have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution; and third, if the rule advocated by the petitioner is a new rule, the court must determine whether the rule falls within one of the two narrow exceptions to the non-retroactivity principle. *Caspari v. Bohlen*, 510 U.S. at 390, 114 S.Ct. at 953.

The only two exceptions to the *Teague* non-retroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, i.e., a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *O'Dell v. Netherland*, 521 U.S. at 157, 117 S.Ct. at 1973. A conviction becomes final for *Teague* purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires. *Caspari v. Bohlen*, 510 U.S. at 390, 114 S.Ct. at 953.

Petitioner's conviction became final for *Teague* purposes not later than November 3, 2003, i.e., the date the Supreme Court denied petitioner's certiorari petition on direct appeal. *Beard v. Banks*, 542 U.S. 406, 411-12, 124 S.Ct. 2504, 2510, 159 L.Ed.2d

494 (2004)(recognizing a state criminal conviction ordinarily becomes final for *Teague* purposes when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition for certiorari has been denied); *Caspari v. Bohlen*, 510 U.S. at 390, 114 S.Ct. at 953 ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Teague remains applicable after the passage of the AEDPA. *See Horn v. Banks*, 536 U.S. 266, 268-72, 122 S.Ct. 2147, 2148-51, 153 L.Ed.2d 301 (2002)(applying *Teague* in an AEDPA context); *Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003) (recognizing the continued vitality of the *Teague* non-retroactivity doctrine under the AEDPA), *cert. denied*, 539 U.S. 979 (2003).

As of the date petitioner's conviction and sentence became final for *Teague* purposes no federal court had ever held a Texas criminal defendant was entitled to voir dire potential jurors in a capital case on their personal views on precisely how Texas parole law would impact their potential deliberations at the punishment phase of a capital murder trial. As is clear from the

discussion of the authorities in Section IV.D. above, the Supreme Court has never held jurisdictions which do not offer the jury the option of imposing a term of life imprisonment without the possibility of parole (such as Texas at the time of petitioner's offense and trial) are constitutionally obligated to permit voir dire examination of potential jurors on precisely how their understanding of Texas parole law will impact their deliberations at the punishment phase of a Texas capital murder trial. Nor was such a holding arguably discernable based on any then-existing Supreme Court precedent. Thus, petitioner's second claim herein is foreclosed by the non-retroactivity doctrine of *Teague*. The new rule proposed by petitioner in his second claim herein falls within neither of the recognized exceptions to the *Teague* doctrine.

Even assuming the Supreme Court might one day adopt a rule imposing a duty on state courts which do *not* offer capital sentencing juries the option of sentencing a petitioner to a term of life imprisonment without the chance of parole to interrogate potential jurors on their personal views on how the defendant's potential parole eligibility might affect their punishment phase deliberations, that day has not yet arrived.

The Fourteenth Amendment claim asserted by petitioner in his second claim herein constitutes a proposed "new rules of criminal procedure" which the non-retroactivity rule of *Teague v. Lane*

precludes this Court from recognizing or applying in a federal habeas context.

F. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits of petitioner's seventh, ninth, eleventh, thirteenth, fifteenth, seventeenth, and nineteenth points of error on direct appeal was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor based upon an unreasonable determination of the facts in light of the evidence presented in the petitioner's trial, motion for new trial, and direct appeal proceedings. Petitioner's second claim herein is foreclosed by the non-retroactivity doctrine of *Teague v. Lane, supra*.

Petitioner's second claim herein does not warrant relief under the AEDPA.

V. Voir Dire Examination of Venire Member Middleton

A. The Claim

In his sixth claim herein, petitioner argues the state trial judge erred, and violated due process principles, when he refused to allow petitioner's trial counsel to ask venire member Middleton whether she could answer the future dangerousness

special issue negatively in the case of a defendant convicted of the capital murder of a young girl.[94]

B. State Court Disposition

During the voir dire of venire member Kimberly R. Middleton, the following exchanges occurred:

> Q. That's fine. Can you imagine a set of circumstances, set of facts where you would find a person guilty of capital murder, of killing a young girl where you would answer question number one no if you thought that that is the kind of case that was --
> THE COURT: Well, just disregard the -- that clause, killing of a young girl. Now counsel -- go ahead, Mr. Lee.
> MR. LEE: We'll object on the basis that Mr. Garcia is trying to commit the juror to a specific course of action or a specific set of facts.
> THE COURT: Sustained.
> Q. (BY MR. GARCIA) Can you imagine a set of circumstances where, after you found a person guilty of capital murder from whatever facts were presented to you, that you could answer the question number one no?
> A. I'm sure that I could, yes.
> Q. And would you do so?
> A. Yes, I would.[95]

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[94] Amended Petition, at pp. 166-72. Petitioner's sixth claim herein consists primarily of a verbatim recitation of the petitioner's twenty-third point of error on direct appeal, i.e., a wholly state-law complaint about the trial court's sustaining of the prosecutor's objection to a particular question petitioner's trial counsel directed to venire member Middleton. As explained above, insofar as petitioner urges a claim herein based exclusively upon the Texas Constitution, that claim is non sequitur. *See note* 84, *supra*.

[95] S.F. Trial, Volume 6, voir dire examination of Kimberly R. Middleton, at pp. 244-25.

Petitioner did not challenge venire member Middleton for cause but did employ a peremptory challenge against her.[96]

As his twenty-third point of error on direct appeal, petitioner argued the state trial court erroneously, under Texas constitutional and Texas statutory principles, precluded his trial counsel from inquiring of Ms. Middleton regarding her ability to answer the first Texas capital sentencing issue, i.e., the future dangerousness special issue, negatively in the case of the capital murder of a young child.[97]

The Texas Court of Criminal Appeals rejected on the merits petitioner's purely state-law twenty-third point of error on direct appeal:

> In his twenty-third point of error, appellant complains that the trial court erred when it prohibited him from asking a venireperson whether she could answer the future dangerousness issue "no" if the defendant had just been convicted of the capital murder of a young girl. Specifically, the following occurred:
>
> > [By defense counsel] Q. That's fine. Can you imagine a set of circumstances, set of facts where you would find a person guilty of capital murder, of killing a young girl where you would answer question number one no if you thought that that is the kind of case that was—
> > THE COURT: Well, just disregard the—that clause, killing of a young girl. Now

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[96] *Id.*, at pp. 247-48. More specifically, petitioner employed the defense's second peremptory challenge against venire member Middleton. *Id.*

[97] Appellant's brief, at pp. 86-89. At no point in his twenty-third point of error did petitioner refer or allude to any federal constitutional principle or federal legal authority.

> counsel—go ahead, [prosecutor].
> [By the prosecutor]: We'll object on the basis that [defense counsel] is trying to commit the juror to a specific course of action or a specific set of facts.
> THE COURT: Sustained.
> Without further comment to the court, defense counsel rephrased his question and asked it again.
> As we explained in *Standefer,* a commitment question is one which seeks to "commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." Further, such a question is proper only when it includes such facts, and only those facts, that lead to a challenge for cause.
> The question that appellant wanted to ask the venireperson sought to commit her to a particular answer after learning a particular fact. Thus, as phrased, it was a commitment question. Further, that a defendant has been convicted of the capital murder of a young girl is a factor that a juror could consider in determining punishment. However, the law does not require the juror to consider the factor or to give it any weight. Therefore, regardless of her answer to the specific question asked, the prospective juror would not have been subject to a challenge for cause. The trial court did not err in refusing to allow appellant to ask an improper commitment question. Point of error twenty-three is overruled.

Sells v. State, 121 S.W.3d at 757-58 (*Footnotes omitted*).

C. Procedural Default on Unexhausted Federal Claim

Before seeking federal habeas corpus relief, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' *federal* rights. *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 1731, 144 L.Ed.2d 1 (1999); *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); *Picard v. Connor*, 404

U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971); 28 U.S.C. §2254(b)(1). To provide the State with this necessary "opportunity," the prisoner must "fairly present" his claim to the appropriate state court in a manner that alerts that court to the federal nature of the claim. *See Baldwin v. Reese*, 541 U.S. at 29-32, 124 S.Ct. at 1349-51 (rejecting the argument that a petitioner "fairly presents" a federal claim, despite failing to give any indication in his appellate brief of the federal nature of the claim through reference to any federal source of law, when the state appellate court could have discerned the federal nature of the claim through review of the lower state court opinion); *O'Sullivan v. Boerckel*, 526 U.S. at 844-45, 119 S.Ct. at 1732-33 (holding comity requires that a state prisoner present the state courts with the first opportunity to review a federal claim by invoking one complete round of that State's established appellate review process); *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 2081, 135 L.Ed.2d 457 (1996) (holding that, for purposes of exhausting state remedies, a claim for *federal* relief must include reference to a specific constitutional guarantee, as well as a statement of facts that entitle the petitioner to relief and rejecting the contention that the exhaustion requirement is satisfied by presenting the state courts only with the facts necessary to state a claim for relief).

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts and, thereby, to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S.Ct. 2134, 2138, 153 L.Ed.2d 260 (2002); Duncan v. Walker, 533 U.S. at 179, 121 S.Ct. at 2128; *O'Sullivan v. Boerckel*, 526 U.S. at 845, 119 S.Ct. at 1732; *Rose v. Lundy*, 455 U.S. 509, 518-19, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982).

