

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FILED

12/03/2020

Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

OSCAR SMITH v. STATE OF TENNESSEE

**Criminal Court for Davidson County
No. 89-F-1773**

No. M2020-00485-SC-R11-ECN

ORDER

Upon consideration of the application for permission to appeal of Oscar Smith and the record before us, the application is denied.

The opinion of the Court of Criminal Appeals is designated "Not For Citation" in accordance with Supreme Court Rule 4, § E due to the intermediate court's characterization of the juror declarations in obiter dictum contained in its conclusion.

PER CURIAM

 KeyCite Yellow Flag - Negative Treatment
Appeal Denied, Not for Citation December 3, 2020

2020 WL 5870566

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE
COURT OF CRIMINAL APPEALS RELATING
TO PUBLICATION OF OPINIONS AND
CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT NASHVILLE.

Oscar SMITH

v.

STATE of Tennessee

No. M2020-00485-CCA-R3-ECN

|

August 19, 2020 Session

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FILED 10/02/2020

**Appeal from the Criminal Court for Davidson County,
No. 89-F-1773, [Angelita Blackshear Dalton](#), Judge**

Attorneys and Law Firms

[Kelley J. Henry](#), Supervisory Assistant Federal Public Defender; Amy D. Harwell, Assistant Chief, Capital Habeas Unit; and Katherine M. Dix, Assistant Federal Public Defender, Nashville, Tennessee, for the appellant, [Oscar Smith](#).

[Herbert H. Slatery III](#), Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; [Glenn R. Funk](#), District Attorney General; and [Amy Hunter](#), Assistant District Attorney General, for the appellee, State of Tennessee.

[Thomas T. Woodall](#), J., delivered the opinion of the court, in which [Robert W. Wedemeyer](#) and [Robert L. Holloway, Jr.](#), JJ., joined.

OPINION

Thomas T. Woodall, J.

*1 Following a jury trial in 1990, Oscar Smith was sentenced to receive the death penalty in each of three first degree murder convictions in the Criminal Court of Davidson County. The Tennessee Supreme Court affirmed the convictions and sentences of death in [State v. Smith](#), 868 S.W.2d 561 (Tenn. 1993). Mr. Smith is scheduled to be executed February 4, 2021. This appeal by Mr. Smith is from the trial court's summary dismissal of "Oscar Smith's Omnibus Request for Relief on His Jury Claims," (hereinafter "Omnibus Request"). After oral arguments and review of the briefs and the appellate record, we affirm the judgment of the trial court in part, and dismiss the appeal in part.

Procedural Background

From the record and briefs it is apparent that Mr. Smith "has pursued at least one unsuccessful challenge to [Mr. Smith's] conviction[s] and [death] sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings," *see* Tennessee Supreme Court Rule 12.4.(A), which resulted in our Supreme Court setting Mr. Smith's execution date. Mr. Smith filed the Omnibus Request after the execution date was set. The Omnibus Request seeks relief under the following "procedural mechanisms potentially available in Tennessee," which we set forth as described in Mr. Smith's Omnibus Request:

- Statutory writ of error *coram nobis*
- *Bivens*-like action [ [Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics](#), 403 U.S. 388 (1971)]
- Motion to reopen post-conviction petition under  Tennessee Code Annotated section 40-30-117
- Common law writ of *audita querela*
- A motion to correct illegal sentence pursuant to  Tennessee Rules of Criminal Procedure, Rule 36.1
- Open Courts Clause of Article I, section 17 of the Tennessee Constitution
- The due process provisions in the Fifth and Fourteenth Amendments of the United States Constitution, and the law of the land provision in Article I, section 8 of the Tennessee Constitution

As to Mr. Smith's request to reopen his post-conviction petition pursuant to  [Tennessee Code Annotated section 40-30-117](#), following proper statutory procedure, Mr. Smith filed an application in the Court of Criminal Appeals for permission to appeal from the trial court's denial of the motion to reopen the post-conviction petition. *See*  [Tenn. Code Ann. § 40-30-117\(c\)](#). The application was denied. *Oscar Smith v. State of Tennessee*, 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). Accordingly, that claim is not before this court in this case.

On page 2 of his Omnibus Request, Mr. Smith candidly acknowledges that Tennessee courts have previously interpreted his theories of procedural vehicles to present his jury claims in a manner that might foreclose relief for Mr. Smith in this proceeding. Specifically, Mr. Smith asserts a summary of his arguments for relief in the Omnibus Request filed in the trial court as follows:

While acknowledging that Tennessee courts have construed each of these procedural vehicles in ways that may foreclose his ability to obtain relief, he presents here every procedural vehicle of which he is aware. He respectfully requests that this Court (1) interpret at least one of these vehicles as providing an avenue for relief; (2) if none of these provide such a vehicle, create a new procedural mechanism for him to vindicate his constitutional rights; or (3) hold that one or more of these procedural vehicles are unconstitutional because it leaves him without a mechanism for him to vindicate his constitutional rights. State and federal due process and state open courts constitutional provisions require that Tennessee courts provide Mr. Smith a procedure by which he may establish his entitlement to relief for the constitutional violations that infected his capital trial.

*2 Mr. Smith's statement of the issues in this appeal asserts that this court must determine whether one of the procedural vehicles submitted in the Omnibus Request permits adjudication of his claims regarding:

- 1) introduction of extraneous, prejudicial, and untrue information during the jury's deliberations;
- 2) deception which resulted in a juror biased against Mr. Smith being seated on the jury; and
- 3) "other claims of juror misconduct" – however only one such claim is alleged in the statement of issues – unsworn opinion "testimony" by a juror during deliberations.

