IN THE
SUPREME COURT OF THE UNITED STATES

No. 19-_____

In re: LEE HALL, *Petitioner*

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX

THIS IS A CAPITAL CASE
EXECUTION SET FOR DECEMBER 5, 2019, at 7:00 PM (CST)

STEPHEN A. FERRELL*
Asst. Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
Phone: (865) 637-7979
Fax: (865) 637-7999
Stephen_Ferrell@fd.org
*Counsel of Record

KELLY A. GLEASON
Assistant Post-Conviction Defender
404 James Robertson Parkway, #1100
P.O. Box 198068
Nashville, TN 37219-1523
Phone: (615) 741-9331
Fax: (615) 741-9430
GleasonK@tnpcdo.net

Index of Appendices

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION 3

LEE HALL,	)	Case No. _____
	)	Trial Case Nos. 188000 and 188001
Petitioner,	)	P-C Case No. 222931
	)	
v.	)	
	)	Writ of Error Coram Nobis
STATE OF TENNESSEE	)	(CAPITAL CASE)
	)	
Respondent.	)	Execution Set for Dec. 5, 2019

Petition for Writ of Error Coram Nobis Relief and Request for Evidentiary Hearing

Petitioner Lee Hall[1] respectfully requests that this Court grant a writ of error coram nobis pursuant to Tennessee Code Annotated § 40–26–105; the common law writ of error coram nobis; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, §§ 8, 9, 16, 17, and 32 of the Tennessee Constitution; Article XI, §§ 8 and 16 of the Tennessee Constitution; and his rights to due process and a full and fair hearing on claims of constitutional violations. Petitioner moves for this Court to set the case for further proceedings, including an evidentiary hearing, and to enter an order vacating Mr. Hall's convictions and death sentence.

[1] Mr. Hall's legal name was changed from "Leroy Hall, Jr." to "Lee Hall," pursuant to an order entered by the Davidson County Chancery Court on May 6, 1994. Further, the Tennessee Supreme Court granted Petitioner's unopposed motion to change the style of this case to reflect his legal name change from "Leroy Hall, Jr." to "Lee Hall." *See* Order, *State v. Hall*, No. E1997-00344-SC-DDT-DD (filed March 11, 2014). Accordingly, he proceeds under that name.

I. INTRODUCTION

The basis for this petition is newly discovered evidence that Mr. Hall's 1992 trial was compromised by a structural constitutional defect—the service of a juror who admits bias toward and hatred of Mr. Hall at the time she sat in judgment and delivered a guilty verdict and death sentence upon him. The juror, "Juror A,"[2] who served in this trial involving allegations of domestic violence by Mr. Hall escalating to the murder of his estranged girlfriend, Traci Crozier, was herself the victim of severe domestic violence, including rape, which culminated in her abusive husband's suicide. Juror A failed to disclose her traumatic experiences when completing her jury questionnaire and in answering questions during voir dire. She finally came forward regarding her life experiences only three weeks ago and revealed that her own victimization biased her against Mr. Hall.

Juror A's service on Mr. Hall's capital jury is the greatest magnitude of constitutional violation—a structural error—which requires that Mr. Hall's convictions and sentence be vacated. *See Faulkner v. State*, W2012–00612–CCA–R3–PD, 2014 WL 4267460 (Tenn. Crim. App. August 29, 2014) (service of a juror who was the victim of domestic violence, but failed to disclose this on her

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[2] The juror's name is withheld due to the sensitive nature of her disclosures. The following documents containing identifying information have been provided to the District Attorney General on October 11 and 16, 2019, and will be submitted for filing under seal: Sealed Exhibit 1, *October 7, 2019 Declaration of Juror A* (disclosing her history of domestic violence); Sealed Exhibit 2, *October 10, 2019 Affidavit of Jeffery Vittatoe* (regarding his conversations with Juror A); Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A.*

In support of this Petition, Mr. Hall also attaches the following appendices: Appendix 1, *Tennessee Supreme Court record on direct appeal* (provided on compact disc); Appendix 2, June 23, 2015 *Order granting Defendants Motion for Mistrial, State of Tennessee v. Cory L. Batey and Brandon R. Vandenburg* (Davidson County Criminal Court no. 2013-C-2199).

questionnaire and at trial, denied the accused on trial the right to a fair and impartial jury; the denial of that right is a structural error requiring "automatic reversal"). In fact, this is the rare case where the juror actually admits her bias against the defendant. *See State v. Smith*, 357 S.W.3d 322, 345 (Tenn. 2013) ("Rare is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact.") (citing *State v. Green,* 783 S.W.2d 548, 553 (Tenn. 1990)).

The facts underlying this claim existed at the time of trial, although unknown at that time, are credible, and would have been admissible had they come to light at any time during the trial or on motion for a new trial. Indeed, a court is empowered at any point of trial or in a motion for new trial to investigate and take action if it appears that any member of the jury has compromised the process. *See, e.g., State v. Smith*, 418 S.W.3d 38 (Tenn. 2013) (when juror error is discovered, it is within the court's power and authority to launch a full-scale investigation with a view of getting to the bottom of the matter, even upon the judge's own motion); *State v. Akins*, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993) (propter affectum challenges, those made "on account of prejudice," may be made after verdict and, thus, when a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may be made in a motion for new trial).

This newly discovered evidence could not have been discovered sooner with the exercise of reasonable diligence because Juror A was traumatized by the events in her first marriage and did not openly discuss her personal experiences with

domestic violence and rape until very recently. Even now, she still has not disclosed them to family members, hence Petitioner's request to file relevant documents under seal.

II. PROCEDURAL HISTORY

Lee Hall was tried on charges of first-degree murder and aggravated arson in the death of his estranged girlfriend, Traci Crozier, in March of 1992. Hamilton County Case Nos. 188000 and 188001. Potential jurors completed jury questionnaires and were asked questions regarding domestic violence and crime victimization as part of the process of selection. *See* Section III, *infra*. The jurors selected to serve convicted Mr. Hall of arson and first-degree murder and sentenced him to death.

The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed Mr. Hall's convictions and sentence on direct appeal. *State v. Hall*, No. 03C01–9303–CR–00065, 1996 WL 740822 (Tenn. Crim. App. December 30, 1996); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). A Petition for Writ of Certiorari was filed in the Supreme Court of the United States and denied on June 22, 1998. *Hall v. Tennessee*, 118 S.Ct. 2348 (1998).

On August 17, 1998, Mr. Hall filed a *pro se* petition for post-conviction relief that was subsequently amended. After holding an evidentiary hearing, the post-conviction court issued an order denying relief on January 26, 2004. PC TR Vol. 1, 111–28 (order was entered on March 4, 2004, nunc pro tunc for January 26, 2004). The Tennessee Court of Criminal Appeals subsequently affirmed the denial of relief.

Hall v. State, No. E2004–01635–CCA–R3–PD, 2005 WL 2008176 (Tenn. Crim. App. August 22, 2005). Federal habeas proceedings were disposed and dismissed by order entered September 22, 2011, in the United States District Court for the Eastern District of Tennessee. *Hall v. Bell,* No. 2:06-cv-00056.

Lee Hall is scheduled to be executed on December 5, 2019. *See* Order, *State v. Hall*, E1997–00344–SC–DDT–DD (filed Nov. 16, 2016).

III. FACTS REGARDING THE NEWLY DISCOVERED EVIDENCE

Juror A dated a man who would later become her first husband when she was in high school in the late 1960's. Sealed Exhibit 1, *October 7, 2019 Declaration of Juror* A, 1. Before she left for college, he forced himself on her. Juror A recalls: "I tried to fight him off, but he raped me. The rape resulted in a pregnancy. I ended up coming back home and marrying him." *Id.* After becoming pregnant due to the rape, Juror A married her first husband in 1969. *Id.* He was "a very abusive husband." *Id.* She remembers that he "was the worst when he was drunk. He would get very mean and hateful toward me." *Id.* "He would push me, throw things at me." *Id.* Juror A's husband continued to forcefully rape her after marriage. *Id.* She "would seek shelter at his grandmother's house but didn't tell [her] parents." *Id.* Juror A was married to her abusive husband until 1975 and they had a son from the pregnancy which resulted from the first rape. *Id.*, 1, 2.

In 1975, Juror A finally called her father for help during an especially violent attack by her husband. *Id.*, 2. In her declaration, Juror A recalls: "My husband beat me severely—punching me with his closed fist. It was our anniversary. Our son was

already at my parents' house. My dad came and got me and [my husband] left. I later learned that he had thought that he had killed me." *Id.* Her husband traveled to Florida, but came back, and they continued to live together for less than a month. *Id.* Juror A said that when he came back: "He was mentally absent and mostly just sat there. He didn't talk. Before that, he was very paranoid; always thinking people were out to get him." *Id.* Within a couple of weeks of her husband's return from Florida, Juror A, her husband, and son went to her parents' house for Christmas Day. *Id.* There, she said, "[Her husband] took one of the shotguns at my parents' house and shot himself and killed himself." *Id.*

Of her first marriage, Juror A, says "What I went through with [my husband] was extremely difficult. I didn't talk to others about the abuse and the rapes." *Id.*, 3. Juror A was remarried and her second husband died in 2007. *Id.* She never even told her second husband about the violence in her first marriage. *Id.* It was only after going through therapy between 2007 and 2009 to help with the grieving process after her second husband's death, that she "finally started to feel more comfortable to talk about it with those close to [her]." *Id.* Further, "[i]t [was] not until very recently that [she] started to share with those beyond [her] close circle. However, [her] family members still don't know, and neither does [her] son." *Id.*

In 1992, Juror A received a summons to appear as a potential juror in the case of *State v. Hall.* The State sought convictions for felony murder, premeditated murder, and aggravated arson and also pursued imposition of death by electrocution upon Mr. Hall. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). Juror A

filled out a questionnaire that was provided to all the potential jurors to assist the parties in selecting an impartial jury. *See* Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A.* The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." *Id.*, Question 39. Juror A handwrote the answer "NO." *Id.* Question 41 asked: "Have you or any member of your family had occasion to call the police concerning any problem, domestic or criminal?" *Id.* Juror A checked the option of "NO." *Id.*

During the group voir dire, the potential jurors were brought into the courtroom and told that questions would be primarily directed to those jurors in the jury box and in front of the jury box, but also applied to all potential jurors in the room. They were told that if anything private arose it could be addressed outside the presence of other jurors. Trial Vol. 5 at 608 (court addressing entire panel before group voir dire) ("[I]t may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors."); *see also* Trial Vol. 5 at 609 ("[P]lease listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you . . . . So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.").

Following the court's introductory comments to the potential jurors, defense attorney William Heck, while Juror A was present in the courtroom, asked a panel

in the jury box whether any of them had any experience with domestic violence and none of the jurors answered in the affirmative. Trial Vol. 5 at 673–74. Juror A, upon entering the jury box, was specifically asked by the court whether she had heard all of the questions asked earlier of the panel. *See* Trial Vol. 5 at 720 ("[D]id you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?"); Trial Vol. 5 at 731–32 ("Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things?"). Juror A never disclosed her experiences with domestic violence in her first marriage. *Id.* at 720–40.

On September 26, 2019, and again on October 7, 2019, Juror A was interviewed by members of the Office of the Post-Conviction Defender. Sealed Exhibit 2, *October 10, 2019 Affidavit of Jeffery Vittatoe*. During these interviews, Juror A shared her experiences from her first marriage and how they affected her during Mr. Hall's trial. *Id.* She discussed how much Mr. Hall and his trial reminded her of what she went through:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [Her husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [Her husband] was such a bad drunk that he would leave our son in a car while he'd go drinking at

> his friend's house. In fact, I called police on him once when he was drunk driving.

Sealed Ex. 1, 2. Serving as a juror and hearing the proof in Mr. Hall's case took Juror A back, emotionally, to the time of her first marriage:

> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Id., 2–3.

IV. REQUIREMENTS FOR ISSUANCE OF A WRIT OF CORAM NOBIS

The writ of error coram nobis is a mechanism by which a petitioner asks to set aside a judgment of conviction by bringing before the trial court subsequently or newly discovered evidence which was not available at the time of trial, and which may have resulted in a different outcome had it been presented at trial. *See* Tenn. Code Ann. § 40–26–105(b). In addition, the error coram nobis remedy is also available where evidence is "not newly discovered evidence in the usual sense of the term, [but where] the availability of the evidence is newly discovered." *Payne v. State*, 493 S.W.3d 478, 486 (Tenn. 2016) (citing *Harris*, 301 S.W.3d at 152 (Koch, J., concurring)). This exception arises when previously unavailable evidence becomes available following a change in *factual* circumstances. *Id.* (emphasis original).

The writ is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999). The "purpose of this remedy 'is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment.'" *State v.*

Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting *State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (Tenn. 1966)).

Recently, the Tennessee Supreme Court examined the pleading requirements for a motion or petition for writ of error coram nobis and set forth the following:

> The motion or petition must be in writing and 1) must describe with particularity the nature and substance of the newly discovered evidence and (2) must demonstrate that this evidence qualifies as "newly discovered evidence." In order to be considered "newly discovered evidence," the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. In addition to describing the form and substance of the evidence and demonstrating that it qualifies as "newly discovered evidence," the prisoner must also demonstrate with particularity (3) why the newly discovered evidence could not have been discovered in a more timely manner with the exercise of reasonable diligence; and (4) how the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment.

Nunley v. State, 552 S.W.3d 800, 823 (Tenn. 2018) (quoting with approval Justice Koch's concurring opinion in *Harris v. State*, 301 S.W.3d 141, 150 (Tenn. 2010)) (footnotes and citations omitted).

After the Tennessee Supreme Court's holding in *Nunley*, the Court of Criminal Appeals recently examined the grounds available to a petitioner seeking coram nobis relief:

> Unlike the grounds for reopening a post-conviction petition, the grounds for seeking a petition for writ of error coram nobis ***are not limited to specific categories***. *See Harris v. State*, 102 S.W.3d 587, 592 (Tenn. 2003), *overruled on other grounds by Nunley*, 552 S.W.3d at 828. "Coram nobis claims may be based upon any 'newly discovered evidence relating to matters litigated at the trial' so long as the petitioner establishes that he or she was 'without fault' in failing to present the evidence at the proper time." *Harris*, 102 S.W.3d at 592–93. Coram nobis claims are "singularly fact-intensive," are not easily resolved on the face of the petition, and often require a hearing. *Id.* at 593.

Wilson v. State, No. M2018–01109–CCA–R3–ECN, 2019 WL 3494153, at *6 (Tenn. Crim. App. Aug. 1, 2019) (emphasis added).

V. ARGUMENT

As demonstrated below, Juror A, a victim of domestic violence, sat on this capital murder trial and heard evidence strikingly similar to her past abuse. Juror A revealed to Mr. Hall's legal team, less than three weeks ago, that she was raped and otherwise severely physically and emotionally abused by her husband. At the time of the trial, Juror A was specifically asked on a questionnaire and during voir dire whether she was a victim of a crime or of domestic violence, and each time she denied it or remained silent.

Alone, Juror A's failure to disclose this material information is sufficient to show presumed bias pursuant to well-established Tennessee law. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011). In *Smith*, a capital post-conviction case, the Court held:

> In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality....'" *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing *Akins*, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." *Akins*, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 356 (footnotes omitted).

Id. See also Faulkner v. State, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014)[3] (hereinafter "*Faulkner*"); *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012)).

Moreover, Juror A *concedes that she was actually biased* against Mr. Hall at the time of the trial and in fact hated him because he reminded her of her abusive husband. Juror A's affirmative misrepresentations rendered Mr. Hall's capital murder trial fundamentally unfair. The biased juror's presence on Mr. Hall's jury constitutes structural error and warrants reversal of conviction and his death sentence.

A. Mr. Hall's trial was infected with a biased juror, which constitutes structural error.

Juror A's participation in Mr. Hall's capital murder trial violated his constitutional right to a fair and impartial jury. "The right to a jury that is fair and impartial is fundamental, and the denial of that right cannot be treated as harmless error." *Faulkner* at *81 (citations omitted). "Such errors are structural constitutional errors that compromise the integrity of the judicial process." *Id.* (citations omitted). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence . . . and are subject to automatic reversal because they deprive a defendant of a right to a fair trial." *Id.* (citations omitted).

[3] Mr. Faulkner was on trial for the murder of his wife. The State presented Mr. Faulkner's prior convictions for second degree murder, assault with intent to commit robbery, and assault with intent to commit voluntary manslaughter, and four prior robbery convictions in support of an aggravating circumstance. *Faulkner* at *98.

In *Faulkner*, the Court of Criminal Appeals reiterated that "[o]ur system of justice cannot tolerate a trial with a tainted juror, regardless of the strength of the evidence against the defendant." *Id.*, at *81–82. The Court found that the service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused on trial for the murder of his domestic partner the right to a fair and impartial juror and that the denial of that right was a structural error requiring "automatic reversal."

The *Faulkner* holding is deeply rooted in rights embedded in the federal and state constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Jurors "who have had life experiences or associations which have swayed them 'in response to those natural and human instincts common to mankind,' interfere with the underpinnings of our justice system." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Durham v. State*, 182 Tenn. 577, 188

S.W.2d 555, 559 (1945)). "[P]otential bias arises if a juror has been involved in a crime or incident similar to the one on trial." *Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011). The Tennessee Supreme Court has recognized that a juror is disqualified "where some bias or partiality is ***either*** actually shown to exist ***or*** is presumed to exist from circumstances." *State v. Hugueley*, 185 S.W.3d 356, 378 (Tenn. 2006) (emphasis added).[4] The Tennessee Supreme Court has instructed that a presumption of bias arises where a juror purposefully conceals or fails to disclose in response re to a material question, information relevant to juror's impartiality. *Smith,* 357 S.W.3d at 347–48.

In *Faulkner*, a capital post-conviction case involving domestic violence, the petitioner discovered that a juror, the foreperson, failed to disclose her history of domestic abuse. The *Faulkner* juror "answered 'no' when the questionnaire asked if she or anyone she knew had been a victim of violence." *Faulkner* at *77. During voir dire when asked whether she had any prior experience with domestic violence the juror "did not respond." *Id.* The Court of Criminal Appeals found that the juror's failure to disclose the information about her history of domestic abuse, in a case

[4] In *Hyatt v. State*, 430 S.W.2d 129 (Tenn. 1967), the Tennessee Supreme Court presumed bias under circumstances which arose through no fault of anyone involved. In that case, the court acknowledged that "[t]his is a case where unexpected events have arisen without fault on the part of anyone. The record reflects the trial judge, prosecutor and defense counsel made diligent efforts to secure a fair and impartial jury." *Id.* at 647. Further, the Court noted that failure to discover the facts regarding Juror Johnson prior to the verdict was not due to any lack of diligence on the part of counsel. "Even so the presence of Juror Johnson on this jury raises a reasonable doubt in our minds as to whether these defendants have been tried by a fair and impartial jury." *Id.* The court found: "Where the jury or a juror has prejudged the case, and the knowledge of his bias or prejudice is unknown until after the verdict, the courts say it must be presumed that his prejudices enter into and become a part of the result, and for that reason the verdict should be set aside. *Id.* (quoting from *McGoldrick v. State*, 159 Tenn. 667, 21 S.W.2d 390 (1929)).

involving domestic violence, created a presumption that the juror was biased against the petitioner. *Id.* at *78.[5]

The *Faulkner* court held this presumption of bias could not be overcome by the juror's post-conviction testimony that she based her verdict solely on the facts of the case and the law. *Id.* at *78. Such statements constituted improper evidence of a jury's internal deliberative process. *Id.* Further, the juror's repeated failure to disclose the information in response to direct questions and the obvious parallels between her own experience and the facts of the case, weighed against rebuttal of prejudice. *Id.* at *79–80. The court found that the juror was biased and her service on Mr. Faulkner's jury resulted in a structural error, warranting reversal of his conviction. *Id.* at *80–81.

The holding in *Faulkner* applies to the facts here. Like Mr. Faulkner's juror, Juror A responded untruthfully on her questionnaire to questions related to domestic violence. The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." Sealed

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[5] Other courts have recognized a presumed bias where a juror has been a victim of a crime or has experienced a situation similar to the one at issue in the trial. *See State v. Pamplin*, 138 S.W.3d 283 (Tenn. Crim. App. 2003) (juror who was a law enforcement officer possessed a "professional relationship and interest in the case [that] was entirely too close to" that of witnesses in the case and, given that "the nature of the case involved an assault upon a law enforcement officer," a presumption of prejudice was warranted; case reversed and remanded due to failure to dismiss the challenged juror for cause); *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (implying bias where several jurors were victims of a burglary that "placed the jurors in the shoes of the victim just before she was murdered" since the circumstances were "profoundly similar" to that of the murder case they were trying); *State v. LaRue*, 722 P.2d 1039, 1042 (Hawaii 1986) (victim of child abuse could not be impartial in a case involving sexual abuse of a minor); *Jackson v. United States*, 395 F.2d 615, 617–18 (D.C. Cir. 1968) (court considered juror presumptively biased because he had been a participant in a "love-triangle" analogous to the one at issue in trial); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3d Cir.1957) (en banc) (court imputed bias to juror in a robbery case because juror was victim of a robbery prior to trial).

Ex. 3, Question 39. Juror A responded "NO." *Id.* However, Juror A now admits that her son was the product of rape by the man she later married; that her abusive partner continued to rape her during their marriage; and that on at least one occasion, he beat her so severely that she was forced to call her father and flee the house. Sealed Ex. 1, 2. The incident was so violent that her abusive husband fled the state, thinking that he had killed her. *Id.* In addition, Juror A also answered "no" to a question of whether she or a family member ever had occasion to call the police concerning domestic or criminal problems. Sealed Ex. 3, Question 41. However, Juror A had previously at least once called the police when her husband—who was often drinking when caring for their son—was driving drunk. Sealed Ex. 1, 2.

Like the juror in *Faulkner*, Juror A remained silent when questioned regarding her history of domestic violence during voir dire. In the instant case, the prospective jurors were questioned collectively after two days of individual voir dire. The court, the state, and the defense made clear to all prospective jurors that any questions addressed to the jurors in the box applied to the entire panel:

> Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. **If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days.** And, as we said earlier, ladies and gentlemen, it's not an attempt in any way to embarrass you, to delve into your personal lives, **but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentlemen, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of this case.** If there is a question that's asked of you and you would like to respond, but you

> feel that the question — **it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand**, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving sexual assault or sometimes in homicide cases. So please let the Court know.

Trial Vol. 5 at 608 (Court addressing entire panel before group voir dire).

> Also, I'm going to ask you—the questions this will be directed primarily to those of you seated in the jury box and in front of the jury box, **but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you**, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

Trial Vol. 5 at 609 (same). Shortly thereafter, the Court again addressed the jurors: "Since you're all here, we may be able to do this one time." Trial Vol. 5 at 616. (Court addressing the entire panel before reading witness names). Shortly thereafter, defense counsel William Heck asked the following question:

> Now, another thing that I need to ask about—and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentlemen here. One of the things that I'm curious about—and if there is something in your background or someone close to you in that background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. That has to do with domestic violence. **Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict?** If there's anyone like that, please let me know by just showing a hand and we can talk about that at some other time. Okay

Trial Vol. 5 at 673–74.

Once Juror A was in the box, she failed to answer material questions related to her past.

> BY THE COURT: Q: Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?

Trial Vol. 5 at 720 (Juror A in box).

> BY THE COURT: Q: Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things? Do you know any reason why you cannot listen to the evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

Trial Vol. 5 at 731–32 (Juror A in box).

Just as in *Faulkner,* Juror A's failure to disclose this crucially significant information, despite being given multiple opportunities to do so, gives rise to a presumption of bias. *Faulkner* at *77 (citing *Akins*, 867 S.W.2d at 354). Further, it is difficult to imagine how this presumption could be rebutted, given Juror A's statements that Lee Hall reminded her of her abusive husband and that she hated Mr. Hall at the time of the trial:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [My first husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [He] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.
>
> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated

> Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Sealed Ex. 1, 2.

In finding Faulkner's constitutional rights to a fair and impartial jury were violated by the juror's failure to disclose material life events giving rise to potential bias, the court examined the parallels between the victim and the juror. *Faulkner* at *80 (examining specific similarities between past experiences of juror and victim). Like in *Faulkner*, Juror A's identification with Ms. Crozier was inevitable given the similarities between the proof in the case Juror A adjudicated and the specific details of her life experience that she failed to disclose. Juror A had a difficult, traumatic marriage with her first husband. *See* Sealed Ex. 1. During Mr. Hall's trial, Juror A heard "evidence that the defendant and the victim had a troubled relationship . . . ." *State v. Hall*, 958 S.W.2d 679, 705 (Tenn. 1997). Juror A lived with her husband for six years; Petitioner and Ms. Crozier lived together for five years before she moved out. *See* Sealed Ex. 1, 3; *Hall*, 958 S.W.2d at 683.

In addition, although she failed to disclose it during voir dire when asked, *see* Trial Vol. 2 at 643–44 (group voir dire), Juror A's first husband drank and was a "mean drunk." Sealed Ex. 1, 2. At trial, Juror A heard that, like her first husband, Lee Hall, drank to excess and was capable of violence when that intoxicated:

(1) drank excessively and was drunk on the night of the offense, 958 S.W.2d at 685;

(2) drank over a case of beer in total that night. *id*;

(3) "was intoxicated and unable to drive" on the night of the offense, Trial Vol. 8 at 1032–34 (testimony of acquaintance of Lee Hall at trial); and that

(4) he was slurring and could not walk well. Trial Vol. 8 at 1032–34.

Both Juror A and Traci Crozier sought refuge from their abusive partners in the homes of family members. Juror A sought shelter at her husband's grandmother's house. Sealed Ex. 1, 1. When Ms. Crozier left Petitioner, she moved in with her grandmother, Gloria Mathis, and her uncle, Chris Mathis. 958 S.W.2d at 683.

The facts in this case are strikingly similar to those in *Faulkner* and establish unquestionable (indeed, admitted) bias on the part of Juror A, and therefore reveal a structural defect in the trial process that must be remedied by "automatic reversal." *See Faulkner* at *81, *103. As the *Faulkner* Court concluded: "Our system of justice cannot tolerate a trial with a tainted juror regardless of the strength of the evidence against the defendant." *Id.* at *81.

B. The facts underlying the structural error are newly discovered and cognizable in a Writ of Error Coram Nobis.

Juror A's recent disclosure of her history of rape and domestic abuse is newly discovered evidence—it is (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. *Nunley,* 552 S.W.3d at 823. The evidence certainly existed at the time of the trial, although was not revealed at the time. In her own words, the juror was "biased" against Mr. Hall *at the time of trial* because she was flooded with memories of her victimization at the hands of her abusive first husband: "I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee." Sealed Ex. 1, 2.

This evidence was not ascertained at the time of the trial because Juror A failed to disclose her victimization history during jury selection, as required by law. *See Faulkner* at *77 (citing to *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012)) (Jurors are obligated to make "full and truthful answers . . . neither falsely stating any fact nor concealing any material matter."). Despite direct questioning by the court, the prosecution, and the defense, Juror A kept secret her history as an abused spouse during jury selection, the stage at which such evidence would have been subjected to the adversarial process as required by the federal and state constitutions.

Had Juror A's actual bias been disclosed in a timely manner it could have been raised during the trial or at a motion for new trial hearing. *See, e.g., State v. Smith*, 418 S.W.3d 38 (Tenn. 2013) (when juror error is discovered, it is within the court's power and authority to launch a full-scale investigation, or even upon the judge's own motion); *State v. Akins*, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993) (challenges regarding juror bias may be made after verdict and, if known, in a motion for new trial); *see also* Appendix 2, *June 23, 2015 Order, granting Defendants' motion for mistrial or, in the alternative, to set aside the verdict,* State of Tennessee v. Cory L. Batey and Brandon R. Vandenburg (*Davidson County Criminal Court no. 2013-C-2199*) (granting mistrial in a rape case based on juror's failure to disclose during voir dire juror's prior involvement as the victim in a statutory rape case).

The evidence from Juror A is credible. She has disclosed the evidence despite the fact that her own son and family have no knowledge that she was raped and otherwise physically and psychologically abused by her first husband. Sealed Ex. 1, 3. Her Declaration is not in any way self-serving, but rather, the opposite. It makes public facts which she clearly would prefer not to share, given her history of keeping it secret for many years.

C. This evidence of juror bias could not have been previously discovered.

Juror A's disclosures constitute newly discovered evidence because, in her own words, "not until very recently," did she share her history as the victim of rape, assault, and psychological abuse by her rapist–husband with people outside of the circle of her closest friends. Sealed Ex. 1, 3. In fact, prior to therapy that concluded in 2009, she was not able to speak to others about the details of her traumatic first marriage. *Id.* Representatives from the Office of the Post-Conviction Defender visited Juror A in 2014, but she did not disclose the evidence at that time.[6] It was only three weeks ago that she told anyone connected to Mr. Hall's trial and appeals that she was subjected to severe domestic violence prior to her service in this capital murder trial and stated that she was actually biased against Mr. Hall. Given the highly sensitive nature of Juror A's experiences and how traumatic it was for her, Mr. Hall was not able to discover this information sooner. It was only once Juror A became comfortable enough with her past that she was willing to disclose the details to Mr. Hall's legal team. Sealed Exhibit 1, 3.

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[6] Juror A was interviewed in 2014 by investigator Larry Gidcomb and attorney Sophia Bernhardt, both former employees of the Office of the Post-Conviction Defender.

D. This newly discovered evidence would have resulted in a new trial.

As discussed in Section A, Juror A's failure to disclose material facts similar to the allegations in Lee Hall's case constitutes structural error, which requires automatic reversal. Indeed, the only significant difference between Mr. Hall's petition for relief and that of Mr. Faulkner is the procedural posture of the case at the time the juror disclosed her history of domestic abuse.

The *Faulkner* Court explained the burden shifting framework with which Tennessee courts examine juror bias: "A presumption of bias arises 'when a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias.'" *Faulkner* at *77 (citing *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993)). Juror A's repeated failures to reveal her past victimhood despite explicit questioning satisfy this test.

Moreover, the facts of the present case are even stronger, because unlike the *Faulkner* juror, Juror A now admits her bias against and hate for Mr. Hall at the time of trial. Sealed Ex. 1, 2. Juror A suffered repeated sexual, physical, and psychological abuse throughout her marriage at the hands of a man who "reminded" her of the defendant whose culpability and punishment she deliberated. *Id.* Juror A twice failed to disclose her experience on the juror questionnaire. Sealed Ex. 3, Questions 38 and 41.

The Tennessee courts have zealously guarded the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantees to the right to a trial by an impartial jury. *See, e.g., State v. Smith*, 418

S.W.3d 38, 44 (Tenn. 2013) ("The right to a trial by jury . . . is a foundational right protected by both the federal and state constitutions.") (footnote omitted); *Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *Faulkner at* *76 ("Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the right to a trial by an impartial jury."); *Rollins*, 2012 WL 3776696 at *14.

"The right to a jury trial envisions that all contested factual issues will be decided by jurors who are unbiased and impartial." *Smith*, 418 S.W.3d at 45 (citations omitted). "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, ..." *Id.* (citing *Durham*, 188 S.W.2d at 558). "Trial courts must ensure the integrity of the jury system by holding jurors accountable to the highest standards of conduct." *Id.* (citation omitted). Mechanisms in our legal process to ensure juror impartiality protect not only "the fairness of the trial itself" but also serve to "promote[ ] and preserve[ ] the public's confidence in the fairness of the system." *Id.* (citations omitted). "Like judges, jurors must be—and must be perceived to be—disinterested and impartial." *Id.* (citation omitted).

"Our courts, both civil and criminal, have long recognized the importance of the voir dire process and have zealously guarded its integrity." *Akins*, 867 S.W.2d at 355 (citations omitted). "Since full knowledge of the facts which might bear upon a juror's qualifications is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make 'full and truthful answers . . . neither

falsely stating any fact nor concealing any material matter.' 47 Am. Jur. 2d, Jury § 208 (1969)." *Id.*

It is imperative in capital cases, like Mr. Hall's, that a defendant's case be adjudicated by a tribunal (jury or judge) unburdened by an appearance of bias. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'").[7] The *Smith* Court reaffirmed the heightened due process inquiry concerning the existence of even subconscious partiality in capital cases, while noting that "[r]are is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact." *Id.* at 345 (citing *State v. Green,* 783 S.W.2d 548, 553 (Tenn. 1990)).

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[7] The *Smith* Court described the heightened due process principles applicable to capital cases as follows:

> We have on numerous occasions recognized "the heightened due process applicable in capital cases" and "the heightened reliability required and the gravity of the ultimate penalty in capital cases." *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994); *see also Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) ("[W]e must be mindful that 'a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment.'") (quoting *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001)); *State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.*") (emphasis in original) (internal quotation marks and citations omitted); *Cooper*, 847 S.W.2d [521] at 531 [(Tenn. Crim. App. 1992)] (reversing death penalty on ineffective assistance grounds; noting "the Supreme Court 'has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

357 S.W.3d at 346 (parallel citations omitted) (emphasis original).

Indeed, Juror A is the rare person, and Lee Hall's is the rare case, in which a juror admits bias in performing her duty as a juror deliberating degree of culpability and punishment. She has done so after decades of suppressing her traumatic early life experience as a victim of domestic violence. While the circumstances of Juror A's life and her journey to disclosing her experience as a victim of severe domestic violence are unique, the legal authority regarding the failure of a capital juror to disclose her experience with domestic violence in completing the jury questionnaire and responding in voir dire could not be clearer. *Faulkner* mandates vacation of Mr. Hall's convictions and sentence.

E. The circumstances of the discovery of newly available evidence require equitable tolling of any statute of limitations.

The statute governing the writ of error coram bis in criminal proceedings coram nobis statute for criminal proceedings does not specifically reference a timeframe for filing. *See* Tenn. Code Ann. § 40–26–105. The statute specifically provides for filing at any time where circumstances prevent earlier filing:

> 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.

Id.[8] The circumstances in this case call for tolling of the statute of limitations, which would have required Mr. Hall to file a petition within one year of the day his

[8] Tennessee Code Annotated § 40–26–105(a) states that the proceedings are "to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith." Tennessee Code Annotated § 27–7–103, governing civil proceedings provides

judgment became final. The information regarding Juror A's history of abuse was not available until late September 2019. *See* Argument section C, *supra*. It could not have been discovered earlier upon the exercise of due diligence because Juror A was traumatized by the events in her first marriage and did not openly discuss her personal experiences with domestic violence and rape until very recently. *Id.* Upon discovery of the newly available evidence, Petitioner expeditiously pursues coram nobis relief.

The Court must weigh the competing interests of the State and Mr. Hall in determining whether to grant equitable tolling. The weight of equities in this case lies in Mr. Hall's favor.

Mr. Hall is scheduled to be executed on December 5. His interest in having this claim of a structural constitutional violation heard by a Tennessee court, despite the statute of limitations, should weigh heavily in the favor of allowing this petition to proceed. As the Tennessee Supreme Court has stated:

> The private interest involved here is the petitioner's opportunity to have a hearing on the grounds of newly discovered evidence which may have resulted in a different verdict if heard by the jury at trial. If the procedural time bar is applied, [the petitioner] will be put to death without being given any opportunity to have the merits of his claim evaluated by a court of this State.

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that a "writ of error coram nobis may be had within one (1) year after the judgment becomes final by petition presented to the judge at chambers or in open court, who may order it to operate as a supersedeas or not." While the writ in criminal cases shall be governed by the same rules and procedures that apply to the writ in civil cases, the civil provisions were replaced in 1971 by the Tennessee Rules of Civil Procedure. The Tennessee Supreme Court in *Nunley*, held that criminal error coram nobis claims are not governed by the Tennessee Rules of Civil Procedure and instead are guided by Tenn. Code Ann. §§ 27–7–101 through –108. 552 S.W.3d 800, 827 (Tenn. 2018)

> Weighing these competing interests in the context of this case, we have no hesitation in concluding that due process precludes application of the statute of limitations to bar consideration of the writ of error coram nobis in this case.

Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001) (tolling statute of limitations in capital error coram nobis nineteen years after conviction). The Court should allow Mr. Hall's error coram nobis claims to proceed despite falling outside of the statute of limitations, through no fault of the Petitioner's.

F. The Due Process, the Eighth Amendment, and Equal Protection provisions in the United States and Tennessee Constitutions require the Court to address this case on the merits and grant relief.

The Court should hear constitutional claims related to newly discovered evidence when no other avenue exists for their presentation.[9] Error coram nobis "survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Wlodarz v. State*, 361 S.W.3d 490, 499 (Tenn. 2012), abrogated by *Frazier v. State*, 495 S.W.3d 246 (Tenn. 2016).[10]

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[9] Mr. Hall has also contemporaneously filed in this court a *Motion to Reopen Post-Conviction Proceedings* and *Second Petition For Post-Conviction Relief* in addition to this pleading. The Tennessee Supreme Court has directed that when multiple procedural vehicles are available for newly discovered evidence, "each claim for relief should be presented and evaluated on a separate track . . . ." *Nunley v. State*, 552 S.W.3d 800, 819–20 (Tenn. 2018):

> In cases in which a petitioner seeks relief via a petition for writ of error coram nobis as well as post-conviction proceedings, both based on newly discovered evidence . . . each claim for relief should be presented and evaluated on a separate track, so to speak—the first in accordance with the coram nobis statutes, and the second for a constitutional Brady violation under a petition for post-conviction relief.

Id. Petitioner asserts that Writ of Error Coram Nobis is the most fitting procedural vehicle for resolution of this biased juror structural error claim.

[10] *Frazier* abrogated *Woldarz's* holding that challenges to a guilty plea are cognizable in petitions for a writ of error coram nobis.

The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan,* 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8.

The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State,* 216 Tenn. 666, 393 S.W.2d 739 (1965). The Tennessee Supreme Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992) (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

The Tennessee Supreme Court has specifically found that application of the strict time bars in Tennessee Code Annotated § 40–30–102 violates the state and federal constitutional rights to due process under certain circumstances.[11] *See*

[11] "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Whitehead v. State*, 402 S.W.3d 615, 622 (Tenn. 2013).

Burford v. State, 845 S.W.2d 204 (Tenn. 1992) (non-capital case tolling the statute of limitations for post-conviction relief; due process requires that a post-conviction petitioner be afforded an opportunity to seek this relief "at a meaningful time and in a meaningful manner," and circumstances precluded petitioner from doing so during the three-year post-conviction statute of limitations); *Seals v. State,* 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Whitehead v. State,* 402 S.W.3d 615, 622 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). The *Whitehead* court noted that "the pervasive theme" in all tolling cases "is that circumstances beyond a petitioner's control prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations." 402 S.W.3d at 625 (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011)).

The Court in *Whitehead*, as was done in earlier due process tolling cases, weighed the competing rights at stake in determining whether due process barred strict application of the statute of limitation. In the post-conviction context, "the private interest at stake is 'a prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process.'" 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). "The government's interest is 'the interest in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually

allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* "The remainder of the analysis focuses on 'the risk of erroneous deprivation' of the prisoner's interest, and safeguards that may be necessary to protect that interest." *Id.* These considerations apply equally to determining whether equitable tolling of statutory time limits for petitions for writ of error coram nobis is required to effectuate due process and fundamental fairness.

In capital cases[12] such as Mr. Hall's, the interest of the condemned weighs strongly against any interests of the State given that life, and not merely liberty is at issue.[13] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction

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[12] Mr. Hall is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

[13] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency), abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010).

and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's).[14]

The Tennessee Supreme Court has noted that our courts must be mindful that "a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment." *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (citation omitted); *State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.*") (emphasis original) (internal quotation marks and citations omitted). Accordingly, there is a "correspondingly greater degree of scrutiny" in these cases. *Smith v. State*, 357 S.W.3d at 346 (quoting *California v. Ramos*, 463 U.S. 992, 998–99, (1983)).

Weighed against Mr. Hall's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead v. State*, 402 S.W.3d 615, 623 (Tenn. 2013) (citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). Here, the biased juror claim is neither groundless nor fruitless—it is a structural constitutional error,

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[14] Similarly, in *Howell*, the Supreme Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application."). The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348 at 364–365 (1996) (comparing the risk of incompetent defendant standing trial versus State's risk of incorrect competency determination)).

striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing but undiscovered during the 1992 trial. It is not stale in the legal sense of the term[15] because Mr. Hall had no control over the facts establishing juror bias—Juror A answered "no" on the questionnaire to important questions about victimization; Juror A remained silent and failed to disclose her experience with severe domestic violence when asked; Juror A did not discuss her rape and abuse openly until undergoing therapy after Mr. Hall's post-conviction proceedings ended; Juror A did not discuss her victimization with members of Mr. Hall's legal team in a 2014 interview; Juror A finally revealed these facts in late September 2019.

Finally, in weighing the equities for due process tolling, the court must consider "the risk of erroneous deprivation" of the prisoner's interest, and safeguards that may be necessary to protect that interest. *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Mr. Hall has until now been deprived of a fair trial and the opportunity to present a claim of structural error that requires vacation of his convictions and sentence. *See* comparisons to *Faulkner, supra.* The safeguards necessary to protect his interest are 1) an evidentiary hearing in this court, and 2) granting relief in the form of an order vacating his convictions and sentence.

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[15] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article XI, § 8 of the Tennessee Constitution precludes passage of "any law granting to any individual or individuals, rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law."

The claims and underlying facts presented by Mr. Faulkner and Mr. Hall are identical. They became available when the former jurors finally revealed the domestic abuse they suffered, which they failed to disclose on questionnaires and in voir dire. In Mr. Faulkner's case, the juror's deception was discovered at a time that Mr. Faulkner could raise the claim and put on proof at his post-conviction evidentiary hearing. In Mr. Hall's case, the juror's deception was discovered later in the legal process, at a time when Mr. Hall has fewer available State court remedies depending upon the Tennessee courts' interpretation of law regarding writs of error coram nobis, motions to reopen, and successor post-conviction petitions.

Mr. Faulkner's death sentence was vacated. Mr. Hall is scheduled for execution on December 5. Imposing the death penalty on Mr. Hall, but not on Mr.

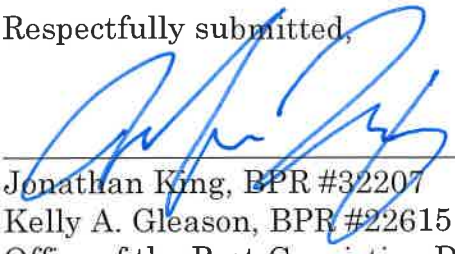
Faulkner, is arbitrary.[16] The only differences between them, their claims, and their exposure to the death penalty is *when* the jurors finally revealed the domestic abuse they suffered and *where* Mr. Faulkner and Mr. Hall were in the legal process at that time. Mr. Faulkner and Mr. Hall had no control over these factors, which alone may determine Mr. Faulkner lives and Mr. Hall dies.

VI. CONCLUSION

The newly discovered evidence constitutes structural error and requires a vacation of Mr. Hall's convictions and sentence. The Court should hold a hearing on these matters to develop the record and to gauge the credibility of witnesses. Mr. Hall brings to the Court's attention newly discovered and newly available evidence showing that a juror on his case was biased and violated his right to a fair and impartial jury. "[C]oram nobis claims are singularly fact-intensive, are not easily resolved on the face of the petition, and often require a hearing." *Busby v. State*, No. M2017–00943–CCA–R3–ECN, 2018 WL 3641868, at *4 (Tenn. Crim. App. 2018).

[16] Arbitrary imposition of the death penalty violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Those constitutional provisions, in conjunction with the 14th amendment due process clause and the Tennessee Constitution, Article I, § 8 and § 17, require that, if a state chooses to impose the death penalty, it must do under systems that guaranty, as much as humanly possible, non-arbitrary imposition of the death penalty.

Respectfully submitted,



Jonathan King, BPR #32207
Kelly A. Gleason, BPR #22615
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN 37219-8068
(615) 741-9331
(615) 741-9430 (fax)
kingj@tnpcdo.net
gleasonk@tnpcdo.net

Counsel for Petitioner

Verification of Petitioner and Affidavit of Indigency

I, Lee Hall, swear or affirm under the penalty of perjury that the foregoing motion is true and correct to the best of my knowledge.

I do solemnly swear that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear that, to the best of my knowledge, I am justly entitled to the relief sought.

Lee Hall

Date: 10/14/19 X _____
Petitioner

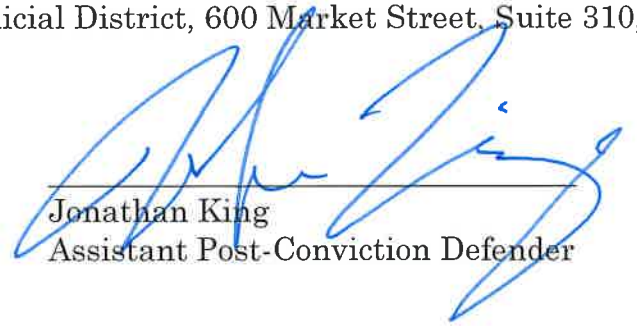
Sworn to and subscribed before me this the 14th day of October, 2019.

JONATHAN KING STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY

_____
Notary Public
My commission expires: March 8, 2022

Certificate of Service

I hereby certify that a true and exact copy of this Motion and attachments was delivered via email, U.S. Mail, and/or by hand delivery to Neal Pinkston, District Attorney General, 11th Judicial District, 600 Market Street, Suite 310, Chattanooga, TN 37402.



Jonathan King
Assistant Post-Conviction Defender

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION 3

LEE HALL,	)	**Case No. _____**
	)	
Petitioner,	)	**P-C Case No. 222931**
	)	
v.	)	
	)	**Post-Conviction**
STATE OF TENNESSEE	)	**(CAPITAL CASE)**
	)	
Respondent.	)	**Execution Set for Dec. 5, 2019**

Motion to Reopen Petition for Post-Conviction Relief

Petitioner Lee Hall,[1] by and through undersigned counsel, and pursuant to his rights to a fair trial, due process, access to the courts, equal protection, and protection from cruel and unusual treatment under the state and federal constitutions, as found in Article I, §§ 8, 9, 10, 16, 17 ("all courts shall be open and every man, for an injury done him shall have remedy by due course of law"), and 32, Article XI, § 16 of the Tennessee Constitution, and Amendments 5, 6, 8 and 14 to the United States Constitution, respectfully moves this Court to reopen his petition for post-conviction relief under Tenn. Code Ann. § 40–30–117, as interpreted through the due process analysis employed by *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) and its progeny.

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[1] Mr. Hall's legal name was changed from "Leroy Hall, Jr." to "Lee Hall," pursuant to an order entered by the Davidson County Chancery Court on May 6, 1994. Further, the Tennessee Supreme Court granted Petitioner's unopposed motion to change the style of this case to reflect his legal name change from "Leroy Hall, Jr." to "Lee Hall." *See* Order, *State v. Hall*, No. E1997-00344-SC-DDT-DD (filed March 11, 2014). Accordingly, he proceeds under that name.

Petitioner Hall has previously filed a post-conviction petition which was resolved on the merits. He now moves to reopen the post-conviction proceedings to adjudicate a structural constitutional error which could not have been raised during his post-conviction proceedings.

I. INTRODUCTION

The basis for this motion to reopen post-conviction is newly discovered evidence that Mr. Hall's 1992 trial was compromised by a structural constitutional defect—the service of a juror who admits bias toward and hatred of Mr. Hall at the time she sat in judgment and delivered a guilty verdict and death sentence upon him. The juror, "Juror A,"[2] who served in this trial involving allegations of domestic violence by Mr. Hall escalating to the murder of his estranged girlfriend, Traci Crozier, was herself the victim of severe domestic violence, including rape, which culminated in her abusive husband's suicide. Juror A failed to disclose her traumatic experiences when completing her jury questionnaire and in answering questions during voir dire. She finally came forward regarding her life experiences only three weeks ago and revealed that her own victimization biased her against Mr. Hall.

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[2] The juror's name is withheld due to the sensitive nature of her disclosures. The following documents containing identifying information have been provided to the District Attorney General on October 11 and 16, 2019, and will be submitted for filing under seal: Sealed Exhibit 1, *October 7, 2019 Declaration of Juror A* (disclosing her history of domestic violence); Sealed Exhibit 2, *October 10, 2019 Affidavit of Jeffery Vittatoe* (regarding his conversations with Juror A); Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A.*

In support of this Motion, Mr. Hall also attaches the following appendices: Appendix 1, *Tennessee Supreme Court record on direct appeal* (provided on compact disc); Appendix 2, June 23, 2015 *Order granting Defendants Motion for Mistrial, State of Tennessee v. Cory L. Batey and Brandon R. Vandenburg* (Davidson County Criminal Court no. 2013-C-2199).

Juror A's service on Mr. Hall's capital jury is the greatest magnitude of constitutional violation—a structural error—which requires that Mr. Hall's convictions and sentence be vacated. *See Faulkner v. State*, W2012–00612–CCA–R3–PD, 2014 WL 4267460 (Tenn. Crim. App. August 29, 2014) (service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused on trial the right to a fair and impartial jury; the denial of that right is a structural error requiring "automatic reversal"). In fact, this is the rare case where the juror actually admits her bias against the defendant. *See State v. Smith*, 357 S.W.3d 322, 345 (Tenn. 2013) ("[r]are is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact." (citing *State v. Green*, 783 S.W.2d 548, 553 (Tenn. 1990)).

The facts underlying this claim existed at the time of trial, although not ascertained then, are credible, would have been admissible in post-conviction, and would have required vacation of Mr. Hall's convictions and death sentence had they come to light at the time he sought post-conviction relief—August 17, 1998 to January 26, 2004. *See Faulkner v. State, supra*; *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (Petitioner was denied his constitutional right to a fair and impartial jury by the presence of a presumptively biased juror).

This newly discovered evidence could not have been discovered sooner, including at the time of Mr. Hall's original post-conviction proceedings with the

exercise of reasonable diligence, because Juror A was traumatized by the events in her first marriage and did not openly discuss her personal experiences with domestic violence and rape until very recently. Even now, she still has not disclosed them to family members, hence Petitioner's request to file relevant documents under seal.

II. PROCEDURAL HISTORY

Lee Hall was tried on charges of first-degree murder and aggravated arson in the death of his estranged girlfriend, Traci Crozier, in March of 1992. Hamilton County Case Nos. 188000 and 188001. Potential jurors completed jury questionnaires and were asked questions regarding domestic violence and crime victimization as part of the process of selection. *See* Section III, *infra*. The jurors selected to serve convicted Mr. Hall of arson and first-degree murder and sentenced him to death.

The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed Mr. Hall's convictions and sentence on direct appeal. *State v. Hall*, No. 03C01–9303–CR–00065, 1996 WL 740822 (Tenn. Crim. App. December 30, 1996); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). A Petition for Writ of Certiorari was filed in the Supreme Court of the United States and denied on June 22, 1998. *Hall v. Tennessee*, 118 S.Ct. 2348 (1998).

On August 17, 1998, Mr. Hall filed a *pro se* petition for post-conviction relief that was subsequently amended. After holding an evidentiary hearing, the post-conviction court issued an order denying relief on January 26, 2004. PC TR Vol. 1,

111–28 (order was entered on March 4, 2004, nunc pro tunc for January 26, 2004). The Tennessee Court of Criminal Appeals subsequently affirmed the denial of relief. *Hall v. State,* No. E2004–01635–CCA–R3–PD, 2005 WL 2008176 (Tenn. Crim. App. August 22, 2005). Federal habeas proceedings were disposed and dismissed by order entered September 22, 2011, in the United States District Court for the Eastern District of Tennessee. *Hall v. Bell,* No. 2:06-cv-00056.

Lee Hall is scheduled to be executed on December 5, 2019. *See* Order, *State v. Hall*, E1997–00344–SC–DDT–DD (filed Nov. 16, 2016).

III. FACTS REGARDING THE NEWLY DISCOVERED EVIDENCE

Juror A dated a man who would later become her first husband when she was in high school in the late 1960's. Sealed Exhibit 1, *October 7, 2019 Declaration of Juror* A, 1. Before she left for college, he forced himself on her. Juror A recalls: "I tried to fight him off, but he raped me. The rape resulted in a pregnancy. I ended up coming back home and marrying him." *Id.* After becoming pregnant due to the rape, Juror A married her first husband in 1969. *Id.* He was "a very abusive husband." *Id.* She remembers that he "was the worst when he was drunk. He would get very mean and hateful toward me." *Id.* "He would push me, throw things at me." *Id.* Juror A's husband continued to forcefully rape her after marriage. *Id.* She "would seek shelter at his grandmother's house but didn't tell [her] parents." *Id.* Juror A was married to her abusive husband until 1975 and they had a son from the pregnancy which resulted from the first rape. *Id.*, 1, 2.

In 1975, Juror A finally called her father for help during an especially violent attack by her husband. *Id.*, 2. In her declaration, Juror A recalls: "My husband beat me severely—punching me with his closed fist. It was our anniversary. Our son was already at my parents' house. My dad came and got me and [my husband] left. I later learned that he had thought that he had killed me." *Id.* Her husband traveled to Florida, but came back, and they continued to live together for less than a month. *Id.* Juror A said that when he came back: "He was mentally absent and mostly just sat there. He didn't talk. Before that, he was very paranoid; always thinking people were out to get him." *Id.* Within a couple of weeks of her husband's return from Florida, Juror A, her husband, and son went to her parents' house for Christmas Day. *Id.* There, she said, "[Her husband] took one of the shotguns at my parents' house and shot himself and killed himself." *Id.*

Of her first marriage, Juror A, says "What I went through with [my husband] was extremely difficult. I didn't talk to others about the abuse and the rapes." *Id.*, 3. Juror A remarried and her second husband died in 2007. *Id.* She never even told her second husband about the violence in her first marriage. *Id.* It was only after going through therapy between 2007 and 2009 to help with the grieving process after her second husband's death, that she "finally started to feel more comfortable to talk about it with those close to [her]." *Id.* Further, "[i]t [was] not until very recently that [she] started to share with those beyond [her] close circle. However, [her] family members still don't know, and neither does [her] son." *Id.*

In 1992, Juror A received a summons to appear as a potential juror in the case of *State v. Hall*. The State sought convictions for felony murder, premeditated murder, and aggravated arson and also pursued imposition of death by electrocution upon Mr. Hall. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). Juror A filled out a questionnaire that was provided to all the potential jurors to assist the parties in selecting an impartial jury. *See* Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A*. The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." *Id.*, Question 39. Juror A handwrote the answer "NO." *Id.* Question 41 asked: "Have you or any member of your family had occasion to call the police concerning any problem, domestic or criminal?" Juror A checked the option of "NO." *Id.*

During the group voir dire, the potential jurors were brought into the courtroom and told that questions would be primarily directed to those jurors in the jury box and in front of the jury box, but also applied to all potential jurors in the room. They were told that if anything private arose it could be addressed outside the presence of other jurors. Trial Vol. 5 at 608 (court addressing entire panel before group voir dire) ("[I]t may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors."); *see also* Trial Vol. 5 at 609 ("[P]lease listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to

you . . . . So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.").

Following the court's introductory comments to the potential jurors, defense attorney William Heck, while Juror A was present in the courtroom, asked a panel in the jury box whether any of them had any experience with domestic violence and none of the jurors answered in the affirmative. Trial Vol. 5 at 673–74. Juror A, upon entering the jury box, was specifically asked by the court whether she had heard all of the questions asked earlier of the panel. *See* Trial Vol. 5 at 720 ("[D]id you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?"); Trial Vol. 5 at 731–32 ("Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things?"). Juror A never disclosed her experiences with domestic violence in her first marriage.

On September 26, 2019, and again on October 7, 2019, Juror A was interviewed by members of the Office of the Post-Conviction Defender. Sealed Exhibit 2, *October 10, 2019 Affidavit of Jeffery Vittatoe*. During these interviews, Juror A shared her experiences from her first marriage and how they affected her during Mr. Hall's trial. *Id.* She discussed how much Mr. Hall and his trial reminded her of what she went through:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [Her husband] did the

> same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [Her husband] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.

Sealed Ex. 1, 2. Serving as a juror and hearing the proof in Mr. Hall's case took Juror A back, emotionally, to the time of her first marriage:

> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Id., 2–3.

IV. ARGUMENT

As demonstrated below, Juror A, a victim of domestic violence, sat on this capital murder trial and heard evidence strikingly similar to her past abuse. Sealed Ex. 1. Juror A revealed to Mr. Hall's legal team three weeks ago that she was raped and otherwise severely physically and emotionally abused by her husband. At the time of the trial, Juror A was specifically asked on a questionnaire and during voir dire whether she was a victim of a crime or of domestic violence, and each time she denied it or remained silent.

Alone, Juror A's failure to disclose this material information is sufficient to show presumed bias pursuant to well-established Tennessee law. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011). In *Smith*, a capital post-conviction case, the Court held:

> In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality....'" *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing *Akins*, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." *Akins*, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 356 (footnotes omitted).

Id. See also Faulkner v. State, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014)[3] (hereinafter "*Faulkner*"); *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012)).

Moreover, Juror A *concedes that she was actually biased* against Mr. Hall at the time of the trial and in fact hated him because he reminded her of her abusive husband. Juror A's affirmative misrepresentations rendered Mr. Hall's capital murder trial fundamentally unfair. The biased juror's presence on Mr. Hall's jury constitutes structural error and warrants reversal of conviction and his death sentence.

A. Mr. Hall's trial was infected with a biased juror, which constitutes structural error.

Juror A's participation in Mr. Hall's capital murder trial violated his constitutional right to a fair and impartial jury. "The right to a jury that is fair and impartial is fundamental, and the denial of that right cannot be treated as harmless

[3] Mr. Faulkner was on trial for the murder of his wife. The State presented Mr. Faulkner's prior convictions for second degree murder, assault with intent to commit robbery, and assault with intent to commit voluntary manslaughter, and four prior robbery convictions in support of an aggravating circumstance. *Faulkner* at *98.

error." *Faulkner*, at *81 (citations omitted). "Such errors are structural constitutional errors that compromise the integrity of the judicial process." *Id.* (citations omitted). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence . . . and are subject to automatic reversal because they deprive a defendant of a right to a fair trial." *Id.* (citations omitted).

In *Faulkner*, the Court of Criminal Appeals reiterated that "[o]ur system of justice cannot tolerate a trial with a tainted juror, regardless of the strength of the evidence against the defendant." *Id.*, at *81–82. The Court found that the service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused on trial for the murder of his domestic partner the right to a fair and impartial juror and that the denial of that right was a structural error requiring "automatic reversal."

The *Faulkner* holding is deeply rooted in rights embedded in the federal and state constitutions. U.S. Const. amend. VI; Tenn. Const. art.I, § 9. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification

on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Jurors "who have had life experiences or associations which have swayed them 'in response to those natural and human instincts common to mankind,' interfere with the underpinnings of our justice system." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (1945)). "[P]otential bias arises if a juror has been involved in a crime or incident similar to the one on trial." *Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011). The Tennessee Supreme Court has recognized that a juror is disqualified "where some bias or partiality is ***either*** actually shown to exist ***or*** is presumed to exist from circumstances." *State v. Hugueley*, 185 S.W.3d 356, 378 (Tenn. 2006) (emphasis added).[4] The Tennessee Supreme Court has instructed that a presumption of bias arises where a juror purposefully conceals or fails to disclose in response re to a material question, information relevant to juror's impartiality. *Smith*, 357 S.W.3d at 347–48.

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[4] In *Hyatt v. State*, 430 S.W.2d 129 (Tenn. 1967), the Tennessee Supreme Court presumed bias under circumstances which arose through no fault of anyone involved. In that case, the court acknowledged that "[t]his is a case where unexpected events have arisen without fault on the part of anyone. The record reflects the trial judge, prosecutor and defense counsel made diligent efforts to secure a fair and impartial jury." *Id.* at 647. Further, the Court noted that failure to discover the facts regarding Juror Johnson prior to the verdict was not due to any lack of diligence on the part of counsel. "Even so the presence of Juror Johnson on this jury raises a reasonable doubt in our minds as to whether these defendants have been tried by a fair and impartial jury." *Id.* The court found: "Where the jury or a juror has prejudged the case, and the knowledge of his bias or prejudice is unknown until after the verdict, the courts say it must be presumed that his prejudices enter into and become a part of the result, and for that reason the verdict should be set aside. *Id.* (quoting from *McGoldrick v. State*, 159 Tenn. 667, 21 S.W.2d 390 (1929)).

In *Faulkner*, a capital post-conviction case involving domestic violence, the petitioner discovered that a juror, the foreperson, failed to disclose her history of domestic abuse. The *Faulkner* juror "answered 'no' when the questionnaire asked if she or anyone she knew had been a victim of violence." *Faulkner* at *77. During voir dire when asked whether she had any prior experience with domestic violence the juror "did not respond." *Id.* The Court of Criminal Appeals found that the juror's failure to disclose the information about her history of domestic abuse, in a case involving domestic violence, created a presumption that the juror was biased against the petitioner. *Id.* at *78.[5]

The *Faulkner* court held this presumption of bias could not be overcome by the juror's post-conviction testimony that she based her verdict solely on the facts of the case and the law. *Id.* at *78. Such statements constituted improper evidence of a jury's internal deliberative process. *Id.* Further, the juror's repeated failure to disclose the information in response to direct questions and the obvious parallels between her own experience and the facts of the case, weighed against rebuttal of

[5] Other courts have recognized a presumed bias where a juror has been a victim of a crime or has experienced a situation similar to the one at issue in the trial. *See State v. Pamplin*, 138 S.W.3d 283 (Tenn. Crim. App. 2003) (juror who was a law enforcement officer possessed a "professional relationship and interest in the case [that] was entirely too close to" that of witnesses in the case and, given that "the nature of the case involved an assault upon a law enforcement officer," a presumption of prejudice was warranted; case reversed and remanded due to failure to dismiss the challenged juror for cause); *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (implying bias where several jurors were victims of a burglary that "placed the jurors in the shoes of the victim just before she was murdered" since the circumstances were "profoundly similar" to that of the murder case they were trying); *State v. LaRue*, 722 P.2d 1039, 1042 (Hawaii 1986) (victim of child abuse could not be impartial in a case involving sexual abuse of a minor); *Jackson v. United States*, 395 F.2d 615, 617–18 (D.C. Cir. 1968) (court considered juror presumptively biased because he had been a participant in a "love-triangle" analogous to the one at issue in trial); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3d Cir.1957) (en banc) (court imputed bias to juror in a robbery case because juror was victim of a robbery prior to trial).

prejudice. *Id.* at *79–80. The court found that the juror was biased and her service on Mr. Faulkner's jury resulted in a structural error, warranting reversal of his conviction. *Id.* at *80–81.

The holding in *Faulkner* applies to the facts here. Like Mr. Faulkner's juror, Juror A responded untruthfully on her questionnaire to questions related to domestic violence. The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." Sealed Ex. 3, Question 39. Juror A responded "NO." *Id.* However, Juror A now admits that her son was the product of rape by the man she later married, that her abusive partner continued to rape her during their marriage, and that on at least one occasion, he beat her so severely that she was forced to call her father and flee the house. Sealed Ex. 1, 2. The incident was so violent that her abusive husband fled the state, thinking that he had killed her. *Id.* In addition, Juror A also answered "no" to a question of whether she or a family member ever had occasion to call the police concerning domestic or criminal problems. Sealed Ex. 3, Question 41. However, Juror A had previously at least once called the police when her husband—who was often drinking when caring for their son—was driving drunk. Sealed Ex. 1, 2.

Like the juror in *Faulkner*, Juror A remained silent when questioned regarding her history of domestic violence during voir dire. In the instant case, the prospective jurors were questioned collectively after two days of individual voir dire.

The court, the state, and the defense made clear to all prospective jurors that any questions addressed to the jurors in the box applied to the entire panel:

> Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. **If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days.** And, as we said earlier, ladies and gentlemen, it's not an attempt in any way to embarrass you, to delve into your personal lives, **but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentlemen, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of this case.** If there is a question that's asked of you and you would like to respond, but you feel that the question — **it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand**, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving sexual assault or sometimes in homicide cases. So please let the Court know.

Trial Vol. 5 at 608 (Court addressing entire panel before group voir dire).

> Also, I'm going to ask you—the questions this will be directed primarily to those of you seated in the jury box and in front of the jury box, **but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you**, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

Trial Vol. 5 at 609 (same). Shortly thereafter, the Court again addressed the jurors: "Since you're all here, we may be able to do this one time." Trial Vol. 5 at 616. (Court addressing the entire panel before reading witness names). Shortly thereafter, defense counsel William Heck asked the following question:

> Now, another thing that I need to ask about—and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentlemen here. One of the things that I'm curious about—and if

there is something in your background or someone close to you in that background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. That has to do with domestic violence. **Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict?** If there's anyone like that, please let me know by just showing a hand and we can talk about that at some other time. Okay

Trial Vol. 5 at 673–74.

Once Juror A was in the box, she failed to answer material questions related to her past.

> BY THE COURT: Q: Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?

Trial Vol. 5 at 720 (Juror A in box).

> BY THE COURT: Q: Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things? Do you know any reason why you cannot listen to the evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

Trial Vol. 5 at 731–32 (Juror A in box).

Just as in *Faulkner*, Juror A's failure to disclose this crucially significant information, despite being given multiple opportunities to do so, gives rise to a presumption of bias. *Faulkner* at *77 (citing *Akins*, 867 S.W.2d at 354). Further, it is difficult to imagine how this presumption could be rebutted, given Juror A's

statements that Lee Hall reminded her of her abusive husband and that she hated Mr. Hall at the time of the trial:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [My first husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [He] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.
>
> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Sealed Ex. 1, 2.

In finding Faulkner's constitutional rights to a fair and impartial jury were violated by the juror's failure to disclose material life events giving rise to potential bias, the court examined the parallels between the victim and the juror. *Faulkner* at *80 (examining specific similarities between past experiences of juror and victim). Like in *Faulkner*, Juror A's identification with Ms. Crozier was inevitable given the similarities between the proof in the case Juror A adjudicated and the specific details of her life experience that she failed to disclose. Juror A had a difficult, traumatic marriage with her first husband. *See* Sealed Ex. 1. During Mr. Hall's trial, Juror A heard "evidence that the defendant and the victim had a troubled relationship . . . ." *State v. Hall*, 958 S.W.2d 679, 705 (Tenn. 1997). Juror A lived with her husband for six years; Petitioner and Ms. Crozier lived together for five years before she moved out. *See* Sealed Ex. 1, 3; *Hall*, 958 S.W.2d at 683.

In addition, although she failed to disclose it during voir dire when asked, *see* Trial Vol. 2 at 643–44 (group voir dire), Juror A's first husband drank and was a "mean drunk." Sealed Ex. 1, 2. At trial, Juror A heard that, like her first husband, Lee Hall, drank to excess and was capable of violence when that intoxicated:

(1) drank excessively and was drunk on the night of the offense, 958 S.W.2d at 685;

(2) drank over a case of beer in total that night. *Id*;

(3) "was intoxicated and unable to drive" on the night of the offense, Trial Vol. 8 at 1032–34 (testimony of acquaintance of Lee Hall at trial); and that

(4) he was slurring and could not walk well. Trial Vol. 8 at 1032–34.

Both Juror A and Traci Crozier sought refuge from their abusive partners in the homes of family members. Juror A sought shelter at her husband's grandmother's house. Sealed Ex. 1, 1. When Ms. Crozier left Petitioner, she moved in with her grandmother, Gloria Mathis, and her uncle, Chris Mathis. 958 S.W.2d at 683.

The facts in this case are strikingly similar to those in *Faulkner* and establish unquestionable (indeed, admitted) bias on the part of Juror A, and therefore reveal a structural defect in the trial process that must be remedied by "automatic reversal." *See Faulkner* at *81, *103. As the *Faulkner* Court concluded: "Our system of justice cannot tolerate a trial with a tainted juror regardless of the strength of the evidence against the defendant." *Id.* at *81.

B. The facts underlying the structural error are newly discovered and cognizable in a motion to reopen the post-conviction petition pursuant to due process and fundamental fairness.

Juror A's recent disclosure of her history of rape and domestic abuse is newly discovered evidence. This is evidence of facts existing, but not yet ascertained, at the time of the original trial, that would have been admissible in post-conviction, and credible. The evidence certainly existed at the time of the trial, although was not revealed at the time. In her own words, the juror was "biased" against Mr. Hall *at the time of trial* because she was flooded with memories of her victimization at the hands of her abusive first husband: "I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee." Sealed Ex. 1, 2.

This evidence was not ascertained at the time of the trial because Juror A failed to disclose her victimization history during jury selection, as required by law. *See Faulkner* at *77 (citing to *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012)) (Jurors are obligated to make "full and truthful answers . . . neither falsely stating any fact nor concealing any material matter.") Despite direct questioning by the court, the prosecution, and the defense, Juror A kept secret her history as an abused spouse during jury selection, the stage at which such evidence would have been subjected to the adversarial process as required by the federal and state constitutions.

Had Juror A's actual bias been disclosed in a timely manner it could have been raised in post-conviction. *See Faulkner, supra,* and *Rollins, supra.*

The evidence from Juror A is credible. She disclosed the evidence despite the fact that her own son and family have no knowledge that she was raped and otherwise physically and psychologically abused by her first husband. Sealed Ex. 1, 3. Her Declaration is not in any way self-serving, but rather, the opposite. It makes public facts which she clearly would prefer not to share, given her history of keeping it secret for many years.

Under the Post-Conviction Procedure Act, a petitioner may reopen post-conviction proceedings if:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40–30–117 (a) (West 2019). Although this evidence does not fit precisely under the limited circumstances delineated in this statute, it is most analogous to subsection (3), in that the facts establish a serious structural error and were not

previously ascertained through no fault of the petitioner and through circumstances beyond his control.

"The 1995 version of the Post–Conviction Procedure Act now contains explicit exceptions to the one-year filing deadline that apply to some, *but not all,* forms of later-arising claims. Tenn. Code Ann. §§ 40–30–117(a)(1)–(3), –102(b)(1)–(3)." *Whitehead v. State*, 402 S.W.3d 615, 624 (Tenn. 2013) (emphasis added). *See also Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (declining to apply the strict language of the statute as violative of due process in a capital motion to reopen involving fundamental constitutional rights). As discussed, *infra*, in Section E, due process requires loosening the restrictions of the statute to ensure that Mr. Hall is afforded "fundamental fairness" and access to the courts to adjudicate his structural constitutional violation.

C. This evidence of juror bias could not have been previously discovered.

Juror A's disclosures constitute newly discovered evidence because, in her own words, "not until very recently," did she share her history as the victim of rape, assault, and psychological abuse by her rapist–husband with people outside of the circle of her closest friends. Sealed Ex. 1, 3. In fact, prior to therapy that concluded in 2009, she was not able to speak to others about the details of her traumatic first marriage. *Id.* Representatives from the Office of the Post-Conviction Defender visited Juror A in 2014, but she did not disclose the evidence at that time.[6] It was

[6] Juror A was interviewed in 2014 by investigator Larry Gidcomb and attorney Sophia Bernhardt, both former employees of the Office of the Post-Conviction Defender.

only three weeks ago that she told anyone connected to Mr. Hall's trial and appeals that she was subjected to severe domestic violence prior to her service in this capital murder trial and stated that she was actually biased against Mr. Hall. Given the highly sensitive nature of Juror A's experiences and how traumatic it was for her, Mr. Hall was not able to discover this information sooner. It was only once Juror A became comfortable enough with her past that she was willing to disclose the details to Mr. Hall's legal team. Sealed Exhibit 1, 3.