Under the AEDPA, federal courts lack the power to grant habeas corpus relief on unexhausted claims. *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003)("28 U.S.C. § 2254(b)(1) requires that federal habeas petitioners fully exhaust remedies available in state court before proceeding in federal court."), *cert. denied*, 543 U.S. 835 (2004); *Henry v. Cockrell*, 327 F.3d 429, 432 (5th Cir. 2003)("Absent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief."), *cert. denied*, 540 U.S. 956 (2003). However, Title 28 U.S.C. §2254(b)(2) empowers a federal habeas court to deny an unexhausted claim on the merits. *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002), *cert. dism'd*, 541 U.S. 913 (2004); *Daniel v.*

Cockrell, 283 F.3d 697, 701-02 (5th Cir. 2002), *cert. denied*, 537 U.S. 874 (2002).

The exhaustion of *all* federal claims in state court is a fundamental prerequisite to requesting federal collateral relief under Title 28 U.S.C. Section 2254. *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001); *Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996); 28 U.S.C. §2254(b)(1)(A).

In order to "exhaust" available state remedies, a petitioner must "fairly present" *all* of his claims to the state courts. *Duncan v. Henry*, 513 U.S. at 365, 115 S.Ct. at 888; *Picard v. Connor*, 404 U.S. at 270, 275-76, 92 S.Ct. 509, at 512-13, 30 L.Ed.2d 438 (1971); *Kunkle v. Dretke*, 352 F.3d at 988; *Shute v. State of Texas*, 117 F.3d at 237 ("a habeas petitioner 'must fairly apprize [sic] the highest court of his state of the federal rights which were allegedly violated.'"). In Texas, the highest state court with jurisdiction to review the validity of a state criminal conviction is the Texas Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985). Petitioner has never "fairly presented" to any state court his new, Fourteenth Amendment, "due process" challenge to the state trial court's ruling sustaining the prosecution's objection to petitioner's trial counsel's hypothetical question to venire member Middleton.

The exhaustion doctrine requires that the petitioner present his *federal* claim in a manner reasonably designed to afford the State courts a meaningful opportunity to address same. The exhaustion requirement is satisfied when the substance of the *federal* habeas claim has been "fairly presented" to the highest state court, i.e., the petitioner presents his claims before the state courts in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, 541 U.S. at 29-32, 124 S.Ct. at 1349-51 (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to *federal* law or a citation to an opinion applying *federal* law to such a claim).

Respondent correctly points out the Fourteenth Amendment due process gloss petitioner has added in his sixth claim herein (to what is essentially petitioner's twenty-third point of error on direct appeal) has never been presented to any state court and is, therefore, unexhausted. *See Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001)(holding neither a fleeting reference to the federal constitution, tacked on to the end of a lengthy, purely state-law argument nor a vague reference to such expansive concepts as "due process" or "fair trial" "fairly presents" the state court with a federal constitutional claim); *Bartee v.*

Quarterman, 574 F.Supp.2d 624, 659 (W.D. Tex. 2008)(holding the same), *CoA denied*, 339 Fed. Appx. 429 (5th Cir. July 31, 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1882, 176 L.Ed.2d 370 (2010).

Respondent is also correct that petitioner's federal constitutional "due process" complaint about the trial court's ruling during venire member Middleton's voir dire examination, presented in this Court for the first time, is procedurally defaulted. *See Hughes v. Dretke*, 412 F.3d 582, 594-95 (5th Cir. 2005)(holding petitioner procedurally defaulted on a jury misconduct claim by presenting the state courts with purely state-law arguments supporting same and waiting until he reached federal court to first urge federal constitutional arguments), *cert. denied*, 546 U.S. 1177 (2006); *Beazley v. Johnson*, 242 F.3d 248, 264-68 (5th Cir. 2001)(holding petitioner procedurally defaulted on a claim by failing to present same to the Texas Court of Criminal Appeals either on direct appeal or in a state habeas corpus application where claim was readily available at the time petitioner filed his state habeas application), *cert. denied*, 534 U.S. 945 (2001); *Hicks v. Johnson*, 186 F.3d 634, 637-38 (5th Cir. 1999)(petitioner procedurally defaulted on an unexhausted claim for relief), *cert. denied*, 528 U.S. 1132 (2000).

The Supreme Court's recent holding in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, ___ L.Ed.2d ___ (2012), carved out of

the Supreme Court's procedural default jurisprudence a narrow exception for claims of ineffective assistance by trial counsel which were not raised in convicted criminal defendant's a state habeas corpus proceeding because of the deficient performance of the defendant's state habeas counsel. *See Martinez v. Ryan*, ___ U.S. at ___, 132 S.Ct. at 1315 ("Inadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default *of a claim of ineffective assistance at trial*). Petitioner's sixth claim herein does not present a complaint of ineffective assistance by his trial counsel. On the contrary, petitioner's sixth claim herein is an attempt to add a federal constitutional gloss to a garden variety complaint about the trial court's ruling on a state-law procedural matter committed by state procedural rules to the discretion of the trial court.

D. *Teague* Foreclosure

For reasons similar to those set forth in Section IV.E. above, petitioner's sixth claim herein is foreclosed by the non-retroactivity doctrine of *Teague v. Lane, supra*. At the time petitioner's conviction became final no federal court had ever held that state courts are constitutionally required to permit a criminal defendant to commit potential jurors to a particular verdict based upon a specific hypothetical set of facts. That is precisely what petitioner's trial counsel attempted to do to Ms.

Middleton. As of this date, no federal court has adopted such a rule. In fact, adoption of such a rule would stand the constitutional principle that a criminal defendant is entitled to trial before an *impartial* jury on its head. There is no legal authority for the principle underlying petitioner's sixth claim herein, i.e., that petitioner possessed a constitutional right to a jury composed of citizens who agreed *in advance* to consider particular evidence in a manner acceptable to the defense.

E. Alternatively, No Merit on *De Novo* Review

Title 28 U.S.C. Section 2254(b)(2) authorizes this Court to deny relief on an unexhausted claim.

Because no state court has ever addressed the merits of the federal constitutional portion of petitioner's sixth claim herein, this court's review of that federal constitutional claim is necessarily *de novo*. *See Porter v. McCollum*, ___ U.S. ___, ___, 130 S.Ct. 447, 452, 175 L.Ed.2d 398 (2009)(holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 2467, 162 L.Ed.2d 360 (2005)(holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

To be constitutionally compelled, it is not enough that requested voir dire questions might be helpful. Rather, the trial court's failure to ask (or permit counsel to ask) the questions must render the defendant's trial fundamentally unfair. *Morgan v. Illinois*, 504 U.S. at 730 n.5, 112 S.Ct. at 2230 n.5; *Mu'Min v. Virginia*, 500 U.S. at 425-26, 111 S.Ct. at 1905.

The Texas Court of Criminal Appeals concluded the question petitioner's trial counsel directed to Ms. Middleton at issue in petitioner's sixth claim herein was improper because, regardless of how she answered same, she would not have been subject under applicable state law to a challenge for cause. *Sells v. State*, 121 S.W.3d at 758. This Court is not free to second-guess the state habeas court's interpretation of applicable state law. The Texas Court of Criminal Appeals' constructions of state law in the course of petitioner's direct appeal and state habeas corpus proceeding are binding on this Court in this federal habeas corpus proceeding. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 604, 163 L.Ed.2d 407 (2005)("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009)(a state court's interpretation of state law binds a federal court sitting in habeas corpus),

cert. denied, ___ U.S. ___, 131 S.Ct. 1050, 178 L.Ed.2d 870 (2010).

As respondent correctly point out, the Fifth Circuit has recognized "a voir dire question that 'in effect asked the jury how it would weigh evidence it had not heard' would 'not be a proper line of inquiry.'" *United States v. Fambro*, 526 F.3d 836, 848 (5th Cir.), *cert. denied*, 555 U.S. 1050 (2008). The dual purposes of voir dire are (1) to enable the court to discern bias and prejudice in prospective jurors and (2) to assist counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. at 431, 111 S.Ct. at 1908; *United States v. Fambro*, 526 F.3d at 848.

Petitioner has identified no federal legal authority mandating voir dire examination which commits venire members to return a particular verdict based upon a hypothetical fact situation. Nor has this Court's independent research identified any such authority, much less any clearly established Supreme Court precedent mandating such a strange outcome.

Petitioner's trial counsel was permitted to ask Ms. Middleton whether she could imagine a set of circumstances under which she could answer the future dangerousness special issue negatively after convicting a defendant of capital murder.[98] Petitioner's trial counsel was also permitted to explore in

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[98] S.F. Trial, Volume 6, voir dire examination of Kimberly R. Middleton, at pp. 244-45.

detail with Ms. Middleton the circumstances under which she could return an affirmative answer to the mitigation special issue after finding a defendant guilty of capital murder.[99] Moreover, petitioner did not make a challenge for cause to Ms. Middleton and she did not serve on petitioner's petit jury. It is inappropriate to require potential jurors during voir dire to weigh evidence they have not heard or to commit to render a particular verdict based upon a hypothetical set of facts. *Soria v. Johnson*, 207 F.3d 232, 243-44 (5th Cir.)(holding it was improper for party to attempt during voir dire to bind a prospective juror regarding his or her position on the evidence), *cert. denied*, 530 U.S. 1286 (2000); *Green v. Johnson*, 160 F.3d 1029, 1036 n.4 (5th Cir. 1998)(discussing the distinction under Texas law between using proper hypothetical fact situations to explain the application of law and making improper inquiries into how a venire member would respond to particular circumstances), *cert. denied*, 525 U.S. 1174 (1999). Under such circumstances, the state trial court's refusal to permit petitioner's trial counsel to force Ms. Middleton to commit to an answer to the future dangerousness special issue based upon a specific set of hypothetical facts did not render petitioner's trial fundamentally unfair.