In the alternative to granting relief to Mr. Smith pursuant to one or more of the "procedural vehicles" he has named, Mr. Smith asserts that this court should determine whether the courts must fulfill constitutional duties by "independently providing a non-statutory procedure for the adjudication" of Mr. Smith's claims.

Mr. Smith's claims derive from the contents of signed statements purportedly from three of the jurors who sat on the jury which convicted Mr. Smith of three counts of first degree murder and imposed the sentence of death for each of the three convictions. Mr. Smith asserts that each claim is based upon violations of his constitutional rights guaranteed by the United States and/or Tennessee Constitutions. The statements are not affidavits. They are each designated as a declaration of each person, with the following sentence directly above the signature: "I, [Declarant], declare under penalty of perjury that the foregoing is true and correct." In order to protect the identity of each juror named in the statements, they shall be designated herein as "Juror A," "Juror B," and "Juror C." Juror A's statement is dated in handwriting as "11-22-2019;" Juror B's is dated in handwriting as "11-25-19;" and Juror C's is dated in handwriting as "12-1-19."

All three statements are typed. The statements of Juror A and Juror B have no changes to what was typed. However, Juror C's statement contains handwritten changes initialed with Juror C's initials. There is nothing in the record to disclose who interviewed the people who signed the statements, who typed the statements, the amount of time between any interview and the signing of the statements, the method(s) of the interviews (by phone, in person, etc.), or why it took almost thirty years after Mr. Smith's trial for the jurors' statements to be obtained. Also, since the statements are not notarized, there is nothing authenticating the identification of

the persons who signed the statements. There is nothing in the record disclosing when or how the statements came into possession of Mr. Smith.

We conclude that the statements should be set forth herein. Each statement has been redacted where necessary to protect the identities of the persons who signed the statements, but nothing which is redacted is relevant to the disposition of this appeal. Juror C's statement will be set forth as amended.

Declaration of [Juror A]

I, [Juror A], an adult resident of Davidson County, Tennessee, declare as follows:

1. I was on the jury that sentenced Oscar Frank Smith to death.
2. 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.
- *3 3. Mr. Smith's case was even worse than most murders, because it was three murders. Two of the victims were children.
4. At the time of the trial, I was [employed at a Nashville business]. My 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.
5. 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.
6. It was a tragedy how the police were called to the house, but they didn't go inside. That young boy may have still been alive.
7. Paul Newman was one of the public defenders for Mr. Smith. My brother-in-law was friends with him. They

were both from the Scottsboro area outside of Nashville, TN. Mr. Newman was a police officer before he became an attorney.

I, [Juror A], declare under penalty of perjury that the foregoing is true and correct.

/s/ [Juror A]

[Juror A]

Dated: 11-22-2019

Declaration of [Juror B]

I, [Juror B], an adult resident of Davidson County, Tennessee, declare as follows:

1. I was on the jury that sentenced Oscar Frank Smith to death.
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 I was young and naive. I would now vote for life.
6. 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.

I, [Juror B], declare under penalty of perjury that the foregoing is true and correct.

/s/ [Juror B]

[Juror B]

Dated: 11-25-2019

Declaration of [Juror C]

I, [Juror C], an adult resident of Davidson County, Tennessee, declare as follows:

1. Many years ago, I served on a jury in the case involving the prosecution of Oscar Frank Smith.

*4 2. 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.

3. Mr. Smith was found guilty of three individual murders. You automatically had to give death.

4. None of us doubted Mr. Smith was guilty, even the two alternates. 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.

5. There were two younger [jurors] who really had a hard time voting, because they did not want to give the death penalty. One [juror] was black and one [juror] was white.

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.

I, [Juror C], declare under penalty of perjury that the foregoing is true and correct.

/s/ [Juror C]

[Juror C]

Dated: 12-1-2019

Concerning Juror A's statement relied upon by Mr. Smith in his Omnibus Request, Mr. Smith included within the pleading a transcript of a portion of the voir dire of Juror A concerning imposition of the death penalty. It states as follows:

[Defense Counsel]: 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.

[Defense Counsel]: 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.

[Defense Counsel]: 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.

[Defense Counsel]: Your Honor, at this point we'd ask that he be excused.

[Prosecutor]: 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 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.

*5 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 [Defense Counsel'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 the 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 beyond a reasonable doubt 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.

[Defense Counsel]: [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.

ANALYSIS

On January 15, 2020, our supreme court granted the State's request to set a date for Mr. Smith to be executed. The court ordered Mr. Smith to be executed by the State of Tennessee on June 4, 2020. Mr. Smith's Omnibus Request was filed February 28, 2020. The trial court summarily dismissed the Omnibus Request in an order filed March 10, 2020. On April 17, 2020, the Tennessee Supreme Court, upon motion of Mr. Smith, stayed his execution of June 4, 2020 due to the COVID-19 pandemic. The order rescheduled the execution of Mr. Smith by the Tennessee Department of Correction for February 4, 2021.

There are two distinct parts to Mr. Smith's Omnibus Request and his appeal from the trial court's summary dismissal of the Omnibus Request. The first part is comprised of allegations that Mr. Smith was unconstitutionally denied a fair and impartial trial as the result of improper juror conduct during voir dire and improprieties during and before jury deliberations. Everything that Mr. Smith relies upon in support of these allegations is contained in the statements of Jurors A, B, and C. For clarity we will refer to all of Mr. Smith's assertions of violations of his constitutional rights, based upon the three statements, as his substantive claims. It does not matter how meritorious the substantive claims may be unless there is a procedural mechanism for the substantive issues to be addressed by a Tennessee court at this late date, thirty years after his convictions. Thus, the other part of Mr. Smith's Omnibus Request is his arguments that: (1) either one or more of the procedural vehicles he names allows a court to address his substantive claims, or (2) if not, the trial court or this court must fulfill "constitutional obligations by independently providing a non-statutory procedure for the adjudication of Mr. Smith's constitutional claims." (Mr. Smith's brief, p. 1).

