the right "to a jury capable and willing to decide the case solely on the evidence before it," a defendant's constitutional right to a fair trial is violated by juror bias that "affects the juror's evaluation of trial evidence").

Specific rules of critical import apply to the impartiality of jurors tasked with deciding whether a defendant should be sentenced to death. If the juror's "views on capital punishment … would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," the juror must not sit on the jury that decides the defendant's fate. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted). If a biased juror does sit on the jury that ultimately sentences the defendant to death, defendant's right to trial by impartial jury has been abridged, and "the sentence would have to be overturned." *Ross*, 487 U.S. at 85; *accord United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000).

To be sure, embedded in the criminal justice system are certain "safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge," but such safeguards "are not infallible." *Phillips*, 455 U.S. at 217; *cf. Dietz*, 136 S. Ct. 1885 (collecting and discussing cases involving requests to dismiss jurors for cause and/or motions to set aside verdicts where issues of juror partiality are revealed during or immediately after trial). A juror may be unaware of his partiality, or worse yet, "may have an interest in concealing his own bias[.]" *Phillips*, 455 U.S. at 221–22 (O'Connor, J., concurring). While "[t]he motives for concealing information may vary," it is "those reasons that affect a juror's impartiality [that] can truly be said to affect the fairness of a trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Thus, where "a juror failed to answer honestly a material question on *voir dire*," and "a correct response" would have provided a valid basis for a challenge for cause, the presumption of impartiality is defeated. *Id.*

And, although "[t]he resolution of juror-bias questions is never clear cut," *Martinez-Salazar*, 528 U.S. at 319 (Scalia, J., concurring), "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," *Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014). When the usual safeguards have been insufficient to protect against a serious undisclosed bias, "the law must not wholly disregard its occurrence[.]" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017) (finding undisclosed racial-animus bias by juror sufficiently serious to violate right to fair trial). Indeed, the very premise of structural-error review—review of claims that speak to the fundamental fairness and integrity of

the proceeding—is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right." *Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part). Stated another way, the strength of the state's case does not preclude a petitioner from obtaining relief on a claim that a structural error infected the fairness and integrity of his conviction and sentence of death. *See, e.g.*, *Barnes v. Thomas*, 938 F.3d 526, 536 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 446 (2020); *Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010) (holding that a defendant's rights under the Sixth and Fourteenth Amendments to a fair trial by a panel of impartial jurors who return a verdict on the evidence presented at the trial must be protected "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies") (citing *Parker*, 385 U.S. at 364; *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)).

The law also may not simply disregard a violation of defendant's right to a jury willing and able to decide his fate solely based on the evidence presented at trial. This is directly related to the defendant's Sixth Amendment rights to confrontation and process: that is, capital jurors must base their verdicts solely on the "evidence developed" at trial, which "shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner*, 379 U.S. at 472-73; *Parker*, 385 U.S. at 366 (noting that this Court "follow[s] the undeviating rule" that the rights of confrontation and cross-examination "are among the fundamental requirements of a constitutionally fair trial"). As such, a defendant's Sixth and

Fourteenth Amendment rights are implicated when a juror is subjected to outside influence and/or when extraneous information relevant to the matter before it infiltrates the jury. *See, e.g.*, *Parker*, 385 U.S. at 364–65 (information provided to jurors that was not "subjected to confrontation, cross-examination or other safeguards" was "outside influence" sufficiently likely to have prejudiced defendant such that the proceeding was "inherently lacking in due process"); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting) (noting that jurors "have long been prohibited from … receiving evidence in private").