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[99] *Id.*, at pp. 246.

F. Conclusions

Petitioner procedurally defaulted on the federal aspect of his sixth claim herein by failing to "fairly present" his federal constitutional claim to the Texas Court of Criminal Appeals either on direct appeal or in any of petitioner's multiple state habeas corpus proceedings.

Insofar as petitioner seeks federal habeas corpus relief from this Court based upon the same state-law complaints he raised in his twenty-third point of error on direct appeal, his sixth claim is without arguable merit. Federal habeas relief does not lie to correct errors of purely state procedural or substantive law.

The legal argument underlying petitioner's sixth claim herein, i.e., that petitioner possessed a constitutional right to commit a potential juror to a particular punishment phase verdict based upon a hypothetical set of facts, would be a new rule of federal constitutional criminal procedure and is foreclosed from adoption in this federal habeas corpus proceeding by the Supreme Court's holding in *Teague v. Lane, supra*.

Alternatively, petitioner's federal constitutional aspect of his sixth claim herein lacks any arguable merit. Petitioner's trial counsel was permitted to interrogate venire member Middleton regarding her ability to answer both of the Texas capital sentencing special issues in a manner favorable to

petitioner after finding petitioner guilty of capital murder. The inability of petitioner's trial counsel to pin Mr. Middleton down to a specific answer to the future dangerousness special issue based a particular hypothetical set of facts did not render petitioner's trial fundamentally unfair.

Petitioner's sixth claim herein does not warrant federal habeas corpus relief.

VI. Denial of Petitioner's Challenges for Cause

A. The Claims

In his fourth and fifth claims herein, petitioner argues the state trial court erroneously denied his challenges for cause to two members of the jury venire, specifically venire members Urbano Gonzalez and Gregory Sedbrook, in violation of petitioner's federal constitutional rights.[100]

B. State Court Disposition

1. Voir Dire Examination of Urbano Gonzalez

During the course of voir dire examination by petitioner's trial counsel, venire member Urbano Gonzalez testified in pertinent part as follows:

> Q. And the issues that they are going to be asking, you would answer those honestly, wouldn't you?
> A. Yes, sir.
> Q. See, because you only get to these questions if you find a person guilty of capital murder. If it is just murder then it is something else, and I'll talk about that late, but in a capital murder case if you found

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[100] Amended Petition, at pp. 157-66.

that person guilty you have to look at question number one.

Now, that question has already been explained to you. Is this person going to be a danger in the future? If you found the person guilty of capital murder, Mr. Gonzalez, would you automatically believe and find that that person is going to be a danger in the future? Would you answer that question yes automatically?

A. I think yes, because if somebody does something you never know if they are going to do it again, so it is going to be in your mind. It is going to be like a threat to society, or if you live in a town you would never know if it is going to happen. If he's done it one time you never know if he's going to change.

Q. So you are of the thinking that is a person did it once, he's going to do it again?

A. I guess so.

Q. Okay. So you would automatically look at question number one and say yes?

THE COURT: Regardless of the evidence in the case?

THE VENIREMAN: Regardless of the evidence? I would say yes.

THE COURT: No matter what the evidence was?

THE VENIREMAN: Yes.

Q. (BY MR. GARCIA) Now, if a jury -- if the jury that you are on, not this case but another jury finds him guilty of capital murder, guilty of killing somebody, and you find that yes, he's going to be a danger in the future, and as you said, yes, he's going to do it again, or there is a probability that he's going to do it again, and you look at question number three and they are asking you should this person serve life or does this person deserve the death penalty, would you automatically say that question number three should be answered no, that he should get the death penalty automatically because you already found him guilty?

A. If they found him guilty found the evidence and everything?

Q. If you found him guilty. All I want to know, Mr. Gonzalez -- maybe I'm confusing you. I just want to know if you automatically, without considering the evidence, no matter what the evidence says, if you would answer that question no just because you have already found him guilty of capital murder and you already found he's going to be a threat in the future, would you automatically, always say question number

three should be answered to be no, and in fact he gets the death penalty?
A. Well, that's kind of confusing. Number three, if you find him from the evidence -- I would say yes if that's from the evidence.
Q. Okay. But would you always say that no matter what the evidence is?
A. Well, it all depends about the things that are involved.
Q. Okay. Can you picture in your mind a case where a person was found guilty of capital murder and a person who you found is going to be a threat in the future, can you envision something about that person or that case in your mind right now that you would say that person might deserve a life sentence? You don't have to tell me what it is, but can you think of something like that?
A. Yeah. I can think of something like that.[101]

Later, when Mr. Gonzalez was questioned by the prosecutor and trial judge, the following exchanges occurred:

QUESTIONS BY MR. LEE:

Q. Just want to ask one question or cover one subject. That's about your answer concerning question number one up here, and you indicated that -- I believe that you indicated that you would have a tendency to answer that question yes; having convicted the defendant of capital murder you would automatically have a tendency to answer that question yes, is that what you are saying.
A. Yes,
Q. Okay. Now, you understand that the State carries the burden of proof to prove that beyond a reasonable doubt, to prove there is a probability he would commit future acts of dangerousness [sic], do you understand?
A. Yes, I understand.
Q. It doesn't mean, of course, that all the evidence you have heard in the case can't be part of the evidence you make that decision with, do you see what I'm saying?
A. Yes, I understand what you are saying.

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[101] S.F. Trial, Volume 11, voir dire examination of Urbano Gonzalez, at pp. 33-36.

Q. And basically what you are saying is, if it is shown that he committed these violent criminal acts in the case on trial that would be pretty strong evidence to you that he would commit future acts of dangerousness [sic]?
A. Yes.
Q. Is that what you are saying?
A. (Nods affirmatively).
Q. Could you, Mr. Gonzalez, before answering that question yes or no, consider all of the evidence you have heard and then make your judgment based on that evidence?
A. If I have to decide?
Q. Yes, you as a juror would have to decide the question, yes or no.
A. Yes.
Q. What I'm asking you is, would you consider everything you heard in the case before you answered that question?
A. Yes, I understand what you are saying. Yeah, I should say yes.
Q. You would?
A. Uh-huh.

MR. LEE: We have no further questions.

MR. GARCIA: Nothing further, Your Honor.

THE COURT: You made that statement on Mr. Lee's examination, I believe you said when they were questioning you about how you would answer number one if it would be automatic, did you say that a person that did it once would do it again?

THE VENIREMAN: Yeah.

THE COURT: Do you remember saying that?

THE VENIREMAN: Yes, I remember saying that.

THE COURT: And you think that's true in every case?

THE VENIREMAN: In every case? Well, not in every case. It depends on the case. I have to weigh the evidence and everything.

THE COURT: Have to weigh all the evidence?

THE VENIREMAN: Have to weigh the evidence and the witnesses and everything, but not -- like you say, not in every case.

THE COURT: Okay. Well, you step outside and just wait for a moment outside the courtroom and I'll see what further instructions I have for you.

THE WITNESS: Okay.

(Venireman excused.)

MR. LEE: State will accept the juror.

MR. GARCIA: Your Honor, we would challenge Urbano Gonzalez in reference to 35.16, subsection c in reference to the answers to the questions that were consistently -- where it involved the young victim, and he started talking about how the death penalty would be appropriate, talked about him in question and answer number one that he said -- his words were if he did it once he'll do it again, and answer that question yes. Then it got down to question number three. I believe consistently the totality of his answers was [sic] that if he found a person guilty and a future danger he would always vote for the death penalty. We feel that under those circumstances that he is not going to follow the law that we're entitled to rely on, and that's for him to consider separately the punishment phase of the trial instead of just being an automatic answer to question number one. He appeared at times not to understand the concepts of how his questions would affect the ability of this court to either give a life or death sentence, so we would challenge him on those grounds.

THE COURT: The challenge will be overruled.

MR. GARCIA: We'll use our next strike.[102]

2. Voir Dire Examination of Gregory Sedbrook

Under questioning by the prosecution, venire member Sedbrook testified in pertinent part as follows:

QUESTIONS BY MR. LEE:

Q. * * * The first question up is the one at the top of the board, and it will ask whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. That's what we call the future dangerousness issue, and basically it just has the jury, you know, to [sic] answer is this person probably going to commit more acts of violence and be a danger to society, and the State carries the burden of proof on that question, and we have to prove that beyond a reasonable doubt in order for the jury to answer the question yes. Now, my question to you would be, if you were on a jury in a capital murder case, and you were

[102] *Id.*, at pp. 38-41.

having to answer that question, and after you have received all of the evidence and you looked at the evidence and you believed that it had been proved beyond a reasonable doubt that the defendant would commit future acts of violence, could you answer that question yes?
A. Are you asking to assess the death penalty?
Q. No, just asking you if you could answer the question yes or no?
A. Yes, sir.
Q. And if you thought the question should be answered yes, could you answer the question yes?
A. Yes, sir.
Q. But if you thought that the answer should be no, that the State had not met its burden of proof, could you answer that question no?
A. Yes, sir.
Q. Now, if the jury answers question number one yes, then they move on and answer question number three. Under question three it is -- it asks the jury top determine whether taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than the death sentence be imposed. Do you follow what the question is asking.
A. Yes, sir.
Q. That is the last step in the process. The jury is told to look at all the evidence in the case, and I want to also make it clear there is no burden of proof on this question. It is just whatever the jury believes, and if that jury looks at all the facts in the case and they think -- and they say no, there is no mitigating factor in this case that would justify a life sentence, then they would answer it no, okay? But if they look at the question and they say yeah, there is a factor in this case that would mitigate or lessen the impact of what the sentence should be, and he should get a life sentence, do you see what I'm saying? In that circumstance they would answer it yes. My question to you is, could you answer it yes or no depending upon the facts you see?
A. Yes, sir.
Q. If you thought the facts said that there is a circumstance that would mitigate the punishment then you could answer it yes?