*6 We must respectfully decline to attempt to create a non-statutory procedure to address Mr. Smith's substantive claims. As an intermediate appellate court, we lack the authority to create a heretofore non-existent procedural mechanism to address the merits of Mr. Smith's substantive claims. *See Tenn. Code Ann. § 16-5-108* (stating the jurisdiction of the Court of Criminal Appeals); *Tenn. Code Ann. § 16-3-402* (granting the supreme court the authority to prescribe rules of practice and procedure). Accordingly, we will only review whether any of the procedural mechanisms asserted by Mr. Smith in his Omnibus Request allows a Tennessee court to address his substantive claims at this time.

I. Writ of Error Coram Nobis

Mr. Smith argues that the substantive claims can be addressed pursuant to the statutory writ of error *coram nobis*. He makes a short argument in his appellate brief in support of using a petition for writ of error *coram nobis* as a procedural vehicle. He asserts the evidence contained in the juror statements is newly discovered, the court proceedings might have been different if the statements had been discovered earlier, it is not Mr. Smith's fault the statements were not discovered earlier, and the one year statute of limitations for filing a petition for writ of error *coram nobis* should be tolled on due process grounds pursuant to  *Workman v. State*, 41 S.W.3d 100,

101-104 (Tenn. 2001). Mr. Smith argues in his brief on appeal that the statements of Jurors A, B, and C constitute "proof that the jury that convicted and sentenced Mr. Smith to death violated his constitutional rights" to a fair and impartial jury. In its brief, the State argues that the writ of error *coram nobis* is not appropriate for remedying violations of a defendant's constitutional rights. We agree with the State. In *Nunley v. State*, 552 S.W.3d 800 (Tenn. 2018), our supreme court held that "an error *coram nobis* proceeding is not the appropriate procedural vehicle for obtaining relief on the ground that the defendant suffered a constitutional due process violation under  *Brady v. Maryland*, 373 U.S. 83 (1963)]." *Nunley*, 552 S.W.3d at 819. The court concluded that a post-conviction proceeding is the proper procedural vehicle to seek relief for a *Brady* violation. Also in *Nunley*, the court specifically clarified that the writ of error *coram nobis* is not a procedural mechanism to remedy violations of constitutional rights. *Id.* at 829 n. 22. Thus, Mr. Smith is not entitled to present his substantive constitutional issues by writ of error *coram nobis*.

The State also argues that Mr. Smith's effort to have his substantive issues addressed in a petition for writ of error *coram nobis* is barred by the applicable one year statute of limitations in *Tennessee Code Annotated section 27-7-103*, and Mr. Smith is not entitled to have the statute of limitations tolled. We agree with the State. As noted above, remedying any deprivation of constitutional rights is not cognizable in an error *coram nobis* proceeding. *Nunley*, 552 S.W.3d 800, 823 n. 22 (Tenn. 2018). When a petitioner raises only non-cognizable claims in a petition for writ of error *coram nobis*, the petitioner is not entitled to tolling of the statute of limitations. *Id.* at 831; *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, 2020 WL 703607, at *4 (Tenn. Crim. App. Feb. 11, 2020) *perm. app. denied* (Tenn. Feb. 14, 2020). Furthermore, the facts detailed in the three statements are not the type of admissible evidence which is applicable to error *coram nobis* claims. If taken as absolutely true, evidence of juror misconduct set forth in the statements would not be relevant to the issues of Mr. Smith's guilt or innocence or to the existence of aggravating and mitigating factors for sentencing. At most, if the conduct of the jurors had timely come to the attention of the trial court during or after trial, a mistrial or a new trial, respectively, would have been the available remedies, not an acquittal or a sentence of life imprisonment. By the explicit language in the statute that authorizes *coram nobis* relief, the newly discovered evidence must relate "to matters ... litigated at the trial if the judge determines that such evidence may have resulted in a *different judgment*, had it been presented at the trial." *Tenn. Code Ann.*

§ 40-26-105(b) (emphasis added). *See Nunley*, 552 S.W.3d at 831.

*7 Mr. Smith is not entitled to relief on his issue that a petition for writ of error *coram nobis* is an available procedural vehicle to present his substantive claims.

II. Tennessee Rule of Criminal Procedure 36.1

 Tennessee Rule of Criminal Procedure 36.1 provides to a defendant a method to request correction of an unexpired illegal sentence. At the time Mr. Smith's offenses and convictions occurred, execution was a statutorily legal sentence for first degree murder. *See Tenn. Code Ann. § 39-2-203* [now § 39-13-204]. Accordingly, the death sentences imposed upon Mr. Smith were authorized by statute and did not directly contravene an applicable statute. Therefore, the sentences of death are not illegal pursuant to  Rule 36.1. *See State v. Wooden*, 478 S.W.3d 585, 595 (Tenn. 2015). In his brief, Mr. Smith makes arguments that have been rejected by our supreme court. Essentially, Mr. Smith argues that his death sentences are illegal because of the methodology used to impose the sentences of death: the jurors who deliberated and reached the verdicts denied Mr. Smith of his constitutional right to a fair and impartial jury. In *Wooden*, the Court determined the meaning of "illegal sentence" as that term is used in  Rule 36.1. *Id.* at 587. In its analysis, the court set forth three types of sentencing errors. *Id.* at 595. The first is a clerical error, which occurs as a result of a mistake filling out the judgment document, and these can be corrected at any time pursuant to Tennessee Rule of Criminal Procedure 36. Second is the appealable error, from which an appeal as of right from a judgment is authorized. The court stated that appealable errors "generally involve attacks on the correctness of the methodology" by which a sentence is imposed. *Id.* Finally, as to the third type of sentencing error, the fatal error, the court stated,

The final category is fatal errors, and these errors are "so profound as to render the sentence illegal and void."