D. This newly discovered evidence would have resulted in a new trial.

As discussed in Section A, Juror A's failure to disclose material facts similar to the allegations in Lee Hall's case constitutes structural error, which requires automatic reversal. Indeed, the only significant difference between Mr. Hall's petition for relief and that of Mr. Faulkner is the procedural posture of the case at the time the juror disclosed her history of domestic abuse.

The *Faulkner* Court explained the burden shifting framework with which Tennessee courts examine juror bias: "A presumption of bias arises 'when a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias.'" *Faulkner* at *77 (citing *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993)). Juror A's repeated failures to reveal her past victimhood despite explicit questioning satisfy this test.

Moreover, the facts of the present case are even stronger, because unlike the *Faulkner* juror, Juror A now admits her bias against and hate for Mr. Hall at the

time of trial. Sealed Ex. 1, 2. Juror A suffered repeated sexual, physical, and psychological abuse throughout her marriage at the hands of a man who "reminded" her of the defendant whose culpability and punishment she deliberated. *Id.* Juror A twice failed to disclose her experience on the juror questionnaire. Sealed Ex. 3, Questions 38 and 41.

The Tennessee courts have zealously guarded the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantees to the right to a trial by an impartial jury. *See, e.g., State v. Smith*, 418 S.W.3d 38, 44 (Tenn. 2013) ("The right to a trial by jury . . . is a foundational right protected by both the federal and state constitutions.") (footnote omitted); *Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *Faulkner at* *76 ("Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the right to a trial by an impartial jury."); *Rollins*, 2012 WL 3776696 at *14.

"The right to a jury trial envisions that all contested factual issues will be decided by jurors who are unbiased and impartial." *Smith*, 418 S.W.3d at 45 (citations omitted). "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, ..." *Id.* (citing *Durham*, 188 S.W.2d at 558). "Trial courts must ensure the integrity of the jury system by holding jurors accountable to the highest standards of conduct." *Id. (*citation omitted). Mechanisms in our legal process to ensure juror impartiality protect not only "the fairness of the trial itself" but also serve to "promote[] and preserve[] the public's confidence in the fairness of

the system." *Id.* (citations omitted). "Like judges, jurors must be—and must be perceived to be—disinterested and impartial." *Id.* (citation omitted).

"Our courts, both civil and criminal, have long recognized the importance of the voir dire process and have zealously guarded its integrity." *Akins*, 867 S.W.2d at 355 (citations omitted). "Since full knowledge of the facts which might bear upon a juror's qualifications is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make 'full and truthful answers . . . neither falsely stating any fact nor concealing any material matter.' 47 Am. Jur. 2d, Jury § 208 (1969)." *Id.*

It is imperative in capital cases, like Mr. Hall's, that a defendant's case be adjudicated by a tribunal (jury or judge) unburdened by an appearance of bias. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'").[7] The *Smith*

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[7] The *Smith* Court described the heightened due process principles applicable to capital cases as follows:

> We have on numerous occasions recognized "the heightened due process applicable in capital cases" and "the heightened reliability required and the gravity of the ultimate penalty in capital cases." *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994); *see also Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) ("[W]e must be mindful that 'a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment.'") (quoting *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001)); *State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.*") (emphasis in original)(internal quotation marks and citations omitted); *Cooper*, 847 S.W.2d [521] at 531 [(Tenn. Crim. App. 1992)] (reversing death penalty on ineffective assistance grounds; noting "the Supreme Court 'has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the

Court reaffirmed the heightened due process inquiry concerning the existence of even subconscious partiality in capital cases, while noting that "[r]are is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact." *Id.* at 345 (citing *State v. Green,* 783 S.W.2d 548, 553 (Tenn. 1990)).

Indeed, Juror A is the rare person, and Lee Hall's is the rare case, in which a juror admits bias in performing her duty as a juror deliberating degree of culpability and punishment. She has done so after decades of suppressing her traumatic early life experience as a victim of domestic violence. While the circumstances of Juror A's life and her journey to disclosing her experience as a victim of severe domestic violence are unique, the legal authority regarding the failure of a capital juror to disclose her experience with domestic violence in completing the jury questionnaire and responding in voir dire could not be clearer. *Faulkner* mandates vacation of Mr. Hall's convictions and sentence.

E. The Due Process, the Eighth Amendment, and Equal Protection provisions in the United States and Tennessee Constitutions require the Court to address this case on the merits and grant relief.

The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan,* 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to

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capital sentencing determination.'") (quoting *California v. Ramos,* 463 U.S. 992, 998–99 (1983)).

357 S.W.3d at 346 (parallel citations omitted) (emphasis original).

the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8.

The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965). The Tennessee Supreme Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992) (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

The Tennessee Supreme Court has specifically found that application of the strict time bars in Tennessee Code Annotated § 40–30–102 violates the state and federal constitutional rights to due process under certain circumstances.[8] *See Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) (non-capital case tolling the statute of limitations for post-conviction relief; due process requires that a post-conviction petitioner be afforded an opportunity to seek this relief "at a meaningful time and in a meaningful manner," and circumstances precluded petitioner from doing so

[8] "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Whitehead v. State*, 402 S.W.3d 615, 622 (Tenn. 2013).

during the three-year post-conviction statute of limitations); *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Whitehead v. State*, 402 S.W.3d 615, 622 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). The *Whitehead* court noted that "the pervasive theme" in all tolling cases "is that circumstances beyond a petitioner's control prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations." 402 S.W.3d at 625 (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011).

The Court in *Whitehead*, as was done in earlier due process tolling cases, weighed the competing rights at stake in determining whether due process barred strict application of the statute of limitation. In the post-conviction context, "the private interest at stake is 'a prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process.'" 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). "The government's interest is 'the interest in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* "The remainder of the analysis focuses on 'the risk of erroneous deprivation' of the prisoner's interest, and safeguards that may be necessary to protect that interest." *Id.* These considerations apply equally to determining whether equitable tolling of

statutory time limits and/or bars against successive post-conviction petitions is required to effectuate due process and fundamental fairness.

In capital cases[9] such as Mr. Hall's, the interest of the condemned weighs strongly against any interests of the State given that life, and not merely liberty is at issue.[10] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's).[11] *See also Workman v. State*, 41 S.W.3d 100, 103 (Tenn.

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[9] Mr. Hall is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

[10] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency), abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010).

[11] Similarly, in *Howell,* the Supreme Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application.") The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348 at 364–365 (1996) (comparing the risk of incompetent defendant standing trial versus State's risk of incorrect competency determination)).

2001) (tolling statute of limitations in capital error coram nobis nineteen years after conviction after finding that "[w]eighing these competing interests in the context of this case, we have no hesitation in concluding that due process precludes application of the statute of limitations to bar consideration of the writ of error coram nobis in this case.").

The Tennessee Supreme Court has noted that our courts must be mindful that "a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment." *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (citation omitted); *State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.*") (emphasis in original)(internal quotation marks and citations omitted). Accordingly, there is a "correspondingly greater degree of scrutiny" in these cases. *Smith v. State*, 357 S.W.3d at 346 (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

Weighed against Mr. Hall's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead v. State*, 402 S.W.3d 615, 623 (Tenn. 2013) (citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). Here, the biased juror claim is neither groundless nor fruitless—it is a structural constitutional error, striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing but undiscovered

during the 1992 trial. It is not stale in the legal sense of the term[12] because Mr. Hall had no control over the facts establishing juror bias—Juror A answered no on the questionnaire to important questions about victimization; Juror A remained silent and failed to disclose her experience with severe domestic violence when asked; Juror A did not discuss her rape and abuse openly until undergoing therapy after Mr. Hall's post-conviction proceedings ended; Juror A did not discuss her victimization with members of Mr. Hall's legal team in a 2014 interview; Juror A finally revealed these facts in late September 2019.

Finally, in weighing the equities for due process tolling, the court must consider "the risk of erroneous deprivation" of the prisoner's interest, and safeguards that may be necessary to protect that interest. *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Mr. Hall has until now been deprived of a fair trial and the opportunity to present a claim of structural error that requires vacation of his convictions and sentence. *See Faulkner, supra.* The safeguards necessary to protect his interest are 1) an evidentiary hearing in this court and 2) granting relief in the form of an order vacating his convictions and sentence.

The same considerations favoring due process tolling also apply in regard to providing Mr. Hall access to the courts through a motion to reopen, despite the strict language of the statute limiting the vehicle to only three types of claims.

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[12] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article XI, § 8 of the Tennessee Constitution precludes passage of "any law granting to any individual or individuals, rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law."

The claims and underlying facts presented by Mr. Faulkner and Mr. Hall are identical. They became available when the former jurors finally revealed the domestic abuse they suffered, which they failed to disclose on questionnaires and in voir dire. In Mr. Faulkner's case, the juror's deception was discovered at a time that Mr. Faulkner could raise the claim and put on proof at his post-conviction evidentiary hearing. In Mr. Hall's case, the juror's deception was discovered later in the legal process, at a time when Mr. Hall has fewer available State court remedies—depending upon the Tennessee courts' interpretation of law regarding writs of error coram nobis, motions to reopen, and successor post-conviction petitions.

Mr. Faulkner's death sentence was vacated. Mr. Hall is scheduled for execution on December 5. Imposing the death penalty on Mr. Hall, but not on Mr.

Faulkner, is arbitrary.[13] The only differences between them, their claims, and their exposure to the death penalty is when the jurors finally revealed the domestic abuse they suffered and where Mr. Faulkner and Mr. Hall were in the legal process at that time. Mr. Faulkner and Mr. Hall had no control over these factors, which alone may determine Mr. Faulkner lives and Mr. Hall dies.

V. CONCLUSION

The newly discovered evidence constitutes structural error and requires a vacation of Mr. Hall's convictions and sentence. The Court should hold a hearing on these matters to develop the record and to gauge the credibility of witnesses. Mr. Hall brings to the Court's attention newly discovered and newly available evidence showing that a juror on his case was biased and violated his right to a fair and impartial jury. Mr. Hall's post-conviction proceedings should be re-opened and his claim of structural error fully litigated in the post-conviction court.

WHEREFORE, Petitioner Lee Hall, respectfully requests the Court to:

(1) reopen the post-conviction proceeding to consider Mr. Hall's new claim of structural error;

(2) enter a colorable claim order in accordance with Tenn. S. Ct. R. 28, § 6(B)(3);

(3) grant an evidentiary hearing; and,

(4) vacate his convictions and sentence of death.

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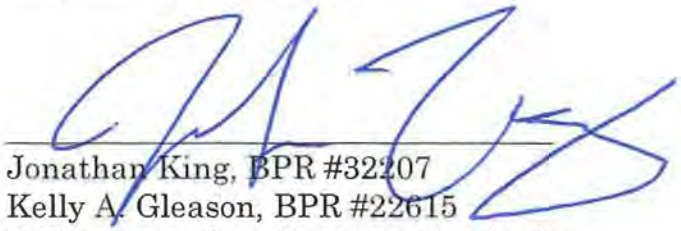
[13] Arbitrary imposition of the death penalty violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Those constitutional provisions, in conjunction with the 14th amendment due process clause and the Tennessee Constitution, Article I, § 8 and § 17, require that, if a state chooses to impose the death penalty, it must do under systems that guaranty, as much as humanly possible, non-arbitrary imposition of the death penalty.

Respectfully submitted,



Jonathan King, BPR #32207
Kelly A. Gleason, BPR #22615
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN 37219-8068
(615) 741-9331
(615) 741-9430 (fax)
kingj@tnpcdo.net
gleasonk@tnpcdo.net

Counsel for Petitioner

Appendix B

Verification of Petitioner and Affidavit of Indigency

I, Lee Hall, swear or affirm under the penalty of perjury that the foregoing motion is true and correct to the best of my knowledge.

I do solemnly swear that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear that, to the best of my knowledge, I am justly entitled to the relief sought.

Date: 10/14/19 X Petitioner Lee Hall

Sworn to and subscribed before me this the 14th day of October, 2019.

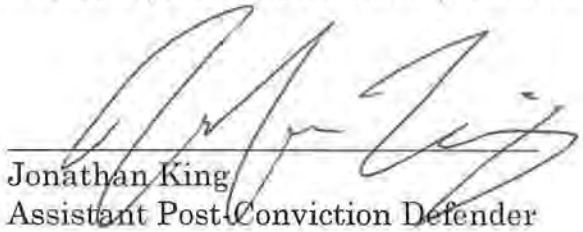
JONATHAN KING STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY

Notary Public

My commission expires: March 8, 2022

Certificate of Service

I hereby certify that a true and exact copy of this Motion and attachments was delivered via email, U.S. Mail, and/or by hand delivery to Neal Pinkston, District Attorney General, 11th Judicial District, 600 Market Street, Suite 310, Chattanooga, TN 37402.



Jonathan King
Assistant Post-Conviction Defender

Appendix B

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION 3

LEE HALL,	)	**Case No. _____**
	)	
Petitioner,	)	**P-C Case No. 222931**
	)	
v.	)	
	)	**Post-Conviction**
STATE OF TENNESSEE	)	**(CAPITAL CASE)**
	)	
Respondent.	)	**Execution Set for Dec. 5, 2019**

Second Petition for Post-Conviction Relief

Petitioner Lee Hall,[1] by and through undersigned counsel, and pursuant to his rights to a fair trial, due process, access to the courts, equal protection, and protection from cruel and unusual treatment under the state and federal constitutions, as found in Article I, §§ 8, 9, 10, 16, 17 ("all courts shall be open and every man, for an injury done him shall have remedy by due course of law"), and 32, Article XI, § 16 of the Tennessee Constitution, and Amendments 5, 6, 8 and 14 to the United States Constitution, respectfully sets forth below his claim for post-conviction relief under Tennessee Code Annotated § 40–30–101 *et seq.*[2] Tennessee

[1] Mr. Hall's legal name was changed from "Leroy Hall, Jr." to "Lee Hall," pursuant to an order entered by the Davidson County Chancery Court on May 6, 1994. Further, the Tennessee Supreme Court granted Petitioner's unopposed motion to change the style of this case to reflect his legal name change from "Leroy Hall, Jr." to "Lee Hall." *See* Order, *State v. Hall*, No. E1997-00344-SC-DDT-DD (filed March 11, 2014). Accordingly, he proceeds under that name.

[2] Mr. Hall has also contemporaneously filed in this court a *Petition for Writ of Error Coram Nobis and Request for Evidentiary Hearing* and a *Motion to Reopen Post-Conviction Proceedings*, in addition to this pleading. The Tennessee Supreme Court has directed that when multiple procedural vehicles are available for newly discovered evidence, "each claim for relief should be presented and evaluated on a separate track . . . ." *Nunley v. State*, 552 S.W.3d 800, 819–20 (Tenn. 2018).

Appendix C

Code Annotated § 40–30–102(c) provides that "[i]f a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed." However, the same provision allows for a motion to reopen "under the limited circumstances set out in § 40–30–117." *Id.*

The Petitioner explains below why due process, the Eighth Amendment, and equal protection principles preclude application of the statute's time bar and prohibition against the filing of a successive petition under the unique circumstances of this case pursuant to *Burford v. State,* 845 S.W.2d 204 (Tenn. 1992) and its progeny.

I. INTRODUCTION

The basis for this petition is newly discovered evidence that Mr. Hall's 1992 trial was compromised by a structural constitutional defect—the service of a juror who admits bias toward and hatred of Mr. Hall at the time she sat in judgment and delivered a guilty verdict and death sentence upon him. The juror, "Juror A,"[3] who served in this trial involving allegations of domestic violence by Mr. Hall escalating to the murder of his estranged girlfriend, Traci Crozier, was herself the victim of

[3] The juror's name is withheld due to the sensitive nature of her disclosures. The following documents containing identifying information have been provided to the District Attorney General on October 11 and 16, 2019, and will be submitted for filing under seal: Sealed Exhibit 1, *October 7, 2019 Declaration of Juror A* (disclosing her history of domestic violence); Sealed Exhibit 2, *October 10 Affidavit of Jeffery Vittatoe* (regarding his conversations with Juror A); Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A.* In support of this Petition, Mr. Hall also attaches the following appendices: Appendix 1, *Tennessee Supreme Court record on direct appeal* (provided on compact disc); Appendix 2, June 23, 2015 *Order granting Defendants Motion for Mistrial, State of Tennessee v. Cory L. Batey and Brandon R. Vandenburg* (Davidson County Criminal Court no. 2013-C-2199).

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severe domestic violence, including rape, which culminated in her abusive husband's suicide. Juror A failed to disclose her traumatic experiences when completing her jury questionnaire and in answering questions during voir dire. She finally came forward regarding her life experiences only three weeks ago and revealed that her own victimization biased her against Mr. Hall.

Juror A's service on Mr. Hall's capital jury is the greatest magnitude of constitutional violation—a structural error—which requires that Mr. Hall's convictions and sentence be vacated. *See Faulkner v. State,* W2012–00612–CCA–R3–PD, 2014 WL 4267460 (Tenn. Crim. App. August 29, 2014) (service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused on trial the right to a fair and impartial jury; the denial of that right is a structural error requiring "automatic reversal"). In fact, this is the rare case where the juror actually admits her bias against the defendant. *See State v. Smith*, 357 S.W.3d 322, 345 (Tenn. 2013) ("[r]are is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact." (citing *State v. Green,* 783 S.W.2d 548, 553 (Tenn. 1990)).

The facts underlying this claim existed at the time of trial, although not ascertained then, are credible, would have been admissible in post-conviction, and would have required vacation of Mr. Hall's convictions and death sentence had they come to light at the time he sought post-conviction relief—August 17, 1998 to January 26, 2004. *See Faulkner v. State, supra*; *Rollins v. State*, No. E2010–01150–

CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (Petitioner was denied his constitutional right to a fair and impartial jury by the presence of a presumptively biased juror).

This newly discovered evidence could not have been discovered sooner, including at the time of Mr. Hall's original post-conviction proceedings, with the exercise of reasonable diligence, because Juror A was traumatized by the events in her first marriage and did not openly discuss her personal experiences with domestic violence and rape until very recently. Even now, she still has not disclosed them to family members, hence Petitioner's request to file relevant documents under seal.

II. PROCEDURAL HISTORY

Lee Hall was tried on charges of first-degree murder and aggravated arson in the death of his estranged girlfriend, Traci Crozier, in March of 1992. Hamilton County Case Nos. 188000 and 188001. Potential jurors completed jury questionnaires and were asked questions regarding domestic violence and crime victimization as part of the process of selection. *See* Section III, *infra*. The jurors selected to serve convicted Mr. Hall of arson and first-degree murder and sentenced him to death.

The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed Mr. Hall's convictions and sentence on direct appeal. *State v. Hall*, No. 03C01–9303–CR–00065, 1996 WL 740822 (Tenn. Crim. App. December 30, 1996); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). A Petition for Writ of Certiorari was

filed in the Supreme Court of the United States and denied on June 22, 1998. *Hall v. Tennessee*, 118 S.Ct. 2348 (1998).

On August 17, 1998, Mr. Hall filed a *pro se* petition for post-conviction relief that was subsequently amended. After holding an evidentiary hearing, the post-conviction court issued an order denying relief on January 26, 2004. PC TR Vol. 1, 111–28 (order was entered on March 4, 2004, nunc pro tunc for January 26, 2004). The Tennessee Court of Criminal Appeals subsequently affirmed the denial of relief. *Hall v. State*, No. E2004–01635–CCA–R3–PD, 2005 WL 2008176 (Tenn. Crim. App. August 22, 2005). Federal habeas proceedings were disposed and dismissed by order entered September 22, 2011, in the United States District Court for the Eastern District of Tennessee. *Hall v. Bell*, No. 2:06-cv-00056.

Lee Hall is scheduled to be executed on December 5, 2019. *See* Order, *State v. Hall*, E1997–00344–SC–DDT–DD (filed Nov. 16, 2016).[4]

III. FACTS REGARDING THE NEWLY DISCOVERED EVIDENCE

Juror A dated a man who would later become her first husband when she was in high school in the late 1960's. Sealed Exhibit 1, *October 7, 2019 Declaration of Juror* A, 1. Before she left for college, he forced himself on her. Juror A recalls: "I tried to fight him off, but he raped me. The rape resulted in a pregnancy. I ended up coming back home and marrying him." *Id.* After becoming pregnant due to the rape, Juror A married her first husband in 1969. *Id.* He was "a very abusive husband." *Id.* She remembers that he "was the worst when he was drunk. He would get very

[4] Petitioner incorporates the information from the previously filed pro se and amended petitions to satisfy the Rule 28 form requirements.

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mean and hateful toward me." *Id.* "He would push me, throw things at me." *Id.* Juror A's husband continued to forcefully rape her after marriage. *Id.* She "would seek shelter at his grandmother's house but didn't tell [her] parents." *Id.* Juror A was married to her abusive husband until 1975 and they had a son from the pregnancy which resulted from the first rape. *Id.*, 1, 2.

In 1975, Juror A finally called her father for help during an especially violent attack by her husband. *Id.*, 2. In her declaration, Juror A recalls: "My husband beat me severely—punching me with his closed fist. It was our anniversary. Our son was already at my parents' house. My dad came and got me and [my husband] left. I later learned that he had thought that he had killed me." *Id.* Her husband traveled to Florida, but came back, and they continued to live together for less than a month. *Id.* Juror A said that when he came back: "He was mentally absent and mostly just sat there. He didn't talk. Before that, he was very paranoid; always thinking people were out to get him." *Id.* Within a couple of weeks of her husband's return from Florida, Juror A, her husband, and son went to her parents' house for Christmas Day. *Id.* There, she said, "[Her husband] took one of the shotguns at my parents' house and shot himself and killed himself." *Id.*

Of her first marriage, Juror A, says "What I went through with [my husband] was extremely difficult. I didn't talk to others about the abuse and the rapes." *Id.*, 3. Juror A was remarried and her second husband died in 2007. *Id.* She never even told her second husband about the violence in her first marriage. *Id.* It was only after going through therapy between 2007 and 2009 to help with the grieving

process after her second husband's death, that she "finally started to feel more comfortable to talk about it with those close to [her]." *Id.* Further, "[i]t [was] not until very recently that [she] started to share with those beyond [her] close circle. However, [her] family members still don't know, and neither does [her] son." *Id.*

In 1992, Juror A received a summons to appear as a potential juror in the case of *State v. Hall*. The State sought convictions for felony murder, premeditated murder, and aggravated arson and also pursued imposition of death by electrocution upon Mr. Hall. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). Juror A filled out a questionnaire that was provided to all the potential jurors to assist the parties in selecting an impartial jury. *See* Sealed Exhibit 3, *March 1992 Juror Questionnaire completed by Juror A*. The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." *Id.*, Question 39. Juror A handwrote the answer "NO." *Id.* Question 41 asked: "Have you or any member of your family had occasion to call the police concerning any problem, domestic or criminal?" Juror A checked the option of "NO." *Id.*

During the group voir dire, the potential jurors were brought into the courtroom and told that questions would be primarily directed to those jurors in the jury box and in front of the jury box, but also applied to all potential jurors in the room. They were told that if anything private arose it could be addressed outside the presence of other jurors. Trial Vol. 5 at 608 (court addressing entire panel before group voir dire) ("[I]t may be somewhat embarrassing for you to answer that

question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors."); *see also* Trial Vol. 5 at 609 ("[P]lease listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you . . . . So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.").

Following the court's introductory comments to the potential jurors, defense attorney William Heck, while Juror A was present in the courtroom, asked a panel in the jury box whether any of them had any experience with domestic violence and none of the jurors answered in the affirmative. Trial Vol. 5 at 673–74. Juror A, upon entering the jury box, was specifically asked by the court whether she had heard all of the questions asked earlier of the panel. *See* Trial Vol. 5 at 720 ("[D]id you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?"); Trial Vol. 5 at 731–32 ("Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things?"). Juror A never disclosed her experiences with domestic violence in her first marriage. *Id.* at 720–40.

On September 26, 2019, and again on October 7, 2019, Juror A was interviewed by members of the Office of the Post-Conviction Defender. Sealed

Exhibit 2, *October 10, 2019 Affidavit of Jeffery Vittatoe*. During these interviews, Juror A shared her experiences from her first marriage and how they affected her during Mr. Hall's trial. *Id.* She discussed how much Mr. Hall and his trial reminded her of what she went through:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [Her husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [Her husband] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.

Sealed Ex. 1, 2. Serving as a juror and hearing the proof in Mr. Hall's case took Juror A back, emotionally, to the time of her first marriage:

> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Id., 2–3.

IV. ARGUMENT

As demonstrated below, Juror A, a victim of domestic violence, sat on this capital murder trial and heard evidence strikingly similar to her past abuse. Juror A revealed to Mr. Hall's legal team, three weeks ago, that she was raped and otherwise severely physically and emotionally abused by her husband. At the time of the trial, Juror A was specifically asked on a questionnaire and during voir dire whether she was a victim of a crime or of domestic violence, and each time she denied it or remained silent.

Alone, Juror A's failure to disclose this material information is sufficient to show presumed bias pursuant to well-established Tennessee law. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011). In *Smith*, a capital post-conviction case, the Court held:

> In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality....'" *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing *Akins*, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." *Akins*, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 356 (footnotes omitted).

Id. See also Faulkner v. State, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014)[5] (hereinafter "*Faulkner*"); *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012).

Moreover, Juror A *concedes that she was actually biased* against Mr. Hall at the time of the trial and in fact hated him because he reminded her of her abusive husband. Juror A's affirmative misrepresentations rendered Mr. Hall's capital murder trial fundamentally unfair. The biased juror's presence on Mr. Hall's jury constitutes structural error and warrants reversal of conviction and his death sentence.

[5] Mr. Faulkner was on trial for the murder of his wife. The State presented Mr. Faulkner's prior convictions for second degree murder, assault with intent to commit robbery, and assault with intent to commit voluntary manslaughter, and four prior robbery convictions in support of an aggravating circumstance. *Faulkner* at *98.

A. Mr. Hall's trial was infected with a biased juror, which constitutes structural error.

Juror A's participation in Mr. Hall's capital murder trial violated his constitutional right to a fair and impartial jury. "The right to a jury that is fair and impartial is fundamental, and the denial of that right cannot be treated as harmless error." *Faulkner*, at *81 (citations omitted). "Such errors are structural constitutional errors that compromise the integrity of the judicial process." *Id.* (citations omitted). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence . . . and are subject to automatic reversal because they deprive a defendant of a right to a fair trial." *Id.* (citations omitted).

In *Faulkner*, the Court of Criminal Appeals reiterated that "[o]ur system of justice cannot tolerate a trial with a tainted juror, regardless of the strength of the evidence against the defendant." *Id.*, at *81–82. The Court found that the service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused on trial for the murder of his domestic partner the right to a fair and impartial juror and that the denial of that right was a structural error requiring "automatic reversal."

The *Faulkner* holding is deeply rooted in rights embedded in the federal and state constitutions. U.S. Const. amend. VI; Tenn. Const. art.I, § 9. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of

due process."). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Jurors "who have had life experiences or associations which have swayed them 'in response to those natural and human instincts common to mankind,' interfere with the underpinnings of our justice system." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (1945)). "[P]otential bias arises if a juror has been involved in a crime or incident similar to the one on trial." *Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011). The Tennessee Supreme Court has recognized that a juror is disqualified "where some bias or partiality is ***either*** actually shown to exist ***or*** is presumed to exist from circumstances." *State v. Hugueley*, 185 S.W.3d 356, 378 (Tenn. 2006) (emphasis added).[6] The Tennessee Supreme Court has instructed that

[6] In *Hyatt v. State*, 430 S.W.2d 129 (Tenn. 1967), the Tennessee Supreme Court presumed bias under circumstances which arose through no fault of anyone involved. In that case, the court acknowledged that "[t]his is a case where unexpected events have arisen without fault on the part of anyone. The record reflects the trial judge, prosecutor and defense counsel made diligent efforts to secure a fair and impartial jury." *Id.* at 647. Further, the Court noted that failure to discover the facts regarding Juror Johnson prior to the verdict was not due to any lack of diligence on the part of counsel. "Even so the presence of Juror Johnson on this jury raises a reasonable doubt in our minds as to whether these defendants have been tried by a fair and impartial jury." *Id.* The court found: "Where the jury or a juror has prejudged the case, and the knowledge of his bias or prejudice is unknown until after the verdict, the courts say it must be presumed that his prejudices enter into and become a part of the result, and for that reason the verdict should be set aside. *Id.* (quoting from *McGoldrick v. State*, 159 Tenn. 667, 21 S.W.2d 390 (1929)).

a presumption of bias arises where a juror purposefully conceals or fails to disclose in response re to a material question, information relevant to juror's impartiality. *Smith*, 357 S.W.3d at 347–48.

In *Faulkner*, a capital post-conviction case involving domestic violence, the petitioner discovered that a juror, the foreperson, failed to disclose her history of domestic abuse. The *Faulkner* juror "answered 'no' when the questionnaire asked if she or anyone she knew had been a victim of violence." *Faulkner* at *77. During voir dire when asked whether she had any prior experience with domestic violence the juror "did not respond." *Id.* The Court of Criminal Appeals found that the juror's failure to disclose the information about her history of domestic abuse, in a case involving domestic violence, created a presumption that the juror was biased against the petitioner. *Id.* at *78.[7]

The *Faulkner* court held this presumption of bias could not be overcome by the juror's post-conviction testimony that she based her verdict solely on the facts of the case and the law. *Id.* at *78. Such statements constituted improper evidence of a

[7] Other courts have recognized a presumed bias where a juror has been a victim of a crime or has experienced a situation similar to the one at issue in the trial. *See State v. Pamplin*, 138 S.W.3d 283 (Tenn. Crim. App. 2003) (juror who was a law enforcement officer possessed a "professional relationship and interest in the case [that] was entirely too close to" that of witnesses in the case and, given that "the nature of the case involved an assault upon a law enforcement officer," a presumption of prejudice was warranted; case reversed and remanded due to failure to dismiss the challenged juror for cause); *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (implying bias where several jurors were victims of a burglary that "placed the jurors in the shoes of the victim just before she was murdered" since the circumstances were "profoundly similar" to that of the murder case they were trying); *State v. LaRue*, 722 P.2d 1039, 1042 (Hawaii 1986) (victim of child abuse could not be impartial in a case involving sexual abuse of a minor); *Jackson v. United States*, 395 F.2d 615, 617–18 (D.C. Cir. 1968) (court considered juror presumptively biased because he had been a participant in a "love-triangle" analogous to the one at issue in trial); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3d Cir.1957) (en banc) (court imputed bias to juror in a robbery case because juror was victim of a robbery prior to trial).

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jury's internal deliberative process. *Id.* Further, the juror's repeated failure to disclose the information in response to direct questions and the obvious parallels between her own experience and the facts of the case, weighed against rebuttal of prejudice. *Id.* at *79–80. The court found that the juror was biased and her service on Mr. Faulkner's jury resulted in a structural error, warranting reversal of his conviction. *Id.* at *80–81.

The holding in *Faulkner* applies to the facts here. Like Mr. Faulkner's juror, Juror A responded untruthfully on her questionnaire to questions related to domestic violence. The juror questionnaire for Mr. Hall's capital trial included the question: "Have you ever been a victim o[f] a crime? If yes please explain." Sealed Ex. 3, Question 39. Juror A responded "NO." *Id.* However, Juror A now admits that her son was the product of rape by the man she later married, that her abusive partner continued to rape her during their marriage, and that on at least one occasion, he beat her so severely that she was forced to call her father and flee the house. Sealed Ex. 1, 2. The incident was so violent that her abusive husband fled the state, thinking that he had killed her. *Id.* In addition, Juror A also answered "no" to a question of whether she or a family member ever had occasion to call the police concerning domestic or criminal problems. Sealed Ex. 3, Question 41. However, Juror A had previously at least once called the police when her husband—who was often drinking when caring for their son—was driving drunk. Sealed Ex. 1, 2.

Like the juror in *Faulkner*, Juror A remained silent when questioned regarding her history of domestic violence during voir dire. In the instant case, the prospective jurors were questioned collectively after two days of individual voir dire. The court, the state, and the defense made clear to all prospective jurors that any questions addressed to the jurors in the box applied to the entire panel:

> Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. **If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days.** And, as we said earlier, ladies and gentlemen, it's not an attempt in any way to embarrass you, to delve into your personal lives, **but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentlemen, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of this case.** If there is a question that's asked of you and you would like to respond, but you feel that the question — **it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand**, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving sexual assault or sometimes in homicide cases. So please let the Court know.

Trial Vol. 5 at 608 (Court addressing entire panel before group voir dire).

> Also, I'm going to ask you—the questions this will be directed primarily to those of you seated in the jury box and in front of the jury box, **but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you**, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

Trial Vol. 5 at 609 (same). Shortly thereafter, the Court again addressed the jurors: "Since you're all here, we may be able to do this one time." Trial Vol. 5 at 616.

(Court addressing the entire panel before reading witness names). Shortly thereafter, defense counsel William Heck asked the following question:

> Now, another thing that I need to ask about—and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentlemen here. One of the things that I'm curious about—and if there is something in your background or someone close to you in that background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. That has to do with domestic violence. **Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict?** If there's anyone like that, please let me know by just showing a hand and we can talk about that at some other time. Okay

Trial Vol. 5 at 673–74.

Once Juror A was in the box, she failed to answer material questions related to her past.

> BY THE COURT: Q: Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?

Trial Vol. 5 at 720 (Juror A in box).

> BY THE COURT: Q: Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things? Do you know any reason why you cannot listen to the evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

Trial Vol. 5 at 731–32 (Juror A in box).

Just as in *Faulkner*, Juror A's failure to disclose this crucially significant information, despite being given multiple opportunities to do so, gives rise to a presumption of bias. *Faulkner* at *77 (citing *Akins*, 867 S.W.2d at 354). Further, it is difficult to imagine how this presumption could be rebutted, given Juror A's statements that Lee Hall reminded her of her abusive husband and that she hated Mr. Hall at the time of the trial:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [My first husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [He] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.
>
> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.

Sealed Ex. 1, 2.

In finding Faulkner's constitutional rights to a fair and impartial jury were violated by the juror's failure to disclose material life events giving rise to potential bias, the court examined the parallels between the victim and the juror. *Faulkner* at *80 (examining specific similarities between past experiences of juror and victim). Like in *Faulkner*, Juror A's identification with Ms. Crozier was inevitable given the similarities between the proof in the case Juror A adjudicated and the specific details of her life experience that she failed to disclose. Juror A had a difficult, traumatic marriage with her first husband. *See* Sealed Ex. 1. During Mr. Hall's trial, Juror A heard "evidence that the defendant and the victim had a troubled

relationship . . . ." *State v. Hall*, 958 S.W.2d 679, 705 (Tenn. 1997). Juror A lived with her husband for six years; Petitioner and Ms. Crozier lived together for five years before she moved out. *See* Sealed Ex. 1, 3; *Hall*, 958 S.W.2d at 683.

In addition, although she failed to disclose it during voir dire when asked, *see* Trial Vol. 2 at 643–44 (group voir dire), Juror A's first husband drank and was a "mean drunk." Sealed Ex. 1, 2. At trial, Juror A heard that, like her first husband, Lee Hall, drank to excess and was capable of violence when that intoxicated:

(1) drank excessively and was drunk on the night of the offense, 958 S.W.2d at 685;

(2) drank over a case of beer in total that night. *Id*;

(3) "was intoxicated and unable to drive" on the night of the offense, TR Vol. 8 at 1032–34 (testimony of acquaintance of Lee Hall at trial); and that

(4) he was slurring and could not walk well. TR Vol. 8 at 1032–34.

Both Juror A and Traci Crozier sought refuge from their abusive partners in the homes of family members. Juror A sought shelter at her husband's grandmother's house. Sealed Ex., 1. When Ms. Crozier left Petitioner, she moved in with her grandmother, Gloria Mathis, and her uncle, Chris Mathis. 958 S.W.2d at 683.

The facts in this case are strikingly similar to those in *Faulkner* and establish unquestionable (indeed, admitted) bias on the part of Juror A, and therefore reveal a structural defect in the trial process that must be remedied by "automatic reversal." *See Faulkner* at *81, *103. As the *Faulkner* Court concluded: "Our system of justice cannot tolerate a trial with a tainted juror regardless of the strength of the evidence against the defendant." *Id.* at *81.

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B. The facts underlying the structural error are newly discovered and cognizable in a successive post-conviction petition.

Juror A's recent disclosure of her history of rape and domestic abuse is newly discovered evidence. This is evidence of facts existing, but not yet ascertained, at the time of the original trial, that would have been admissible in post-conviction, and credible. The evidence certainly existed at the time of the trial, although was not revealed at the time. In her own words, the juror was "biased" against Mr. Hall *at the time of trial* because she was flooded with memories of her victimization at the hands of her abusive first husband: "I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee." Sealed Ex. 1, 2.

This evidence was not ascertained at the time of the trial because Juror A failed to disclose her victimization history during jury selection, as required by law. *See Faulkner* at *77 (citing to *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012)) (Jurors are obligated to make "full and truthful answers . . . neither falsely stating any fact nor concealing any material matter."). Despite direct questioning by the court, the prosecution, and the defense, Juror A kept secret her history as an abused spouse during jury selection, the stage at which such evidence would have been subjected to the adversarial process as required by the federal and state constitutions.

Had Juror A's actual bias been disclosed in a timely manner it could have been raised in post-conviction. *See Faulkner, supra,* and *Rollins, supra.*

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The evidence from Juror A is credible. She has disclosed the evidence despite the fact that her own son and family have no knowledge that she was raped and otherwise physically and psychologically abused by her first husband. Sealed Ex. 1, 3. Her Declaration is not in any way self-serving, but rather, the opposite. It makes public facts which she clearly would prefer not to share, given her history of keeping it secret for many years.

C. This evidence of juror bias could not have been previously discovered.

Juror A's disclosures constitute newly discovered evidence because, in her own words, "not until very recently," did she share her history as the victim of rape, assault, and psychological abuse by her rapist–husband with people outside of the circle of her closest friends. Sealed Ex. 1, 3. In fact, prior to therapy that concluded in 2009, she was not able to speak to others about the details of her traumatic first marriage. *Id.* Representatives from the Office of the Post-Conviction Defender visited Juror A in 2014, but she did not disclose the evidence at that time.[8] It was only three weeks ago that she told anyone connected to Mr. Hall's trial and appeals that she was subjected to severe domestic violence prior to her service in this capital murder trial and stated that she was actually biased against Mr. Hall. Given the highly sensitive nature of Juror A's experiences and how traumatic it was for her, Mr. Hall was not able to discover this information sooner. It was only once Juror A became comfortable enough with her past that she was willing to disclose the details to Mr. Hall's legal team. Sealed Exhibit 1, 3.

[8] Juror A was interviewed in 2014 by investigator Larry Gidcomb and attorney Sophia Bernhardt, both former employees of the Office of the Post-Conviction Defender.

D. This newly discovered evidence would have resulted in a new trial.

As discussed in Section A, Juror A's failure to disclose material facts similar to the allegations in Lee Hall's case constitutes structural error, which requires automatic reversal. Indeed, the only significant difference between Mr. Hall's petition for relief and that of Mr. Faulkner is the procedural posture of the case at the time the juror disclosed her history of domestic abuse.

The *Faulkner* Court explained the burden shifting framework with which Tennessee courts examine juror bias: "A presumption of bias arises 'when a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias.'" *Faulkner* at *77 (citing *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993)). Juror A's repeated failures to reveal her past victimhood despite explicit questioning satisfy this test.

Moreover, the facts of the present case are even stronger, because unlike the *Faulkner* juror, Juror A now admits her bias against and hate for Mr. Hall at the time of trial. Sealed Ex. 1, 2. Juror A suffered repeated sexual, physical, and psychological abuse throughout her marriage at the hands of a man who "reminded" her of the defendant whose culpability and punishment she deliberated. *Id.* Juror A twice failed to disclose her experience on the juror questionnaire. Sealed Ex. 3, Questions 38 and 41.

The Tennessee courts have zealously guarded the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantees to the right to a trial by an impartial jury. *See, e.g., State v. Smith*, 418

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S.W.3d 38, 44 (Tenn. 2013) ("The right to a trial by jury . . . is a foundational right protected by both the federal and state constitutions.") (footnote omitted); *Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *Faulkner at* *76 ("Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the right to a trial by an impartial jury."); *Rollins*, 2012 WL 3776696 at *14.

"The right to a jury trial envisions that all contested factual issues will be decided by jurors who are unbiased and impartial." *Smith*, 418 S.W.3d at 45 (citations omitted). "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, ..." *Id.* (citing *Durham*,188 S.W.2d at 558). "Trial courts must ensure the integrity of the jury system by holding jurors accountable to the highest standards of conduct." *Id. (*citation omitted). Mechanisms in our legal process to ensure juror impartiality protect not only "the fairness of the trial itself" but also serve to "promote[ ] and preserve[ ] the public's confidence in the fairness of the system." *Id.* (citations omitted). "Like judges, jurors must be—and must be perceived to be—disinterested and impartial." *Id.* (citation omitted).

"Our courts, both civil and criminal, have long recognized the importance of the voir dire process and have zealously guarded its integrity." *Akins*, 867 S.W.2d at 355 (citations omitted). "Since full knowledge of the facts which might bear upon a juror's qualifications is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make 'full and truthful answers . . . neither

falsely stating any fact nor concealing any material matter.' 47 Am. Jur. 2d, Jury § 208 (1969)." *Id.*

It is imperative in capital cases, like Mr. Hall's, that a defendant's case be adjudicated by a tribunal (jury or judge) unburdened by an appearance of bias. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'").[9] The *Smith* Court reaffirmed the heightened due process inquiry concerning the existence of even subconscious partiality in capital cases, while noting that "[r]are is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact." *Id.* at 345 (citing *State v. Green*, 783 S.W.2d 548, 553 (Tenn. 1990)).

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[9] The *Smith* Court described the heightened due process principles applicable to capital cases as follows:

> We have on numerous occasions recognized "the heightened due process applicable in capital cases" and "the heightened reliability required and the gravity of the ultimate penalty in capital cases." *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994); *see also Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) ("[W]e must be mindful that 'a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment.'") (quoting *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001)); *State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.*") (emphasis in original) (internal quotation marks and citations omitted); *Cooper*, 847 S.W.2d [521] at 531 [(Tenn. Crim. App. 1992)] (reversing death penalty on ineffective assistance grounds; noting "the Supreme Court 'has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

357 S.W.3d at 346 (parallel citations omitted) (emphasis original).

Indeed, Juror A is the rare person, and Lee Hall's is the rare case, in which a juror admits bias in performing her duty as a juror deliberating degree of culpability and punishment. She has done so after decades of suppressing her traumatic early life experience as a victim of domestic violence. While the circumstances of Juror A's life and her journey to disclosing her experience as a victim of severe domestic violence are unique, the legal authority regarding the failure of a capital juror to disclose her experience with domestic violence in completing the jury questionnaire and responding in voir dire could not be clearer. *Faulkner* mandates vacation of Mr. Hall's convictions and sentence.

E. The Due Process, the Eighth Amendment, and Equal Protection provisions in the United States and Tennessee Constitutions require the Court to address this case on the merits and grant relief.

The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8.

The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the

Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965). The Tennessee Supreme Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992) (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

The Tennessee Supreme Court has specifically found that application of the strict time bars in Tennessee Code Annotated § 40–30–102 violates the state and federal constitutional rights to due process under certain circumstances.[10] *See Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) (non-capital case tolling the statute of limitations for post-conviction relief; due process requires that a post-conviction petitioner be afforded an opportunity to seek this relief "at a meaningful time and in a meaningful manner," and circumstances precluded petitioner from doing so during the three-year post-conviction statute of limitations); *Seals v. State,* 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Whitehead v. State*, 402 S.W.3d 615, 622 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). The *Whitehead* court noted that "the pervasive theme" in all tolling cases "is that circumstances beyond a petitioner's control prevented the petitioner from filing a petition for post-conviction relief within the statute of

[10] "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Whitehead v. State*, 402 S.W.3d 615, 622 (Tenn. 2013).

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limitations." 402 S.W.3d at 625 (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011).

The Court in *Whitehead*, as was done in earlier due process tolling cases, weighed the competing rights at stake in determining whether due process barred strict application of the statute of limitation. In the post-conviction context, "the private interest at stake is 'a prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process.'" 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). "The government's interest is 'the interest in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* "The remainder of the analysis focuses on 'the risk of erroneous deprivation' of the prisoner's interest, and safeguards that may be necessary to protect that interest." *Id.* These considerations apply equally to determining whether equitable tolling of statutory time limits and/or bars against successive post-conviction petitions is required to effectuate due process and fundamental fairness.

In capital cases[11] such as Mr. Hall's, the interest of the condemned weighs strongly against any interests of the State given that life, and not merely liberty is

[11] Mr. Hall is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

at issue.[12] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's).[13] *See also Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001) (tolling statute of limitations in capital error coram nobis nineteen years after conviction after finding that "[w]eighing these competing interests in the context of this case, we have no hesitation in concluding that due process precludes application of the statute of limitations to bar consideration of the writ of error coram nobis in this case.").

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[12] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency), abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010).

[13] Similarly, in *Howell*, the Supreme Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application.") The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348 at 364–365 (1996) (comparing the risk of incompetent defendant standing trial versus State's risk of incorrect competency determination)).

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The successor post-conviction capital case of *Sample v. State*, 82 S.W.3d 267 (Tenn. 2002) is also instructive. After conviction and imposition of a death sentence for the killing of two men in 1981, Mr. Sample sought relief through the appellate process and more than one post-conviction petition. 82 S.W.3d at 269.[14] The 2002 decision of the Tennessee Supreme Court involved a post-conviction petition filed in 1995, which raised a due process claim regarding suppression of exculpatory evidence. *Id.* Mr. Sample argued in support of his successor post-conviction petition, that "the exculpatory evidence claim could not have been raised before the statute of limitations expired because he did not have access to investigative files until the decision in *Woodall* in January of 1992 and did not have actual possession of the exculpatory evidence until September of 1993." *Id.* at 272. The State argued that, since *Woodall* was decided in January of 1992, and the petition was not filed until January of 1995, the "claim was barred by the statute of limitations and that the petitioner was not denied a reasonable opportunity to have the claim heard." *Id.*

The Supreme Court, in determining whether due process required relaxation of the strict statutory requirements for post-conviction, found that "beginning with *Burford*, we have consistently said that the principles of due process are flexible and require balancing of a petitioner's liberty interests against the State's finality interests on a case by case basis." *Id.* (quoting *Burford v. State*, 845 S.W.2d at 207) ("Identification of the precise dictates of due process requires consideration of both

[14] The post-conviction court found that Mr. Sample had filed six post-conviction actions, all of which were denied. *Sample*, 82 S.W.3d at 269, n. 2. The Tennessee Supreme Court identified three post-conviction suits which were denied in the trial court and on appeal. *Id.*

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the governmental interests involved and the private interests affected by the official action."). In *Sample*, the Court determined that a petitioner should not be denied a reasonable opportunity to raise a claim *due to another's misconduct*. *Id.* at 275.[15] 82 S.W.3d at 273–74. Similarly, it is only the misconduct of Juror A—failing to disclose her personal history with domestic violence, a key component of the State's case at Mr. Hall's trial—that prevented Mr. Hall from filing a successive petition earlier.

Weighed against Mr. Hall's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead v. State*, 402 S.W.3d 615, 623 (Tenn. 2013) (citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). Here, the biased juror claim is neither groundless nor fruitless—it is a structural constitutional error, striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing but undiscovered during the 1992 trial. It is not stale in the legal sense of the term[16] because Mr. Hall had no control over the facts establishing juror bias—Juror A answered no on the questionnaire to important questions about victimization; Juror A remained silent and failed to disclose her experience with severe domestic violence when asked; Juror A did not discuss her rape and abuse openly until undergoing therapy after

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[15] Therefore, the fact that Sample waited approximately 16 months after discovering the evidence before raising the issue was unremarkable in the Court's view.

[16] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

Mr. Hall's post-conviction proceedings ended; Juror A did not discuss her victimization with members of Mr. Hall's legal team in a 2014 interview; Juror A finally revealed these facts in late September 2019.

Finally, in weighing the equities for due process tolling, the court must consider "the risk of erroneous deprivation" of the prisoner's interest, and safeguards that may be necessary to protect that interest. *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Mr. Hall has until now been deprived of a fair trial and the opportunity to present a claim of structural error that requires vacation of his convictions and sentence. *See Faulkner, supra*. The safeguards necessary to protect his interest are 1) an evidentiary hearing in this court and 2) granting relief in the form of an order vacating his convictions and sentence.

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article XI, § 8 of the Tennessee Constitution precludes passage of "any law granting to any individual or individuals, rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law."

The claims and underlying facts presented by Mr. Faulkner and Mr. Hall are identical. They became available when the former jurors finally revealed the domestic abuse they suffered, which they failed to disclose on questionnaires and in

voir dire. In Mr. Faulkner's case, the juror's deception was discovered at a time that Mr. Faulkner could raise the claim and put on proof at his post-conviction evidentiary hearing. In Mr. Hall's case, the juror's deception was discovered later in the legal process, at a time when Mr. Hall has fewer available State court remedies—depending upon the Tennessee courts' interpretation of law regarding writs of error coram nobis, motions to reopen, and successor post-conviction petitions.

Mr. Faulkner's death sentence was vacated. Mr. Hall is scheduled for execution on December 5. Imposing the death penalty on Mr. Hall, but not on Mr. Faulkner, is arbitrary.[17] The only differences between them, their claims, and their exposure to the death penalty is when the jurors finally revealed the domestic abuse they suffered and where Mr. Faulkner and Mr. Hall were in the legal process at that time. Mr. Faulkner and Mr. Hall had no control over these factors, which alone may determine Mr. Faulkner lives and Mr. Hall dies.

V. CONCLUSION

The newly discovered evidence constitutes structural error and requires a vacation of Mr. Hall's convictions and sentence. The Court should hold a hearing on these matters to develop the record and grant Mr. Hall a new trial.

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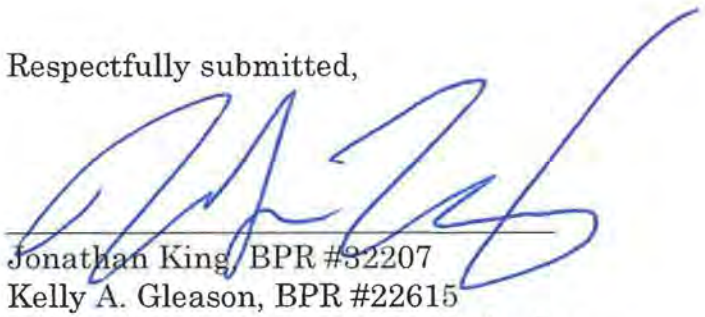
[17] Arbitrary imposition of the death penalty violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Those constitutional provisions, in conjunction with the 14th amendment due process clause and the Tennessee Constitution, Article I, § 8 and § 17, require that, if a state chooses to impose the death penalty, it must do under systems that guaranty, as much as humanly possible, non-arbitrary imposition of the death penalty.

Respectfully submitted,



Jonathan King, BPR #32207
Kelly A. Gleason, BPR #22615
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN 37219-8068
(615) 741-9331
(615) 741-9430 (fax)
kingj@tnpcdo.net
gleasonk@tnpcdo.net

Counsel for Petitioner

Appendix C

Verification of Petitioner and Affidavit of Indigency

I, Lee Hall, swear or affirm under the penalty of perjury that the foregoing motion is true and correct to the best of my knowledge.

I do solemnly swear that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear that, to the best of my knowledge, I am justly entitled to the relief sought.

Date: 10/14/19 X

Petitioner Lee Hall

Sworn to and subscribed before me this the 14th day of October, 2019.

JONATHAN KING STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY

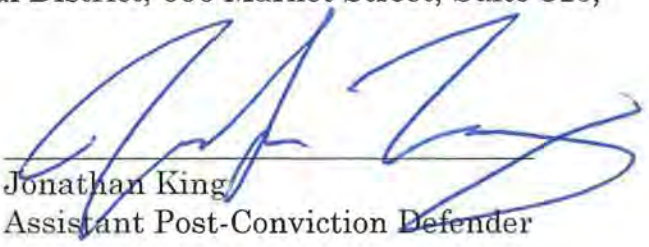
Notary Public

My commission expires: MARCH 8, 2022

Appendix C

Certificate of Service

I hereby certify that a true and exact copy of this Motion and attachments was delivered via email, U.S. Mail, and/or by hand delivery to Neal Pinkston, District Attorney General, 11th Judicial District, 600 Market Street, Suite 310, Chattanooga, TN 37402.



Jonathan King
Assistant Post-Conviction Defender

Appendix C

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION III

LEE HALL,[1]	)	
f/k/a Leroy Hall, Jr.	)	**Nos. 222931 (Motion to Reopen)**
Petitioner	)	**308968 (Post-Conviction)**
vs.	)	**308969 (Coram Nobis)**
	)	
STATE OF TENNESSEE,	)	**Capital Case**
Respondent	)	**Execution Date 12/5/2019**

ORDER REGARDING PROCEDURAL POSTURE OF PETITIONER'S CLAIMS FOR RELIEF

I. Introduction

This matter came before the Court November 4, 2019, for a hearing on the above-referenced filings, filed October 17, 2019. The State filed an answer to the pleadings October 29, 2019, and counsel for the Petitioner filed a response to the State's answer the morning of the hearing. In his petitions, Mr. Hall asserts he is entitled to a new trial based upon what he claims is newly-discovered evidence that one of the jurors who served in his 1992 trial was prejudiced against him, thus denying him his right to a fair trial by an impartial jury. Petitioner is scheduled to be executed December 5, 2019.

Before resolving the merits of Petitioner's claims, this Court must determine whether the Petitioner's claims are properly before the Court. After reviewing the parties' pleadings, the relevant case law, the arguments of counsel at the November 4 hearing, and the record as a whole, the Court concludes the following:

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[1] Petitioner was indicted under his birth name, Leroy Hall, Jr. As explained in Mr. Hall's filings, in 1994 the Davidson County Chancery Court issued an order changing Petitioner's name to Lee Hall, and the Tennessee Supreme Court has recognized Petitioner as "Lee Hall" since 2014. This Court will therefore reference Petitioner by the name provided in these pleadings.

Appendix D

1. The Petitioner's coram nobis claim concerns a constitutional violation, and the Tennessee Supreme Court has concluded the petition for writ of error coram nobis is not proper for resolving constitutional claims. The writ of error coram nobis addresses factual claims of actual innocence, and Mr. Hall's stated claim is not one of actual innocence. As such, the petition for writ of error coram nobis is DISMISSED.

2. The Petitioner's motion to reopen his prior post-conviction proceedings does not state one of the bases for reopening post-conviction proceedings as provided in Tennessee Code Annotated section 40-30-117. The Court is unaware of any authority which would permit a post-conviction court to reopen a prior post-conviction matter on due process grounds. Thus, the motion to reopen is DISMISSED.

3. Tennessee Code Annotated section 40-30-102(c) provides, "This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." The Court acknowledges the Tennessee Supreme Court has concluded the statute of limitations may be waived on due process grounds, but Tennessee's appellate courts have not yet examined a case in which a petitioner seeks to circumvent the statutory one-petition limit on due process grounds. Accordingly, this Court determines a hearing is necessary to focus on the due process issue in greater detail. This hearing shall be held November 14, 2019.

In support of the above, the Court makes the following findings of fact and conclusions of law:

II. Relevant Procedural History

A Hamilton County jury found Petitioner guilty of one count each of first degree murder and aggravated arson in connection with the Petitioner's killing of his ex-girlfriend, Traci Crozier. The jury sentenced Mr. Hall to death. The Petitioner's convictions and sentences have withstood the three-tier capital review process.[2]

[2] *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997) (direct appeal); *Leroy Hall, Jr., v. State*, 2005 WL 2008176 (Tenn. Crim. App. Aug. 22, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005) (post-conviction); *Lee Hall, formerly known as Leroy Hall, Jr., v. Ricky Bell, Warden*, No. 2:06-CV-56, 2010 WL 908933 (E.D. Tenn. Mar 12. 2010) (federal district court order denying petition for writ of habeas corpus); *Lee Hall, formerly known as Leroy Hall, Jr., v. Ricky Bell, Warden*, No. 2:06-CV-56 (E.D. Tenn. Sept. 22, 2011) (memorandum and order dismissing coram nobis petition prior to Sixth Circuit review).

III. Recent Case Developments

The Petitioner asserts that in September 2019, post-conviction counsel interviewed one of the jurors from Petitioner's trial, referenced in public pleadings as "Juror A."[3] Shortly before the filing of these petitions, the juror completed an affidavit stating that she was a victim of extensive domestic violence during her first marriage, which ended over a decade before her service on Mr. Hall's jury. On the questionnaire, the victim answered "no" to questions asking whether she had been a victim of a crime and whether she had contacted the police concerning a domestic or criminal matter. During general voir dire, the juror did not answer certain questions which the Petitioner claims would have been reasonably expected to elicit disclosures of the juror's prejudices. The State asserts such questions did not meet this threshold.

In her recent affidavit, Juror A's stated she "could put [her]self in [the victim's] shoes, given what had happened to [the juror]." She also claimed she "hated [Petitioner] for what he did to that girl. It really triggered all the trauma [the juror] had gone through with [her husband] and I was biased against [Petitioner]."

IV. Review of Procedural Issues

As stated above, Petitioner has raised his juror bias claim in three separate filings: A petition for writ of error coram nobis, a motion to reopen his prior post-conviction proceeding, and a successive petition for post-conviction relief. Before this Court can resolve the Petitioner's stated issues, the Court must determine whether any proper vehicle exists for the Court to resolve Petitioner's claims.

A. Writ of Error Coram Nobis

1. Parties' Arguments

Petitioner contends his coram nobis petition states a colorable claim for relief and should be considered by this Court. Petitioner asserts he is entitled to due process-based tolling of the one-year limitations period because he was without fault in bringing these claims. Post-conviction counsel assert they exercised reasonable diligence in pursuing these claims and could not have discovered these claims previously because Juror A did not disclose her history of abuse and prejudice toward Mr. Hall before now. Petitioner

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[3] The parties have agreed to withhold the juror's name from public pleadings. The juror's name appears in sealed exhibits to Petitioner's pleadings, including an affidavit from the juror and the juror's questionnaire from the 1992 trial.

asserts his claims constitute newly-discovered evidence relating to matters at trial and would have been admissible at trial. Petitioner acknowledges the writ of error coram nobis is an extraordinary proceeding, but given the constitutional claims involved and the fact that these claims do not fit well into other available procedural remedies, Petitioner argues a coram nobis proceeding is most appropriate to resolve Mr. Hall's stated issues.

The State contends the coram nobis petition must be dismissed because evidence of Juror A's supposed bias does not relate to matters litigated at trial. The State also argues Mr. Hall's petition is impermissibly broad, and because post-conviction counsel did not exercise reasonable diligence in discovering Juror A's disclosures, Mr. Hall is not entitled to due process-based tolling of the coram nobis limitations period.[4]

2. Analysis

The writ of error coram nobis is an "extraordinary procedural remedy . . . into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1992). To obtain coram nobis relief, the petitioner must show that the newly discovered evidence could not have been obtained before trial by either the petitioner or his counsel exercising reasonable diligence. *State v. Vasques*, 221 S.W.3d 514, 527-28 (Tenn. 2007). The legislature has limited the relief available through the writ:

> The relief obtainable by this proceeding shall be obtained to errors [outside] the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. 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

[4] The State also contends the coram nobis petition should be dismissed because facts of this case are different from those of *Robert Faulkner v. State*, in which a death row defendant was granted post-conviction relief based on juror bias. This Court will not address this contention in this order because the State's argument relates more to the merits of the petition than the procedural issues which are the focus of this order.

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> discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different result, had it been presented at the trial.

Tenn. Code Ann. § 40-26-105(b) (2012).

A petition for writ of error coram nobis must be filed within one year of the judgment becoming final in the trial court. *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1990); *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). The current petition for writ of error coram nobis, filed in October 2019, is clearly untimely, as it was filed over twenty-five years after the order denying Mr. Hall's motion for a new trial. However, in certain instances due process concerns may require tolling of the coram nobis limitations period. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). As relevant to this case, the Tennessee Supreme Court has concluded that "newly available" evidence may constitute "newly discovered" evidence for coram nobis purposes in limited circumstances. *See Payne v. State*, 493 S.W.3d 478, 485-86 (Tenn. 2016).

The parties have raised extensive, well-reasoned arguments in support of their contentions, particularly regarding Petitioner's due process-based claims. However, the Court will resolve this issue on grounds not addressed directly by the parties. This Court notes that the Tennessee Supreme Court has limited coram nobis relief to situations involving newly discovered evidence of actual innocence. In a recent opinion, the Supreme Court stated,

> The writ [of error coram nobis] is not designed to address *Brady* violations: hence, the statute contains no requirement that the State withheld or suppressed the subsequently or newly discovered evidence. *Brady* violations are constitutional violations: the appropriate remedy is therefore a post-conviction proceeding. . . . As previously noted, matters appropriate for post-conviction relief—such as *Brady* violations—are not appropriate for coram nobis proceedings."

State v. Nunley, 552 S.W.3d 800, 819 (Tenn. 2018) (alteration in original) (quoting

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Hershell Lee Kinnaird v. State, 2001 WL 881371, at *6 (Tenn. Crim. App. Aug. 7, 2001)).

Nunley dealt specifically with a *Brady* violation, but the entirety of the *Nunley* opinion, including the cases cited therein, makes clear to this Court that the *Nunley* holding applies to all constitutional violations. The issues raised by Mr. Hall ultimately are constitutional in nature—Mr. Hall is arguing he was denied his right to a fair and impartial jury and should be granted a new trial because the denial of such right is a structural constitutional error. The *Nunley* opinion, therefore, places Petitioner's claim beyond the reach of the writ of error coram nobis.

Nunley appears to be a logical extension of prior appellate case law limiting the writ of error coram nobis to matters involving evidence of actual innocence. For instance, in *Stephen Lynn Hugueley v. State*, counsel for a death row inmate asserted Mr. Hugueley was entitled to coram nobis relief based on newly-available brain scans which established the petitioner was incompetent at the time of his trial. *Stephen Lynn Hugueley v. State*, 2017 WL 2805204 (Tenn. Crim. App. June 28, 2017), *perm. app. denied* (Tenn. Nov. 17, 2017). The coram nobis court denied relief; on appeal, one of the many reasons cited by the Court of Criminal Appeals in affirming the court below was that Mr. Hugueley did "not have a valid due process claim requiring tolling because he [was] not contending he [was] actually innocent of the crime." *Id.* at *13.

In *Joann Rosa v. State*, the petitioner argued she was entitled to due-process based tolling of the limitations period based on what she claimed was the newly-discovered intoxication of the judge who presided over her trial. The Court of Criminal Appeals rejected Ms. Rosa's claims, stating,

> We conclude that the Petitioner has failed to state a cognizable claim for coram nobis relief because she has not presented evidence of actual innocence. Evidence of intoxication and illegal activities surrounding the judge's drug abuse would not have been admissible at her trial because it was not relevant and probative of whether she committed the crime of which she was convicted

Joann G. Rosa v. State, 2013 WL 5744781, at *4 (Tenn. Crim. App. Oct. 21, 2013).

Similarly, Mr. Hall's coram nobis petition does not raise a claim of actual innocence. As stated above, the petition raises a constitutional claim. Thus, Mr. Hall's claims are not cognizable in a coram nobis action. Mr. Hall's coram nobis petition is therefore dismissed.

B. Motion to Reopen Post-Conviction Petition

1. Parties' Arguments

Mr. Hall acknowledges his motion to reopen does not fall into any of the statutory categories which entitle a post-conviction petitioner to reopen his prior post-conviction claim. Petitioner nonetheless argues he is entitled to reopen his prior post-conviction proceedings "in that the facts [alleged in the motion] establish a serious structural error and were not previously ascertained through no fault of the petitioner and through circumstances beyond his control."[5] The State contends the Petitioner's failure to present a claim which qualifies as a ground for reopening post-conviction proceedings is fatal to the motion to reopen.

2. Analysis

A post-conviction petitioner is permitted to reopen his post-conviction proceedings in limited circumstances. The post-conviction statutes limit these circumstances to the

[5] Motion to reopen at 20.

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following:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid;[6] and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann. § 40-30-117(a)(1)-(4).

The Petitioner's constitutional claims do not fall into any of the three categories established in Tennessee Code Annotated section 40-30-117(a)(1) through -(3). The Tennessee Supreme Court has limited a petitioner's ability to reopen his post-conviction proceedings strictly to the grounds listed in the statute. *See, e.g.*, *Harris v. State*, 102 S.W.3d 587, 591 (Tenn. 2003) (claim that State withheld exculpatory evidence not cognizable in motion to reopen because "[a] claim that the State suppressed or failed to disclose exculpatory evidence in violation of *Brady* simply is not one of the statutory grounds for reopening a post-conviction proceedings"); *see also id.* at 591 n.6 ("Clearly,

[6] Petitioner argues the claims raised in his motion to reopen are "most analogous" to this ground. The Court finds this assertion unavailing.

the General Assembly knows how to make exceptions for *Brady* violations. It simply chose not to include such claims in the statute addressing motions to reopen"). This Court is also unaware of any authority which would permit a trial court to reopen a post-conviction proceeding on due process grounds based on a claim which does not qualify under one of the three statutory grounds.

Because Petitioner's motion to reopen does not fall into one of the categories entitling him to relief, his motion to reopen must be dismissed.

C. Successive Post-Conviction Claim

1. Parties' Arguments

The Petitioner acknowledges his second post-conviction petition is both untimely and filed in contravention of the statutory limit to one post-conviction petition. However, post-conviction counsel argue the Petitioner's due process rights should allow this Court to consider Petitioner's claims. The State did not address the second post-conviction petition in great detail in its answer; at the November 4 hearing, the State claimed this resulted from the post-conviction statutes' requirement that this Court file an order stating the petition stated a colorable claim before the State could answer the petition. The State's answer does note the statutory limit to one post-conviction filing.

2. Analysis

A petitioner is entitled to post-conviction relief if the petitioner can establish his "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the

petitioner to prove the factual allegations contained in his petition by clear and convincing evidence. *Id.* § 40-30-110(f); *Dellinger v. State*, 279 S.W.3d 282, 296 (Tenn. 2009).

The post-conviction statutes place limits on a petitioner's ability to file a petition for post-conviction relief. Two of those limits are relevant in this case. First, Tennessee Code Annotated section 40-30-102(a) provides that a post-conviction petition must be filed

> within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.

Mr. Hall's petition is clearly untimely under this statute.

Tennessee Code Annotated section 40-30-102(c) states,

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-117.

Mr. Hall has already filed a post-conviction petition that has been fully litigated, and as stated above Petitioner's current claims do not meet the criteria for reopening his prior post-conviction proceedings. Under a strict reading of section 40-30-102, Petitioner's second petition would be dismissed as untimely and as violating the one-petition provision.

However, the Tennessee Supreme Court has established, at least as it relates to the timeliness of a post-conviction petition, that a petitioner may be entitled to have his claims heard on due process grounds. As the Tennessee Supreme Court has stated,

> The notion of "due process" is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the "Law of the Land" clause in Article I, Section 8 of the Constitution of Tennessee. Due process "embodies the concepts of fundamental fairness," justice, and "the community's sense of fair play and decency" *Whitehead v. State,* 402 S.W.3d 615, 623 (Tenn.2013) (quoting *Seals v. State,* 23 S.W.3d 272, 277 (Tenn.2000); *United States v. Lovasco,* 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L.Ed.2d 752 (1977)). Both this Court and the United States Supreme Court have recognized that due process requires that, once the legislature provides prisoners with a method for obtaining post-conviction relief, prisoners must be afforded an opportunity to seek this relief "at a meaningful time and in a meaningful manner." *Burford v. State,* 845 S.W.2d 204, 208 (Tenn. 1992) (citing *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437, 102 S. Ct. 1148, 71 L.Ed.2d 265 (1982)).
>
> We recently clarified Tennessee's due process tolling standard in *Whitehead v. State.* We held that a post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing. *Whitehead v. State,* 402 S.W.3d at 631 (citing *Holland v. Florida,* 560 U.S. 631, 648–49, 130 S. Ct. 2549, 2562, 177 L.Ed.2d 130 (2010)). This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.
>
> We also noted in *Whitehead* that the standard for pursuing one's rights diligently "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts [to pursue his or her claim]." *Whitehead v. State,* 402 S.W.3d at 631 (quoting *Aron v. United States,* 291 F.3d 708, 712 (11th Cir.2002)). However, we emphasized that due process tolling "must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Whitehead v. State,* 402 S.W.3d at 631–32 (quoting *Harris v. Hutchinson,* 209 F.3d 325, 330 (4th Cir.2000)).
>
> The threshold for triggering this form of relief is "very high, lest the exceptions swallow the rule." *Whitehead v. State,* 402 S.W.3d at 632 (quoting *United States v. Marcello,* 212 F.3d 1005, 1010 (7th Cir.2000)).

Bush v. State, 428 S.W.3d 1, 21-23 (Tenn. 2014) (footnotes omitted).

This Court recognizes that the due process-related post-conviction opinions cited by Petitioner (including the *Whitehead* and *Burford* cases cited above) have concluded only that due process can, in certain cases, excuse the untimeliness of a petitioner's

claims for relief. This Court is unaware of any authority (statute, court rule, appellate opinion, or otherwise) addressing whether due process concerns may allow a trial court to consider a second or successive post-conviction petition on its merits despite the statutory limit of one post-conviction petition.

This Court has two options before it. On one hand, the Court could determine that expansion of a petitioner's due process rights in post-conviction cases is the exclusive province of the Tennessee Supreme Court and conclude that the Supreme Court's rulings regarding due process apply only to the previously-addressed timeliness issues. If this Court reaches this conclusion, the Petitioner's second post-conviction petition would be dismissed.

On the other hand, this Court could determine that Mr. Hall's due process rights, which are heightened in a death penalty case, should permit this Court to consider the merits of the second post-conviction claim in light of the facts presented in the petition and the Supreme Court's previous due process-based post-conviction jurisprudence. In such an instance, this Court would, on due process grounds, permit the post-conviction petition to proceed consistent with the post-conviction statutes. If procedurally proper, this Court would be inclined to conclude the Petition states a colorable claim—one which still must be proven by Petitioner before he would be entitled to relief—and consider the petition on its merits.

