

NO. 20-7930

**IN THE SUPREME COURT OF THE
UNITED STATES**

**OSCAR FRANKLIN SMITH,
Petitioner**

v.

**STATE OF TENNESSEE,
Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI TO THE
TENNESSEE COURT OF CRIMINAL APPEALS**

RESPONDENT’S BRIEF IN OPPOSITION

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

After completing three-tier review of his convictions and sentences, the Petitioner obtained three juror declarations decades after his convictions and mere months before his scheduled execution. He sought to litigate these juror declarations, but Tennessee state courts determined that no procedural mechanism existed through which he could adjudicate his last-minute allegations of juror bias and misconduct.

I

Does this Court have jurisdiction to review the decisions of the state courts since they denied relief based upon the absence of an available state procedural vehicle, which is an independent and adequate state ground for resolving the Petitioner's claims?

II

Does the Sixth Amendment through the Due Process Clause of the Fourteenth Amendment to the United States Constitution require Tennessee courts to provide the Petitioner with a non-existent procedural vehicle so that he may pursue last-minute litigation of these allegations?

RELATED PROCEEDINGS¹

Smith v. Colson, 569 U.S. 1015 (2013) (granting petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *Trevino v. Thaler*, 569 U.S. 413 (2013)).

Smith v. State, No. M2019-01662-CCA-R28-PD (Tenn. Crim. App. Oct. 28, 2019) (denying application for permission to appeal denial of second motion to reopen state post-conviction petition), *perm. app. denied* (Tenn. Jan. 15, 2020).

¹ Pursuant to Rules of the Supreme Court of the United States, Rule 15.2, these cases are directly related to this case and were not identified in the petition for writ of certiorari.

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OPINIONS BELOW

The Tennessee Supreme Court's order denying discretionary review is unreported and is available on Lexis: *Smith v. State*, No. M2020-00485-SC-R11-ECN, 2020 Tenn. LEXIS 590 (Tenn. Dec. 3, 2020). (Pet's App'x, 1A.) The opinion of the Tennessee Court of Criminal Appeals is unreported but is available at *Smith v. State*, No. M2020-00485-CCA-R3-ECN, 2020 Tenn. Crim. App. LEXIS 651 (Tenn. Crim. App. Oct. 2, 2020). (Pet's App'x, 2A-10A.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied discretionary review on December 3, 2020. (Pet's App'x, 1A.) By Order dated March 19, 2020, this Court extended the deadline for filing a petition for writ of certiorari to 150 days from the date of the lower court order denying discretionary review, which, in this case, was May 3, 2021. Smith filed his petition on May 3, 2021, and he invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1257(a) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tenn. Code Ann. § 40-26-105(b) establishes:

Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for

subsequently or newly discovered evidence relating to matters which were 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. § 27-7-103 subjects coram nobis claims to a one-year statute of limitations.

Tennessee Rule of Criminal Procedure 36.1(a)(1) sets out, “Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.” “[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a)(2).

STATEMENT OF THE CASE

The Petitioner, Oscar Franklin Smith, murdered his estranged wife, Judy Smith, and her two minor children on October 1, 1989. *State v. Smith*, 868 S.W.2d 561, 565 (Tenn. 1993). A Davidson County jury convicted the Petitioner of the premeditated, first-degree murder of all three victims, and the jury sentenced him to death for each conviction. *Id.* On direct appeal, the Tennessee Supreme Court affirmed his convictions and death sentences. *Id.* at 582-83.

The Petitioner filed a petition for post-conviction relief, which the post-conviction court denied. *See Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353, at *1 (Tenn. Crim. App. June 30, 1998), *perm. app. denied* (Tenn. Jan. 25, 1999). On appeal, the Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief, and the Tennessee Supreme Court denied further appellate review. *Id.*

The Petitioner twice unsuccessfully moved to reopen his post-conviction petition. In 2016, the Petitioner unsuccessfully sought reopening to claim that the imposition of the death penalty was cruel and unusual pursuant to Justice Stephen Breyer’s dissent in *Glossip v. Gross*, 135 S. Ct.

2726 (2015), and that the death sentence violated his basic human dignity and fundamental right to life pursuant to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Smith v. State*, No. M2016-01869-CCA-R28-PD, at *2 (Tenn. Crim. App. Oct. 19, 2016), *perm. app. denied* (Tenn. Feb. 16, 2017). In 2019, the Petitioner unsuccessfully sought reopening again, this time arguing that his trial counsel violated *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), by conceding the Petitioner's guilt during the closing argument of the penalty phase. *Smith v. State*, No. M2019-01662-CCA-R28-PD, at *2 (Tenn. Crim. App. Oct. 28, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020).