 *Cantrell v. Easterling*, 346 S.W.3d 445, 452. This category consists of any sentence "that is not authorized by the applicable statutes or that directly contravenes an applicable statute."  *Tenn. R. Crim. P. 36.1(a)*; *see also*

 *Cantrell*, 346 S.W.3d at 452. Included in this category are sentences imposed pursuant to an inapplicable statutory scheme, sentences designating release eligibility dates

where early release is statutorily prohibited, sentences that are ordered to be served concurrently where statutorily required to be served consecutively, and sentences not authorized by any statute for the offenses. *Davis v. State*, 313 S.W.3d 751, 759.

Wooden, 478 S.W.3d at 595.

"Only fatal errors render sentences illegal." *Id.*, (citing  *Cantrell*, 346 S.W.3d at 452).

Mr. Smith's sentences of death by execution by the State of Tennessee were imposed by an applicable statutory scheme; the sentences of death were authorized for convictions of first degree murder; release eligibility is not applicable to a death sentence; and concurrent/consecutive sentencing was not applicable.  Tennessee Rule of Criminal Procedure 36.1 does not supply a procedural vehicle to address Mr. Smith's substantive claims because the claims solely involve attacks on whether the methodology used by the trial court to impose the death sentences was correct. *See Wooden*, 478 S.W.3d 595. Accordingly, Mr. Smith is not entitled to relief pursuant to  Rule 36.1.

III. Claims for relief based upon

 *Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Common law writ of audita querela*; *Open Courts Clause of Article I, section 17 of the Tennessee Constitution*; the due process provisions in the Fifth and Fourteenth Amendments of the United States Constitution, and the law of the land provision in Article I, section 8 of the Tennessee Constitution

*8 As to these claims for a procedural vehicle to present Mr. Smith's substantive issues, the State's only argument is that Mr. Smith's appeal as to these issues should be dismissed because this court lacks jurisdiction to address whether the trial court erred as to these claims. The State's argument is that there is no appeal as of right pursuant to any statute or in  Tennessee Rule of Appellate Procedure 3(b) from the trial

court's dismissal of Mr. Smith's request for relief pursuant to the four proposed procedural vehicles listed above.

A more appropriate analysis based on the State's argument would be that an appeal as of right does not explicitly exist from either a trial court's denial or granting in whole, or in part, an "Omnibus Request for Relief on a petitioner's jury claims," with the exceptions as to the included grounds in this case of: (1) petition for writ of error *coram nobis* and (2) motion to correct illegal sentences. [Tenn. Code Ann. § 40-26-105\(d\)](#) (allows an appeal of a writ of error *coram nobis*

to this court); [Tenn. R. App. P. 3\(b\)](#) (allows an appeal as of right from judgment entered pursuant to [Rule 36.1](#)). The State did not address the merits of whether Mr. Smith's claims of procedural vehicles by these means was appropriate, except to note Mr. Smith's concession in his motion that "Tennessee courts have construed each of these procedural vehicles in ways that may foreclose his ability to obtain relief."

Mr. Smith does not contest this assertion in his reply brief. Instead, he focuses in his reply brief, quite correctly, that the State on appeal does not dispute Mr. Smith's assertion that his constitutional rights to a fair and impartial jury were denied. Mr. Smith concludes his reply brief by arguing he is entitled to a judicially created procedure in order to address his substantive claims.

We conclude that we are without jurisdiction to consider these claims for relief to these four listed procedural vehicles because he has no appeal as of right from the denial of relief by the trial court. Accordingly, as to these claims, the appeal must be dismissed.

Mr. Smith also argues that the trial court erred by not allowing evidence in support of his substantive claims to be presented, and relies upon the order of our supreme court in *State v. Lee Hall, a/k/a Leroy Hall, Jr.*, No. E1997-00344-SC-DDT-DD, (Tenn. Dec. 3, 2019) (Order denying stay of execution pending appeal as of right regarding biased juror). As to Mr. Hall's appeal from denial of a motion for a second post-conviction proceeding due to newly discovered evidence of a juror's bias in his death penalty case, the Tennessee Supreme Court included in its order the following: "[T]he trial court wisely recognized the due process concerns, particularly in a capital case, and allowed Mr. Hall to present evidence *on his second post-conviction petition as if it were a proper vehicle.*" *Id.* at p. 10, (emphasis added).

We have addressed on the merits Mr. Smith's contentions that the writ for error *coram nobis* and [Tennessee Rule of Criminal Procedure 36.1](#) provide procedural vehicles for presentation of his substantive issues regarding juror improprieties. We have dismissed the appeal as to his other claims of relief for a procedural vehicle, and concluded we have no authority to create an unspecified judicial procedure to address Mr. Smith's substantive issues. No amount of testimony from the jurors, based upon what is contained in the statements, would change the results reached by this court.

*9 In addition, our supreme court in *Leroy Hall, Jr.*, *Id.*, also noted that the trial court would have acted within its discretion to dismiss the claim for a second post-conviction proceeding without the evidentiary hearing. *Id.* at p. 10.