Given the parties' limited focus on the second post-conviction petition in their previous filings, the Court finds it necessary for the parties to present the Court with additional pleadings and argument on this issue before the Court resolves the issue. Such

pleadings and arguments will proceed as detailed below.

V. Conclusion

For the reasons stated above, Mr. Hall's petition for writ of error coram nobis and motion to reopen his post-conviction proceedings are DISMISSED.

The Court will not rule on whether Petitioner's second post-conviction petition is properly before the Court at this time. The parties shall instead file additional pleadings on whether the second post-conviction petition may be considered on due process grounds. Given the time constraints involved in this case, any pleadings shall be filed no later than the close of business on **Wednesday, November 13, 2019.** No responsive pleadings shall be filed. The parties should be prepared to argue this issue at the hearing set for **Thursday, November 14, 2019.**

At the November 14, hearing, the parties should also be prepared to present evidence on the merits of the claims raised in the post-conviction petition. If the Court concludes the post-conviction claim is properly before the Court, the Court shall issue an order on the merits of the petition based on the proof introduced at the hearing. If the Court concludes due process does not permit the filing of the second petition, the proof presented on the merits shall be considered an offer of proof designed to preserve Petitioner's claims on appellate review.

IT IS SO ORDERED this the 6 day of November, 2019.

Don W. Poole

Don W. Poole,
Judge

Appendix D

CRIMINAL COURT, DIVISION III

Immediate Copy to:

Attorneys for Petitioner
Kelly Gleason
Jonathan King

Fax: 615-741-9430 (gleasonk@tnpedo.net)

404 James Robertson Parkway
Suite 1100
P. O. Box 198068
Nashville, TN 37219-8068

District Attorney General
Neal Pinkston

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

THE ELEVENTH JUDICIAL DISTRICT

LEE HALL, JR.	:	
vs.	:	NO. 308968
STATE OF TENNESSEE	:	

SECOND PETITION FOR POST-CONVICTION RELIEF

NOVEMBER 14, 2019

BEFORE THE HONORABLE DON W. POOLE, JUDGE

FOR THE STATE:

Neal Pinkston
Hamilton County District Attorney General
New Courts Building
600 Market Street
Chattanooga, Tennessee

FOR THE DEFENDANT:

Kelly A. Gleason, Esquire
Jonathan King, Esquire
Assistant Post-Conviction Defenders
404 James Robertson Parkway
Suite 1100
Nashville, Tennessee

WITNESSES

EXHIBITS

P R O C E E D I N G S

THE COURT: Let me, before I call the case, let me make some general statements. Now, the hearing that will be conducted today will be an open hearing, so, people, everything that happens will be in open court. But let me remind the media of a couple of things, and certainly applies to the TV stations. I think something was mentioned some coverage and things of this nature. For the most part, that's going to be allowed, but let me read you -- and I think the media, TV stations, radio, newspapers, are aware of this. Rule of Supreme Court. Jury selection: Media coverage of jury selection is prohibited. The next section, media coverage of jurors during the judicial proceedings is also prohibited.

Part of the case, or the hearing, that will be conducted today concerns the presentation of a juror. So the request has been made, and we will follow the Supreme Court rule, there will be no streaming of that juror. Now, guys, understand me, this is important: No streaming of that juror, no pictures of the juror. And this applies to cell phone and everything else. Nothing to show an image of that juror in any way. I think this is prohibited and we're

going to follow the Supreme Court rule. So part of what we're hearing today concerns a juror, so I think Supreme Court rule covers that, that no streaming of that.

Now, as far as the rest of the proof, you'll be allowed to stream. I think that, lawyers, is what was said.

And so everybody knows, we sometimes have in-chambers meetings, not for secrecy, but that was the purpose of what that meeting was for, just to make clear that part of the hearing today will be in regard to a juror selection process and what may or may not have occurred. So no streaming, no photographing, no imaging whatsoever of that juror.

Now, let me ask the petitioner attorneys, does that cover at least -- does that satisfy the rule as far as it petitioner is concerned?

MS. GLEASON: Yes, it does, Your Honor, in regard to the media; however, I would also ask the Court to advise members of the gallery, who are non-media, that they are also not allowed to take photographs.

THE COURT: I think I mentioned that, but I'll mention it again. That includes everybody in the courtroom. Everybody. Now, that would be contemptuous

if that is violated. But no pictures, no cell phone, no photographs, no nothing. Everybody understand? Okay. The camera people back here seem to understand.

All right. So the case then of Leroy Hall, Jr., or also known as Lee Hall, versus State of Tennessee will now be called. Lee Hall, Leroy Hall, is represented by Ms. Kelly Gleason and Mr. Jonathan King. State of Tennessee is represented by Mr. Neal Pinkston.

Couple of things that covers -- we have an affidavit and a waiver - and I'll let y'all make any statements you want to make in just a second - an affidavit and a waiver from the petitioner, that is incarcerated, and he has waived his appearance in regard to this hearing this morning. It does appear, based upon vision problems and medical problems, that the waiver is appropriate and we will sustain his waiver of his presence in court.

Several weeks ago, the petitioner filed three separate petitions that came before the Court.

MR. PINKSTON: Judge, could I interrupt?

THE COURT: These petitions were writ of error coram nobis, a motion to reopen for post-conviction relief, and a second petition for post-conviction relief. The State of Tennessee filed a complete response to that. The Court has issued an

order concerning the two first things, the writ of error coram nobis and the motion to reopen for post-conviction relief, and the Court basically has ruled this: These are all statutory remedies, every one of them are statutory. Our lawmakers --

BAILIFF BENDER: We've got a problem, Judge, this young man needs to leave the courtroom, wants to interrupt everything.

THE COURT: He can have a seat. Sir, if you'll be seated and follow the directions of the Court, I'll let you sit there.

MR. MARCEAUX, SR.: I just got one second to say to you.

THE COURT: You got a statement to make about this case, sir?

MR. MARCEAUX, SR.: I think so. I saw you before. I told you things I want. No one knows it.

THE COURT: Have a seat, sir. You can sit down or you can leave. Okay? Now, I don't want to bar the court to anybody, but have a seat.

MR. MARCEAUX, SR.: You wouldn't let come forward and read this law? I have a slip law that allows me to walk in.

THE COURT: You can walk in, you can sit down. Okay? Sit down. Okay?

MR. MARCEAUX, SR.: This is slip law from the federal government.

THE COURT: One more word, sir, I'm going to have you leave. Okay? Have a seat.

Once again, the three things filed by the petitioner, all statutory, certainly courts have interpreted those statutes. But the Court has issued an order dismissing the writ of error coram nobis and the motion to reopen for post-conviction relief, for the reasons that the Court was of the opinion, based upon the law, the statutes, and the cases interpreted, that those matters are not properly here, there's no grounds for those matters to be looked into or further proceedings had.

The second petition for post-conviction relief is here before the Court today and the Court is going to allow proof to be presented concerning this. The State filed a response - and once again, I appreciate all the attorneys and their good work in what they've done - indicating that there is no basis in the law for a second petition, which is exactly true, but there is law to the effect that in certain circumstances, due process would allow certain things to be presented to the Court. And for that reason, I have allowed this second petition for post-conviction

relief to go forward. So it's encompassed within the order that the Court has filed, but for the purposes in that order, this will go forward, understanding that statutorily there is no basis for a second petition for post-conviction relief to be filed.

All right now, we're prepared to go forward. Petitioner's attorneys have anything else? Have we covered everything preliminarily that we need to cover?

MS. GLEASON: Yes, Your Honor.

THE COURT: And once again, media, everybody in the courtroom now, it's extremely important that that Rule 30 be followed because that's the law. So no coverage, no photographing, cell phones, live streaming, anything concerning this juror. And I think will be enumerated as Juror A, is that correct?

MS. GLEASON: Yes, Your Honor.

THE COURT: All right. Preliminary statements then.

MS. GLEASON: Yes, your Honor, we would call as our first witness Juror A.

THE COURT: All right. And Mr. Pinkston, anything else, sir, that I haven't covered?

MR. PINKSTON: No, Your Honor.

THE COURT: All right. Thank you. All right. Juror A will be covered. No live coverage, no photographs, of this juror.

JUROR A,

called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GLEASON:

Q Good morning, Juror A.

A Good morning.

Q The Court has ordered that we will refer to you today as Juror A, so it is important to remember that as you answer my questions and Mr. Pinkston's for the State.

THE COURT: Get a little closer to the mike now. This courtroom, it's hard to hear you sometimes.

Q Juror A, do you currently live in Tennessee or another state?

A Another state.

Q And when did you move to your current state?

A 2000.

Q Did you live in Tennessee prior to living in your current state?

A No, we lived in Arizona for seven years.

Q And do you remember meeting with me and Investigator Jeff Vittatoe from our office this year?

A Yes.

Q Do you also recall meeting with Justyna Scalpone from my office and Jeff Vittatoe in October of 2019?

A Yes.

Q If I may hand you something. I'll approach.

THE COURT: That's fine.

Q And Juror A, this is a document which is under seal, so I would not want you to reference any identifying information that is within it. Do you recognize this as a four-page document with your initials and signature as a declaration you provided to Justyna Scalpone and Jeff Vittatoe on October 7th, 2019?

A Yes.

Q Were you one of the jurors in Lee Hall's case in 1992?

A Yes.

Q Do you recall that it was a capital trial involving allegations that Lee Hall abused his girlfriend and killed her when she left him?

A Yes. Can I answer that different? I

actually had no idea it was about abusing, I just knew it was a murder case.

Q Is that when you first were selected as a juror?

A Well, I really, I heard somebody talking that it was a murder case while we were filling out our form, before jury selection. So all I knew was a murder case.

Q And in your declaration, did you discuss your first marriage?

A Yes.

Q And please refer to it if you need to while I'm asking you questions. Do you recall what years you were married to your first husband?

A Yeah, from 1969 to 1975.

Q In your declaration, do you talk about how you came to be married to your first husband?

A Yes.

Q And could you describe that?

A Well, we had been dating for two years and I had fought him off. I graduated from high school, was getting ready to go to college. I was still a virgin and he decided he didn't want that to stay that way, so he forced himself on me and a pregnancy resulted from that.

Q And as a result of that pregnancy, what happened?

A I married him.

Q And what was your first marriage like?

A It was bad. I never -- I would have never married him otherwise. He was a heavy drinker. While we were dating, it wasn't a problem, but after we were married, he got mean when he was drinking.

Q And when you say he got mean, can you provide a description of what that was like?

A He would go out drinking with a buddy. He would make up an excuse for why he had to leave and go get drunk and come home 2 or 3:00 in the morning and wake me up and start being mean. But he never hit me for the first few years, but he would put holes in the wall and threaten. Threw something at our fish tank one time and busted it and I'd have to clean the mess up.

Q Would you describe it as a trusting relationship?

A No.

Q How so?

A Well, I had already decided I wasn't going to stay married to him, so I was already figuring out how I could support myself and my child. And was going

to school and working part-time and just planning on how I was going to eventually extricate myself from the marriage. And he was, he would threaten things like, If you ever leave me, I'll never let you see another person, another man. It was just an unhappy marriage altogether.

Q And did he do other things to indicate a lack of trust in you?

A I'm not sure what you mean.

Q Did you ever run into issues with him if you weren't home by a certain time?

A Oh gosh, yes, he kept up with everywhere I went. He called me constantly at work. I eventually got a job as a med tech at a hospital and he was jealous, always thought I was going to run around on him. Kept account of, you know -- now I know that this is the usual thing, but he would isolate me from my family and try to accuse me of all kinds of fooling around. I'd go to the grocery store for an hour and come back with groceries and he'd claim I'd been out fooling around.

Q And was this something that you talked with your family about at the time?

A No, not at all, ever.

Q Did he ever physically assault you?

A A couple of times, when he was really drunk. And I probably instigated it some because I was fighting with him. And that was sort of the last straw, I decided I was going to leave him after that. About two incidences that had happened.

Q Let's talk about the first incident.

A Oh gosh, it was my birthday and we'd gone out to celebrate and we'd both been drinking and he started getting very mean. And I was fighting with him and he ended up socking me in the eye, black eye and bloody nose. And I called my dad for the first time, first time ever. I let him know that something had been going on. That was probably the second time. I think there was one other time when he had not hit me as hard, but -- mostly, his violence was towards objects, throwing things and breaking up stuff and taking off drunk in our car. He'd gotten caught once for drunk driving.

Q How did he get caught for drunk driving?

A Oh, he was on the interstate heading to Chattanooga and got caught for speeding and they realized he was drunk.

Q Was he arrested?

A Yes, he ended up having to have special insurance to cover him and -- because of his -- he was

allowed to drive but he was restricted some, I think, to where he could drive. And cost us a lot of money. We had to borrow money to pay the lawyer.

Q Did you have much money at the time to spend on something like that?

A No, we were living from paycheck to paycheck.

Q Were there any people other than your family that you turned to when you were having problems with your first husband?

A His grandmother knew what was going on, because I would escape sometimes to her house.

Q Did she help emotionally support you?

A Oh yes.

Q Did she help financially support you by providing food or anything?

A Food. Sometimes we didn't have any money left to buy groceries before the next paycheck was due, because I wasn't working then, I was going to school.

Q Why did you leave your job?

A Oh, I didn't have a job by then, I was still going to school trying to become a med tech.

Q And in the incident with the drunk driving, was your first husband convicted?

A I guess. I'm not sure. There wasn't a

court trial or anything.

Q But he was certainly charged?

A Yes.

Q So you said there were two incidents?

A I don't remember details about the second one, it's mostly the -- well, the second one was the one I remember the most. I know there was an incident before, but I don't remember anything. I tried to block out a lot of that stuff.

Q Can you tell us the first incident, the most violent incident?

A Like I said, we were celebrating my birthday and we'd both been drinking too much and he started this fight. And when I called my dad, he came and got me, because they were already babysitting our son and I went -- the next day, we were planning to go to a UT football game, so I just went with my family and didn't know what had happened to Mike. Turns out, he had gotten in the car and driven, tried to get to Florida, where he had relatives.

Q Were you living in a house or in a trailer at that time?

A Trailer.

Q Was there a gun in the trailer at the time this happened?

A Yes, I had a .22 rifle that I'd had since I was a kid. Kept it hid up in a -- because we got a young child, I kept the rifle up in the closet and one in the trailer and the ammunitions in another end. And that night, he did -- I didn't know it. It was when I got home the next day that I went in and he had gotten the gun out and loaded it, but there were bullets everywhere and he had poked holes in the ceiling with it and bent it in half.

Q Meaning what bent in half?

A The gun, the rifle, the barrel. And which I figured he probably had planned to shoot me and himself, but I don't know that because I was gone by then, so he might have been just planning on shooting himself. He was so drunk, he didn't know what he was doing.

Q Did you later find out why he fled the state at that point?

A Oh yes, he wanted to go visit his aunt in Florida. And he got as far as Dalton, Georgia, and wrecked the car and then called his aunt and got bus fare and took a bus all the way to Florida.

Q Did he come back from Florida?

A Yes.

Q What was it like when he come back from

Florida?

A He was a different person. He was solemn and had quit eating or drinking anything, he just sat, because I had told him I was done, I was leaving him. He begged me to wait until Christmas, for our son's sake.

Q Was there any point where you thought that he might have mental or emotional problems that required treatment?

A Oh yes, I knew he was crazy. That's all I knew was he's crazy, because he was irrational, he was paranoid, he was always looking for listening devices in our trailer. It was like why would anybody bother, you know.

Q Did you seek help for him for that?

A I did. I talked him into going to the county health department. And all they wanted to do was do marital counseling and I was trying to convince them no, that's not the problem, you know, he's crazy.

Q So when he got back from Florida and you told him that you wanted the marriage to end, what happened after that?

A Nothing. I mean he just sat around until Christmas. I don't think he had eaten or drank a thing. He almost looked gray. But I was mad, I was

furious, because I was just like do something, get up, eat. And, you know, 20/20 hindsight, I realize what he was thinking about.

Q Did anything unusual happen on Christmas Eve or Christmas Day?

A On Christmas Eve, we did our usual, going up to his grandmother's, and he went around and said goodbye to everybody; to his mother, his father, his sister, his grandmother. And I just thought it was because we were going home. Of course, I realized later why he was doing that.

Q And did anything unusual happen on Christmas Day?

A Yes, we went over to my parent's house and he went upstairs to my brother's room, loaded a shotgun and blew his brains out, without, you know, saying anything or giving me -- I had no idea that he was suicidal.

Q That must have been extremely difficult for you. Could you describe what your emotions were at that point?

A Well, every negative emotion that's possible for a human being to have, I think I had that then: Horror, anger, fear, disbelief. I mean you can just name it and that's what I was feeling.

Q And what year was that?

A 1975.

Q And when did you marry -- did you marry again?

A Yes, in 1981.

Q And was he someone who was about your age?

A No, he was 25 years older than me.

Q How did you come to be married?

A Well, he was a pathologist, I was a med tech. I met him through a mutual friend. And I was shocked when he asked me to go on a date. So we started dating and he got serious and I started falling for him and when he asked me to marry him, I said yes.

Q Did he offer any conditions to the marriage?

A Yeah. I like to say he made me an offer I couldn't refuse. He said, I'll send your son to the best private school, I'll let you quit work, you can go back to school, get another degree and we're going to retire early and we're going to travel around the world. And I was going, Wow. And yeah.

Q Did you in fact travel around the world with your second husband?

A Yes, we did, twice.

Q And were you married to your second husband

in 1992 when you were selected as a juror in Mr. Hall's trial?

A Yes.

Q Did you ever tell your second husband about the details of your first marriage?

A No.

Q At the beginning of -- well, first, tell us what you remember about how you first learned that you might be a potential juror in a murder trial.

A Well, we'd been gone out of town for quite a while and I had came back and we picked up a load of mail and I found the jury notice and it was coming up like in a few days. So I had never been called to jury duty before, so I came to the courthouse and there was a huge number of people. So I had no idea that that wasn't normal. And it was while I was filling out this form that somebody sitting next to me mentioned that it was a murder trial.

Q I just handed you a form, does that -- do you know what that form is?

A Yes, this was the questionnaire that I filled out.

Q And do you recognize your handwriting?

A Yes.

Q Do you remember filling out the answers?

A Not specific individual answers.

Q If you could flip to -- and I should let you know that this questionnaire has also currently been filed under seal. If you could look at question 38, do you remember why you said no to that answer?

A Well, "Have you ever been a victim of a crime," I did not consider I was ever a victim of a crime. And in 1969, there was really no such thing, that I knew of, of date rape, especially since I'd been dating him for so long. And I didn't consider -- I didn't even know the term "domestic abuse" at the time. So I really thought it was not -- I mean, I never thought of it as a crime. I had no notion that I had ever been a victim of a crime.

Q And on question 40, do you recall why you answered no on that one?

A I had totally forgot. I mean this was out of my mind. I had not, I mean I don't even remember thinking about my first husband when I was filling this out, at all. It had been years and I had put it out of my mind.

Q If you could look at question 41, do you recall why you said no?

A Oh gosh, that was another answer where I had totally forgotten. I mean I really, seriously, had

put it away.

Q Do you remember that you were asked about domestic violence by a lawyer or a judge during the jury selection?

A I don't remember that.

MS. GLEASON: Your Honor, we would move to introduce the questionnaires as an exhibit at this time and request that it be filed under seal.

THE COURT: Mr. Pinkston, any objections?

MR. PINKSTON: No, Your Honor.

THE COURT: Let that be introduced then, under seal. Would that be Exhibit 2?

MS. GLEASON: That would be Exhibit 1. We have not yet introduced the declaration.

(Thereupon, the document was marked Exhibit No. 1 and received in evidence, to be filed under seal.)

Q (By Ms. Gleason) And if we could return, Juror A, to the declaration, was there anything about Lee Hall that reminded you of your first husband?

A Not until he got on the stand and started testifying and admitting everything. He did remind me of my first husband, but -- it was kind of a surprise. It was bringing up memories I had buried.

Q Do you remember specifically what it was

about him that reminded you of your first husband?

A Well, I think it was when he was describing how he was stalking his ex-girlfriend and I know that my first husband had threatened to follow me and never leave me alone, but at the time, there was no such word that I knew as stalking. I thought I was the only person in the world that had ever been married to somebody that mean.

Q And do you recall when Mr. Vittatoe and I first met with you, and then later on, describing yourself as biased against Lee Hall?

A I don't think I ever used the word biased.

Q If it appears in the declaration?

A Did I? I know during the trial I never thought of myself as biased because of what had happened previously. It was something that was just, you know, a fact of life that had happened to me way in the past.

Q Do you recall using the term that you hated Lee Hall?

A That was during his testimony when he was talking about stalking her. I remember thinking, oh, that's what my first husband had threatened to do. So that was a bad thought, and it was a fleeting thought. I mean it wasn't like I let it -- I wasn't dwelling on

it or anything, it was a life experience that came up.

Q And you indicated earlier that you'd never told your second husband about your first marriage, when did you begin to share those memories with anyone?

A I had shared what had happened to me with a friend not long after my first husband's death. It was a guy I worked with and he listened and I talked. But I didn't share it much with anybody else.

Q Was there a time that you came to talk to a professional person about it?

A Yes.

Q When was that?

A Oh, after my second husband died, I went through grief counseling and a lot of other stuff came out, that I had never dealt with. So I was in two years of grief counseling first time I ever dealt with the death of my first husband.

Q Do you remember what year that was?

A In 2000-- well, my husband died in 2007 and I started grief counseling right away, so it was in 2007 through '8.

Q Do you remember how the circumstances of your first marriage came up with the grief counselor?

A Oh, I was just telling him -- it came up I had been widowed twice and he talked with me and

realized that I was in pretty bad shape. So he recommended I go for PTSD therapy, which I did for maybe six months and then I went back to him.

Q And how many years were you in grief counseling?

A Two.

Q So that would have ended around 1999?

A Yes.

Q You said, I believe, earlier, that you recalled, when we first met in September or 2019 with Mr. Vittatoe, you did speak with us about your first marriage.

A Yes, and I'm not even sure why it came out. I think it was just after all these years and all the grief counseling, I was ready to acknowledge to myself what had happened, because I never acknowledged to myself that I was an abused victim. I mean I didn't think of myself that way. I didn't, you know, even -- like I said, I'd totally blocked out all that previous.

Q Would you say you had a lot of happy years with your second marriage?

A Oh gosh, yes, 25 years. Well, the last five, he was sick, and I was determined to be the best caregiver I could possibly be. We traveled around the world, traveled everywhere.

Q How many continents?

A Huh?

Q How many continents?

A Oh, mostly the tropics because he was into tropical medicine. I didn't count continents.

Q Did you go to Africa?

A Yeah, we lived in Nairobi by a while, Kenya.

Q Did you go to Asia?

A India. We spent like six months traveling around India.

Q Australia?

A Yes, went to Australia twice.

Q Did you travel within the United States as well?

A Oh yes, we got an RV and went all over, anywhere we wanted to go; Canada, went to Alaska, went all the way as far north as you can go, and Canada. Just went everywhere we wanted to go, or he wanted to go. I was on his bucket list, traveling with him on his bucket list. Once we had been everywhere he wanted to go, we sold the RV.

Q So after '92, were you traveling a lot?

A Yes.

Q And if anyone from our office had contacted

you about your jury service in the years of 1998 to 2003, would you have told them about your first marriage?

A Probably not.

Q Is that the same case for 2014?

A I don't know, I don't remember. I don't even remember why I started talking about it with you.

Q Do you remember a couple of people from our office coming to see you around 2014?

A Yes.

Q Do you recall talking with them for some length?

A Yes, I can't remember exactly what we talked about. I mean, it was a shock, because I hadn't really thought about the trial in a long time.

MS. GLEASON: Your Honor, at this point we would move to introduce the declaration into evidence. It is the original and we would ask that it be placed under seal.

THE COURT: The declaration that she gave earlier?

MS. GLEASON: The declaration she provided in October 7th, 2019. The declaration she's been referring to and that was filed under seal earlier.

THE COURT: Mr. Pinkston, any objection to

that?

MR. PINKSTON: Well, Judge --

THE COURT: This is just a prior statement, is it not, Ms. Gleason?

MS. GLEASON: It's a prior statement but it's a direct statement from the witness as opposed to, say, work product.

THE COURT: You've got the witness here on the stand, you could ask her anything you want, but prior statements typically would not be introduced, would they? Mr. Pinkston?

MR. PINKSTON: No, they would not and that's what the State would object to.

THE COURT: You can ask the witness anything you would like.

Q Juror A, would you take a moment to review the declaration? It will take a few minutes. Have you had time to review it?

A Yes.

Q Is there anything in that declaration that is untrue?

A No.

Q If I were to ask you a single question about everything on that declaration, would you answer the same way that you did in the declaration?

A As close as possible. I might not use the exact same words.

MS. GLEASON: Your Honor, we would move to admit the declaration.

THE COURT: Any objection?

MR. PINKSTON: The previous objection stated.

THE COURT: Are you finished examining her at this time?

MS. GLEASON: I have a couple of more questions.

THE COURT: Go ahead and ask her that and we'll rule on your request, okay?

Q (By Ms. Gleason) I was a little unclear earlier, Juror A, did you ever call the police on your first husband?

A Yes.

Q And was that the incident that resulted in his arrest?

A No, that was when he got caught drunk driving by the State. This was he had just torn the house up really bad and I was worried that he was out drunk driving. But they never arrested him for that. It was the local police.

Q Did you ever call the police on him?

A I did call that time and they came to the house, but they didn't go try to find him or anything, and they never even suggested I charge him with, you know -- I don't think the police at that time even considered domestic a violence -- domestic abuse.

Q What was the state of your house when the police arrived?

A Well, the aquarium was busted and several blinds were busted because he'd been throwing things around. I wasn't injured then.

Q Had he been drinking at the time?

A Oh yes.

Q And was that something you reported to the police?

A Yes.

Q You had indicated earlier about back then, in the sixties, there wasn't really, society may not have considered forced consensual -- forced un-consensual intercourse, as a rape?

A Not -- especially if the girl had been dating the guy for a while. There was no consideration, that I can remember, of any mention of date rape. It was basically if you dated the guy, you were consensual.

Q During your marriage, your first marriage,

was there ever forced non-consensual sexual intercourse?

A Yeah, a few times when he'd come home after drinking. This always happened when he was drinking. It was also something I totally didn't think about being a rape at the time. There wasn't -- a marital rape wasn't considered, at least in my mind, I didn't think anybody would ever consider marital rape being a crime.

MS. GLEASON: And, Your Honor, I would renew my motion to --

THE COURT: Let me ask you -- what is the basis for introducing her prior statement?

MS. GLEASON: It is to reflect that she provided a true and accurate account of information she shared with us during that interview, that she continues to endorse on the stand. And I could go through every single question.

THE COURT: Well, she's on the stand, I think it more appropriate to ask her what you want to ask her, rather than presenting a prior statement. Okay?

MS. GLEASON: Okay. If I can have a moment to make sure I've covered everything.

THE COURT: That's fine.

Q (By Ms. Gleason) Juror A, were you married to your first husband for about six years?

A Yes.

Q Was he a very abusive husband?

A He was abusive while and when he was drinking.

Q Did your first husband ever threaten to not let you leave, say he would find you and harass you and take your son away?

A Yes, but I don't think he said he wouldn't let me leave, but he wouldn't leave me alone if I'd left him.

Q Did your first husband -- you described some of this, but did your first husband ever call you at work?

A Oh, he would call a lot, almost threaten -- I mean my boss, I was afraid I was going to lose my job because he was calling me so often.

Q To your knowledge, did your first husband ever drive your young son in the vehicle while he was intoxicated?

A Yes, I took a job on second shift in a lab and I counted on him to be babysitting, you know, while I was working, and then I found out while I was at work, he was taking him to his drinking buddy's house

and drinking and leaving him in the car. I quit my job right away when I found that out.

Q You spoke about when Mr. Hall testified at trial, do you recall who the victim was in the Lee Hall trial?

A Yes.

Q What is the name?

A Oh gosh, I'm seriously having a senior moment.

Q If the record reflected her name was Traci Crozier, does that refresh your recollection?

A Yes, that's who it was. I'm sorry, I was just --

Q Was there ever a time where you could identify with her?

A Yes, when I heard him talking about stalking her, it just brought back that my first husband had threatened to do that to me.

Q Do you have a clear memory of whether in 2014 the folks that came to speak to you at your home specifically asked about domestic violence?

A I don't remember.

MS. GLEASON: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. PINKSTON:

Q Good morning, ma'am. My name is Neal Pinkston, I'm the district attorney in Hamilton County. I wasn't at that time, obviously. I'll ask you a series of questions, and I'm not trying to make you feel uncomfortable, just to ask you questions based upon your direct testimony. And if I could, you were born in this area?

A Yes.

Q And you lived in this area with your first husband?

A Yes, in Bradley County.

Q In Bradley County. So somewhat different. Bradley County at that time was different than Chattanooga?

A Yeah, much smaller.

Q So when your first husband committed suicide, you were living in Bradley County?

A Yes.

Q At some point, you moved to Chattanooga?

A When I married my second husband.

Q So you stayed in Bradley County until about 1981?

A Yes.

Q And then you moved here to Chattanooga?

A Yes.

Q And you stay in Chattanooga until when?

A Well, we bought a place in Arizona and for a while we lived in both.

Q When you say lived in both, meaning Chattanooga and Arizona?

A Yes, we had two residences and we would drive back and forth.

Q Do you remember in '98 if that was the case, both?

A I don't think so, I think it was later, but I'm not sure of the time line. We still lived in a condo here until we sold it and lived permanently in Arizona, but I'm not sure about the years.

Q And if I could, when you lived in a condo here in Chattanooga, was you and your husband's name, your second husband, were they published, like through the phone book?

A Oh yes.

Q Phone numbers?

A Yes.

Q Address?

A Yes.

Q Would the same have been true in the state of Arizona?

A No. For a while when we were in Arizona,

we used Chattanooga as our main residence, so we still had Tennessee tags on our car. And when we sold our place in Chattanooga, then we were registered.

Q So even if you weren't registered in Arizona, even though living there during that time period, you were identified by a Chattanooga address, phone number, license plate?

A A P.O. Box.

Q And then at some point when you fully move to Arizona, do you establish a new mailing address, phone number and things of that nature?

A Yes.

Q And those were public record?

A Yes.

Q Now, at the time, in 1981, when you married again, had you traveled much as you did compared to later?

A No.

Q All right. Had you traveled any outside of Tennessee?

A I'd been to Florida a few times. Well, when I was a child, with my parents, we traveled across country, when I was like 14.

Q And I'm not trying to make light of this at all, just questions. You've mentioned on direct you

were unaware of any claim of spousal rape or domestic violence or anything of that nature when it happened to you?

A Right.

Q And so that was you in '69 to '75?

A Yes.

Q Now, 1981 forward, you began, I guess, to see more of the world?

A Oh yes.

Q And does your, Juror A's, perspective and understanding of things change during that time period compared to when you stayed in Bradley County?

A Yes.

Q In what ways?

A Well, I was happily married, going to school, my son was in a private school. You know, everything was great.

Q And I guess during that time, as we often do as individuals, as we grow older and/or travel, our intelligence about the world increases, probably, would that be fair to say?

A Yes.

Q And you traveled around the world twice?

A Yes.

Q Now, at some point in your life, do you

become aware of the term domestic violence?

A Yes, it was probably before I married the second time. I just remember they started talking about it like on talk shows on TV, like Phil Donahue would start, and that's the first time I'd even heard the term.

Q But when you filled out the questionnaire, you weren't even thinking of yourself as a victim?

A No, I wasn't, at all. I never really considered myself a victim.

Q And were you trying to mislead anybody at all with your answers?

A No, not at all.

Q It's just your understanding at that time was those were your truthful and honest answers?

A At the time, yes. I don't even remember answering them that way, but I can understand why.

Q You can understand now why you answered that way?

A Exactly, because I never considered myself a victim. I just wasn't of that mindset.

Q Sure. And you mentioned, I think, in direct, that during the trial, you were not biased against Mr. Hall?

A No.

Q All right.

A Well, just during his testimony when some memories started coming back. I mean I don't consider that biased, I think that was just my life experience.

Q I mean it's fair to say that the facts you heard him testify to were troubling, despite your prior experience?

A Right.

Q The case itself?

A Was very troubling.

Q Despite what you may have went through in your life?

A Exactly.

Q And if I don't ask this correctly, I apologize, but there was the written questionnaire that you filled out and then there were oral questions that the attorneys asked you?

A Yes, and I don't remember what any of those were.

Q Do you remember about anything influencing you?

A No.

Q Okay. During your deliberations, did your experiences during your first marriage have any influence upon your deliberations?

A No.

Q And why is that?

MS. GLEASON: Your Honor, we object for the record, based on Walsh versus State. That is inadmissible testimony and we move to strike it from the record.

THE COURT: I'm going to let her answer. I understand what you're saying, but I'm going to let her answer that, based upon what the circumstances of the petition's based on.

A Ask again.

Q During your deliberations in '92, did anything you experienced in your first marriage have any influence upon you as you deliberated through the facts and the law of evidence?

A I don't think so. I really don't believe so. Of course, we had two deliberations.

Q Sure, the guilt phase and then the penalty phase.

A The guilt phase, no, because he had gotten on the stand and admitted what he'd done. And then the punishment phase, I was in agreement with everybody that if we had been able to give him life without parole, that's what we would have done. We just didn't think that he would ever --

THE COURT: I think that's enough. The objection was made and I'll sustain it from this point on.

Q If I could fast-forward a little bit, and if you recall, 1998, you don't know if you were living in Arizona exclusively or Chattanooga and Arizona?

A I don't remember.

Q Okay. Did anybody from Mr. Hall's defense team, be it attorney, paralegal, investigator, support staff or otherwise, ever contact you?

A No, and some of that time, we were out of the country.

Q And I believe you answered earlier you don't know if you would have answered questions about domestic violence in 1998?

A No, I don't think I would have.

Q You don't think you would have. But, nonetheless, they were never asked of you in 1998?

A I don't recall, but I don't think so.

Q And that was the same thing in 2014 as well?

A I think -- I don't remember. I may have brought it up myself.

Q You don't remember if that attorney/investigator asked you anything about domestic

violence or otherwise?

A I don't think they asked me, I may have just started talking about it.

Q Now, was that in '14 or '19?

A '19.

Q But not in '14?

A No.

Q But based upon, I guess, the therapy you went through was in 2007 and after?

A Yes.

Q And that's when you began to talk more about this?

A To my therapist, yes. And we discussed even my father's death, that I'd never grieved over.

Q And how was it, I guess, in 2019 that it was so apparent to discuss?

A I don't recall why, I don't know why I started talking about it.

Q And this may sound odd, but have your views, political or otherwise, changed from when you lived in Bradley County versus where you live now?

A Yes.

Q In what way?

A I've changed political parties several times over the years, just gotten wiser and more at

ease with talking about my past.

Q I guess world views change, would that be fair to say?

A Yes.

Q Influenced by your travel and your new life experiences?

A Yes.

Q And so Juror A's perspective in 2019, of your past, would be different than Juror A in 1992, maybe even 1998?

A Probably, yes.

Q And would it be fair to say that maybe you can identify things now about your past that you were unaware of then?

A Yes.

Q And that's not -- none of that was to intentionally deceive anyone?

A No, I was just burying it.

Q Excuse me?

A I just buried it.

Q Sure.

A Once I was remarried, I didn't think about it.

Q And I guess didn't until you had to deal with grief counseling?

A Yes.

Q All right. Do you recall the circumstances in 2014 how you were located?

A I just had a knock at the door one day and there were two people and they introduced themselves. And I was not a hundred percent surprised. I mean I was surprised, but I was thinking some day they might try to contact me.

Q And during all that time, you've never hidden or tried to change your identity or anything where nobody could --

A Oh heavens no. And there were times when nobody knew where we were, because we were traveling and we didn't even know what our plans were.

Q But you maintained physical addresses or a P.O. Box?

A Yes.

Q And I assume you maintained some type of phone number?

A Yes.

Q Thank you.

THE COURT: Ms. Gleason, any redirect, ma'am?

REDIRECT EXAMINATION

BY MS. GLEASON:

Q If I'm understanding correct, Juror A, in 2014, when two people arrived, you did not have a phone call ahead of time to let you know?

A No, I didn't. And I asked them how did you find me, which I was pretty easy to find.

Q By that time?

A Yeah, you could Google me and I would show up, because I was a member of several things in Nashville.

Q And you do not recall whether domestic violence was discussed at that interview or not?

A I don't think so. I'm pretty sure not.

Q Do you recall whether you were the person to bring it up when Mr. Vittatoe and I were there?

A I believe so.

Q In trying to remember exactly when you had completely left Chattanooga for Arizona, have you ever created a timeline of your travels?

A Yes.

Q If your timeline indicated that in 1995 you had some sort of rental truck and went to Arizona --

A That would be when we moved permanently, because we had sold our condo here.

Q Nothing further, thank you.

THE COURT: And Mr. Pinkston, any recross?

RECROSS EXAMINATION

BY MR. PINKSTON:

Q So in '98, you would have been -- Google didn't exist then, I don't think, but your identity, address, phone number, where it was, available in 1998, if you lived there full time in Arizona?

A Yes.

THE COURT: Anything else? All right. May Juror A be excused?

MS. GLEASON: Yes, Your Honor.

(Witness excused.)

(Thereupon, court was in recess.)

TAMMY KENNEDY,

called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q Good morning, Ms. Kennedy.

A Good morning.

Q Could you please state and spell your name for the record?

A Tammy Kennedy, T-A-M-M-Y, K-E-N-N-E-D-Y.

Q And what is your connection to Lee Hall's appellate case?

A I investigated Lee Hall's case at the

post-conviction defender's office. It was my first case as the main investigator.

Q And when did you begin at the post-conviction defender's office?

A 1996.

Q And do you recall when you were assigned to Lee Hall's case as the primary investigator, I believe you said?

A '97 or '98.

Q And as the primary investigator on the case, were you in charge of overseeing and preparing the juror interviews?

A Yes.

Q Do you recognize the documents in the red well in front of you?

A Yes, I do.

Q And can you describe, generally, what they are?

A They are juror folders I prepared.

Q And are those the original folders that someone prepared?

A Yes.

Q And who was it that prepared them?

A I prepared them.

Q And Ms. Kennedy, I have here a color copy

of those documents. I believe some of them are printed in legal paper format and some of the ones I have have been reduced to eight and a half by eleven. My copy, the color copy, is Bate stamped, which I hope to enter into the record and having the Bate stamps for just the appellate record purposes.

Have you had an opportunity to look at these color copies I have here in front of me?

A Yes.

Q And when you reviewed these color copies, do they accurately reflect the originals you have in front of you?

A Yes.

Q If we could go through some of the records, I believe there are a number of file folders within the red well, is that correct?

A Yes.

Q And some of the file folders, I have placed tabs with numbers on them?

A Yes.

Q And those file folders, what do they relate to?

A The different jurors.

Q The different jurors. And in the original copies, do the folders have the jurors' names?

A Yes.
Q I will be referring to the folders by number and referencing the Bate number, but not referencing the juror names, out of concern for juror anonymity and privacy.
The first folder in the red well in front of you, can you describe it to me?
A Do you mean what it contains?
Q What it contains. I believe it's a manila folder with a yellow label?
A Oh, the first. Yes.
Q What is this folder titled?
A Juror list.
Q And inside the folder, can you describe the contents?
A It's a list of the different jurors and information about them.
Q So I am turning a few pages in. I see a page with pink or purple handwritten notes?
A Those are my notes.
Q And can you describe the notes?
A It's the different jurors, where they were employed at the time.
Q Would you have made this document prior to going out and conducting juror interviews?

A Yes.

Q And the next page, do you recognize the handwriting on that page, it is Bate No. 006, for the record.

A My handwriting or the typed-written one?

Q Yes, I believe it's just a few lines, again in pink or purple pen.

A Yes, it's a juror information list.

Q And what is the next folder in the red well, what color is it?

A It's red.

Q And what is it titled?

A Peremptory jury challenges.

Q Would you take a moment to flip through it and then I'll ask you to describe its contents.

MR. KING: Your Honor, I have before me the copy we intend to introduce into evidence. I don't know if the Court --

THE COURT: Now, are these what you're asking Ms. Kennedy right now?

MR. KING: Yes, Your Honor.

THE COURT: And you've shown those to the State?

MR. KING: Yes, Your Honor.

THE COURT: If there's no objections, let

those be entered -- you're asking to introduce them?

MR. KING: Not yet, Your Honor, I was going to see if the Court wanted a copy in front of it.

THE COURT: That will be fine, if you have a copy. That's for the Court then?

MR. KING: Yes, Your Honor.

THE COURT: Thank you, sir.

Q (By Mr. King) Have you had a moment to review this folder?

A Yes.

Q And what does it contain?

A It's the peremptory jury challenges.

Q I see that it appears to end on Bate No. 84; however, that's sort of hard to see because it's dark black at the bottom.

The next folder, can you describe the color of the folder?

A Purple.

Q And without stating the juror's name, is there anything else on the folder's label?

A It would be the juror's name and the date that the information probably was ran.

Q And flipping a few pages into the folder, I see a document titled witness interview, can you describe this document for the Court? Generally, what

was it, who conducted it, on what date was it conducted? This is Bate No. 87, for the record.

A It's witness interview.

Q And on what date was it?

A On December 17th, 1998.

Q And this witness interview is five pages?

A Yes.

Q And the next pages in the folder, these begin on Bate No. 92, do you recognize this document?

A Yes, this is the juror being questioned by the Court.

Q Would that perhaps be during voir dire?

A Yes, voir dire.

Q And you would have prepared this document, included this document prior to attempting to interview this juror?

A Yes.

Q The following pages, Bate No. 98 through 104, I see handwritten notes in green ink, do you recognize that handwriting?

A Yes, that's my handwriting.

Q And how have these notes been produced?

A I'm sorry?

Q In what context would you have made these notes?

A During the interview with the juror.
Q And after the handwritten notes, I see a page that says intake form, Bate No. 105, do you recognize this handwriting?
A That's my handwriting.
Q And what is an intake form?
A It's a form that our office used for information regarding jurors and, you know, such as addresses, et cetera, that we would find.
Q I see some comments on the bottom of the intake form, that's also in your handwriting?
A Yes.
Q Would you have prepared this form before or after attempting to interview a juror?
A Before.
Q The following page, Bate No. 106, I see a printout with an individual's name, do you have any idea what this might be?
A I think it's -- it came from the clerk's office.
Q And would that be the clerk's office here in Hamilton County?
A In Hamilton County.
Q Was it a regular part of your practice to obtain this information from the clerk's office in

preparation of juror interviews?

A Yes.

Q And I see on the following page, and this page is Bate No. 107, a similar form, does it have the same name as the page on Bate No. 106?

A Yes.

Q Is the address different?

A The address has been changed. Those are my notes and I probably ran her name through whatever program we were using at the time and got a different address, a newer address, for this particular person.

Q On the following page, and this is Bate No., for the record, 108. It appears to be a printout from the internet, why is this in the folder?

A It would be directions to a juror's home.

Q And at this time, and the folder, it looks like it's noted 1998, did you have GPS devices to assist you in finding jurors?

A No.

Q The following page, Bate No. 109, can you describe this document?

A A juror questionnaire.

Q And would this have been in the folder before you attempted to interview this juror?

A Yes.

Q Would you have this folder with you while you were out on an investigative trip attempting to interview?

A Yes.

Q Ms. Kennedy, I'm not going to go through all of these page by page, but there are a few places I'd like to direct your attention to. The next file folder, I believe it is tabbed number 2, it appears to be a juror folder, is there a date on it?

A Yes, December 17th, 1998.

Q And on page Bate number, the first page in that folder, Bate No. 119, what is that on that page?

A That's my business card at the time.

Q And does it appear there's any writing on the business card?

A Yes, it's a signature.

Q Whose signature might that be?

A It's the juror's signature, I asked the juror to sign my card.

Q Why would you do that?

A To make sure they knew who I was and there was no mistake between prosecution or defense.

Q And the following page is Bate No. 120, for the record, is this another witness interview?

A Yes, it is.

Q And again, on two pages later, Bate No. 122, is this that particular juror's individual voir dire?

A Yes, it is.

Q Skipping ahead a few pages, I see some more handwritten notes in green ink on lined paper, page number 131 for the record. Is there a date in the upper right corner?

A December 17th, 1998.

Q And what do these appear to be to you?

A These are my handwritten notes from interview with the juror.

Q And if you would quickly look through the rest of the folder, would it be accurate to say it contains that juror's questionnaire and individual profile similar to the one you said you believed was obtained from the Hamilton County clerk's office, that would be page 134?

A Yes.

Q Mitigation, witness intake form?

A Yes.

Q That would be page 135 and the questionnaire begins on page 136, is that correct?

A Yes.

Q The next juror folder, I have it tabbed as

number 3, is there a date on that folder, on the tab?

A December 17th, 1998.

Q And the first document within that folder, what is that?

A That's the typed interview with the juror.

Q And Ms. Kennedy, this was an interview you conducted, is that correct?

A Yes.

Q I see that it says from Tammy Lewis, that would be your name at that time?

A At that time, that was my name.

Q And I see more handwritten notes in green ink on lined paper, are those your notes?

A Yes.

Q And then page, Bate No. 156, that appears to be more voir dire transcripts, is that correct?

A Yes.

Q In the interest of time, you've reviewed these folders more than once in the past week, is that correct?

A Yes.

Q And in your review of those folders, would you say that any of the handwritten notes in green ink would belong to you?

A Yes.

Q On lined paper?

A Yes.

Q What other colors ink did you like to write in?

A Pink, purple. I get tired of blue and black when you write a lot, so I would color it up.

Q And if there is an interview memo in a folder that is from Tammy Lewis, that would be written by you, and the note, corresponding notes, would be notes you took during your jury interview, correct?

A Yes, correct.

Q So I'm looking at juror folder tab number four, I believe it has a date of 12/16/1998. For the record, the Bate No. is 174. It's easier to read on the subsequent page, 175, it's a witness interview. If you'll flip past the witness interview, I see some more green handwritten notes, and on Bate No. 179, that would be the first page of the green handwritten notes. In your folder, I see you have an X through those, do you recall why you might have made that X as you were preparing the interview memo?

A Well, it would be after the memo. And as I typed up the memo, most of the time I put an X on the page of notes. That way I know I've typed it up if I don't get to do the whole memo in one sitting.

Q The X would reflect the notes that you have taken from your handwritten notes and transferred into a typewritten memo?

A Yes.

Q If I could ask you to flip a little further in this folder, and this is Bate No. 205, I see what appears to be a yellow page. Well, let me step back a moment. Do you know what happened to these records after they left the post-conviction defender's office?

A No.

Q Would it surprise you to learn that they were sent to successor counsel at the federal defenders east?

A No.

Q Let's move on to folder tab number five. For the record, that is Bate No. 211. The first page in that folder, Bate No. 212, can you describe what you see to me?

A Yes, it looks like whatever -- again, whatever program we were using at the time to look up people, try to locate them.

Q Are we on the folder tabbed number 5?

A Yeah, Faces of the Nation.

Q Can you tell me the initials of the juror on the front of this folder?

A D.R.

Q And when you said Faces of the Nation within the folder tabbed 5 of the initials D.R., thank you, I've located the page you're describing. It is Bate No. 219, for the record. What was Faces of the Nation?

A Well, I think it was AutoTrack that we used at the time, which was a program to help locate people, the latest addresses, and we would use that before going out on an investigative trip.

Q And did you continue to work as an investigator both in the office of the post-conviction defender and outside of the office of post-conviction defender in your career?

A Yes.

Q And have you continued to use software or services such as this to help you locate witnesses?

A Yes.

Q What other types of software have you used, after Faces of the Nation, both within the office or outside of the office?

A AutoTrack, AcuAt, TLO, LexisNexis.

Q How would Faces of the Nation -- it appears that this was run, perhaps, around the year 2000, based on the notes at the, what looks like a web link?

A Yes.
Q How would that compare to software you have used recently, as far as its accuracy, information, level of detail it provides for locating witnesses?
A Well, programs have gotten better throughout the years.
Q Moving on to the next folder, folder tabbed 6, I see a page, Intake Form Mitigation Potential Witness, is this your handwriting?
A Yes.
Q And does this folder, is it the folder for Juror A, who testified earlier today in court?
A Yes.
THE COURT: And Mr. King, what number is that?
MR. KING: This is Bate No. 230. And again, they're hard to see on the folder pages, but you'll see 231. And the first page I'm going to ask Ms. Kennedy about is Bate No. --
THE COURT: But Juror A was interviewed by Ms. Kennedy, correct?
MR. KING: No, Your Honor.
THE COURT: Oh, I see. Thought this was you were talking about interviewing that juror.
MR. KING: I'm going to be asking Ms.

Kennedy about her efforts to locate that juror.

THE COURT: That's fine. Go ahead.

Q I see a page labeled Intake Form Mitigation Potential Witness, Bate No. 232, can you describe -- and there's a number of fields, one of them is an address field. Without giving the street address, can you say what city that address is in?

A Chattanooga.

Q And then I see at the bottom of that page - again, we're on page Bate 232 - some handwritten notes, are those your notes?

A Yes.

Q And you would have made this form, completed this form, made these notes, before attempting to contact the juror?

A Yes.

Q The following page, Bate 233, does this appear to be the individual voir dire of the juror?

A Yes.

Q Moving past that, and now we're on Bate No. 242, I see another Faces of the Nation printout?

A Yes.

Q This printout, there is a name listed and then it says SSN. And I'm not going to read that out in court and I don't want to read the name listed, but

I will ask is it the female juror's name that is listed?

A No.

Q Is it a male name with the same last name as the juror?

A Yes.

Q Does this -- flipping back, I'm sorry to make you go back and forth out of order. Where do you think you would have found that name, that male name, to search for?

A In her question, juror questionnaire.

Q And would that be the very next page, Bate No. 243 for the record?

A Yes.

Q Does this folder contain any of the documents you described earlier as printouts you believe came from the Hamilton County courthouse? Please take a moment to review.

A I don't see it, the page like you're asking.

Q I believe I referenced that earlier in the folder tabbed 1, and that would be Bate No. 106 for the record, and again in another place that I don't have in front of me. When you went to the courthouse and requested the information for the jurors in this case,

would you have prepared, in advance of requesting the information from the court clerk, the information contained on Bate No. 2, individual juror information?

A Yes.

Q And would you have requested the address or locate that came from the courthouse for all of the jurors?

A Yes.

Q And if that document is not contained in a particular juror's folder, what does that indicate to you?

A That the clerk did not have a copy.

Q In going back to Bate No. 242, you searched for the juror's husband's name?

A Correct.

Q And I see that there are two addresses listed on this page?

A Yes, one in Chattanooga and one in Arizona.

Q The Chattanooga address, is it a residential street address?

A No, it a P.O. Box.

Q Would a P.O. Box assist you in locating a juror's house or telephone number?

A No.

Q Was it your practice to mail letters to

prospective witnesses?

A No.

Q Why not?

A Because the practice was the knock on the door, and because if you knock on someone's door, it's most likely that they're going to refuse to talk to you about a trial or something like that.

Q And would this apply to witnesses generally with which you had no connection through, perhaps your client's family, other types of witnesses; would you call them in advance or send them a letter?

A I'm sorry?

Q Non-juror witnesses. Did you ever interview witnesses who were not jurors?

A Yes. No, I did not call unless they were family members or school teachers, things of that nature.

Q Why might you call a schoolteacher or family member but not another type of witness?

A Because they're friendly witnesses.

Q What do you mean by friendly witnesses?

A Well, normally a client's family likes the client. Jurors, I don't know what goes on in their mind, or other witnesses, guilt/innocence witnesses, things of that nature, you're not going to call ahead.

Q What was the practice for witnesses like jurors or, as you say, guilt/innocence witnesses?

A To locate their address and show up and knock on the door.

Q You've practiced as an investigator for a number of years, roughly how many?

A 22.

Q And for witnesses such as jurors or, as you've described, non-friendly witnesses, is it or has it been your practice to call them or mail them letters?

A No.

Q Going back to the Faces of the Nation page, again, that's Bate 242, you described a P.O. Box in Chattanooga, Tennessee, is there another address listed on that page?

A Yes, one in Arizona.

Q And is there a phone number provided?

A No.

Q Had there been a phone number, would you have called this witness in order to schedule on interview?

A That would be something that I would have discussed with the attorneys and they would make that call, make the decision.

Q At that time, in the office, did you frequently travel out of state to Arizona to speak to a single witness?

A No.

Q For juror interviews, did you typically interview the jurors alone?

A No, it was our practice to always have two people, another investigator.

Q And that was the practice as long as you were in the office?

A Yes.

Q And the office of post-conviction defender, you started in what year?

A 1996.

Q Do you know when the office was founded?

A 1995.

Q Do you recall roughly how many employees there were at the time?

A Nine.

Q Did the office have a large budget for travel?

A No.

Q Would an out-of-state trip have required special approval?

A Yes.

Q Would it have required special approval for both, if it was a juror interview, for both you and another employee?
A Yes.
Q I see a handwritten note on this page, 242, is that your handwriting?
A Yes.
Q And what does it say?
A Arizona.
Q Do you know why you wrote that?
A I believed this particular person to live in Arizona.
Q Might you have tried the Chattanooga address as well?
A Not the P.O. Box. If I'd had the street address, I'd have tried that.
Q But the trip would have required special approval?
A Yes.
Q And who would have provided that special approval? What would the process have been to get it in the office?
A Well, Mr. Dawson would have to approve it, at the time.
Q Who is Mr. Dawson?

A Mr. Dawson was the post-conviction defender at the time.
Q Moving to the next page in the folder, page 243, can you describe what this document is?
A Juror questionnaire.
Q And are there any other documents in the folder, apart from the voir dire, the Faces of the Nation locate, and the juror questionnaire?
A No.
Q If we move on to the next folder, tabbed number 7, Bate No. 252, there's a date on the top of this tab. What is that date?
A February 19th, 2000.
Q Is this a different date than is on the top of the tab of folder number 1?
A Yes.
Q Is it a different date that is on the top of the tab of folder number 3?
A Yes.
Q Is it also different than the tab on folder number 2?
A Yes.
Q I see within this folder a document titled Witness Interview, is this another witness interview written by you?

A Yes.

Q And the date of this witness interview, when is it?

A February 19th, 2000.

Q And without making you get the folder back open, folder number 1, if the date on that witness interview, Bate No. 87, for the record, is December 17th, 1998, that would reflect the date you had the interview with the witness?

A Yes.

Q And the date of the witness interview on Bate No. 254 is -- I'm sorry, will you repeat the date it occurred again?

A February 19th, 2000.

Q Would that have been a separate trip to interview jurors in this case?

A Yes.

Q And within this folder, after the Witness Interview, is there a Mitigation Potential Witness Intake Form with your purple handwriting?

A Yes.

Q Is there also a juror questionnaire?

A Yes.

Q I'm sorry, voir dire, beginning on Bate No. 258?

A Yes.

Q Flipping past that, Bate No. 265, is this a document titled Individual Profile that you received from the Hamilton County clerk?

A Yes.

Q And is that your handwriting in green ink on the bottom of that?

A Yes.

Q And the next page looks like another MapQuest page, is that correct?

A Correct.

Q And the rest of the folder consists of this juror's juror questionnaire, is that correct?

A Correct.

Q The next folder, is there a date listed on this folder? This is folder number 8, for the record, Bate No. 276.

A I don't see a date on the folder.

Q Flipping into the folder, is there an intake form for a mitigation witness filled out in your handwriting?

A Yes.

Q On the first page of what appears to be the voir dire transcripts, Bate No. 279, is there a highlighting on this page?

A Yes.

Q Is that highlighting you would have done?

A Yes.

Q Flipping forward past the voir dire, we're on Bate No. 295, this is another Faces of the Nation search, is that correct?

A Correct.

Q And the two following pages are pages from the clerk's office with this juror's potential addresses, correct?

A Correct.

Q And then I see on page, a few pages forward, directly after the page which appears to be a MapQuest printout, Bate No. 299, some handwritten notes, is that correct? Please let me know if I'm moving too fast.

A I just don't see the handwritten notes.

Q Okay. Do you see a MapQuest page?

A I do.

Q Is there anything on the back of that MapQuest page?

A Oh, the handwritten notes.

Q Might those notes have been made in the process of attempting to locate this juror?

A Correct.

Q Moving on to the next folder, folder tabbed 9, for the record, it is Bate No. 309, few pages in, I see another mitigation intake form, is that your handwriting?

A Yes.

Q And is that your highlighting on the voir dire transcript pages?

A Yes.

Q And that folder also contains a juror questionnaire?

A Yes.

Q The next folder, folder tabbed 10, is there a date on the top of this folder tab?

A There is, January 1, 2011.

Q And the first document in the folder is a juror interview, what is the date on the juror interview?

A January 4th, 2001.

Q Is that the same date that appeared on the last folder with the date on it? Give me one moment. That would be folder number 7, which appears to have the date--

A No, it's a different day.

Q And the date on folder 7 is February 19th, 2000?

A Yes.
Q Would this indicate a third trip in attempts to locate these jurors?
A Correct.
Q Were you accompanied by any other people on this trip? You could refer to --
A Each trip, I was accompanied by someone.
Q And on this trip, I'm looking at Bate No. 331, the first page of the juror interview, who wrote this juror interview?
A Kate Pryce.
Q And flipping ahead a few pages after the interview, this is your handwriting in purple on the Mitigation Potential Witness Form?
A Yes.
Q And again, would you have had these folders with you while out on the road in investigation?
A Yes.
Q Does this folder also contain the voir dire transcripts, a Faces of the Nation printout, a MapQuest locate, and the juror questionnaire?
A Yes.
Q The next folder, folder 11, the first page appears produced by the office, and this is Bate No. 358, for the record. The folder begins at Bate No.

356. Is that your handwriting on the intake form?

A It is.

Q And your highlighting on the voir dire transcripts?

A It is.

Q And as you flip past the voir dire, on page 366, the Faces of the Nation, would you have run that?

A Yes.

Q And then there's a MapQuest page, looks like there's a couple of them. Would you have used those to assist you in locating this juror?

A Yes.

Q After the MapQuest pages, the rest of the folder contains only the juror questionnaire, is that correct?

A Correct.

Q Next folder, folder 12. We've only got three more after this. We are getting close. This folder is page 378, for the record. That is your handwriting on the Mitigation Potential Witness Intake Form on Bate No. 380?

A It is.

Q And your highlighting on the voir dire beginning on Bate No. 381?

A Correct.

Q And you would have run the Faces of the Nation and the MapQuest on page 392, 392, respectively?

A Yes.

Q And the rest of the folder contains only the juror's questionnaire, is that correct?

A Correct.

Q The next folder, folder 13, is there a date on the tab of this folder?

A Yes, January 3rd, 2001.

Q And the first document in the folder, produced by the office, is a juror interview memo, is that correct?

A Correct.

Q And this interview would have occurred on the same trip the last interview we discussed was on, but that would be your third trip trying to locate jurors, is that correct?

A Yeah, third or fourth.

Q The next folder, and this is Bate No. 419, for the record, is there a date on the top of the folder tab above the juror's name, folder 14?

A No.

Q The first document in the folder, is that the juror questionnaire?

A It is.

Q The next document in the folder, Bate No. 430, is this an intake form?
A It is.
Q And is that your handwriting?
A It is.
Q Can you read what it says in the upper right-hand corner?
A Alternate.
Q What does that mean?
A This individual was an alternate juror.
Q Why would you interview alternate jurors if they didn't sit in deliberation and judgment of Mr. Hall?
A Well, they sat through the trial and they could have been called, so we always wanted to get the alternate's mindset as well, because they went through the same process as the jurors.
Q Would you say your went through a similar amount of effort to contact and locate the alternate jurors on the case?
A Yes.
Q Following, Bate No. 431, is that your highlighting on the voir dire?
A Yes.
Q And I see there are some notes on page 438,

I don't believe that is your handwriting, but correct me if I'm wrong.

A It's not.

Q The following page, Bate No. 439, a Faces of the Nation search?

A Yes.

Q Followed by two pages of MapQuest?

A Yes.

Q And that is the entirety of the contents of that folder for an alternate juror?

A Yes.

Q This folder, titled 13, is it the last juror folder in your box of the front of your originals?

A Yes.

Q Is there a date on this folder?

A January 3rd, 2001.

Q For the record, this is Bate No. 442. Flipping in a few pages, Bate No. 444, is this another interview memo conducted by the office of the post-conviction defender?

A Yes.

Q The page after the interview memo, is that your handwriting, those handwritten notes?

A Yes.

Q Can you describe this page to me?

A It's a people finder page and the handwritten notes are directions on how to get to the address.

Q So in the upper right-hand corner of the page, I see it says Powered by AnyWho, what is AnyWho?

A AnyWho is one of the people finder search engines on the internet.

Q Moving on to the next page, Bate No. 448, that appears to be transcripts of individual voir dire?

A Yes.

Q And the first page has your highlighting on it?

A Correct.

Q Bate No. 457, again we have pink pen on an intake form, that would be your handwriting?

A Yes.

Q And the remainder of the folder consists of this juror's juror questionnaire, is that correct?

A Correct.

Q Are there any more documents or folders in the box in front of you?

A No.

Q Those records reflect the work that you did on Mr. Hall's case attempting to locate jurors?

A Yes.

MR. KING: Your Honor, if I may have a moment.

(Brief pause.)

MR. KING: If I may, I'd move to introduce the photo color copy of this into evidence.

THE COURT: You're talking about the whole, all of it, right?

MR. KING: Yes, Your Honor. And for the Court's convenience, I've also placed it on a CD-rom.

THE COURT: Mr. Pinkston, any objection to that?

MR. PINKSTON: No, Your Honor, except, I think it should be under seal or some form of redactions.

MR. KING: I agree.

MR. PINKSTON: Since it reveals Juror A's identity.

MR. KING: As well as other jurors' Social Security number.

THE COURT: So under seal then, okay. Let me ask you this, certainly you've gone through with this witness the talking to different jurors and all this, but also have statements from some jurors, is this relevant in regard to the proceedings which we're

having?

MR. KING: Well, Your Honor, I appreciate the Court's patience, I believe --

THE COURT: No, I want you to put on everything you can, I'm just wondering, this witness has talked to the jurors and taken statements from them?

MR. KING: That is correct, Your Honor.

THE COURT: What's the relevance in regard to this case?

MR. KING: I would say the relevance in regard to this case is the efforts undertaken by the office of the post-conviction defender --

THE COURT: Understanding, but talking to the jurors themselves, is that relevant? That's what I'm talking -- I understand the questionnaires, the efforts made and so forth, but then she took statements from the different jurors.

MR. KING: I believe I can address that.

THE COURT: I'm just asking. If there is no objection, I'll let it come in. That's fine.

Q (By Mr. King) Ms. Kennedy, in your understanding, were these verbatim statements taken from the jurors that they signed for you?

A No.

Q The interview memos contained within this record?

A No.

Q Whenever you were able to interview a juror, would you produce an interview memo?

A Yes.

Q What is your understanding of the purpose of that?

A The purpose was to give the information to the attorneys handling the case and allowing them to review it to see if it was pertinent information that they felt was necessary and that we need to go and perhaps get an affidavit from a juror witness.

Q And while I recognize you are not an attorney, you certainly have experience interviewing capital jurors, can you provide some examples of the types of information that the attorneys might be excited to hear about?

A That the case was discussed outside of deliberations, you know, perhaps over dinner, between a couple of jurors. Jurors that perhaps did not disclose that they might have known the victims or be related to someone in the case.

Q Are you familiar with any capital cases in Tennessee, either cases you worked on or did not work

on, where information from a juror resulted in a court granting the once-defendant/then-petitioner some type of relief?

A I know I've heard of that, I can't --

Q That's okay.

THE COURT: That's fine.

MR. KING: And so I would move this in under seal. Thank you, Your Honor.

THE COURT: And this will be under seal based upon all the questions, right?

MR. KING: Yes, Your Honor.

THE COURT: Let that be done as the next-numbered exhibit, okay?

(Thereupon, the CD of files was marked Exhibit No. 2 and received in evidence, to be filed under seal.)

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. PINKSTON:

Q Ma'am, what were the years that you were an investigator in the post-conviction defender's office?

A 1996 to 2012.

Q I thought you testified earlier you were there for 22 years?

A No, I said I've been an investigator for

that long.

Q What kind of background did you have, and experience, before you went with the post-conviction defender's office?

A I had a paralegal degree, I had been a legal secretary, a paralegal, an office manager. I attended Belmont University, majoring in criminal justice, minoring in sociology and had less than 19 credits before I graduated.

Q Prior to coming to the post-conviction defender's office, was that a paralegal or legal secretary in the private practice of law or was that under a public office?

A Private sector.

Q Had you ever searched for people in that role?

A I don't think so.

Q Never served subpoenas for somebody or went and found someone and served one a subpoena?

A Served subpoenas, yes.

Q How would you know where to go serve the subpoena?

A That information might have already been given to me at that point.

Q Okay. So you'd had a few years of legal

experience when you came to work for the post-conviction defender's office?

A I started in the legal field when I was 25. I believe I was 32 or 34 when I started --

Q So during your 16 years at the post-conviction defender's office, how many investigators other than yourself were there?

A I think we always had three when I was there.

Q All right. And if I could take your attention to Bate stamps 230 to 240, or excuse me, 251.

A Oh, mine aren't Bate stamped.

Q It's the folder dealing with Juror A, if that helps.

MR. KING: That would be folder tabbed number 6.

A Okay.

Q My Bate stamp 230 would be the, I guess, rows outside folder of Juror A, the name?

MR. PINKSTON: If I may approach, Your Honor.

THE COURT: You may.

A Oh, okay. Yeah, that's the folder.

Q There's not a date next to her name like there are on other jurors?

A No, not on the folder.
Q What would the reason for that be?
A Because she was not interviewed by me.
Q Do you know if she was interviewed by anyone else?
A Not at that time.
Q What time was she interviewed?
A In 2019.
Q Did you recall any other time she was interviewed?
A I think 2014.
Q Okay. All right now, if we flip over --
MR. PINKSTON: Your Honor, may I approach for one moment?
THE COURT: You may.
Q Ma'am, Batestamp 242, this document here?
A Yes.
Q Do you know when you ran this Faces of the Nation?
A It looks like December 28th, 2000.
Q And did it reveal a P.O. Box, or it revealed a name and then a P.O. Box in Chattanooga?
A Yes.
Q With a date out from that P.O. Box?
A Yes.

Q What date was that?

A The date is April 1996.

Q And what is the significance of that date?

A That would be when they lived at the address, but it's not an actual address.

Q Right, but there is a date associated with that P.O. Box?

A Correct.

Q And you have a name that matches the juror questionnaire, someone listed in that questionnaire?

A Yes.

Q And then you actually have a physical address in the state of Arizona?

A Correct.

Q With a date as well, correct?

A Correct.

Q And what date was that?

A April 1996.

Q All right. Now, you mentioned it wasn't your practice to send letters?

A I'm sorry?

Q I think, and correct me if I'm wrong, but on direct examination, you indicated it was not your practice to send letters to jurors?

A Correct.

Q You would agree that sending letters is a form of, or attempted form of, communication?

A Correct.

Q And a letter could have been sent to the P.O. Box of Chattanooga?

A Correct.

Q And the letter could have been sent to the address in Arizona?

A Correct.

Q Now, in your time of the defender's office, you'd mentioned a moment ago several different, I guess we would call it now search engines, to look for individuals?

A Correct.

Q And you named two or three of them, I think?

A Correct.

Q Did you ever cross reference, say, Faces of the Nation with another one?

A I don't know if we had that ability to do that back then. I mean this was our only people locator program that we had in August.

Q Was there any way back then in, I think you said you ran this in 2000, correct?

A Yes.

Q Was there any way back in 2000 to run potential phone numbers based off of physical addresses?

A Probably. I can't say for sure.

Q Do you know if you undertook any steps in that regard as to this Juror A?

A Phone numbers?

Q Did you run any potential phone numbers?

A No.

Q Did you search any city directories with Juror A's name or anybody associated with her?

A We did search city directories, so I probably did.

Q Which city directory?

A It would have been Hamilton County.

Q So nothing related to the physical address in Arizona?

A No.

Q So other than printing off my Bates 242, the Faces of the Nation page, in 2000 in regard to Juror A, what did you do in 2000 about contacting her?

A I can't honestly tell you what I did, because I'm not sure. We probably went to her old address in Chattanooga.

Q But the old address is a P.O. Box.

A Well, not on her questionnaire.

Q But you had a Faces of the Nation that didn't reflect that address from the questionnaire?

A No.

Q But you had a new physical address in the state of Arizona?

A Yes.

Q Did you make any attempt to travel there to speak with her?

A To Arizona?

Q Yes.

A No.

Q But you were aware at that time in 2000 that an address associated with her and/or the male's name came back to you?

A Came back to?

Q Meaning that you had a record of a potential physical address for Juror A?

A Yes.

Q And you didn't undertake any steps to send her a letter?

A No.

Q And you made no steps to contact her via telephone?

A No, I did not have a telephone number.

Q Nor did you search for one?
A I'm not sure.
Q Now, is it ever, in your time with the post-conviction defender's office, that say someone, say Juror B, C, however you wanted to characterize them, lives in another state, do you ever contact a defender's office in that state asking for assistance to locate somebody?
A Not jurors, I haven't, myself.
Q You haven't, but has anybody in your office at the time you worked there?
A I can't speak for other people, I don't know if they did or not.
Q What was the practice of your office at the time you were there, from '96 to --
A We did not do that.
Q Okay. So other than running this page, the Faces of the Nation page, in 2000, until your time ended in 2012, correct?
A Correct.
Q What did you yourself do in regard to finding Juror A, sending her a letter, phoning her, or interviewing her?
A I did not send her a letter and I did not have a phone number for her, but once we have the

post-conviction hearing, then it moves on, I move onto other cases.

Q I understand that, but other than running this page in the time 12 years after -- you were there from 2000 to 2012, the only thing you really did to locate Juror A was run off this page of Faces of the Nation?

A And probably we went by her Chattanooga residence?

Q Was anybody there?

A Obviously not.

Q Do you know of anybody in your office that would have, between 2000 and 2012, attempted to locate Juror A?

A I don't know the answer to that.

Q Obviously, this is a death penalty case?

A Yes.

Q Why wouldn't you ask for approval to travel to Arizona to contact Juror A?

A I might have. I don't know that I didn't ask that. I just don't recall. But I know that at that point in time, our budget was very limited as to what our -- travel budget and everything.

Q Do you remember in 2000 where you traveled to other than locally in the State of Tennessee?

A I do not.

Q But it wasn't your practice to travel out of state?

A Not back then. We didn't have the money.

Q So would you have asked to travel out of state if you'd known that that request was going to be denied?

A Yes.

Q But you don't recall if you requested in this instance?

A I can't. I don't recall.

Q Now, have you searched any other notes that you've -- what did you review prior to today?

A Everything in this folder.

