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.

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.

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, JUDGE
DIVISION III
CRIMINAL COURT
HAMILTON COUNTY, TENNESSEE

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