CONCLUSION

None of the procedural vehicles asserted by Mr. Smith are legally available to address his substantive claims that juror misconduct deprived him of a fair and impartial trial in violation of his rights under the United States and/or Tennessee Constitutions. 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 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). However, we conclude that at this time no procedural vehicle in Tennessee courts exists for Mr. Smith to present his claims. Accordingly, the judgment of the trial court dismissing the Omnibus Request as to a request

for relief via a  Tennessee Rule of Criminal Procedure 36.1 motion and petition for writ of error *coram nobis* is affirmed. As to Mr. Smith's claims for relief via a "Bivens-like" action, common law writ of *audita querela*, the open courts clause of Article I, section 17 of the Tennessee Constitution, and due process provisions of the United States Constitution and the law of the land provision of the Tennessee Constitution, the appeal is dismissed. Furthermore, we respectfully deny Mr. Smith's request for this court to create a presently non-existent non-statutory procedural vehicle for Mr. Smith to have his

substantive issues addressed on the merits. The 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.

All Citations

Slip Copy, 2020 WL 5870566

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Declaration of **JUROR A**

I, **JUROR A** , an adult resident of Davidson County, Tennessee, declare as follows:

1. I was on the jury that sentenced Oscar Frank Smith to death.
2. 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.
3. Mr. Smith's case was even worse than most murders, because it was three murders. Two of the victims were children.
4. At the time of the trial, I was a supervisor at Nashville Wire Company. My 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.
5. Before I was selected, the Judge talked to me in the court room 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.
6. It was a tragedy how the police were called to the house, but they didn't go inside. That young boy may have still been alive.
7. Paul Newman was one of the public defenders for Mr. Smith. My brother-in-law was friends with him. They were both from the Scottsboro area outside of Nashville, TN. Mr. Newman was a police officer before he became an attorney

I, **JUROR A** , declare under penalty of perjury that the foregoing is true and correct.

JUROR A

JUROR A

Dated: 11-22-2019

Declaration of JUROR B

I, JUROR B , an adult resident of Davidson County, Tennessee, declare as follows:

1. I was on the jury that sentenced Oscar Frank Smith to death.
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 I was young and naive. I would now vote for life.
6. 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.

I, JUROR B , declare under penalty of perjury that the foregoing is true and correct.
JUROR B

JUROR B

Dated: 11-25-19

Declaration of JUROR C

I, JUROR C, an adult resident of Davidson County, Tennessee, declare as follows:

1. Many years ago, I served on the jury in the case involving the prosecution of Oscar Frank Smith.
2. 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 Antioch High School, I took an aerospace science class taught by the head of local civil aviation. Later, when I was in the Navy at Millington, 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.
3. Mr. Smith was found guilty of three individual murders. You automatically had to give death. JUROR C
speak about things we heard
4. None of us doubted Mr. Smith was guilty, even the two alternates. We ate in the courthouse and therefore could discuss the case 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.
5. There were two younger women who really had a hard time voting, because they did not want to give the death penalty. One woman was black and one woman was white. JUROR C
6. The forewoman, who had been the mayor of Belle Meade, talked to us each privately in a quiet voice, before we began deliberating. She talked to most of us for about three minutes, but talked to the two younger women for at least 15 minutes each privately.
7. After we all met with the forewoman, 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 women, who sat next to each other, changed their vote.

I, JUROR C, declare under penalty of perjury that the foregoing is true and correct.

JUROR C

[Signature]
JUROR C

Dated: 12-1-19

1 I'm going to read you a little statement
2 here in a moment of two that will give you a brief
3 outline of the statement of the alleged facts and so
4 forth, but that's the introduction to it.

5 Now, what I want to do first and
6 foremost with all of you is very strongly emphasize,
7 very strongly emphasize that the only information that
8 you would need to consider, if you're selected to serve
9 on this jury, is the information and the evidence that
10 you hear in this courtroom. You will hear witnesses
11 testifying under oath. There will be, I'm sure,
12 evidence introduced for your consideration, physical
13 evidence, so forth, pictures and different things. You
14 will need to consider that evidence as it is introduced
15 in this courtroom from this witness chair under oath
16 and nothing else. By that I mean during the course of
17 this week, during the course of this jury selection,
18 during the course of this trial, which will go in
19 through next week, we do not want you to look at any
20 newspapers that have any accounts of this trial whatso-
21 ever. Those newspaper reports would be reports of a
22 reporter, made in good faith, I'm sure, but from a
23 perspective that's not what you need to consider it
24 from. All you need to consider anything about this
25 case on is what you hear in this courtroom under oath

1 and absolutely nothing else.

2 So during this week when you're being
3 considered to be on the jury, and after that, if you
4 are selected to be on the jury, you need to have no
5 reference whatsoever in any shape, form, or fashion to
6 anything that is either in the Tennessean in the morn-
7 ing or the Nashville Banner in the afternoon. Also,
8 I'm sure there will be television accounts concerning
9 this case, different things that the television
10 stations will present to their viewers that will relate
11 to this case that may emphasize one part of the case,
12 may emphasize another. Whatever it may be, you need to
13 have no reference to that whatsoever.

14 So during the jury selection process
15 this week you need not watch the news on television
16 until this jury is selected at all. You don't need to
17 watch it anytime, but particularly while you're being
18 processed and considered to serve on this jury, you
19 need to have no reference to the local news whatsoever.

20 So I realize that this is somewhat of an
21 imposition on you, and it's done because I intend to
22 give both the State of Tennessee and the defendant a
23 fair trial. And in order for me to do that, I need to
24 ensure that what you consider in the course of giving
25 both sides a fair trial is what you hear in this
courtroom, not what a newspaper reporter on television

1 Smith, that you consider only the evidence that you
2 hear in this courtroom.
3

4 Plenty of people have got opinions.
5 Everybody's got an opinion. You know that. You can go
6 to a barber shop, a beauty parlor, a ball game, or
7 wherever you might go. And people have got all kinds
8 of big opinions about this, and I'd do this and that,
9 and this and the other. You don't need to consider any
10 of that. You need to not consider that. You need to
11 be above that and to only listen to the evidence in
12 this courtroom.
13

14 You'll have time, if you're selected to
15 be a member of the jury, to deliberate in good faith in
16 the jury room, without any outside influence whatsoev-
17 er. And during the process that we're having now, it's
18 extremely important for you not to have any considera-
19 tion outside the group or even among yourselves, as
20 you're waiting to consider jury service about this
21 case. You're going to be asked questions when you come
22 into the courtroom about what you know about the case.
23 You'll have plenty of time to let these lawyers ask you
24 questions as to whether or not you've either formed or
25 expressed any kind of an opinion at all. But we'll
keep that between you, the lawyers, and the Court. You
don't need to be speculating in the hall or thinking
about it or wondering out loud or anything.