Q Any other notes, in whatever ink color there was, that indicate any efforts to contact Juror A and interview her?

A I have not seen any.

MR. PINKSTON: Thank you.

THE COURT: Redirect, Mr. King?

MR. KING: Just a few questions.

REDIRECT EXAMINATION

BY MR. KING:

Q I believe the general asked you on cross-examination whether you mailed a letter to this

Arizona address or attempted to find a phone number associated with the address?

A Correct.

Q I believe he also asked whether in a different capacity working in the legal field you had ever served a subpoena?

A Yes.

Q In your mind, having had experienced both, is there a difference between serving a witness a subpoena and conducting an interview about someone's experience sentencing someone to death?

A Yes, a subpoena is issued by the Court and someone is required to serve it.

Q What is the process of service like?

A Process of service is you get a subpoena from the Court for whatever witness you're trying to locate and you want at your trial, hearing, whatever court procedure, and you have an address and that goes on the subpoena and then someone attempts to find this particular person and serve the subpoena.

Q If the person you are serving the subpoena to answers the door but does not want to talk to you or physically accept the subpoena, is that still considered service, if you have knowledge?

A I believe today it is considered service.

Q How long do you typically spend speaking with someone you serve a subpoena to?

A Not very long.

Q And how long would you say, generally, having just reviewed the interview memos in this folder, these various folders of varying length, if you had to guess, how long would those interviews have lasted?

A An hour or more.

Q In your experience interviewing capital jurors, have you found that they are excited to talk about their experience?

A No.

Q How would you describe their feelings about discussing their work on the case?

A Most of them don't want to talk about serving on a capital jury because they sentenced someone to death.

Q Have you ever knocked on someone's door, introduced yourself, explained why you wanted to speak with a formal capital juror and have them refuse to speak to you?

A Yes.

Q Has that occurred on more than one occasion?

A Yes.

Q How, on a case with 15 jurors such as this, how much would you expect, how frequently would you expect that to occur?

A Very frequently.

Q Is the refusal at the door -- is a juror's, a formal capital juror's, disinclination to speak with you, does that guide how you initially contact that juror; to be clear, whether you call them, send them a letter or show up at their door?

A No, you only show up at the door.

Q Why wouldn't you just call or send them a letter?

A Because more than likely you're going to be turned down for the interview.

Q Have you ever, perhaps in a non-juror situation, called a witness in a case and had that witness want to conduct the interview on the phone?

A Yes.

Q Do you see a difference between sitting down with a witness face-to-face and conducting a phone interview?

A Absolutely.

Q Can you tell me a little about that difference?

A Well, over the phone, you can't see the expressions on their face when they're giving you information, you can't pick up on cues. You actually, you need to do it in person.

Q Sometimes witnesses in capital cases discuss very difficult things, is that correct?

A Yes.

Q Sometimes family member witnesses of a client, have they ever discussed difficult things with you?

A Absolutely.

Q Can you give me an example of those difficult things?

A I've had family members tell me, you know, their deepest darkest secrets in the family; of abuse, grown up poor, uneducated, mental illness.

Q While I don't mean to suggest at all that a family member's history of abuse is equivalent to jury service, I believe you stated that many jurors do not feel readily comfortable talking about their jury service?

A Correct.

Q Would you describe that discussion as sometimes a difficult thing?

A Yes.

Q And that is why you knock on their doors rather than call or mail them?

A Correct.

MR. KING: No further questions, Your Honor.

THE COURT: Any recross?

MR. PINKSTON: Just one question.

RECROSS EXAMINATION

BY MR. PINKSTON:

Q From '98 to 2012, are you aware of any efforts of your office to contact Juror A?

A Not to my knowledge, I don't.

MR. KING: And one more.

THE COURT: As it relates to that question, I'll let you ask another question.

FURTHER REDIRECT EXAMINATION

BY MR. KING:

Q Do you know when the post-conviction hearing was in Mr. Hall's case?

A I don't recall what year it was.

Q If the record reflected that it was a bifurcated hearing and the second hearing occurred in 2003, would you defer to that?

A Yes.

Q While I recognize that you are not an

attorney, in your experience as an investigator, were you conducting juror interviews, interviews with other witnesses, to develop proof after a post-conviction hearing had already occurred?

A No.

Q Why not?

A My job was done at that point; the hearing had taken place and the rest was left up to attorneys, with appeals or whatnot.

Q Is it your understanding that after a hearing, the proof is closed, as far as evidence, and the appellate courts consider only the record put on in the post-conviction?

A Yes.

MR. KING: Thank you.

THE COURT: Can this witness be excused?

MR. KING: Yes, Your Honor.

(Witness excused.)

(Thereupon, court was in recess.)

KATHRYN TATE,

called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q Good afternoon, Ms. Tate.

A Afternoon.

Q Would you say and spell your complete name for the record?

A It's actually Katherine Tate, K-A-T-H-R-Y-N, Tate, T-A-T-E.

Q And how are you currently employed, Ms. Tate?

A I'm an investigator with the federal public defender's capital habeas unit.

Q And before that, where were you employed?

A The post-conviction defender's office in Tennessee.

Q And did you participate in any of the juror interviews on this case?

A Yes, I did.

Q Before you started at the post-conviction defender's office, what were you doing?

A I was studying for a law degree in England. I came over in the summer of '98 and the summer of '99 to do an internship related to American legal practice and they offered me a position. I came back over November 1st of 2000.

Q And I believe you have the original files up there near you. Again, I have tabbed the different folders --

THE COURT: Ma'am, before you do that, give me your last name again.

THE WITNESS: Tate, T-A-T-E.

THE COURT: Not as hard as it sounds like. Okay.

Q If I could direct your attention to the first folder in the red well, can you please describe the label on the folder?

A Juror list.

Q And the contents? The first page would be my Bate No. 2 and the first page inside the folder.

A It's a list of the juror's names, number and brief information.

Q And how many jurors are listed on this page?

A Twelve are listed on the first one, which would be the actual jurors that sat through the whole, the deliberations.

Q And if I could have you flip a few pages forward, I believe two pages, this is Bate No. 4, it appears to be the same list with some handwritten notes in blue on it.

A Yes.

Q If I could direct your attention to the notes right under number 12, what -- can you describe

what you see there?

A I see two more names, which are, I presume, the alternates.

Q Would that have been standard practice to try to speak to all 12 jurors as well as the alternates?

A Yes.

Q And why is that?

A You might not get the same information from every person and you might want to corroborate what people tell you to get the best picture, the fuller picture.

Q And you did not participate in all of the jury interviews in Mr. Hall's case, is that correct?

A That's correct.

Q Do you remember about what time your participation began?

A I believe it was around January of 2001.

Q If I could direct you to the folder tabbed number 10, it has a juror's name and a date above that. Could you please read the date?

A 01/01/2001.

Q And for the record, this is Bate No. 329. If you open the folder, Bate No. 330, I see a sheet that says Scan-It Prep Sheet, do you know what this is?

A That's not from the original file, it's probably where a subsequent law office scanned the file.

Q So that would not have been included in the post-conviction defender's file?

A No, I don't think so.

Q And what is your understanding of the -- who handled Mr. Hall's case after the post-conviction defender's office?

A I believe he went to the East Tennessee Federal Defender's office.

Q So this sheet might have been added by them in scanning of their file?

A Yes.

Q If I could direct you to the next page, Bate 331, this appears to be a juror interview memo?

A Yes.

Q Who completed this memo?

A That was me, that was my maiden name, Pryce, P-R-Y-C-E. I accompanied Tammy Kennedy.

Q And while you were out doing juror interviews, would you have had the folder you are holding with you, or similar contents, on the road?

A Yes.

Q And why would you want to bring that?

A You kind of MapQuest at that time where the jurors live and then you would go around and try and catch people at home. And each time you went to a new door, you'd have to refer back and remind yourself which person this was and the information about them.

Q And why, specifically, would you include the individual voir dire and the juror questionnaires in that folder?

A Because that gives you the background that you need to begin an interview.

Q And the next folder, tabbed 11, this is Bate No. 356, do you see a date listed at the top of this folder? On the red folder's tab, I see a juror's name, is there a date above that?

A Not that I see. On 11, no.

Q Opening the folder, after the scanned sheet, I'm looking at Bate 358, Mitigation Potential Witness, this form would have been in the folder?

A Yes.

Q And flipping through the folder, I see the voir dire transcripts. And then after those, on Bate 366, a Faces of the Nation page?

A Yes.

Q What is Faces of the Nation?

A It was part of AutoTrack, which was the

software we used to look up information on individuals.

Q And that was used at the time in the office?

A Yes.

Q When did you leave the post-conviction defender's office?

A October of 2008.

Q And do you recall if you continued using Faces of the Nation your entire time while you were at the office?

A I believe we switched to Clear at some point, and LexisNexis, but I think we may have had Accurate at some point.

Q In your assessment, how did those locate products compare to Faces of the Nation?

A Over time, every system got better. I don't think this is still in existence. But every system got better records from more diverse sources. Particularly, now that people use internet more and there's more online presence, it would pull things that you wouldn't have gotten from this service.

Q And you continue using online locate tools in your current position at the federal public defender?

A Yes.

Q Which ones do you use?
A Accurate, and we also have Clear sometimes. We also do criminal record searches of different court systems online.
Q And would you say today, or, well, let's say in 2014, would you say the tools available to you at that time and the tools available to, I guess, anyone who wants to pay for them, were they better or worse than Faces of the Nation for finding potential witnesses?
A Better. Everything, technology wise, is better. We didn't have GPS, we didn't have cell phones, we were basically working from pay phones on the road. So it's primitive compared to now.
Q And turning to the next page, Bate No. 367, it appears to be a MapQuest page and it looks like there's a Post-it note on it. And I think the next page is actually the same page without the Post-it notes. It appears there's writing on the MapQuest page and also a Post-it, do you recognize any of that handwriting?
A Yes, that's mine.
Q And could you read the Post-it note for me?
A It says, "Called several times between 01/02/2001 and 01/05/2001. Excuses, then mother

informed us she would not talk with us."

Q So you ended up calling this juror?

A We went to the address, because I have the directions here and when we came back to the address, so I think my reference to "called" is my way of saying we went there.

Q I see. And on the following page, I see some notes, this is Bate No. 368, do you recognize that handwriting?

A Sorry, which?

Q The following page, 368?

A Yeah, that's my handwriting.

Q And looking at those notations, what does it indicate to you?

A That we went there, that they said to come back at 11/12 on Wednesday.

Q Reviewing the rest of the folder, am I correct that the only other contents are the juror questionnaire?

A Yeah.

Q Apart from your handwritten notes on the MapQuest pages, Faces of the Nation, and the voir dire, mitigation intake form, there are no notes indicating a conversation with this juror?

A No.

Q There's no memo that would document a conversation with the juror?
A No, my Post-it note says that her mother said she would not speak to us.
Q In your practice and experience interviewing capital jurors, is it uncommon for jurors to speak to you?
A No, it's not uncommon, but it's less common than you would presume if you turn up on their door.
Q Why do you turn up on their door?
A It's harder for someone to refuse if you're there and they haven't had the time to think about it or to find excuses. You get to see them in person and you can maybe strike up some common ground or, you know, conversation. They might stay on the door for ten minutes telling you no and then finally invite you in.
Q Are you familiar with the phrase "getting your foot in the door"?
A Yes.
Q Is that ever used in the context of your work as an investigator?
A Yes.
Q And what does that mean in that context?
A Establishing that contact with them to get

them more agreeable to talk with you. So that's usually done on the doorstep and then getting in the door.

Q Have you ever had conversations through the door, perhaps a glass door or a screen door?

A Yes.

Q And have some of those conversations lasted more than a matter of minutes?

A Yes.

Q And have you ever discovered information that went into an interview memo because you thought the attorneys for the case would be interested in that information gleaned through the door?

A Yes.

Q If I could direct your attention to the next folder, folder 12, is there a date on the top of this folder, above the juror's name?

A No.

Q And after the scanned page, I see an intake form. After that, is it correct that it is the voir dire for this juror?

A Yes.

Q And then after the voir dire, and looking at page, Bate page 390, for the record, it appears to be two handwritten notes, do you recognize the

handwriting?

A Yes, that's mine.

Q What were you trying to document?

A That I visited several times over three days and mail was piling up and didn't seem like anyone was there, that they were out of town.

Q Why is it important to put that information in a note?

A So that we would -- I might mix up the jurors. I want to know where I've been, what the situation was, and then, you know, that they didn't refuse but maybe I can go back another time.

Q And the second note, it looks like a yellow Post-it note, is that also your handwriting?

A Yes.

Q And what does it indicate?

A The same thing: "Out of town? Visited several times."

Q And what date range did you attempt to interview this juror?

A January 2nd through January 5th, 2001.

Q Following pages, I see Bate No. 391, another Faces of the Nation search?

A Yeah.

Q This page indicates a number of addresses,

correct?

A Yes.

Q One of them is an out-of-state address, in fact?

A Yes.

Q What city and state is that address?

A Atlanta, Georgia.

Q Would you have required special approval to travel to Atlanta, Georgia?

A Probably not, because you could drive there, and it would be similar to driving to Memphis, which we did a lot, just maybe an hour more.

Q But it would not require a plane flight?

A Right.

Q I see another MapQuest page and then the juror questionnaire, Bate No. 393, do you recognize any of the handwriting on this page?

A No.

Q After the juror questionnaire, is there any more information in the folder?

A No.

Q So the only documentation made by you is the multiple attempts to contact this juror over what appears to be a four-day period?

A Yes.

Q Moving on to the folder tabbed 13, Bate No. 402, is there a date on this folder, above the juror's name?

A 01/03/2001.

Q And is one of the early documents in the folder a juror interview memo?

A Yes.

Q And this was completed by you?

A Yes.

Q Would you take a moment to review this memo?

A Yes.

Q And how long is the memo?

A Two pages.

Q In your review of these files, not today but recently, are you aware that there are longer memos in the file?

A Likely, yes.

Q Why might --

A This was an alternate, so he didn't have anything to say about the deliberations process.

Q He was an alternate but you still interviewed him anyway?

A Yes.

Q And what is your understanding of why you

want to interview alternate jurors?

A They can actually be useful in terms of they're not as invested in the sentence. They may be more willing to tell you about things that went along before that stage that would be of interest; you know, if other jurors were drinking or falling asleep in court or if they witnessed something that maybe other jurors wouldn't be as open to talking about.

Q So it sounds like the process -- you can't interview all the jurors at one time and you are tracking what they have to say about other jurors in the case?

A Uh-huh.

Q And how would that inform how you might prioritize finding a difficult-to-reach juror; be it because you don't have an address, because they live far away, because maybe they're dodging you?

A We have limited time and resources, we always have a post-conviction hearing that we're working towards. The jurors were one part of that and there were 14, sometimes 15, of those. So we would have to prioritize, looking to getting as many as we could in a short amount of time. So we would talk to the jurors closest first, and then if they gave us grounds or anything to suspect that we needed to really

really make an effort for someone that was far away, then we would proceed with that.

Q So if there were a juror living in the southwest, as there was in this case, what circumstances would have merited a trip, a plane flight, to interview this juror, for two employees?

A If another juror, say, shared a room with them and said that they told them something, or that they did something that could affect the trial, such as, you know, they looked up the case in the newspapers or they told me that their brother had been killed or, you know, something that they hadn't disclosed. If things were pointing towards maybe this person being key, then we would make the extra effort. But we couldn't just fly out there without having, I don't think, further info.

Q In your review of these files recently, is there anything that indicates that the Juror A in Arizona was, I guess as you said, a key juror?

A No.

Q You worked on more than one case at a time?

A Yes.

Q And the office handled more than one case at a time?

A Yes.

Q And the investigation happened before the post-conviction hearing?

A Yes.

Q Would it be fair to say there's a finite amount of time of person hours within the office to be devoted to investigation of jurors?

A Yes.

Q Would it be fair to say that there was a finite amount of financial resources that could be devoted to investigation of jurors?

A Yes.

Q Moving on to the next folder, I believe tabbed 14, for the record is 419, is there a date on this folder?

A No, there isn't.

Q What is the first item in the folder after the scan page?

A The juror questionnaire.

Q And if you flip past the juror questionnaire, you see a juror intake form, Bate No. 430. What does it indicate in the upper right-hand corner?

A Alternate.

Q And the next item in the folder appears to be the voir dire of this juror, is that correct?

A That's correct.

Q And moving past that, on Bate No. 438, what do you see there?

A Yes, my handwritten notes.

Q And on the next page, what do you see? I'm sorry, the following page, Faces of the Nation?

A Faces of the Nation then MapQuest is in my folder here.

Q And again, going back to Bate 438, your handwritten notes, the bottom sticky note, can you read that to me?

A The directions?

Q Below the directions.

A "Alternate. No time to see us when we called."

Q What is your understanding of "called" in that context?

A That was my English way of saying that we went there.

Q Final folder, tabbed 15, is there a date on this folder above the juror's name? And for the record, that is Bate 442.

A Date is 01/03/2001.

Q And does this folder contain a juror interview memo?

A Yes.

Q Did you write this memo?

A Yes.

Q Ms. Tate, you did juror interviews on a number of cases while you worked at the post-conviction defender's office, is that correct?

A Yes.

Q Do you recall doing juror interviews on Robert Faulkner's case?

A Yes.

Q Do you recall whether or not one of those interviews led to something of significance?

A Yes, one juror that we spoke to told us about physical abuse that she had suffered in the relationship, and it led to an overturn of his case.

Q Were you present for that interview?

A Yes.

Q Do you remember who was asking the questions to the juror about her history of trauma and abuse?

A I did.

Q Can you recall whether or not you showed up at that juror's door or did you mail them a letter or call them on the telephone to schedule an interview?

A We showed up at the door.

Q And how can you be certain of that?

A It's what we've always done. And I remember.

MR. KING: If I may have just one moment.

(Brief pause.)

MR. KING: Thank you.

THE COURT: Cross examination of Ms. Tate?

MR. PINKSTON: Briefly, Your Honor.

CROSS EXAMINATION

BY MR. PINKSTON:

Q Ma'am, Bates 242.

A I don't have Bates numbers.

Q I think it's tabbed 10, is that correct?

MR. KING: Tab 10?

MR. PINKSTON: Juror A?

MR. KING: Juror A would be tab 6.

Q Excuse me, tab 6.

MR. PINKSTON: And if I may approach the witness, Your Honor?

THE COURT: You may.

Q Did you find that page?

A I did.

Q Faces of the Nation. From 2000 until 2008, when you left -- I understand you left the office in 2008?

A Uh-huh.

Q What search engines or technology was available that was better than Faces of the Nation, during that time?

A Towards the latter part of my time, I believe we were using Clear.

Q And what was Clear?

A It was an extension of this program, just better, I think. They changed hands the whole time. LexisNexis may have owned one or merged some things.

Q Clear, does it contain physical addresses?

A Yes, if they find the person.

Q If they find a person, does it just highlight the current address or does it go back a number of years?

A It was similar, I believe, to the system I use now I'm most familiar with, is Accurate, and they list all addresses that they have associated with that person. And then often they'll have a date next to it, which is the dates that they have records that they may have been at the address.

Q So, say, for instance, somebody lived somewhere in '96 or '97, if the records exist, you could possibly find that, if you searched in 2012, by matching up addresses?

A Yes.

Q Does Clear provide telephone numbers?

A It depends if they have them available for the person.

Q If that person is available, would it list a phone number?

A I believe so, but it's been a long time since I've used Clear.

Q And if available, would it list an email address?

A Not back then, I don't believe.

Q Not back then, okay.

A Well, I didn't get my first email address until '98.

Q Previous testimony shows this Faces of the Nation was ran in 2000?

A Yeah.

Q So it could have been there if that information was available?

A I don't believe so.

Q All right. Did you do any duties in your time there about locating or interviewing Juror A?

A Yes. Juror A? Sorry, I thought you said just jurors.

Q Juror A?

A No, I did not.

Q Now, showing up in person is not the only way you contacted people, is that correct?

A People in general, no, there are other ways, but that's preferred.

MR. PINKSTON: If I may approach?

THE COURT: You may approach.

Q I think this was under tab 11, there's a MapQuest page with a Post-it note?

A Yes.

Q You recall that?

A Yes.

Q And you called that individual several times, didn't you?

A When I said "called," it could be that I went to their house, I called at their house. It's an English phrase.

Q I got you. Do you remember in this instance if it was a telephone call or a personal visit?

A If it was a call, it would have been, usually, when we go to the house and they're not home and like if the wife might say here's his number. At that point, we're kind of in a bind that they've given us a number, so we'd have to try and call them, or

we'll just go back around.

Q And then on the Post-it note, you wrote, "Then mother informed us she would not talk with us"?

A Yes.

Q How did you get that information?

A I would have -- the mother would have spoken to me, probably in person.

Q But it requires you to take some affirmative step to find out that information?

A Yes, I'd been to the house several times.

Q Or communicate somehow?

A Yes.

Q Back to the Faces of the Nation page, you couldn't glean the information you got on this Post-it note just by this Faces of the Nation page, could you?

A That the mother said no?

Q I guess, and maybe it's the wrong question, I'm sorry, but do you have that information here about 'she wouldn't talk to us'?

A Yeah.

Q Unless you make some affirmative step, you couldn't find out that information, for instance, just by Faces of the Nation?

A No.

Q You've got to actually do something?

A Yes.

Q In your time at the federal defender's office, if I may, I believe at some point Mr. Hall had federal pleadings, is that correct?

A He was with the eastern district, I'm with the middle district.

Q All right. Have you ever made yourself aware of the pleadings in those filings?

A No, I have not contacted the eastern district.

Q Just out of choice or they don't talk to you or how does that work?

A We're not assigned to that case, so I've never had interaction with them on that.

Q In your time in -- the middle district, is that correct?

A Yes.

Q Have you performed juror interviews in regard to death penalty cases?

A Yes.

Q Do you know if that's the practice for other districts?

A Yes.

Q Do you all ever share information?

A About jurors that we're looking for?

Q And/or interviews, contents of interviews?

A No, we're not working together, but we wouldn't -- I don't think we would be assigned to the same person. We might have co-defendants.

Q Might have co-defendants. Okay. And what did you review before today?

A This, the purple juror files.

Q Anything in there indicated that -- when I say "your office," the state post-conviction defender office, ever reached out via letter, phone, in person, to Juror A?

A No.

Q Thank you.

THE COURT: And then redirect of Ms. Tate, anything?

MR. KING: Just a few questions.

REDIRECT EXAMINATION

BY MR. KING:

Q Forgive me if I missed a question you've already answered, I'm not having you repeat yourself. In your current practice at the Middle District Federal Public Defender, do you call or send letters to jurors as a way to get ahold of them?

A No.

Q How would you describe the resources

available to you at the middle district versus the resources available to you at the time you were working on Mr. Hall's case?

A Night and day, it's much greater resources.

Q And give me a little more context.

A A lot of my time at post-conviction defender's office, a lot of our time was spent trying to justify expenses to the court for experts; they would have to be within 250 miles of Memphis, if that was where the case was. We didn't have our own expert budget. And then like our travel budget, we had to spread it out through the year and sometimes we didn't have enough to last us right through.

Q So the travel budget was more limited at the post-conviction defender's office in that time period?

A Yes.

Q Are there other differences in resources that come to mind in your work as an investigator during the time period that you worked on Mr. Hall's trial and post-conviction and your work as an investigator now?

A We didn't have the staffing level, we were overworked, we couldn't hire more people to help.

Q And I believe it came up on

cross-examination the access to different types of location databases. When you were at the post-conviction defender's office, were you able to use whatever database you wanted to use?

A We had to have a contract, you know, because it had to be paid for, and so I think that was why we were with the one we were.

Q Did you decide who that contract was with?

A No.

Q Is it your understanding that the office's limited resources would be a factor in determining what types of contracts to get; for location services, for example?

A Yes.

Q In your work, both, I guess, at the post-conviction defender's office and at the federal public defender, and perhaps, I don't know what English law is like, are you familiar with an ineffective assistance of counsel claim?

A Yes.

Q Is it your understanding that there can be an ineffective assistance of an investigator?

A Yes.

Q Would that be through counsel because they have the duty to oversee the investigation?

A Yes. Yeah, we usually find that for the trial level, we're looking back.

Q So, primarily, ineffective assistance of counsel claims, even in your federal practice, are looking at the trial practice?

A (Moved head affirmatively.)

Q Do those claims on the cases you've worked on, both in post-conviction and at the federal public defender, ever relate to the trial defense team's investigation of the case?

A Yes, heavily. We look at their ineffectiveness, and part of that is not reaching out for in-person interviews with people.

Q Are you familiar specifically with cases in which it was alleged trial counsel were ineffective for letting their investigators merely call or send letters to potential witnesses?

A Yes.

Q And why, in your understanding, would that be, would a post-conviction petitioner make a claim of ineffective assistance of counsel because of that allegedly ineffective investigation?

A Because they missed out on a wealth of information. So we would show that they only did, you know, a cursory call. And then we would have to go and

do the work ourselves and show if they'd gone in person and approached this person the right way, they could have gotten this much more information. And then put that in there to support the claim.

Q Has it occurred more than once, where you were able to speak with a witness, perhaps a juror, perhaps a different type of witness, because you tried in person and that witness had been contacted by trial counsel either by phone or letter?

A Yes.

Q Ballpark number of times, perhaps?

A I'd say hundreds of times.

Q And have you attended trainings on capital investigation?

A Yes.

Q What types of training?

A Now it's more federal habeas conferences. I've also done, you know, the State ones when I was with the State. Numerous ones on different forensics or mitigation or guilt/innocence issues.

Q Are some of these conferences national conferences attended by investigators practicing capital work from around the country?

A Yes.

Q In any of these trainings, has it been

discussed, talked, discussed amongst other investigators, the practice of trial counsel merely calling or mailing a letter to a potential witness?

A Yes, that's the way I learned it since I came over in '98.

Q And what would you say is the prevailing professional norm of how you contact a witness in a capital case?

A You approach them personally, in person.

Q Are you familiar with any training materials such as, perhaps, Tools for the Ultimate Trial? What was that?

A It's a three-volume manual that we kept in the office that was produced -- it was Tennessee-specific, I believe. Tennessee Tools for the Ultimate Trial. That was what I was given to study when I first interned at the office and it has best practices for approaching a death penalty case.

Q Do some of those practices involve investigation?

A Yes.

Q And witness interviews?

A Yes.

Q And juror interviews?

A Yes.

Q I believe you said it was called Tools for the Ultimate Trial, is it subsequently known by another name?

A I'm not sure of the name now.

Q Might it be The Capital Case Handbook?

A There you go.

Q So there have been multiple editions of this training volume published throughout the years?

A Yes.

Q And it is Tennessee-specific but incorporating the best practices and norms?

A Right, had national case law and what had been successful and what issues to look out for.

Q Ms. Tate, I've asked you a number of questions, I don't know if there is anything else you'd like to share with the Court?

A I don't think so.

Q Thank you.

RECROSS EXAMINATION

BY MR. PINKSTON:

Q Ma'am, anywhere in your time, has Mr. Hall ever claimed ineffectiveness based upon an investigator's lack thereof, or efforts?

A I was the second person on these juror interviews, he was not my client, I did not work on any

other aspect of the case.

Q So you don't know?

A No.

Q Okay. And maybe I'm struggling with this, but what is the purpose for interviewing jurors?

A The purpose?

Q Yes.

A Cases have been overturned on jury issues.

Q So if you don't call and you don't send letters, but you have an address, how do you -- is the better practice just to ignore that juror?

A If I can get to them, I'll get to them.

Q So there are a multiple number of ways to get to a juror?

A There are a number of ways, but the preferred way -- and then, you know, if you're in a bad situation, you might have to resort to the others.

Q Are you saying, though, if there's a preferred way that's not available, you just don't act, even though there might be another avenue?

A Ideally, we would get to the point where we could go see them and follow up every last lead, but we're always working towards a hearing date and other cases and caseloads. So it might fall through the cracks if you have 1 witness out of 14 that's out of

state and you don't have any indication that they could be key.

Q Have you done that before, printed off a Faces of the Nation page, just stuck it in the folder and made no other efforts to contact that person?

A I would certainly hope to follow up with that person, but I can't say I haven't done that.

Q How would you try to follow up with that person?

A I would try to find the time to get to wherever they were, but if I didn't have the time and the resources, then they might fall through the cracks.

Q So I guess Mr. Hall should somehow get relief based upon not interviewing a juror, is that what I'm hearing?

A That's not for me to say.

Q But without recourses, you're kind of indicating that stuff just falls through the cracks?

A Well, there's instances where, yes, things get missed because you just can't get to it in time.

Q Have you ever worked in a government agency, state or otherwise, that wasn't limited in resources and people?

A I've only ever worked for the state post-conviction defender's office and the federal.

Q Right, but everybody is limited by resources; money, people, right?

A To different degrees, I'm sure.

Q Thank you.

THE COURT: All right. Mr. King, you have another question?

MR. KING: Just one, Your Honor.

THE COURT: Just one question. Okay. I think we're repeating a lot of stuff, so just one question. And I don't want to cut you short, but I'll let you ask one question. Go ahead.

MR. KING: It is directly responsive to the cross.

FURTHER REDIRECT EXAMINATION

BY MR. KING:

Q I believe you have stated that in certain instances if you make contact with a person at the witness's house and you've given them your card, your approach might change. Help me understand that.

A Well, if, say, the wife had given you a card, given you the phone number, and then you have to, you know, follow that lead, so you ...

Q If you were to call a witness and speak with them and they said absolutely no, I don't want to talk to you, would you then be in a good position to

show up on their doorstep?

A No.

Q Why?

THE COURT: That's three questions.

Answer the question.

A They've already shut you down for that avenue, so I would try to avoid calling, for that reason.

Q Are you familiar with the phrase "burning a witness"?

A Yes.

THE COURT: Do you have one question, Mr. Pinkston?

MR. PINKSTON: Your Honor, I have three, but I'll pass.

THE COURT: Thank you, ma'am, you're excused.

(Witness excused.)

THE COURT: Petitioner may call its next witness.

MR. KING: Petitioner will call Larry Gidcomb.

LARRY GIDCOMB,

called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q Mr. Gidcomb, can you state and spell your name for the record?

A Larry, L-A-R-R-Y, Gidcomb, G-I-D-C-O-M-B.

Q Thank you. What is your relation to Lee Hall's case?

A I worked in the office of the post-conviction defender from January of 2000 through the summer of 2017 and there was an instance in 2000 when I accompanied Ms. Kennedy to Chattanooga on the Hall case to try to find potential jurors, which I don't think we found any on that trip. And I also happened to be with Sophia Bernhardt in 2014 when she interviewed Juror A in Ashville.

Q Who was in charge of preparing for and directing the interview of Juror A?

A Sophia Bernhardt.

Q But you were present?

A Yes.

Q Do you recall who did more of the talking during the interview with Juror A?

A As it wasn't my case and I was just the second person there and I was actually in town for another case we were working on, this would have been

something that Sophia would have taken the lead on.
Q Do you recall who wrote the memo documenting that interview?
A Sophia took the notes and she wrote the memo.
Q Have you reviewed that memo?
A I did review it, yes.
MR. KING: May I pass it to the witness?
Q And you've reviewed the memo recently, Mr. Gidcomb?
A Yes.
Q How recently?
A Last night.
Q Would you say it is still fresh in your mind?
A Yes.
Q Does it accurately reflect the interview?
A From what I recall, yes.
Q Did you ever participate in other interviews with Ms. Bernhardt?
A Yes.
Q Did you ever read any of her other interview memos?
A Yes.
Q How would you characterize her interview

memos?

A She was extremely capable and professional and always prepared.

Q Would the information contained in her memos reflect the substance of the conversation?

A Yes.

MR. KING: Your Honor, at this point I'd like to move into evidence the 2014 interview memo and request that it is placed under seal.

THE COURT: This is the 2014 interview of Juror A?

MR. KING: That is correct, Your Honor.

THE COURT: Any objections to that?

MR. PINKSTON: Judge, on its face, it is hearsay, in a sense, and then when you couple that with the affidavit that accompanies it, it can be very troublesome. And if I may, if you take the memo by itself and then you take Ms. Bernhardt's affidavit, in particular paragraph seven, it says in her affidavit, "I don't specifically recall asking the juror about exposure to domestic violence or sexual abuse." She further says, "Had I asked domestic and/or sexual abuse, I would not have included this question if the juror's response was not relevant."

So it could intimate that Juror A was not

being truthful today, back in 2014, 2019, whenever, and I think without that attorney present, and her not even remembering if that question was asked, it can be highly misleading.

THE COURT: Mr. King, what do you say about that, is it not hearsay?

MR. KING: Your Honor, if I could respond. To the hearsay issue, I think it may be, in fact; although, I don't know that it goes directly to the truth of the matter asserted. However, I can also say in my practice in capital post-conviction proceedings, which is different than this proceeding, during sentencing and in post-conviction, in capital cases, hearsay testimony is admissible. I can't tell you off the top of my --

THE COURT: Let me ask you this -- and some things are confusing because the Juror A was here.

MR. KING: That's correct.

THE COURT: Was anything asked about what she said in 2014?

MR. KING: I believe it was, Your Honor. I believe that was covered by both the State and the defense.

THE COURT: Would that not be the more appropriate way to get that testimony in?

MR. KING: I believe both counsel for Mr. Hall and the General asked that of Juror A and Juror A did not have a specific recollection of 2014. And so Mr. Hall offers this memorandum and Ms. Bernhardt's affidavit as additional information to consider for what I believe to be a very important and critical matter and interview that goes to certainly some of the claims alleged in the writ of error coram nobis and whether it constitutes newly-discovered evidence. And while this Court has ruled on that, I --

THE COURT: Well, have you asked this witness if he knows whether she was asked about any of the things that you're concerned with now?

MR. KING: I intend to ask this witness, Your Honor.

THE COURT: You do intend to ask him?

MR. KING: Yes, sir.

THE COURT: Why don't you go ahead and do that.

Q (By Mr. King) Mr. Gidcomb, do you have a recollection of whether in the 2014 interview either you or Ms. Bernhardt asked Juror A specifically whether she had a history of domestic assault/sexual violence against her?

A No direct recollection of that.

Q And you were not responsible for preparing the interview?

A No.

Q And is it in the memorandum you reviewed last night and you have before you, is there any mention of whether or not -- is there any mention of Juror A's history of sexual abuse and domestic violence?

A No, no mention of that early part of her life at all.

Q If it had been discussed, if she had disclosed it in '14, would you expect to see it in the interview memo?

A Yes.

Q When practicing, how many juror interviews have you done in your time at the post-conviction defender's office?

A I've tried to recreate that through records. Probably between 200 and 250.

Q Are there certain types of questions that you always try to ask if you have the opportunity?

A Yes.

Q Do some of those questions also depend on the facts of the underlying case?

A Yes.

Q Are you familiar with Robert Faulkner's case?

A Yes.

Q Did you participate in juror interviews on Mr. Faulkner's case?

A Yes, I was the investigator on that case.

Q Did you participate in the juror interview that resulted in the issue going up on appeal?

A Yes.

Q Do you know off the top of your head when the Criminal Court of Appeals granted Mr. Faulkner relief based on that issue?

A I believe it would have been prior to 2014, when we were on the road with this case.

Q And that was something you were present for and discovered as an investigator on the case, along with Ms. Tate?

A Yes.

Q Did that case also, Mr. Faulkner's case, also involve, the facts of the case, involve domestic violence and/or --

A Yes.

Q But you have no specific recollection whether or not you asked the question?

A I do not. Under the circumstances of the

Faulkner case, if that had come up, it would have sent big red flags up for me.

Q If in the question was not asked in 2014, are you saying you're certain it was not volunteered or disclosed voluntarily by Juror A?

A I do not recall that, and I certainly would have.

Q In looking at the interview memo, is there, on page two, I believe, it might be page three, is there any bold text?

A Yes.

Q In your practice in the office and the interview memos you're familiar with from Ms. Bernhardt, why would something be put in bold-face text?

A To highlight it for the attorneys as they were skimming through, to make sure that they looked at that section.

Q And what does that bold-face text describe?

A Well, on page three, it describes an incident in which the bailiff took the jurors to eat at a family-style restaurant. And as it goes forward, Juror A was saying that she was familiar with that area and thought that -- do you want me to just read it directly?

Q I don't have a problem with that as long as you don't disclose any of the names of the jurors.

A "Was familiar with the area and thought the restaurant was probably just a few blocks from where the victim was killed. Juror A remembered thinking to herself that the judge probably wouldn't like it if he knew that they were so close to the crime scene. She kept these opinions to herself and she didn't tell any other jurors how close they were to the scene."

Q Do you see any -- reviewing the memo, do you see any other bold-face texts in it?

A Let me go back to page two, I did miss that. Page two, in bold, was some information about Juror A and her pathologist husband.

Q Without providing -- with providing as few identifying details as possible, can you either read or describe that information?

A She is saying that she and her husband had socialized with the doctor who had performed the autopsy on the victim, and the doctor who performed the autopsy was never called to testify but he was listed on the witness list. So prior to being chosen for the jury, she did recognize that name as someone she knew. And she also told the Court that she knew him.

Q To your knowledge, was that raised as a

claim?
A I have no knowledge of what was raised as claims.
Q Are you currently aware of where Sophia Bernhardt is practicing?
A I think she's in New York City. That's all I know.
Q Are you aware that she is an attorney?
A Yes.
Q Are you aware that she is seven months pregnant?
A Yes.
Q Are you aware that she indicated to counsel that she was unavailable to appear here today?
A Yes.
Q Would it surprise you to learn that in her affidavit, in paragraph ten, she states, "Should this Court or the parties wish to address the information contained within this affidavit, I will make myself available for a telephonic statement or testimony, given adequate notice"?
A I know she would do whatever she could.
Q And are you aware that Mr. Hall has an execution date set for December 5th?
A Yes.

Q Thank you. No further questions.

MR. PINKSTON: State would stand on the objection.

THE COURT: No questions?

MR. PINKSTON: We would stand on the objection as to the admissibility of the memo.

THE COURT: I don't know, are you still moving to introduce the statement?

MR. KING: I am, Your Honor.

THE COURT: Let me review the statement, okay? I thought if Mr. Pinkston was going to cross-examine, I would rule on it then, but let me just review what you're trying -- my concern is not only the hearsay aspect, but that the witness actually was called that gave the statement.

MR. PINKSTON: And the State has no questions of this witness.

THE COURT: I understand that.

Do you have the proposed statement, sir?

MR. KING: (Tendered to the Judge.)

THE COURT: Thank you.

(Brief pause.)

THE COURT: All right. For the purpose of which it's been mentioned, I'll let this be introduced into evidence, okay?

MR. KING: And, Your Honor, I would ask that to be introduced under seal.

THE COURT: That's fine. Under seal. That's fine.

MR. KING: And if the Court would permit, co-counsel has informed me I neglected to ask two, maybe three, questions of the witness.

THE COURT: Two, maybe three questions.

Let this be marked. I'll let this come in.

(Thereupon, the document was marked Exhibit No. 3 and received in evidence, to be filed under seal.)

Q (By Mr. King) Mr. Gidcomb, regardless of when the Court of Criminal Appeals issued the decision in Faulkner, your interview with the juror in Mr. Faulkner's case was years before his post-conviction hearing, is that correct?

A Yes, we had already had the hearing and she had already testified at the hearing.

Q I see. So the hearing had occurred prior to your 2014 interview?

A Yes.

Q I understand. And moving your attention back to the 2014 interview, the memo, and your independent recollection of the interview, did Juror A

ever mention her first husband during the interview?

A No.

Q Do you have a sense of how long the interview was, roughly?

A Maybe one to two hours. We were spending the afternoon with her.

Q How long was the interview memo?

A The interview memo was seven singe-spaced pages.

Q In your experience, does the length of an interview memo correlate/correspond to the length of time one spends talking to a juror?

A Not necessarily, but this one would be consistent with that amount of time.

MR. KING: No further questions.

THE COURT: Mr. Pinkston, any questions now?

MR. PINKSTON: (Moved head negatively.)

THE COURT: Thank you, sir. You're excused.

(Witness excused.)

THE COURT: Petitioner have any other witnesses?

MS. GLEASON: We had a matter that Mr. Pinkston needed to review, it was motions to continue

filed by Mr. Dawson or Mr. Morrow in the 1998 to 2000--

THE COURT: I'm not quite understanding. What are you --

(Off-the-record discussion among counsel.)

MS. GLEASON: Your Honor, we believe we'll be able to stipulate to the admission of three different pleadings that are court pleadings in other cases, not in Mr. Hall's case, that relate to motions for a continuance filed by Mr. Don Dawson, who was the post-conviction defender, or Mr. Paul Morrow, who was the deputy post-conviction defender. These three motions lay out the office's caseload and problems --

THE COURT: These were motions to continue?

MS. GLEASON: Different motions to continue. And all are file-stamped copies from the court file in those cases. And the stipulation will be simply to admit them into evidence, but acknowledge that they are not specific to Mr. Hall's case.

THE COURT: Is that understood?

MR. PINKSTON: (Moved head affirmatively.)

THE COURT: All right. You want those introduced as exhibits then to this hearing?

MS. GLEASON: Yes, Your Honor.

THE COURT: Are there three of them?

MS. GLEASON: There are three.

THE COURT: All right. And these are three motions to continue in other post-conviction cases, correct?

MS. GLEASON: Yes. I don't know if the Court prefers that to be a collective exhibit or --

THE COURT: Well, I think, there are three, we'll just let them be marked individually.

(Thereupon, the documents were marked Exhibits No. 4-6 and received in evidence.)

THE COURT: They're introduced, but how are they relevant? And there's no objection to the introduction of them, but as I review them, I want to make sure I'm looking for something.

MS. GLEASON: Correct. The 1998 to 2003 period was a period of -- Mr. Hall filed his pro se petition in August of '98, our office was appointed shortly thereafter. The last evidentiary hearing in the case was March of 2003. So, consistent with some of the testimony the Court's heard today, there were issues with office resources and caseload --

THE COURT: Oh, I see.

MS. GLEASON: And that would go to the diligence of the office's efforts in the post-conviction period, despite limitations.

THE COURT: I see. And we've had various

questions about resources and so forth, I understand what you're saying.

Any other proof to present on behalf of the petitioner?

MS. GLEASON: There were, I believe, two different items that counsel and the parties discussed in chambers prior to the beginning of the argument, specific to what we would like to put on, to introduce into the record. The first is the affidavit of Sophia Bernhardt, who is unavailable due to the time frame, due to her pregnancy, due to her workload.

THE COURT: Now, this was the person who took the statement, correct?

MS. GLEASON: Correct, and who drafted the memo.

MR. PINKSTON: Judge, I think it has to be read in conjunction with the memo the Court has introduced.

THE COURT: And the Court allowed that to come into evidence, is there some other thing that that will --

MR. PINKSTON: But if you'll note, the State's hesitancy originally is that it can appear that Juror A was misleading, based upon the way the affidavit is drafted.

THE COURT: Okay.

MR. PINKSTON: But if the Court wants to examine it, so be it.

THE COURT: Well, let me see the affidavit. And she's indicated why she could not be present, is that correct?

MS. GLEASON: Yes, but she would be willing to make herself available, if the Court or counsel have questions, telephonically or in some other manner.

THE COURT: And Mr. Pinkston, I think you directed your objections to one particular thing, what was that, sir?

MR. PINKSTON: I believe it was paragraph ten, where it talked about the practice was if she had asked that question and there was no meaningful response.

THE COURT: Well, paragraph ten just says she'll make herself available.

MR. PINKSTON: I'm sorry, it's one or two before that, where it talked about if there had been an answer that was irrelevant, she wouldn't have included that in the memo.

THE COURT: Well, paragraph seven says, "I cannot remember whether I specifically asked the juror about disclosure."

MR. PINKSTON: Yes, sir.

MS. GLEASON: And Your Honor, I neglected. There was an exhibit attached to the declaration. It's training material.

THE COURT: Well, for the purposes of the fact that she can't be here, I will consider it.

Once again, this is a capital punishment situation, so I will let that come in. Okay?

(Thereupon, the document was marked Exhibit No. 7 and received in evidence.)

MS. GLEASON: And Your Honor, one more thing before I would address the last declaration that we would like to tender. I mentioned it in chambers, but I was remiss for failing to mention it earlier. The post-conviction defender during this time period was Donald Dawson, who was director of the office. We did reach out to him to check his availability to be here today. He is in Nebraska visiting a relative and so is unavailable to us and has no independent memory of things during this period, so we are not presenting his testimony, whereas we perhaps might have if we had additional time.

We also had attempted to reach Paul Morrow, who was counsel for Mr. Hall during this entire period, and he was a deputy post-conviction director. And we

were aware that he had some serious medical issues, had been in assisted living, had been hospitalized at various points, but when we were getting ready to reach out to him over the weekend and into the holiday, Veteran's Day, Monday, November 11th, we learned that he had passed away that morning. So he is not available to us today as well.

Finally, Your Honor, as we mentioned in chambers, if we had had -- once again, thank you for the opportunity to present a hearing. If we had had additional time, we would have consulted with a trauma specialist that could have contextualized Juror A's life experiences and the reasons she did or did not disclose certain things over various periods of time in her life. And I see two ways that that could have been helpful to the Court: One is for us or for counsel for the State to have proposed potential people who have addressed those issues, because certainly the State has worked with sexual assault and domestic violence survivors on a regular basis in many cases. And in capital cases, we have also addressed those issues in some forms, but Mr. King and I certainly are not experts. So we thought it would be beneficial to reach out to someone who is a trauma specialist, who could help the Court contextualize this particular issue with

this victim of domestic violence and sexual assault.

We were able to very quickly reach out to Linda Manning, who is a trauma specialist, who provided for us a very brief declaration. I believe the State will have objections to this, but if I could tender to the Court for consideration.

THE COURT: Now, this person did not examine Juror A?

MS. GLEASON: No, Your Honor, she did not examine Juror A, that would have been something we would have liked to have done with more time.

THE COURT: Mr. Pinkston, you want to be heard?

MR. PINKSTON: I'll just add, Your Honor, that as the Court examines that affidavit, it would be -- three situations come to mind. If we're in a DUI trial and somebody testifies that I understand such and such person acts this way under the influence of alcohol, or I understand that such and such person acts this way under the influence of controlled substance, or we've had eyewitness experts who indicate that sometimes witnesses can deal with these types of issues, with eyewitness testimony, my understanding, they can only give a general idea of what may or may not have occurred, unless they have personal knowledge

of this individual and how they act in a certain manner. And I think he can only be viewed in the most general sense, that this person may have been under this trauma, that trauma, the other, but without actual knowledge of that individual, anything specific should not be considered.

THE COURT: Ms. Gleason, anything further?

MS. GLEASON: No, Your Honor. Thank you again for your patience.

THE COURT: Well, I want to be very, very lenient in regard to the admission of evidence, and I think have been, but it looks like to me that this is too far afield, as far as introducing it as an exhibit itself into evidence. So as far as the introduction into evidence, I will sustain the objections. Okay?

MS. GLEASON: Might we tender it as an offer of proof, Your Honor?

THE COURT: That's fine.

MS. GLEASON: Thank you, Your Honor.

THE COURT: You can make it for identification purposes. ID purposes only.

MS. GLEASON: Thank you.

(Thereupon, the document was marked Exhibit No. 8 for identification.)

THE COURT: All right. Anything else from

the petitioner?

MR. KING: No, Your Honor.

THE COURT: Does the State have any proof?

MR. PINKSTON: (Moved head affirmatively.)

THE COURT: Do you want to briefly be heard? Now, I told you originally I complimented both sides for the material that you pointed out and the petitions, the responses, the responses, once again, that you did on fairly short notice yesterday. So I have all of your arguments, responses, and law that you pointed out, but anything that you think is important enough to bring up again, I'll be glad to hear you. On behalf of the petitioner? And something you specifically want to point out to me. This is important. It's important we act quickly, and I want to do that, but I'll hear what you say.

MS. GLEASON: Just very briefly. We would direct the Court's attention to the pleading, the brief we drafted and filed yesterday. It came in late yesterday. But we believe it's important, both to contextualize the second post-conviction petition and then the Court's dismissal of the earlier two procedural vehicles, and that is the longstanding notion in Tennessee that there can be no wrong without a remedy. And that goes back to Bob, the slave, and

other case law from the 1800s. It's a very fundamental principal in Tennessee and it relates to the very unique open courts clause in Tennessee, which is our section of the constitution that says the courts will always be open to citizens to come to the court and address their grievances.

And we spent some time in that pleading talking about the history of the open courts clause and then we also just very briefly addressed the due process considerations again. But, fundamentally, where we're at, Your Honor, that we'd like you to consider, is Lee Hall is set for execution seven p.m. three weeks from today, and he has raised a serious constitutional error. It is a structural error which we believe would have required granting of a new trial had it been raised earlier. It was raised earlier in Mr. Faulkner's case and he got relief, he got a new trial, and then he actually passed away of natural causes before the trial.

So he is similarly situated to our office's previous performance and it was only because Juror A was not in a place to disclose information when we did act diligently and attempted to interview her in the '98 to 2003 period and then again in 2014 after we were appointed by the Tennessee Supreme Court to take a look

at any potential issues in his case when the State had asked for an execution date. In neither attempts did we receive the information that we received when myself and Mr. Vittatoe from our office interviewed Juror A in September of 2019. And then we acted as diligently as possible, as soon we had that information, to get before this Court and hope that this Court would recognize what a serious error this was. Thank you.

THE COURT: Well, thank you.

Mr. Pinkston?

MR. PINKSTON: Judge, I think the pleadings from the State are pretty well from our point of view, as well as the testimony today, and the State thinks that the hope for a second petition should be dismissed and would address the Court's attention to Juror A's testimony about her bias or lack thereof during the trial, and then the testimony of the investigator, I believe Kennedy, about the efforts from '98, 2000, to 2012, to locate and interview Juror A, essentially consisted of printing off a sheet, Faces of the Nation, with two different addresses, but making no affirmative steps to touch base with her. I think those highlights should be considered by the Court.

THE COURT: Well, once again, there can be no more important matter to come before the Court than

here. I will say that the petitioner did file three different petitions; the writ of error, motion to reopen, a second petition. If you go by one, two, three, four, five, the law, then I think all of them are barred, quite frankly. The legislatures have passed certain laws that says, Judges, this is what you have to consider.

I consider, certainly, the cases that have interpreted those, and both counsel have pointed out those cases and how they might apply to Mr. Hall's case. But it is important. I understand what the petitioner is saying. I think petitioner basically argues due process, fairness. The State argues at some point in time something has to end. And that's where I said two major things come into conflict with each other.

I will say this: In reviewing the evidence that I've heard today, the responses that Juror A gave to the questions that were asked of her today were not a great deal different than the responses on the other juror's questions that have been introduced by the State, as far as there seemed to be no question in any of the jurors' minds about guilt, that was never an issue. And that's the thing that the Court did emphasize in regard to the writ of error: We weren't

talking about a state of innocence at all, we were talking about whether one juror could not fairly consider the case.

I'll look at everything again. I'll look at the file, the responses, the petition, and enter -- it's important that we all act quickly, and I will enter an order quickly to do that. Thank you all for being here and thank you for what you've done. Okay?

MR. PINKSTON: May we be excused, Your Honor?

THE COURT: You may, sir.

MS. GLEASON: Thank you, Your Honor.

MR. KING: Thank you.

(Thereupon, this was all the proceedings had and evidence introduced herein.)

REPORTER'S CERTIFICATE

I, the undersigned, Lynn S. Woods, Official Court Reporter for the Eleventh Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate and complete transcript, to the best of my knowledge and ability, of all the proceedings had and evidence introduced in the hearing of the captioned causes in the Criminal Court of Hamilton County, Tennessee, on the 14th day of November, 2019.

_____

_____

Lynn S. Woods
Official Court Reporter

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

ELEVENTH JUDICIAL DISTRICT

LEE HALL, JR.)

vs.) Case No. 308968

STATE OF TENNESSEE)

ORDER APPROVING TRANSCRIPT OF PROCEEDINGS

This is to certify that the transcript of the proceedings adduced at the hearing of this case has been filed with the clerk on _____, in accordance with the Tennessee Rules of Appellate Procedure. The transcript has been examined by counsel for the Defendant and the State and has been found by both to be a true and accurate record of the proceedings.

This is to further certify that the Court has examined the transcript of the proceedings and has bound it to be a true and accurate record of the proceedings.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that the transcript of the proceedings is hereby approved by the Court and counsel for the Defendant and the State, and the Clerk is hereby ordered to make the transcript of the proceedings part of the Record on Appeal in this case.

Entered this ____day of _____, 2019.

_____
JUDGE

APPROVED:

_____
ATTORNEY FOR STATE OF TENNESSEE

_____
ATTORNEY FOR THE DEFENDANT

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION III

LEE HALL,	)	
f/k/a Leroy Hall, Jr.,	)	
Petitioner	)	
vs.	)	No. 308968 (Post-Conviction)
	)	
STATE OF TENNESSEE,	)	
Respondent	)	

ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF

I. Introduction

This matter came before the Court November 14, 2019, for a hearing on the above-referenced petition, filed October 17, 2019, and followed by several responsive pleadings. The Petitioner, Lee Hall, is presently set to be executed on December 5, 2019.

Having conducted a hearing, and in consideration of the relevant authorities and the record as a whole, this Court concludes Petitioner's second post-conviction petition is barred by Tennessee Code Annotated section 40-30-102(c), which limits a petitioner to one post-conviction petition. The Court also concludes due process concerns do not entitle Mr. Hall to have this Court consider the merits of the post-conviction petition, as current appellate case law addressing due process in post-conviction cases has been limited to waiving the statute of limitations. Any expansion of due process principles must be undertaken by the Tennessee Supreme Court. Accordingly, Mr. Hall's second post-conviction petition is DISMISSED.

Given the limited time before Mr. Hall's scheduled execution and the appellate review which will almost certainly ensue, at the November 14 hearing this Court

permitted the Petitioner to present evidence on the issues raised in the post-conviction petition. Based on the proof presented, the Court finds that had this petition been properly before the Court, the evidence presented would not have entitled Mr. Hall to relief on the merits.

II. Relevant Procedural History

A. Trial

> The evidence presented at the guilt phase of the trial demonstrated that around midnight on April 16, 1991, the defendant threw gasoline on the victim, Traci Crozier, his ex-girlfriend, as she was lying in the front seat of her car. The victim received third degree burns to more than ninety percent of her body and died several hours later in the hospital. When questioned by police, the defendant initially denied involvement in the offense. Eventually, however, Hall admitted responsibility, but claimed that he did not intend to kill the victim; he intended to burn her car.

State v. Hall, 958 S.W.2d 679, 683 (Tenn. 1997).

A Hamilton County jury found Petitioner guilty of one count each of premeditated first degree murder and aggravated arson. The jury sentenced Mr. Hall to death. The trial judge[1] imposed a consecutive twenty-five year sentence for the aggravated arson conviction. The Petitioner's convictions and sentences were affirmed on direct appeal. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997).

B. Post-Conviction

Mr. Hall filed a timely petition for post-conviction relief. After the appointment of counsel and a hearing on Petitioner's claims for relief, the post-conviction court denied the post-conviction petition. The Court of Criminal Appeals affirmed the post-conviction court's ruling. *Leroy Hall, Jr., v. State*, No. E2004-01635-CCA-R3-PD, 2005 WL

[1] The late Judge Stephen M. Bevil presided over Petitioner's trial and post-conviction proceedings.

2008176 (Tenn. Crim. App. Aug. 22, 2005). The Tennessee Supreme Court denied Mr. Hall's application for permission to appeal on December 19, 2005.

C. Federal Habeas Corpus

Mr. Hall filed a timely petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. The district court denied the petition in an order filed in March 2010. *Lee Hall, formerly known as Leroy Hall, Jr., v. Ricky Bell, Warden*, No. 2:06-CV-56, 2010 908933 (E.D. Tenn. Mar 12. 2010). Before the case could proceed to the Sixth Circuit, Mr. Hall filed a motion to dismiss his petition. After a hearing, the district court concluded Mr. Hall was competent to forego his appeal and dismissed the habeas corpus petition. *Lee Hall, formerly known as Leroy Hall, Jr., v. Ricky Bell, Warden*, No. 2:06-CV-56 (E.D. Tenn. Sept. 22, 2011) (memorandum and order dismissing coram nobis petition).

D. Current Pleadings

On October 17, 2019, Mr. Hall filed the current post-conviction petition, along with two other pleadings, a petition for writ of error coram nobis and a motion to reopen his prior post-conviction proceedings. The three pleadings raised identical claims. In his petitions, Mr. Hall alleges he is entitled to a new trial based upon the newly-discovered admissions by one of the jurors who served during Mr. Hall's 1992 trial that (1) the juror was the victim of extensive domestic violence; (2) she did not admit this fact to the parties or the Court in her questionnaire or during voir dire; and (3) she was prejudiced against Mr. Hall, whom the juror hated because he reminded her of her abusive ex-husband. Mr. Hall asserts the prejudiced juror denied him his right to a fair trial under the

state and federal constitutions and constitutes structural error, mandating a new trial. The State and Petitioner subsequently filed additional pleadings.

On November 4, 2019, this Court held an initial hearing on Petitioner's filings. This hearing was limited to the issue of whether Petitioner's pleadings were proper procedurally. After considering the parties' arguments, the Court issued an order on November 6, 2019, concluding Mr. Hall's coram nobis petition and the motion to reopen his prior post-conviction proceedings were procedurally barred. The Petitioner subsequently appealed this Court's rulings. The coram nobis appeal is presently before the Court of the Criminal Appeals. However, the Court of Criminal Appeals dismissed Mr. Hall's application for permission to appeal the motion to reopen ruling on procedural grounds.[2]

This Court's November 6 order did not dispose of the Petitioner's second post-conviction petition. The order acknowledged Tennessee Code Annotated section 40-30-102(c) allows only one post-conviction petition but stated that due process considerations may require this Court to consider the merits of the second post-conviction petition. The Court ordered the parties to file legal memoranda on the due process issue before the November 14 hearing, which the parties did. In its November 6 order, the Court stated the parties would be able to present proof on the merits of the post-conviction petition. The Court informed the parties that if the Court concluded the petition was procedurally proper, the Court would resolve the post-conviction petition on the merits. If the Court concluded that the second petition was barred, the evidence would be considered an offer of proof.

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[2] *See Lee Hall v. State*, No. E2019-01977-CCA-R28-PD (Tenn. Crim. App. Nov. 8, 2019) (order dismissing application for permission to appeal in motion to reopen case).

III. Findings of Fact: Testimony Presented at November 14 Hearing[3]

A. Juror A

1. Her First Marriage

The juror, a woman, lived in Tennessee for most of her life, including the time of the Petitioner's trial. She moved to her current state of residence in 2000.[4]

The juror dated the man who would become her first husband for two years in high school. Juror A intended to go off to college after graduation, but sometime after graduation the man who would become Juror A's first husband raped her, which was the juror's first sexual experience. This rape resulted in a pregnancy; Juror A married her first husband in 1969 and gave birth to their son.

Juror A described the marriage to her first husband as "bad." She said her first husband was a "heavy drinker" who "got mean" when he drank. For most of their marriage, Juror A's first husband did not physically assault her; she said her husband would usually express his anger by putting holes in the wall of their trailer and causing damage to other items in the house. Specifically, Juror A recalled one time her first husband destroyed an aquarium in the residence. Juror A said her husband would often drive drunk, occasionally with their son in the car. The juror recalled on one occasion, her husband took their son with him when he went to a friend's house; the husband left the son in the car while the husband went inside to drink with his friend.

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3 The Court finds all witnesses to be credible.

4 Juror A and at least one other witness inadvertently disclosed the juror's current city of residence during the November 14 hearing. For the sake of the juror's privacy, and because her current residence is irrelevant to the issues before the Court, Juror A's place of residence will not be disclosed here.

Appendix F

Juror A also said that when her first husband drank he would impose himself on her sexually. Juror A did not necessarily consent to these encounters but she did not consider herself a rape victim at the time. She said at the time of her first marriage, people generally did not think in terms of spousal rape or spousal sexual abuse.

Juror A recalled her husband was very controlling and very jealous. She stated that during the course of her marriage, she thought of ways to leave her husband. She eventually attended school to become a medical technician. She also maintained a part-time job during her time at school. The juror recalled that her first husband would call her workplace so often she feared she would lose her job over the disruptions. Whenever the juror would leave the house for any period of time, such as when she went to the grocery store, the juror's husband would berate her when she returned, accusing her of seeing other men. She also said her first husband isolated her from her family. During this time the juror's husband told her that if she left him, she would never be able to meet anyone else and he would never leave her alone.

Juror A testified that toward the end of her first marriage, her first husband was arrested for drunk driving. She testified that on one occasion her husband "tore up" their residence and left. Juror A contacted the authorities in Bradley County, where they lived. When the police arrived, Juror A related her concerns, but the local authorities did not pursue the husband. The first husband was arrested on suspicion of drunk driving by another law enforcement agency. Juror A did not recall whether her husband was convicted after this arrest.

Toward the end of her marriage, Juror A was physically assaulted by her first husband twice. The juror did not recall the details of the first assault. Regarding the second assault, the juror recalled she and her husband went out for a night of drinking; at

the end of the night, the two got into an argument, which ended with the juror's first husband assaulting her. The assault left her with a bloody nose and a black eye. This led to Juror A deciding she would divorce her first husband, though she told her husband she would wait until Christmas to leave her husband for the sake of their son.

Juror A described her first husband's further decline following her telling him she was leaving. In one incident, the juror left their residence and returned to find several holes had been shot in the ceiling. Juror A also said that after the second incident of abuse, her husband drove to Florida before returning. Upon his return, he was "different." Juror A described her husband as "solemn," and he was not eating and drinking. The juror said that at a family gathering held Christmas Eve, 1975, her first husband said goodbye to everyone gathered. The next day, without warning, at another family gathering the juror's first husband went to a room away from everyone else and fatally shot himself in the head. Juror A said that during her first marriage she suspected her husband had mental health issues but she did not suspect he would kill himself.

Juror A did not tell many people about her abuse during her first marriage. She said she did tell her first husband's grandmother, who the juror said provided emotional support and food for Juror A's family when the family ran out of money. She also said that after the second incident of abuse, she told her father about the incident. After her first husband's death Juror A told a friend about her experiences during the marriage, but she told nobody else about what happened until engaging in therapy, as described below. She also said she told the Bradley County Health Department about her husband's mental health issues, but the agency only recommended marital counseling.

2. Her Second Marriage

After her first husband's death, Juror A completed her medical technician training. In the course of her work, she met her second husband, a Hamilton County physician. They married in 1981 and remained married until his death in 2007. Juror A went into great detail about her marriage, which was very happy and fulfilling for her. She explained that she and her second husband went on many trips together around the world and across North America. At some point in the 1990s, the couple began splitting their time between Arizona and Hamilton County; at the time of Petitioner's trial, Juror A still considered Tennessee her state of permanent residence. After the trial, the juror and her second husband moved to Arizona full-time before moving to the state of Juror A's current residence in 2000. Juror A said she never told her second husband about her first husband's actions.

3. Her Jury Service

Juror A said that when she reported for jury service in Petitioner's trial, she overheard other prospective jurors say the case on trial was a murder case. She did not know at that time that the case involved allegations of domestic violence. All prospective jurors in Mr. Hall's case completed a questionnaire before voir dire. Question 38 asked, "Have you ever been a victim o[f] a crime? If yes, please explain." Question 41 asked, "Have you or any member of your family had occasion to call the police concerning any problem, domestic or criminal?" Juror A answered "no" to both questions. The juror testified she answered question 38 as she did because she did not think of herself as a crime victim at the time she completed the questionnaire, as at the time there were "no such crimes" as date rape and spousal rape. She answered "no" to question 41 because

she had put the episode in which she called the police on her first husband "out of her mind" at the time of Petitioner's trial.

Question 40 on the questionnaire asked, "Have you, your spouse, friend or relative or any family member ever been charged with or convicted of a criminal offense?" She answered "no" to this question; as with question 41 above, she replied that she had put memories of her first husband's drunk driving arrest "out of her mind" at the time of the trial.

Juror A did not recall using the word "bias" in describing her feelings toward the Petitioner. She said that during voir dire and Petitioner's trial she did not think of herself as biased against Mr. Hall based on her past experiences. At the time of Petitioner's trial, she viewed her past experiences as "something that just happened." She also did not recall being asked any questions about domestic violence during voir dire. Juror A said her past experiences did not affect her answers during voir dire, and she added she was not biased against Petitioner except during Mr. Hall's testimony, as described below. The juror said she answered all voir dire questions truthfully and did not attempt to mislead the Court or attorneys.

The juror testified that her past experiences did not affect her jury service until Petitioner testified at trial. At that point, Mr. Hall's recounting his stalking and threats toward Ms. Crozier reminded Petitioner of her husband. Juror A testified at one point during Petitioner's testimony, the juror "hated" Mr. Hall, but the juror described these feelings as "fleeting."[5]

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[5] Juror A testified her past experiences did not affect her deliberations. However, the Court concludes such testimony is inadmissible per Tennessee Rule of Evidence 606(b). *See Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005). Thus, while the Court notes juror A's testimony for the record, the Court shall not consider the juror's testimony regarding her deliberations in disposing of the current petition.

Appendix F

4. Her Subsequent Disclosures

Juror A did not recall exactly when she first met with Petitioner's post-conviction attorneys. She testified that had she been contacted between 1998 and 2003, she probably would not have said anything about her experiences during her first marriage. The juror recalled meeting with investigators from the Post-Conviction Defender's Office in 2014, but she did not recall whether she was asked about domestic violence. She also said that had she been asked about her past abuse during the 2014 interview, she was unsure whether she would have disclosed anything. As explained below, however, she had begun disclosing incidents regarding her first marriage to counselors before 2014. Juror A said she never tried to hide from anyone following the Petitioner's trial; she said that during the period of Mr. Hall's initial post-conviction proceedings she and her second husband traveled extensively and may well have been out of the country if Petitioner's attorneys attempted to contact her between 1998 and 2003. Juror A said that she brought up the incidences of domestic violence when she spoke with Petitioner's post-conviction attorneys and investigator in 2019.

Juror A testified that after her husband died in 2007, she began grief counseling. Her grief counselor referred her to another counselor who treated her for post-traumatic stress disorder (PTSD) In the course of that treatment, she began discussing issues surrounding her first marriage. Juror A said her counseling ended around 2009.

B. Tammy Kennedy, Kathryn Tate, and Larry Gidcomb

1. Investigating Jurors, Generally

Ms. Kennedy, Ms. Tate, and Mr. Gidcomb all formerly served as investigators with the Tennessee Post-Conviction Defender's Office. Ms. Tate and Ms. Kennedy

worked on the Petitioner's case during his original post-conviction proceedings, which lasted from 1998 to 2003. Mr. Gidcomb testified about a meeting he and a former attorney with the Post-Conviction Defender, Sophia Bernhardt, had with Juror A in 2014. Ms. Bernhardt was unable to appear at this hearing, as she is an attorney in New York and was, as of this hearing, seven months pregnant.

Ms. Kennedy and Ms. Tate testified regarding their investigations into the jurors who served at Petitioner's trial. Both investigators stated trial jurors are routinely interviewed as part of the post-conviction investigation because occasionally jurors disclose information which could lead to claims for relief. A copy of the Post-Conviction Defender's investigative file on the jurors in Mr. Hall's case was introduced into evidence at this hearing. The file contained copies of the juror list, all peremptory challenges used by both sides during voir dire, and information particular to each juror. The investigators stated that before attempting to contact each juror, they reviewed the voir dire testimony and juror questionnaires for each juror. Those documents appeared in the investigative file for each juror in this case, including Juror A.

As the investigators attempted to contact each juror, an information sheet for each juror containing the juror's potential contact information was developed, along with printed directions to each juror's residence as listed on Mapquest.com. Ms. Kennedy and Ms. Tate stated that during the initial post-conviction proceedings, the office had no access to GPS units in their vehicles or on their mobile phones. All three investigators said that at the time of the initial post-conviction proceedings, the office used a computer program called "Faces of the Nation" in an attempt to locate jurors' current addresses. The investigators stated the program was not as good as providing addresses as current programs or information available through a routine internet search which can be

conducted today. The investigators said that during the period of Mr. Hall's first post-conviction proceeding, resources were limited, and out-of-state travel to investigate jurors was rare.

All three investigators stated that the office usually attempted to meet with jurors in person without advance warning instead of sending letters, phone calls, or emails. The investigators said generally, jurors who serve on death penalty cases are reluctant to speak about their experiences. The investigators said that emails and letters can be ignored, and if a juror refuses to speak to an investigator over the phone, all other potential lines of communication are usually foreclosed. The investigators stated that jurors may be more willing to talk if an investigator shows up on the juror's front porch. If a juror in Mr. Hall's case was interviewed, the investigator's notes from the interview and a memorandum detailing the interview also appeared in the file.

2. The Investigators' Failure to Meet with Juror A between 1998 and 2003

The Post-Conviction Defender's investigative file for Juror A contains, in addition to the transcript of her individual voir dire and her jury questionnaire, only two items: a cover sheet listing a particular Hamilton County residential address but no phone number, and a Faces of the Nation printout listing a residential address in Arizona and a Post Office Box in Hamilton County. There are no other documents in the file suggesting the investigators were able to contact the juror during the first post-conviction proceeding, and in her testimony Ms. Kennedy confirmed that she did not interview Juror A between 1998 and 2003. Ms. Kennedy acknowledged the investigators did not attempt to send letters to the juror's addresses for the reasons stated above, nor did the investigators attempt to gain information on the juror through other means, such as contacting

authorities in Arizona or reviewing a city directory in the juror's home town. Ms. Kennedy did not recall whether she asked for money to travel to Arizona in an attempt to meet with Juror A.

The two attorneys who represented Mr. Hall in the initial post-conviction proceeding, Don Dawson and Paul Morrow, did not testify at this hearing. Mr. Dawson was out of state, but current post-conviction counsel asserted Mr. Dawson had no independent recollection of the office's juror investigation in Mr. Hall's case. Current counsel informed the Court Mr. Morrow died three days before this hearing began (November 11, 2019).

3. Post-Conviction Defender's Meeting with Juror A in 2014

Mr. Gidcomb testified he and Ms. Bernhardt met with Juror A at her residence in 2014. Mr. Gidcomb recalled he and Ms. Bernhardt showed up unannounced at the juror's residence and asked to speak with the juror, who obliged. Mr. Gidcomb testified that during his interview with Juror A, she did not bring up the abuse which she disclosed to Petitioner's attorneys in 2019. Mr. Gidcomb's testimony suggests that had Juror A mentioned the abuse, such abuse would have been recounted in the memorandum detailing the interview. In a declaration admitted into evidence, Ms. Bernhardt stated she did not recall whether she asked Juror A about domestic violence during the 2014 interview.