The classification of an influence as external or internal is based not upon whether it occurred "inside or outside the jury room" but rather, upon "the nature of the allegation." *Tanner v. United States*, 483 U.S. 107, 117 (1987). "Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case … or (2) is an outside influence upon the partiality of the jury, such as private communication, contact, or tampering with a juror." *Wolfe v. Johnson*, 565 F.3d 140, 161 (4th Cir. 2009) (cleaned up); *Remmer*, 347 U.S. at 229 (an "external" influence on the jury includes sharing information and/or communicating with a juror "during a trial about the matter pending before the jury … if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties"); *cf. Barnes*, 938 F.3d at 536 (noting that external

influence "need not take the form of a third party directly telling jurors how they should vote or introducing new facts or law for their consideration"); *but see, e.g., Tanner*, 483 U.S. at 125 (holding that a juror's intoxication is not an "outside influence" on the jury); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020), *cert. dismissed*, 141 S. Ct. 729 (2021) (jurors' subjective fears regarding their safety due to their names being listed on verdict form was not an "outside influence").

This Court has determined "that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215; *see also Remmer*, 347 U.S. at 230; *Ewing v. Horton*, 914 F.3d 1027, 1031 (6th Cir. 2019) ("When a petitioner shows that extraneous information may have tainted the jury, due process requires the opportunity to show that the information did taint the jury to his detriment."). Indeed, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950).

To be entitled to such a hearing, a defendant must make "a colorable showing of juror bias"; if he makes such a showing "but has been denied an opportunity to prove actual prejudice, the proper remedy is to remand for [an evidentiary] hearing to determine what, if any, actual impact the outside information had on the jury's verdict." *Ewing*, 914 F.3d at 1031 (citing *Remmer*, 347 U.S. at 230; *Phillips*, 455 U.S. at 217–18; *Williams v. Taylor*, 529 U.S. 420, 442 (2000)); *see also, e.g.*, *Hall v.*

Zenk, 692 F.3d 793 (7th Cir. 2012) (where jury convicted after juror shared with other jurors external information relevant to the question of defendant's guilt, affidavits were a sufficient "factual foundation, absent any countervailing evidence, to suggest that he was prejudiced" by the juror's act of sharing extraneous information with other jurors, and remand for additional factfinding regarding actual prejudice necessary, "given the dearth of information" in the record); *Ward*, 592 F.3d at 1176 (presumption that jurors acted impartially in rendering verdict may be overcome with a "colorable showing that juror exposure to extraneous information has violated his right to an impartial jury"). Stated another way, the defendant's presentation of a colorable claim triggers the trial court's "duty to investigate and to determine whether there may have been a violation of the [constitutional guarantee]." *United States v. Lanier*, 988 F.3d 284, 294–95 (6th Cir. 2021); *cf. Ewing*, 914 F.3d at 1032 (rule that evidentiary hearing is not necessary where defendant can show actual prejudice without a hearing is an exception that proves the rule that the "normal remedy" for a colorable claim of juror bias or influence is "a hearing to show actual prejudice"); *but see Brooks*, 569 F.3d at 1288 (evidentiary hearing is not required where the defendant "presents only thin allegations of jury misconduct" or when a hearing "would not be useful or necessary in determining whether a defendant's rights were violated") (citation and internal quotation marks omitted).

Although the form and content of such a hearing may vary, "due process always requires ... that the [court's] investigation be reasonably calculated to

resolve the doubts raised about the juror's impartiality." *Godoy v. Spearman*, 861 F.3d 956, 969 (9th Cir. 2017) (citing *Remmer*, 347 U.S. at 230; *Dyer v. Calderon*, 151 F.3d 970, 974–75 (9th Cir. 1998) (en banc)); *see also Lanier*, 988 F.3d at 295 (to comport with due process, an "adequate" investigation should be "unhurried and thorough," should involve all interested parties, should allow for questioning of the jurors). "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case."[7] *Phillips*, 455 U.S. at 221–22 (O'Connor, J., concurring). The adequacy of the hearing "is a function of the probability of bias; the greater that probability, the more searching the inquiry [into juror partiality is] needed." *Lanier*, 988 F.3d at 295–96 (citing *Oswald v Bertrand*, 374 F.3d 475, 480 (7th Cir. 2004)).