1 | prison.

2 JUROR: Right.

3 MR. NEWMAN: Do you understand that?

4 JUROR: Yes, sir.

5 MR. NEWMAN: Do you have any problems
6 with that at all?

7 JUROR: No, sir.

8 MR. NEWMAN: Now, from reading through
9 the facts or the facts that the Judge read to you
10 concerning this alleged crime, they -- there was an
11 alleged -- allegedly there are three people killed in
12 this crime. Do you understand that?

13 JUROR: Yes, sir.

20 JUROR: If he's proven guilty, he
21 should, yes, sir.

22 MR. NEWMAN: Okay. So even though the
23 Judge would instruct you that you are to weigh the
24 factors, is it your position and are you telling the
25 Court that if it is three murders, that you would

automatically vote for the death penalty?

1 JUROR: Yes, sir.
2

3 MR. NEWMAN: And that would be despite
4 whatever instructions the Judge may give you because of
5 your personal feelings concerning this type of crime?
6

7 JUROR: Yes, sir.
8

9 MR. NEWMAN: Your Honor, at this point
10 we'd ask that he be excused.
11

12 GEN. BLACKBURN: Well, Your Honor, I'd
13 object at this point. He's already answered the
14 question a different way.
15

16 THE COURT: He answered the question
17 already that if he thought the aggravating factors did
18 not outweigh the mitigating factors that he would
19 impose a life sentence. He has answered that two or
20 three different ways. I think you need to answer the
21 question now, **JUROR A**, and I understand what his
22 question is, is whether or not, if you did not find
23 that the mitigating -- that the aggravating factors
24 outweighed the mitigating factors, in any of the three
25 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: Yes, sir. Yes, sir.

10 THE COURT: And not add them up and have
11 a cumulative --

JUROR: Right.

THE COURT: -- sort of a --

JUROR: Yes, sir.

15 THE COURT: -- finding? Do you
16 understand the point I'm making?

JUROR: Yes, sir.

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

1 JUROR: Life.

2 THE COURT: If you had Victim B, and you
3 thought the aggravating factors did not outweigh beyond
4 a reasonable doubt the mitigating factors as to that
5 victim, what would --

6 JUROR: That would be life.

7 THE COURT: -- your verdict be? And as
8 to Victim C, if you found that the aggravating factors
9 did not beyond a reasonable doubt outweigh the mitigat-
10 ing factors, what would your verdict be --

11 JUROR: Life.

12 THE COURT: -- in that case? All right.
13 So are you saying if factors did not outweigh -- the
14 aggravating factors did not outweigh the mitigating
15 factors, in any of the three victims' case that you
16 would return a verdict of life in this case, assuming--

17 JUROR: Yes, sir.

18 THE COURT: -- that guilt is proven
19 beyond a reasonable doubt; is that what you're
20 saying?

21 JUROR: Yes, sir.

22 THE COURT: Okay. I thought that that
23 was what he was saying, but I'll be glad to let you ask
24 him a follow-up question, but I don't want to have
25 JUROR A getting maybe a little confused by your question

1 based on what I heard him say two or three different
2 ways in his responses to earlier questions.

3 Okay. Go ahead.

4 MR. NEWMAN: JUROR A , I'm not trying
5 to confuse you. And if I have, I apologize. What my
6 question concerned was, was the -- was the possibility
7 that you may be sitting as a juror trying to decide
8 either death by electrocution or life in prison, would that
9 cause you to have a preconceived notion or an idea that
10 you should vote for death by electrocution?

11 JUROR: No, sir; not just because there
12 was three, no.

13 MR. NEWMAN: Okay. So you understand,
14 then, the concept of weighing the --

15 JUROR: Right.

16 MR. NEWMAN: -- aggravating and
17 mitigating, and you could follow the instructions that
18 Judge Wyatt had just given to you?

19 JUROR: Yes, sir.

20 MR. NEWMAN: Okay. And if I have
21 confused you, I certainly apologize.

22 I don't recall your answer concerning
23 pre-trial publicity. Can you tell me if you had heard
24 anything about this case before you came here this
25 morning?

1 you. These court officers will do anything they can to
2 help you. And then tomorrow we'll probably have two
3 different ones that will be with you tomorrow. We'll
4 kind of alternate a little bit.

5 Let me mention to you now at the
6 beginning of the trial, you're going to be sequestered.
7 So there shouldn't be any real problem with you being
8 exposed to the matters that you do not need to concern
9 yourself with. But I want to remind you now, this is,
10 I think, all of the people -- all of the folks that are
11 on the jury, this is your first trial.

12 During the trial of a case, you're going
13 to hear evidence beginning here in maybe five or ten or
14 fifteen minutes. During the trial of the case,
15 consider this evidence, naturally, store it in your
16 mind for a later reference in your deliberations, but
17 please do not form or express any opinion during the
18 trial of the case about what you're hearing. It's very
19 important for you not to discuss or to begin to
20 speculate when you hear part of the evidence, during
21 your breaks or during your lunch, or whenever it may
22 be, anything about the case. It's only appropriate to
23 discuss the matter with each other at the end of all of
24 the evidence, the closing arguments by the attorneys
25 and by the Court's instruction to you, when you begin

1 of it is such that that is what we need to go ahead and
2 do. So we'll be in recess for dinner. And Kayo said
3 you all can eat about 5:15. So that will be 15
4 minutes. And you all can kind of loosen up, if you
5 would. And I'll just see you back here as soon as we
6 can get here. And that will be sometime maybe just a
little after 6:00. So we'll see you then.