A. Yes, sir.
Q. And on the other hand, if you thought there was no factor then you could answer it no?
A. Right.
Q. Would you be able to follow the evidence you hear, Mr. Sedbrook, and answer those questions based upon the evidence?
A. Yes, sir, I believe so.
Q. All right. Now, let me tell you the effect of those answers. If the jury answers question number one no, there is no probability of future dangerousness, then that is where the case ends right there, and the judge will assess a life sentence, but if they answer question number one yes, then they move on and answer question number three. If they look at question number three and they answer that question yes, there is a mitigating factor that will justify a life sentence, then again, that's the end of the case and the judge assesses a life sentence, but on the other hand, if they look at the evidence and they say there is no mitigating factor in this case to justify a life sentence instead of a death sentence, then they answer that question no. At that point the judge must impose the death sentence. You see what I'm saying?
A. Yes, sir.
Q. What I have to ask you is, would you have any tendency to answer those questions in a certain way just so you could get a certain result such as a life sentence or a death sentence?
A. No, sir.
Q. Then you would answer and be led by the evidence and answer them according to what you think the evidence indicates the way they should be answered?
A. Yes, sir.[103]

Under questioning by petitioner's trial counsel, Mr. Sedbrook testified in pertinent part as follows:

QUESTIONS BY MR. GARCIA:

Q. In listening to your answers, I listened to answers that in question number one, the question was, are you asking if I can give the death penalty, is that

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[103] S.F. Trial, Volume 16, voir dire examination of Gregory Sedbrook, at pp. 68-71.

something that you feel that when a person takes the life of another person that they should get the death penalty?
A. Not necessarily. I mean, I just -- I didn't know exactly6 what Mr. Lee was asking, so that's why I asked.
Q. Do you feel that when a person kills once they are going to kill again?
A. I'm not sure about that. I guess that would depend on the evidence and so forth. I mean, I don't have a set -- set decision or answer on that.[104]

* * * * *

Q. In line with that, when a person is found guilty of capital murder, let's say in a hypothetical you are in a group, and you found a person guilty of capital, and there is only two possible sentences. One is life and one is death. What does life mean to you when we're talking about --
A. I would assume that individual would spend the rest of his given life in prison. There would be no ever leaving prison.
Q. Okay. Now, in the charge that a juror would get in any criminal case, especially in a capital murder case, there is a paragraph that says that Texas has a parole system. However, you are also instructed that you are not to consider how parole would affect a person's sentence, so at the same time they tell you it exists, they tell you don't think about it. Do you think that in your decision of -- under your definition of what you feel a life sentence is, if -- could you follow the law that would tell you to disregard anything having to do with parole?
A. Yes, sir, I think I could.
Q. In light of that, if you were on a jury that found a person guilty of capital murder, would you have a tendency to look at question number one, and in trying to decide if this person is going to be a danger in the future to answer that question yes based on your finding of him guilty of killing one?
THE COURT: Solely on that finding.
THE VENIREMAN: No, sir. At first I didn't understand exactly what you were saying but I do now.
Q. (BY MR. GARCIA) When you saw the word probability, can you tell me if there is a difference between

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[104] *Id.*, at pp. 74-75.

probability and possibility in your mind, a different meaning?
A. I guess they would mean just about the same thi8ng to me.
Q. Do you -- okay. When you looked at the word society, what were you thinking about when you -- was this person going to be a threat in the future to society? What is your definition of society?
A. All of us. I mean, all individuals.
Q. Can you envision that behind the prison walls could be a type of society?
A. Oh, yes.
Q. And in answer to question number one, keeping in mind that that person could well spend the rest of his life in prison if he doesn't get the death sentence, would that be a society that you could envision in answering question number one?
A. If you are asking if I believe the people in prison ate the same as us, well, I mean, they are individuals. They are human beings. I guess I don't fully understand what you are saying.
Q. Well, I guess the point is a little more blunt. You know, in answering question number one, would you consider whether those persons are going to commit acts of violence in prison?
A. I'm not sure about that one, I guess. To me when I saw society I guess we all kind of feel -- or I feel like it is people that are outside of the prison.
THE COURT: No, that's not necessarily the meaning of the term. It can be person's environment.
Q. (BY MR. GARCIA) Okay. And then I guess if you are on a jury as a hypothetical, not talking about this case, and you found that person guilty of capital murder, and you and eleven other jurors all agreed that that person would also be a continuing threat to society in the future, you answered question number one yes, would you have a tendency to look at question number three that's asking you to look at everything all over again and just answer that question no just based on your finding to number one?
A. I would think that -- I would hope that I would -- and feel like I would take and consider everything that is -- question three is asking to decide that answer.
Q. But would you have a tendency to answer it no just based on --
A. No, I don't believe so.
Q. When there is a punishment to be assessed the code provides that there is [sic] four reasons that people

get punished. There may be others, but you know, I'm going to give them to you and you tell me what order you think they are more important to you. The first one is that people get put in the penitentiary to rehabilitate them. Second one is people get put in the penitentiary to protect society. Third one, people get put in the penitentiary to deter others from committing same or similar crime, and fourth, punishment, punish them, eye for an eye. I know that's not the complete meaning but just -- they need punishing, period. Of those four, rehabilitate, protect, to deter or to punish, which do you feel is more important to you?
A. I guess to protect.
Q. To protect society? What would you put next?
A. Punishment.
Q. Punishment? Okay.

MR. GARCIA: Thank you very much.

THE COURT: Mr. Garcia asked you if there is any difference between possibility and probability, and I think your answer was they are about the same thing. There is a difference, you understand, between something being probable and something being possible. Can you explain how you understand those terms now? He just dropped it there, but the distinction between something being possible and something being probable --

THE VENIREMAN: I guess anything is possible, but to be probable there would have to be some indicators or some evidence, something I suppose to make something --

THE COURT: More likely than not?

THE VENIREMAN: Yeah,

THE COURT: Okay. Anything further?

MR. LEE: No, sir.

THE COURT: Okay. You can step down, Mr. Sedbrook, and we'll have you back in, in just a moment to see what your further instructions are.

(Venireman excused.)

MR. LEE: State will accept the juror.

MR. GARCIA: Your Honor, we would challenge in reference to -- again as to the prior juror, his meaning of possibility and probability, about the same, and even after the court explained to him that I feel that his feelings are they would be the same, and we're entitled to have him give the burden of probability, and also he could not consider that society would be the penitentiary. We're entitled to have him under

35.16 (c), be able to follow that, be able to give us the benefit of that law.

THE COURT: Overruled.

MR. GARCIA: We'll strike him.[105]

3. Direct Appeal

Petitioner challenged the denial of his challenges for cause to venire members Gonzalez and Sedbrook in his twentieth and twenty-second points of error on direct appeal. Petitioner presented purely state-law legal arguments in support of his twentieth and twenty-second points of error on direct appeal challenging the trial court's denials of his challenges for cause to these same two venire members.[106] The Texas Court of Criminal Appeals rejected these state-law complaints on the merits:

> When the trial judge errs in overruling a challenge for cause against a venireperson, the defendant is harmed if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. Because the record reflects that appellant received an extra peremptory challenge in addition to the fifteen he was granted by statute, appellant can demonstrate harm only by showing that both of his complained-of challenges were erroneously denied. *Feldman*, 71 S.W.3d at 743-45; *Penry v. State*, 903 S.W.2d 715, 732 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995).
>
> A defendant may properly challenge any prospective juror who has a bias or prejudice against any phase of

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[105] *Id.*, at pp. 76-81.

[106] Appellant's Brief, at pp. 75-79, 83-85. Respondent correctly points out these two points of error on direct appeal were phrased exclusively in terms of alleged violations of state law. Nothing in petitioner's appellant's brief discussing either of those two points of error "fairly presented" the state appellate court with a federal constitutional claim.

the law upon which he is entitled to rely. When reviewing a trial court's decision to grant or deny a challenge for cause, we look at the entire record to determine if there is sufficient evidence to support the trial court's ruling. The test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. Before a prospective juror can be excused for cause on this basis, however, the law must be explained to him and he must be asked whether he can follow that law regardless of his personal views. Finally, the proponent of a challenge for cause has the burden of establishing his challenge is proper. The proponent does not meet his burden until he has shown that the venireman understood the requirements of the law and could not overcome his prejudice well enough to follow it.

In point of error twenty-two, appellant complains about prospective juror Sedbrook. Specifically, he complains that the trial court erred in denying his challenge to Sedbrook because the prospective juror "was biased against the law that 'society' comprises persons inside prison." Specifically, appellant bases his claim on the following exchange:

> Q. [By defense counsel] You know, in answering [the future dangerousness question], would you consider whether those persons are going to commit acts of violence in prison?
> A. [Venireperson] I'm not sure about that one, I guess. To me when I saw society I guess we all kind of feel—or I feel like it is people that are outside of the prison.
> THE COURT: No, that's not necessarily the meaning of the term. It can be the person's environment.

