

CAPITAL CASE

No. 20-7930

**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**

PETITIONER'S BRIEF IN REPLY

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

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I. Respondent’s argument that this Court lacks jurisdiction to review the decision of the Tennessee Supreme Court is wholly without merit.

This Court has jurisdiction over federal questions, including questions regarding the requirements of the United States Constitution, even when they arise in the context of a state court adjudication. Nonetheless, Respondent’s first argument in opposition to Mr. Smith’s Petition for Writ of Certiorari (hereinafter, “Petition”) is that this Court is simply without jurisdiction to consider the question presented because the various state courts’ rejections of his juror partiality claims rested on independent and adequate state-law grounds. Brief in Opp. at 7-8. But the basis for his independent and adequate state-law grounds argument is patently flawed. Mr. Smith attempted to vindicate his claims of juror partiality in state court *both* via a variety of state procedural vehicles *and* through the Due Process Clause of the U.S. Constitution, but Respondent expressly concedes that Mr. Smith’s Petition “does not challenge the determination of the state courts” with respect to the state procedural vehicles. *Id.* at 8. This Court is thus left to determine *only* the federal question of what the Due Process Clause requires of the states under these circumstances, making the adequate and independent grounds doctrine wholly inapplicable.¹

¹ Respondent also makes several vague references to the trial court’s finding that the juror issues were previously determined by the Tennessee Supreme Court in its January 15, 2020 order setting Mr. Smith’s first execution date. Brief in Opp. at 4-5, 8. He stops short, though, of saying that this Court can simply reject the Petition because the Tennessee Supreme Court has already determined that an evidentiary hearing would be futile in this case due to Tennessee Rule of Evidence 606(b), and for good reason:

Recognizing, then, that the issue presented by Mr. Smith does indeed arise under the U.S. Constitution, Respondent contends that, if a petitioner has a viable federal constitutional claim, but the state provides no procedure through which to pursue the claim, the United States Supreme Court simply lacks jurisdiction to even consider the question of whether the federal constitution bestows upon petitioner some minimum level of protection or process. *See Brief in Opp.* at 8. Both the rationale and the consequences of such an argument are troubling: if followed, this Court would no longer be the supreme and final arbiter of the contours of the federal constitution. Rather, the federal constitution would require only what each state says that it does. That can't be right if this Court is indeed "supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *c.f.*, *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (federal courts may intervene in state judicial proceedings "to correct wrongs of constitutional dimension"); *Chandler v. Florida*, 449 U.S. 560,

The Tennessee Supreme Court's January 2020 Order simply states: "Not only does Tennessee Rule of Evidence 606(b) prohibit the testimony of jurors about the jury's deliberations but the jurisdiction of this Court is appellate only." *Brief in Opp.* App. A at 1A. Although the trial court construed this statement as a finding that the State's high court had determined the declarations to be inadmissible, *see Brief in Opp.* App. B, the Tennessee Court of Criminal Appeals disagreed. It instead noted that Tenn. R. Evid. 606(b) does not prohibit a juror from testifying about matters such as their failure to disclose relevant and potentially prejudicial information or the disclosure of extraneous prejudicial information during deliberations, although testimony regarding the "effect" of the improper information on the jurors is not permitted. *Cert. Petition App.* B at 9A. Because Tennessee law is clear on the exceptions and contours of its version of Rule 606(b), Respondent unsurprisingly did not challenge this finding in its response to Mr. Smith's application for permission to appeal to the Tennessee Supreme Court.

570, 582 (1981) (noting that this Court may indeed intervene when “state action infringes upon fundamental guarantees” of the U.S. Constitution); *Chapman v. California*, 386 U.S. 18, 21 (1967) (“Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.”); *Angel v. Bullington*, 330 U.S. 183, 188 (1947). “With faithfulness to the constitutional union of the States, [this Court] cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.” *Chapman*, 386 U.S. at 21.

Mr. Smith has asked this Court to consider whether Tennessee has deprived him of minimal protections under the Due Process Clause of the federal constitution. There can simply be no reasonable disagreement that this Court has authority not only to review questions of whether a state has curtailed a fundamental guarantee of the U.S. Constitution, but also to require states to correct processes and procedures that are inconsistent with constitutional imperatives.

II. Respondent does not dispute the vast majority of the factual and legal arguments set forth in Mr. Smith’s Petition.

What Respondent has *not* said is, perhaps, more telling than that which he has made explicit. Thus, before addressing Respondent’s delineated arguments as to why Mr. Smith’s Petition should not be granted, it is important to take note of that which may now be deemed undisputed.