IV. Review of Procedural Issues

A. Parties' Arguments

Petitioner argues he was without fault in raising his juror bias claim before now, as Juror A did not disclose her abusive first marriage and alleged bias toward Petitioner until post-conviction counsel interviewed the juror in 2019. While a second post-conviction petition is barred by statute, Petitioner argues he should be permitted to present this claim based on existing due process principles that have been applied to post-conviction claims previously or other equitable principles such as the Open Courts provision of the Tennessee Constitution. The State counters that due process principles do not provide Petitioner relief, as no authority exists which would permit Petitioner to excuse the one-petition rule or allow him to reopen his current post-conviction proceedings based on grounds not established by statute.

B. Second Petition Barred by Statute

Tennessee Code Annotated section 40-30-102(c) provides,

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-117.

As outlined above, Petitioner has already filed a post-conviction petition that was fully litigated. And as explained in this Court's November 6 order, none of the statutory provisions for reopening a post-conviction petition apply to Petitioner's current claims. Thus, Petitioner's second post-conviction petition is barred by statute.

C. Due Process in Post-Conviction Cases

One of the first major opinions of the Tennessee Supreme Court to consider the application of due process principles in light of post-conviction procedural limitations was *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992). At that time, the post-conviction statutes did not contain an explicit bar to successive post-conviction claims. If anything, then-existing case law suggested a successive post-conviction claim could be brought if the claim had not been waived or previously determined. *See, e.g.*, *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988) (petitioner could bring successive claim if he could "show that no knowing and understanding waiver of a ground for relief was made, or that the claim was not previously determined, or that it was unavailable at the time of any prior proceeding"). Thus, it is logical that the one-petition limit was not addressed in *Burford*. The one-petition statutory limit was not enacted until 1995.

In *Burford*, a Trousdale County petitioner filed a post-conviction petition in 1990 seeking relief from his 50-year sentence as a persistent offender, imposed in 1985. Burford based his claim upon the 1988 reversal of the Wilson County convictions on which the Trousdale County persistent offender status had been based. *Burford*, 845 S.W.2d at 206. The Trousdale County post-conviction court concluded the three-year statute of limitations had expired and dismissed the petition as untimely. *Id.* On appeal, the Tennessee Supreme Court concluded the three-year statute of limitations was reasonable but concluded Burford was entitled to have his claims adjudicated by the post-conviction court on due process grounds.

In examining Burford's claims, the Tennessee Supreme Court first stated,

> [I]t is clear that the State has a legitimate interest in preventing the litigation of stale or fraudulent claims. *Jimenez v. Weinberger,* 417 U.S. 628, 636, 94 S. Ct. 2496, 2501, 41 L.Ed.2d 363, 370 (1974). It is also clear that a state may erect reasonable procedural requirements for triggering the right to an

adjudication, *such as* statutes of limitations, and a state may terminate a claim for failure to comply with a reasonable procedural rule without violating due process rights. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437, 102 S. Ct. 1148, 1158, 71 L.Ed.2d 265, 279 (1982).

However, before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. *Id.,* 455 U.S at 437, 102 S. Ct. at 1158–59, 71 L.Ed.2d at 279. The question, then, is "whether the state's policy reflected in the statute affords a fair and reasonable opportunity for . . . bringing . . . suit." *Pickett v. Brown,* 638 S.W.2d 369, 376 (Tenn.1982), *rev'd on equal protection grounds* 462 U.S. 1, 103 S. Ct. 2199, 76 L.Ed.2d 372 (1983). In other words, the test is whether the time period provides an applicant a reasonable opportunity to have the claimed issue heard and determined. *Michel v. Louisiana,* 350 U.S. 91, 93, 76 S. Ct. 158, 160, 100 L.Ed. 83, 89 (1955).

Burford, 845 S.W.2d at 208 (emphasis added).

The Court in *Burford* concluded,

As stated previously, identification of the precise dictates of due process requires consideration of the governmental and private interests involved. *Fusari v. Steinberg, supra,* 419 U.S. at 389, 95 S. Ct. at 539, 42 L.Ed.2d at 529. While the State has a legitimate interest in preventing the litigation of stale and fraudulent claims, *Jimenez v. Weinberger, supra,* 417 U.S. at 636, 94 S. Ct. at 2501, 41 L.Ed.2d at 370, we find that application of the statute of limitations to Burford's petition fails to serve that interest.

There is nothing stale or fraudulent about the petitioner's claim. Although he filed his petition outside the time limits provided by the statute of limitations, there is no difficulty here with the availability of witnesses or the memories of witnesses. Nor is there a problem with respect to a groundless claim generating excessive costs. It is abundantly clear that the petitioner has a valid claim to have his sentence reduced, and all the Trousdale County court will have to do is examine the record of the Wilson County proceedings. The Trousdale County court can then resentence Burford using the appropriate considerations set forth in the Criminal Sentencing Reform Act. Tenn. Code Ann. §§ 40–35–101 to –35–504 (1990 & Supp.1991). Accordingly, we find that the governmental interest represented by Tenn. Code Ann. § 40–30–102 is not served by applying the statute to bar Burford's petition.

Moreover, although the Post–Conviction Procedure Act only provides an opportunity to litigate constitutional attacks upon prior convictions, which we have already determined is not a fundamental right, application of the statute to bar Burford's petition in this case will deny him of a fundamental right. If

> consideration of the petition is barred, Burford will be forced to serve a persistent offender sentence that was enhanced by previous convictions that no longer stand. As a result, Burford will be forced to serve an excessive sentence in violation of his rights under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, which, by definition, are fundamental rights entitled to heightened protection.
>
> Given that the governmental interest in preventing the litigation of stale or fraudulent claims is not served by applying the statute to bar consideration of Burford's petition, we find that the only other governmental interest served by application of the statute in this case is the administrative efficiency and economy provided by a time bar. Clearly, as stated earlier, this governmental interest is insufficient to override Burford's interest against serving an excessive sentence in violation of his rights under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution. In criminal litigation, where an alleged infringement of a constitutional right often affects life or liberty, conventional notions of finality associated with civil litigation have less importance, *Sanders v. United States,* 373 U.S. 1, 8, 83 S. Ct. 1068, 1073, 10 L.Ed.2d 148, 157 (1963), and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha,* 462 U.S. 919, 944, 103 S. Ct. 2764, 2781, 77 L.Ed.2d 317, 340 (1983).

Burford, 845 S.W.2d at 208-09.

While some language of *Burford* suggests due process considerations may not necessary be limited to the statute of limitations, *Burford* and the Tennessee Supreme Court's opinions addressing due process concerns in post-conviction cases as applied to the post-1995 statute—including *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000), *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001), *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011), *Whitehead v. State*, 23 S.W.2d 272 (Tenn. 2000), and *Bush v. State*, 428 S.W.3d 1 (Tenn. 2014)—have exclusively addressed due process-based tolling of the statutory post-conviction limitations period. In this Court's view, the Tennessee Supreme Court's narrowed focus on the limitations period means that this Court cannot expand the due process-based principles of *Burford* and its progeny to the procedural issues presented in

Mr. Hall's case. Any expansion of a post-conviction petitioner's due process rights must be granted by the Tennessee Supreme Court.

A Tennessee Supreme Court opinion in another death penalty case supports this Court's conclusion. Before the Tennessee Supreme Court issued a later opinion concluding he was entitled to raise claims he was intellectually disabled and ineligible for the death penalty,[6] death row inmate Heck Van Tran filed a post-conviction petition in Shelby County alleging he was not competent to be executed. *Van Tran v. State*, 6 S.W.3d 257, 261 (Tenn. 1999). The Tennessee Supreme Court affirmed the trial court's dismissal of the petition, though on different grounds.[7] The Tennessee Supreme Court focused on the procedural aspects of Van Tran's claim. The Court noted no statute, post-conviction or otherwise, permitted a petitioner to challenge his competency to be executed. *Id.* at 263. Specifically, the Court noted that "the one-year statute of limitations for actions under the Post-Conviction Act . . . indicates that the General Assembly did not contemplate that post-conviction relief would be available in this circumstance." *Id.* (alteration added). The Court also noted a competency to be executed claim did not satisfy the criteria for reopening a post-conviction petition, adding, "That the Post-Conviction Act is such an ineffective and incomplete means to protect the insane from execution indicates that the General Assembly never intended for the Act to serve this purpose." *Id.* at 264. Accordingly, the Court concluded a post-conviction claim was "not

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[6] *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).

[7] The Shelby County Criminal Court's order dismissing Van Tran's post-conviction petition concluded that even if Van Tran's mental state precluded him from being executed, the claim was not cognizable for post-conviction relief because the claim would not have rendered the verdict and judgment "void or voidable as a result of a constitutional claim." *Id.* at 261. Unlike the first Van Tran case, Mr. Hall's claims of juror bias would be cognizable in a properly-brought post-conviction proceeding.

the appropriate avenue for litigating the issue of competency to be executed." *Id.* The Court also concluded other statutory claims, such as the writ of error coram nobis, would not provide an avenue for relief. *Id.*

However, the Supreme Court concluded it had the authority to create procedures to resolve certain claims where no such procedural avenues existed previously:

> Our conclusion that no existing statute provides a procedure for litigating the issue of competency to be executed does not end the inquiry, however. It has long been recognized and widely accepted that *the Tennessee Supreme Court* is the repository of the inherent power of the judiciary in this State. *Petition of Burson,* 909 S.W.2d 768, 772 (Tenn. 1995) (citing cases). Indeed, Tenn. Code Ann. §§ 16-3-503 and -504 (1994) broadly confer upon *this Court* all discretionary and inherent powers existing at common law at the time of the adoption of the state constitution. *Id.* We have also recognized that *this Court* has not only the power, but the duty, to consider, adapt, and modify common law rules. *State v. Rogers,* 992 S.W.2d 393, 400 (Tenn.1999); *Cary v. Cary,* 937 S.W.2d 777, 781 (Tenn.1996) (citing cases). Finally, we have recently held in the context of a capital case that Tennessee courts have inherent power to adopt appropriate rules of criminal procedure when an issue arises for which no procedure is otherwise specifically prescribed. *State v. Reid,* 981 S.W.2d 166, 170 (Tenn.1998).

Van Tran, 6 S.W.3d at 264-65 (emphasis added). The Court outlined a procedure for bringing a competency to be executed claim then dismissed Van Tran's competency claim because his execution was not "imminent." *Id.* at 265-74.

Van Tran makes clear to this Court that if any expansion of the Tennessee Supreme Court's due-process based holdings in post-conviction cases is to occur, such expansion must be undertaken by the Tennessee Supreme Court, not this Court. This Court must follow the Tennessee Supreme Court's precedent in *Burford* and its progeny strictly. Thus, because the Tennessee Supreme Court has not concluded that due process principles permit a petitioner to bring successive post-conviction petitions or permit a petitioner to reopen his post-conviction petition based on grounds not enumerated in the

post-conviction statute, this Court is constrained to conclude due process principles do not permit the Court to review review Mr. Hall's second post-conviction petition.

C. Open Courts Clause and Other Claims

The Petitioner argues dismissing his petition without giving him an opportunity to resolve the claims contained therein would violate his rights under the state and federal constitutions, particularly the "Open Courts Clause" contained in Article I, section 17 of the Tennessee Constitution. This Court disagrees. This Court notes that in an appeal involving another death row inmate, the Tennessee Court of Criminal Appeals concluded the petitioner could not use the Open Courts Clause to raise his procedurally-barred intellectual disability claims:

> Article I, section 17 of the Tennessee Constitution provides: "That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." In interpreting this provision, our supreme court has stated:
>
> > The obvious meaning of this is that there shall be established courts proceeding according to the course of the common law, or some system of well established judicature, to which all of the citizens of the state may resort for the enforcement of rights denied, or redress of wrongs done them.
>
> *Staples v. Brown,* 85 S.W. 254, 255 (Tenn.1905); *see State ex rel. Herbert S. Moncier v. Nancy S. Jones,* No. M2012–01429–COA–R3–CV, 2013 WL 2492648, at *6 (Tenn. App. June 6, 2013), perm. app. denied (Tenn. Nov. 13, 2013). This provision "does not create a right but, rather, requires a mechanism by which a citizen may redress grievances." *State ex rel. Herbert S. Moncier,* 2013 WL 2492648, at *6. Accordingly, Article I, section 17 does not create a substantive cause of action to enforce other constitutional provisions or laws. *Id.* The Petitioner may not rely upon the Open Courts Clause as a means to obtain a hearing on his intellectual disability and double jeopardy claims.

James Dellinger v. State, 2015 WL 4931576, at **15-16 (Tenn. Crim. App. Aug. 18, 2015), *perm. app. denied*, (Tenn. May 6, 2016). The Open Courts Clause does not entitle Petitioner to relief.

D. Dismissal of Petition on Procedural Grounds

Because there is no basis—procedural, due process-based, or otherwise—upon which the Petitioner may bring the claims raised in the second post-conviction petition, the petition is hereby DISMISSED. Although the Court is dismissing Petitioner's claims on procedural grounds, the Court will examine the merits of Petitioner's claims to facilitate appellate review.

V. Petitioner's Juror Bias Claims

A. Relevant Case Law: The Right to a Fair and Impartial Jury

"Both the United States Constitution and the Tennessee Constitution guarantee a criminal defendant the right to trial by an impartial jury." *State v. Odom*, 336 S.W.3d 541, 556 (Tenn. 2011) (citing U.S. Const. amend. VI and Tenn. Const. art. I, § 9. "Because the right to an impartial jury is a fundamental aspect of a fair trial, the infraction of that right can never be treated as harmless error." *Odom*, 336 S.W.3d at 556 (internal quotations omitted; *citing Gray v. Mississippi*, 481 U.S. 648, 668 (1987) and *State v. Bobo*, 814 S.W.2d 353, 358 (Tenn. 1991)).

The Court of Criminal Appeals has explained,

> The jury selection process must be carefully guarded to ensure that each defendant has a fair trial and that the verdict is determined by an impartial trier of fact. The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the

other of the litigation". *Toombs v. State,* 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Bias in a juror is a "leaning of the mind; propensity or prepossession towards an object or view, not leaving the mind indifferent; [a] bent; [for] inclination." *Durham v. State,* 182 Tenn. 577, 188 S.W.2d 555, 559 (1945). Jurors who have prejudged certain issues or who have had life experiences or associations which have swayed them "in response to those natural and human instincts common to mankind," *id.* 188 S.W.2d at 559, interfere with the underpinnings of our justice system.

The essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel. 47 Am.Jur.2d, Jury § 195 (1969). [. . . .] Since full knowledge of the facts which might bear upon a juror's qualifications is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make "full and truthful answers ... neither falsely stating any fact nor concealing any material matter." 47 Am.Jur.2d, Jury § 208 (1969).

Tennessee follows the common-law rule by which challenges of juror qualifications fall within two distinct classes. Those challenges based on defects in qualifications such as alienage or statutory requirements are called propter defectum, which, literally translated means "on account of defect." *See* Black's Law Dictionary 1098 (5th ed.1979). The other class of challenges, propter affectum ("on account of prejudice"), *id.,* is based on bias or prejudice "actually shown to exist or presumed to exist from circumstances." *Durham v. State,* 188 S.W.2d 555, 559 (Tenn.1945) (quoting 1 Bouvier's Law Dictionary 451 (Rawle's 3d rev. 8th ed. (1914)). Propter defectum challenges must be made prior to verdict, but propter affectum challenges may be made after verdict. *State v. Furlough,* 797 S.W.2d 631, 652 (Tenn. Crim. App.), *perm. to appeal denied,* (Tenn.1990) [. . . .]

After establishing that the challenge may be maintained, a defendant bears the burden of providing a prima facie case of bias or partiality. *See State v. Taylor,* 669 S.W.2d 694, 700 (Tenn.Crim.App.1983), *perm. to appeal denied,* (Tenn.1984). When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality, a presumption of prejudice arises. *Durham v. State,* 188 S.W.2d 555, 559 (Tenn.1945). Silence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer. 47 Am.Jur.2d § 208 (1969) (counsel has right to rely on silence as negative answer); *see Hyatt v. State,* 430 S.W.2d 129, 130 (Tenn.1967) ("[j]uror . . . by his silence . . . acknowledged"). Therefore, failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality, *Hyatt v. State,* 430 S.W.2d 129 (Tenn.1967); *Toombs v. State,* 270

> S.W.2d 649 (Tenn.1954); *Durham v. State,* 188 S.W.2d 555 (Tenn.1945), "the theory being that a prejudicial bias has been implanted in the mind which will probably influence the judgment." 188 S.W.2d at 558.
>
> [. . . .]
>
> [W]hen a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias, a presumption of bias arises. While that presumption may be rebutted by an absence of actual prejudice, the court must view the totality of the circumstances, and not merely the juror's self-serving claim of lack of partiality, to determine whether the presumption is overcome. Moreover, when the presumed bias is confirmed by the challenged juror's conduct during jury deliberations which gives rise to the possibility that improper extraneous information was provided to the jury, actual prejudice has been demonstrated.

State v. Akins, 867 S.W.2d 350, 354-57 (Tenn. Crim. App. 1993) (omissions added; footnotes omitted).

A "material question" is "one to which counsel would reasonably be expected to give substantial weight. Insignificant nondisclosures will not give rise to a presumption of prejudice." *Akins*, 867 S.W.2d at 356 n.12. In determining whether a material question is "reasonably calculated to produce an answer," the court in *Akins* stated, "The test is whether a reasonable, impartial person would have believed the question, as asked, called for juror response under the circumstances." *Id.* at 356 n.13.

B. Transcripts of Voir Dire

Counsel for the Petitioner introduced into evidence the entire appellate record from Petitioner's trial, including the transcript of voir dire, at the November 4 hearing. The transcript of Juror A's individual voir dire was also introduced as part of the Post-Conviction Defender's investigative files at the November 14 hearing. The record reflects

the juror was not asked any questions about domestic violence during individual voir dire.

During general voir dire, before Juror A was called into the jury box, Judge Bevil made the following statements during his overview of the general voir dire process:

> Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days. And, as we said earlier, ladies and gentlemen, it's not an attempt in any way to embarrass you, to delve into your personal lives, but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentlemen, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of the case. If there is a question that's asked of you and you would like to respond, but you feel that the question—it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving sexual assault or sometimes in homicide cases. So please let the Court know.

Trial trans. Vol. 5, at 608.

Judge Bevil also told the panel the following:

> Also, I'm going to ask you—the questions this will be directed primarily to those of you seated in the jury box and in front of the jury box, but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

Id. at 609.

During his initial questioning of prospective jurors, before the juror at issue was brought into the box, defense trial counsel William Heck asked the following question:

> Now, another thing that I need to ask about—and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentlemen here. One of the things that I'm curious about—and if there is something in your background or someone close to you in that background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. *That has to do with domestic*

> *violence*. Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature *that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict?* If there's anyone like that, please let me know by showing a hand and we can talk about that at some other time. Okay.

Id. at 673-74 (emphasis added).

When the juror at issue was called into the box, Judge Bevil asked the following questions:

> Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?
>
> . . . .
>
> Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things? Do you know any reason why you cannot listen to the evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

Id. at 720, 731-32.

Juror A did not respond to either of the judge's questions.

C. Application to Current Case

This Court concludes the Petitioner has failed to establish Juror A was prejudiced against him at the time of trial. While Juror A did not disclose the domestic violence she suffered before and during her first marriage, that failure to disclose did not result from the juror's intentional nondisclosure or attempt to deceive the Court or attorneys. Rather, this Court accredits Juror A's November 14 testimony in which she stated she did not

think of herself as a victim at the time of Petitioner's trial and that her past experiences did not render her prejudiced against Mr. Hall at the time of jury selection. Furthermore, the Court finds that the questions asked of Juror A during voir dire may not have been reasonably calculated to elicit an answer in which the juror would have disclosed her past abuse. The most relevant question asked during general voir dire, as cited by Petitioner's attorneys, concerned whether any juror's past exposure to domestic violence "would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict[.]" Based on the juror's testimony at this hearing, Juror A answered this question truthfully, as while she may have encountered domestic violence before Petitioner's trial, it did not appear to leave the juror unable to render a fair and impartial verdict as of the time the question was asked. Juror A was involved in a happy and fulfilling marriage at that point, which helped her overcome any feelings she may have had about her first marriage.

Even if somehow the juror's past abuse creates a presumption of prejudice under *Akins* and its progeny, the entirety of Juror A's testimony regarding her abuse and the relatively small impact it had on her ability to serve as a juror is sufficient for the State to have rebutted such a presumption. Petitioner points to Juror A's supposed "hatred" of the Petitioner, but the testimony presented at this hearing regarding such hatred was unavailing to the Petitioner. Juror A testified she did not feel any hatred, bias, or prejudice toward the Petitioner until she heard the Petitioner testify at trial. While the testimony about Petitioner's actions may have reminded Juror A about the stalking and other abuse she suffered at the hands of her first husband, Juror A stated any "hatred" she may have had toward the Petitioner was fleeting and did not affect her going forward.

Petitioner argues this case is little different than *Robert Faulkner v. State*, a post-

conviction case in which a death row inmate convicted of killing his wife was granted a new trial after the jury foreperson testified at the post-conviction proceeding about being the victim of domestic violence. But important distinctions can be drawn between the *Faulkner* case and Mr. Hall's case. For instance, the juror in *Faulkner* was asked directly on the questionnaire whether she or anyone she knew had been the victim of domestic violence, and she was also asked during voir dire whether she had any prior experience with domestic violence. *Robert Faulkner v. State*, 2014 WL 4267460, at **65-66 (Tenn. Crim. App. Aug. 29, 2014). She answered "no" to these questions. *Id.*, *66. The Faulkner juror claimed her answers were inadvertent, as she must have rushed through the questionnaire, but the post-conviction court did not accredit this testimony. *Id.*, *78. Furthermore, the juror in *Faulkner* had criminal record, including a conviction for driving under the influence, two warrants for violating probation, and an arrest for theft of property, though the juror was not charged. *Id.*, *66.

Conversely, in Mr. Hall's case this Court fully accredits Juror A's testimony. No evidence has been put before the Court of any criminal record or anything else which would call Juror A's credibility into question. While the *Faulkner* juror was asked directly on voir dire whether she had any experience with domestic violence, Juror A was only asked whether such exposure would have affected her ability to serve on this jury. Juror A did not indicate that she would have been so affected, a response which appears truthful in light of her testimony at this hearing. Juror A testified her past experiences did not affect her at the time of trial and she did not harbor any bias toward Petitioner as of jury selection.

Finally, the Court of Criminal Appeals' opinion in *Faulkner* suggests the juror in that case offered only brief testimony. The appellate court's opinion stated only that the

juror testified she had not answered certain questions truthfully, that she was a domestic violence victim, and—in testimony found inadmissible—that her experience did not affect her verdict. Thus, it appears the State presented no evidence in *Faulkner* which could have rebutted the presumption of prejudice created by the juror's admissions. Conversely, in this case Juror A testified extensively about the nature of her past abuse, how she was unaffected by such abuse at trial based in large part on the happy and fulfilling marriage in which she had been involved over a decade as of trial, and the fact that any prejudice or hatred she may have felt toward the Petitioner was fleeting at best. Thus, any presumption of prejudice which may have resulted in the current proceedings was rebutted by the entirety of Juror A's testimony.

In conclusion, Petitioner fails to establish Juror A was prejudiced against him. Were Petitioner's post-conviction petition properly before the Court, he would not be entitled to relief on the juror bias claim raised therein.

VI. Conclusion

For the reasons stated above, the Court concludes Juror A's second post-conviction petition is procedurally barred. Furthermore, even if this Court could consider the post-conviction petition, the Court would conclude Petitioner has not established he was denied the right to a fair trial based on Juror A's service on his jury.

Mr. Hall's petition for post-conviction relief is DISMISSED. Petitioner is indigent, so costs are taxed to the State.

IT IS SO ORDERED this the 19 day of November, 2019.

Don W. Poole

DON W. POOLE, JUDGE
DIVISION III
CRIMINAL COURT
HAMILTON COUNTY, TENNESSEE

IMMEDIATE COPY TO:

Kelly Greason
Jonathan King
Attorneys for the Petitioner
Office of the Post Conviction Defender
404 James Robertson Parkway
Suite 1100
P. O BOX 198068
Nashville, Tennessee 37219-8068
FAX: 615-741-9430
E-MAIL: www.tnpcdo.net

Neil Pinkston
District Attorney General
State of Tennessee
Hamilton County, Tennessee

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

LEE HALL,	)	
	)	**No. E1997–00344–SC–DDT–DD**
Petitioner,	)	
	)	**Hamilton Co. Nos. 308968 (PC),**
v.	)	**308969 (ECN), and 222931 (MTR)**
	)	
STATE OF TENNESSEE,	)	**(CAPITAL CASE)**
	)	
Respondent.	)	**Execution Set for Dec. 5, 2019**

LEE HALL'S MOTION TO STAY HIS EXECUTION
PENDING APPEALS OF RIGHT REGARDING BIASED JUROR

This Court decides who lives and dies. In wielding this power, the Court has the responsibility of considering matters of life or death with great care and attention. Lee Hall's life, and the critical question of whether his foundational constitutional right to a fair and impartial jury was denied, arrives at this Court later than anyone would hope. But it is not too late for the Court to pause to consider whether Lee Hall was fairly tried given that a juror who convicted and sentenced him to death failed to disclose a history of severe domestic abuse and admits that she "hated" Mr. Hall and was "biased" against him during his trial.

Mr. Hall moves this Court for a stay of execution while he pursues appeals of right from denial of his petition for writ of error coram nobis and second post-conviction petition, both of which were filed on October

17, 2019 and were based upon newly available evidence.[1] Counsel learned on September 26, 2019 that one of Mr. Hall's jurors, "Juror A," suffered traumatic domestic violence prior to her jury service which mirrors evidence presented at trial; that she failed to disclose this information when asked several questions on her jury questionnaire, and in voir dire, reasonably designed to elicit the information; and that she "hated" Lee Hall when he testified because it triggered her deeply painful memories and emotions from her first marriage. The trial court dismissed both cases, in orders entered November 6 and November 19, 2019, on procedural grounds, but, in a rushed hearing—due to the imminent execution date—heard an offer of proof regarding the biased juror claim. On appeal, Mr. Hall will seek a remand for a full and fair evidentiary hearing.

This Court zealously guards the right to a fair and impartial tribunal—to protect not only the right of a litigant to a fair trial but also to provide the public with the assurance of a fair and impartial justice system. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013). This right is most imperative in capital cases. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital

[1] Mr. Hall also intends to appeal the November 6, 2019 denial of his Motion to Reopen Post-Conviction Petition. Petitioner filed an application in the Court of Criminal Appeals which was denied on November 8, 2019, due to failure to meet procedural requirements. Petitioner is filing another application forthwith.

cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'").

Juror A's service on Mr. Hall's capital jury is the greatest magnitude of constitutional violation—a structural error—which requires that Mr. Hall's convictions and sentence be vacated. *See Faulkner v. State*, W2012–00612–CCA–R3–PD, 2014 WL 4267460 (Tenn. Crim. App. August 29, 2014) (holding that the service of a juror who was the victim of domestic violence, but failed to disclose this on her questionnaire and at trial, denied the accused the right to a fair and impartial jury, a structural error requiring "automatic reversal").

As it stands, Mr. Hall will instead be executed in the electric chair on December 5, 2019 if the merits of his claim are not allowed to be fully litigated.

Structural errors require reversal because they cannot be remedied. Here, the equities weigh in favor of a stay to allow the Court time to consider Mr. Hall's claim because it will be impossible to afford him the required relief after December 5th. It is not uncommon for structural errors to be recognized only after an appellate court has reviewed the claims. For example, Steven Rollins,[2] Robert Faulkner,[3] and Glenn

[2] *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (capital case in which a new trial was granted due to the presence of a biased juror).

[3] *Faulkner v. State*, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014) (capital case in which a new trial was

Sexton[4] all lost their biased juror claims in the trial courts before receiving appellate relief. This Court should stay the execution and let the appellate courts address the consequences of Juror A's concealment of her traumatic domestic violence experience until September 26, 2019.

PROCEDURAL HISTORY

Lee Hall was tried on charges of first-degree murder and aggravated arson in the death of his estranged girlfriend, Traci Crozier, in March of 1992. *See* Hamilton County Case Nos. 188000 and 188001. Potential jurors completed jury questionnaires with questions about crime victimization, experience calling the police, and experience with spouses or family members charged with a crime. During voir dire, jurors were questioned about their experience with domestic violence. The jurors selected to serve—based on their answers to those questions—convicted Mr. Hall of arson and first-degree murder and sentenced him to death.

The Court of Criminal Appeals and this Court affirmed Mr. Hall's convictions and sentence on direct appeal. *State v. Hall*, No. 03C01–9303–CR–00065, 1996 WL 740822 (Tenn. Crim. App. December 30,

granted due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

[4] *Sexton v. State*, No. E2018–01864–CCA–R3–PC (Tenn. Crim. App. November 25, 2019) (formerly capital case in which pro se litigant was granted a new trial due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

1996); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997). On August 17, 1998, Mr. Hall filed a *pro se* petition for post-conviction relief that was subsequently amended. After an evidentiary hearing, the post-conviction court denied relief. PC TR Vol. 1, 111–28.[5] The Court of Criminal Appeals subsequently affirmed the denial of relief. *Hall v. State*, No. E2004–01635–CCA–R3–PD, 2005 WL 2008176 (Tenn. Crim. App. August 22, 2005). Federal habeas proceedings concluded in 2011. *See Hall v. Bell,* No. 2:06-cv-00056 (E.D. Tenn. Sept. 22, 2011).

Lee Hall is scheduled to be executed on December 5, 2019. *See* Order, *State v. Hall*, E1997–00344–SC–DDT–DD (filed Nov. 16, 2016). He will be electrocuted.

On October 17, 2019, Mr. Hall filed a motion to reopen post-conviction proceedings, a petition for writ of error coram nobis, and a second post-conviction petition (collectively, the "the juror bias filings"), based on newly available evidence that Juror A had failed to truthfully answer material questions on her jury questionnaire and in jury selection, which were designed to elicit whether she had: (1) ever been the victim of any crime, (2) ever had a spouse or family member charged with a crime, or (3) ever called the police about any problem, domestic or

[5] The order was entered on March 4, 2004, nunc pro tunc for January 26, 2004.

criminal. Mr. Hall's filings also alleged actual bias, based upon an October 7, 2019 declaration[6] provided by Juror A which stated, in part:

> Lee Hall reminded me of [my first husband]. He was a mean drunk as well and didn't want to let his girlfriend go. [My husband] did the same thing to me—he wouldn't let me leave and said he would find me and harass me and take our son away. He was always paranoid about what I was doing and calling my work constantly to check what I was doing and accusing me of cheating. [My husband] was such a bad drunk that he would leave our son in a car while he'd go drinking at his friend's house. In fact, I called police on him once when he was drunk driving.
>
> All these memories flooded back to me during the trial. I could put myself in Traci C[rozier]'s shoes, given what happened to me. *I hated Lee for what he did to that girl. It really triggered all the trauma I had gone through with [my first husband] and I was biased against Lee.*

Id. (emphasis added). Juror A did not reveal this information until September 26, 2019, when she met with two members of Mr. Hall's defense team.

[6] The Hamilton County Criminal Court filed the declaration under seal upon the agreement of the parties to maintain the confidentiality of Juror A.

The parties argued the juror bias filings in the trial court on November 4, 2019. On November 6, 2019, the trial court issued an order dismissing the motion to reopen and petition for writ of error coram nobis. That same day, Mr. Hall filed notices of appeal in the Court of Criminal Appeals.[7]

The November 6 order also directed the parties to file additional briefing on whether due process required the court to hear the merits of Mr. Hall's claim, which the parties submitted on November 13, 2019. Finally, the order set a hearing on the Second Post-Conviction Petition for November 14, 2019.[8]

At the November 14, 2019 hearing, Mr. Hall presented four witnesses: Juror A, who resides out of state, and three investigators who worked on Mr. Hall's case. In addition, Mr. Hall presented an affidavit of former counsel, who also resides out of state, and a declaration by trauma expert Linda Manning, Ph.D.

On November 19, 2019, the trial court dismissed Mr. Hall's second post-conviction petition, finding that only this Court had the authority to address whether due process requires a court to hear the merits of Mr. Hall's biased juror claim in a second post-conviction petition. The court

[7] As referenced above, Petitioner intends to timely file his application to appeal the denial of his motion to reopen post-conviction.

[8] The order explained that the court would only address the merits of the petition if the second post-conviction petition was properly before the court after reviewing the additional briefing on whether due process so required. Absent such a finding, the court would conduct the hearing as an offer of proof.

distinguished the clear authority for due process tolling the statute of limitations with the ambiguous authority for permitting a second post-conviction petition in light of the single-petition limitation in Tennessee Code Annotated § 40–30–102(c). Due to the finding that the second petition was procedurally barred, the evidence presented on November 14, 2019, is only in the record as an offer of proof. The trial court, in dicta, made various findings about the offer of proof.

The trial court found that investigators with the Office of the Post-Conviction Defender (OPCD) made efforts to locate Juror A during the original post-conviction time frame, and that if they succeeded in speaking with her, she likely would not have told them about her first marriage.[9] The court accepted the juror's testimony in full, except a statement she made, over objection, that her experiences did not affect her insofar as it related to deliberations. The court found this portion of the testimony to be inadmissible pursuant to Tennessee Rule of Evidence 606(b) and *Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005).

The trial court concluded that Mr. Hall failed to establish Juror A was prejudiced against him because she "was unaffected by [her] abuse at trial based in large part on the happy and fulfilling [second] marriage in which she had been involved over a decade as of trial, and the fact that

[9] Juror A acknowledged that she was interviewed by the OPCD in 2014 but could not remember if she was asked about domestic violence at that time. If she had been asked, she was unsure if she would have disclosed her first marriage. Juror A brought up her history of domestic violence in 2019 without being asked and could not explain why she decided to share it now.

any prejudice or hatred she may have felt toward the Petitioner was fleeting at best." Thus, while the court found inadmissible Juror A's testimony regarding whether her experiences affected her deliberations, this inadmissible evidence then drove the court's decision. On appeal, Mr. Hall will both challenge the finding that a merits determination is barred and fully brief the merits of his biased juror claim.

On November 26, Petitioner filed a Motion to Reconsider, with an additional Declaration of Linda Manning, Ph.D., which was denied that day. Mr. Hall filed his notice of appeal from the dismissal of his second post-conviction petition on November 26, 2019. That appeal is Case No. E2019–02094–CCA–R3–PD.[10]

STANDARD FOR GRANTING A STAY

This Court's rules authorize a stay of execution pending resolution of collateral litigation in state court if the person under death sentence "can prove a likelihood of success on the merits of that [collateral] litigation." Tenn. Sup. Ct. R. 12(4)(E). This standard does not require a "significant possibility of success."[11] Instead, a movant proves that he has

[10] Counsel for Mr. Hall have worked with the court reporter and clerk's office to finalize the record in all cases as quickly as possible. The clerk mailed the record in Case No. E2019–01978–CCA–R3–ECN to the Court of Criminal Appeals for filing on November 26, 2019.

[11] This Court amended the rule, effective July 1, 2015, after rejecting a proposal to change the language to "a significant possibility of success on the merits" in collateral litigation. The Tennessee Bar Association (TBA) opposed imposing the burden of demonstrating a "significant" possibility as a "potential deviation of the long established 'heightened due process

a likelihood of succeeding on the merits of that litigation by showing "more than a mere possibility of success.'" *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). "However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics*, 119 F.3d at 402 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Moreover, this Court's standard, premised on principles of constitutional adjudication and procedural fairness, is coexistent with the application of heightened due process principles in capital cases. As such, this Court has consistently required that constitutional challenges be considered in light of a fully developed record. *See State v. Stephen Michael West,* No. M1987–00130–SC–DPE–DD (Tenn. Nov. 26, 2014) (Order); *State v. Zagorski*, No. M1996–00110–SC–DPE–DD (Tenn. October 22, 2014) (Order); *State v. Irick*, No. M1987–00131–SC–DPE–DD (Tenn. Sept. 25, 2014) (Order); *Donald Wayne Strouth v. State*, No. E1997–00348–SC–DDT–DD (Tenn. April 8, 2014) (Order); *Stephen*

standards involved in capital cases,'" citing *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011). Comment of the TBA, filed January 20, 2015, at 2. The TBA urged the Court to continue applying heightened due process standards by exercising "discretion on a case by case basis regarding stays sought pending collateral litigation so as to allow the record to fully develop." *Id.*, at 3.

Michael West v. Ray, No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order).

Indeed, in *State v. Workman*, this Court granted a stay of execution pending adjudication of a petition for writ of error coram nobis which had been denied by the lower courts. 41 S.W.3d 100, 103 (Tenn. 2001). And, as this Court emphasized in *Workman*, the condemned man's ability to have substantive constitutional claims adjudicated on the merits outweighed the State's interests in executing the death sentence. *Id.* Likewise, in *State v. West*, this Court explained, "The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges . . . be considered in light of a fully developed record addressing the specific merits of the challenge." No. M1987–00130–SC–DPE–DD (Tenn. Nov. 29, 2010) (Order), at 3. "Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing." *Stephen Michael West v. Ray,* No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order), at 2. Mr. Hall has not had the opportunity to fully investigate and present the merits of his claim because he has been forced to litigate under imminent threat of execution.

Mr. Hall Has Established A Likelihood That He Will Prevail On The Merits Of His Biased Juror Claim.

Juror A sat on Mr. Hall's capital murder trial. During jury selection, Juror A denied ever being the victim of any crime, having a spouse or family member charged with a criminal offense, or even calling the police

about any problem, domestic or criminal. Juror A was specifically asked whether she was a victim of domestic violence, but she remained silent both during and after trial.

Two months ago, Juror A revealed that she was the victim of domestic violence prior to Mr. Hall's trial. Specifically, she explained that she was repeatedly raped; the first rape resulted in a pregnancy, which caused her to abandon her college plans and marry her rapist. Juror A's first husband was "very controlling" and "very jealous." He beat her and left her "with a bloody nose and a black eye," and then committed suicide, widowing her. During that marriage, she called the police when he destroyed their home after a fight on her birthday. Her husband was arrested at least once for drunk driving.

Elements of the proof presented at trial parallel some of Juror A's life experiences, causing her to associate Mr. Hall with her first husband. Namely, Traci Crozier lived with Mr. Hall for five years; Juror A was married to her first husband for five years. Both couples lived together in a trailer. The relationship between Mr. Hall and Ms. Crozier was described as "rocky"; Juror A testified that her first marriage was "bad," and involved violence. Juror A's husband called her constantly at work, jeopardizing her job; at trial, witnesses testified that Mr. Hall called Ms. Crozier repeatedly. Juror A testified that she would sometimes "escape" to her husband's grandmother's house. Ms. Crozier moved in with her grandmother after leaving Mr. Hall. Mr. Hall drank over a case of beer the night of the offense, was slurring, and could not walk well. Juror A testified that her husband was a "drunk," who became abusive after

drinking. Like Juror A's first husband, Mr. Hall had been charged with drunk driving.

Alone, Juror A's failure to disclose her relevant, materially significant history is sufficient to show presumed bias pursuant to well-established Tennessee law. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011). In *Smith*, a capital post-conviction case, the Court held:

> In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality....'" *Carruthers v. State*, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing *Akins*, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." *Akins*, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 356 (footnotes omitted).

Id. See also Faulkner v. State, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, (Tenn. Crim. App. Aug. 29, 2014) (granted new trial due to juror's undisclosed experience with domestic violence); *Rollins v. State*, No. E2010–01150–CCA–R3–PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (granting new trial due to a biased juror); *Sexton v. State*, No. E2018–01864–CCA–R3–PC (Tenn. Crim. App. November 25, 2019) (double homicide case in which pro se litigant was granted a new trial

due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

Moreover, Juror A signed a declaration *conceding that she was actually biased* against Mr. Hall at the time of the trial and in fact hated him because he reminded her of her abusive husband. During the offer of proof hearing on November 14, Juror A tried to back away from her statement of bias, saying she did not recall saying that or putting it in the declaration, though she also agreed that the declaration contained nothing untrue. During her testimony, she also claimed that she did not reveal the information about her abusive marriage because it was not on her mind at the time of the jury selection; however, she was flooded with memories of her violent husband during the trial and failed to bring that to the court's attention.

Juror A would have been subject to a challenge for cause under federal and state law. Jurors "who have had life experiences or associations which have swayed them 'in response to those natural and human instincts common to mankind,' interfere with the underpinnings of our justice system." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (1945)). "[P]otential bias arises if a juror has been involved in a crime or incident similar to the one on trial." *Smith*, 357 S.W.3d at 347.

The right to a fair and impartial tribunal is deeply rooted in rights embedded in the federal and state constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an

accused a fair hearing violates even the minimal standards of due process."). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The Tennessee Constitution guarantees every accused "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954).

Juror A's affirmative misrepresentations and omissions rendered Mr. Hall's capital murder trial fundamentally unfair. The presence of a biased juror constitutes structural error and warrants reversal of conviction and his death sentence. Denial of the right to an impartial jury is a structural constitutional error that compromises the integrity of the judicial process and cannot be treated as harmless error. *State v. Odom*, 336 S.W.3d 541, 556 (Tenn. 2011); *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). Because structural errors deprive a defendant of a right to a fair trial, they are subject to automatic reversal. *Rodriguez*, 254 S.W.3d at 361.

Statutory Limits On Collateral Challenges To Relief Violate Due Process If Interpreted To Bar Mr. Hall From Litigating The Merits Of His Structural Error Claim.

Due process[12] requires that Mr. Hall be allowed to fully litigate his bias juror claims on the merits through at least one of the three procedural vehicles he filed. Post-conviction petitioners must be afforded an opportunity to seek relief "at a meaningful time and in a meaningful manner." *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992). This Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Id.* (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

In exercising this responsibility to protect the Constitution, this Court has previously found that strict procedural restrictions of the post-

[12] The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides, in part, "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8. The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965).

conviction statute must be relaxed, where "circumstances beyond a petitioner's control" prevented the petitioner from complying with the statutory requirements. *Whitehead v. State*, 402 S.W.3d 615, 622, 625 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Id. See also Seals v. State,* 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's);[13] *Sample v. State*, 82 S.W.3d 267, 269–75 (Tenn. 2002) (court

[13] Similarly, in *Howell,* this Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application."). The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma,* 517 U.S. 348 at 364–65 (1996) (comparing the risk of

was required to reach the merits of petitioner's *Brady* claim in a late and successive post-conviction petition, because others' misconduct prevented him from obtaining the evidence necessary to raise the claim earlier).[14]

The statute of limitations must be weighed against the competing interests identified in the juror bias filings. *See Whitehead*, 402 S.W.3d at 623 (weighing the competing rights at stake in determining whether due process barred strict application of the statute of limitation). The recognized private interest at stake is the "prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process." *Id.* (citing *Burford*, 845 S.W.2d at 207). The government's interest, by contrast, is "'in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* These considerations apply equally to: (1) determining whether due process requires the equitable tolling of statutory time limits in collateral proceedings, and (2) fundamental fairness principles.

incompetent defendant standing trial versus State's risk of incorrect competency determination)).

[14] Therefore, the fact that Sample waited approximately 16 months after discovering the evidence before raising the issue was unremarkable in the Court's view.

In capital cases,[15] the interest of the condemned weighs strongly against any interests of the State given that life, and not merely liberty is at issue.[16] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004).

Weighed against Mr. Hall's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Here, the biased juror claim is neither groundless nor fruitless—it is a structural constitutional error, striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing

[15] Mr. Hall is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

[16] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (finding that despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (holding that the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency) (abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010)).

but undiscovered during the 1992 trial. The claim is not stale[17] because Mr. Hall had no control over the facts establishing juror bias—Juror A answered "no" on the questionnaire to important questions; Juror A remained silent and failed to disclose her experience with severe domestic violence when asked, and again, when the memories started flooding her during trial; Juror A did not discuss her rape and abuse openly until undergoing therapy after Mr. Hall's post-conviction proceedings ended; Juror A did not discuss her relevant history with members of Mr. Hall's legal team in a 2014 interview, even though she freely talked about other aspects of her personal life; and Juror A finally revealed these facts in late September 2019.

It is only the conduct of Juror A—failing to disclose her personal history with domestic violence, a key component of the State's case at Mr. Hall's trial—that prevented Mr. Hall from raising the claim in the original post-conviction proceedings or filing a successive petition earlier.

This Court stated in 1826: "The maxim of the law is, that there is no wrong without a remedy . . . ." *Bob, a slave v. The State*, 10 Tenn. 173, 176 (1826). *See also State v. Johnson*, 569 S.W.2d 808, 814 (Tenn. 1978) (relying on *Bob* and applying the same principle). This is particularly true when a life is at stake. "Should error intervene to the prejudice of the

[17] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

person tried, and there be no remedy after judgment, the injury is twofold,—a barbarous example of the execution of a human being . . . or, perhaps some of the thousand accidental errors that are daily committed by higher courts, to whom belongs the administration of this branch of the law." 10 Tenn. at 182. The Tennessee Constitution provides that "all courts shall be open and every man, for an injury done him shall have remedy by due course of law . . . ." Article I, § 17. The open courts provision specifically applies to the right to a fair tribunal. *In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912); *see also State v. Benson*, 973 S.W.2d 202, 205 (Tenn. 1998) ("The right to an impartial judge is also guaranteed by Article I, § 17 of the Tennessee Constitution, . . .").

The trial court's finding that Lee Hall could not avail himself of any of the three procedural vehicles for his structural constitutional error claim cannot stand because it would mean there is no remedy for a grievous constitutional violation.

This Court has stayed routine capital proceedings to permit a death-sentenced petitioner his full and fair opportunity to pursue a permissive appeal. In *Corinio Allen Pruitt v. State*, a death-sentenced litigant sought to disqualify the post-conviction trial judge, alleging that the judge exhibited bias against him and his attorneys. Case No. W2017–00960–SC–T10B–CO. The trial judge declined to recuse himself, and Pruitt appealed. While the appeal was pending, and before the scheduled post-conviction hearing, Pruitt moved the trial judge to delay the evidentiary hearing until the appellate courts had fully considered his judicial bias claims.

The trial judge denied a continuance of the post-conviction hearing for two primary reasons. First, no harm would come to Pruitt if the trial judge presided over the already scheduled hearing, even if this Court later determined that the trial judge's bias required his removal. The trial court noted that there was an obvious solution if this Court determined that the trial judge should have recused himself—another judge could preside over a second post-conviction hearing. In sum, the trial judge reasoned that if Pruitt prevailed on appeal, he would ultimately suffer no harm because he could receive a do-over.

This Court, however, disagreed with Pruitt's trial judge and stayed the evidentiary hearing.[18] Lee Hall has no such remedy. Executions are final—there are no do-overs.

[18] Days before Pruitt's evidentiary hearing was set to begin, the Court of Criminal Appeals denied Pruitt's Rule 10B appeal. On August 3, 2017, Pruitt filed in this Court his emergency motion for a stay of the capital post-conviction hearing, set to commence on August 7, 2017. Pruitt asserted that this Court should have time to properly consider Pruitt's permissive Rule 10B appeal. He argued that the fundamental constitutional due process right to a tribunal which is not only fair, but bears the appearance of impartiality, required the full attention of this Court to effectuate Pruitt's state and federal constitutional rights, citing *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011). On August 4, 2017, this Court granted a stay of proceedings to postpone the scheduled evidentiary hearing. This Court ultimately declined to grant the application for review by order entered October 17, 2017.

Equal Protection And Eighth Amendment Principles Require That Mr. Hall's Biased Juror Claim Be Considered On The Merits.

If Mr. Hall is not allowed to litigate these claims simply because of when they were discovered, his right to equal protection will be violated, in contravention of Article XI, § 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution. *See Bush v. Gore*, 531 U.S. 98 (2000) (holding that a state court's implementation of voting rights must comport with "the rudimentary requirements of equal treatment and fundamental fairness").

Mr. Hall, like another previously death-sentenced prisoner, was convicted and sentenced to death by a juror who concealed evidence of bias which establishes a structural constitutional error—deprivation of the right to a fair and impartial tribunal. The claims and underlying facts presented by Mr. Faulkner—who was also represented by the OPCD[19]—and Mr. Hall are identical. They became available when the former jurors finally revealed the domestic abuse they suffered, which they failed to disclose on questionnaires and in voir dire. In Mr. Faulkner's case, the juror's deception was discovered at a time that Mr. Faulkner could raise the claim and put on proof at his post-conviction evidentiary hearing. In Mr. Hall's case, the juror's deception was discovered later in the legal

[19] Indeed, two of the three former OPCD investigators who testified during the offer of proof about their efforts to interview Mr. Hall's jurors also testified that they interviewed the biased juror in *Faulkner* whose concealment of her experience with domestic violence resulted in the appellate court granting a new trial.

process, at a time when Mr. Hall has fewer available State court remedies—depending upon this Court's interpretation of law regarding writs of error coram nobis, motions to reopen, and successor post-conviction petitions.

Mr. Faulkner's death sentence was vacated. Mr. Hall is scheduled for execution on December 5. Imposing the death penalty on Mr. Hall, but not on Mr. Faulkner, is arbitrary.[20] The only differences between them, their claims, and their exposure to the death penalty is *when* the jurors finally revealed the domestic abuse they suffered and *where* Mr. Faulkner and Mr. Hall were in the legal process at that time. Mr. Faulkner and Mr. Hall had no control over these factors, which alone may determine Mr. Faulkner lives and Mr. Hall dies.

Respectfully submitted,

/s/ Kelly A. Gleason
Kelly A. Gleason, BPR #22615
Jonathan King, BPR #32207
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN 37219-8068
(615) 741-9331
gleasonk@tnpcdo.net
kingj@tnpcdo.net

[20] Arbitrary imposition of the death penalty violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Those constitutional provisions, in conjunction with the 14th amendment due process clause and the Tennessee Constitution, Article I, § 8 and § 17, require that, if a state chooses to impose the death penalty, it must do under systems that guaranty, as much as humanly possible, non-arbitrary imposition of the death penalty.

Certificate of Service

I hereby certify that a true and exact copy of this Motion was delivered via email to the following counsel in the Office of the Attorney General: Amy Tarkington, Amy.Tarkington@ag.tn.gov, Leslie Price, Leslie.Price@ag.tn.gov, and Zachary Hinkle, zachary.hinkle@ag.tn.gov.

/s/ Kelly A. Gleason
Kelly A. Gleason
Assistant Post-Conviction Defender

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LEE HALL, a/k/a LEROY HALL, JR.

Criminal Court for Hamilton County
No. 222931

No. E1997-00344-SC-DDT-DD

NOT FOR PUBLICATION

ORDER

In April 1991, LeRoy Hall, Jr., now known as Lee Hall, threw a "gas bomb" on the victim, Traci Crozier, while she was lying in the front seat of her car. The victim received third degree burns to more than ninety percent of her body and died several hours later in the hospital. Mr. Hall eventually admitted responsibility but claimed he only intended to burn her car. A Hamilton County jury convicted Mr. Hall of first degree premeditated murder and aggravated arson. On March 11, 1992, the jury sentenced Mr. Hall to death. Almost twenty-two years ago, this Court affirmed Mr. Hall's convictions and his sentence of death. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997), *cert. denied*, *Hall v. Tennessee*, 524 U.S. 941 (1998). Mr. Hall's pursuit of post-conviction relief was unsuccessful. *Hall v. State*, No. E2004-01635-CCA-R3-PD, 2005 WL 2008176 (Tenn. Crim. App. Aug. 22, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005).

Mr. Hall subsequently sought relief from his conviction and sentence of death in federal court. *Hall v. Bell*, No. 2:06-CV-56, 2010 WL 9089933, at *1 (E.D. Tenn. Mar. 12, 2010). The federal district court denied his petition for a writ of habeas corpus but granted him a certificate of appealability as to select claims. *Id.* at *64. Mr. Hall filed a pro se motion to waive any further appeals and to proceed with his execution. *Hall v. Bell*, No. 2:06-CV-56, 2011 WL 4431100, at *1 (E.D. Tenn. Sept. 22, 2011). Following a hearing on Mr. Hall's competency to waive his appeals, the federal district court granted Mr. Hall's motion. *Id.* at *6.

On October 3, 2013, the State filed a motion to set an execution date asserting that Mr. Hall had completed his standard three-tier appeals process. This Court granted the State's motion and scheduled the execution for January 12, 2016. On April 10, 2015, the

Court vacated Mr. Hall's execution date pending the outcome of the litigation involving the lethal injection protocol. This litigation concluded in May 2019. *See West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S.Ct. 476 (Nov. 27, 2017), and *cert. denied sub nom. Abdur'Rahman v. Parker*, 138 S.Ct. 647 (Jan. 8, 2018), *reh'g denied*, 138 S.Ct. 1183 (Feb. 26, 2018); *Abdur-Rahman et al v. Parker*, 558 S.W.3d 606 (Tenn. 2018), *cert. denied sub. nom. Zagorski v. Parker*, 139 S.Ct. 11 (Oct. 11, 2018), and *cert. denied sub. nom. Miller v. Parker*, 139 S.Ct. 626 (Dec. 6, 2018), *cert. denied* 139 S.Ct. 1533 (May 13, 2019) (J. Sotomayor dissenting). Under the provisions of Tennessee Supreme Court Rule 12(4)(E), the Court sua sponte re-scheduled Mr. Hall's execution for December 5, 2019.

On October 17, 2019, Mr. Hall filed three pleadings in Hamilton County Criminal Court seeking to adjudicate what he characterized as "structural constitutional error" based on "newly discovered evidence" that a juror in Mr. Hall's 1992 trial recently admitted bias toward him at the time of trial. Mr. Hall pursued three alternative avenues of relief: (1) a petition for writ of error coram nobis; (2) a motion to reopen post-conviction proceedings; and (3) a second petition for post-conviction relief. *See* Pleadings, *Hall v. State*, Nos. 308969, 222931, 308968 (Hamilton Cnty. Crim. Crt. Oct. 19, 2019). By order dated November 6, 2019, the trial court summarily dismissed the first two pleadings. Order at 2, *Hall v. State*, Nos. 308969, 222931, 308968 (Hamilton Cnty. Crim. Crt. Nov. 6, 2019). As to the third pleading, the court recognized that the post-conviction statute limits a petitioner to a single post-conviction petition; however, the court conducted a hearing to determine whether the "second" post-conviction petition should nonetheless be considered on due process grounds. *Id.* at 14. After a hearing on November 14, 2019, at which the court heard testimony from the juror and three investigators from the Post-Conviction Defender's Office, the trial court dismissed the second post-conviction petition. Mr. Hall's subsequent motion to reconsider was denied.

On November 6, 2019, Mr. Hall filed (1) an application for permission to appeal the trial court's denial of his motion to reopen his petition for post-conviction relief; and (2) a notice of appeal of the trial court's dismissal of his petition for a writ of error coram nobis. On November 26, 2019, Mr. Hall filed a notice of appeal of the denial of his second petition for post-conviction relief. By order dated November 8, 2019, the Court of Criminal Appeals dismissed the application for permission to appeal. Order, *Hall v. State*, No. E2019-01977-CCA-R28-PD (Tenn. Crim. App. Nov. 8, 2019). The appeals in the remaining two cases are pending at this time in the Court of Criminal Appeals. *See Hall v. State*, Nos. E2019-01978-CCA-R3-ECN (error coram nobis) and E2019-02094-CCA-R3-PD (second post-conviction petition).[1]

[1] On December 2, 2019, Mr. Hall filed a "Second Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus" along with a "Motion for Stay of Execution" in the United States District Court for the

On November 28, 2019, Mr. Hall filed a motion to stay his scheduled execution pending his appeals in these collateral challenges. Tennessee Supreme Court Rule 12(4)(E) provides that this Court "will not grant a stay or delay an execution date pending resolution of collateral proceedings in state court *unless the prisoner can prove a likelihood of success on the merits of that litigation*." Tenn. Sup. Ct. R. 12(4)(E) (emphasis added). "In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success." *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). Accordingly, we examine the pending appeals to determine whether Mr. Hall has satisfied this standard.

The predominant argument underlying Mr. Hall's appeals is that due process requires that he be permitted to fully litigate his juror-bias claims through at least one of the three procedural vehicles he pursued in the trial court. Thus, our analysis begins by examining the nature and scope of each statutory vehicle.

Writ of Error Coram Nobis

As noted, Mr. Hall filed a petition for writ of error coram nobis and requested an evidentiary hearing. Tennessee Code Annotated section 40-26-105 provides that:

> (b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. 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. § 40-26-105(b) (2012). The writ of error coram nobis is an "extraordinary procedural remedy." *State v. Nunley*, 552 S.W.3d 800, 816 (Tenn. 2018)

Eastern District of Tennessee. *See* Pet. for Habeas Corpus and Mot. for Stay of Execution, *Hall v. Mays*, No. 1:19-cv-00341-DCLC-CRW (E.D. Tenn. Dec. 2, 2019). On December 3, 2019, Mr. Hall filed a pleading in the Court of Criminal Appeals asking the intermediate court to reconsider its prior dismissal of his application for permission to appeal the trial court's denial of his motion to reopen post-conviction proceedings. App. Perm. Appeal, *Hall v. State*, No. E2019-02120-CCA-R28-PD (Tenn. Crim. App. Dec. 3, 2019).

(quoting *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999)). "[N]either the United States Constitution nor the Tennessee Constitution provides a criminal defendant with a constitutional right to error coram nobis relief." *Id.* at 817 (quoting *Frazier v. State*, 495 S.W.3d 246, 248 (Tenn. 2016)). In fact, the Court has held that error coram nobis is not a vehicle for raising constitutional claims. *See id.* at 819-20.

Notably, among other requirements, the statute contemplates "newly discovered evidence" relating to "matters . . . litigated at the trial." *Id.* at 817; Tenn. Code Ann. § 40-26-105(b). In dismissing the petition, the trial court reasoned that coram nobis relief has been limited to cases involving newly discovered evidence of actual innocence. *Id.* at 829-31. In *Frazier v. State*, the Court explained that the "litigated at the trial" language found in the statute "refers to a contested proceeding involving the submission of evidence to a fact-finder who then must assess and weigh the proof in light of the applicable law and arrive at a verdict of guilt or acquittal." 495 S.W.3d 246, 250 (Tenn. 2016). In the instant case, the alleged "newly discovered evidence" or "facts" relate to whether a juror was biased against Mr. Hall and is being submitted to support a purported constitutional error rather than guilt or innocence. Indeed, Mr. Hall makes no claim of actual innocence in his filings. As a result, we agree that the error coram nobis statute is not a proper vehicle to bring such a claim.

Motion to Reopen Post-Conviction Proceedings

Mr. Hall also filed a motion to reopen his original post-conviction proceedings. Pursuant to Tennessee Code Annotated section 40-30-117:

> (a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:
>
> > (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
> >
> > (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann. § 40-30-117. Mr. Hall acknowledges that his motion to reopen does not fall within any of these categories. The trial court dismissed the motion, finding no authority that would permit the court to expand these categories. We again agree that this statutory vehicle was foreclosed by the limitations placed on a motion to reopen by the General Assembly.

Second Post-Conviction Petition

The final vehicle pursued by Mr. Hall was a second post-conviction petition. Tennessee Code Annotated section 40-30-102 specifically provides that:

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-117.

Tenn. Code Ann. § 40-30-102(c) (2011). By its plain language, the statute limited the petitioner to a single post-conviction petition subject only to a motion to reopen under the enumerated circumstances. Mr. Hall was not entitled to bring a second post-conviction petition, and the trial court would have been warranted in summarily dismissing the petition.

Although the trial court correctly observed that Mr. Hall's alleged constitutional

claim was not encompassed by any of the three statutory vehicles, the court nonetheless recognized the gravity of the procedural posture of Mr. Hall's case. Citing due process concerns, the trial court permitted Mr. Hall to present evidence on the juror-bias claim raised in his second post-conviction petition. The court explained that either the evidence would be used to rule on the merits of the second petition or the evidence would become an "offer of proof" to facilitate appellate review. To that end, the trial court conducted a hearing to allow Mr. Hall to present his proof. Although the court ultimately determined that the second post-conviction petition was barred by Tennessee Code Annotated section 40-30-102(c), Mr. Hall was given the opportunity to present his juror-bias claim.

Mr. Hall complains that this opportunity was inadequate and that due process requires expansion of one of the statutory avenues to allow him to "fully litigate" his last-minute juror-bias claim. Thus, in assessing the likelihood of success on the merits, we further examine Mr. Hall's juror-bias claim.

The record indicates Mr. Hall's counsel was aware of this juror during the original post-conviction time frame. However, investigators from counsel's office chose not to contact the out-of-state juror, noting their preference to show up unannounced at a juror's residence rather than making contact by telephone or correspondence. Investigators eventually made contact with the juror in 2014. Yet, at the November 14, 2019, hearing, none of the investigators recalled asking the juror about the domestic violence issues now being challenged. Mr. Hall's counsel began investigating the recent claim in late September 2019, when investigators contacted the juror at her home and were informed by her of the instances of domestic violence in her past. The information gleaned from this interview has been characterized by Mr. Hall as "newly available evidence" that serves as the basis for the instant juror-bias claim.[2]

Mr. Hall claims the juror failed to disclose her past domestic violence when asked several questions on the jury questionnaire and in voir dire. He adds that the juror claimed to be biased against Mr. Hall and remarked that she "hated" him because his testimony evoked her own painful memories from her first marriage. Mr. Hall describes the violation as "constitutional error" which requires Mr. Hall's convictions and sentence to be vacated.

Indeed, both the United States and the Tennessee Constitutions guarantee a criminal defendant the right to a trial by an impartial jury. *Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011) (citing U.S. Const. amend. VI; Tenn. Const. art. I, § 9). A juror's

[2] In addressing the merits of this claim, we have chosen not to go into the significant issue regarding the timeliness of the assertion of this claim based on the prior strategic decisions made by counsel for Mr. Hall. Indeed, this matter quite likely could have been decided on that issue alone. However, we have decided to go beyond that issue.

"failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality." *Id.* at 348. A question is "reasonably calculated" to produce an answer if "a reasonable, impartial person would have believed the question, as asked, called for juror response under the circumstances." *State v. Akins*, 867 S.W.2d 350, 356 n.13 (Tenn. Crim. App. 1993). If a defendant establishes a presumption of bias, the State may overcome the presumption by an absence of actual prejudice or actual partiality. *Id.* at 357.

Thus, we first consider whether the juror in question failed to disclose or gave false disclosures. As the trial court noted, the juror was not asked any questions about domestic violence during individual voir dire. The judge trying the case made the following remarks to the potential jurors:

> Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days. And, as we said earlier, ladies and gentleman, it's not an attempt in any way to embarrass you, to delve into your personal lives, but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentleman, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of the case. If there is a question that's asked of you and you would like to respond, but you feel that the question – it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving sexual assault or sometimes in homicide cases. So please let the Court know.

The judge further explained to the panel:

> Also, I'm going to ask you – the questions this will be directed primarily to those of you seated in the jury box and in front of the jury box, but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

During initial questioning by defense counsel, counsel asked the following

question:

> Now, another thing that I need to ask about – and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentleman here. One of the things that I'm curious about – and if there is something in your background or someone close to you in that background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. *That has to do with domestic violence.* Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature *that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict?* If there's anyone like that, please let me know by showing a hand and we can talk about that at some other time. Okay. (Emphasis added.)

After the juror in question was called into the jury box, the trial judge asked the following questions:

> Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side? Would your answers be any different from any of those given previously or do any of those questions apply to you in particular, such as you'd have some response?
>
> . . .
>
> Did all of you hear the questions that were asked earlier of the prospective jurors? Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things? Do you know any reason why you cannot listen to the evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

The juror did not respond to these questions by the trial judge.

At the hearing on the second motion for post-conviction relief, the juror was asked why she checked "no" in response to the question on the jury questionnaire of whether she had been the victim of a crime. The juror explained that she did not consider herself a victim at the time, adding there was no such thing as "date rape" in 1969 and that she

did not know the term "domestic abuse." In another instance, the juror indicated "no" when asked if she had contacted the authorities to report a crime. The juror explained that she had called the police on her first husband when she worried he was driving while intoxicated. However, significantly, she did not testify that she called the police on him for any alleged act of domestic violence. Additionally, the juror was asked whether she was "biased" against Mr. Hall as stated in her earlier declaration or had remarked that she "hated" Mr. Hall. The juror did not recall using the term "bias" in the declaration and added that she was not biased against Mr. Hall. She admitted that her memories with her first husband came back when Mr. Hall testified but that she considered it life experience not bias. She stated she had a "bad thought" during the testimony about Mr. Hall stalking the victim; however, she described the thought as fleeting.

The trial judge accredited the juror's testimony and concluded Mr. Hall failed to establish the juror was prejudiced against him at the time of trial. The court found that the juror did not attempt to deceive the court or counsel and that any nondisclosure was unintentional. The court also found that none of the questions asked of this juror were reasonably calculated to elicit a response that would have disclosed the juror's past domestic abuse. The "most relevant question" cited by Mr. Hall's counsel was the question by defense counsel during voir dire as to whether past exposure to domestic violence would affect or influence the juror to the point the juror could not return a fair and impartial verdict. The trial court found the juror answered this question truthfully because her past domestic violence did not leave the juror unable to be fair and impartial at the time it was asked, particularly in light of the juror's subsequent happy marriage that helped her overcome any residual feelings about her first marriage. The trial court found no presumption of prejudice under *Akins* and its progeny. Having reviewed the transcript of the hearing, we conclude the evidence does not preponderate against the trial court's findings.[3]

Mr. Hall advances additional arguments about constitutional error, equal protection violations, and the inadequacy of his hearing, primarily relying on *Faulker v. State*, W2012-00612-CCA-R3-PD, 2014 WL 4267460 (Tenn. Crim. App. Aug. 29, 2014).[4] In *Faulkner*, the Court of Criminal Appeals reversed the defendant's convictions

[3] The dissent claims that the trial court's findings "reveal the practical difficulties in bringing these issues to light." To the contrary, the trial court's findings demonstrate that counsel for Mr. Hall strategically did not pursue this issue in the manner counsel for Mr. Sexton and Mr. Rollins chose to do in those cases.

[4] The dissent asserts that the Court of Criminal Appeals has granted relief in two cases involving the same constitutional issue, citing *Sexton v. State*, No. E2018-01864-CCA-R3-PC, 2019 WL 6320518 (Tenn. Crim. App. Nov. 25, 2019) and *Rollins v. State*, No. E2010-01150-CCA-R3-PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012). As with *Faulkner*, both *Sexton* and *Rollins* concern timely post-conviction proceedings and are therefore procedurally distinguishable. Rather, relief was not granted

due to a juror's false statements about past domestic violence. The juror answered "no" when specially asked on a jury questionnaire if she had been the victim of domestic violence. Further, the juror did not respond when asked directly about any prior experience with domestic violence. She gave additional false statements about her criminal history. *Id.* at *78-79. The trial court properly distinguished the instant case from *Faulkner*. We likewise reject Mr. Hall's suggestion that granting relief to Mr. Faulkner and affording him no relief would amount to an equal protection violation. In addition to different facts, the cases are not procedurally on all fours. Accordingly, we must conclude the equal protection argument is not likely to succeed on appeal.

Mr. Hall also questions the adequacy of his hearing, noting that, after concluding a second petition was barred by statute, the court characterized the evidentiary hearing as an "offer of proof." Initially, we note that these collateral vehicles are statutory and not constitutional in nature. *Burford v. State* and its progeny remind us that due process simply requires that a potential litigant be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. 845 S.W.2d 204, 208 (Tenn. 1992). In this instance, the trial court would have been acting within its discretion to dismiss the claims under all three procedural vehicles for the reasons explained above. However, the 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. Mr. Hall presented his witnesses at an evidentiary hearing. Only at the conclusion did the trial court announce that a second petition was statutorily barred and that the evidence would be treated as an offer of proof to aid appellate review. Other than the testimony of a trauma specialist, Linda Manning, whose declaration was made an offer of proof with the motion to reconsider the denial of the second petition for post-conviction relief, Mr. Hall has not identified any witness or other proof he was unable to present due to the timing of the hearing. Accordingly, we conclude Mr. Hall is not likely to succeed on a claim he was denied a full and fair hearing on his juror-bias claim.

Finally, Mr. Hall even suggests that due process requires an expansion of the existing procedural vehicles or the creation of a new avenue of relief crafted by this Court. Expansion of a statute is not within the purview of this Court. While the Court has previously created procedures to fill otherwise procedural voids (e.g. *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (procedure for adjudicating competency to be executed)), due process makes no such demand in this case. Mr. Hall is unlikely to convince the appellate courts to otherwise grant relief on this issue.

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in *Sexton* as to a juror who said she did not consider the domestic violence she endured was a crime. *Sexton*, 2019 WL 6320518, at *15. Relief was granted, however, as to a second juror who failed to disclose her past domestic violence and shared that information with her fellow jurors. *Id.* at *14. Of course, there was no such sharing of information in this case.

For all of the reasons set forth above, the Court concludes that Mr. Hall has failed to establish a likelihood of success on the merits of his claim for juror bias under any existing procedural vehicle. Likewise, Mr. Hall has failed to demonstrate that this Court should create a new, previously unrecognized procedure based on the facts of this case. As a result, Mr. Hall has not satisfied his burden under Tennessee Supreme Court Rule 12(4)(E), which is required for this Court to grant a stay or delay of an execution date under these circumstances. Accordingly, "Lee Hall's Motion to Stay His Execution Pending Appeals of Right Regarding Biased Juror" is DENIED.

PER CURIAM

SHARON G. LEE, J., dissenting.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LEE HALL, A/K/A LEROY HALL, JR.

Criminal Court for Hamilton County
No. 222931

No. E1997-00344-SC-DDT-DD
NOT FOR PUBLICATION

SHARON G. LEE, J., dissenting.

I would grant Mr. Hall's motion to stay his December 5 electrocution and allow him the opportunity for appellate review of his compelling constitutional claims. I agree with the Court that the trial court recognized the due process concerns in this capital case and wisely allowed Mr. Hall to present evidence on his second post-conviction petition. The procedural posture of Mr. Hall's case shows the need for this Court to thoughtfully consider whether our existing process is deficient, and if so, whether we should allow petitioners a fair opportunity to raise claims in a second post-conviction petition under the unique circumstances presented in Mr. Hall's case. I agree with the trial court's concern that this Court has addressed due process-based tolling of the post-conviction limitation periods, but not the due process issues raised by Mr. Hall:

> While some language of *Burford [v. State,* 845 S.W.2d 204 (Tenn. 1992)] suggests due process considerations may not necessary[ily] be limited to the statute of limitations, *Burford* and the Tennessee Supreme Court's opinions addressing due process concerns in post-conviction cases as applied to the post-1995 statute . . . have exclusively addressed due process-based tolling of the statutory post-convictions limitations period. In this Court's view, the Tennessee Supreme Court's narrowed focus on the limitations period means that this Court cannot expand the due process-based principles of *Burford* and its progeny to the procedural issues presented in Mr. Hall's case. *Any expansion of a post-conviction petitioner's due process rights must be granted by the Tennessee Supreme Court.*

Hall v. State, No. 308968 (Hamilton Cnty. Crim. Ct. Nov. 19, 2019) (emphasis added).