The Petitioner also litigated numerous claims through his federal petition for writ of habeas corpus. *Smith v. Bell*, No. 3:99-cv-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005). The district court concluded that many of his claims were procedurally defaulted, summarily denied some claims on the merits, and denied the remaining claims after an evidentiary hearing. *Id.* The United States Court of Appeals for the Sixth Circuit partially granted a certificate of appealability to review a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Smith v. Bell*, 381 Fed. Appx. 547 (6th Cir. 2010). After the Sixth Circuit denied relief, this Court granted the Petitioner's petition for writ of certiorari, vacated the judgment of the Sixth Circuit, and remanded the case for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012). *Smith v. Bell*, 566 U.S. 901 (2012), *vacated sub nom Smith v. Colson*, 566 U.S. 901 (2012). On remand, the Sixth Circuit reinstated the judgment, and this Court again granted a petition for writ of certiorari, vacated the Sixth Circuit's judgment, and remanded for further consideration in light of *Trevino v. Thaler*, 569 U.S. 413 (2013). *Smith v. Colson*, No. 05-6653 (6th Cir. April 11, 2012), *vacated* 569 U.S. 1015 (2013). The Sixth Circuit remanded the case to the district court, which denied relief after a limited evidentiary hearing. *Smith v. Carpenter*, No. 3:99-cv-0731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018). The Sixth Circuit denied a certificate of appealability, *Smith v. Mays*, No. 18-5133, 2018

WL 7247244, at *1 (6th Cir. Aug. 22, 2018), and this Court denied further review, *Smith v. Mays*, 139 S. Ct. 2693 (2019).

Once the Petitioner completed the three-tier review process, the Tennessee Attorney General's Office filed a motion to set his execution date as required by Tenn. Sup. Ct. R. 12.4(A). In response to the motion, the Petitioner claimed that his jury was unconstitutionally biased against him and that the Tennessee Supreme Court should create a procedural vehicle through which he could assert that claim. Response in Opposition to Motion to Set Execution Date, *State v. Smith*, No. M2016-01869-SC-R11-PD (Tenn. Jan. 15, 2020). In its January 15, 2020 order setting the Petitioner's execution, the Tennessee Supreme Court addressed the Petitioner's claim that he was entitled to due process relief on the basis of declarations from trial jurors. (Resp. App'x A, at 1A). The Tennessee Supreme Court concluded that "Tennessee Rule of Evidence 606(b) prohibit[ed] the testimony of jurors about the jury's deliberations," and its jurisdiction was appellate only. (*Id.*)

On February 28, 2020, nearly three decades after his convictions, the Petitioner filed an "Omnibus Request for Relief on His Jury Claims" ("Request"). (Resp. App'x B, at 3A-56A.) Relying on declarations from former jurors, the Petitioner alleged that the jury that convicted him and sentenced him to death violated his constitutional rights. (Resp. App'x B, at 3A.) The Petitioner listed seven different procedural vehicles which he might use to litigate his claims: writ of error *coram nobis*, a *Bivens*-like action, a motion to reopen his post-conviction petition, a common law writ of *audita querela*, a motion to correct an illegal sentence, the Open Courts Clause of the Tennessee Constitution, and the Due Process Clause of the U.S. Constitution and Law of the Land Clause of the Tennessee Constitution. (Resp. App'x B, at 3A-4A.) The Petitioner alternatively asked the trial court to "create another procedural vehicle for such claims[.]" (Resp. App'x B, at 4A.) The Petitioner also claimed that he was not at fault for failing to timely raise his

juror misconduct claims, blaming his trial and post-conviction counsel. (Resp. App'x B, 28A-29A.) The Petitioner further claimed that “if counsel had presented the evidence of juror misconduct to the trial court, the court surely would have granted a mistrial” and a different jury would have acquitted him of the murders of Judy, Chad, and Jason. (Resp. App'x B, at 30A.)

The trial court denied the Request on March 10, 2020, concluding that the Petitioner's claims were previously determined by the Tennessee Supreme Court in its order setting the Petitioner's execution date. (Resp. App'x A, at 1A-2A; Resp. App'x C, at 59A-60A.) Further, the court concluded that the Request was “untimely under the *coram nobis* statute.” (Resp. App'x C, at 63A.) And it concluded that due process concerns did not warrant tolling of the *coram nobis* statute of limitations in the Petitioner's case. (Resp. App'x C, at 63A.) The trial court determined that the Request made “no claims of newly discovered evidence of actual innocence.” (Resp. App'x C, at 63A.) The trial court likewise determined that the Petitioner's remaining claims were non-cognizable or meritless. (Resp. App'x C, at 63A-67A.)