Yeah. I didn't see her. Swear Boo.

(WHEREUPON, the matron is sworn to take charge of the jury, and after which, the further following proceedings were had. To-wit:)

THE COURT: Okay. This is Mary
16 Elizabeth Lynch. And she's often -- mostly called and
17 referred to as Boo Lynch. And she apparently has just
18 arrived here in time for supper. And so that's smart
19 on your part, Boo. But she will be with you this
20 evening along with my court officers for any personal
21 needs that any of you ladies may have.

23 So you all can go on upstairs. And let
24 me remind you not to discuss anything about the case at
all. And I'll see you here in a little over an hour.

1 want to thank everyone of you for your attention and
2 patience today. You've been very good and very
3 attentive. And I appreciate you very much.

4 We're going to recess, adjourn for the
5 evening. We'll get started again right at 9 o'clock.
6 Let me remind you do not in any way discuss this matter
7 or do anything inconsistent with what I mentioned to
8 you last week about not forming or expressing an
9 opinion. If you'll do that, I'll see you all in the
10 morning at 9 o'clock. And we'll get started right at
11 that time.

12 (WHEREUPON, the jury retired
13 from open court at 7:57 p.m. and
14 was excused for the evening, and
15 after which, the further following
16 proceedings were had, to-wit:)

17 THE COURT: Keep your seat for just a
18 moment. Did you have something you wanted to add?

19 MR. DEAN: Yeah, I just wanted to --
20 I've been kind of keeping a score card here. And I --
21 we've been telling our witnesses, and Mr. Kayo Smith
22 has, to come in on Wednesday. I -- the way things are
23 moving, it's conceivable, if my list is accurate, maybe
24

1 THE CLERK: 6-JJ.

2 THE COURT: JJ, okay. That's that
3 picture from the State's exhibit?

4 THE CLERK: (Nods affirmatively.)

5 THE COURT: Okay.

6
7 (State's Exhibit No. 6-JJ

8 passed to the jury for their
9 examination.)

10
11 THE COURT: Okay. Members of the Jury,
12 it's time now for lunch. Let me just remind you of
13 this, this is our third day here of what I told you
14 earlier, at the beginning of the trial. And that is,
15 even though we've now heard two and a half days of
16 proof, I still want you to remember not to in any way
17 make any remarks or have any conversations about what
18 you've heard. You'll have plenty of time to do that.
19 And I just wanted to remind you to not have anything to
20 say about what you have heard so far. I hope you enjoy
21 your lunch. And I'll see you back in here in a little
22 over an hour.

23

24

25

1 all the evidence that the State has failed to prove
2 beyond a reasonable doubt that the defendant was at the
3 scene of the crime when it was committed, you must find
the defendant not guilty.

Members of the Jury, some of you have
been exposed to pretrial publicity in this case. I
again instruct you that you can consider no information
in reaching your verdict other than the evidence you
hear in the courtroom. It would be further
impermissible for you to mention during deliberations
to any other juror any information that you recall
reading, hearing, or seeing in the media or otherwise
related to this case other than what you hear or see in
the courtroom. This case must be decided solely upon
the evidence that you hear in the courtroom.

1 (WHEREUPON, the case was argued
2 to the jury by all counsel, and
3 after which the Court charged
4 the jury as follows, to-wit:)

5
6 THE COURT: Members of the Jury: You
7 have reported that you have found the defendant, Oscar
8 Franklin Smith, guilty beyond a reasonable doubt of
9 Murder in the First Degree as charged in Counts One,
10 Two and Four of the indictment. The offense of Murder
11 in the First degree is punishable by death or by
12 imprisonment for life.

13
14 It is now your duty to determine within
15 the limits prescribed by law the penalty which shall be
16 imposed as punishment for this offense. Tennessee Code
17 Annotated Section 39-2-202 (b) provides that a person
18 convicted of Murder in the First Degree shall be
19 punished by death or by imprisonment for life.

20
21 In arriving at this determination, you
22 are authorized to weigh and consider any mitigating
23 circumstances and any of the statutory aggravating
24 circumstances which may have been raised by the
25 evidence throughout the entire course of this trial,
including the guilt-finding phase or the sentencing

You are the exclusive judges of the
9 facts in this case. Also, you are the exclusive judges
10 of the law under the direction of the Court. You
11 should consider all of the evidence in the light of
12 your own observations and experience in life.

The burden of proof is upon the State to
15 prove any statutory aggravating circumstance or
16 circumstances beyond a reasonable doubt to a moral
17 certainty.

Reasonable doubt is that doubt
engendered by an investigation of all the proof in the
case and an inability, after such investigation, to let
the mind rest easily upon the certainty of your
verdict. Reasonable doubt does not mean a doubt that
may arise from possibility. Absolute certainty is not
demanded by the law but moral certainty is required and

1 Members of the Jury, some of you have
2 been exposed to pretrial publicity in this case. I
3 again instruct you that you can consider no information
4 in reaching your verdict other than the evidence you
5 hear in the courtroom. It would be further
6 impermissible for you to mention during deliberations
7 to any other juror any information that you recall
8 reading, hearing, or seeing in the media or otherwise
9 related to this case other than what you hear or see in
10 the courtroom. This case must be decided solely upon
the evidence that you hear in the courtroom.