In my view, Mr. Hall has shown a likelihood of success on appeal. *See* Tenn. Sup. Ct. R. 12(4)(E). Yet, he is being denied the opportunity to present his claims. The Court

of Criminal Appeals has granted relief in other cases to defendants who have raised the same constitutional issue. *See Sexton v. State*, No. E2018-01864-CCA-R3-PC, 2019 WL 6320518 (Tenn. Crim. App. Nov. 25, 2019); *Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460 (Tenn. Crim. App. Aug. 29, 2014); *Rollins v. State*, No. E2010-01150-CCA-R3-PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012).

For example, in *Sexton*, the Court of Criminal Appeals in a recent decision (eight days ago) held that a juror's failure to disclose her relevant history of domestic violence violated the petitioner's right to a fair and impartial jury. 2019 WL 6320518, at *14. The juror admitted at the post-conviction hearing that she had been the victim of domestic violence. She did not recall a question on her jury questionnaire asking whether she had been the victim of a crime, but she later testified she made "an honest mistake" and either did not "see[] that question" or "flew through it." *Id.* at *13. In granting post-conviction relief, the Court of Criminals Appeals observed:

> The denial of the right to an impartial jury is a structural constitutional error that compromises the integrity of the judicial process and cannot be treated as harmless error. *State v. Odom*, 336 S.W.3d 541, 556 (Tenn. 2011); *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). Because structural errors deprive a defendant of a right to a fair trial, they are subject to automatic reversal. *Rodriguez*, 254 S.W.3d at 361.

Id. at *15. Considering *Sexton*, *Faulkner*, and *Rollins*, Mr. Hall deserves to have an opportunity for full and fair appellate review. In short, we need not speculate on whether Mr. Hall's arguments merit relief; we can simply allow appellate review to continue.

Finally, although the State cites the need for finality and faults Mr. Hall for the delay in pursuing these proceedings, the trial court's findings reveal the practical difficulties in bringing these issues to light. Finality is well and good, but should not trump fairness and justice. The State should not electrocute Mr. Hall before giving him the opportunity for meaningful appellate review of the important constitutional issues asserted in his filings.

For these reasons, I would grant Mr. Hall's motion to stay his execution.

Sharon G. Lee

SHARON G. LEE, JUSTICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

LEE HALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.: 1:19-CV-341-DCLC-CRW
	)	DEATH PENALTY
RICKY BELL, *Warden*,	)	
	)	
Respondent.	)	

ORDER

On December 2, 2019, Petitioner Lee Hall – whose execution is scheduled for December 5, 2019 – filed a "Second Petition for Writ of Habeas Corpus" pursuant to 28 U.S.C. § 2254 [Doc. 1], as well as a Motion for a Stay of Execution [Doc. 6]. In light of the urgency of this matter, the Court ordered Respondent to file an immediate response to the Motion to Stay [Doc. 9], and Respondent has now filed his response in opposition [Doc. 10]. For the reasons stated herein, the Court concludes that it lacks jurisdiction over both Petitioner's § 2254 Petition and his Motion to Stay. The Court will immediately **TRANSFER** this case in its entirety to the United States Court of Appeals for the Sixth Circuit for its consideration as to whether to grant Petitioner leave to file a second or successive habeas corpus petition under 28 U.S.C. § 2254, as well as for consideration of Petitioner's Motion to Stay his December 5, 2019 execution.

As an initial matter, Petitioner filed his first Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 on October 18, 2006 [*See Hall v. Bell,* E.D. Tenn. Case No. 2:06-cv-56, Doc. 12]. On March 11, 2010, the District Court dismissed the Petitioner's § 2254 petition in a 127-page memorandum opinion [*See Hall v. Bell,* E.D. Tenn. Case No. 2:06-cv-56, Doc. 85]. On December 2, 2019, the Petitioner filed the instant "Second Petition," raising claims related to juror bias.

Petitioner's second petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), which provides in relevant part that:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)
> >
> > > (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; ***and***
> > >
> > > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2); *see also Magwood v. Patterson*, 561 U.S. 320, 335 (2010) (clarifying that the phrase "second or successive" in the AEDPA applies to "applications" for habeas relief, rather than to specific claims). If a federal habeas petitioner wishes to pursue such a "second or successive" petition in the district court, he must *first* move for (and obtain) an order authorizing the district court to consider the motion in the United States Court of Appeals for the Sixth Circuit. 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147 (2007) (holding that district court lacks jurisdiction to consider a second or successive petition with prior approval under § 2244(b)(3)(A)).

There is no dispute that the Court has not received an order from the Sixth Circuit authorizing the Court to consider this second petition. Given that Petitioner has titled his filing a "Second Petition" for habeas corpus relief pursuant to § 2254, it would appear on first glance that the Court lacks jurisdiction over this matter. However, "second or successive" is a term of art, and not every "numerically second" petition is second or successive under the AEDPA. *See, e.g.*,

Panetti v. Quarterman, 551 U.S. 930, 943-44 (2007) ("The Court has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior [] application."). For those petitions that are second-in-time but not "second or successive," no prior authorization is required from the appellate court. *See, e.g.*, *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). Accordingly, in order to determine whether it has jurisdiction over this matter, the Court must determine whether the instant Petition is "second or successive" under AEDPA or merely "second-in-time." *See In re Smith*, 690 F.3d 809 (6th Cir. 2012) (district court is obligated to make initial determination as to whether petition is second or successive before initiating transfer to appellate court).

Petitioner argues that his instant Petition for habeas relief, though second-in-time, is not "second or successive" under the AEDPA, and that this Court accordingly has jurisdiction to consider his claims without the need for prior authorization from the Sixth Circuit [Doc. 1 at 15-17]. Specifically, he argues that he did not abandon known claims, but rather was prevented from having a fair opportunity to raise his claims of juror bias in his first habeas petition due to the juror's concealment of and/or failure to disclose the relevant evidence in a timely manner [*Id*.]. He accordingly argues that because his petition contains claims that are based upon newly discovered evidence and because those claims "could not have been raised" in his first habeas petition, his instant filing is not "second or successive" under the AEDPA [*Id*.].

Respondent disputes Petitioner's assessment, arguing that the Petition is clearly second or successive [Doc. 10 at 3-6]. Respondent specifically notes that the new petition concerns the same conviction at issue in the first petition and involves a claim of juror bias, which the Sixth Circuit generally considers a "second or successive" claim due to the fact that the claim challenges events

that occurred at the trial stage [*Id*.]. In short, Respondent argues that the fact that the claim is predicated upon newly discovered evidence that could not reasonably have been discovered with due diligence does not render the claim "newly ripened" or remove it from the limitations associated with filing second or successive challenges [*Id*.]. Respondent thus maintains that prior authorization for this petition is required from the Sixth Circuit, and that this Court accordingly lacks jurisdiction to consider Petitioner's claims at this stage [*Id*.].

There are "only limited exception[s]" to the generally applicable rule that a second-in-time habeas application is a second or successive one under § 2244(b)(2)(B). *See Allen v. Mitchell*, 757 F. App'x 482, 484 (6th Cir. 2018). The Sixth Circuit has determined that a subsequent petition will not be second or successive if: (1) it asserts a claim whose factual predicate arose *after* the filing of the original petition; (2) it asserts a ground for relief that was not ripe at the time the initial petition was filed (such as claims for competency to be executed); (3) it is the initial challenge to a specific or new state court judgment; or (4) the first habeas petition was dismissed for failure to exhaust state remedies.[1] *In re Wogenstahl*, 902 F.3d at 627; *see also e.g., Hayward v. Warden*,

[1] In *Wogenstahl*, the Sixth Circuit relies upon the "abuse-of-writ" standard, which pre-dated the AEDPA, "[t]o determine whether a petition is second or successive." 902 F.3d at 627. Abuse of writ principles "asked whether a petitioner already had a full and fair opportunity to raise the relevant claim in the district court." *Askew v. Bradshaw*, 636 F. App'x 342, 346 (6th Cir. 2016). It has generally been applied to numerically second petitions that raise claims that could have been raised previously but were not due to deliberate abandonment or inexcusable neglect, to bar "needless," "piecemeal," or vexatious collateral proceedings. *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (collecting cases and quoting *Sanders v. United States*, 373 U.S. 1 (1963) and *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

However, as noted recently in *Hanna v. Shoop*, 2019 WL 4242735, at *6 (S.D. Ohio Sept. 6, 2019), the abuse-of-writ doctrine was a "judge crafted limitation on second petitions [that was] replaced by the AEDPA. . . . Congress did not incorporate the abuse of writ doctrine into the AEDPA and the category of petitions that are not 'abusive' under the doctrine is broader than the category of cases that are not second or successive under § 2244(b)." *Id*. (noting that petitioner cited "no authority that any petition which would have satisfied the abuse of writ doctrine is, by

2019 WL 2058628 (S.D. Ohio May 9, 2019) (failure to exhaust); *Askew v. Bradshaw*, 636 F. App'x 342 (6th Cir. 2016) (new state court judgment); *Magwood v. Patterson*, 561 U.S. 320 (2010) (new state court judgment); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) (unripe ex post facto claim); *In re Bowen*, 436 F.3d 699 (6th Cir. 2006) (failure to exhaust); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (competency to be executed).

In contrast, a petition that lands squarely "within the scenario contemplated by § 2244(b)(2)(B)" is thus subject to all associated gatekeeping rules if it: challenges the same state court judgment as the first habeas petition; raises claims that were not raised in the first habeas petition; raises claims that were not "unripe" at the time of the first habeas petition (that is, the factual predicates for the alleged constitutional violations had already occurred at the time of the first habeas petition); and is predicated upon facts "only recently discovered." *In re Wogenstahl*, 902 F.3d at 627-28; *see also In re Keith*, 2018 WL 8807240, at *2 (6th Cir. Oct. 26, 2018) (holding that petition with claims based on conduct that occurred prior to trial and were not raised in previous habeas petition is successive, but granting authorization to file second or successive petition based on new evidence under § 2254(b)(2) standard); *but cf. In re Chambers*, 407 F. App'x 877, 880 (6th Cir. 2011) (denying authorization to file second or successive § 2254 petition after assessing claims of juror misconduct and grand jury bias under the requirements of § 2244(b)).

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virtue of that fact, not second or successive.").

This Court notes, as did the district court in *Hanna*, that "if the abuse of writ doctrine still applied, it would be proper to find the instant Petition is not an abuse of writ." *See id*. The Court specifically notes that there is no suggestion of abandonment, inexcusable neglect, or vexatious or abusive litigation tactics in Petitioner's request, and the record demonstrates that Petitioner has not yet have an opportunity to raise the relevant claims of juror bias in the district court. However, the Court can find no precedent supporting the idea that a lack of abuse under the pre-AEDPA standards is sufficient to find that an application is not second or successive if it also falls under the umbrella of § 2244(b)(2).

Applying these standards, the Court must conclude that the instant Petition is both numerically successive *and* "second or successive." The Petition contests the same state court judgment of conviction that was challenged in the first federal habeas petition, which was decided on the merits. The factual predicate for the new claim occurred at the time of Petitioner's trial, not after the trial; thus, the claim was ripe at the time of the alleged constitutional violation – that is, at the time of Petitioner's trial and verdict when the alleged juror bias and misconduct occurred. Petitioner argues that the trigger is the discovery of the bias, which only occurred recently. But, Petitioner's discovery of the juror's alleged bias and concealment is not a factual predicate that gives rise to a new claim, nor is the date upon which he discovered the alleged violation the relevant date for determining the ripeness of the claim. Quite to the contrary, the fact that his application is based upon newly discovered evidence that could not have been discovered with reasonable diligence places it firmly within the purview of § 2244(b)(2) and requires Sixth Circuit authorization for this Court to consider this claim any further.

In drafting the AEDPA, Congress created elaborate gatekeeping mechanisms and a "stringent set of procedures" that habeas petitioners must comply with in order to open the door for additional applications for habeas relief considered on their merits. *In re Salem*, 631 F.3d 809, 811-12 (6th Cir. 2011). In the instant case, the Court simply finds that the gates to this Court's jurisdiction over the new § 2254 Petition remain locked unless and until Petitioner "clear[s the] high hurdle" of obtaining authorization from the Sixth Circuit to file a second or successive habeas application in order to raise his claims of juror bias in this Court. *See Allen*, 757 F. App'x at 485; *c.f. Magwood*, 561 U.S. at 334-35 (rejecting "one opportunity" reading of AEDPA that would "considerably undermine—if not render superfluous" the exceptions and requirements for second or successive habeas petitions under § 2244(b)(2)); *Burton*, 549 U.S. at 152-53 (holding that

decision to exempt petitioner from prior authorization requirements of § 2254(b)(3) based on his "legitimate excuse for failing to raise" his claims in the prior habeas action was inconsistent with precedent and practice for mixed petitions, and remanding based upon district court's lack of jurisdiction over the second or successive petition).

Because the Court has found that it lacks jurisdiction to consider the underlying Petition or the Motion to Stay Petitioner's execution – scheduled for **7:00 p.m. CST on December 5, 2019** – the Clerk is **DIRECTED** to immediately **TRANSFER** this action in its entirety to the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).[2]

IT IS SO ORDERED.

E N T E R :

Clifton L. Corker
United States District Judge

[2] Given that this Court has found that it lacks jurisdiction to consider this second or successive habeas petition, the Court concludes that it also lacks jurisdiction to rule on Petitioner's Motion to Stay his pending execution. *See, e.g.*, *Smith v. Anderson*, 402 F.3d 718, 725 (6th Cir. 2005) (granting respondent's motion to vacate stay of execution because petitioner's motion was "the equivalent of a second or successive habeas petition" over which the district court lacked jurisdiction); *Alley v. Bell*, 392 F.3d 822, 833-34 (6th Cir. 2004) (noting that if district court lacks jurisdiction over a petition because it is second or successive, it also lacks jurisdiction to enter a stay of execution).

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0590n.06

No. 19-6349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 04, 2019
DEBORAH S. HUNT, Clerk

In re: LEE HALL,)
)
Movant.)

ORDER

BEFORE: KETHLEDGE, THAPAR, and MURPHY, Circuit Judges.

PER CURIAM. Some 28 years ago, Lee Hall set his ex-girlfriend Traci Crozier on fire by throwing what Crozier called a "gas bomb" (a jug full of gasoline that Hall lit with a paper-towel fuse) into the car in which she was lying. *See State v. Hall*, 958 S.W.2d 679, 683–85 (Tenn. 1997). Crozier "received third degree burns to more than ninety percent of her body and died several hours later in the hospital." *Id.* at 683. She "had been so badly burned that her hair was melted and skin was hanging from her arms"; her treating doctor, a burn specialist, "had never seen a worse or more uniform pattern of burning on an individual." *Id.* at 684. Crozier suffered "constant pain" during her final hours. *Id.* at 683–84. She, for example, "was alive, conscious, coherent, and alert as her tongue swelled to the extent that it protruded from her mouth and her eyelids became inverted." *Id.* at 700. "The only provocation or motive for this horrendous killing was [Hall's] anger with the victim for leaving him and refusing to return." *Id.*

A Tennessee jury found Hall guilty of first-degree premeditated murder. *Id.* at 686. It also imposed a death sentence after finding two aggravating circumstances: (1) that the murder

"involved torture or serious physical abuse beyond that necessary to produce death" and (2) that "[t]he murder was committed while the defendant was engaged in committing or was attempting to commit[] arson." *Id.* at 682 (citation omitted). The Tennessee Supreme Court upheld Hall's conviction and sentence on direct appeal, and the state courts rejected his requests for postconviction relief. *Id.* at 683; *Hall v. State*, No. E2004-01635-CCA-R3-PD, 2005 WL 2008176 (Tenn. Crim. App. Aug. 22, 2005). A district court rejected Hall's first federal habeas petition under 28 U.S.C. § 2254, but granted a certificate of appealability on two claims. *Hall v. Bell*, No. 2:06-CV-56, 2010 WL 908933, at *64 (E.D. Tenn. Mar. 12, 2010). When Hall voluntarily chose not to appeal those claims, the district court concluded that he was competent to make that decision and dismissed his petition. *Hall v. Bell*, No. 2:06-CV-56, 2011 WL 4431100, at *6 (E.D. Tenn. Sept. 22, 2011). With Hall's requests for state and federal post-conviction relief complete, the State of Tennessee has scheduled his execution for December 5, 2019.

About a month and a half before that date, Hall sought a new trial in state court based on a recently asserted juror-bias claim. Hall's attorneys learned that one of the jurors in his trial had suffered severe domestic violence in a previous marriage, but had not disclosed this abuse during voir dire. After holding an evidentiary hearing, a state trial court rejected Hall's juror-bias claim on both procedural and substantive grounds. The court initially found Hall's claim defaulted. A Tennessee statute generally bars second postconviction proceedings and none of the statutory provisions for reopening a first postconviction proceeding applied in Hall's case. *See* Tenn. Code Ann. §§ 40-30-102(c), 40-30-117. The court next rejected Hall's claim on the merits, finding that he had not established that this juror was prejudiced against him.

Hall has appealed this decision within the state courts. Yesterday, the Tennessee Supreme Court (over one dissent) denied a stay of execution that would have allowed him to complete those

state-court appeals. *See State v. Hall*, No. E1997-00344-SC-DDT-DD, at 11 (Tenn. Dec. 3, 2019). It upheld, among other things, the trial court's factual findings showing that Hall had failed to establish that this juror was prejudiced against him. *Id.* at 9.

On December 2, three days before his scheduled execution, Hall returned to federal court with this juror-bias claim. He filed a second federal habeas petition and a motion to stay his execution in the district court. But this second petition faced a procedural obstacle that Congress adopted in the Antiterrorism and Effective Death Penalty Act: state prisoners may file "a second or successive application" for habeas relief under 28 U.S.C. § 2254 only in limited circumstances, and they must obtain this court's permission before they do so. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(A). The district court held that Hall's petition did, in fact, qualify as a "second or successive" application within the meaning of § 2244(b). The court thus transferred the petition to us so that we could consider whether to grant Hall authorization to file this second-in-time petition. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

Hall argues that his second habeas petition is not a "second or successive" application under § 2244(b)(3)(A). He also asks for a stay of his execution so that he may pursue this juror-bias claim in the district court. For three reasons, we disagree with Hall, deny any request to file a second or successive application, and deny the motion to stay his execution.

First, the district court correctly found that Hall's habeas petition qualifies as a "second or successive" application under § 2244(b). To be sure, "not all second-in-time petitions are 'second or successive.'" *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (per curiam order) (citing *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). The Supreme Court has held, for example, that a claim that was found "unripe" in a first petition—such as a premature claim that the petitioner was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986)—would not qualify

as second or successive when a petitioner again asserted the claim in a second-in-time petition after it had ripened. *Coley*, 871 F.3d at 457 (discussing *Stewart v. Martinez–Villareal*, 523 U.S. 637, 645 (1998)). And the Court has also said that a petition does not qualify as "second or successive" if it challenges a new state-court judgment that a state court entered after the first federal habeas petition had been denied. *See In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018) (order) (discussing *Magwood v. Patterson*, 561 U.S. 320 (2010)).

Here, however, Hall's juror-bias claim does not fall within any of the rare situations that keep a second-in-time petition from being "second or successive" under § 2244(b)(2). *See id.* He attacks the same judgment that he did before. And the events giving rise to Hall's juror-bias claim occurred during his trial, so this claim could have been brought in his first federal habeas petition. True, Hall did not discover the facts underlying this claim until recently. But so long as the facts giving rise to the claim had occurred by the time of the first petition, the petition qualifies as "second or successive" even if the petitioner was unaware of those facts. *Id.* at 627–28.

Second, given that Hall seeks to file a second or successive application, he must make "a prima facie showing" that he can satisfy one of the two "gatekeeping provisions" for that type of relief. 28 U.S.C. § 2244(b)(3)(C); *Panetti*, 551 U.S. at 942; *cf. Tyler v. Cain*, 533 U.S. 656, 661 (2001). The first provision requires a prisoner to show that the second or successive petition "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). The second requires a prisoner to show two things: (1) that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," *id.* § 2244(b)(2)(B)(i); and (2) that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no

reasonable factfinder would have found the [prisoner] guilty of the underlying offense," *id.* § 2244(b)(2)(B)(ii). More concisely, the state prisoner must satisfy both a reasonable-diligence and an actual-innocence requirement.

Hall's juror-bias claim can meet neither of these two "narrow exceptions" to the prohibition on second or successive filings. *Tyler*, 533 U.S. at 661. Hall's claim does not invoke a new rule of constitutional law made retroactive by the Supreme Court. And whether or not Hall could satisfy § 2244(b)(2)(B)(*i*)'s reasonable-diligence requirement, he cannot show that he is actually innocent of the crime under § 2244(b)(2)(B)(*ii*). He does not dispute that he murdered Crozier. But § 2244(b)(2)(B)(ii) requires more than an assertion of "constitutional error" like the juror-bias error that Hall now alleges. It also requires a showing by clear and convincing evidence that, but for that constitutional error, no reasonable fact finder could have found Hall guilty of Crozier's murder. Hall has not even attempted to make that showing. *Cf. Durr v. Cordray*, 602 F.3d 731, 737–38 (6th Cir. 2010). Even at trial, he acknowledged that he "knew the victim was lying in the front seat crying when he threw the gas bomb into the car," but claimed that he only intended to burn her car when he did so. *Hall*, 958 S.W.2d at 685–86.

Third, as we have recognized with respect to other last-minute stay requests, Hall's inability to "make a prima facie showing that he is entitled to file a second or successive habeas petition" also proves that he cannot obtain a stay of his execution. *In re Garner*, 612 F.3d 533, 535 (6th Cir. 2010) (lead op.) (order); *see Brooks v. Bobby*, 660 F.3d 959, 962–63 (6th Cir. 2011) (per curiam); *see also In re Henry*, 757 F.3d 1151, 1163 (11th Cir. 2014); *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011). Because Hall cannot file a habeas claim, he is not entitled to a stay to pursue that claim as a matter of law. Even considering the equities, the Supreme Court has told lower courts that "[l]ast-minute stays" of executions "should be the extreme exception, not

the norm[.]" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). We see no grounds for finding that Hall's case should be that rare exception. We deny his motion to remand, his request to file a second or successive petition, and his motion to stay his execution.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

VII CR-5
03S01-9701-CR-00010

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE)
)
vs.)
)
LEROY HALL, JR.)

Case Nos. 188000, 188001

TRANSCRIPT OF THE EVIDENCE

Trial, 3/3 - 7, 9 - 11, 1992

Volume Five of Twelve Volumes

THE HONORABLE STEPHEN M. BEVIL, PRESIDING JUDGE

APPEARANCES

FOR THE STATE:

Mr. Thomas J. Evans
Mr. William H. Cox, III
Assistant District Attorneys General
Hamilton County - Chattanooga Courts Building
Chattanooga, TN 37402

FOR THE DEFENDANT:

Mr. William R. Heck
212 James Building
Chattanooga, TN 37402

Ms. Karla G. Gothard
Executive Assistant District Public Defender
701 Cherry Street, Suite 300
Chattanooga, TN 37402

Appendix K

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Appendix K

MR. COX: I object, Your Honor. This is repetitive.

THE COURT: Sustain.

MS. GOTHARD: All right. Thank you, Your Honor.

THE COURT: All right, Mr. Lawson, you are tentatively accepted. I will excuse you for the evening. Be back in this courtroom in the morning at 9:00 o'clock. Do not go to the general jury assembly room, but come here. The court officers will show you, when you get here at 9:00, where to go. Do not discuss this case with anyone, do not read, listen to or view any news reports concerning this case, do not talk to anyone else about this case, do not form an opinion as to the guilt or innocence of Mr. Hall, and do not speculate as to what this case is about. You are excused for the evening.

JUROR NO. 72: 9:00 o'clock?

THE COURT: 9:00 o'clock here.

There are some other jurors -- we've got right now, according to my count, 49 jurors.

MR. HECK: Fifty-one.

THE COURT: We can go with these jurors or question a few more. I think it's a very good time for everybody to stop. I think everybody is getting tired.

MS. GOTHARD: Could I ask Your Honor what the procedure will be in terms of bringing them in. Will we bring them all in and ask --

THE COURT: I plan to bring all of them in. I'll

put the first consecutive numbers in the box and in front of the jury box and I'll put everybody else on the first row or second row, however many rows it takes to get them in. And, of course, you'll be questioning the jurors that will be in the box. The others will be listening -- and in front of the box. And the challenges will be for the 15 jurors.

MS. GOTHARD: Thank you, Your Honor.

MR. EVANS: Your Honor, what is the number of challenges again? There will be 11 and --

THE COURT: The state has 11 and the defense has 18. And the defense has already exercised one, so the defense has 17 left.

MR. HECK: Your Honor, as I understand it, the jury selection will be to select the 12 plus the alternates and then there's an at random drawing at the end?

THE COURT: Yes, yes. So none of the 15 jurors will know who the alternates are until after they've been -- they receive the charge and before they go into the jury room and deliberate. At that time we'll draw three numbers at random and those numbers will be the alternates.

MR. HECK: I'm not sure I'm going to object to the procedure or not, but I just wanted to find out.

THE COURT: All right.

MR. HECK: Thank you, sir.

THE COURT: Mr. Ball, would you show those other

jurors in, please.

(Whereupon, the remaining jurors came into the courtroom and the following proceedings were had in their presence:)

THE COURT: Is that everybody, Mr. Ball?

THE BAILIFF: Would you like for me to go to the jury assembly room and get the other three or four?

THE COURT: Yes, if you would, please.

MR. HECK: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon, a bench conference was held on the record in the presence of the jurors but out of the hearing of the jurors and the following proceedings were had:)

MR. HECK: What time is the Court going to reconvene in the morning? I'd request maybe 9:30 instead of 9:15, to give us a little extra time to prepare for general voir dire.

THE COURT: All right, we'll say 9:30.

MR. COX: 9:30?

THE COURT: Start at 9:30.

MS. GOTHARD: 9:30.

THE COURT: I'll try to take care of the other matters on the docket, but we will begin -- I'd like to begin promptly at 9:30.

MR. HECK: Yes, sir.

MS. GOTHARD: I'll be here.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jurors:)

THE COURT: Members of the jury, I know it's been a long day for you, it's been a long day for everybody. As soon as they get the rest of the jurors up here, I'll tell you what's going to be needed of you.

Just have a seat right there in front of the jury box.

Members of the jury, we are in the process of selecting a jury in this case and we do not have a jury selected. We've been questioning jurors individually for the last two days, and we do have a number of jurors where we feel like that we can stop doing that at this time and begin the general jury selection. At this particular time, you'll not be needed. It doesn't mean that you won't be needed sometime tomorrow, so what I'm going to ask you to do is you are free to go home. Do not discuss this case with anyone. I don't know if you know anything about it. Do not discuss this case in which Mr. Leroy Hall is charged with murder and aggravated arson. Do not read or listen to or view any news reports on the radio, TV or in the newspaper about this case, and do not discuss this case with anyone. It may seem harmless to say

well, why can't I talk to my husband or children or somebody, but so many people want to express an opinion, and somebody may want to give you an opinion or they may have heard something about the case and it might influence your thinking on the case. And sitting as a member of a jury in a trial, the only thing that can influence your thinking is what happens in the courtroom and not what somebody else might have said or thought about the case. Do not form an opinion as to the guilt or innocence of Mr. Hall and do not speculate as to what this case is about.

With those things in mind, you are free to go. Call the call-in number to find out if you are needed back in the morning, and report to the jury assembly room if you are needed. With those things in mind, thank you very much for your patience and your willingness to serve. You are excused for the evening.

(Whereupon, the jurors retired from open court and the following proceedings were had out of their presence:)

THE COURT: This case will be adjourned until 9:30 in the morning, and court will be adjourned until 9:00 a.m.

(Whereupon, at 6:40 p.m. court was adjourned to March 5, 1992, at which time the following proceedings were had:)

THE COURT: Back to the case on trial, State versus

Leroy Hall.

Is there anything that needs to be taken up before the jury comes in?

MR. HECK: Yes, Your Honor. From just an administrative point of view, I'd like to make an inquiry of the Court. I talked with Mr. Cox about this first. I would assume that there's a strong possibility that we'll have a jury sometime today.

THE COURT: I certainly hope so, Mr. Heck.

MR. HECK: Yes, sir. And that being the case, will we continue on till tomorrow for opening statements?

THE COURT: Well, it depends on what time we get the jury selected. If we get the jury selected today, it depends on what time. If we have time today, I'd like to go ahead and have opening statements. If we don't have time, we'll put it over till first thing in the morning. And I can't tell you, because I don't know how long it will take to get a jury, if we get a jury today.

MR. HECK: Yes, sir.

THE COURT: So I can't be more specific than that.

MR. HECK: The next question is, does the Court plan on trying the case on Saturday?

THE COURT: Yes.

MR. HECK: Thank you.

THE COURT: Anything further?

MR. EVANS: I had one thought, Your Honor. The Court can ask it or someone can ask it on voir dire. I wanted to make sure that we didn't have someone because of religious background would have a problem with deliberating or listening to evidence on Friday or Saturday.

THE COURT: Well, that is something that we didn't ask, and I'll be glad to ask them that.

Anything else?

Mr. Ball, if you'll show the jurors in, and if you'll begin with the consecutive numbers filling up the jury box. It will be one through -- consecutive numbers.

THE BAILIFF: One through 16 in the box?

THE COURT: Right.

THE BAILIFF: And 19 through 30 in front?

THE COURT: Let's see, how many do we have in the box -- fourteen?

THE BAILIFF: Fourteen.

THE COURT: Fourteen. Okay, then the first 14 consecutive numbers there and the second consecutive numbers, I guess seven consecutive numbers in front of the box.

(Whereupon, the jurors returned to open court and the following proceedings were had in their presence:)

THE COURT: Just go ahead and fill up that front row, if you will, Ms. Gomez. You may be seated.

All right, members of the jury, first of all, I want to, on behalf of everybody concerned in this case, I want to thank you all for your patience for the last two days. We are making some headway, as you can see. You have been asked individual questions and all of you have been tentatively qualified. Now we're going to ask you some questions as a group, and if any of these things apply to you, then raise your hand. This is our time to talk together as far as talking with the Court or with the attorneys. If any of these questions apply to you, please let us know and please be frank in your answers, as you have done the last couple of days. It's important for both sides to find out some things about you. And, as we said earlier, ladies and gentlemen, it's not an attempt in any way to embarrass you, to delve into your personal lives, but to find out if there is anything that would influence your thinking, because what we need in this case, ladies and gentlemen, is a jury that will be only influenced by what you hear in this courtroom throughout the trial of this case. If there is a question that's asked of you and you would like to respond, but you feel that the question -- it may be somewhat embarrassing for you to answer that question in front of all the other jurors, if you'll just raise your hand, if you'll let the Court know, then we will take that up outside the presence of the other jurors. Sometimes that happens in which we're trying cases involving

sexual assault or sometimes in homicide cases. So please let the Court know.

As you probably noticed already, ladies and gentlemen, during the process of the jury selection, as well as the trial, there may be objections from either side. It's up to the Court to rule on those objections, it's not an attempt by either side to keep anything from you. The lawyers feel that there are certain things that are admissible in a case, depending on their interpretation of the law, and they may make objections. But it's up to the Court to decide that issue. Do not hold it against either side if an objection is made. That is a necessary and normal part of the trial, so do not hold it against either side, and the Court will make a ruling upon that objection.

Also, I'm going to ask you -- the questions this morning will be directed primarily to those of you seated in the jury box and in front of the jury box, but they will also apply to you all, so please listen carefully, because if some of these people are excused and you step into the jury box, then those same questions will apply to you, and hopefully we won't have to repeat anything. So be thinking about them, and when you're called into the jury box I'll ask you if any of those questions apply to you.

Also, I'm going to ask you, if we take a break this morning before the jury is selected, and you come back into

this area, please take the same seats that you're in now. The reason for that is the Court as well as the state and the defense are keeping a seating chart, and if we've got all of your names in a particular location on a seating chart and we take a break and you come back in and sit somewhere else, it really throws things into havoc, as you can understand. So please do that.

As I mentioned to you, ladies and gentlemen, just preliminarily -- well, let me ask you this question first -- and I didn't ask this earlier, and I apologize to you -- when we were asking the tentatively qualifying questions. Is there any one of you, because of your church affiliation, because of your religion, would not be able to work on Friday or Saturday? We do plan to work Saturday. Now, we will not work Sunday, but we do plan to work Saturday. Sunday you will be kept together. There will ultimately be fifteen of you. We are going to select a jury of twelve and three alternates, so there will be fifteen of you that will finally be selected to hear this case. Those fifteen of you, if you can agree, if you would like to and you can agree on going to a church somewhere and you can all agree on the same church, then that could work out. If it doesn't work out, then you don't have to. Those are matters we'll take up later. But you will be kept together Sunday. You'll be eating together and hopefully we can provide some activity for you at least so you won't be

sitting there in a hotel room all day long.

We will be picking, as I say, twelve jurors and three alternates. Now, the way it used to be done is that we would pick twelve jurors. That would be the jury panel. Then we would select three alternates. The jury would know they're the twelve, and the alternates would know they're the alternates. And it wasn't really good because even though the alternates feel, "There's a chance I might be deliberating in this case, there's a strong chance that I won't," and sometimes they would not feel part of the main body. Under the new law, the way we do it now is we will select fifteen jurors, and at the conclusion of the trial, when you've heard all the evidence and you've heard the law and you're ready to go into the jury room and deliberate, the clerk will draw at random three numbers out of the fifteen, and those three numbers will be the alternates. So no one will know until the case is over who the alternates will be, and this will encourage every one of you to feel like you are part of the panel and that you need to listen carefully because you may be deliberating. And we've found -- at least I have found that that is a much better way of doing it than the way we've done it in the past. Sometimes the alternates would feel like they're a fifth wheel on a car or something.

Ladies and gentlemen, as I previously mentioned in this case -- and the attorneys will be asking you some

questions, but just preliminarily -- as I said earlier, this is a case in which Leroy Hall is charged with the offenses of murder in the first degree and aggravated arson. This is alleged to have occurred April of last year on Rossville Boulevard in which Traci Crozier, his girlfriend, is alleged to have died as a result of burning by gasoline. You'll hear more about that, and the attorneys may want to ask you some more specific questions about that.

The defendant is charged, as I said, in two indictments, an indictment charging him with murder. Now, ladies and gentlemen, that's an indictment in two counts. The first count of the indictment charges him with what's called common law murder or premeditated murder. The second count of the indictment charges him with felony murder, that is, a murder occurred while committing another felony, in this case arson.

It will be your duty, ladies and gentlemen, if you're selected to sit on this case to -- you would only be able to return a verdict as far as guilty as to one count or the other of that indictment, not both counts. You'll be instructed more on that later, but I wanted to tell you that at this time. It's a two-count indictment, but he can only be convicted of one count of that indictment, and not both, or he could be found not guilty of both counts.

The other indictment is a one-count indictment

charging aggravated arson, but there are what we call lesser offenses included in these indictments, and you will be instructed about lesser offenses. For example, murder in the first degree carries a lesser offense of second degree murder. Aggravated arson carries a lesser offense of arson or, in this case, burning of personal property.

Ladies and gentlemen, the fact that Mr. Hall has been indicted by the grand jury is not evidence against him, and this indictment -- these indictments are not to be taken as evidence in any way. They are no indication of guilt. Leroy Hall, as he's seated before you, ladies and gentlemen, is presumed to be innocent of any offense. The burden is upon the state and that burden remains on the state throughout the trial of the case. It never shifts to the defendant, but it remains on the state throughout the trial of the case. The defendant is under no burden to prove his innocence to you or to prove anything to you. That presumption of innocence stands with him throughout the trial. The defendant may or may not testify. If the defendant chooses not to testify, you can place no significance on that fact, ladies and gentlemen. You cannot hold it against him in any way because he does not testify, and you will be instructed accordingly.

As I had mentioned to you earlier, does anyone -- and I think this might have been asked of some of you, but does anyone know the defendant, Leroy Hall? Mr. Hall, would

you stand at this time?

I think you've indicated earlier -- okay, you may be seated -- that you do not know Mr. Hall.

And does anyone know Ms. Karla Gothard, who is an Assistant Public Defender? She works for Ms. Ardena Garth in the Public Defender's office. Does anyone know Ms. Gothard or does anyone know Ms. Garth?

Okay, sir, a couple of you do. You may be asked about that. Would that have any bearing -- how do you know Ms. Garth?

JUROR: Well, her father comes to my church.

THE COURT: Do you know her --

JUROR: Yes.

THE COURT: -- real well?

Okay. Do you know her -- is she a friend of yours or an acquaintance?

JUROR: No, she's just a kid that grew up in the church where I belong.

THE COURT: Okay. And you, ma'am, how do you know Ms. Garth?

JUROR: I just know her by seeing her in passing or seeing her at functions.

THE COURT: Okay. I don't know if Ms. Garth -- I don't think Ms. Garth will be participating in this trial, but Ms. Gothard works for her. Would that make any difference,

have any bearing on your being able to sit on this case?

JUROR: None at all.

THE COURT: Okay, fine. The defendant is also represented by Mr. Bill Heck, who is an attorney in private practice, who has been appointed by the Court to represent Mr. Hall. Does anyone know Mr. Heck? Okay.

JUROR: I've seen him. I don't know him.

THE COURT: Okay. There's a gentleman back there. Would that have any bearing on any of you on your ability to sit on this case? Of course, that question was asked of you earlier, sir, and you indicated that would not have any bearing at all.

JUROR: Correct.

THE COURT: The state in this case is represented by Assistant District Attorneys General Mr. Tom Evans and Mr. Bill Cox. Does anyone know Mr. Evans, General Evans or General Cox?

Seated at the counsel table also is an investigator with the District Attorney's office, Mr. Bob Brown. Does anyone know Mr. Brown?

Of course, both General Evans and General Cox and Mr. Brown work for Gary Gerbitz, who is the District Attorney in Hamilton County. Do any of you know General Gerbitz?

Okay, sir, you do. Would that have any bearing on your decision? I don't think, of course, General Gerbitz will

be participating in the trial anyway.

And I think you have indicated, all of you had indicated that you did not know the alleged victim in this case, Ms. Traci Crozier. Any of you know Ms. Crozier?

Since you're all here, we may be able to do this one time. There are a number of witnesses listed, ladies and gentlemen, who may or may not testify in this case. Merely the fact that these witnesses are listed doesn't mean that all of them will testify, but I need to call their names to see if any of you know them. And if you will, just keep it in mind, and when the attorneys ask you individual questions, they may ask you if you know any of the witnesses. Listed is Ed Forester, Chattanooga Police Department; Larry Swafford, Chattanooga Police Department; Dr. Frank King, Hamilton County Medical Examiner; Dr. Earl Smith, Erlanger Medical Center; Robert Kemp, 1609 East 47th Street; Viola Price, 1609 East 47th Street; Billy R. Wilson, 1609 East 47th Street; Cassandra Jenkins, Chattanooga Fire Department; Arthur Terry, Chattanooga Fire Department; Sergeant Jim Moon, Chattanooga Police Department; Agent Cordell Malone, ATF; Officer Bill Cross, Chattanooga Police Department; Dr. Sonya Merriman, Erlanger Medical Center; Dr. Faulks, Erlanger Medical Center; Agent Winston Davidson, ATF; Inspector Mary St. Clair, Chattanooga Police Department; Dr. Jim Metcalfe; Captain Roy Dickey, Chattanooga Police Department; Officer Don Bickford,

Chattanooga Police Department; Chief Charles Dunn, Fort Oglethorpe Police Department; Captain Bob Persinger, Fort Oglethorpe Police Department; Detective David Wyrick, Fort Oglethorpe Police Department; David Smartt, Chattanooga Police Department; Gary Fortner, Fort Oglethorpe Police Department; Gary McConathy, Fort Oglethorpe Police Department; Jack Campbell, Fort Oglethorpe Police Department; Kermit Stokes; Catoosa County sheriff's office; James Mathis, 4107 16th Avenue; William Noland, Jr., 1506 East 46th Street Place; Christie Griffin, 411 Barnhardt Circle; Barry Griffin, 411 Barnhardt Circle; Donald Kelley Horton, 5517 Miller Drive; Edward P. Russell, 4510 Rossville Boulevard; Tiffany Ely, 4219 Ealy Road; Drew Hingel, 1708 Green Hills Drive; Craig Lahren, medical examiner's office; Judy Arehart, Erlanger Medical Center; Rose Labach, Erlanger Medical Center; Officer Tommy Kennedy, Chattanooga Police Department; Christopher Mathis, 4107 16th Avenue; Commander Earl Atchley, Chattanooga Fire Department; Detective Tommy Mauldin, Chattanooga Police Department; and Investigator Mike Donnelly, State Fire Marshall's office.

Now, I'm not going to ask you at this time do you know them. The attorneys may want to ask you that and you can so indicate at that time.

Okay, ladies and gentlemen -- and you've been asked this before -- does any one of you know any reason why you

cannot sit on this case, listen to the evidence that's presented to you in this courtroom and, excluding everything else, arrive at a verdict that would be fair and impartial to the defendant Leroy Hall and would be fair and impartial to the State of Tennessee?

General, you may qualify the jury for the state.

MR. EVANS: Thank you, Your Honor.

VOIR DIRE

BY MR. EVANS:

Q Good morning, ladies and gentlemen.

A Good morning.

Q I know you know that this is a new building because you were part of the -- I think they christened the jury room, as you were the first jurors to be able to use it. I hope that's working out. And I think it's going to be nice to be able to -- I hope that all the people are able to hear me. I know in the old courtroom we definitely had a problem as to that. There was noise in the back of the courtroom that you really couldn't hear anything that was going on. Now, I'll attempt to keep my voice up so that not only the jurors here can hear me but the others in the audience can hear me.

The first thing I've got to do is arrange my chart. And the Judge mentioned that and it's sort of a housekeeping matter. But I had it all arranged. I guess I thought, well, they'll file in -- one, two, three, four, five, six, seven,

eight, like that. And that didn't occur, did it? So I'm going to just go ahead and start out.

And the first lady, No. 13. And that would be Ms. Scott, ma'am?

A Scott.

Q And then No. 12, Ms. Tallant?

No. 4, Mr. Ketchum?

A Yes, sir.

Q No. 2, Mr. Hundley?

A Right.

Q And your number, ma'am?

A Eleven.

Q Eleven. That would be Ms. Baskin?

A Uh-huh.

Q And then we have number --?

A Three.

Q Three. Mr. Hobbs.

And then No. 14. There you are. Orman?

A Yes.

Q Just making sure I can read my own little notes here.

And you're number --?

A Eight.

Q The light is reflecting there and I'm having trouble reading them.

Ten. And that's Mr. Ragland.

No. 16, Mr. Miller.

No. 7, Ms. Ladd.

No. 6, Mr. Anderson?

A Yes.

Q No. 15, Ms. Lewis.

A No. 1.

Q No. 1 -- be Mr. Turner.

And No. 20, Ms. Poteet?

A Right.

Q No. 30, Mr. Brackett.

No. 22, Ms. Spratling; is that right -- with a t?

A Yes.

Q No. 23. I've got you somewhere here. I thought I did. Obviously I don't. That's Mr. Overton.

Twenty-nine, Ms. Byrd?

A Yes.

Q No. 19 -- be Ms. Mayfield.

And No. --?

A Twenty-four.

Q Pardon?

A Twenty-four.

Q Twenty-four. I'm sorry. Mr. Carson.

Was there anyone in this group -- again, I'm going to talk loud enough for the other members to hear me. But of

this group, was there anyone who knew any of the witnesses or thought they might have known any of the witnesses? And I can understand and appreciate -- let me back up just a little bit -- any possible witnesses -- and I can appreciate not seeing faces and so forth -- maybe I know someone by that name, but I'm not sure. But is there anyone who thinks they may have known any of those people, that long list of people who were called off?

A Witnesses -- officers.

Q All right. Okay, that's Mr. --?

A Hobbs.

Q Hobbs. You indicated you knew some of the officers?

A Yeah.

Q Which particular ones, if you can recall?

A Officer Dunn. And I'm not sure, but I think Tommy Mauldin.

Q All right. And you indicated, ma'am, you know Mr. Mauldin?

A Tommy Mauldin.

Q All right. And that would be Mr. Ketchum?

A Yes. There was a name -- Mr. Billy Wilson. There was a person of that name that worked at Aztex a few years ago, and I knew him through that, you know. I worked -- he worked in the shop and I worked in the engineering department, but I had occasion to talk with him about problems. I

never knew him more than just in a work situation -- if that's the same person.

Q All right. This Billy R. Wilson -- and you heard the address. Of course, I don't guess there would be any reason for you to have known that gentleman. Approximately how old was the Wilson that --

A The individual that I knew was -- would not be -- probably 30.

Q I doubt that's the same. This is a younger person. At least that's my impression of him, and maybe because I'm older. I think he's younger than that.

A He was very short.

Q No, it wouldn't be same as him then. Thank you, sir.

Yes, ma'am?

A I know Larry Swafford.

Q Larry Swafford, Detective Swafford?

A Yes.

Q How do you know Detective Swafford?

A Well, my son and daughter work for the police department.

Q Right. I have that down here on my notes. Ever talk to them about this case?

A No.

Q Ever talk to them about any cases?

A (No audible reply.)

Q And anyone else of any potential witnesses?

Let me read some more names and see if you might know these people. And again we don't want -- the Court will caution you in its general instructions, and we don't want anyone speculating about anything that we say -- I wonder if that person is going to be a witness or wonder why they didn't call that person -- they talked about that person at the outset. These are just people who might possibly be called as witnesses. A Morris Forester and a Scott Green, and it's my impression Mr. Forester lives somewhere over in the vicinity of East Ridge. He would be a younger individual. When I say younger, he would be probably around the defendant's age, is my impression. And the same would apply to Mr. Scott Green. Sarah Griffin, who lives in Georgia -- that would be the mother of the defendant. Christie Griffin is a half sister. Probably, I believe Ms. Griffin is -- we've already mentioned her name -- 18 years old, lives in Georgia. Barry Griffin would be his step-father, as I understand it, of the defendant, likewise lives in the state of Georgia. And then Mr. Hall has some brothers, I believe. One is, I believe, name of David Hall. Another name I'm going to ask you about is Ms. Gloria Mathis -- her husband Mr. James Mathis. They would be the grandparents of Traci Crozier, and they would live -- I believe it's on East 49th Street -- in the same

general area where this happened, off of Rossville Boulevard.

A couple of you, I believe, mentioned you knew Ms. Gothard. Is there anyone else who knows any of the attorneys -- in this group knows any of the attorneys or anyone in the District Attorney's office or in the Public Defender's office, other than Ms. Gothard?

Now, is there anyone here who lives in East Ridge, of this group?

Ms. Crozier attended East Ridge High School and grew up and lived in the East Ridge area up until the time of her death. This is a picture of Ms. Crozier. Do any of you currently -- and when I say went to East Ridge High School, that would have been -- I believe she graduated in 1986. Do any of you yourselves or have close friends or relatives that went to East Ridge High School that would have graduated or possibly been classmates of Ms. Crozier?

She worked at Cracker Barrel Restaurant and at Buster Brown. Have any of you worked or would you have any reason to have come in contact with her? And I realize, well, yeah, I've been to Cracker Barrel Restaurant. You've seen a picture of her. And I don't know how long she worked at Cracker Barrel Restaurant. Her latest employment was Buster Brown. Does anyone -- would there be any reason for any of you to have come in contact with her through her employments?

Her father is Gene Crozier, and Mr. Crozier runs

Geno's Sports Bar on Brainerd Road. Is there anyone who would have any reason to have met or known or been at that business or know Mr. Gene Crozier?

Okay. Her mother is Susan Murphy. You may have seen or you may have noticed a lady the past couple of days walking around on a pair of crutches with a foot that's obviously in a cast. She lives out of state. Is there anyone who recognized her or knows Ms. Murphy? She worked -- when she lived in Tennessee, lived in Chattanooga she worked at Standard Coosa-Thatcher. It's my recollection that perhaps one or more of the jurors may have put that down as an occupation, although I'm not sure. Of this group here, is there anyone who worked at that business?

There's a sister, Robin Crozier. Is there anyone who would know a Robin Crozier? Does anyone know anyone -- let's just make it very broad -- to your knowledge, know anyone by the last name of Crozier, or by the name of Hall that might be related to Mr. Hall, the defendant?

Yes, sir.

A Where is Mr. Hall from?

Q He's from this same area. He grew up in East Ridge.

A Okay. I know a woman whose last name was Hall before she married. Her name is Kathy Hall.

Q Kathy Hall.

A And she's from Soddy-Daisy.

Q I would assume not. I'm sure if there's some positive response they would have asked you about that. Appreciate that, sir.

When you came here individually, some of you, I pointed out before I started asking questions, that when attorneys ask questions in this portion of the jury selection which we call voir dire, we by necessity have to make statements that sound like statements of fact. I would caution you and I would ask you at this point, number one, you're not to accept them as statements of fact, you're to accept them as statements in good faith, but not of fact. And can all of you and will all of you, once you're selected to sit on this case, set aside anything that we may have said about the facts and actually set aside anything that we represented to you would be the law? Do all of you think you can do that?

We're not going to be misleading you when we talk about some facts -- intentionally. It may turn out you never hear a fact that we bring up, and that is -- probably the more important thing is that when you get back, after you've heard all of the evidence and all of the testimony -- and don't be frightened, number one -- let me back up a little bit. Don't be frightened by that long list of names. There aren't going to be that many witnesses that are called. It's incumbent upon us to give notice of any potential witnesses. So you

aren't going to hear from 30 to 40 witnesses. But it will be your job and your duty and your responsiblity to decide the case on what you hear from the witness stand, and the law will come from the Court. It won't come from me, it won't come from Mr. Cox, and it won't come from Mr. Heck, and it won't come from Ms. Gothard, it will come from the Court. Do all of you appreciate and understand that?

We're going to be talking to you about the law, and we're not going to be trying to mislead you in any way. But again the law comes from the Court. And I guess having served once on the jury myself, perhaps a terror of an attorney is that the jury will go back and consider something a lawyer said as a fact or consider something a lawyer said about the law as the law. And that's why I'm cautioning you -- trying to caution you at this point and asking can you accept that and will you do that, in other words. Testimony, evidence from witness stand, law from the Court. It may not be simple, but it is that simple, it is that exact.

Do all of you and will all of you wait until you've heard all the evidence and wait until you've heard the Judge instruct you on the law before reaching any conclusion?

There's been talk already -- most of the jurors about -- and the Judge has said it -- a person being burned to death, how terrible that is. All right, that is terrible. I don't think there's going to be anyone in the course of this

case that's going to say it's not terrible. But at this point you don't know how the person died. That's just what I said. That's not a fact. Don't let any of my questions and don't let anyone's questions in this session, in this voir dire attempt to commit you to a course of conduct or attempt to make you say yes, I would do that or no, I wouldn't do that, because you don't know, ladies and gentlemen. You haven't heard all the facts, you don't know what the law is. Is there anyone that has any problems with that?

Let's talk a little bit about personalities. Attorneys' personalities should not and must not affect you in this case. It may be at this point in time you don't like Mr. Evans cause he's talking loud and he seems sort of mean and he doesn't seem to have much of a sense of humor. Ladies and gentlemen, there is absolutely nothing humorous about this case. There will be times, however, when something may be said that people will laugh. But there is nothing humorous about this case, there's nothing humorous about the facts, and there's nothing humorous about what the state is seeking in this case. Don't be embarrassed and certainly don't hold it against any of the attorneys if you see one of us say something and you see us smile. We're not smiling about the case, we're not smiling about what the state is seeking, and the defendant isn't going to be smiling, and his attorneys aren't going to be smiling about that. The best analogy I

could draw is perhaps physicians working in a hospital in an emergency room. They've got to maintain a certain degree of, if you want to call it, aloofness from what they deal with in order to be able to deal with it. We will attempt -- all attorneys will attempt to conduct ourselves in a manner that is commensurate with the seriousness of the charge in this case, the facts, and what the penalty the state is seeking is.

Again, it is not a contest between attorneys, ladies and gentlemen. Is there anyone -- and I've been very impressed and I'm sure counsel for the defendant has been very impressed with the group of jurors that we have here. We've been impressed with their honesty, their forthrightness, and the way in which they answered the questions, and I find it unnecessary to even go further and ask a question about the attorneys participation. I wanted to make sure you understood that that was not what's going on here, and that you understood, if you see one of us smile, or see something that you think that's just not -- why are they doing that -- it wouldn't be as to this case, ladies and gentlemen.

As the Court has indicated to you, the defendant is charged with murder in the first degree. And on individual voir dire, some of you talked about and were asked about situations in which you would feel the death penalty would be appropriate. I would caution you -- and I don't want to get any committal from you at all, especially with respect to the

facts of this case, or what I might represent are the facts, I don't want to get any committal from you that you think yes, that might be a death penalty case or no, it wouldn't be a death penalty case, because if we ask that question of you, ladies and gentlemen, the response should be, "I don't know, because I haven't heard the facts, I haven't heard the law, and therefore I can't tell you in a vacuum type setting from a question, a hypothetical question, what I would do. All I can promise is that I would listen to the evidence from the witness stand, I would weigh it, I would listen to the law as given to me by the Court, and I would reach a verdict that truth demands and justice dictates." Is there anyone who thinks they'll have a problem with that?

Now, I'm going to be asking you some questions about law. I don't think any of the law in this case is above anyone of average and -- I'll say it -- below average intelligence. Don't be worried, ladies and gentlemen, because you're not a college graduate. I may, the Court may, the defense may use some big words -- deliberation, premeditation. Any of you who may have an idea already what that is, please set it aside. The Judge will tell you what it is. I'll ask you some questions about it, I'll say, "Can you understand this? If the Judge instructs you this, would you follow it? Yes." But I'm not going to ask you if you had this set of facts, then would you apply this law and would you reach a conclusion,

cause that's your job and it's your job to do it after hearing from the witness stand and after actually hearing the law from the Court.

The Court, I believe, will tell you that premeditation is an act that is done after the exercise of reflection and judgment. Does anyone have any problem with that definition?

And it may include instances of homicide included -- excuse me -- homicide committed by lying in wait for someone. Does anyone have any problem with that?

Quite often lay people think of premeditation as something you really have to think about for four or five days, or at least four or five hours, or at least four or five minutes. If you have any notions of that, ladies and gentlemen, I would ask you to set those aside and wait till what the Court tells you about premeditation, because I believe the Court will tell you that premeditation can be formed in an instant -- the intent to kill. And the Court is going to give you instructions, further instructions, and they will be in writing. You take them back with you to consider -- when you consider the case. They'll be in writing, so don't worry about am I going to have to remember all this, because the Court will give you a charge in writing.

And I believe the Court will talk to you further about premeditation, that it can be inferred from

circumstances surrounding the nature of the killing. Well, that just makes sense, that's common sense, ladies and gentlemen. Again, we're not dealing with any super-technical terms here. Does anyone have any problem with that, from looking at the circumstances surrounding the killing?

With respect to the burden of proof, the defendant -- and I believe most of you have already been instructed this and you probably know it already -- but the defendant is presumed innocent. Now, obviously in order to allow him his presumption of innocence, ladies and gentlemen, you're going to have to do some things that on the surface may not seem just logical. Obviously we have a person here that's indicted. The Judge is going to tell you the indictments means nothing. Is there anyone who has any problem with that? Is there anyone who has any problem that at this point in time the defendant is innocent and the burden is totally on the state to prove him guilty beyond a reasonable doubt?

That burden is no greater in a first degree murder case than it is in a second degree murder case, than it is in aggravated arson, than it is in arson, than it is in theft. The burden is the same, the test is the same. That burden is no greater, ladies and gentlemen, even in cases in which you're dealing with murder in the first degree and the state is seeking the death penalty.

As far as guilt or innocence, the guilt or innocence

stage, is there anyone who, because it is a first degree murder case and because the state is seeking the death penalty, would require a higher degree of proof than that which the Court tells you is necessary?

I'm not going to tell you exactly what the Court tells you, cause the Court is going to tell you what the law is. But we all agree -- can you all agree at this point that you won't place any greater burden on the State of Tennessee in proving this case beyond a reasonable doubt, and if we do prove this case beyond a reasonable doubt, of proving the appropriateness of the death penalty beyond a reasonable doubt than the law does?

All right. Let me ask sort of the converse of that. There was mentioned maybe the horribleness of the way in which we say and the Court has indicated and the attorneys -- and that's what I mean by we -- of how Traci Crozier died. Now, and I think that we have positive responses from all of you that that does not somehow make the case for the state easier to prove. But again it won't make it any harder to prove.

And let's get on into the penalty phase. Mention was made on individual voir dire about the horrible -- how horrible it was, and also mention was made of aggravating and mitigating circumstances, and sometimes mention was made could you still consider life imprisonment given a, what I would call a thumbnail sketch of how the murder occurred. That's

assuming the murder occurred, of course, because the questions are being asked as though you were already in the penalty phase. So let's make that assumption. You're in the penalty phase. Don't let me commit you, ladies and gentlemen, and don't let anyone in this portion of voir dire commit you to a course of action as to what you're going to do in the death penalty phase, if you reach that phase, because you can't, ladies and gentlemen, and you shouldn't. Don't be making any decisions, don't be making any judgments about the facts in the case.

The law in Tennessee is that an aggravating circumstance is that the murder was especially heinous, atrocious, or cruel, in that it involved torture or physical abuse beyond that necessary to produce death. Don't make a judgment and don't commit yourselves, ladies and gentlemen, as to what you're going to do with that aggravating circumstance based on a thumbnail sketch of this case, because the Court is going to tell you, and it is the law in Tennessee, that if the jury unanimously determines that at least one aggravating circumstance has been proven beyond a reasonable doubt, and it outweighs any mitigating circumstances beyond a reasonable doubt, the sentence shall be death. That's the law, ladies and gentlemen. Again, don't let anyone commit you to making a decision such as, well, if that's all I heard, maybe I would do this, maybe I wouldn't. You've got to wait till you hear

it, don't you?

I believe the Court has already indicated that the defendant is charged with aggravated arson. Aggravated arson in Tennessee is the burning -- essentially is the burning of a structure or vehicle where someone was inside. An aggravating circumstance, the Court is going to tell you, is that the murder was committed while the defendant was engaged in committing or attempting to commit arson. I don't know if he was or not, ladies and gentlemen. You don't know if he was or not, because you haven't heard the proof. So don't make a committal as to what you would do or what you wouldn't do, or that you could consider both life and death. Yes, you consider both life and death, but don't make that committal under a hypothetical, because the only committal you can make is, Mr. District Attorney, Mr. Defense Attorney, I will listen to the evidence and I will follow the law, and I will render a verdict that truth dictates and justice demands.

We talked to you about weighing and the Judge is going to talk to you about weighing, and I'm sure the defense attorneys are going to talk to you about weighing aggravating versus mitigating circumstances. It's not, ladies and gentlemen, a numbers game balance. It's not you've got one here, you've got four over here, and therefore, no. It's just what I just read you, ladies and gentlemen. I believe that's what the Court will tell you. Do all of you understand and

appreciate that? In other words, if there are -- what may be submitted to you as ten mitigating circumstances in any case, it may be outweighed by one aggravating circumstance. Does anyone have trouble with that concept?

Again, I'm not asking for a committal, and I don't want you to tell me what you'd do in that case cause I don't know that's the case, and you certainly don't cause you haven't heard it.

One more question concerning the death penalty, and I think this was asked of most of you. If the defendant is convicted of first degree murder in this case, and if you're on the jury and the case is then submitted to you on the penalty phase, as I indicated and we all understand, the state is seeking the death penalty if, as I believe the Court will instruct you, you reach a conclusion beyond a reasonable doubt that the aggravating circumstances are such that the penalty shall be death, then you are going to have to put your name to a document. And this is an enlargement of that document. Can everyone see it all right?

What it says is, "We the jury unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance, or circumstances, outweighs any mitigating circumstances. Therefore, we the jury unanimously find that the punishment shall be death."

We've been here since Tuesday asking questions.

Lots of times I've found that it takes awhile for things to sink in. And we have asked generally, I believe, and specifically most of you already, if it reaches that point, is there anyone who wouldn't be able to put their name on this document. Is there anyone at this point that has developed some reservations about that?

You realize that from the thumbnail sketch you received in the case that if you get in the death penalty stage, there is still no burden on the defendant to prove anything, the state still has to come forward with either evidence from its case on guilt or innocence, which you can also consider, or any additional evidence? There's no burden -- it doesn't come time when you'd like to -- maybe that's a gut reaction -- well, yeah, I had this thumbnail sketch of this girl being horribly burned to death, I'd like to hear from the defendant. That makes sense, but that is not the law, ladies and gentlemen, and the test at this point is can --

MR. HECK: Your Honor, may we approach?

THE COURT: All right.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. HECK: I'm going to have to interpose an

objection. He's commenting on the right not to testify and they would expect to hear from the defendant and they may not hear from the defendant, but they can't hold it against him. He's commenting upon the defendant's right not to testify, and I think that's improper, Your Honor.

THE COURT: What was the statement?

MR. EVANS: I said they might want to say, and it could be a gut reaction that they might want to hear from the defendant, even in the penalty stage, with the understanding he has no burden.

THE COURT: Okay. As long as you follow up with a question and make it clear that -- (indiscernible).

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

BY MR. EVANS (Continuing):

Q You understand he has no burden?

And again don't get yourselves in a position of making a committal because he has no burden. The burden is on the state solely to get you to the point of considering the appropriate penalty, and then the burden is again on the state to prove beyond a reasonable doubt that that is the appropriate punishment.

It may be like a common sense reaction to, well, I'm

going to have trouble presuming a defendant innocent in any case cause he's up here, or she's up here. Had to get here somehow. It doesn't matter, ladies and gentlemen. Can everyone give this defendant the same presumption on the penalty stage, if you reach that portion, that you've already said you can do at this stage?

In other words, he's presumed to be innocent, the Court is going to tell you that, the state agrees with that, and I'm sure the defense attorneys are going to tell you that -- he's presumed to be innocent. You have to presume him innocent. And if you presume him anything else at this point, it would not be justice, and we don't want it.

So look into yourselves, ladies and gentlemen, as best you can and tell me, is there anyone harboring any secret unknown to others -- you know it -- no one can ask you sub-consciously what you're thinking, but that means you don't know what you're thinking -- subconsciously means that. But is there anyone harboring any secret or reservations about the presumption of innocence and about the burden of proof?

All right, ma'am. I'm not going to ask any further questions at this point. Did it -- were you responding to that question?

A (No audible reply.)

Q All right. Anyone else?

I looked at the audience. I'm not seeking answers

at this point, but certainly if there comes a point in time any of you come up here, we'll want to know it.

Same way, ladies and gentlemen, is there anyone harboring any secret reservations that you believe will prevent you from following the law and, if you reach a verdict of murder in the first degree, would prevent you, under what I said I believe the Court will instruct you? And I'm not asking for a committal. All I want to know is there something that's going to prevent you from doing this, either way, in the punishment stage? Because again, ladies and gentlemen, that would not be justice.

I've asked a question along these lines. I'll get very specific now. It's going to be very hard to do. But is there anyone on the first stage that thinks they would not be able to set aside the knowledge that the state is going to be seeking the death penalty in this case because that would not be appropriate? In other words, you're going to have to set that aside. We have to qualify you, you have to be qualified on it. But you must not and should not be considering that when you consider the facts in the case and guilt or innocence. Is there anyone -- and I understand it will be hard, it will be hard. But is there anyone who feels they cannot do that? Is there anyone who feels they would be so concerned about the punishment stage in this case, about the potential for having to put your name on this document that I showed you, that it

would interfere with your ability on guilt or innocence, because, ladies and gentlemen, that would not be justice?

I gather by your silence that no one would have a problem with that.

Let me, if I might, look at some notes I've made and see if I have any specific questions. Obviously one of the reasons for having you fill out that rather long form was to shorten this process.

Ms. Tallent, you have a son that's in the city police academy?

A Yes, sir.

Q The Judge has asked the question -- I think it's probably been asked about six or seven times. Is that factor going to be involved at all in your ability to sit on this case?

A No, sir.

Q Mr. Elliott?

A Yes.

Q You had a prior experience some -- it's my recollection it was a long time ago, but it involved a neighbor threatening you with a firearm?

A (No audible reply.)

Q Did a criminal charge result from that?

A No, the policeman came out and talked to him and talked to me, and it was resolved and everything turned out.

Q Okay. Anything about that experience that you think would interfere with your ability?
A I don't think so.
Q Mr. Ragland, I had a note here you had a job one time as a package car driver. Is that like UPS?
A UPS, yes, sir.
Q UPS. All right. How long did you work for UPS?
A Seven years.
Q I think quite often UPS brings -- I see them up here, and I -- well, I know it's UPS. They come up and observe court proceedings. Were you ever involved in that program? And I don't know what -- but it's --
A No, sir.
Q Ms. Ladd, you know Eddie Cooper?
A Uh-huh.
Q How do you know --
A He's my uncle.
Q Your uncle. Would that interfere with your ability to sit on this case at all?
A No.
Q Mr. Anderson, your father is a TVA public safety officer?
A Was.
Q Was. Did he retire?
A And deceased.

Q Anything about him relating any experiences to you that you can think of that would involve any problem in this case?

A I don't think so.

Q Ms. Poteet, your daughter is a physician?

A Yes.

Q How long has she been a physician?

A About five years.

Q Has she ever had occasion to relate to you the treating of anyone who has been badly burned?

A No. She's a pediatrician.

Q And I believe -- it's my recollection she lives, works out of state; is that right?

A Tuscaloosa.

Q Mr. Turner, I noticed you indicated on your document that -- or your questionnaire, like most of us, you've got some speeding tickets. I don't want to embarrass you. I don't know if -- anyone that says they've never exceeded the speed limit, I think that would reach obviously a credibility factor there. I assume there was nothing, other than the fact you got speeding tickets like many of us have, and knowing the personal displeasure of getting a speeding ticket, there was nothing involved with that that --

A No.

Q I would like to get into a discussion now of alcohol

-- I'll say alcohol/drug abuse. Is there anyone of this group here who has experienced personally someone, close friend, a relative, member of the family, who has been addicted to alcohol or drugs?

I don't want to really -- obviously I don't want to embarrass anyone. But let me ask of that, how many would have been members of the family? I think it's the same --

A Brother.

Q Brother?

A Yeah.

Q Ladies and gentlemen, in Tennessee the term voluntary intoxication is defined as intoxication caused by a substance that the person knowingly introduced into his body, the tendency of which to cause intoxication was known or ought to have been known. That's got a little bit of flowery language in there, but it's pretty simple. Does anyone have a problem with that definition?

Is there anyone on this panel, this group here, who does not know the effects of alcohol on the human body and mind?

Is there anyone on this jury who feels somehow it would be an excuse for a person to become voluntarily intoxicated, commit a crime, and then say, "Hey, I was drunk. I wouldn't have done it if I had not been drinking or if I hadn't been intoxicated"? It's sometimes referred to as the

alcohol crutch, and I don't mean to hurt anyone's feelings in this matter. There are people who have experienced -- family members, friends, who, I assume, have had the problem either of being an alcoholic or had an alcohol related problem or a drug problem. Can you set that experience aside and will you set that aside in this case, should there be any evidence of alcohol consumption or drug use, and listen to what the law in the state of Tennessee is?

THE COURT: General, excuse me. Counsel approach the bench, please.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

THE COURT: I don't mean to cut you off. It's almost 11:00 o'clock. We've been here for two hours -- the attorneys have. The jury has been here about one. I think it's probably time to take about a 15 or 20-minute break. I'll give the jury some cautionary instructions.

MS. GOTHARD: Your Honor, I think for the record we need to interpose an objection to the last question. Mr. Evans said it's not appropriate for someone to come in and say, "I was drunk, so, you know, that should excuse me." Voluntary intoxication is a defense.

MR. EVANS: Let me get to that.

THE COURT: Okay.

MS. GOTHARD: I just wanted to make sure.

MR. EVANS: If you want me to get through that, I will, and then we can take a break.

THE COURT: I thought you were going on to some other matter.

MR. EVANS: No, I was getting right to that.

THE COURT: Okay. Then if you'll clear that up, then we'll take a break.

MR. EVANS: All right.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

BY MR. EVANS (Continuing):

Q We're going to be taking a break shortly. Let me finish with this portion of my questioning, if you'll just bear with me. I was talking about drinking, and I was about to say that in Tennessee, I believe the Court will tell you that intoxication is admissible, it is relevant in evidence; in other words, a jury can consider it, if it is so extreme as to negate a person from forming a required mental state. So, in other words, you may hear -- I don't know if you will or not, but obviously someone thinks you might if we're talking about it; right? Again we're getting into -- don't make a

committal in this case based on what I'm talking about. But obviously if I'm talking about it, there must be some indication through my knowledge that you may hear about drinking.

Is there anyone who feels that they would have a problem with what I have indicated is the law in the state of Tennessee, and that is it would be admissible for that purpose?

And I believe the Court will start out with telling you that intoxication is not -- voluntary intoxication is not a defense, except -- and again I'm not trying to mislead you. The Court will tell you about it being so extreme where it negates the ability of a person to form a required mental element -- excuse me -- mental state. Can you accept the proposition that what we're talking about is not the ability and quite often the effect of alcohol in lifting inhibitions? But we're talking about alcohol to the point that it prevents a person from forming a mental -- a required mental state that is part of the -- or an element of the case. Does anyone think they'll have trouble between drawing a difference between those two things?

Finally, I believe the Court is going to tell you that with respect to alcohol consumption, the defense of drunkenness, that if recklessness establishes an element of the offense, and you should conclude or have a reasonable

doubt, if you should conclude that the defendant is unaware of a risk because he is voluntarily intoxicated, that's immaterial. In other words, it doesn't matter. And I believe you've heard the Court indicate to you that the second count of this indictment charges that the defendant recklessly killed another in the commission of an arson. Does anyone have any problem with that aspect of the case?

Thank you.

THE COURT: Okay, members of the jury, we will take a break. Let me tell you at this time, if any of you -- we try to take a break about every hour and a half. Sometimes it's about two hours. If any of you need a break before then, if you'll just raise your hand and let me know that you'd like to have a break, we'll see to it that that happens. I don't want any of you to be sitting up there trying to listen to what's going on extremely uncomfortable. Okay?

We will take a break for about 15 or 20 minutes. When you come back into the courtroom, if you'll take the same seats. Those of you out there, you don't have to take those same seats, but sit on those first rows. Do not discuss anything with one another about what you've heard up to this point about this case, and do not allow anyone that's not on the jury to discuss anything with you or talk to you about anything. Before coming here, you might have seen the lawyers outside and they might have spoken to you and said hello. If

they don't do that now, don't be offended, because they have to avoid any kind of indication that they're trying to unduly influence you. So don't feel like they're ignoring you or being rude to you, it's just the nature of what this is all about.