"[I]n most instances a postconviction hearing will be adequate to determine whether a juror is biased." *Phillips*, 455 U.S. at 221–22 (O'Connor, J., concurring). Even in cases where significant time has lapsed since the trial, federal courts have found that the Due Process Clause requires a remedy for a criminal defendant who has set forth a credible claim of even one instance of juror partiality. *See, e.g.*,

---

[7] Even in the civil due process context, where the stakes are significantly less "final" than execution, this Court has held that due process requires a hearing where there is "an unjustifiably high risk that meritorious claims will be terminated." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982); *cf. McDonough*, 464 U.S. at 555-56 (remanding for reconsideration of issues related to juror's dishonesty during voir dire for civil trial, noting that evidentiary hearing should be convened to determine whether new trial was warranted).

Ewing, 914 F.3d at 1032-33 (remanding for a "suitable evidentiary hearing" regarding jury impartiality eight years after conviction because "[u]ntil [defendant] shows actual prejudice, he has shown only a due process violation—for denial of an opportunity to prove prejudice"); *Lanier*, 988 F.3d at 295–96 (remanding for new trial five years after verdict, and three years after trial court's evidentiary hearing due to "a sufficiently high probability of jury bias" and trial court's inadequate handling of the hearing); *Barnes*, 938 F.3d at 526 (where petitioner was "legally entitled" to evidentiary hearing on credible claim of juror misconduct, and hearing showed that the juror misconduct "tainted" the death-sentenced inmate's verdict, relief from sentence was warranted more than twenty years after it was imposed); *Ward*, 592 F.3d at 1179-80 (granting new penalty-phase hearing eighteen years after conviction upon finding that, when at least one juror was given information that life without parole was not an option – information that, while true, could not have been considered by the jury under state law –defendant's "Fourteenth Amendment due process right to have the jury decide his punishment based on the evidence presented in court, in accordance with the rules and instructions of the court and with the full knowledge of the parties" was violated).

In the instant case, there is no dispute that: (1) Mr. Smith's underlying claims regarding numerous instances of juror partiality implicate his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; (2) each such violation calls into question the fundamental fairness and integrity of his capital trial; (3) the "disturbing" facts supporting Mr. Smith's

claims of bias and misconduct by his capital jurors are of the type that would have entitled Mr. Smith to a new trial had they come to light within a year of the finality of judgment, *see* App. B, 2020 WL 5870566, at *9. Instead, both the Tennessee Attorney General and the Tennessee courts have declared that—regardless of their potential merit—Tennessee law provides Mr. Smith with no procedural avenue by which to obtain an evidentiary hearing, let alone substantive relief, on his claims that he did not receive a trial by a fair and impartial jury. Thus, despite having produced credible evidence supporting multiple and compounding instances of partiality—be it through actual bias or extraneous information infiltrating the jury room—by his capital jurors, Mr. Smith has been given no opportunity to demonstrate prejudice therefrom.

In focusing solely on the mechanics of Tennessee procedure, the executive and judicial arms of the State have disregarded the essential character and requirements of the federal Due Process Clause. The "power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *Angel v. Bullington*, 330 U.S. 183, 188 (1947). There can be no question that the protections of the Sixth and Fourteenth Amendments "appl[y] to state and federal criminal trials equally." *Ramos*, 140 S. Ct. at 1397; *id.* ("[I]f the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."). To require less of states "would leave the right to a trial by jury devoid of meaning," reducing this

guarantee of the U.S. Constitution "an empty promise. That can't be right." *Id.* at 1400 (internal quotation marks omitted). If this Court's status as the trusted and final authority supporting and defending our shared rights is to continue for another 200 years, it *must* intervene "when the state['s] action infringes fundamental guarantees" of the U.S. Constitution. *Chandler v. Florida*, 449 U.S. 560, 570, 582 (1981); *see also Phillips*, 455 U.S. at 221 (federal courts may intervene in state judicial proceedings "to correct wrongs of constitutional dimension").