You have reported that you have found
the defendant, Oscar Franklin Smith, guilty of murder
in the first degree as charged in counts one, two, and
four of the indictment. The offense of murder in the
first degree is punishable by death or by imprisonment
for life.

Members of the Jury, you must determine
from all the proof in this case whether or not the
punishment shall be death or life imprisonment in count
one, count two and count four of the indictment.

24 Our statutory law provides that the jury
25 shall fix the punishment after a separate sentencing

1 hearing to determine whether the defendant shall be
2 sentenced to death or life imprisonment. Your verdict
3 must be unanimous as to either form of punishment. You
4 have now heard all the evidence to be presented in the
5 trial and the sentencing hearing of this case,
6 including all the evidence as to whether there were any
7 aggravating circumstances and whether there were any
8 mitigating circumstances, all of which you will
9 carefully weigh and consider.

10

18

24

25

1 Before you may find that any one of the
2 aggravating circumstances exists, each of you must
3 unanimously agree that the State has proved each
4 circumstance as defined beyond a reasonable doubt.
5

6 You are to presume that any alleged
7 aggravating circumstance does not exist. This
8 presumption remains unless and until each and every one
9 of you is satisfied from the evidence that the specific
10 aggravating circumstance is proved. If you have a
11 doubt based upon reason concerning any of the
12 aggravating circumstances, you shall not use that
13 circumstance in the course of further deliberations.
14

15 Your determination may not proceed
16 further unless and until you unanimously find that a
17 particular specified aggravating circumstance or
18 circumstances exist beyond a reasonable doubt. If you
19 are unable to reach such an agreement after reasonable
20 and diligent effort, your verdict shall be life and you
21 shall proceed no further.
22

23 If you unanimously determine that the
24 State has proved beyond a reasonable doubt one or more
25 of the specified aggravating circumstances, then you
must go on to consider mitigating circumstances.

As to a determination of mitigating circumstances, you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. Nor are you to gauge whether their existence is shown beyond a reasonable doubt. Instead, when you consider mitigating circumstances, each of you must decide for yourself whether mitigating circumstances may exist, and if so, how much weight each deserves. If you conclude that any evidence supports a mitigating circumstance, then you should consider that mitigating circumstance to be established, and then determine the weight to which it is entitled.

1 If the death penalty is the decision of
2 the jury, the members of the jury shall then complete
3 the attached form entitled "Punishment of Death." The
4 jury must include and reduce to writing the specific
5 statutory aggravating circumstance or circumstances so
6 found. Further, the jury must include in its finding
7 that the statutory aggravating circumstance or
8 circumstances so found outweigh any mitigating
9 circumstances beyond a reasonable doubt. Upon such
10 unanimous finding, each member of the jury shall affix
11 his or her signature to the said written finding, and
12 then return said written verdict to the Court.

13 If the jury unanimously determines that
14 no statutory aggravating circumstance or circumstances
15 have been proved by the State beyond a reasonable
16 doubt, or if the jury unanimously determines that the
17 statutory aggravating circumstance or circumstances
18 have been proved by the State beyond a reasonable
19 doubt, that that said circumstance or circumstances do
20 not outweigh any mitigating circumstances, the
21 punishment shall be life imprisonment. I further
22 instruct each of you that if the weight of the
23 mitigating circumstances equals the weight of the
24 aggravating circumstances you find to be beyond a
25 reasonable doubt, your verdict must be life. The

1 members of the jury shall then complete the attached
2 form entitled "Punishment of Life Imprisonment" by
3 affixing their signatures thereto and returning the
4 written verdict of the jury to the Court.

5

6 Reasonable doubt is that doubt
7 engendered by an investigation of all the proof in the
8 case and an inability, after such investigation, to let
9 the mind rest easily as to the certainty of your
10 findings. Reasonable doubt does not mean a capricious,
11 possible, or imaginary doubt.

12

13 Absolute certainty is not demanded by
14 the law to determine the certainty of your findings,
15 but moral certainty is required as to every proposition
16 of proof requisite to determine the certainty of your
17 findings as to the aggravating circumstance or
18 circumstances.

19

20 You will be provided with a punishment
21 for each individual count of the indictment. One
22 entitled "Punishment of Death," and another entitled
23 "Punishment of Life Imprisonment." You will complete
24 the appropriate punishment for for each count and each
25 juror will sign it. The other punishment form is to be

6 You can have no prejudice or sympathy or
7 allow anything but the law and the evidence to have any
8 influence upon your verdict. You must render your
9 verdict with absolute fairness and impartiality as you
10 think justice and truth dictate.

12 You must render your verdict with
13 absolute fairness and impartiality as you think justice
14 and truth dictate.

21 It is your duty, as jurors, to consult
22 with one another and to deliberate with a view to
23 reaching an agreement, if you can do so without
24 violence to individual judgment. Each of you must
25 decide the case for yourself, but do so only after an

1 impartial consideration of the evidence with your
2 fellow jurors. In the course of your deliberations, do
3 not hesitate to re-examine your own views and change
4 your opinion if convinced it is erroneous. But do not
5 surrender your honest conviction as to the weight or
6 effect of the evidence solely because of the opinion of
7 your fellow jurors or for the mere purpose of returning
8 a verdict.

9
10 You may now retire to the jury room for
11 your deliberations in setting punishment for the
12 defendant, solely and alone upon the evidence
13 introduced upon the trial and sentencing hearing.

14
15 Let me check the spelling of one word
16 here. I've got one word misspelled here. It's not
17 big, but I just want to correct it.

18
19 (Pause in the proceedings while
20 the Court makes a change in the
21 charge.)

22
23 Okay. Okay. One letter was wrong on
24 one of these words. So it isn't wrong anymore. We'll
25 see you all later. And I appreciate each and everyone