The Petitioner filed an application for permission to appeal the trial court's denial of his motion to reopen his post-conviction petition included in his Request on March 24, 2020. On May 1, 2020, the Tennessee Court of Criminal Appeals denied the application for permission to appeal the lower court's dismissal of the Request. *Smith v. State*, No. M2020-00493-CCA-R28-PD (Tenn. Crim. App. May 1, 2020) (order denying application). The Petitioner filed an application for permission to appeal the Court of Criminal Appeals' decision to the Tennessee Supreme Court. On August 5, 2020, the Tennessee Supreme Court denied further appellate review. *Smith v. State*, No. M2020-00493-SC-R11-PD (Tenn. Aug. 5, 2020) (order denying application for permission to appeal).

The Petitioner also appealed the trial court’s decision under Tenn. R. App. P. 3 on March 20, 2020. *Smith v. State*, No. M2020-00485-CCA-R3-ECN, 2020 Tenn. Crim. App. LEXIS 651, at *1-2 (Tenn. Crim. App. Oct. 2, 2020), *perm. app. denied* (Tenn. Dec. 3, 2020). In an opinion filed on October 2, 2020, from which the Petitioner now seeks certiorari, the Tennessee Court of Criminal Appeals “decline[d] to attempt to create a non-statutory procedure to address [the Petitioner’s] substantive claims.” *Id.* at *16. The court acknowledged that it lacked the authority to “create a heretofore non-existent procedural mechanism” that the Petitioner could use to raise his juror bias and misconduct allegations. *Id.* at *16-17. The court determined that the Petitioner was precluded from raising his juror bias and misconduct claims in any of the procedural vehicles mentioned in the Request. *Id.* at *16-27.

The Petitioner filed an application for permission to appeal to the Tennessee Supreme Court, which the Court denied on December 3, 2020. *Smith v. State*, No. M2020-00485-SC-R11-ECN, 2020 Tenn. LEXIS 590 (Tenn. Dec. 3, 2020) (per curiam order). The Supreme Court also designated the Court of Criminal Appeals’s opinion in the Rule 3 appeal as “not for citation” “due to the intermediate court’s characterization of the juror declarations in obiter dictum contained in its conclusion.”² *Id.*

The Petitioner now seeks a writ of certiorari of the state court’s denial of relief in his Tenn. R. App. P. 3 appeal.

² In its conclusion, the court stated that “[t]he facts set forth in the three [juror] statements are disturbing if taken as true” and that “[i]f 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.” *Smith*, 2020 Tenn. Crim. App. LEXIS 651, at *25-26.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for a writ of certiorari. First, the Court lacks jurisdiction to review the decision of the state courts because they rested on independent and adequate state-law grounds; that is, the Petitioner's claims were not cognizable in any of the state procedural vehicles he invoked below. Second, due process does not require Tennessee to provide collateral review procedures *at all*, and it certainly does not require Tennessee state courts to invent a freestanding procedural vehicle for last-minute litigation of claims that the Petitioner had ample opportunities to investigate and litigate in the three decades since his conviction.

I. This Court Does Not Have Jurisdiction to Review the Decision of the Lower Courts Because those Decisions Rested on Independent and Adequate State-Law Grounds.

The Petitioner claims that, “[i]n declining to grant [him] the opportunity for even an evidentiary hearing, the state courts have decided this matter in a way that conflicts with this Court’s precedent.” (Pet. at 14-15.) But the Court lacks jurisdiction to review the decisions of the state courts because they rested on independent and adequate state-law grounds: that the claims were not cognizable in the state procedural vehicles he invoked.

It is well established that “[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). “In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Id.* Moreover, principles of comity require federal courts to defer to a state’s judgment on issues of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“[A] state court’s interpretation of state law . . . binds a federal court[.]”).

In its opinion, the Tennessee Court of Criminal Appeals determined that the Petitioner’s juror bias and misconduct claims were not cognizable in a state *coram nobis* proceeding or in a

Tenn. R. Crim. P. 36.1 motion. *Smith*, 2020 Tenn. Crim. App. LEXIS 651, at *17-22. The court also concluded that the Request was filed outside the statute of limitations applicable in *coram nobis* proceedings and that the Petitioner was not entitled to tolling of that statute of limitations. *Id.*

Further, the Tennessee Court of Criminal Appeals held that it lacked jurisdiction to consider the remaining miscellaneous vehicles invoked by the Petitioner—vehicles that he conceded had been interpreted by Tennessee courts “in ways that may foreclose his ability to obtain relief”—because he had no right to appeal the denial of those claims. *Id.* at *22-25. The trial court, for its part, held that the juror issues were previously determined by the Tennessee Supreme Court, and it accepted the Petitioner’s concession that prior Tennessee decisions had construed these various procedural vehicles in ways that precluded any relief. (Resp. App’x C, at 59A-60A.)