The Court's role as guardian against state infringement upon the fundamental constitutional guarantees is not inconsistent with other important interests of federalism, comity, and finality. "[I]n appropriate cases," principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust" result of a state's criminal process. *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *see O'Neal v. McAninch*, 513 U.S. 432, 442–43 (1995) (noting that the state's interests in finality and comity are "legitimate and important," but that ultimately "the number of acquittals wrongly caused by grant of the writ and delayed retrial (the most serious harm affecting the State's legitimate interests) will be small" as compared to the number who would be wrongly imprisoned or executed if finality and comity were prioritized above all else). On balance, the U.S. Constitution does not support the idea that a citizen may be imprisoned or executed despite fundamental violations of his constitutional rights "for fear that otherwise a smaller number, not so held, may eventually go free." *O'Neal*, 513 U.S. at 442-43; *cf. Logan*, 455 U.S. at 434–35 (finding the state's interest in denying process was

"insubstantial," as there was "no suggestion that any great number of claimants" were in the same position or that additional process would be "unduly burdensome"). And, while states have a certain interest in establishing and adhering to their own procedures, the constitutional requisites for ensuring that a defendant received a trial by a fair and impartial jury "relate to matters of substance," not to "particular forms and procedure[.]" *Wood*, 299 U.S. at 142-43. "[T]he true purpose of the [Sixth] Amendment can be achieved only by applying them in that sense." *Id.*

Here, the requested process is of critical importance to Mr. Smith, whose very life is at stake, but is minimally burdensome to the State of Tennessee. Convening an evidentiary hearing to consider the veracity and prejudicial impact of the multiple instances of juror partiality that have only recently come to light will be an endeavor requiring an expenditure of judicial resources neither excessive nor time-consuming. The time and energy spent thereon should be proportionate to the strength of the colorable claims that Mr. Smith's right to a fair and impartial jury were violated. Additionally, there is no reason to believe that finding that due process requires that Mr. Smith be given a meaningful opportunity to process in state courts would open the floodgates for litigation: first, there are a limited number of persons on Tennessee's death row, making the class of claimants who can present colorable claims of capital juror partiality an intrinsically small one. And even if other jurors were to belatedly come forward with facts suggesting that a capital sentence was rendered without the full protections of the Sixth, Eighth, and

Fourteenth Amendments, pragmatism simply cannot be permitted to trump the fundamental guarantees of our Constitution. "[L]et it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters[.]" 4 W. Blackstone, Commentaries on the Laws of England 350 (1769). Ultimately, protecting and ensuring such process would serve to increase, rather than decrease, confidence in the fundamental fairness of capital trials.

This Court generally "assume[s] state courts will be alert to any factors that impair the fundamental rights of the accused." *Chandler*, 449 U.S. at 582. Indeed, this Court recently found federal intervention unnecessary where state court proceedings were "underway to address – and if appropriate, to remedy" a claim of bias brought by a death-sentenced petitioner who did not receive the evidence supporting his claim until fifteen years after conviction. *Halprin v. Davis*, 140 S. Ct. 1200 (2020) (Sotomayor, J., concurring in denial of certiorari). Because the state court had already stayed petitioner's execution and remanded the bias claims to the trial court for further review on the merits, Justice Sotomayor wrote: "I trust that the Texas courts considering [this] case are more than capable of guarding th[e] fundamental guarantee" of the Due Process Clause: a fair trial in a fair tribunal without bias against the defendant. *Id.*

Here, in contrast, Tennessee's courts have been alerted to the fundamental constitutional error that infected Mr. Smith's trial and have had an opportunity to review and correct such error, but have declined to provide any guaranteed