We must look at this exchange in the context of the entire conversation. Just prior to the above-quoted exchange, defense counsel asked Sedbrook for his definition of society. Sedbrook responded that society meant all individuals. When counsel asked Sedbrook if he could envision a type of society existing behind prison walls, Sedbrook said that he could. This was the extent of the conversation regarding the definition of society. After the judge's brief comment that society did not necessarily mean just the people outside of the prison, Sedbrook was never asked whether

> he could follow any instructions the judge gave him regarding the term.
>
> Given the record, appellant has failed to meet his burden of showing that the law was explained to the venireperson, or that the venireperson was asked whether he could follow that law regardless of his personal views. As such, we cannot say that the trial judge erred in denying appellant's challenge for cause to veniremember Sedbrook. Point of error twenty-two is overruled. Because the trial court did not err in denying appellant's challenge to Sedbrook, appellant cannot show on appeal that both of his complained-of challenges for cause were erroneously denied. Thus, he cannot show harm. Points of error twenty and twenty-one are overruled.

Sells v. State, 121 S.W.3d at 758-59 (*Footnotes omitted*).

C. Procedural Default on Unexhausted Federal Claims

For the same reasons discussed at length in Section V.C. above, petitioner has failed to exhaust available state remedies on his *federal constitutional* claims premised upon the denial of his challenges for cause to venire members Gonzalez and Sedbrook. The only legal complaints petitioner "fairly presented" to the Texas Court of Criminal Appeals arising from the denial of his challenges for cause to these venire members were phrased exclusively in terms of state law principles. Nothing in petitioner's Appellant's Brief reasonably or logically alerted the state appellate court to any argument suggesting the denial of petitioner's challenges for cause to these two venire members violated federal constitutional principles. *See Wilder v. Cockrell*, 274 F.3d at 260 (holding neither a fleeting reference to the federal constitution, tacked on to the end of a lengthy, purely state-law argument nor a vague reference to such expansive

concepts as "due process" or "fair trial" "fairly presents" the state court with a federal constitutional claim). Despite having filed three state habeas corpus applications, petitioner has never presented any state habeas court with his federal constitutional claims premised upon the denial of his challenges for cause to venire members Gonzales or Sedbrook.

By failing to "fairly present" the Texas Court of Criminal Appeals with any federal constitutional claim arising from the denial of petitioner's challenges for cause to venire members Gonzalez or Sedbrook, petitioner has procedurally defaulted on his fourth and fifth claims herein. *See Hughes v. Dretke,* 412 F.3d at 594-95 (holding petitioner procedurally defaulted on a jury misconduct claim by presenting the state courts with purely state-law arguments supporting same and waiting until he reached federal court to first urge federal constitutional arguments); *Beazley v. Johnson,* 242 F.3d at 264-68 (holding petitioner procedurally defaulted on a claim by failing to present same to the Texas Court of Criminal Appeals either on direct appeal or in a state habeas corpus application where claim was readily available at the time petitioner filed his state habeas application).

D. Alternatively, No Merit on *De Novo* Review

1. State Law Complaints Do Not Furnish a Basis for Relief

Insofar as petitioner attempts to assert the same state-law claims he raised in his twentieth and twenty-second points of error on direct appeal as grounds for federal habeas relief herein, that effort is foreclosed by the well-settled principle that federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Estelle v. McGuire*, 502 U.S. at 67-68, 112 S.Ct. at 480 (holding complaints regarding the admission of evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process); *Lewis v. Jeffers*, 497 U.S. at 780, 110 S.Ct. at 3102 (recognizing that federal habeas relief will not issue for errors of state law); *Pulley v. Harris*, 465 U.S. at 41, 104 S.Ct. at 874 (holding a federal court may not issue the writ on the basis of a perceived error of state law).

2. *De Novo* Review of Unexhausted Federal Claims

The portion of petitioner's amended petition setting forth his fourth and fifth claims herein contains cryptic references to the Supreme Court's holdings in *Morgan v. Illinois, supra*, and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Morgan* addressed a due process challenge to voir dire in

an Illinois capital trial and *Jurek* addressed the validity of the Texas capital sentencing scheme under the Eighth Amendment.

Petitioner has never fairly presented either of these Fourteenth Amendment or Eighth Amendment claims to any state court. Because no state court has ever entertained, much less addressed, the merits of petitioner's *federal* constitutional claims challenging the denial of his challenges for cause to venire members Gonzales and Sedbrook, this Court's review of same is necessarily *de novo*. *See Porter v. McCollum*, ___ U.S. at ___, 130 S.Ct. at 452 (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. at 390, 125 S.Ct. at 2467 (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

3. No Fourteenth Amendment Due Process Violation

As was explained above, *Morgan* addressed a Fourteenth Amendment due process challenge to voir dire conducted in an Illinois capital murder trial and held the state trial court was required to question potential jurors (or permit trial counsel to do so) in a manner reasonably calculated to disclose whether the potential jurors would automatically vote to impose the death

penalty based upon the fact of conviction regardless of the existence of any mitigating evidence in the record. *Morgan v. Illinois*, 504 U.S. at 738, 112 S.Ct. at 2235 ("Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty."). Petitioner does not allege any specific facts showing that his ability to voir dire either venire member Gonzalez or venire member Sedbrook was improperly circumscribed.

Insofar as petitioner's cryptic fourth and fifth claims herein can be construed as arguing the failure of the state trial court to grant either of petitioner's challenges for cause to venire members Gonzalez or Sedbrook violated federal due process principles, this Court's independent review of the entirety of the voir dire examination of those two venire members belies any such contention.

Petitioner's trial counsel objected to venire member Sedbrook based upon Mr. Sedbrook's alleged inability to distinguish between the terms "probability" and "possibility" and Mr. Sedbrook's alleged inability to consider those persons within Texas prisons as members of the society referenced in the Texas capital sentencing scheme's future dangerousness special issue.

Both of these objections lacked merit. As the excerpts from Mr. Sedbrook's voir dire examination quoted at length above amply demonstrate, under questioning by the trial court, Mr. Sedbrook explained that he understood the term "probability" to mean more likely than not and agreed that persons within prison were entitled to be considered members of society.[107]

Petitioner's trial counsel objected to venire member Gonzalez based upon Mr. Gonzalez's alleged tendency to automatically answer the future dangerousness special issue affirmatively based solely upon the defendant's conviction for capital murder. However, as the excerpts from Mr. Gonzalez's voir dire examination quoted at length above make clear, under questioning by the trial court, Mr. Gonzalez testified he did not believe proof of capital murder, standing alone, would necessarily warrant a finding of future dangerousness in every case.[108]

To the extent the state trial court's overruling of petitioner's challenges for cause to venire members Gonzalez and Sedbrook reflected implicit credibility determinations based upon the contradictory testimony given by those vacillating venire members, the state trial court was in position to examine first hand the demeanor of both venire members. Even under pre-AEDPA

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[107] *See note 105, supra, and accompanying text.*

[108] *See note 102, supra, and accompanying text.*

case law, a state trial court's rulings on the credibility of potential jurors are entitled to special deference from this Court in a federal habeas corpus proceeding. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984)(recognizing a presumption of correctness applies to a trial court's factual findings (which are essentially credibility determinations) regarding whether a venire member possessed disqualifying bias). Under the AEDPA, specifically Section 2254(e)(1), these implicit factual findings are presumed correct. *Wood v. Allen*, ___ U.S. ___, ___, 130 S.Ct. 841, 843, 175 L.Ed.2d 738 (2010)(a determination of a factual issue made by a state court is presumed correct and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence); *Chester v. Thaler*, 666 F.3d 340, 348 (5th Cir. 2011)(holding the same); *Richards v. Quarterman*, 566 F.3d 553, 563 (5th Cir. 2099)(holding a state court's factual findings, including credibility determinations, are entitled to the presumption of correctness under Section 2254(e)(1)); *Coleman v. Quarterman*, 456 F.3d 537, 541 (5th Cir. 2006)(holding the same), *cert. denied*, 549 U.S. 1343 (2007). Having independently reviewed the entirety of the voir dire examinations of venire members Gonzalez and Sedbrook,[109] this Court concludes the state

[109] Despite the extraordinary amount of time this Court held this cause in abeyance to permit petitioner to return to state court and develop new claims, petitioner did not furnish this

trial court's implicit factual findings that both venire members lacked disqualifying bias were objectively reasonable and fully supported by the record before that court. Petitioner has failed to present this Court with clear and convincing evidence establishing that either venire member Gonzales or venire member Sedbrook possessed disqualifying bias.

Moreover, petitioner exercised peremptory challenges against both venire members Gonzalez and Sedbrook. Neither venire member served on the jury at petitioner's capital murder trial.

Petitioner argues that because he was forced to employ peremptory challenges against venire members Gonzalez and Sedbrook, he was forced to accept a biased juror, venire member "Pedro Urdales" [sic].[110] This Court has undertaken an independent review of the entirety of juror questionnaire and the entire voir dire examination of juror Pedro Vidales and concludes the state trial court reasonably determined juror Vidales

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Court with copies of the juror questionnaires completed by either venire members Gonzalez or Sedbrook.

[110] Amended Petition, at pp. 162-63.

For unknown reasons, the verbatim transcription from the voir dire portion of petitioner's trial indicates the spelling of the last name of the juror in question was "Urdales." See S.F. Trial, Volume 17, voir dire examination of Pedro Urdales [sic], at pp. 51-77. Even a cursory examination of the easily legible juror questionnaire reveals the correct spelling of the juror's last name is "Vidales." Trial Transcript, at pp. 237-43.

possessed no disqualifying bias.[111] The state trial court's implicit factual determination, based in part the state trial court's first-hand observation evaluation of juror Vidales' demeanor and credibility during voir dire examination, is presumed to be correct. *Coleman v. Quarterman*, 456 F.3d at 541; 28 U.S.C. §2254(e)(1).