The Petitioner does not challenge the determination of the state courts on the scope of these state procedural vehicles. Instead, he argues that due process required the state courts to invent a new vehicle for him out of whole cloth. Even if that were a viable claim, which it plainly is not (*see infra*, Part II), there was no available state procedural vehicle in which he could pursue this due process claim either. This Court, therefore, lacks jurisdiction to review the state courts’ rulings based on state-law grounds about the availability of state-court procedural vehicles.

II. Federal Law Does Not Require Tennessee State Courts to Create A New Procedural Vehicle for the Petitioner.

The Petitioner asks this Court to grant certiorari because he claims that the decision of the Tennessee Court of Criminal Appeals declining to create a new procedural vehicle conflicts with federal law. (Pet. at 14.) He claims that due process entitles him to an evidentiary hearing because the juror declarations raise colorable claims that his jury was not impartial. (Pet. at 22-24.) The

Petitioner therefore urges this Court to accept review of this case and to hold that the state courts were constitutionally compelled to create a freestanding procedural vehicle for him to collaterally attack his convictions and sentences.

But this Court has held that states are not required to provide *any* collateral review procedures. Indeed, the Court has steadfastly refused to issue the sort of constitutional mandate the Petitioner is seeking: “[Post-conviction relief] is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief[.]” *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *see also Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O’Connor, J., concurring) (“Nothing in the Constitution requires the States to provide [post-conviction] proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551 . . . (1987), nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.”); *see also Lackawanna Cty. Dist. Att’y v. Coss*, 532 U.S. 394, 402 (2001) (noting that states have created procedures for post-conviction review, “even though there is no constitutional mandate that they do so”). And none of the cases the Petitioner cites for the proposition that a hearing is constitutionally compelled in this instance purported to overturn *Finley* or to mandate the creation of any new *collateral* proceeding.

Further, despite the fact that federal law does not require it, Tennessee provided the Petitioner post-conviction review of his convictions and sentences during which he had the opportunity to present evidence of any juror bias or misconduct claims. Although the Petitioner had state-funded counsel in this post-conviction proceeding—something Tennessee also was not required to provide him, *Finley*, 481 U.S. at 557—the Petitioner did not raise these claims. *Smith*, 1998 WL 345353, at *1. Nor did he raise them when he litigated his petition for writ of habeas

corpus in federal court where he was also represented by counsel. *Smith*, 2005 WL 2416504, at *15-87.

Notably, the Petitioner alleged that he interviewed these jurors—apparently for the first time—in fall 2019 while preparing a response to the Attorney General’s motion to set the execution date. (Resp. App’x B, at 28A-29A.) His only explanation for his failure to investigate and raise these claims during his state collateral review proceedings was an allegation of ineffective assistance of post-conviction counsel (*id.*), which is not a cognizable claim in Tennessee. *Stokes v. State*, 146 S.W.3d 56, 60 (Tenn. 2004). He has provided no explanation for his failure to investigate this claim during his federal habeas proceedings. (Resp. App’x, at 28A-29A (pointing only to ineffective assistance of “trial and post-conviction counsel” and noting that his “current counsel” at the Office of the Federal Public Defender interviewed the jurors).) Tennessee is not to blame for the Petitioner’s failure to timely investigate his trial jury so that he could have raised these claims at the appropriate time and place.

Having provided the Petitioner ample opportunity for collateral review of his convictions and sentences, Tennessee should not now be burdened with facilitating this sort of last-minute litigation. “Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “A State’s interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years the significant costs of federal habeas review, . . . the State is entitled to the assurance of finality.” *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Further, “[w]hen lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension” because “[o]nly with an assurance of real finality can the State execute its moral judgment in a case” and “[o]nly with real

finality can the victims of crime move forward knowing the moral judgment will be carried out.”
Id.

The State of Tennessee has a compelling interest in the finality of the Petitioner’s case. The Petitioner has received thorough review at numerous levels of both the federal and state court systems. In fact, the Petitioner has spent three decades challenging his convictions and resulting death sentences. And the family of the three victims in this case—the Petitioner’s estranged wife and her two young sons—has already waited over 30 years for justice. Due process does not require that they wait longer still so that the Petitioner can pursue claims he could have investigated and litigated decades ago.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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