I've got a Mickey Mouse watch and I can't read it. Even with my glasses on I can't read it cause there's little faces of Mickey Mouse all around it. It's 11:00 o'clock now. Be back in the courtroom ready to go at 20 minutes after 11:00.

There is a snack bar downstairs on the ground floor. It has, I think, coke machines, snack machines, and so forth.

MR. EVANS: Your Honor, I wonder if perhaps when they come back we could have Ms. Mayfield -- she had indicated some question that perhaps should be brought up out of the presence of the other jurors.

THE COURT: Okay.

MR. EVANS: And we could do that after the recess.

THE COURT: All right, if you'll just hold then, Mr. Ball, the jurors outside. I know it's not very comfortable. I guess the easiest way to do it is, rather than come in and separate you in all the different jury rooms -- it shouldn't take that long -- but just have you wait outside the courtroom. Then Mr. Ball will show you in as soon as we're ready for you. Ms. Mayfield, you can come on in.

MR. HECK: Your Honor, I might suggest to the Court that as to the remainder of the jurors, perhaps 25 minutes would be better if they need to get a coke or something of that nature -- take that up in 20 minutes when we come back -- Ms. Mayfield.

THE COURT: All right, Ms. Mayfield might like a break too, gentlemen, so let's let her go ahead and take a break too. Let's make it 25 minutes. Be back in 25 minutes. And, Ms. Mayfield, if you'll be back in 20 minutes. Okay? Thank you. You are excused. Court will be in recess for 20 minutes.

(Whereupon, a recess was taken.)

THE COURT: General or Mr. Heck and Ms. Gothard, do you all want to question Ms. Mayfield?

BY MR. EVANS:

Q Ms. Mayfield, you'd indicated that you'd thought of something?

A Yes.

Q What?

A When you were talking, you were talking about the innocence, you know, you were talking about being innocent until proven beyond a reasonable doubt that he's guilty.

Q Yes, ma'am.

A Okay. Now, the question came in mind, when the situation first happened, I heard about it, he admitted that

he did it.

Q Uh-huh.

A And to me -- maybe I'm wrong, I don't know. But this is a feeling that I've been thinking about and I wanted to get it out. Maybe you could show me -- that if he's admitted that he's guilty, that he's done it, that he did do this, then I see that he's already -- he's not innocent, you know.

Q And you find it exceedingly difficult to set that aside?

A Yes, unless he has some circumstances that's going to, you know, say why this happened. If I can get that out of my mind. You understand what I'm trying to say?

Q Fully, ma'am. And that's one of the reasons we had individual voir dire, because as far as we know there's no one else on this jury that recalls what you just mentioned. And it obviously -- logic, everyday common sense makes the question you're asking a very good question. The only thing we can ask you is that knowing that, would you, having heard that -- that may or may not be true, but what you have heard -- the fact that you heard it, I will admit that's true, you heard that, that was put out in the newspapers or by radio or TV at some point in time.

A Yes.

Q Not accepting that as a fact though, could you -- do

you think you could set that aside, not bring it up in your mind and certainly not bring it up with the other jurors?

A No, I wouldn't dare do that.

Q All right. Can you set it aside from your mind?

A Considering that you said a person is innocent until proven guilty --

Q We have to prove him guilty.

A -- and then the circumstances or evidence that would be presented, then make my decision on what the witnesses and the Court said, I think I could.

Q All right. It's obvious --

A But I wanted to get it out.

Q It's obviously going to be exeedingly difficult -- let's start off with the guilt or innocence, not even think about punishment at this point. Having heard what you've heard --

A That's all I heard.

Q Okay. Can you set that aside and require that the state prove him guilty beyond a reasonable doubt without him putting any proof on at all?

A Yes.

Q You understand he doesn't have to put any proof on?

A Yes. I see what you're saying.

Q The truth of what you may have heard, the accuracy may or may not be accurate, so that's why -- one reason you

have to set it aside. Do you think you could do that?

A Yes, I think I could.

Q Now, let's go into the next thing. Suppose you've set that aside. We -- and there can't be any reservation in your mind, it's going to have to be a positive yes, I can do that. All right, can you?

A Yes.

Q All right. Let's go then into the penalty phase. Again, as I indicated with the other jurors, there is still no burden. Even though you found him guilty -- assuming you found him guilty beyond a reasonable doubt, it still doesn't make him have to prove anything. We still have to prove to you beyond a reasonable doubt that the death penalty is appropriate. And again you would have to -- by that point it doesn't -- it shouldn't matter to you that you heard this anyway because you've concluded, from all of the state's evidence, that he did do it. Would you have any problem -- and again there's no burden on him to prove anything in the penalty stage, ma'am. There may be things in the course of our proof, in proving guilt or innocence, that you might say, well, that might be a mitigating factor. You could consider that in the punishment stage, even though he didn't put any evidence on. The burden again is totally on the state. Now, if he chooses to put evidence on in either stage, you weigh it, you judge it, you decide if that's good evidence, if it's

true, the same way you judge our evidence, but there's no burden on him to do that. Do you understand?

A (No audible reply.)

Q And again it's going to have to be an absolute. It can't be maybe. You think again that in the penalty phase you will require us to prove to you beyond a reasonable doubt that the death penalty is appropriate aside from anything you've heard that may have been said or not said about the case outside of court. Do you think you can do that?

A (No audible reply.)

MR. EVANS: That's all of the questions I have.

THE COURT: Does the defense have any questions to ask Ms. Mayfield?

MR. HECK: Yes, sir.

VOIR DIRE

BY MR. HECK:

Q Ms. Mayfield, Mr. Evans and the Court, we certainly appreciate your honesty and candor. It's very commendable.

The only thing that I would ask you is you told Mr. Evans unequivocally that you can set that aside, and I have no question about that whatsoever, I believe you completely. However, knowing what you've heard, and let's assume we're in a sentencing phase of the case, would what you have heard, would that in any way affect your decision or your ability to listen to any proof in the sentencing phase of the trial, I

mean would it make you angry that you had this dilemma and then there's a finding of guilt and now you're at a sentencing phase -- would that have any effect or could you still set it to one side -- which I believe you can -- and listen to the proof?

A I can.

MR. HECK: We have no problems with this lady at all.

THE COURT: Okay. Thank you for bringing that to our attention, Ms. Mayfield.

Mr. Ball, would you show in the other jurors, please.

(Whereupon, the jurors returned to open court and the following proceedings were had in their presence:)

THE COURT: For those of you back in the courtroom, you do not have to take the same seats, you can sit anywhere you want to.

Let the record reflect that all of the jurors are present in the courtroom and the defendant is here and counsel for both sides are here.

General, you may resume your qualification of the jurors.

MR. EVANS: Your Honor, that's all the questions we have at this time.

THE COURT: Okay, Mr. Heck and Ms. Gothard.

MR. HECK: Thank you, Your Honor.

VOIR DIRE

BY MR. HECK:

Q Ladies and gentlemen, as you already know, my name is Bill Heck, and this is Karla Gothard, and that's Lee Hall.

I know that this process is extremely tedious.

THE COURT: Excuse me, Mr. Heck.

MR. HECK: Yes, sir.

THE COURT: A juror indicated that she could not hear.

MR. HECK: Oh, I'm sorry.

THE COURT: I think there's not a microphone there that amplifies, so you'll probably need to keep your voice up.

MR. HECK: All right.

BY MR. HECK (Continuing):

Q I realize and I know you realize that this process is extremely tedious, and at times it's enormously boring, and you sit for untold hours. What I'd like to say on behalf of everybody here, as the Court has already told you, we appreciate that. What we are about here is enormously serious, as I'm sure each of you are acutely aware. Although it's boring, although it's tiring, although it's tedious, it simply must be done, because what everyone is interested in here is a fair trial. A fair trial is critically important,

it's important to the law, it's important to Lee, it's important to the state, and most of all it's important to everyone of us in this courtroom because we are, we are the people, we are the people that the scholars talk about, that the writers write about, and that the singers sing about. We are the people. Anything but a fair trial, anything but the honest pursuit of justice corrupts it all, it corrupts each and every one of us. So although it gets tedious and tiring, it simply must be done. Questions must be asked that probe each and every one of you, that probe how you feel, probe how you think, and, yes, probe bias, perhaps bias that you aren't even aware that you may have or possess. There's bias in all of us in one direction or another. We prefer one color, a red jacket, a white jacket, a blue jacket, over a green or a brown jacket. We prefer shoes that are different styles, we prefer different style ties. We're biased in one direction or another. You can't go through life -- and I believe each of you will agree with me on this -- you can't go through life without developing these sorts of things.

What we're doing here is attempting -- is asking each and every one of you to probe your very souls to see if there is anything there that may in any way influence you and prevent you from being a fair and impartial juror that you not only want to be but that the law requires and that you would not have it any other way. And I believe each of you agree

with that, and I don't think I need to ask if someone disagrees.

In light of that, there are a lot of questions that need to be asked, need to be asked collectively of each of you, and need to be asked individually of you. Now, as some of you have been told and some of you haven't -- but I think all of you understand -- the purpose of this process, to see, to ask, to evaluate, is certainly not to embarrass anyone or single anyone out, to point a finger at them and say ah-ha, you have a bias, a bent in one direction or the other and therefore there's something about you that makes you less than deserving of being a juror, less than deserving of being a citizen. We're just making the inquiry that must of necessity be made.

Now, some of the things that we're talking about here, some of the things that we are interested -- all of us here are interested in, are to find out if there is that bent or predilection that could interfere with you rendering a fair and impartial verdict based upon the evidence that you hear from the stand here.

Now, I know myself that there are certain things about me that I simply -- you know, it's an admission on my part that I simply cannot control. I have thought of myself as you are now thinking of yourselves and orientations that you may or may not have. What I'm talking about is this: If

I were asked to be a juror on a case involving the sexual assault, mutilation, and murder of a young child, I can't do it. There's no way that I can do it. I can sit there and I can intellectually try to tell myself, look, I will set aside the facts in the case, I will set aside this, I will consider only the law, I will listen to the instructions of His Honor, I will realize that the statements of the lawyers are just statements, they're not proof, I will listen to what comes from that stand. But when I really get down to it, really down to it, deeply thinking about it, I simply cannot do it. I would do a disservice to the individual charged, I would do a disservice to my country, to my fellow citizens, and I would certainly do a disservice to myself. That's why, ladies and gentlemen, that's why questions have got to be asked. This is a tough set of facts. Only a fool would stand and tell you otherwise. You have common sense. Each of you have years of experience. You know, you know. Mr. Evans was talking about -- and I agree with him -- about not committing to any course of action based upon what's said by the attorneys or questions that are asked of you individually. I agree with that. But by the same token, I hope each of you realize -- and if you disagree with this, please let me know. But I hope each of you realize that the only way that potential bias can be probed is to ask the specific questions. It's not that you are to make a determination now. How can

you make a determination now? You don't know it all. I think virtually everyone here is familiar with this case in some small way. You've either seen something on television or you've heard a clip on the radio or you have heard or read something in a newspaper, you've seen a headline. That is not evidence, and I have no problem at all realizing that each of you -- and accepting the fact that you can set these things aside and direct your attention to that stand and listen to the proof. There's no problem there. We all know basically what the facts are in this case, and I have got to ask you specifically, in light of what the facts are, how you react to that. Some of you folks I asked that during the individual portion when we talked briefly, sometimes at length. I've got to ask, I have to probe. It's not to make anybody uncomfortable, it's not to be smart. It's simply that we must know. It's in all of our interest to know these things.

Now, again I am not in any way asking you to make any kind of commitment anymore than the state is. Just be fair. Is there anyone who has any reservation at this point in time about their ability to clear their mind, unclutter their mind of what they know up to this point and render a fair and impartial verdict?

Now, there are a lot of things that will go on during the course of the trial, a whole lot of things will go on during the course of the trial. His Honor has mentioned

very briefly that during the course of a trial there are objections that will be made to evidence. The reason the objections are made is not because I want to harrass the state or the state wants to harrass me. That's not the purpose of objections. We as attorneys are sworn under oath to uphold the law and to do everything we can to see that evidence, proper evidence is properly submitted before you, the ladies and gentlemen of the jury. In order to do that, we have to apply rules of evidence that have been developed over hundreds of years and evaluate and weigh what is being introduced. If there is the possibility that there is something being improperty introduced or a question about that evidence, we as attorneys have the obligation to you the people, to this court, and to the law, to make an objection. When an objection is registered, you will notice that the other attorney, the non-objecting attorney stands mute. The objection is made, the Court will then rule on the objection and either admit or not admit evidence or give instructions to all parties concerned as to what the Court regards as the law and how it applies to this particular piece of evidence. It's not for harrassment, ladies and gentlemen.

Additionally, as Mr. Evans alluded to, it's important to realize that we as individuals, all of us, have got our own personalities. And some parts of personalities may not be agreeable with another party. I myself sometimes

tend to get a little wrapped up in what I'm doing, I become a little verbose, I become a little bit too loud, I become a little bit too argumentative. That's the way things are, that's the way things are with everybody. As a consequence you feel compelled to ask people if they can set aside any bias towards me because of my own idiosyncrasies or some personality or character traits that you just find irritating as possible. I assume each of you can do that. I don't think there's going to be a problem with it. But you feel compelled to talk about these things, talk about all these things. The personal mannerisms tend to be important. And jurors traditionally typically sit in the jury box and sometimes the evidence is boring, sometimes its repetitious, and you concentrate your attention on other things around the courtroom, which is a normal thing to do. Sometimes you concentrate on mannerisms, but you can set that aside and not consider that, not consider how I am or anyone else is in this courtroom, and look to the proof. That's all we're interested in doing.

A lot of evidence is going to be presented during the course of this trial. And again I have to ask -- and I'm not asking to have each and every one of you make some kind of a committal. I don't want a committal, Lee doesn't want a committal. Lee wants a fair trial, the state wants a fair trial. One of the things that we're going to ask, or that I'm asking of you right now, is that during the course of this

trial, there will probably be, most probably be evidence submitted to you from this stand of a psychological-psychiatric nature. Now, what I'm asking you is not whether you're going to believe that evidence. That's up to you to decide individually when the time comes. What I'm asking you is do you have any -- any amongst you, do you have any kind of an orientation that says to you, that would interfere with your ability to listen and evaluate fairly, any kind of an orientation that simply says anything of a psychological or psychiatric nature is bunk, "I'm not going to listen to something like that, I'm going to look at that and I'm going to say this is nonsense, what do they know, it has no applicability, I just don't believe in it." Is there anybody amongst you who could not listen and fairly evaluate psychological or psychiatric testimony? Is there any amongst you that has a problem with that, that would cause you to discount that without ever having heard it?

Now, again each and every one of you will personally, individually evaluate the evidence that you hear from the stand. I know no one disagrees with that. It's an individual thing.

After the case is concluded, the Court will instruct you as to the law that's applicable, and you'll retire to the jury room. At that time, and only at that time you, as jurors, will sit down, you will first elect a forelady or a

foreman, and then you will begin your deliberations, and at that point everything that came from the stand here, every piece of evidence that's been presented to you will be evaluated and weighed. For example, some things that you will find yourself doing is dealing with credibility of witnesses, and the Judge is going to instruct you how you determine credibility. But you'll be in a position where you're going to have to say, well, this witness said "A" and this witness said "B," which is exactly a hundred and 80 degrees apart. Now, how do you reconcile that? And you must, and perhaps you can't. But one way to reconcile it is that you determine, from the charge of the Court as the guiding light, you determine that one of those witness' credibility has been impeached or successfully challenged. And that can be done in a number of ways, which the Court will enumerate for you prior to time of deliberation. I don't think anybody disagrees with the proposition that it's most advisable and extremely wise -- and that's why our system demands it -- that no one discuss the proof prior to the time that the jury is given the case and retires to the jury room to deliberate. I don't think anyone disagrees with that. And the reason is that if you do, you may -- you will not have heard all of the proof at that point. Someone may get an idea and the idea really is erroneous. What if the idea that you get is later challenged and shown to be incorrect? Well, you've already

gotten the ball rolling in one direction. Again, it compromises and interfers with a fair trial, why we're here.

Now, during the course of the trial, other evidence is going to be presented to you, and it's some of this other evidence that I want to talk to you about, again bearing in mind all I'm talking to you about is evidence that may very well be presented for your consideration and for you to digest. I am not asking, Lee is not asking that you make any kind of a commitment, any kind of a judgment, and we're not trying to bend you in one way or the other or sway you towards one side or the other.

The facts in this case, ladies and gentlemen, are atrocious. The manner in which Traci Crozier died is brutal, it is brutal. I believe that you will hear evidence from the stand from medical personnel who cared for her following the fire that is going to grab your attention. When she was burned -- okay -- when she was burned, we're probably talking approximately 124 pounds. At the time of death, approximately 35, 36, 34 hours later, we have a weight gain of over a hundred pounds.

MR. EVANS: Your Honor, I don't know that this is an appropriate preface to a question. If he could just ask a question rather than going -- attempting to detail, at this point in time, personal injuries.

THE COURT: I will sustain the objection as to the

specific detail, not as to the subject matter, in terms of asking the question generally. But I will sustain the objection as to specific detail at this particular point, at this particular time. I don't think the details are necessary, but I will allow you to ask the question.

MR. HECK: Without the details?

THE COURT: Without going into specific details, and suspecting what the proof will show.

MR. HECK: Yes, Your Honor.

BY MR. HECK:

Q As I indicated to you, the facts are rough. The condition of the lady's body and how this happened, the period of time, the pain, the period of consciousness following the injury, all of these things are very real. And, as I said, only a fool could turn in the other direction and say, well, that's not something that may or may not influence somebody's ability to render a fair and impartial verdict. But what you have to do is you have to set that to one side. You cannot be swayed, you cannot be moved by sympathy, because over the years it's been found that sympathy --

MR. EVANS: Your Honor, I'm going to -- I'm not objecting to sympathy, but certainly the jury can consider the extent, the nature of the harm brought to the victim in determining things such as premeditation. Those are going to be factors for the jury to consider. I'm not asking for

sympathy, but I think that when he says they have to set that aside, that's misleading.

MR. HECK: Your Honor, may we approach?

THE COURT: All right.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. HECK: Your Honor, unless I have -- unless I misunderstood the guidance the Court provided during individual voir dire, I was told that at a later time I could go into the specifics of the injury, I could go into these kinds of things, and that's what I'm doing now in this particular instance. What I'm saying to the jury is that these things have to be set aside, they can't appeal to their passion. Now, the evidentiary value is something else. I'm not addressing that.

THE COURT: Are you saying in the proof the condition of the body is not an evidentiary value?

MR. HECK: No, no, no, I'm not saying that, I'm just saying they can consider it for evidentiary purposes, but they can't allow this to appeal to their sympathy, they can't allow their passion to interfere with it, they must view that evidence objectively, and from a distance, as it were, and later weigh and evaluate the value of that evidence. I'm not

saying it has no evidentiary value.

THE COURT: Well, you're intruding on dangerous ground, you're intruding in there where you could easily mislead the jury, because, as the Attorney General said, just to say you can disregard this is not true. They can't disregard it. It's evidence in the case and they're to weigh it, going as to premeditation.

MR. HECK: Your Honor, I was not allowed to finish. When I was talking to the jury, Mr. Evans objected to what I said right then, but that's where I was going with that.

MR. EVANS: He said they had to set it aside.

THE COURT: Well, that's what it sounded like to me, that they had to set it aside, and they don't have to set it aside.

MR. HECK: Well, it's the passion, the prejudice that I'm talking about.

THE COURT: And as to the other thing -- he's going into specifics. I am not allowing him to go into every specific detail of the condition of the body at this time. I don't think it's necessary. I think you can accomplish this sort of thing by doing it in general terms. You can talk about it, as you've done, in general terms, and I think it's sufficient to ask -- to get around to ask the question that I think you're going to ask. But I don't think it's necessary to delve into specifics. What I was talking about letting you

do, when we got to the jury, is not go into specific details of the case as far as things that you can talk about, but as far as going into mitigating and aggravating circumstances, which you tried to do with the individuals, and I told you I would allow you to do that.

MR. HECK: Well, when I get to the aggravating and mitigating circumstances -- Your Honor, it's the position of the defense that we ought to be allowed to make an inquiry as to the specific condition of the body. I know what evidence is going to be introduced by the state, I know the condition of the body, I know what's coming, and I think it's important in order at this point to determine whether or not any bias exists or will exist based upon the condition of the body, that I be allowed to ask that specific -- those specifics.

THE COURT: I think you could ask the same question and accomplish the same purpose generally without going into specific detail.

MR. HECK: Well, Your Honor, not meaning to argue with the Court, but I know that the state is -- I know the state is going to introduce into evidence -- and they're not going to be talking in general terms, they're going to be talking in terms of specifics, and that's why I would just like to be able to ask that. But obviously whatever the ruling of the Court is, I certainly will abide by it.

THE COURT: Well, how do you think it's going to be

any different to the jury if you ask the question in general terms of the -- I guess the horror of this crime, as to what happened, and if that would affect their sympathy, rather than ask them about a specific detail -- how much the body weighed -- how is that going to be any different?

MR. HECK: Because the evidence that's going to come in is not going to be general. The evidence that the state will introduce will be specific. Photographs have been submitted to the Court which, of course, have been suppressed at this point, based upon their relevance materiality. But the evidence is going to be specific, and I think there are specific -- the specific aspects are what will weigh heavily on the mind of a juror if, for example, if I may, the fact that she weighed as much as she weighed at the moment of death meant that the skin was put in such a posture that they had to do incisions on both arms and both legs.

MR. EVANS: There's no point in going into that in front of jury.

THE COURT: I don't know if --

MR. HECK: May I finish? May I finish?

That's the proof that they're going to have. The fact that she was burned horribly is one thing. It's a generality. But the specifics are what they're going to hear, and it may be those specifics that would tip the juror -- a juror one way or the other. That's why I wanted to ask.

THE COURT: You can ask them about the fact that she was burned horribly -- you can ask them about the fact, if this is limited in specific detail with the medical examiner. But I don't see any sense into going into that specific detail at this time.

MR. HECK: Okay.

THE COURT: The same question can be asked that they are going to be told, specifically -- (indiscernible). And I think the same purpose will be accomplished by it rather than at this time go into minute detail as to what happened. I don't think that's necessary. Sustain the objection to --

MR. EVANS: And the state is further objecting as to saying to the jury that they must set that aside --

THE COURT: (Indiscernible). That needs to be clarified.

MR. EVANS: Because in the punishment aspect of it, that's exactly what one of the aggravating circumstances deals with.

THE COURT: I'm not understanding the --

MR. HECK: Well, Your Honor, what I propose to do with that is I propose to go further with that and to distinguish that that we're talking about. They cannot be swayed by passion, they can't be swayed by sympathy. This evidence will be submitted to them and it will have evidentiary value, but it's only the evidentiary value that they can consider,

they cannot add or detract to its evidentiary value because they find -- because it appeals to their sympathy, for example.

THE COURT: All right, then I guess what I'm doing is I'm sustaining the objection not to the subject matter of the question but to the form of the question, because I think the form of the question is misleading to the extent that they can set it aside. If you want to rephrase it in those terms, I'll allow that.

MR. HECK: Okay.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Go ahead, Mr. Heck.

MR. HECK: Thank you, Your Honor.

BY MR. HECK (Continuing):

Q That's the kind of thing that will be going on during the entire course of the trial. Sometimes there will be conferences at the bench. Sometimes the jury will be asked to leave, and there will be conferences without the jury being present.

In any event, back to where I was and what I was talking about. I was talking about being swayed by sympathy. You cannot be swayed by sympathy. And I think -- in fact, I

know that at the point in time wherein the Court instructs you as to the law, I think the Court is going to be very specific in talking about precisely that, and I think that what you will hear right before you go in to conduct your deliberations, the Judge will talk about the jury verdict and what he will tell you is that you can have no prejudice or sympathy or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality.

Now, when you look at the specific facts in the case, when you look at the condition of her following death, the Court will tell you that there is probative value to her condition, and the Court will explain to you what probative value is. But what I'm saying to you is, you look at all evidence as the evidence is, but you each must be aware -- and I hope that you are, I think that you are -- that you cannot allow sympathy to sway how you view that evidence or the weight you give to that evidence. And that's all I'm asking you to do and that's all Lee is asking you to do and that's all the state is asking you to do.

Now, another thing that I need to ask about -- and I'm not asking for a response right now. Of course, I'm addressing this only to you ladies and gentlemen here. One of the things that I'm curious about -- and if there is something in your background or someone close to you in that

background that you are aware of that would in any way possibly affect you, I'd ask you just to raise your hand, and we'll take it up at a later time. That has to do with domestic violence. Has anyone on this prospective jury had any kind of occasion or experience with domestic violence, either with a spouse, a girlfriend, a boyfriend, or anything of that nature that would in any way possibly affect or influence you to the point where it would maybe compromise you to be able to render a fair and impartial verdict? If there's anyone like that, please let me know by just showing a hand and we can talk about that at some other time. Okay.

Now, as you know, the trial -- there's a two-part trial. What I'm -- and the part that I'm going to address right now is sentencing. And there's been some talk about sentencing when you were each individually up here and we were questioning you one at a time. Do each of you realize and understand and accept the proposition that the state of Tennessee has what's called a two-tiered burden of proof in sentencing hearings?

You've heard a lot about aggravating circumstances and mitigating circumstances. The state is relying on three aggravating circumstances in this particular case, and the Judge will read those to you and define those to you. I think what you're going to hear from the Court is in a sentencing hearing that first of all the state must establish, must prove

beyond a reasonable doubt the existence of one or more aggravating factor. If the state does that, they're halfway there. The second tier of their burden of proof is that they must then show and prove beyond a reasonable doubt that the aggravating factor or factors outweighs any mitigating factor or factors that you will find. So it's a two-step process. Do you understand that? I mean did I make myself -- the the gravamen, the point in this is the standard of reasonable doubt. Reasonable doubt is the standard in all criminal cases, whether it be a trespass case or it be a murder in the first degree case. From the lowest to the highest, the standard is reasonable doubt.

Now, some of you have sat on juries before, some civil, some criminal. In a civil case you have a different standard, a different burden of proof. If I hit you with my car and you sue me for money damages and you take me into a civil court -- not a criminal court but a civil court -- it's preponderance of the evidence -- 51 percent in your direction and you win, you will recover. In a criminal case, because what we're dealing with is so essential to our very liberty, the standards are infinitely higher. It's proof beyond a reasonable doubt. The Court will define reasonable doubt to you, and I believe what the Court will say is this: 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 as to the certainty of guilt. Something says no.

The Court will go on to say that reasonable doubt does not mean any capricious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense. The state must prove beyond a reasonable doubt. So there's a double reasonable doubt standard in a sentencing hearing.

Now, as I --

MR. EVANS: Your Honor, I'm going to object to a double reasonable doubt.

MR. HECK: One for each tier, Your Honor, as I just explained --

MR. EVANS: And there's nothing about tiers. There's not a --

THE COURT: I'll sustain the objection to the form of the question.

Q Do you understand that first the state must prove beyond a reasonable doubt the existence of a mitigating or mitigating factors?

If they do that -- again the standard of reasonable doubt. If they do that, they then must prove that that aggravating factor or aggravating factors outweighs beyond a

reasonable doubt any factor or factors presented to you in mitigation.

Now, with reference to mitigating factors, the law says -- and I think the Court will instruct you that virtually anything can be proved, if it is proved, as a mitigating factor. As Mr. Evans correctly told you, if from this stand the state puts on proof that is a mitigating factor, that factor can be considered by you even though Lee and Karla and I did not put that before you. It can be a mitigating factor, and they can introduce that mitigating factor. The question that I'm asking you is do any of you disagree with the proposition that you should be able to consider mitigating factors in arriving at a verdict determining whether the sentence should be death by electrocution or life in the penitentiary. Does anybody disagree with that?

As you have already been told in the initial inquiry by Mr. Evans, everything that you hear from myself, from Karla, everything you hear from Mr. Cox and Mr. Evans, every argument, what we have to say is not proof, it's not proof. The way a trial normally goes for those of you who haven't been a participant in a trial before or sat as a juror in one before, it's not quite like TV. The structure of a trial is that it begins with the selection of a jury obviously. Once a jury is impaneled, it then proceeds. At that point the indictment or indictments are read, and the defendant responds

to those indictments. The next step is that you have what they call opening arguments. The state, since they have the burden of proof, addresses you first. Since we have no burden of proof, we address you second. That, ladies and gentlemen, is not evidence, it's not evidence. What that will be, the opening statement, the opening argument will be is precisely that, a statement or an argument. It's to act as a road map, something of a guide, from each of the two sides as to what they think will be shown to you in evidence, what they think they will show to you in evidence, and what they think you may conclude from all of this evidence. It's a map, it's a guide. It is not evidence. You listen, take it for what it's worth, and use it as that guide.

The proof is then presented. Obviously, since the state has the burden of proof, the state goes first. The state puts on their proof. They put on all their proof, the witnesses testify. We're given an opportunity to examine those witnesses to bring out all the truth. After the state has concluded their proof, the baton then passes to Lee and to Karla and I. We then present our proof.

After our proof is concluded, we then get to a stage called final argument. Again, since the State of Tennessee has the burden of proof --

MR. EVANS: Your Honor, I'm going to have to object. I don't believe this lecture is appropriate for voir dire.

I don't mind him asking questions and prefacing questions, but I think detailing the --

THE COURT: I'll sustain the objection. Go ahead and ask the questions, Mr. Heck. You will have an opportunity to make an opening statement and, of course, a final argument.

MR. HECK: I understand, Your Honor.

Q Anyway, that's a thumbnail sketch of how a trial goes.

One of the things that I believe, in fact I know you're going to hear from the stand is that there will be testimony and evidence offered regarding who Lee Hall is, his background, who he is, and what we believe makes him function. Can you listen to that proof and not discount any evidence or any proof regarding background of an individual, can you listen to that kind of stuff and weigh it and give it the weight that it deserves in your opinion?

One of the areas of the areas that will be delved into by us during the course of the trial is the relationship that existed between Traci Crozier, the victim in this case, and Leroy Hall, the defendant. We'll offer testimony in that area. The question that I am asking you is can you listen fairly to that evidence and testimony and give it the weight that you feel that it deserves?

Now, during the course of the trial and during the course of discussing the relationship that you'll be shown

about the six year living together arrangement between Mr. Hall and Ms. Crozier, things will come out, and what I'm talking about is this, what I want you to understand is this. Any time you explore a relationship, everything is not positive, and I think we can all agree with that as a general proposition. What I'm asking you to consider, what I'm asking you to understand and evaluate is this: If things come out during the course of the trial that are not complimentary to Traci Crozier, will you understand that is not for the purpose of attacking this victim?

MR. EVANS: We would object to that. I think that's argument, that is total argument.

THE COURT: Sustain.

MR. HECK: Your Honor, may we approach? In fact, can we have a jury-out hearing?

THE COURT: You may approach the bench.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

THE COURT: What do you want to say, Mr. Heck?

MR. HECK: Your Honor, what I'm trying to do is I'm trying to educate this jury about what's going on with the proof in this case. I want them to understand that this is not a situation where you're attacking the victim for the sake

of attacking the victim, so it would appear that she deserved what she got. I'm trying to separate that out. All we're doing is exploring the relationship.

THE COURT: Mr. Heck, that's fine to do it in argument. This is voir dire. I'm waiting for the questions to be asked. We're here to select a jury and ask them questions to find out if they're qualified, not to lecture them on the case. The Court will tell them the order of events of the case. If you want to say anything about why you're asking a certain witness a question, you can do that in your argument. But basically it's arguing to this jury. I want some questions to be asked.

MR. HECK: Are we close to the noon recess, Your Honor? I'll restructure what I've done.

THE COURT: Well, I didn't plan to stop at this time, I plan to go a little longer. But a lot of the things you're saying are argument in your opening statement and I'll allow it. But at this time, ask the jury some questions and do not argue the case.

MR. HECK: Well, all I'm trying to do is probe their ability to be fair and impartial.

THE COURT: Well, you can do that with questions, you understand that, you can do that with questions. They can be educated -- that's the purpose of opening statement, is to educate them about the case, and what your intent is and what

you're planning to do.

MR. HECK: So is voir dire, too, Your Honor.

THE COURT: No, it isn't, it's to find out whether they're qualified to sit on the case.

MR. HECK: I understand that.

THE COURT: Not to educate them, but to find out if they're qualified to sit, if they're prejudiced, if there are any undue influences that would keep them from sitting. So let's get to the point where we're asking some questions. I'll let you state those things in opening statement. That's fine at the appropriate time.

MR. HECK: Okay.

THE COURT: And I'm not cutting you off from mentioning them, only reserving them at the proper time, which is the argument in opening statement.

MR. HECK: Okay, that's fine. Could I talk to Ms. Gothard for a moment?

THE COURT: Sure.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

BY MR. HECK (Continuing:)

Q There's some other things that I want to ask you about, too. By the way, ladies and gentlemen, I have a

problem with blood pressure, so I sweat pretty freely.

A couple other things that I wanted to ask you with reference to the sentencing hearing itself, and with the proof in general.

Are there any amongst you that have an objection to -- a strong objection to cause you individual problems to drinking, the consumption of alochol or the use of drugs -- just drugs generally, not specifically?

I believe that at the appropriate time the Court will instruct you, prior to the time you retire for your deliberation, about some things, and I wanted to ask you about this in particular to see if you disagreed with it. I think the Court will tell you that among other things that you can take with you to the jury room -- you take the jury charge, of course -- is that you can take your God given everyday common sense, your daily experiences. Does anybody disagree with that and thinks that you shouldn't be able to use your everyday common sense experiences in evaluating things that you're asked to evaluate?

Is there anything in the minds of any of you at this point in time that you feel could influence or interfere with your ability to render a fair and impartial verdict in this case, or your ability to deliberate with your other jurors open mindedly and examine and evaluate and weigh the proof after it has been presented to you?

That's all. Thank you, Your Honor.

THE COURT: I'll accept your challenges when ready.

Members of the jury, I will tell you at this time while counsel is doing this, during the course of the trial any remarks or statements which the Court makes during the course of the trial in no way is to indicate to you any opinion as to what the Court thinks your verdict should be or as to any opinion the Court has about the facts.

Members of the jury, at any time during the course of the trial if any remarks are made which appear to be -- that might be humorous or in a way of levity, it does not mean -- the Court does not mean to indicate to you or undermine in any way the seriousness of this case for both sides.

Counsel approach the bench.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

THE COURT: I don't know if you're aware, but at this time the excuses will be for the first 15.

MR. EVANS: I need to recalculate.

THE COURT: Okay.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing

of the jury:)

MR. EVANS: Approach again?

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. EVANS: Is that as they're seated, or is it one through --?

THE COURT: Well, it's those 14 in the jury box and --

MR. EVANS: Okay. As they're sitting in the jury box.

MS. GOTHARD: There's one in an extra chair beside --

THE COURT: Yes, there's no particular order, just all 14 in the jury box will be subject to challenge at this time.

MR. HECK: The Court is not -- is going to allow a back strike if necessary?

THE COURT: Oh, yes, yes, sure.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Okay, for purposes of this trial the

Court will excuse No. 15, Ms. Edith Lewis; No. 10, Mr. Harold Ragland; and No. 11, Ms. Hazel Baskin. You all are excused. I want to thank you very much for your service and your patience during the last two days. You are excused for the day. If you have anything in the jury room, if you brought it, you may go back and get that. Call the call-in number tonight after 5:00 to find out if you're needed tomorrow. Thank you for your service.

Okay, let's see, No. 20, Ms. Poteet, will you take one of those vacant chairs in the jury box, please; and, Mr. Brackett, if you'll take one of the other chairs in the jury box; and, Ms. Spratling, if you'll take one of those vacant chairs in the jury box, please.

Are there any further questions from the state?

MR. EVANS: Not at this time.

THE COURT: Any further questions from the defense?

MS. GOTHARD: Just a moment, please, Your Honor.

THE COURT: For the purposes of this trial, the Court will excuse Juror No. 20, Ms. Edith Poteet, and Juror No. 30, Mr. Darrell Brackett. You all are excused for the day. Call the call-in number tonight after 5:00 to find out if you're needed for tomorrow. Thank you very much for your service. If you have anything in the jury room, Officer Hamrick will take you there to get it.

Juror No. 23, Mr. Overton, will you take one of

those vacant chairs, please; and, Juror No. 29, Ms. Byrd, will you take the other vacant chair.

Are there any further questions from the state?

MR. EVANS: One minute, please.

VOIR DIRE

BY MR. EVANS:

Q Mr. Ketchum, Mr. Heck mentioned there may be psychological testimony. Obviously in your form that I looked at, I guess two days ago, you've had considerable education in that area or field?

A Yes, sir.

Q And without having it at my fingertip, do you have a degree in psychology?

A Yes, sir.

Q Have you ever actively practiced or is your current employment in fact related to the practice of psychology?

A No, it's not.

Q You currently work for Astec Industries?

A Yes, I do.

Q And what is the nature of your job with them?

A I assemble technical manuals for the process equipment that we build.

Q Did you ever practice psychology as far as counseling in any --

A No, in the state of California you can't practice

without a PhD. I worked in a mental hospital for four years, and worked as a primary care giver, but I wouldn't say that I practiced psychology.

Q I would assume as a result of your education you're familiar with what is know as a DSM 3 or DSM, Diagnostical and Statistical Manual of Mental Disorders?

A The DSM 3 came after --

Q After you --?

A Yeah. I was familiar with the DSM 2.

Q And in connection with that, would you have had any study or education or personal experience with diagnosis such as the borderline personality disorder and another diagnosis as an antisocial personality disorder?

A Yes, I'm familiar with that.

Q I guess probably the reservation, if in fact psychological testimony comes out, the obvious reservation is that neither side, I don't believe, would want what may well be in essence an expert witness in evaluating that testimony, where that juror might possibly be looked upon by the other jurors as a person more accustomed or an expert in a particular area of testimony such as psychology. A similar problem when I served on the jury obviously -- I was an attorney and I know what's going to happen. I can't see but what it would help to happen that people are going to turn to you as possibly a source of information. As Mr. Heck indicated, you're entitled

to take your common everyday experiences -- in fact, that's why we have a jury -- into the jury room with you. Do you think, sir, that you would be able to refrain from -- and I'm not trying to -- I think you can see that I'm not trying to embarrass you or get you angry -- refrain from becoming possibly an expert witness in the jury room with respect -- if there is -- now, really we've got a lot of ifs -- if there is psychological testimony -- I expect there will be honestly. How do you see that as posing any sort of problem?

A I don't see it as a problem. My current field of study is in industrial organizational psychology, which is more toward management and personnel kinds of work. I'm not interested in clinical psychology per se. My dealings with people were well over ten years ago. I haven't pursued that as a career.

Q And your dealings with -- I think you said you worked in a -- as a care giver or --

A Primary care giver for the -- it was the City-County Hospital in San Diego. It was a teaching psychiatric hospital.

Q Was it necessary that the people you would have had contact with, in other words, the patients, would they have necessarily been suffering from a mental illness or could they have just had emotional problems?

A It was a locked facility, so they would have had to

have significant problems to have been in the facility itself. I didn't make diagnoses of people. I did do primary -- I did do preliminary intakes, but I didn't make any diagnoses.

Q Did you come in contact either through that occupation or through your general education training with individuals who were charged with crimes, crimes of violence?

A No, I didn't.

Q I believe that will be all. Thank you, sir.

THE COURT: Does the defense have any further questions?

MS. GOTHARD: No, Your Honor, not at this time.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse No. 13, Ms. Bonnie Scott, and No. 4, Mr. Joseph Ketchum. You all are excused for the day. Thank you very much for your service. Call the call-in number tonight after 5:00 to find out if you're needed tomorrow.

At this point in time it's almost a quarter till 1:00. We need to stop for the noon recess. Let's say be back in the courtroom at 2:00 o'clock ready to proceed.

Remember the cautionary instructions that I gave you earlier. All of you potential jurors that are in the court-room will need to come back, and those of you who are in the jury box and in front of the jury box, you'll need to come back. And we'll resume the jury selection after lunch.

Do not discuss this case with one another or anyone else outside the jury, do not form an opinion as to the guilt or innocence of Mr. Hall, do not speculate about the case, do not read, listen to or view any news reports concerning the case while you're at lunch, do not allow anything but the law and the evidence in this case to influence your verdict. With those things in mind, you are excused. Be back in the courtroom at 2:00 p.m.

(Whereupon, the jurors retired from open court and the following proceedings were had out of their presence:)

THE COURT: Court will be in recess until 2:00 p.m.

(Whereupon, a recess was taken for the lunch hour.)

(Whereupon, the jurors returned to open court and the following proceedings were had in their presence:)

THE COURT: Let the record reflect that all the jurors are present in the courtroom, the defendant is here, and counsel for both sides are here.

Ms. Mayfield, will you take a seat in the jury box, please, and, Mr. Carson, will you take one of those empty chairs.

Will counsel approach the bench a moment.

(Whereupon, a bench conference was held

on the record in the presence of the jurors but out of the hearing of the jurors and the following proceedings were had:)

THE COURT: According to my records, the next juror would be No. 32, Mr. Edward Harris. Is that with you all?

MS. GOTHARD: Yes, sir.

THE COURT: Okay, I just wanted to make sure we all agree.

MR. HECK: Yes, sir.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

BY THE COURT:

Q Okay, as I call your number would you take a seat in front of the jury box beginning in the chair to the left as you're facing the jury box. Juror No. 32, Mr. Edward D. Harris; Juror No. 33, Mr. Dana M. Harding; Juror No. 37, Ms. Darlene Thomas; Juror No. 38, Jeff Bolus; Juror No. 39, Mark Davis; Juror No. 40, Mr. Charles Webb; and Juror No. 41, Darla G. Haggard.

Okay, for those of you whose numbers I just called out, did you hear the questions that were asked earlier either by the Court or by the attorneys for both sides?

Would your answers be any different or is there

anything about those particular questions that would apply to you or affect you?

Yes, sir.

A A couple of things, just a DUI, had a DUI case experience in my family.

Q Okay.

A Not saying that that would taint my judgment in this case, but I just wanted you to know it.

Q The attorneys may want to ask you more about that. Anything else? Yes, ma'am.

A I've had a DUI.

Q Okay. The attorneys may want to ask you more about that. Would that affect your ability to sit on this case?

A No, sir.

Q Anyone else?

Do any of you, ladies and gentlemen, know any reason why you cannot listen to the evidence, apply it to the law, and upon those two things and only those two things, arrive at a verdict that would be fair and impartial to both the defense and the state?

And I'd also ask not only you all sitting in front of the jury box but those in the jury box and those sitting out in the courtroom, did anything happen during the noon recess that would have any influence on your verdict, that

would affect your thinking one way or the other, anything at all happen?

Okay, fine. I hope not. But I wanted to ask that question just for the record to make sure.

General, you may qualify for the state.

VOIR DIRE

BY MR. EVANS:

Q Mr. Webb, you indicated in your form you're retired, sir?

A Yes.

Q And what did you do prior to retiring?

A I worked for Du Pont.

Q And you also indicated you had prior jury service?

A Yes, sir.

Q And you probably said on your form, but how long ago was that?

A Grand jury approximately six years ago, maybe seven.

Q Mr. Harris, you know Dale Thomas?

A Yes, sir.

Q Did you meet Dale when he worked here in Chattanooga as a officer or did you get to know him after he went with the GBI?

A I knew him prior to that time. I met him through our church affiliation.

Q I'm not following up with questions such as, and

more about, would that affect your ability. If you'd just let me know, if you think it would affect your ability, and I think both sides would want to know, just like Mr. Harding and Ms. Thomas, if there were things you think perhaps we should know about, even if you did put them on your form, if it would make you feel more comfortable with us passing on you as jurors.

Mr. Harding, you indicated on your form, and I know personally the experience you had. I don't believe, if I recall correctly, that either myself or Mr. Cox was involved in the prosecution of that case; is that correct?

A That's correct.

Q And I'll not follow up on -- would it bother you -- I assume from all the questions, not only the indication that you gave on individual voir dire, but just from what you've indicated this morning -- this afternoon -- do you feel competent sitting on this case?

A (No audible reply.)

MR. EVANS: One minue, please.

That's all.

THE COURT: Mr. Heck or Ms. Gothard.

MS. GOTHARD: Thank you, Your Honor.

VOIR DIRE

BY MS. GOTHARD:

Q Ladies and gentlemen, I have just a few questions to

ask of you. To begin with, I believe Mr. Carson and Ms. Byrd and Mr. Overton, several other people have served on juries before; is that correct?

All right. Mr. Carson, let me just ask you, was a verdict reached in the case you sat on?

A Yes, a verdict was reached. I served as an alternate, I didn't have anything to do with --

Q All right. Was that a criminal case or a civil case?

A Criminal case.

Q And, Ms. Byrd, how about you, did you sit on a criminal case or a civil case?

A Criminal, criminal.

Q All right. Were you by any chance the fore-person?

A Yes, I was.

Q Okay. Mr. Overton.

A Yes, ma'am.

Q Did you sit on a criminal case or civil case?

A Criminal.

Q And was a verdict reached in that case?

A Yes, it was.

Q Okay. Were you the foreman?

A No, I was not.

Q And, Mr. Webb, you said that you'd sat on the grand jury before. Have you sat on a criminal jury or a civil jury,

as well?

A Yes, ma'am, approximately 20, 25 years ago.

Q All right. Do you recall whether it was -- excuse me -- criminal or civil, or did you have both?

A Both.

Q That's all I have listed. Is there anybody else who has had jury duty before?

Yes, sir, Mr. Bolus.

A Yes, ma'am, I sat.

Q Was that criminal or civil?

A Criminal.

Q All right. About how long ago was that, sir?

A 1982, I believe.

Q Okay. Did the jury reach a verdict in the case?

A They did.

Q Were you the foreman?

A No.

Q And, Mr. Webb, I didn't ask you. Were you ever the foreman, sir?

A No, ma'am.

Q Mr. Webb, let me ask you, since you've had experience on both criminal juries and civil juries. You heard Mr. Heck earlier today talk about the difference in the burden of proof. Do you understand that?

A (No audible reply.)

Q I'm sure you've heard instruction on both criminal and civil juries about that. Essentially the burden of proof, what we're talking about, is who has to go forward and present proof, and how much proof they have to show basically for there to be a verdict rendered. And, sir, I'm sure that you understand that there's a difference in a criminal case and a civil case. Primarily in civil cases we're dealing with money and in criminal cases we're dealing with someone's liberty basically.

If I could for the rest of you just talk for just a few minutes about the burden of proof and what that means. Again, the burden of proof is what -- which side must present evidence, to begin with, which side has the burden of showing whether -- actually what they're asking for in the case. In a criminal case, it is the prosecution who must demonstrate beyond a reasonable doubt that a crime was committed, and that the person who is accused is the one who committed the crime. And when we talk about the burden of proof, the legal terms that we use are in a civil case the preponderance of the evidence, and in a criminal case we talk about reasonable doubt and guilt beyond a reasonable doubt. Now, when we talk about preponderance of the evidence, let me just demonstrate for a few minutes what we're talking about. If you can, vision that my hands and my body represent the scales of justice. In a civil case you start out with both sides equal.

The person who is suing, the person who is being sued, they start out equal. The person who is suing tries to place evidence on their side to tip the scales in their favor. The person who is being sued can present evidence on their side to tip it back or tip it in their favor. And what you do, after you've heard all the evidence, is you weigh it, and you weigh which side tipped the scales in their favor. And it just has to be a bare tipping, and the side that tips the scales in their favor by a preponderance of the evidence -- means just a little bit on either side -- wins.

In a criminal case we start out differently. The scales of justice start out being tipped in the accused person's favor. That's called the presumption of innocence. And the state must be the ones to go forward to put evidence on their side, and they not just have to balance the scale or slightly tip it, but they have to prove it beyond a reasonable doubt, a much greater proportion of the evidence. Each of you understand that?

All right. And when we talk about reasonable doubt, the Judge will instruct you about what reasonable doubt is, and one of the things that he will tell you is that you must be convinced to a moral certainty. That's what reasonable doubt means -- to a moral certainty, in order to render a verdict. And in a case in which the state is seeking the death penalty, that burden stays with the state in both phases

of the trial. Do each of you understand that?

Now, let me talk for just a few minutes about the sentencing phase. I want you to assume for a minute in a death penalty case, in a capital case, if the person -- if it has been demonstrated that they're guilty beyond a reasonable doubt, we go into the sentencing phase. And during the sentencing phase, the state again must tip the scales beyond a reasonable doubt to show that the death penalty would be the appropriate punishment. And in order to do that, you're not, as we've said, just told to go in the back and make up your mind. You're given instructions prior to doing that. And in those instructions, the Judge will tell you what the law is in the state of Tennessee regarding the death penalty. And in the code there is a section that's called sentencing for first degree murder and it sets out the factors that you can look at, and the first thing that it says is, it says, "No death penalty shall be imposed unless there is unanimous finding, finding by each juror, that the state has proven beyond a reasonable doubt the existence of an aggravating factor."

MR. EVANS: Your Honor, excuse me. I'm going to have to interpose an objection here. This sounds like more of an educational thing than really questions.

MS. GOTHARD: I'm just trying to make sure they understand the process, Your Honor. I'm going to talk about specific -- aggravating and mitigating factors.

THE COURT: All right, I'll overrule the objection. That's what I thought you intended to do, so I will at this time overrule the objection.

MS. GOTHARD: Thank you, Your Honor.

BY MS. GOTHARD (Continuing):

Q Now, the aggravating factors are set out, the classification of what is an aggravating factor is set out in the statute, and the Judge will instruct you as far as what that is. Do each of you understand that?

You're not just left in a vacuum or a void in terms of what shall I think is aggravating and what shall I think is mitigating. The Judge will instruct you about that. Do each of you understand that?

And the aggravating factors are set out, and there are ten of them specified in the statute, and it tells you that if you find beyond a reasonable doubt that one of these circumstances exist, you can consider that an aggravating factor. And, as we said, an aggravating factor are the things -- you must find that in order to return a verdict of death. Do you understand that?

All right. Now, these aggravating factors are specific. You cannot make up another aggravating factor. It has to be what is in the statute.

Now, in addition, the statute says that in arriving at the punishment, the jury shall consider any mitigating

circumstances. And so you have to look beyond -- you can't just pick out aggravating factors. It says you shall consider mitigating factors as well. Mitigating factors are things which point toward life imprisonment as the appropriate punishment, and these are listed as well, some of them are listed, because the statute says specifically, we're listing nine things, but it says mitigating factors are not limited to this. So in this instance you can consider anything that the evidence shows in mitigation, if you feel that that is something that lessens the culpability, the responsibliity of the accused.

Ms. Ladd, are you following me at this point, do you understand that?

A (No audible reply.)

Q All right. And I want to talk to you for just a moment about some things and see what your feelings are and your understanding is about this.

Ms. Tallant, may I ask you a few questions for a moment?

A (No audible reply.)

Q All right. The statute says that one of the things that you shall consider in mitigation can be the youth or the advanced age of the defendant at the time of the crime. Ma'am, in reaching a decision, what I want to ask you is -- as I've told you, the statute says that you shall consider that.

Now, what --

THE COURT: Ms. Gothard -- would counsel approach the bench, please.

MS. GOTHARD: Yes, Your Honor.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

THE COURT: Let me ask this question: Are you using that as an example?

MS. GOTHARD: As an example, yes, sir.

THE COURT: Well, you're not telling them that that's what -- (indiscernible).

MS. GOTHARD: No, no. I'll clear that up.

THE COURT: Okay. Just as an example.

MS. GOTHARD: Sure.

THE COURT: I didn't know if you all wanted to go into -- (indiscernible) -- aggravating circumstances and what's proven and what isn't proven and --

MS. GOTHARD: Certainly.

THE COURT: Okay, that's fine.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury.)

THE COURT: You may proceed.

MS. GOTHARD: Thank you, Your Honor.

BY MS. GOTHARD (Continuing):

Q If I could, Ms. Tallant, as I said, there are several that are listed here, and I'm not going to read them all out, but -- because the Judge will give you those after all the evidence is presented. But I'm just using this as an example. That was the shortest one to pick out. And it says that if you find that age was a contributing factor, or in a case of someone who is very old, someone who might be an elderly person who might be accused of a crime, of murder, that you can consider that in determining whether life imprisonment should be given rather than the death penalty. Do you understand what I'm saying in terms of considering that? It's not saying you have to make a decision one way or another, but that you need to consider that. Can you do that?

All right. Do you think that matters?

And one of the other ones to pick out, just another one as an example, it talks about the mental aspect of the accused person. Actually there are two that talk about the mental aspect of the accused person. One says that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Now, Mr. Heck asked earlier if people were willing to listen to psychological testimony, and essentially that's

somewhat what my question is, because there may be testimony in this case or in other cases regarding this factor. And I'm not telling you what the factors are that you have to find, I'm not trying to tell you that. I'm just telling you this is set out in the statute, and the things -- that the law says you shall consider whether these factors apply.

Let me ask, Ms. Byrd, if I could ask you for a minute, do you feel that in some cases that the mental aspect of the accused person should be considered and psychological testimony should be considered, or do you feel that is something that you would not want to consider?

A I think it should be.

Q All right. Is there anybody at this point who feels that that's something that shouldn't come into play?

All right. The last thing that is listed in the statute under mitigating circumstances is kind of a catch-all, cause, as I said, the statute says we're not limiting it just to the things that are set down here. Now, the statute does limit it on aggravating circumstances but not mitigating circumstances.

And the last thing it says is, it says, "Any other mitigating factor which is raised by the evidence, produced either by the prosecution or the defense, can be and shall be considered if you find that there is such a factor."

Mr. Harris, if I could ask you for just a moment.

Do you feel that you are following me and understand what I'm talking about in terms of mitigating factors?

A (No audible reply.)

Q All right. And in terms of this last one, do you understand that basically the statute is saying anything that you feel is brought out in evidence, whether it's brought out by the state or whether it's brought out by the defense, can be considered?

A Yes.

Q And in essence it's saying you can determine if there is a factor, and you can determine whether this is a factor in which mercy and compassion should be shown to the accused. Do you understand that?

A Yes.

Q Does anybody have any questions about that, feel that they're --

MR. EVANS: No, no, Your Honor, no. There's nothing about mercy and compassion.

THE COURT: Sustain.

MS. GOTHARD: Those words are not used, but the statute does say any other --

MR. EVANS: Your Honor, I'd object to reference to those words and then used and then implying to the jury they're to have mercy and compassion and other counsel --

THE COURT: Sustain.

MR. EVANS: -- they're to have no mercy.

BY MS. GOTHARD (Continuing):

Q Mr. Harris, do you understand the statute says you can consider any other factor, that this is not limited in terms of mitigating circumstances?

A Yes.

Q All right. Thank you, sir.

Now, I anticipate that you will hear proof at some point in this trial regarding intoxication of Mr. Hall at the time of this incident. Let me ask you at this point -- Mr. Heck asked if there's anybody that had strong feelings about the use of drugs or alcohol. I personally think that probably all of us have strong feelings about the use of drugs, talking about, you know, what situation you're talking about. I take prescription medication every day and I don't see anything wrong with that, but I think most of us would consider drug usage as bad. So what I want to ask you is is there anybody at this point that feels that they're so strongly against drinking that they feel that they could not listen to this evidence and consider it, that they would just pretty much foreclose out and say that's not even something I should consider. Is there anybody that feels that way at this point?

Let me ask you, is there anybody here that contributes to or is a member of any kind of assocation such as

Mothers Against Drunk Drivers or Remove Intoxicated Drivers, anything -- Students Staying Straight, anything of that sort?

Mr. Harding, could you tell me --

A I work with the DUI task force, and I work with the DA's office --

Q Okay.

A -- as far as they work through the DUI task force basically. But I work with them lecturing in schools, high schools.

Q Okay. You said filming of DUIs earlier?

A No.

Q Did you say that or did I misunderstand you?

A No.

Q Okay. All right. Okay, how long have you been doing that?

A Eight years.

Q Is there any particular members of the DUI task force that you work with?

A I work with just basically --

Q Is that with the city DUI task force?

A DUI task forces with the city and county.

Q Right. Officer Simpson, Neblett?

A Simpson, yeah.

Q Those?

A I've worked with Officer Lee, when he was with the

task force.

Q Okay. Let me ask you this: In your work, have you ever been out with them?

A Yes.

Q Okay. All right. Do you mind me asking you a few questions along this line?

A No, no.

Q Okay. Have you seen -- I assume that all of us at one point or another have seen somebody that we felt was intoxicated. Is that true for you?

A Yes.

Q Okay. Do you feel that intoxication is something that should be considered in terms of someone's mental state or their intent to act?

A Yes.

Q Okay. In fact, what I'm asking is do you think that that can affect their mental state?

A Yes.

Q And their intent to act?

A Yes.

Q Okay. Does everybody pretty much feel the same way?

Yes, Ms. Orman.

A I was involved in a seminar for Students Staying Straight.

Q Okay, okay. All right. Now, there was some mention

earlier in terms of sympathy and there was a little bit of talk on that topic, and essentially what the law says is that sympathy and bias cannot enter into our decisions as jurors. I've sat as a juror before, so I understand a little bit of the wait and everything you all have been through. But the law says that you cannot make your decision based on sympathy or bias either towards one side or the other. And, as Mr. Heck said, I believe that each of us would agree that we all have some kind of sympathy or prejudice or bias in our own minds, whether it's about the food we eat or anything. And in this case, the families of both Ms. Crozier and Mr. Hall may be in the courtroom. Ms. Crozier's mother and father are sitting back here. Mr. Hall's parents are here. And while each of us, I'm sure, will say that we feel strongly for the families and we feel for their pain and we feel for the suffering that they've been through, anybody who has been through the loss of a child or a death in the family understands that. But do each of you realize that we cannot base our decisions on putting ourselves in their place; do each of you understand that, that the decision that you have to make, to some extent you have to be able to disassociate yourself and to make the decision based on the evidence that you hear and the law and that alone; do each of you understand that?

Now, to back up just a minute, let me go back to aggravating and mitigating circumstances. Again, talking

about reasonable doubt and the burden being on the state to prove things beyond a reasonable doubt. The law says that when we -- when there's talk and when there's deliberation regarding the options of life imprisonment and the death penalty, that the state must prove beyond a reasonable doubt, that is, to a moral certainty, to each one of you, that aggravating circumstances exist, and if they exist, that they outweigh any mitigating circumstances.

Now, essentially if I could, let me just ask -- Mr. Elliott, may I ask you a question just a moment?

A Sure.

Q In this discussion you've heard about weighing mitigating circumstances and aggravating circumstances. Do you feel that there's some set of formula that's placed on that, that you count the numbers or anything like that? I know you haven't been instructed at this point, but do you have a general feeling about that?

A I don't think you can do that.

Q Okay. Mr. Evans, I think, earlier told members of the jury that there is no formula. The law doesn't say that you count how many aggravating circumstances there are and you count how many mitigating circumstances there are and the one that has the most number of circumstances is the way you go. Do each of you understand that?

What the law says is that you weigh them, you

determine how much each one weighs in balancing those scales of justice. And in fact if you have ten mitigating circumstances and one aggravating circumstance, you may find that the aggravating circumstance outweighs the ten mitigating circumstances. But, on the other hand, you can find, and the law says that you can find, that one mitigating circumstance outweighs any and all aggravating circumstances. Do each of you understand that, that it's an individual decision?

Now, in terms of individual decisions, I asked a few of you here who have had prior jury service about whether you were foreman or forewoman, and essentially I want to ask do each of you understand, have you heard, do you have any idea about what the job of the foreman or the forewoman is? Does anybody have any question about that? The foreman or forewoman, whoever is chosen, pretty much kind of directs the scope of the discussion, not in terms of telling people what --

MR. EVANS: Your Honor, I don't see any purpose in voir dire in talking about the duties of a foreman.

THE COURT: I'll sustain the objection.

MS. GOTHARD: All right, if I could --

MR. EVANS: Thank you.

MS. GOTHARD: -- I'm trying to predicate another question, Your Honor.

THE COURT: Let's hear the question then.

MS. GOTHARD: All right.

BY MS. GOTHARD (Continuing):

Q In essence, what I'm trying to say is that the foreman or forewoman is not -- it's not their job to make up the minds of the other people. Do each of you understand that?

In essence, what the law says is that each of you must be the foreman or forewoman of your own conscience. Do each of you understand that?

All right. Mr. Turner, in light of that, let me ask you this: If you were selected as a member of the jury and you went back and it came time to deliberate on this or any other case, and if you found out that 11 people in that room felt one way and you felt the other, how would feel and what do you think you would do?

A I would express the way I feel.

Q All right.

A It wouldn't influence me that the 11 others disagreed.

Q Okay. Now -- thank you. One of the things that the Judge will tell you is that a verdict of the jury in any situation has to be unanimous. That means for you to return a verdict, it has to be unanimous. It doesn't mean that you each have to agree just because you think everybody else feels one way. Do each of you understand that?

And can each of you tell us at this point that you feel that you can be the foreman or forewoman of your own conscience and make up your own mind and stay by your decision? And I'm not talking about, you know, foreclosing discussion about things, but just can each of you promise at this point that you will make up your own mind?

Thank you.

May I have just a moment, Your Honor?

THE COURT: Yes.

MS. GOTHARD: That's all I have at this point, Your Honor.

THE COURT: I will accept your challenges when ready.

MR. HECK: May we approach the bench, Your Honor?

THE COURT: Yes.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. HECK: Would the Court consider allowing us to go back into the cell area with our client and talk to him? It's very difficult to communicate with him with the jurors right on top of us, behind us. We need to talk to him so that he's not excluded from this process.

MR. EVANS: Each time that we --

MR. HECK: We've talked with him about the others, but we've got a bunch more up there right now, and we wanted to talk with him about that. It doesn't have to be each time, no, sir.

THE COURT: Up until this time, you've sat there, and this is -- we've been here since about 9:30 doing this. Has there been a problem?

MR. HECK: Well, no. We've talked with him about the panel that's up there, but it's --

MR. COX: Talk to him now.

MR. HECK: It's very difficult for the three of us --

MR. COX: He's been communicating with Ms. Gothard and pointing out jurors on the sheet.

THE COURT: I don't see any reason to do it.

MR. HECK: Well, the three of us are trying to talk and it's kind of difficult --

THE COURT: I noticed she was talking to him and there's quite bit of distance between Ms. Gothard and the defendant and the jurors, especially those in the box.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: For purposes of this trial, the Court

will excuse Juror No. 29, Ms. Cynthia Byrd, and Juror No. 16, Mr. Timothy Miller. You all are excused for the day. If you have anything in the jury room, you may retrieve that. Call the call-in number tonight after 5:00 to find out if you're needed tomorrow. Thank you for your service.

Mr. Harris, will you take one of those vacant chairs in the jury box, please. And, Mr. Harding, will you take the other vacant chair.

Any further questions from the state?

MR. EVANS: None at this time, Your Honor.

THE COURT: Any further questions from the defense?

MR. HECK: Not at this time, Your Honor.

THE COURT: I will accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 37, Ms. Darlene Thomas, and Juror No. 2, Mr. Marvin Hundley. You all are excused for the day. Call the call-in number to find out if you're needed for tomorrow. Thank you very much for your service.

Mr. Bolus, will you take one of those vacant chairs, please -- the only vacant chair.

Are there further questions from the state at this time?

MR. EVANS: A few short ones, Your Honor, if I may.

VOIR DIRE

BY MR. EVANS:

Q Is there anyone -- as we're grouped now, is there anyone on the jury who knew someone before you came to jury duty that is also on the jury?

Let's just go ahead and start -- yes, sir.

A Ms. Spratling -- (indiscernible).

Q Any problem -- I certainly don't want to embarrass anyone, but I assume, since we haven't mentioned it already, you feel you can deliberate with him?

A With her.

Q Her, I mean. I'm sorry. I was thinking one question ahead of myself.

And -- yes, sir.

A I knew Mr. -- (indiscernible).

Q Same question there. Do you suspect there would be any problem there?

A (No audible reply.)

Q The reason I asked that -- and I would ask you to keep in mind if you think there would be --

A Mr. Evans --

Q -- and certainly either side would want to know about it, because it is true that your verdict -- it must be your individual opinion, but it is also true that the Court is going to decide -- is going to instruct you that in the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous.

In other words, that's why we have 12 jurors, is to consult among each other, not to just -- we don't have 12 separate opinions. We have 12 separate opinions ultimately. Does everyone understand that obviously there's going to be discussion?

And those of you who know someone on the jury panel at this point foresee no problems at all in being able to discuss matters?

Okay. Thank you.

THE COURT: Any questions for the defense?

MR. HECK: Just a moment, Your Honor.

No, sir.

THE COURT: Then I'll accept your challenges when ready.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. EVANS: I'd ask for the current -- the Court's current talley.

THE COURT: Okay. I show that both sides have exercised six peremptories each.

MR. EVANS: And this would be number seven for the state.

THE COURT: Okay.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: For purposes of this trial, the Court will excuse No. 38, Mr. Jeff Bolus. Mr. Bolus, you are excused for the day. Please call the call-in number to find out if you're needed for tomorrow. Thank you very much for your service.

Mr. Davis, you're next up. Will you take that vacant chair, please.

Any further questions from the state?

MR. EVANS: None, Your Honor.

THE COURT: Any further questions from the defense?

MR. HECK: None, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse No. 12, Ms. Violet Tallant. Ms. Tallant, you are excused for the day. Thank you for your service. Call the call-in number to find out if you're needed tomorrow.

Mr. Webb, will you take that vacant chair in the jury box, please.

Any further questions from the state?

MR. EVANS: None, Your Honor.

THE COURT: Any further questions from the defense?

MR. HECK: No, Your Honor.

THE COURT: I will accept your challenges when ready, counsel.

For the purposes of this trial, the Court will excuse No. 33, Mr. Dana Harding. Thank you for your service, Mr. Harding. You are excused for the day. Call the call-in number to find out if you're needed tomorrow.

Ms. Haggard, will you take that vacant chair, please.

Juror No. 43, Diana M. Jones, will you take the first chair in front of the jury box, please.

Juror No. 44, Mary H. Nichols, if you'll take the next chair.

Juror No. 45, Cynthia Taylor. Juror No. 46, Lanier Hubble. Juror No. 50, Doris M. Bradley. Juror No. 51, Stephen McGill. And Juror No. 52, William R. Nash.

BY THE COURT:

Q Okay, those of you seated in front of the jury box, did you hear the questions that were asked either by the Court or counsel for either side?

Would your answers be any different from any of those given previously or do any of those questions apply to you in paricular, such as you'd have some response?

A Your Honor.

Q Yes.

A I've met one of the possible witnesses.

Q Okay. The attorneys will probably want to delve into that a little more.

Anything else?

Would that have any bearing on your being able to sit on this case?

A (No audible reply.)

Q Do any of you know of any reason why you cannot listen to the evidence in this case, apply it to the law, and arrive at a verdict that would be fair and impartial to both the state and the defense in this case, any reason why you cannot do that?

You may qualify for the state.

VOIR DIRE

BY MR. EVANS:

Q Ma'am, you indicated that you had met one of the potential or possible witnesses, some name that was called out?

A Yes, Dr. Metcalfe.

Q He is -- usually we have Dr. King as a witness, but in this particular instance Dr. King was out of town and Dr. Metcalfe was the medical examiner in the case. Does that cause you any problem that he would be a witness if you were selected on the jury?

A No.

Q All right. How did you come to meet him?

A He knows my husband.

Q And you have a daughter -- excuse me -- a step-daughter that has graduated from law school?

A Yes.

Q Do you socialize at all with Dr. Metcalfe?

A Yes -- (indiscernible).

Q Thank you.

MR. EVANS: That's all. Thank you.

THE COURT: For the defense.

MS. GOTHARD: Could we have a few minutes, Your Honor?

THE COURT: Yes.

MS. GOTHARD: No questions at this time, Your Honor.

THE COURT: All right, the Court will accept your challenges when ready.

For the purposes of this trial, the Court will excuse No. 32, Mr. Edward Harris. Mr. Harris, you are excused for the day. Call the call-in number to find out if you're needed tomorrow. Thank you for your service.

Ms. Jones, will you take that vacant chair in the jury box, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MR. HECK: No, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse No. 24, Mr. Alton Carson. Mr. Carson, you are excused for the day. Call the call-in number to find out if you're needed tomorrow, sir. Thank you for your service.

Ms. Nichols, as soon as he steps down, will you take that vacant chair, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MS. GOTHARD: No, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse No. 39, Mr. Mark Davis. Mr. Davis, you are excused for the day. Thank you for your service. Call the call-in number to find out if you're needed tomorrow.

Ms. Cynthia Taylor, No. 45, will you take that chair, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MS. GOTHARD: No, thank you, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 6, Mr. Joseph Anderson. Thank you for your

service, Mr. Anderson. You are excused for the day. Call the call-in number to find out if you're needed tomorrow.

And, Mr. Hubble, will you take that vacant chair, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MR. HECK: No, Your Honor.

THE COURT: Then I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 7, Ms. Ladd. Ms. Ladd, you are excused. Thank you for your service. Call the call-in number tonight after 5:00 to find out if you're needed tomorrow.

Ms. Bradley, will you take that vacant chair, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MS. GOTHARD: No, Your Honor. May we approach?

THE COURT: Yes.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MS. GOTHARD: I just wanted to see where we are in

the count. Six and thirteen?

THE COURT: Fourteen, six and fourteen.

MS. GOTHARD: Six and fourteen. Okay.

MR. EVANS: Are we close to a break?

THE COURT: Fairly close.

MS. GOTHARD: If we get down to having to bring some people up in front of here, I'd like to take a break so we can look through their forms.

THE COURT: Yes, that's why I was waiting to take a break, to see if we needed to call up some more people.

MS. GOTHARD: Okay, thank you.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Any further questions on behalf of the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MS. GOTHARD: No, Your Honor.

THE COURT: I will accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 8, Mr. Donald Elliott. Thank you, Mr. Elliott for your service. You are excused for the day. Call the call-in number to find out if you're needed tomorrow.

Mr. McGill, will you take that vacant chair in the jury box, please.

Any further questions for the state?

MR. EVANS: One minute, please.

No, Your Honor.

THE COURT: Any further questions for the defense?

MS. GOTHARD: No, Your Honor.

THE COURT: I will accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 46, Mr. Lanier Hubble. Mr. Hubble, you are excused for the day. Thank you for your service. Call the call-in number to find out if you're needed tomorrow. Thank you, sir.

Mr. Nash, you may take that seat momentarily.

We are going to take a break at this time, ladies and gentlemen of the jury. Those of you who are potential jurors in the courtroom, we will be taking a break, as well as those of you in the box. When we come back -- yes, sir.

JUROR NO 1: Can I speak with you for a moment after we recess, just to ask a question?

THE COURT: Okay. Is it something you need to discuss in private?

JUROR: (No audible reply.)

THE COURT: Okay, I'll have the attorneys come to

the bench and you can come to the bench when everybody is excused.

We will take a break. Let's see what time it is.

MR. HECK: Your Honor, may we approach briefly?