In his answers to the trial court's questionnaire, juror Vidales answered (1) "no" to a question asking whether he was opposed to the death penalty as a matter of principle; (2) "yes" to a question which asked "Do you believe that the death penalty would always be an excessively severe sentence for a person convicted of capital murder?"; (3) "no" to the question "Do you believe that Life Imprisonment would always be an excessively lenient sentence for a person convicted of capital murder?"; (4) "no" to "Would the fact that Life Imprisonment is the minimum sentence for capital murder prevent or seriously impair the performance of your duty as a juror to render a verdict according to the law and the evidence?"; and (5) "no" to "Would the fact that death is the maximum sentence for capital murder prevent or seriously impair the performance of your duty to render a verdict according to the law and the evidence?"[112]

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[111] Juror Pedro Vidales' juror questionnaire appears herein at Trial Transcript, at pp. 237-43.

[112] Trial Transcript, at p. 242.

In response to general questioning by the trial court, juror Vidales testified during voir dire, in pertinent part, as follows:

> THE COURT: * * * Now, the State in this case has given notice that it will seek the death penalty if the defendant is convicted of the offense of capital murder. This means that the jury would have before it when it hears all the evidence on punishment after it has found the defendant guilty of capital murder if they do so, would go into the jury room and have to answer a question or two questions. Whether it is two questions that have to be answered depends on the jury's answer to the first question.
>
> If you will just take a moment and look at that paragraph one on the board to your left, that would be the first question to confront a juror on a conviction for a capital murder, and the way that that would be put to a juror is, do you find beyond a reasonable doubt that there is a probability -- now, that doesn't mean a chance, it doesn't mean a possibility, but it is more likely than not, a probability from all the evidence that you have heard, a probability that the defendant would commit acts of criminal violence, you know, assaults, any type of violent activity directed towards himself or another, that would constitute him a continuing threat to society. Of course, society there, what we mean by that is to [sic] the people that surround him, his environment, his peers. That could even be a penitentiary sentence where the people around him would be inmates, guards, staff, matters [sic] such as that. The burden is on the State if it is seeking the penalty of death to prove beyond a reasonable doubt that there should be a yes answer to that question from all of the evidence in the case, that yes, there is a probability that the defendant would commit these acts of violence that would make him a continuing threat to his society. Do you grasp what I mean by all that, understand that?
>
> THE VENIREMAN: Yes, sir.
>
> THE COURT: Now, that's to be judged separate -- your answer to that question wouldn't -- would not necessarily under your oath follow from your answer to the question of whether he's guilty or innocent. This is a separate inquiry.
>
> THE VENIREMAN: I understand.

THE COURT: You found a person guilty of capital murder, but now you are faced with well, has the State shown beyond a reasonable doubt that there is a possibility that he would, you know, commit acts of violence, continuing threat to society. They would have to show that, and that's independent and a separate consideration from your finding of guilt. Would you automatically answer that question yes, that there is such a probability, solely because you found the defendant guilty of capital murder, or would you have an independent discussion of the evidence and deliberate whether or not there ought to be a yes or no answer to that question?

THE VENIREMAN: I would say yes.

THE COURT: An independent --

THE VENIREMAN: Yes, sir.

THE COURT: -- inquiry or an independent discussion of that issue?

THE VENIREMAN: I understand.

THE COURT: Wouldn't necessarily follow from your answer to question number one?

THE VENIREMAN: It would be an answer independently.

THE COURT: Independently" Okay. Now, if the jury were to answer that first question no, the State has not shown beyond a reasonable doubt that there is this probability, or no, we have a reasonable doubt that the States had shown this, then that would end the jury's work on the case. They have returned that verdict of no, there is not this probability, and the court would fix punishment at life imprisonment. If the jury were to answer that question yes, however, that there is this probability shown beyond a reasonable doubt, then the jury would have to go to another independent inquiry and searching of the evidence and discussion, and that would be on the question that is number three there on the board. Could you take a moment and just read that paragraph number three, and then I'll ask you about it.

What that question is asking, the State doesn't have to prove it ought to be answered one way, the defense doesn't have to prove as a matter of law it ought to be answered another way. It just inquires into whether or not, despite the fact -- regardless of the fact that the defendant was convicted of capital murder, and regardless of the fact that we've answered question one yes, that there is this probability of future violence, still taking into consideration all of

the evidence in the case, the jury, at least ten members of the jury, that is, feel that there has been a showing of sufficient mitigating circumstances, or even one sufficient mitigating circumstance where the jury feels that a sentence of life imprisonment rather than death be imposed, and that's another completely independent inquiry apart from the answers that were given to the finding of guilt, and the probability being shown, if that's the case, that he would commit future acts of violence. Do you think that you could give independent consideration on a jury in a capital murder case in the punishment phase of that third paragraph there on the board?

THE VENIREMAN: No, sir.

THE COURT: What -- again what it asks is if you felt that there was something in the case that mitigates or lets the jury feel from some circumstance that a sentence of life imprisonment rather than death would be appropriate, could you answer that question yes or no according to how you find the evidence?

THE VENIREMAN: Honestly, I mean, I don't know what mitigating means.

THE COURT: Mitigating means -- I guess the best way to put it is that there is some mitigating factor or circumstances, something that makes it that a softer punishment than the death penalty be imposed, that there is some factor in the evidence that requires that the punishment be lesser than the penalty of death really is the best way to put it, for some reason. It could be a person's background, character, the circumstances, how blameworthy the defendant might be in the case, all of those factors, anything in the evidence that would say that no, this is not a case where death should be imposed. There are certain factors in this case that we feel warrant a life imprisonment sentence rather than death. That's really what that question is asking. Does that help you any?

THE VENIREMAN: Yes, a little bit.

THE COURT: Do you think that you could answer that question yes or no as you -- that yes, there are mitigating factors, and there should be a life sentence, or if you f: mitigating factors and it should be the death sentence, could you do that?

THE VENIREMAN: Yes, sir.

THE COURT: And again, that's an independent consideration from the others. It merits separate, serious discussion, you understand.

THE VENIREMAN: Yes, sir.

THE COURT: Is there any reason that you know of right now why you could not be a fair and impartial juror to both the State and the defense if you were on the jury in this case.

THE VENIREMAN: No, sir.[113]

During voir dire questioning by the prosecution, juror Vidales testified in pertinent part as follows:

QUESTIONS BY MR. LEE:

Q. When we're talking about capital murder, I was reading your questionnaire, and I'm a little confused. I just need to clear that up. How do you -- I notice that you put down that you are not opposed to the death penalty as a matter of principle. How do you feel about that?
A. I feel that if somebody takes a life of somebody they should be punished in the same way.
Q. In the same way?
A. Yes, sir.
Q. Okay.

THE COURT: Now, the punishment is either life imprisonment or death. Are you telling Mr. Lee any time someone tales a life they should be punished by death, or would it be within the range --?

THE VENIREMAN: Well, within the range of both, I mean, either life imprisonment or death.

THE COURT: That's what I thought. I thought you answered that before.

Q. (BY MR. LEE) And if it were the right situation and a death sentence was the appropriate punishment, then you would have no problem with that?
A. No, sir.
Q. In your questionnaire you indicate to the question that was asked, do you believe that the death penalty would always be an excessively severe sentence for a person convicted of capital murder, and you marked yes. Do you think the death sentence would always be too severe for a capital murder case?

THE COURT: In every case where a person is convicted of capital murder would it be imposed -- in

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[113] S.F. Trial, Volume 17, voir dire examination of Pedro Urdales [sic], at pp. 58-64.

other words, would it be too severe a penalty in every case where a person is convicted?

THE VENIREMAN: Yes.

MR. LEE: You do? Okay.

THE COURT: There is some case where life imprisonment would be appropriate; is that what you mean by that?

THE VENIREMAN: Yes.

THE COURT: Okay.

MR. LEE: Well, I'm totally confused now.

THE COURT: Mr. Lee, he said that it would be an excessively severe punishment in some cases.

MR. LEE: Oh, I thought he said in every case.

THE COURT: No, that's not the way the question is posed.

Q. (BY MR. LEE) Let me ask you this, Mr. Urdales [sic]. As I talk top people about the death penalty there are basically three ideas that seem to come to light. The first are those individuals that believe in the death sentence and believe it is a proper punishment to be imposed in a case. They may not enjoy the idea of having to give a death sentence, but if it was the right thing to do then they could do it. That's group numbe

Group number two are those individuals that believe in the death sentence and think it is a proper part of our legal system, but perhaps because of something in their personal background they could not assess the death penalty.

The third group are those people that are always opposed to the death penalty under any circumstances. No matter how heinous or horrible the crime would be they would never give the death sentence. Of those three categories, can you tell us where you would fall?

A. First one.

Q. In the first one? Okay. Now, as Judge Thurmond talked to you about the questions that are asked of the jury, did I understand that you would be willing to follow the law and answer those questions the way you thought the evidence in the case indicated they should be answered?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. You are not going to answer a question in a certain way just so a person will get a life sentence, in other words, so you could get a certain result?