constitutional process for the same. Tennessee is thus not, at this stage, entitled to the benefit of the doubt, making this Court's review essential to guarding the sanctity of the federal Due Process Clause. That is to say: when important federal constitutional claims are "plainly and reasonably made," a state court must engage in meaningful fact-finding to resolve them. *Angel*, 330 U.S. at 188; *see also Harris v. Nelson*, 394 U.S. 286, 300 (1969) (where federal constitutional claims are supported by "specific allegations" which, if proven, could provide a basis for relief under the U.S. Constitution, "it is the duty of the court[s] to provide the necessary facilities and procedures for an adequate inquiry"); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) (states may not create "unreasonable obstacles" to resolution of federal constitutional claims that are "plainly and reasonably made"). As such, federal courts may upset a state's reliance on their own postconviction procedures "if they are fundamentally inadequate to vindicate the substantive rights provided" by the federal constitution, and "inconsistent with the traditions and conscience of our people or with any recognized principle of fundamental fairness." *Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69-70 (2009) (citation and internal quotation marks omitted).[8] And even when it so finds that the state court has failed

[8] Notably, this Court's holding in *Osborne* – which found that the State's refusal to provide postconviction access to its evidence for the purpose of obtaining DNA testing was not a due process violation – was based, in part, on the fact that the Alaska Supreme Court had left open the possibility that its state constitution would provide a "failsafe" remedy in an appropriate case to a petitioner with no other procedural avenue. *Osbourne*, 557 U.S. at 70-71. Indeed, this Court was concerned that the petitioner had "sidestep[ped] state process" in not attempting to utilize any such state procedural avenues before filing a federal civil rights action. *Id.* The same simply cannot be said of Mr. Smith, who has indisputably attempted to utilize any

to adequately protect a defendant's due process rights, this Court may assume that the state courts will be able to correct their errors by providing appropriate relief upon remand. *See, e.g.*, *Halprin*, 140 S. Ct. 1200 (Sotomayor, J., concurring in denial of certiorari); *Ewing*, 914 F.3d at 1033 (remanding to state court for evidentiary hearing eight years after verdict, noting both that the state is "well equipped to provide appropriate relief should the passage of time prevent the court from affording [defendant] a constitutionally-meaningful hearing" on his jury partiality claims, and defendant retains the right to seek additional federal relief "if he finds the State's process constitutionally inadequate").

"Formal requirements are often scorned when they stand in the way of expediency. This Court, however, has an obligation to take a longer view." *Neder*, 527 U.S. at 34, 39-40 (Scalia, J., concurring in part). In this case, the Tennessee Supreme Court has given short shrift to the Due Process Clause by refusing to provide Mr. Smith with any opportunity—let alone a meaningful one—for factfinding and proof of actual prejudice based on the multiple instances of juror partiality that came to light more than one year after his judgment was final. Given the importance of the constitutional right at issue and the life-or-death nature of the stakes, the formal requirement of an evidentiary hearing is a small price for the State of Tennessee to pay. Indeed, "[w]hen the American people chose to enshrine [the right to a fair and impartial jury] in the Constitution, they weren't suggesting

---

and all arguable avenue for obtaining a hearing and review of his juror partiality claims in state court, but has been stymied by the state court's implicit rebuke that the federal constitution requires any such failsafe.

fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." *Ramos*, 140 S. Ct. at 1402. To protect that liberty, the U.S. Constitution is the ultimate failsafe on states' arbitrary action and failure to prevent or correct federal constitutional error. Here, that failsafe must be employed to ensure that the State of Tennessee does not prevent a death-sentenced prisoner from obtaining the minimum amount of process required by the federal constitution before it executes him.

CONCLUSION

Wherefore, this Court should grant Mr. Smith's Petition for Writ of Certiorari.

Respectfully submitted,

AMY D. HARWELL
Assistant Chief, Capital Habeas Unit
*Counsel of Record

KATHERINE M. DIX
Assistant Federal Defender

ASHLEY WEST THOMPSON
Research & Writing Attorney

FEDERAL PUBLIC DEFENDER
Middle District of Tennessee
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
Amy_Harwell@fd.org

Counsel for Petitioner

BY: 
Counsel for Oscar Smith

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(a), I certify a copy of the Petition for a Writ of Certiorari was sent via Federal Express to the U.S. Supreme Court and via U.S. Mail to Samantha Simpson, counsel for the Respondent, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37243 on May 3, 2021.

Amy D. Harwell