THE COURT: Yes.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. HECK: It looks like we're about to get a jury, that we may have a jury shortly. Is the Court going to hear final arguments this afternoon?

MS. GOTHARD: Not final arguments.

MR. HECK: Opening arguments. I'm sorry.

THE COURT: No, and I anticipated and what I think about doing is some people might have brought some things, and some of the ones that did bring things have already been excused. I think I'll just let them go home tonight, get everything they need, rest, and then come back and start in the morning, rather than keep them and have somebody -- send for their things. What do you all think about that? Not swear them.

MS. GOTHARD: I don't have any problem with that. They've been going home every night till now anyway.

THE COURT: I think it would be better on them to

knock off and let them go home.

MS. GOTHARD: Yeah.

THE COURT: And they can get whatever they want.

MR. HECK: That's before we swear the jury in?

MS. GOTHARD: Yeah, yeah, that's before they're sworn.

THE COURT: Once we have the 15, I'll excuse them for the evening, with the cautionary instruction, and have them come back in the morning with their things, and then we will begin in the morning, swear the jury, swear the officers, read the indictment, and begin opening statements the first thing in the morning. Is that all right with --

MR. HECK: That's fine.

MR. COX: That will work out fine.

THE COURT: Well, I think we'd feel more comfortable doing that and it's not too early to do that.

MS. GOTHARD: We've got to practice with him so he'll know it's an opening statement.

MR. HECK: Judge, is there any way they can do anything with the temperature in here? I'm about to pass out.

THE COURT: We can try.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Okay, members of the jury, let's take about a 20-minute recess. Remember the instructions that I gave you earlier. Do not discuss this case with anyone, and those other instructions still apply. Be back in the court-room say at five minutes till 4:00, and we will be ready to go at that time -- five minutes till 4:00. Court will be in recess till five minutes till 4:00.

I just need to see Mr. Turner. The rest of them can go.

(Whereupon, the jurors retired from open court, and a bench conference was held on the record with Juror No. 1, Mr. Scott Turner, and the following proceedings were had:)

JUROR NO. 1: Your Honor, my grandmother is in the hospital. She went last night, and she's in -- it's really more like my mother because I grew up with her. And she could be in there for quite awhile. But if I'm on a sequestered jury, then -- they say she's in pretty bad shape.

THE COURT: Is it real serious?

JUROR NO. 1: It's pretty serious. She has a heart condition. Right now she's in ICU.

THE COURT: All right. Will counsel approach the bench, please.

MR. HECK: Yes, sir.

THE COURT: All right. Mr. Turner just indicated to me that his grandmother went in the hospital last night. She's in ICU, is very serious, and they expect her to be in there for a number of days, and he says it's more like his mother than grandmother because she raised him. And I'm sure that would be weighing on your mind.

JUROR NO. 1: It is today.

THE COURT: And you'd prefer not to be locked up?

JUROR NO. 1: Uh-huh, I would.

THE COURT: All right.

MR. HECK: No problem.

MS. GOTHARD: We have no problem.

THE COURT: All right, Mr. Turner, I will excuse you.

JUROR NO. 1: Thank you. Thanks. Should I call this afternoon to --

THE COURT: You'll probably still need to call the call-in number. You might report across the street before you leave to Judge Brown's courtroom and talk to his secretary and see -- explain the circumstances and see if you can't be excused for tomorrow.

JUROR NO. 1: Okay.

THE COURT: You may not even be needed tomorrow.

JUROR NO. 1: Okay. What's the -- do you have the number or --

THE COURT: No, it's over in Circuit Court, the building over there.

JUROR NO. 1: Okay, thank you.

(Said bench conference having been completed, a recess was taken, after which the jurors returned to open court and the following proceedings were had in their presence:)

THE COURT: Ronda Evatt, would you take a chair in the jury box, please.

Juror No. 56, Richard Winters, would you have that seat in front of the jury box, please.

Juror No. 59, Ronald Swafford, if you'll take the next chair.

Juror No. 60, Emmett Baker; Juror No. 61, Rose Hall; Juror No. 64, Debra Riemke; and Juror No. 65, Frances Burd.

Oh, there's one more. We have another chair.

Juror No. 66, Mary Wilson.

BY THE COURT:

Q Did all of you hear the questions that were asked earlier of the prospective jurors?

Do any of those things apply particularly to you, do you have any comments or anything that you need to say about any of those things?

Do you know any reason why you cannot listen to the

Appendix K

evidence in this case and apply it to the law and upon the evidence and the law, and only the evidence and the law, arrive at a verdict that would be fair and impartial to both the state and the defense in this case?

General, you may qualify the jury for the state.

MR. EVANS: One minute, please.

We would have no further questions, Your Honor.

THE COURT: For the defense.

MS. GOTHARD: Just a moment, please, Your Honor.

THE COURT: For the purposes of this trial, the Court would excuse No. 52, Mr. William Nash, and No. 56, Mr. Richard Winters. Thank you all for your service. You are free to go, and you will be excused for tomorrow. You don't need to call the call-in number. Call the call-in number Monday evening after 5:00 to find out if you're needed Tuesday. Thank you very much for your service.

Mr. Swafford, will you take one of those vacant chairs, please, and, Mr. Baker, will you take the other one.

That's okay. I'm sorry, Mr. Baker. There's only one. Just have a seat right there. I lost count.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Any further questions for the defense?

MR. HECK: No, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purpose of this trial, the Court will excuse Juror No. 59, Ronald Swafford, and Juror No. 55, Ronda Evatt. You all are excused for the day and for tomorrow. Call the call-in number Monday after 5:00 to find out if you're needed Tuesday. Thank you for your service.

Juror No. 60, Mr. Baker, will you take one of those vacant chairs, please, sir, and, Ms. Hall, will you take the other one.

Any further questions for the defense?

MS. GOTHARD: No, Your Honor.

THE COURT: Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: I'll accept your challenges when ready.

For the purposes of this trial, the Court will excuse Juror No. 19, Ms. Mayfield. Ms. Mayfield, you are excused, you are excused for tomorrow, too. Call the call-in number Monday after 5:00 to find out if you're needed Tuesday. Thank you for your service.

Ms. Riemke, will you take that chair, please.

Any further questions for the state?

MR. EVANS: No, Your Honor.

THE COURT: Or for the defense?

MS. GOTHARD: No, Your Honor.

THE COURT: Those of you who are seated in the jury box, the 14 of you, plus Ms. Burd, you will be the jury that

will be hearing this case. Ms. Wilson, and those of you who are in the courtroom, I know you probably feel like "I've wasted three days of my life," but, believe me, you are a very valuable part of this process, you're a very valuable part of this trial, an indispensable part. Without you being here and ready to serve, we could not proceed with this case. And I want to express my utmost appreciation to you for being here and your willingness to serve on this case, knowing that it was a difficult case and not an easy thing to do, but you were willing to do it. Thank you very much. You are excused for the day. You are excused for tomorrow. Call the call-in number tomorrow -- I mean Monday after 5:00 to find out if you're needed Tuesday. Again, thank you very much for your service. You're free to go. If you have anything in the jury room, you're free to get it.

Okay, members of the jury, as I said, you will be the jury that will be hearing this case. Normally at this point in time, once we have a jury, the jury would be sworn, and the court officers would be sworn, the state would read the indictment, and we'd proceed. It's almost 4:30, and instead of swearing you tonight and taking you to a hotel tonight to be kept together, I'm going to not place you under oath at this time and allow you all to go home and pack and get whatever things you'll need. And I'd suggest you'll probably need enough probably till this time next week. You

will be able to get messages out through the court officer. But after tonight, you will have no communciation with anyone in your families or anyone else other than the court officer, and except through the court officer.

I caution you -- I cannot caution you enough -- normally I wouldn't do this, because I would need you to be kept together -- because there has been some publicity, I'm going to caution you and I'm going to instruct you at this time, rather than just avoid the possibility of hearing any news, I'm going to ask you not to listen to any news programs on TV, not to read anything in the paper. I wouldn't want you to accidentally stumble upon this case while you're reading the newspaper. And avoid listening to the radio, because right in the middle of listening to some music or some show, they may come in with a news announcement about this case. And, as you well know by this time, ladies and gentlemen, it will be up to you to decide this case on not what somebody else says, not what somebody else thinks happened, but what you hear in this courtroom from the witness stand, the testimony of the witnesses and the evidence in this case. So, since I am allowing you to go home to retrieve your things, then please do that. Do not talk to anyone about what this case is about. Just tell them, if anyone at home asks you, say, "I'm sorry. After it's over, I'll talk your ears off, but right now I can't say a thing to you. The Judge has

instructed us not to say anything and I can't do it," because I would not want anyone to influence your thinking. And as I said, the other things, do not attempt to go to the crime scene, do not attempt any investigation on your own, don't get all your books at home and start reading about homicides or arsons or things like that. The Court will give you the law at the proper time.

Be back -- have your things with you, and be back in the jury room -- of course, there will be room for all of you now in the jury room. Have your things, and be back in the morning at 9:00 a.m. ready to go. We'll try to start back into this case.

And let me tell you a little bit about what you can expect. The first thing we'll do in the morning when we bring you back in is you'll be sworn to truly try the issues, the officers will be sworn. The next thing, the state will read the indictments to you formally charging Mr. Hall with these offenses. At that time the defendant will enter a plea to these indictments. The next thing, both sides will have an opportunity to have opening statements. These statements are like a road map to help you in understanding the evidence and applying the law, to give you some idea what each expects the proof to show. Following the opening statements, the state will have an opportunity to call their witnesses first. The burden of proof is on the state. The state will go first and

call witnesses to testify on behalf of the state. After the state has rested, then the defense will have an opportunity to call witnesses. And again I remind you the defense is under no burden to prove anything to you, and they don't have to call a single witness, but they have that opportunity at that time. After the defense rests, the state will have an opportunity to call rebuttal witnesses if it chooses. If not, then we'll proceed into final argument. Both sides will have an opportunity to give a closing summation or final argument to you stating to you and telling in essence what they feel like the proof showed. And then after that, the Court will charge you as to the law. You will be entitled to take that charge, that written charge with you into the jury room. So when you're hearing it for the first time and you're a little confused about all these legal terms you hear, don't feel like it's a lost cause. You will be able to take that charge with you into the jury room and re-read it and analyze it. And then, of course, as I said earlier, prior to going into the jury room, we will at random draw numbers for the three alternates. And then you will come back in the court-room with a verdict.

Okay, with all that in mind, you are excused for the evening. Be back in the morning at 9:00 a.m. Do not go to the assembly room, but come straight to this courtroom. You are excused.

(Whereupon, the jury retired from open court and the following proceedings were had out of its presence:)

THE COURT: Is there anything further before I recess for the day?

Okay, then this case will be adjourned until say 9:30 in the morning. Court will be adjourned until 9:00 a.m.

(Whereupon, at 4:30 p.m. this case was adjourned to March 6, 1992, at which time the following proceedings were had:)

THE COURT: Case Nos. 188000 and 188001, State versus Leroy Hall.

Anything before the jury comes out?

MS. GOTHARD: Mr. Heck.

THE COURT: All witnesses who are going to testify in the case of State versus Leroy Hall will need to step outside the courtroom until your name is called.

(Whereupon, the witnesses were excluded from the courtroom.)

THE COURT: One matter for the record: Yesterday after we concluded the trial, Ms. Gothard handed to me a memorandum on the admissibliity of photographs of the deceased, and I will make this part of the record.

MS. GOTHARD: Thank you, Your Honor.

THE COURT: Does the state have a copy of it?

MR. COX: Yes, sir.

THE COURT: Let that be filed in the file as part of the record.

All right, what all officers will need to be sworn? We'll not do it at this time, but the officers -- Officer Hamrick, Officer Eldredge, and Officer Tate, at this time?

Okay. We'll wait and do it when the jury comes back. I just wanted to make sure we had everybody.

Officer Hamrick or Officer Eldredge, if you would, show the jury in, please.

(Whereupon, the jury returned to open court and the following proceedings were had in its presence:)

THE COURT: Good morning, ladies and gentlemen. I hope you all slept well last night, and I hope everybody came with all your belongings ready to stay for awhile.

Let me ask you, first of all, did anything happen last night in the way of any information that you might have received, did any of you see any news reports concerning this case or anything about this case, did anything at all happen last night that would influence your thinking one way or the other or have any effect on your verdict?

Okay, fine. Also, I want to let you all know that we -- periodically the Court does -- when the Court takes a recess and sets a definite time, sometimes you find out it's a

little longer than that and you don't get back into the court-room at the time that I mentioned. And please don't think that we've forgotten about you. There are other matters that need to be taken up, and sometimes, if we have a hearing or motion on things, sometimes they extend longer than the period of time. So please don't think we've forgotten about you or we're sitting around drinking coffee and eating doughnuts, because we're not, we're working.

Okay, at this time, let me swear the court officers.

(Whereupon, the court officers were sworn.)

THE COURT: General, are you ready to read the indictments?

MR. EVANS: Yes, Your Honor.

MR. HECK: Your Honor, has the jury been sworn?

THE COURT: I'll swear them after the indictments are read.

MR. EVANS: Ladies and gentlemen of the jury, the indictments in these matters, the first one, docketed 188001, read as follows:

"State of Tennessee, Hamilton County, Criminal Court.

"The grand jurors for the state aforesaid, being duly summoned, elected, impaneled, sworn, and charged to inquire for the body of the county aforesaid, upon their

oaths present:

"That Leroy Hall, Jr., heretofore on or before April the 17th, 1991, in the county aforesaid, did unlawfully, knowingly, and/or for an unlawful purpose, damage or destroy by fire or explosion to an autombile, personal property belonging to Traci Crozier, without her consent, or consent of all others who may have a possessory, proprietary or security interest therein, when one or more persons were in said automobile, in violation of Tennessee Code Annotated 39-14-302, against the peace and dignity of the State."

And this is signed by the District Attorney General and by the forewoman of the grand jury, and was returned a true bill.

The indictment in the next case, 188 --

THE COURT: General, let me ask the defendant at this time, how does the defendant, Leroy Hall, plead to this indictment?

THE DEFENDANT: Guilty.

THE COURT: Okay, the defendant pleads guilty to this indictment.

MR. EVANS: We need to approach the bench.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury and the following proceedings were had:)

MR. EVANS; There are things that have to occur at this point before we go any further. I'll have to read the second indictment. I don't want to get us in a Mackey situation, where they blind-sided Judge Hinson on that -- the same thing now the Court has to inquire, about the validity of this plea. I'll go ahead and read the second indictment, but I don't want to get into opening statements until we have a firm and valid plea of guilty.

THE COURT: To make sure the plea is knowingly and understandingly --

MR. EVANS: That's what happened -- exactly what happened in Mackey.

THE COURT: I think you're absolutely right.

MR. HECK: Well, we're not trying to blind-side the Court, Your Honor.

THE COURT: I understand that. Neither were the attorneys in the Mackey case.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: General, proceed with the next indictment.

MR. EVANS: "State of Tennessee, Hamilton County, Criminal Court.

"The grand jurors for the state aforesaid, being duly summoned, elected, impaneled, sworn, and charged to inquire for the body of the county aforesaid, upon their oaths present:

"That Leroy Hall, Jr., heretofore on or before April 19, 1991, in the county aforesaid, did unlawfully, intentionally, deliberately, and with premeditation kill Traci Crozier, in violation of Tennessee Code Annotated 39-13-202, against the peace and dignity of the State.

"Second Count: The grand jurors for the State aforesaid, being duly summoned, elected, impaneled, sworn, and charged to inquire for the body of the county aforesaid, upon their oaths further present:

"That Leroy Hall, Jr., heretofore on or before April 19, 1991, in the county aforesaid, did unlawfully and recklessly kill Traci Crozier during the perpetration of arson, in violation of Tennessee Code Annotated 39-13-202, against the peace and dignity of the State."

And this indictment is signed by the District Attorney General and by the forewoman of the grand jury, and was returned a true bill.

THE COURT: How does the defendant plead to indictment 188000, charging him with murder?

MR. HECK: He pleads not guilty on Count One, guilty on Count Two.

THE COURT: All right. Members of the jury, you've heard the defendant's pleas to guilty in Case No. 188001 and in Case No. 188000, not guilty as to Count One and guilty as to Count Two.

It is going to be necessary at this time to ask the jury to be excused. There are some matters that need to be taken up outside the presence of the jury. So I will ask you to go into the jury room, and we'll bring you back in.

Remember the admonitions that I gave you earlier. Do not discuss what's happened up to this point, and do not speculate.

(Whereupon, the jury retired from open court and the following proceedings were had out of its presence:)

THE COURT: Okay, counsel, we need to, of course, determine -- there are a couple of things I think we need to take up ahead of time. First of all, the defendant has entered a plea of guilty to the aggravated arson, and the defendant is entering a plea of guilty to Count Two of the indictment, which is the felony murder, murder in the commission of or attempt to commit arson.

General, as I understand the case law, if we were to try this case and the jury were to find the defendant both guilty of aggravated arson and guilty of felony murder, then that would be double jeopardy, and he could not be convicted

of both aggravated arson and the felony murder charging him with those. Is that your understanding of the law also?

MR. EVANS: No. I'm sorry. He can't be convicted of the -- he's entered pleas of guilty. Obviously if there were any question of that, he has waived, as I understand the Court's question, as to whether he can be convicted of aggravated arson and also of the felony murder.

THE COURT: There's a case -- I have it on my desk, I don't have it before me. But there was a case in which the defendant was found guilty of murder in the -- as a matter of fact, the jury was silent as to common law murder, and they found him guilty as to murder while in the commission of robbery, and they also found him guilty of robbery. And the Court said both of those convictions could not stand because it was double jeopardy. And since the jury was silent as to common law murder, then that was a verdict of not guilty as to the common law murder. Now, he could be found guilty of common law murder and the aggravated arson, but, as I understand the law, he could not be found guilty of both aggravated arson and felony murder while committing arson.

MR. EVANS: All right. Then I would assume that if the jury returns a verdict of guilty in the common law count, that would pretermit his plea of guilty in the --

THE COURT: That conviction would stand. So I guess the question I'm asking is is the state proceeding, in light

of the defendant's plea, is the state proceeding and asking the jury to consider a conviction for common law murder?

MR. EVANS: Yes.

THE COURT: What does the defense say about that, or does the defense have any response to that?

MR. HECK: We believe the Court to be correct, Your Honor, but there's no response to that.

THE COURT: Okay. Well, then we will proceed in this case and the state will proceed only on that portion of the indictment charging the defendant as to Count One and not as to Count Two, in light of the defendant's plea, if the Court accepts the defendant's plea as knowingly and voluntarily and intelligently entered. And we will not be proceeding with indictment No. 188001 if the Court accepts the plea. We will only be proceeding to the jury as far as the guilt or innocence phase as to Count One of the indictment charging common law murder. Is that everybody's understanding?

MR. HECK: Yes, Your Honor.

THE COURT: Okay.

MR. EVANS: Yes. But in the course of that the state is allowed to introduce evidence as to the count in which he's pleading guilty to.

THE COURT: The Court is going to allow the state to put on whatever evidence the state needs to put on in proving

its case, any elements that are relative and probative in this case, and if it does not unfairly prejudice the defendant, the Court is going to allow it.

MR. EVANS: I just want to forestall any objection to evidence going to the second count to which he's pled guilty to, because the Court has to hear, before ultimately concluding that the plea is a valid plea, the Court has to hear evidence, and we intend to introduce evidence on that aspect.

THE COURT: Are you talking about the time the Court accepts his plea of guilty?

MR. EVANS: I think at this point the Court can make a tentative acceptance of his plea of guilty. Then the state -- then the Court has to hear some statement of the evidence. We intend to introduce statement of the evidence going to his plea of guilty, in addition to the first degree murder count. In other words, we have to satisfy the Court that there is a sufficient factual basis for the plea of guilty. As I understand it, there's no -- it's not a no contest plea, it's not a plea of -- even though he's saying he's not guilty, he's going to go ahead and plead guilty. In a plea of guilty, the law requires the state, before the Court can ultimately approve the plea of guilty, to either make a factual statement of what the facts are or to actually introduce evidence, and we will be choosing the latter.

THE COURT: Okay.

MR. HECK: Your Honor, we would object to that. We think that the law is clear and that all that they have to do is provide a factual basis for the plea to the Court and to the Court alone. We'd object to them introducing evidence for the purposes of obtaining a conviction under aggravated arson when he's already entered a plea of aggravated arson, if, of course, the Court accepts the plea of guilty on aggravated arson after the appropriate inquiry is made by Your Honor.

THE COURT: Well, of course there has to be a factual basis for the acceptance of the plea, Mr. Heck. And, by the same token, the Court also understands that even in the common law murder case, the state has to prove its case and have to prove cause of death and they have to prove manner of death.

MR. EVANS: The jury will have to also concur in a guilt finding. We're not waiving -- the state has not consented to a waiver of jury trial in the plea of guilty. He has the right to plead guilty. The state has a right to prove its case to the jury. The Court has the responsbility to determine ultimately whether the case will be submitted to the jury on a plea of guilty. It would be highly unusual, but it could be that the jury, for whatever reason, would return a not guilty verdict. We have not waived -- the state has not consented and the defendant cannot force the state to waive

its right to a trial by jury. We have to concur in that and we haven't concurred in that.

THE COURT: Of course, the defendant has a right to plead anything he wants to plead.

MR. EVANS: I understand that, Your Honor.

THE COURT: But what I'm going to do is I'm going to qualify Mr. Hall at this time, but the Court will tentatively accept a plea of guilty and allow the state to offer whatever factual basis for that plea the state wants to offer.

MR. HECK: Would that be to the Court or to the jury, Your Honor?

THE COURT: Well, both to the Court and to the jury. The Court is going to allow that.

MR. HECK: For the record, we'd like for the Court to note our exception and objection, Your Honor.

THE COURT: All right. I am going to ask that Mr. Hall fill out a plea paper in this regard. Do you need some time to do that?

MR. HECK: Yes, Your Honor.

MS. GOTHARD: Yes, sir.

THE COURT: All right, court will be in recess for about ten or fifteen minutes.

(Whereupon, a recess was taken.)

THE COURT: Getting back to the case on trial, State versus Leroy Hall.

For the benefit of counsel and for the record, the Court is going to recant its previous statement in reference to the double jeopardy. The Court was relying upon State versus Briggs for the legal premise that a person cannot be convicted of a felony murder alleging a specific felony and also convicted of a felony which is the subject of that felony murder. And that's what the court said in State versus Briggs. Briggs was decided in two different parts. Briggs One, which the Court refers to, stated that there could be dual convictions. Briggs Two said that there cannot be dual convictions. However, it was cleared up by the courts in the State of Tennessee in the Tennessee Supreme Court case of State versus Blackburn, which is cited at 694 SW 2d 934. And that court did say that they felt like the court was previously confused in relying upon a case of Harris versus Oklahoma, which is the case that the court cited as the basis for its decision in Briggs Two. However, the Tennessee Supreme Court said that, "It is our opinion, as it was at the time Briggs One was decided, that the legislature intended that multiple punishments be imposed on conviction of the defendant for felony murder and the underlying felony. Whether the sentences are to be served consecutively or concurrently, as in this case, is within the discretion of the trial judge." I might add this case was also followed, or at least that this premise was followed, in State versus Johnson

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION III

LEE HALL,	)	
	)	
Petitioner,	)	**Case No. 308968**
	)	
v.	)	
	)	**Post-Conviction**
STATE OF TENNESSEE,	)	**(CAPITAL CASE)**
	)	
Respondent.	)	**Execution Set for Dec. 5, 2019**

Motion to Reconsider Judgment Entered November 19, 2019

On November 19, 2019, the court entered an order dismissing Mr. Hall's Second Petition for Post-Conviction Relief. Petitioner Lee Hall respectfully moves the court to reconsider the court's findings regarding Juror A, and enter an order granting Mr. Hall's second post-conviction petition and vacating his convictions. At the November 14, 2019 hearing, Mr. Hall tendered Dr. Manning's November 14 Declaration as evidence at the hearing. The State objected and stated the reasons in support of the objection. The court sustained the objection but permitted its introduction as an offer of proof.[1]

Mr. Hall asks the court to 1) reconsider the evidentiary ruling excluding Dr. Manning's expert testimony via declaration, 2) consider as evidence Dr. Manning's previous declaration, and 3) also consider the attached *November 25, 2019 Declaration of Linda Manning, Ph.D.*, in determining whether due process bars a

[1] In the event the court declines to reconsider the November 19, 2019 judgment and order, Mr. Hall respectfully requests that the attached updated declaration and cv be filed as an offer of proof.

merits hearing on Petitioner's bias juror claim and also whether Mr. Hall's state and federal constitutional rights were violated by the presence of Juror A on his jury

Mr. Hall, based on the same arguments made at hearing, moves for the court to reconsider the November 19 order based on Dr. Manning's opinions explaining and contextualizing Juror A's failure to disclose her experiences earlier, and her testimony and actions, given the lasting effects of the type of abuse she survived.

Dr. Manning reviewed the transcript of Juror A's testimony, Juror A's October 7, 2019 declaration, the 2014 interview memo, and the opinion of the Tennessee Supreme Court on direct appeal of Mr. Hall's case. In her declaration, Dr. Manning summarizes her assessment of the impact of trauma upon Juror A and how that has manifested. She concludes:

1. Survivors of rape by someone they know commonly do not reveal this information to anyone. Research on this issue reveals that two-thirds of respondents who had experienced a rape told no one. Of the one-third who did reveal the rape, most told "a close friend." (BJS, 2001).

2. In close interpersonal relationships, it is common for survivors to be very confused by the rape, and often embarrassed and ashamed. They often do not want to identify the experience as rape at the time, and they frequently blame themselves in some way for the experience.

3. It is quite common for victims of domestic violence to remain in the relationship despite escalating violence. They often blame themselves for the on-going violence and believe they can and should change themselves to prevent the violence. Juror A at several points in her testimony blamed herself in various ways.

4. Juror A also, in her testimony, blamed her first husband's violence on alcohol. She also minimized her abusive husband's behavior at various points and used vocabulary emblematic of such minimization during her

testimony. She also, characteristically for domestic violence survivors, minimized her feelings of "hatred" toward Mr. Hall, by describing them as "fleeting."

5. Further, Juror A also "normalized" the culture of rape and assault that she experienced in the late 1960s and early 1970s.

6. It is also common for survivors of domestic violence to exhibit avoidant behavior and attempt to "get on with it" and put the past behind them once the relationship is over and that dynamic is seen in Juror A's 2014 interview and testimony.

7. Given Juror A's experiences in her first marriage, service on a homicide case involving allegations of domestic violence, would have been retraumatizing, as is demonstrated her account of memories flooding her. The parallels between Juror A's experience and the trial proof as reported in the Tennessee Supreme Court opinion would have exacerbated her inability to prevent emotions and images from her own experience from arising during her jury service.

8. The memories that "flooded" over Juror A during the trial are the traumatic re-experiencing symptom of Post-Traumatic Stress Disorder.

9. Traumatic memory does not go away. The emotional impact of the trauma can be triggered by exposure to reminders of the trauma, particularly sensory reminders (sights, sounds, etc.). These reminders can result in strong "re-experiencing" of the trauma in the form of nightmares, flashbacks, and/or "amygdala hijack."

10. When survivors are moved by re-experiencing traumas out of their "Window of Tolerance," they are unable to effectively process emotions and cognitions.

11. Dr. Manning's professional opinion, to a reasonable degree of scientific certainty, is that this "amygdala hijack" response could inform and/or explain: Why Juror A did not notify anyone immediately after Mr. Hall testified about her history; and Why Juror A may not have disclosed her history during the 2014 interview, which appears to focus mostly on her life after meeting her second husband.

12. Juror A was and continues to be traumatized by her domestic violence experience. Her ongoing trauma response informs any current opinion Juror A might hold as to whether her history as a victim of domestic and

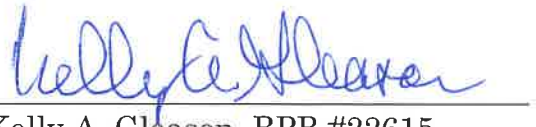
sexual violence impacted her decision-making in her service as a juror.

13. As an individual still experiencing the effects of trauma, it is difficult for Juror A to accurately and objectively assess how her past experiences may have influenced her decision-making at Mr. Hall's trial or how her past experiences may impact her perspective of the trauma to this day.

In the November 19, 2019 order, the court found that Juror A was not biased due to the ameliorating effects of her subsequent happy marriage to her second husband. As demonstrated by Dr. Manning in the attached declaration, trauma science does not support this finding.

Wherefore, Petitioner Lee Hall respectfully requests this court to 1) reconsider the evidentiary ruling excluding Dr. Manning's expert testimony via declaration, 2) consider as evidence Dr. Manning's previous declaration, and 3) also consider the attached *November 25, 2019 Declaration of Linda Manning, Ph.D.*, in determining whether due process bars a merits hearing on Petitioner's bias juror claim and also whether Mr. Hall's state and federal constitutional rights were violated by the presence of Juror A on his jury; and 4) enter an order granting Mr. Hall's second post-conviction petition and vacating his convictions.

Respectfully submitted,



Kelly A. Gleason, BPR #22615
Jonathan King, BPR #32207
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN 37219-8068
(615) 741-9331
(615) 741-9430 (fax)
gleasonk@tnpcdo.net
kingj@tnpcdo.net

Counsel for Petitioner

Certificate of Service

I hereby certify that a true and exact copy of this pleading was delivered via email to Neal Pinkston, District Attorney General, 11th Judicial District, 600 Market Street, Suite 310, Chattanooga, TN 37402 on this 25th day of November, 2019.

Kelly A. Gleason
Assistant Post-Conviction Defender

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION III

LEE HALL,	)	
Petitioner,	)	
	)	**Case No. 308968**
v.	)	
	)	
STATE OF TENNESSEE,	)	
Respondent.	)	**(CAPITAL CASE)**

November 25, 2019 Declaration of Linda Manning, Ph.D.

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, Linda Manning, affirm that the following is true to the best of my knowledge, information, and belief:

1. I hold a doctoral degree in psychology and am a licensed psychologist in Tennessee and Texas. I have worked as a clinician with survivors of trauma for over twenty-five years in both university and medical center settings. I have also taught a graduate level class on trauma, specifically "Trauma: Impact and Intervention," at Vanderbilt University for over fifteen years and am familiar with the research literature on trauma. Attached to this declaration is my current curriculum vitae.

2. I was contacted by counsel for Mr. Hall about my availability to testify at the November 14, 2019 evidentiary hearing regarding the trauma experienced

by one of the juror's in Mr. Hall's case. Due to the short notice and preexisting commitments, I was unable to testify on that day, but prepared a declaration that was submitted by Mr. Hall's counsel.

3. It is my understanding that Mr. Hall is currently scheduled to be executed by the State of Tennessee on December 5, 2019. Given the time constraints, I have not met Juror A, nor have I interviewed Juror A or reviewed treatment records related to her history of trauma and abuse. However, I can comment on common responses of trauma survivors and offer insight into Juror A's testimony at the evidentiary hearing.

4. This declaration builds upon the declaration I prepared in advance of the evidentiary hearing and incorporates notes on Juror A's testimony at the hearing. Since my previous declaration, I have reviewed Juror A's testimony from the November 2019 evidentiary hearing. Mr. Hall's counsel explained to me that the final version of the testimony was not yet complete, but that they obtained a draft of Juror A's testimony on Thursday, November 21 at approximately 9:30pm. In addition to this testimony, I have reviewed the October 7, 2019 declaration of Juror A, which I understand has been filed under seal, and a 2014 interview memo of Juror A, which I understand was filed under seal at the November 14 evidentiary hearing.

5. Juror A's testimony at the November 14, 2019 evidentiary hearing establishes the following:

- Juror A was a virgin before she was raped shortly after graduating from high school; she had dated the rapist for 2 years prior to the rape; the raped resulted in a pregnancy; she married the rapist. (11)
- Had Juror A not been impregnated, she "would have never married [the man who would become her first husband] otherwise." (12)
- At first, Juror A's first husband did not hit her. In her own words: "[H]e never hit me the first few years, but he would put holes in the wall and threaten." (12)
- At times, Juror A was able to seek refuge with her first husband's grandmother: "His grandmother knew what was going on, because I would escape sometimes to her house." (15)
- Juror A could only recall two instances of physical assault by her first husband. Of the first, she could recall almost no details. Only after the second assault—where her husband punched her in the face, giving her a black eye and bloody nose—did Juror A seek refuge with her family, from whom she had hidden the abuse until that time. When Juror A returned to her home the following day, she found it riddled with bullet holes, reflecting "I figured he probably had planned to shoot me and himself, but I don't know that because I was gone by then, so he might have just been planning on shooting himself." (17)
- Juror A's first husband continued to rape her during their marriage (32)
- The abuse of Juror A by her first husband only ended when he killed himself: after leaving her parents' Christmas dinner table, he went upstairs and found and loaded her brother's shotgun, which he then used to shoot himself in the head. (19)
- Juror A subsequently remarried, happily. (--)
- Juror A underwent two years of grief counseling after the death of her second husband in 2007. (25)

6. Juror A's first husband was a heavy drinker. In my experience substance abuse is not uncommon in domestic abuse cases and can make abusive

situations even more volatile. In her hearing testimony, Juror A notes that her first husband:

- "was a heavy drinker" (12)
- "got mean when he was drinking" (12)
- Would get drunk, come home at 2 or 3:00 in the morning and "started being mean" (12)

Alcoholism is a progressive disease. Untreated, the person continues to decompensate. They become malnourished and depleted of B vitamins that the nervous system runs on. In advanced stages, the person can develop alcohol hallucinosis, which comes on quickly and causes auditory hallucinations. Alcoholism also causes severe depression and hopelessness, and an inability to regulate one's emotions. If Juror A's first husband was suffering from alcoholism, he would have had diminished abilities to care for their son or contribute to his wife's well-being or contribute to the household. This would have added more stress to Juror A's already abject situation. Indeed, these cumulative factors would have made her more susceptible to traumatic stress disorders.

7. There is a very high correlation between alcoholism and other mental illnesses, such as paranoid disorders, major depression, and uncontrollable anxiety. The younger the person is when he or she begins to drink to excess, the greater the likelihood that the problem will become chronic and that the illness will affect all spheres; i.e., relationships, work, parenting, and social function.

8. Additionally, Juror A's first husband may have been suffering from another mental illness, which can cause additional complications in the trauma response in an abusive relationship. At the November 14, 2019 evidentiary hearing, Juror A stated:

- "Oh yes, I knew he was crazy. That's all I knew was he's crazy, because he was irrational, he was paranoid, he was always looking for listening devices in our trailer. It was like why would anybody bother, you know." (18)
- After her first husband beat her on her birthday, fled the state, and later returned, Juror A describes her husband as follows:
    - "He was a different person. He was solemn and had quit eating or drinking anything, he just sat, because I had told him I was done, I was leaving him." (18)
    - "I talked him into going to the county health department. And all they wanted to do was do marital counseling and I was trying to convince them no, that's not the problem, you know, he's crazy." (18)
    - "I don't think he had eaten or drank a thing. He almost looked gray." (18)
- A few weeks after her first husband's return, on Christmas Day, Juror A describes how "he went upstairs to my brother's room, loaded a shotgun and blew his brains out, without, you know, saying anything or giving me – I had no idea that he was suicidal." (19)

9. In my experience working with survivors of rape by someone they know, it is common for survivors not to reveal this information to anyone. Research on this issue reveals that two-thirds of respondents who had experienced a rape told no one. Of the one-third who did reveal the rape, most told "a close friend." (BJS, 2001). In close interpersonal relationships, it is common for survivors to be very confused by the rape. They are often embarrassed and ashamed. They often do

not want to identify the experience as rape at the time, and they frequently blame themselves in some way for the experience.

10. In my clinical experience, it is quite common for victims of domestic violence to return over and over to the relationship and to remain in the relationship for years, despite escalating violence. They often blame themselves for the on-going violence and believe they can and should change themselves to prevent the violence. Author Judith Lewis Herman describes this as a condition of "captivity" that is systematically cultivated by the perpetrator through efforts of power and control (Herman, 1997). In reviewing Juror A's testimony at the hearing, Juror A appears to blame the violence on herself in various ways. Describing the most brutal assault that Juror A was able to remember, she remarked:

- "And I probably instigated it some because I was fighting with him." (14).
- "And I was fighting with him and he ended up socking me in the eye, black eye and bloody nose." (14)
- "[W]e'd both been drinking and he started getting very mean." (14)
- "Like I said, we were celebrating my birthday and we'd both been drinking too much and he started this fight." (16)

11. Likewise, Juror A appears to blame much of her first husband's abuse on alcohol:

- When asked if her fist husband was ever physically abusive, Juror A responded: "A couple of times, when he was really drunk (14)
- Describing her husband's destruction of their trailer after assaulting Juror A on her birthday, Juror A stated: "And which I figured he

probably had planned to shoot me and himself, but I don't know that because I was gone by then, so he might have been just planning on shooting himself. He was so drunk, he didn't know what he was doing." (17) Notably, even though Juror A was not present, and had no independent knowledge of when during the evening her husband destroyed their trailer and loaded her rifle, she excuses his actions on his speculative level of intoxication.

- When asked whether her husband forced her to have non-consensual sex during their marriage, Juror A replied, "Yeah, a few times when he'd come home after drinking." (32)
- Responding to the question whether her first husband was "a very abusive husband," Juror A qualifies his abuse, stating, "He was abusive when he was drinking." (33)

12. At the November 14, 2019 hearing, Juror A appears to minimize her abusive husband's behavior at various points:

- When asked if he was physically violent with her, Juror A responded, "but – mostly his violence was toward objects, throwing things and breaking up stuff and taking off drunk in our car." (14)
- When asked whether her husband forced her to have non-consensual sex during their marriage, Juror A replied, "Yeah, a few times when he'd come home after drinking. This always happened when he was drinking. It was also something I totally didn't think about being a rape at the time. There wasn't – a marital rape wasn't considered, at least in my mind, I didn't think anybody would ever consider marital rape being a crime." (32)
- On cross-examination, Juror A affirmed that she did not consider herself a victim at the time of trial. (39)

13. Similarly, when asked whether she recalled saying that she "hated" Mr. Hall, Juror A characteristically minimized her feelings—much like many of her memories surrounding her physical, sexual, and emotional abuse—she described her hatred of Mr. Hall during his testimony as a "fleeting thought." (24)

14. In her 2019 hearing testimony, Juror A also normalized the culture of rape and assault that she experienced in the late 1960s and early 1970s:

- Regarding her responses on the juror questionnaire, Juror A noted: "Well, 'Have you ever been a victim of a crime,' I did not consider I was ever a victim of a crime. And in 1969, there was really no such thing, that I knew of, of date rape, especially since I'd been dating him for so long. And I didn't consider – I didn't even know the term "domestic abuse" at the time. So I really thought it was not – I mean, I never thought of it as a crime. I had no notion that I had ever been a victim of a crime." (22)
- Responding to a question about occasions on which she called the police on her husband, Juror A stated: "I don't think the police at that time even considered a domestic violence – domestic abuse." (31)
- Describing the time when her husband raped her as a virgin as well as perhaps later occasions: "There was no consideration, that I can remember, of any mention of date rape. It was basically if you dated the guy, you were consensual." (31)

15. Juror A's choice of vocabulary at the November 14, 2019 hearing also functions to minimize her first husband's abuse and behavior:

- She uses the word "incident" to describe physical and/or sexual assaults by her first husband.
    - Juror A describing two physical assaults as "incidences" that compelled her to begin to plan to leave her husband) (14)
    - "I know there was an incident before, but I don't remember anything." (16)
- Juror A uses the word "mean" to describe occasions where her husband physically and/or sexually assaulted her.
    - "he got mean when he was drinking" (12)
    - "He would go out drinking with a buddy. He would make up an excuse for why he had to leave and go get drunk and come home at 2 or 3:00 in the morning and wake me up and start being mean." (12).

- "[W]e'd both been drinking and he started getting very mean. And I was fighting with him and he ended up socking me in the eye, black eye and bloody nose." (14)
- "I thought that I was the only person in the world that had ever been married to somebody that mean." (24)

16. The traumatic events that seem to have most been minimized and evoke the most horror in Juror A are the time her husband shot up the trailer and when he went upstairs and "blew his brains out." The fact that Juror A was called to serve on a homicide case involving allegations of domestic violence in and of itself would have been retraumatizing. Juror A, over the years, had not talked freely about her husband shooting up the house or his suicide, and the evidence of this case was a traumatic reminder of what could have happened to her and her son. It is extremely unlikely that Juror A had any ability to prevent emotions and images from her own experiences from arising, or that these would not have affected how she saw Lee Hall and how she made decisions on both his culpability and sentence.

17. The parallels between Juror A's experience and the trial proof as reported in the Tennessee Supreme Court opinion would have exacerbated her inability to prevent emotions and images from her own experience from arising during her jury service. Juror A was married to her first husband for five years and Mr. Hall and Traci Crozier lived together for five years. Juror A's memories are set in the trailer where she and her first husband lived. Mr. Hall and Ms. Crozier lived in a trailer until she left him a few weeks before Mr. Hall cause her death. The

relationship between Hall and Crozier was reported to be "rocky." Juror A's first marriage was tumultuous and violent. Juror A describes her husband called her constantly at work, exhibiting controlling behavior, and jeopardizing her job. At Mr. Hall's trial, witnesses testified that he called Traci repeatedly when she left. Juror A testified that she would sometimes "escape" to her husband's grandmother's house. Ms. Crozier moved in with her grandmother upon leaving Mr. Hall. Mr. Hall and Juror A's husband both drank to excess and the most violent episode Juror A experienced was while her husband was drunk, as was the case in Mr. Hall causing Ms. Crozier's death after having consumed a large amount of alcohol.

18. It is also common for survivors of domestic violence to exhibit avoidant behavior and attempt to "get on with it" and put the past behind them once the relationship is over. Some of Juror A's comments in 2014 are consistent with an avoidant response. For example:

- Much of the interview focuses on her happy second marriage. Her second husband "swept her off her feet"; they traveled the world together; her second husband "convinced her to go through his bucket list with him."
- Juror A recalled filling out a long questionnaire but did not mention any questions concerning being a crime victim or a victim of domestic abuse.

Indeed, at no point in the 2014 interview does Juror A report that she had been previously married. Juror A likewise fondly recalled her second marriage at the November 14, 2019 hearing:

- In his marriage proposal, her husband offered to send her son to the very best school; he encouraged her to quit her job, go back to school, travel around the world, and retire early together. (20)
- Juror A recounted how she and her second husband traveled around the world together twice. They lived in Africa; they spent six months traveling around India; they visited Australia twice; and they traveled around North America in an RV, going as far north as one can drive in Canada and Alaska. (27)

19. In her 2019 declaration, Juror A declares that "Lee Hall reminded me of (my first husband)." And later, "All these memories flooded during the trial. I could put myself in [the victim's] shoes, given what happened to me. I hated Lee for what he did to that girl. It really triggered the trauma I had gone through with (my first husband) and I was biased against Lee." The memories that "flooded" over Juror A during the trial are the traumatic re-experiencing symptom of Post-Traumatic Stress Disorder.

20. Traumatic memory does not go away. The emotional impact of the trauma can be triggered by exposure to reminders of the trauma, particularly sensory reminders (sights, sounds, etc.). These reminders can result in strong "re-experiencing" of the trauma in the form of nightmares, flashbacks, and/or "amygdala hijack." (Ogden et al, 2006, Van der Kolk, 2004). Amygdala hijack results in very strong emotions (e.g., fear, anger) becoming activated.

21. When survivors are moved by re-experiencing traumas out of their "Window of Tolerance," they are unable to effectively process emotions and cognitions. (Siegel, 2012, and Porges, 2011).

22. It is my professional opinion to a reasonable degree of scientific certainty that this "amygdala hijack" response could inform and/or explain:

- Why Juror A did not notify anyone immediately after Mr. Hall testified about her history; and
- Why Juror A may not have disclosed her history during the 2014 interview, which appears to focus mostly on her life after meeting her second husband.

23. In addition, the ongoing trauma response to the experience could also inform any current opinion Juror A might hold as to whether her history as a victim of domestic and sexual violence impacted her decision-making in her service as a juror.

24. From her testimony, sworn statement, and from the 2014 juror interview memo, it appears that Juror A was and continues to be traumatized by the experience. For example:

- The abusive relationship Juror A described was traumatizing. The fact that her husband was both an alcoholic and mentally ill could have made an abusive relationship even more traumatic.
- Juror A could not recall parts of her conversation with OPCD investigators that occurred a few weeks prior to the hearing.
- As described above, Juror A continues to exhibit signs and symptoms of an abuse victim.
- Like many trauma victims, Juror A has repressed memories of the experience.
- To this day, she still blames herself, at least in part, for the abuse she suffered.

- As an individual still experiencing the effects of trauma, it is difficult for Juror A to accurately and objectively assess how her past experiences may have influenced her decision-making at Mr. Hall's trial or how her past experiences may impact her perspective of the trauma to this day.

25. In sum, I have seen nothing to suggest that Juror A's experiences and memories of her trauma were ever fully integrated or processed. Juror A's history of sexual, physical, and emotional abuse would have colored her perception, judgement, and behavior at the time of Mr. Hall's trial. Juror A's November 2019 testimony also make clear that she is still traumatized and that her experiences continue to impact her perception, judgement, and behavior surrounding her own trauma as well as similar incidents of trauma.

26. In my professional opinion to a reasonable degree of scientific certainty, the 2019 testimony and declaration of Juror A as well as the topics documented in the 2014 interview are consistent with typical responses of trauma survivors.

27. **References:**

- Bureau of Justice Statistics. (2001). Sexual Victimization of College Students.
- Herman, J. L. (1997). Trauma and recovery: The aftermath of trauma in domestic abuse and political terrorism. New York: Basic Books.
- Ogden, P., Minton, K., and Pain, C. (2006). The body and trauma: A sensorimoter approach to psychotherapy. New York: W. W. Norton & Company.

- Porges, S.P. (2011). The polyvagal theory: Neurobiological foundations of emotions, attachment, communication, and self-regulation. New York: W. W. Norton & Company.
- Siegel, D. J. (2012). Pocket guide to interpersonal neurobiology. New York: W. W. Norton & Company.
- Van der Kolk, B. (2004). The Body keeps the score: Brain, mind, and body in the healing of trauma. New York: Penguin Books.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States of America and the State of Tennessee.

/s *Linda Manning*

Linda Manning

LINDA G. MANNING

Address: 2212 Grantland Avenue
Nashville TN 37204
Phone: 615-500-5265

Education:

University of Texas Health Science Center, School of Allied Health Sciences (Dallas, Texas), B.S., 1977**,** Rehabilitation Science

University of Texas, Department of Educational Psychology (Austin, Texas), Ph.D., 1988,
Counseling Psychology (APA approved)

University of Texas, Counseling and Psychological Services Center (Austin, Texas), Internship, 1981 to 1983

Alaya Process, Nashville, Tennessee, 1994 - 1995. Eighteen month training program in body-centered psychotherapy and the mind, body, spirit connection

Jean Baker Miller Training Institute, Wellesley College, 1999. Summer Advanced Training Institute in Relational-Cultural Theory

Coming Full Circle, Nashville, Tennessee, 2000 – 2001. Eighteen month series on contemplative practices in death and dying.

Robert Penn Warren Center for the Humanities, Vanderbilt University, 2008 – 2009. Fellowship in Trauma Studies.

Wellcoaches Core Training & Certification Program for Health & Wellness Coaches, 2011

Wellcoaches Professional Coaching Training & Certification Program, 2011 - 2012

Potentials Realized, Training in Group Health Coaching, 2011

Take Courage Coaching, Training in Chronic Pain Health Coaching, 2012

Licensure and Certification:

Tennessee, March, 2007 to present, Licensed Psychologist, No. 2778
Texas, 1994 to present, Licensed Psychologist, No. 5042

Academic Appointments:

Adjunct Faculty**,** Department of Psychology and Philosophy, Texas Women's University, 1986

Adjunct Faculty**,** School of Behavioral and Social Sciences and New College Program for adult learners, St. Edward's University, 1987 to 1997

Senior Lecturer**,** College of Arts and Science, Women and Gender Studies Program, Vanderbilt University, 1999 to 2007

Senior Lecturer, Peabody College, Human Development Counseling Program, Vanderbilt University, 2005 to 2008

Assistant Professor**,** Department of Psychiatry, Vanderbilt University School of Medicine, November 2008 to present

Assistant Professor, Department of Physical Medicine and Rehabilitation, Vanderbilt University School of Medicine, September, 2014 to April 30, 2019

Assistant Clinical Professor, Peabody College, Human Development Counseling Program, Vanderbilt University, 2009 to present

Employment:

07/83 to 07/87	Staff Psychologist, Counseling Center, Texas Woman's University, Denton, Texas
08/87 to 07/89	Staff Psychologist, Psychological Services, St. Edward's University, Austin, Texas
08/ 89 to 10/97 Texas	Director**,** Psychological Services, St. Edward's University, Austin,
11/97 to 11/08	Director**,** Margaret Cuninggim Women's Center, Vanderbilt University, Nashville, Tennessee

12/08 to present	Health Psychologist, Osher Center for Integrative Medicine (formerly Vanderbilt Center for Integrative Health), Vanderbilt University Medical Center, Nashville, Tennessee
07/15 to 4/19	Director of Psychology, Osher Center for Integrative Medicine, Vanderbilt University Medical Center, Nashville, Tennessee
08/15 to 03/16	Assistant Director, Osher Center for Integrative Medicine, Vanderbilt University Medical Center, Nashville, Tennessee
03/16 to 4/19	Interim Director, Osher Center for Integrative Medicine, Vanderbilt University Medical Center, Nashville, Tennessee

Professional Organizations:

American Psychological Association
Division 35 – Society for the Psychology of Women

Nashville Psychotherapy Institute (Board Member, January 2019 – 2022)

Association of University and College Counseling Center Directors
(1989 - 1997)

Texas University and College Counseling Directors
(President, 1991 - 1992)
(Liaison Officer to Texas Psychological Association, 1990-1994)

Professional Activities

Revised and coordinated Practicum training program in psychology, Texas Women's University, 1983 to 1985

Co-Development of a pre-doctoral internship training program in psychology and successful application for accreditation by the American Psychological Association, Texas Women's University, 1985 to 1987

Received four years of funding under the Department of Justice, Office of Justice Programs, Violence Against Women Office, Grants to Reduce Violent Crimes Against Women on Campus Program, Vanderbilt University, 2000 to 2004

Supervised campus and community Violence Against Women Task Force, Vanderbilt University, 1999 to 2008

Member of Advisory Board, Women's Health Report Card, Vanderbilt University Medical Center, 2009, 2013

Co-Director and Faculty, Vanderbilt Health Coaching Certificate Program, Osher Center for Integrative Medicine and Vanderbilt School of Nursing, September 2014 to 2018

Teaching Activities

Medical School Courses:

Small Group Facilitator for Diabetes Intersession, 2008 to 2011
Lecture on Violence Against Women for Patient, Profession and Society, 2009
Small Group Facilitator on Mindfulness for Brain, Behavior, and Movement, 2014, 2015, 2016, 2017
Lecture and Small Group Facilitation on Health Coaching for CCE, 2013 - 2016

Graduate Courses: (developed and lectured)

Trauma: Impact and Intervention, Human Development Counseling Program, Peabody College, Vanderbilt University, Summer 2005 to present, now a required course

Theories of Counseling, Human Development Counseling Program, Peabody College, Vanderbilt University, Fall 2006

Continuing Education (co-developed and presented)

Manning, L., & Robinson, K. (2008, August & September). *Up close and transpersonal.* An APA approved Continuing Education program for mental health professionals. Vanderbilt Department of Psychiatry and the Center for Integrative Health, Nashville, Tennessee.

Manning, L., & Robinson, K. (2009, February through July). *Transpersonal psychology: the deepening experience*. An APA approved Continuing Education program for mental health professionals. Vanderbilt Department of Psychiatry and the Center for Integrated Health, Nashville, Tennessee.

Manning, L., & Robinson, K. (2011, May through October). *Transpersonal approaches in practice and in life.* An APA approved Continuing Education program for mental health professionals. Vanderbilt Department of Psychiatry and the Center for Integrated Health, Nashville, Tennessee.

Manning, L., & Robinson, K. (2012, October through 2013, March). *Training the mind; awakening the body.* An APA approved Continuing Education program for mental health professionals. Vanderbilt Department of Psychiatry and the Center for Integrated Health, Nashville, Tennessee.

Manning, L., & Robinson, K. (2013, November through 2014, February and March). *Breathwork: The use of breathwork in psychotherapy*. An APA approved Continuing Education program for mental health professionals. Vanderbilt Department of Psychiatry and the Center for Integrated Health, Nashville, Tennessee.

Morriss, B., **Manning**, L., & Cooper, A. (2011, April). *Philosophy and skills of health coaching*. Workshops for the Vanderbilt University Medical Center My Health at Vanderbilt Team, Nashville, Tennessee

Morriss, B., **Manning**, L., & Cooper, A. (2011, May). *Philosophy and skills of health coaching*. Workshops for the Vanderbilt University Medical Center Department of Bariatric Surgery, Nashville, Tennessee

Morriss, B., **Manning**, L., & Cooper, A. (2011, November). *Philosophy and skills of health coaching*. Workshops for the Vanderbilt University Medical Center Physical Therapy Program at the Dayani Center, Nashville, Tennessee

Morriss, B., **Manning**, L., & Cooper, A. (2012, March). *Philosophy and skills of health coaching*. Workshops for Vanderbilt University Medical Center Dieticians, Nashville, Tennessee

Morriss, B., **Manning**, L., & Cooper, A. (2012, October and November). *Philosophy and skills of health coaching*. Workshops for Vanderbilt Professional Program in Interdisciplinary Learning, Nashville, Tennessee

Manning, L., Morriss, Blaire, & Armstrong, Colin (2014, September through 2017). Vanderbilt Health Coaching Certificate Program. An APA, CME, and TNA approved six month Continuing Education program for licensed health care professionals. Osher Center for Integrative Medicine (formerly the Vanderbilt Center for Integrative Health) and the Vanderbilt School of Nursing, Nashville Tennessee.

Robinson, K., **Manning**, L., & Silverstein, K. (2016, October 8 & 9, November 5 & 6, December 3 & 4). *The art of no compromise: Teachings in body psychology*. An APA approved Continuing Education program for mental health professionals. Onsite Workshops, Nashville, Tennessee

Clinical Teaching

Psychiatry Resident

Sunny Kim, M.D., Vanderbilt Adult Outpatient Clinic, Clinical Supervision of Psychotherapy, 2010 – 2011

Nataly Sumarriva, Osher Center for Integrative Medicine, Clinical Supervision of Psychotherapy, 2017 - 2018

Post-Doctoral Fellow in Psychology, Renee Hill, Psy.D., Osher Center for Integrative Medicine (60% time), Clinical Supervision of Psychotherapy, 2015 – 2016

Post-Doctoral Fellow in Psychology, Landrew Sevel, Ph.D., Osher Center for Integrative Medicine (70% time), Clinical Supervision of Psychotherapy, 2017 – 2018

Post-Doctoral Fellow in Psychology, John Verbos, PhD., Osher Center for Integrative Medicine (70% time), Clinical Supervision of Psychotherapy, 2018 - 2019

Internship in Psychology

Nickolas Armstrong, 20% time, 2017 - 2018

Cinthia Benitez, 20% time, 2017 – 2018

Alexandra Chadderdon, (secondary – 20% time), 2017 – 2018

Behavioral Medicine Trainees – Clinical Supervision of Psychotherapy Services provided at the Eskind Adult Diabetes Clinic, Sickle Cell Infusion Clinic, IBD Clinic, Mercury Courts Clinic, Internal Medicine, Pain Clinic at Cool Springs, ENT Clinic, Osher Center for Integrative Medicine

Abby Mintz , Vanderbilt Human Development Counseling Internship, 2009 – 2010

Toy Lisa Mitchell, Vanderbilt Human Development Counseling Internship, 2011 – 2012

Rachel Aaron, Vanderbilt Department of Psychology Doctoral Practicum, 2013 – 2014

Rain Voss, Vanderbilt Human Development Counseling Internship, 2014 – 2015

Mary Harlinger, Tennessee State University Doctoral Practicum, 2014 – 2015

Emily Henry, Vanderbilt Human Development Counseling Internship, 2015 – 2016

Deanna Calderona, Vanderbilt Human Development Counseling Internship, 2016 - 2017

Maria Boero-Legge, Tennessee State University Doctoral Practicum, 2016 – 2018

Publications and Professional Presentations

Articles:

Dial, J., and **Freemon, L**. (1979, October). *Predictive validation of the McCarron-Dial Evaluation System*. Vocational Evaluation and Work Adjustment Bulletin.

Colin, A., Wolever, R.Q., **Manning, L**., Elam, R., Moore, M., Frates, P.F., Duskey, Heidi, Anderson, C., Curtis, R.L., Masemer, S., Lawson, K. (2013, May). *Group health coaching: Strengths, challenges, and next steps.* Global Advances in Health and Medicine.

Presentations:

1 Stachowiak, T.I., de St. Aubin, T.M., Foos, J. A., & **Manning**, L. (1985, November). *Guidelines for intake system design*. Paper presented at the meeting of the Texas Psychological Association, Dallas, Texas.

2 Stachowiak, T.I., de St. Aubin, T.M. Foos, J.A. & **Manning**, L. (1987, January). *Negative effects of the higher education experience on family relationships*. Paper presented at the meeting of the Texas Association of Marriage and Family Therapy, Dallas, Texas.

3 **Manning,** L., Ponder, M. & Gilbert, L.A. (1979, April). *Returning students' conflicts with the student role: Gender and parenthood effects*. Paper presented at the meeting of the Southwestern Psychological Association, San Antonio, Texas.

4 **Manning**, L. & Gilbert, L.A. (1979, March). *Factors affecting the experience of role conflict.* Paper presented at the meeting of the Association for Women in Psychology. Dallas, Texas.

5 **Manning**, L. & Davis, B. (1981, August). *The men in dual career families*. Paper presented at the meeting of the American Psychological Association, Los Angeles, California.

6 **Manning**, L. (1984, November). *Skill development for crisis counseling situations*. Invited workshop presented to the Division of Student Affairs of Texas Christian University, Fort Worth, Texas.

7 **Manning**, L. (1984, November). The liberated woman. In G.A. Brooks (Chair). *Values in psychotherapy*. Symposium conducted at the meeting of the Texas Psychological Association, San Antonio, Texas.

8 **Manning**, L. (1986, August). *From theory to practice: Applying student development theory to programming for the "new student."* Invited workshop presented at the retreat of the Division of Student Life of Texas Women's University. Lake Taxhoma, Oklahoma.

9 **Manning**, L. (1987, October). *Designing a stress free life*. An invited presentation for the national meeting of the University and College Design Association, San Antonio, Texas.

10 **Manning**, L. (1991, January). *Substance Abuse: Recognizing and intervening*. An invited staff development workshop for the multi-campus Counseling staff of Austin Community College, Austin, Texas.

11 **Manning**, L. (1991, October). Experiences of a freshman director. In W. Birch (Chair), *Orientation for new directors*. Invited presentation at the meeting of the Association of University and College Counseling Center Directors. Jekyll Island, Georgia.

12 **Manning** L. & Swindell, C.J. (1993, August). One program's experiences: Origin and development of student involvement. In J.M. Galessich (Chair). *Student impact on counseling psychology training programs*. Symposium conducted at the meeting of the American Psychological Association, Los Angeles, California.

13 **Manning** L. & Spano, D. (1993, March). *Students leading students toward the common good: Peer education*. Paper presented at the meeting of the American College Personnel Association, Kansas City, Missouri.

14 **Manning** L. & Spano, D. (1995, March). *Counseling centers as campus-wide organizational development consultants*. Paper presented at the meeting of The American College Personnel Association, Boston, Massachusetts.

15 **Manning**, L. & Pena, E. (1995, March). *Mutuality and reciprocity in cross-cultural supervision*. Paper presented at the meeting of the American College Personnel Association, Boston, Massachusetts.

16 **Manning**, L. & Pierce, P. (1998, July). *Barriers to women's advancement: Is there a common thread?* Paper presented at the International Conference Winds of Change: Women & the Culture of Universities, Sydney, Australia.

17 **Manning**, L. & Rosovsky, C. (1999, February). *Women working with women: Can we really lift as we climb?* Pre-conference workshop presented at the annual meeting of the National Association of Women in Higher Education, Denver, Colorado.

18 **Manning**, L. & Rosovsky, C. (1999, June). *Women working with women: Can we really lift as we climb?* Paper presented at the annual meeting of the National Women's Studies Association, Albuquerque, New Mexico.

19 **Manning**, L. & Coleman, S. (2000, September). *Honoring all communities: Culturally sensitive education and response to violence against women.* Invited address at the 3rd Technical Assistance Institute for recipients of FY '99 Grants to Combat Violent Crimes Against Women on Campuses, Nashville, Tennessee.

20 **Manning**, L. (2001, February). *Integrating therapy and spirituality*. Invited address at the Texas University and College Counseling Conference, Austin, Texas.

21 **Manning**, L. (2001, October). *The art of therapy*. Opening Keynote at the American Association of Marriage and Family Therapy Annual Conference, Nashville, Tennessee.

22 **Manning**, L. (2002, March) *Healing violent men: A model for Christian communities*. Invited Panelist for the joint Carpenter Program/American Men's Studies Association Program preceding the Annual Men's Studies Conference at the Vanderbilt Divinity School, Nashville, Tennessee.

23 **Manning**, L., & Province, A. (January, 2005). *By the waters of Babylon: A trauma workshop for clergy*. St. Martin's Episcopal Church, Austin Texas.

24 **Manning,** L. (2005, February). *Re-membering trauma: Reawakening the body, revitalizing the spirit*. Invited workshop for the Human Development Counseling Program and Chi Sigma Iota Professional Development Workshop, Peabody College, Vanderbilt University.

25 **Manning**, L., & Robinson, K. (2005, June). *Taking care: Self-respect in action.* 2005 Invited address, Street Outreach Workers Conference, Texas Department of State Health Services, Austin, Texas.

26 **Manning**, L., Robinson, K., & Province, A. (2005 & 2006, July – March). *The study and practice of surrender.* A six weekend training series for therapists and spiritual directors. Yoga for the Emotional Body, Austin, Texas.

27 **Manning**, L. (2006, April). *The healing connection: Introduction to the Relational-Cultural model of therapy.* Invited address, Nashville Psychotherapy Institute, Nashville, Tennessee.

28 Fishel, T., **Manning**, L., & Pearce, M. (2009, November). *The embodied mind: The science and practice of integrated medicine.* Invited address at the Nashville Psychotherapy Institute, Nashville, Tennessee.

29 **Manning**, L., & Morriss, B. (2010, January). *Mindfulness*. Invited address, Wellcoaches Professional Coaches Training and Certification Program, Nashville, Tennessee.

30 **Manning**, L. (2010, February). *The other side of difference*: Invited address, Nashville Psychotherapy Institute Spring Smorgasbord, Nashville, Tennessee.

31 **Manning**, L. (2011, November). *Chronic trauma, chronic pain and the practice of integrative medicine.* Invited address, faculty development program for AOMA, Graduate School of Integrative Medicine, Austin, Texas.

32 **Manning**, L. (2011, August). *Preserving the passion that propels primary prevention*. Invited address, Tennessee Coalition to End Domestic and Sexual Violence Rape Prevention & Education Institute, Nashville, Tennessee.

33 **Manning**, L. (2012, May). *The practice of integrative medicine: Treating chronic trauma and chronic pain.* Invited address, AIM@Aoma Conference, Austin, Texas.

34 **Manning**, L. (2012, July). *Vicarious trauma*. Invited address, Coordinated Community Response to Sexual Assault Institute, Nashville, Tennessee.

35 **Manning**, L. (2012, August). *Preventing burnout for prevention advocates*. Invited address, Tennessee Coalition to End Domestic and Sexual Violence Rape Prevention & Education Institute, Nashville, Tennessee.

36 Morriss, B., and **Manning**, L. (2012, October). *Fundamentals of integrative health coaching for clinicians*. Peer Reviewed Presentation, International Congress for Educators in Complementary and Integrative Medicine, Washington, D.C.

37 **Manning**, L. (2013, August). *It takes a village: Preventing vicarious trauma in individuals and organizations working with sexual violence.* Invited address, Tennessee Coalition to End Domestic and Sexual Violence Rape Prevention & Education Institute, Nashville, Tennessee.

38 **Manning**, L., and Morriss, B. (2013, October). *Fundamentals of integrative health coaching for clinicians*. Peer Reviewed Pre-conference workshop, American Association of Cardiovascular and Pulmonary Rehabilitation, Nashville, Tennessee

39 **Manning**, L., & Wroth, S. (2013, November). *Health coaching: Empowering patients for behavior change.* Peer Reviewed Presentation, International Congress for Clinicians in Complementary and Integrative Medicine, Chicago, Illinois.

40 **Manning**, L. (2016, April). *Working with trauma and chronic pain*. Invited presentation, Nashville Psychotherapy Institute, Nashville, Tennessee

41 **Manning**, L. (2017, February). *Trauma and the body*. Invited workshop for Connections Retreat, Nashville Psychotherapy Institute, Montgomery Bell State Park, Tennessee

42 **Manning**, L. (2017, October). *Integrative medicine: treating the whole person*. Invited address for the Osher Lifelong Learning Institute, University of Richmond, Richmond, Virginia.

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
DIVISION III

LEE HALL,	)	
Petitioner,	)	
	)	Case No. 308968
v.	)	
	)	
STATE OF TENNESSEE,	)	
Respondent.	)	(CAPITAL CASE)

AFFIDAVIT OF SOPHIA F. BERNHARDT

STATE OF NEW YORK)
)
COUNTY OF KINGS)

I, Sophia F. Bernhardt, affirm that the following is true to the best of my knowledge, information and belief:

1. I am currently a trial supervisor at Brooklyn Defender Services where I supervise attorneys and represent clients in a wide range of family court matters including abuse and neglect proceedings, child custody, and paternity. I am also a Lecturer in Law at Columbia Law School where I have taught Legal Practice Workshop for the past four years.

2. In October 2019, I was contacted by Kelly Gleason, my former colleague at the State of Tennessee Office of the Post-Conviction Defender (OPCD) concerning a 2014 interview I conducted with a juror on Lee Hall's capital trial. I was able to recall aspects of the interview, but not all of the topics we covered.

3. In November of 2019, I spoke with Jonathan King, another one of my former OPCD colleagues. He inquired about my availability to appear in Chattanooga on short-notice for the hearing set on November 14, 2019. Due to the short notice and to work obligations, I am unable to attend this hearing. Accordingly, I offer this affidavit in absence of my appearance.

4. In preparation of this affidavit, I have reviewed my 2014 Juror A interview memo. I have also reviewed the October 7, 2019 declaration from the same juror, which I understand has been filed under seal. Additionally, I reviewed training materials upon which I relied in preparation for juror interviews in Mr. Hall's case.

5. I was the attorney responsible for the 2014 juror interviews in Mr. Hall's case; however, an investigator from the office, Larry Gidcomb, accompanied me on one the interviews out-of-state as we were traveling together for another case. In preparation for the interview of Juror A, I reviewed the juror's questionnaire and testimony during individual and group voir dire. As the person most familiar with the materials, I asked most (if not all) of the questions during the interview and drafted the interview memorandum (memo) along with the juror's affidavit supporting a sentence of life without parole.

6. As noted by the memo's watermark, it was drafted for internal circulation only. Considering that Mr. Hall had exhausted his appeals and that we uncovered no groundbreaking information, I did not anticipate that the memo would become discoverable or play any role in future proceedings. As was my practice, I put in boldface font any information I thought could remotely form the basis of a claim. On page two, I bolded that the juror's husband, who was by that

time deceased, may have known some of the witnesses in a professional capacity. I also bolded the fact that the juror and her husband socialized with one of the professionals involved in the case, but who was never called to testify. I provide (in boldface) additional facts which indicate that these tangential relationships are unlikely to substantiate a meritorious claim for relief.

7. After reviewing my memorandum, I cannot remember whether I specifically asked the juror about her exposure to domestic and/or sexual abuse. However, given (1) the nature of the case, and (2) my training and experience relating to capital juror interviews, it is a topic that I would have covered, along with other potential extraneous influences on the jury. Had I asked about domestic and/or sexual abuse, I would not have included this question (along with many others) if the juror's response was not relevant to and supportive of a potential claim for relief.

8. Below, I outline my education and training relevant to capital juror interviews.

- I received my J.D. from New York University (NYU) School of Law in 2008, where I was a Root-Tilden-Kern public interest scholar and an articles editor on the NYU Law Review.
- During the fall of my third year of law school, I took a class on capital punishment with Bryan Stevenson, the founder/director of the Equal Justice Initiative (EJI) based in Montgomery, Alabama.
- After graduating from law school passing the Alabama bar exam in 2008, I went to work for EJI, where I worked on numerous capital cases until July of 2012.
- While at EJI I conducted approximately fifteen to twenty interviews with capital jurors and twice attended Airlie, a national training on capital punishment.
- In 2012, I left EJI to clerk for the Honorable James L. Cott in the Southern District of New York, my home state and birthplace.

- After my clerkship, I took a job at State of Tennessee Office of the Post-Conviction Defender (OPCD) where I worked as a staff attorney until August of 2014 when I returned to New York because my spouse had taken a job in New York.
- While at the OPCD, I received additional training on capital juror interviews.

9. Before conducting the juror interviews in Mr. Hall's case, I received training on capital juror interviews; part of this training involved familiarizing myself with the *Alabama Capital Postconviction Manual* (Fifth Edition, 2009), written and published by EJI, where I worked for four years. I have recently reviewed the Manual and have attached to this affidavit the portions relevant to juror interviews, which are described below.

- Litigating Juror Misconduct Claims—juror consideration of extraneous evidence (p. 80);
- Litigating Juror Misconduct Claims—failure to respond accurately during voir dire (p. 81);
- The Legal Standard of Review for Juror Misconduct Claims (pp. 81–83);
- Investigating Juror Misconduct Claims (pp. 83–84);
- Juror Misconduct Litigation Case Summaries (pp.112–24)
- U.S. Supreme Court Capital and Selected Cases—cases relating to bias, juror misconduct, and the jury (pp. 240–41);
- Selected Alabama Capital Cases—cases relating to juror misconduct and other juror issues (pp. 285–89); and
- Selected Alabama Noncapital Cases—cases relating to juror misconduct and other juror issues (pp. 330–35).

10. Should this Court or the parties wish to address the information contained within this affidavit, I will make myself available for a telephonic statement or testimony given adequate notice.

FURTHER THE AFFIANT SAITH NOT.

Sophia Bernhardt

Signed and sworn before me this 13 day of November 2019.

Notary Public

My commission expires: 4/6/23

Emma Claire Alpert
Notary Public State of NY
No. 02AL6322452
Kings Cty
exp 4/6/23