A. No, sir.[114]

When petitioner's trial counsel questioned juror Vidales during voir dire, the following exchanges occurred:

QUESTIONS BY MR. GARCIA:

> Q. * * * Have you ever heard the saying if you kill once you are going to kill again?
> A. Yes, sir.
> Q. Do you agree with that?
> THE COURT: In every case.
> THE VENIREMAN: Yes.
> MR. GARCIA: All right.
> THE VENIREMAN: I do.
> Q. (BY MR. GARCIA) And that's kind of the impression I was getting from your answers, because when you are going to be looking to answer a question, how you feel if you were to find a person -- if you were on a jury, Mr. Urdales [sic], and all 12 of you found that person guilty of capital murder, the intentional killing of another person, let's say during a robbery a guy shoots a clerk, you found that person guilty, then you are going to be looking at answering question number one. They are going to be asking you, do you think there is a probability that this person is going to commit an act of violence again. Would you have a tendency to, just because you found him guilty of murder once already, that question number one should be answered yes?
> THE COURT: Or would you give it independent consideration?
> THE VENIREMAN: I would give it independent consideration.
> Q. (BY MR. GARCIA) You can think in your mind right now of a situation where if you found a person guilty of capital murder, that person would not be a danger in the future? Can you think of something like that?
> A. Not right now.
> Q. Not right now? Now, in the same way, Mr. Urdales [sic], and you know, if you were on the jury that found a person guilty of capital murder, and you and all the 12 jurors looked at question number one, you decided the answer should be yes, this person is going

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[114] *Id.*, at pp. 67-70.

to be a threat in the future, okay? He's going to be a continuing threat. Question number three is asking you to look at everything all over again. You have already seen it once; take a look at it one more time. Okay. Now, the question is that based on the feelings that you have, if you would say you know, I already found him guilty of capital murder, I already found him guilty of capital murder, I already found that he's going to be a threat in the future, and I've found that he is going to be a threat again, would you look at question number three and say you now, this question always should be answered no, there is nothing else left about this case that can give this guy a life sentence. Would you have a tendency to do that?
A. Yes.
Q. Right? Okay. Now, is it -- because you have to take everything all over again, you know, is one thing, but when you start reading it in your mind, you are already convinced how it should be answered, then you really can't give it an independent consideration. Would you agree with that?
A. Yes.
Q. Okay.

MR. GARCIA: Mr. Urdales [sic], thank you. I don't have any further questions.

THE COURT: Well, wait. You told me that you could give independent consideration for each of these questions. You are telling Mr. Garcia that you can't. Which is it?

THE VENIREMAN: See, I didn't understand the question clearly when you asked me, and that's why I was asking you what mitigating was, and when he asked me again if I can make an independent answer, yes, I can.

THE COURT: Well, that is what you told me.

THE VENIREMAN: Yes, I can.

THE COURT: And could you do that? I mean, we just want to be sure we understand you.

THE VENIREMAN: Yeah, I can make up my own decision, independent.

THE COURT: And would the same be true on number one?

THE VENIREMAN: Yes, sir.

THE COURT: The fact that a person might be found guilty of capital murder by you, you would make an independent examination of the evidence and determine

whether or not that question ought to be answered yes or no.

THE VENIREMAN: Yes, sir.

THE COURT: All right. Go ahead, Mr. Garcia.

MR. GARCIA: I don't have any further questions.

MR. LEE: No additional questions.

THE COURT: I want to clear up one thing that Mr. Lee brought up. He seized on an answer that you have in your questionnaire, do you believe the death penalty in a capital murder case would always be excessively severe. By that -- what that question is asking is, do you believe that the death penalty in every capital murder case would be a decision that you could not arrive at, or would there be some cases where you would feel that the death penalty, depending on the answers to these questions, would be proper?

THE VENIREMAN: Yes. Yes, I mean, it depends on the case.

THE COURT: Some cases?

THE VENIREMAN: Some cases.

THE COURT: A death penalty would be too severe, is that right?

THE VENIREMAN: Yes, sir.

THE COURT: And it should be for life?

THE VENIREMAN: Yes, sir.

THE COURT: Other cases a death penalty would be appropriate; it just depends on --

THE VENIREMAN: Just depends on the case.

THE COURT: The case, and if the State discharges its burden of proof, is that right?

THE VENIREMAN: Yes, sir.

THE COURT: Okay. Well, you can step outside, Mr. Urdales [sic]. I think we understand clearly your feelings on these matters. Thank you very much.

(Venireman excused.)

MR. LEE: State will accept the juror.

MR. GARCIA: Your Honor, we would challenge Pedro Urdales [sic]. In the totality of his answers when asked specifically if he would kill once he would kill gain he said yes. When asked specifically if he found a person guilty of capital murder on question number one he would always answer it yes. That was 35.16(c), [sic] goes clearly against -- it is a difference when a judge is asking him to answer a certain way, but when I asked him he was very clear. He would always answer that question yes.

THE COURT: Overruled. Ask. Mr. Urdales [sic] come in.

> MR. GARCIA: Your Honor, we would ask for an additional peremptory strike based on how the Court had overruled our prior challenges, we were forced to use peremptory strikes on some of the other jurors, and I have a list of those. We had challenged juror number four and was [sic] overruled, juror number nine, we were overruled, number 21, number 47, and 79 and 95 and 99.
>
> THE COURT: Overruled.
>
> MR. GARCIA: Let the record note we're seating him, an objectionable juror to the defense.
>
> THE COURT: Okay. Overruled.[115]

With regard to whether he would automatically answer the future dangerousness special issue affirmatively based solely upon a guilty verdict on a charge of capital murder, Mr. Vidales was a quintessential vacillating juror. The state trial court was uniquely positioned to evaluate firsthand Mr. Vidales' demeanor and credibility. That court implicitly determined Mr. Vidales lacked disqualifying bias. Petitioner has failed to present this Court with clear and convincing evidence showing juror Vidales possessed disqualifying bias. Petitioner's trial counsel's ambiguous voir dire questions regarding whether Mr. Vidales' had a "tendency" to vote affirmatively on the future dangerousness special issue were anything but "clear and convincing" with regard to establishing disqualifying bias.

None of the three venire members whose voir dire testimony is quoted at length above unequivocally indicated an inability to follow the law applicable to Texas capital sentencing special

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[115] *Id.*, at pp. 71-76.

issues at the punishment phase of petitioner's trial. The failure of the state trial court to grant either of petitioner's challenges for cause to venire members Gonzalez or Sedbrook did result in the seating of a biased juror at petitioner's capital murder trial and did not render petitioner's trial fundamentally unfair.

4. No Eighth Amendment Violation

As this Court has previously noted, the federal constitutional standard for determining qualifications for jury service on a capital sentencing jury is set forth in a series of Supreme Court opinions dating back more than four decades:

> In *Witherspoon v. Illinois*, 391 U.S. 510, 521-23, 88 S.Ct. 1770, 1776-77, 20 L.Ed.2d 776 (1968), the Supreme Court held that prospective jurors may not be excused from sitting on a capital jury simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Rather, the Supreme Court held as follows:
>
> > The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.
>
> *Witherspoon v. Illinois*, 391 U.S. at 522 n.21, 88 S.Ct. at 1777 n.21.
>
> In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Supreme Court emphasized the limitations *Witherspoon* imposed on the ability of the State to exclude members of a jury venire from service on a petit capital jury and directly addressed jury selection in Texas capital murder trials:
>
> > a juror may not be challenged for cause based on his views about capital punishment

> unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. at 45, 100 S.Ct. at 2526.

In *Adams*, the Supreme Court further discussed the many practical consequences of its *Witherspoon* holding:

> If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality. * * *
>
> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion" permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.
>
> The State could, consistently with *Witherspoon*, use § 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible. * * *
>
> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. * * * Nor in our view would the Constitution permit the exclusion of jurors

> from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. * * * [T]he State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths.

Adams v. Texas, 448 U.S. at 46-50, 100 S.Ct. at 2527-29 (citations omitted).

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Supreme Court further clarified its holdings in *Witherspoon* and *Adams*, holding that the proper inquiry when faced with a venire member who expresses personal, conscientious, or religious views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. at 424, 105 S.Ct. at 852. In *Wainwright v. Witt*, the Supreme Court also emphasized that considerable deference is to be given the trial court's first-hand evaluation of the potential juror's demeanor and that no particular magical incantation or word choice need necessarily be followed in interrogating the potential juror in this regard. *Id.*, 469 U.S. at 430-35, 105 S.Ct. at 855-58.

The Supreme Court subsequently held that the erroneous dismissal of a potential juror in violation of *Witherspoon* is not subject to harmless error analysis. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1987).

More recently, in *Uttecht v. Brown*, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007), the Supreme Court reviewed its *Witherspoon-Witt* line of opinions and identified the following "principles of relevance":

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are

> able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.
>
> *Uttecht v. Brown*, 551 U.S. at 9, 127 S.Ct. at 2224 (*citations omitted*).
>
> The Supreme Court emphasized the critical inquiry for *Witherspoon-Witt* purposes is not whether a state appellate court properly reviewed the propriety of the exclusion but, rather, whether the trial court correctly applied the appropriate federal constitutional standard. *Uttecht v. Brown*, 551 U.S. at 16-17, 127 S.Ct. at 2228. Finally, the Supreme Court admonished reviewing courts to defer to the trial court's resolution of questions of bias arising from a potential juror's conflicting voir dire answers because the trial court had the opportunity to observe the demeanor of the potential juror. *Uttecht v. Brown*, 551 U.S. at 20, 127 S.Ct. at 2230 ("where, as here there is a lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion."). "Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Uttecht v. Brown*, 551 U.S. at 22, 127 S.Ct. at 2231.

Bartee v. Quarterman, 574 F.Supp.2d 624, 662-64 (W.D. Tex. 2008), *CoA denied*, 339 Fed. Appx. 429 (5th Cir. July 31, 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1882, 176 L.Ed.2d 370 (2010).