1. Respondent does not dispute that a criminal defendant has constitutional rights to trial by an impartial jury, to be confronted with witnesses against him, and to compulsory process.
2. Respondent does not dispute that the above-listed constitutional rights apply with more force in a death-penalty case.
3. Respondent does not dispute that Mr. Smith has set forth not one but several, credible, substantial, and disturbing claims of juror partiality, including acts of deception, explicit bias, introduction of external information to and influence upon his capital jurors.
4. Respondent does not dispute that claims such as these are structural in nature, thus implicating the fundamental fairness and integrity of the criminal proceeding and undermining his convictions and death sentence.
5. Respondent does not dispute that this Court has determined that the appropriate remedy for colorable allegations of juror partiality is a hearing in which defendant is given a meaningful opportunity to prove that his jury was tainted by the bias, misconduct, and external influence.
6. Respondent does not dispute that numerous federal courts have found that the Due Process Clause requires an evidentiary hearing on such claims, even when significant time has lapsed since the trial, and as such, that the denial of the opportunity to prove prejudice is itself a violation of the Due Process Clause.

7. Respondent does not dispute that this case presents an important federal question that this Court has not decided on the precise factual premise as the present matter, making certiorari appropriate.

III. Respondent’s remaining arguments skirt the edges of the question presented by Mr. Smith and have minimal relevance to the issue before this Court.

What Respondent has offered instead is a series of tangential arguments that duck and sidestep the core constitutional query posed by Mr. Smith’s Petition, and which suggests a belief by Respondent that, once direct appeal is complete, a person sentenced to death by a state enjoys no protections under the U.S. Constitution. These dangerous contentions, much like Respondent’s argument regarding this Court’s jurisdiction to even consider this Petition, should be firmly and squarely rejected.

First, Respondent argues that there can be no merit to Mr. Smith’s due process challenge because states simply have no obligation to provide any proceedings for collateral review. Brief in Opp. at 9. In support, Respondent relies primarily on *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), asserting that “none of the cases [Mr. Smith] cites for the proposition that a hearing is constitutionally compelled … purported to overturn *Finley*[.]” Brief in Opp. at 9. However, the holding of *Finley* was that neither the Due Process Clause nor the Equal Protection Clause of the U.S. Constitution required that counsel for a petitioner pursuing postconviction relief comport with the standard from *Anders v. California*, 386 U.S. 738 (1967). Because *Finley* is factually and legally inapposite to the issues in Mr.

Smith's Petition, the fact that Mr. Smith cited no cases purporting to overturn it is neither surprising nor consequential.²

More to the point, while homing in on that which states are *not* obligated to do, Respondent wholly ignores that to which the states *are* obligated. Once a state *does* provide avenues for postconviction relief—and each state has, in fact, so provided³—its procedures must comport with principles of fundamental fairness and are subject to due process protections. *See, e.g., Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69-70 (2009); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 293 n.3 (1998) (Stevens, J., concurring) (“Indeed, *Finley* itself asked whether the State’s postconviction proceedings comported with the fundamental fairness mandated by the Due Process Clause.”) (internal quotation marks omitted). This is because the Due Process Clause safeguards “the fundamental elements of fairness in a criminal trial,” and *not* “the meticulous observance of state procedural prescriptions.” *Rivera v. Illinois*, 556 U.S. 148, 158 (2009).

Respondent also touts the various opportunities that Mr. Smith allegedly had to present these allegations and claims, each of which was undisputedly available to

² That *Finley* is inapposite in the instant case is all the more clear when one considers that it did not purport to overturn the line of precedent regarding evidentiary hearings for colorable claims of juror partiality, which all predated it. *See, e.g., Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227 (1954); *Dennis v. United States*, 339 U.S. 162 (1950); *c.f., McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). Indeed, why would the *Finley* Court have so ruled when that case involved neither juror bias and misconduct nor the denial of an evidentiary hearing on a colorable and substantial constitutional claim?

³ *See* Larry W. Yackle, Postconviction Remedies §§ 1, 13 (1981 and Supp. 2000).

him years *before* these jurors provided their declarations. Brief in Opp. at 9-10. It is, however, axiomatic that one cannot attempt to vindicate a violation of constitutional rights of which he is wholly unaware.

Respondent then faults Mr. Smith for failing to provide “explanation” for that which the State casts as his various “failures,” Brief in Opp. at 10, but this too proves Mr. Smith’s point: the appropriate forum to elucidate on facts, actions, inactions, and knowledge of various individuals relevant to these claims—i.e., Mr. Smith, his trial, appellate, and postconviction attorneys in his state court proceedings, and the jurors themselves—is an evidentiary hearing. The U.S. Constitution does not (and should not) permit the execution of a person who has presented multiple credible claims that his capital jury was infected by bias and misconduct without at least providing a minimally adequate forum to hear such claims. Ultimately, Respondent hides behind the cloak of state procedure and technicalities to avoid engaging with the fundamental constitutional issue in this case because there can be no reasonable dispute as to either the disturbing nature of the multiple allegations of juror partiality or the fact that an evidentiary hearing is the appropriate method for resolving such claims.

Respondent finally makes a plea for this Court to reject Mr. Smith’s Petition because the State is not “to blame” for his current lack of an available avenue through which to vindicate these claims and thus should be not be “burdened” with

this litigation.⁴ Brief in Opp. at 10-11. In other words, Respondent maintains that, regardless of the import of the constitutional violation at issue or the severity of the stakes for a capital claimant, the principle of finality should always win the day. However, Respondent notably fails to confront the numerous cases cited in the Petition wherein evidentiary hearings, or even new penalty-phase hearings, have been ordered years or decades after conviction based on just *one* claim like those presented by Mr. Smith. *See* Cert. Petition at 23-24. Of course, a ruling on behalf of Mr. Smith would “surely impose a cost” upon the State, *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020), as a cost surely inured in each case where new proceedings were ordered years after conviction. The state’s burden is one factor to consider but is certainly not dispositive; after all, “[t]he Constitution demands more than the continued use of flawed criminal procedures—all because the Court fears the consequences of changing course.” *Id.* at 1410 (Sotomayor, J., concurring). This consideration is all the more crucial in a case such as this one, where the “burden” the state invokes is a minimal one. This Court should, once and for all, disabuse the State of the notion that the concept of “finality” is its ace-in-the-hole, the incantation of which will immediately cut off any reasonable discussion or debate

⁴ It is also disingenuous for Respondent to characterize this litigation as “last-minute.” *See* Brief. in Opp. at 10. The record reflects that Mr. Smith acted promptly upon receiving the facts that created the legal bases for his juror partiality claims, presenting them in state court less than a month after obtaining the declarations, and filing his Omnibus Motion approximately two months later. *See* Cert. Petition at 4-11. Additionally, as Mr. Smith does not currently have an execution date pending, there is nothing “last minute” about Mr. Smith’s attempt to have this Court consider his constitutional questions.

regarding the requirements of the U.S. Constitution. It should instead reaffirm its longstanding body of precedent that, when appropriate, the principle of finality “must yield to the imperative of correcting a fundamentally unjust result[.]” *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *see O’Neal v. McAninch*, 513 U.S. 432, 442–43 (1995).

The resolution of juror partiality claims is rarely, if ever, “clear cut.” *United States v. Martinez-Salazar*, 528 U.S. 304, 319 (2000) (Scalia, J., concurring). In this case, however, the claims of partiality are straightforward and undisputed, as Respondent has failed to challenge the merits of Mr. Smith’s numerous, colorable, disturbing instances of bias and misconduct by his capital jurors. His claims—individually, but especially collectively—are of a character “so extreme that, almost by definition, the jury trial right has been abridged[.]” *See Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014). The only reason that they remain unresolved is due to a procedural void in Tennessee that leaves Mr. Smith without recourse for obtaining what the federal constitution promises: an evidentiary hearing at which he can prove actual partiality. *See, e.g., Phillips*, 455 U.S. at 215; *Remmer*, 347 U.S. at 230; *Dennis*, 339 U.S. at 171–72. Because the usual safeguards of the trial process and state corrective process have been insufficient to protect Mr. Smith’s rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, this Court “must not wholly disregard [the] occurrence” of these constitutional violations. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017). As such, this Court should grant Mr. Smith’s petition for certiorari, and clarify that a state court infringes upon a

fundamental guarantee of the federal constitution when it deprives a death-sentenced prisoner of any of process to prove substantial and colorable claims of juror partiality whose factual predicates do not surface within one-year of conviction.

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 this Reply was sent via Federal Express to the U.S. Supreme Court and via U.S. Mail to Zachary T. Hinkle, counsel for the Respondent, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37243, on June 10, 2021.



Amy D. Harwell