None of the three venire members identified by petitioner in his fourth and fifth claims herein, i.e., venire members Gonzales

and Sedbrook and juror Vidales, indicated an unwillingness to set aside their personal views and render a verdict based solely upon the evidence and law set forth in the trial court's jury instructions. On the contrary, based upon this Court's independent review of the entirety of their voir dire testimony, it appears all three were willing to comply with the trial court's instructions and render a punishment-phase verdict based upon the evidence and trial court's instructions. The failure of the state trial court to grant petitioner's challenges for cause to any of these three venire members did not violate the petitioner's federal constitutional rights under the Eighth Amendment.

E. Conclusions

Petitioner's purely state-law claims in his twentieth and twenty-second points of error on direct appeal do not furnish a basis for federal habeas corpus relief.

Petitioner procedurally defaulted on the unexhausted federal constitutional aspects of his fourth and fifth claims herein.

Alternatively, petitioner's federal constitutional attacks upon the state trial court's denial of petitioner's challenges for cause to venire members Gonzalez and Sedbrook possess no merit.

Petitioner's fourth and fifth claims herein do not warrant federal habeas relief.

VII. Ineffective Assistance Claims

A. The Claims

In his first and third claims herein, petitioner argues his trial counsel rendered ineffective assistance by failing to (1) request a continuance to complete a mitigation investigation in Missouri, (2) issue out of state subpoenas to petitioner's family and friends and obtain their depositions, (3) adequately question Dr. Dickerson regarding unspecified mitigating circumstances, (4) investigate, develop, and present psychological evidence, (5) obtain a mental health evaluation of petitioner and unspecified records necessary for such an evaluation, and (6) voir dire the jury venire regarding their views on parole eligibility.[116] In addition, petitioner also complains that the state trial court denied various pretrial motions for appointment and funding of investigative and mental health experts and severely restricted funding for the petitioner's mitigation investigation.[117]

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[116] Amended Petition, at pp. 13-106 & 151-56.

[117] For unknown reasons, petitioner chose to present these complaints about the trial court's procedural rulings as Sixth Amendment ineffective assistance claims. As will be explained hereinafter, however, a Sixth Amendment ineffective assistance claim focuses properly upon the performance of a defendant's counsel, not on rulings made by the trial court. Any complaints petitioner might have had with the trial court's rulings should and could have been raised via points of error on direct appeal challenging those rulings. In the context in which petitioner presents those complaints to this Court, i.e., as Sixth Amendment claims, those complaints are non sequitur.

B. State Court Disposition

While petitioner did fairly present the state habeas court with a variety of ineffective assistance claims in the course of petitioner's first and third state habeas corpus proceedings, as respondent correctly points out, petitioner has presented this court with a veritable cornucopia of new documents supporting his ineffective assistance claims herein which have never been presented to any state court and which significantly and substantially alter the context and content of many of petitioner's ineffective assistance claims herein to the point that most of petitioner's ineffective assistance claims in his amended petition herein are unexhausted.[118]

1. Petitioner's First State Habeas Proceeding

During his first state habeas corpus proceeding, petitioner presented three federal constitutional ineffective assistance claims and three state constitutional ineffective assistance claims. More specifically, in support of his Sixth Amendment claims, petitioner argued (1) his trial counsel failed to investigate and present unspecified mitigating evidence, (2) a conflict of interest arose as a result of petitioner's trial counsel negotiating book deals during said counsel's representation of petitioner, and (3) petitioner's trial counsel offered only one witnesses at the punishment phase of

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[118] *See notes 70-71, supra.*

petitioner's capital murder trial (Dr. Dickerson) and asked only one question to this witness. In support of his Texas constitutional claims, petitioner argued (1) the three foregoing deficiencies in the performance of petitioner's trial counsel also violated state constitutional guarantees, (2) the failure of petitioner's trial counsel to voir dire the jury venire on parole eligibility violated the Texas Constitution, and (3) the failure of petitioner's trial counsel to request appointment of co-counsel also violated state constitutional guarantees. In support of these claims, petitioner presented the state habeas court with (1) an affidavit from Ann Matthews in which she averred in a highly conclusory fashion that (a) the defense team was more interested in personal gain than in defending petitioner, (b) the defense team solicited payments from unspecified persons in exchange for obtaining petitioner's confessions to unadjudicated offenses in other jurisdictions, (c) during petitioner's trial, the defense team received payments totaling approximately five thousand dollar payment from an unspecified "Missouri official" in exchange for petitioner's confession to a double homicide in Taney County, Missouri, (d) the defense team used author Donna Hughes to gather unspecified information from petitioner, and (e) defense investigator Vince Gonzalez subsequently refused to release unspecified mitigation evidence to unidentified persons without assurances of payment

and (2) a rank hearsay within hearsay affidavit from Bob Schanz in which he stated he was told certain information by a San Antonio investigator about a written confession to an unspecified offense which Schanz was led to believe would be executed by petitioner.[119]

The State presented the state habeas court with an affidavit from petitioner's former trial counsel, attorney Victor Robert Garcia, in which said counsel (1) stated the defense team's court-appointed investigator Vince Gonzalez "spoke with various family members of Tommy Lynn Sells and did not find any helpful mitigation evidence that was not already known," (2) at the request of the defense team, petitioner underwent a PET exam which showed no organic brain damage or signs of schizophrenia, (3) during the pendency of trial, there were no discussions among the defense team regarding any fees other than those earned and paid for by Val Verde County, (4) there were never any discussions of book royalties being given or assigned to anyone on the defense team, (5) no one on the defense team ever accepted any remuneration other than that provided as payment by Val Verde County, (6) the defense team chose as a matter of trial strategy not to call any mitigation witnesses other than Dr. Dickerson because of concerns other witnesses might have knowledge of extraneous offenses committed by petitioner which could have been

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[119] First State Habeas Transcript, at pp. 53-55.

raised and used by the prosecution, including an attempted sexual assault, (7) petitioner approved this defense strategy, and (8) while the trial court originally appointed a second attorney to assist petitioner, and the trial court indicated a willingness to appoint co-counsel to assist petitioner, the petitioner did not want the attorney originally court-appointed as co-counsel to assist at trial and petitioner's trial counsel did not feel he needed a co-counsel for petitioner's trial.[120]

On June 29, 2005, the state habeas trial court issued an Order containing its findings of fact, conclusions of law, and recommendation that petitioner's first state habeas corpus application be denied.[121] Among the findings of fact made by the state trial court were determinations that (1) on February 8, 2000, the trial court appointed attorney Garcia as lead trial counsel attorney Manual Pacheco as co-counsel for petitioner, (2) upon petitioner's request, on April 28, 2000, attorney Pacheco was relieved of his duties as petitioner's co-counsel, (3) the trial court offered to appoint a substitute co-counsel but attorney Garcia declined the trial court's offer, (4) the court appointed Vince Gonzalez as investigator for petitioner, (5) the trial court authorized the defense to retain the professional

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[120] Affidavit of Victor Robert Garcia, First State Habeas Transcript, at pp. 73-75.

[121] First State Habeas Transcript, at pp. 97-107.

mental health services of psychologist, Dr. Windel L. Dickerson, (6) petitioner's trial counsel called Dr. Dickerson and the Vel Verde County Detention Center's jail administrator to testify on petitioner's behalf at the punishment phase of trial, (7) Dr. Dickerson testified, in part, (a) he had examined petitioner at least five times, (b) he was able to speak with persons who had known petitioner his while life, (c) petitioner may have been abused as a child by a pedophile, (d) he administered many psychological tests to and reviewed petitioner's medical records from Wyoming, Arkansas, and West Virginia penal facilities, (e) petitioner has borderline personality disorder withy schizoid, avoidant, and anti-social features, along with possible brain damage, (f) he reviewed more than twenty years or records relating to petitioner's drug abuse and hospitalizations, (g) petitioner is a very seriously disordered individual, and (h) instigators to violence are present in petitioner's mind and body which dramatically affect petitioner's ability to guide and direct his own behavior and resist those instigators to violence, (8) Dr. Dickerson was questioned extensively at trial concerning his examination of petitioner and his professional findings, (9) Dr. Dickerson concluded petitioner's propensity for future violence was substantially lower than other prison inmates if petitioner were properly medicated and separated from other inmates to the point that petitioner would likely need to be

separated from the general prison population for petitioner's own protection, (10) petitioner's trial counsel never received any remuneration during his representation of petitioner other than that paid for Val Verde County, (11) petitioner's trial counsel was well versed in the psychological evidentiary aspects of the case, and (12) petitioner's trial counsel used reasonable diligence to investigate potential mitigating evidence.[122]

The Texas Court of Criminal Appeals denied petitioner's first state habeas corpus application in an unpublished per curiam Order based upon the trial court's findings and conclusions. *Ex parte Tommy Lynn Sells*, WR-62,552-01 (Tex. Crim. App. August 31, 2005).

2. Petitioner's Third State Habeas Corpus Proceeding

On September 15, 2010, petitioner filed his third state habeas corpus application, in which he asserted ten *new* claims of ineffective assistance by his trial counsel, along with a new *Brady* claim premised upon the prosecution's alleged failure to disclose to petitioner's trial counsel a booking sheet that was introduced into evidence by petitioner's trial counsel during a pretrial hearing. On September 30, 2010, petitioner supplemented his third state habeas corpus application with an affidavit executed September 27, 2010 by a psychologist and expert in "fetal alcohol syndrome" and "fetal alcohol effects," Dr. Natalie

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[122] First State Habeas Transcript, at pp. 99-104.

Novick Brown, who stated therein her opinions that (1) prenatal alcohol exposure causes structural brain damage (including (a) executive functioning deficits, (b) general intelligence deficits, and (c) difficulties with learning, communication, social and adaptive functioning, and poor impulse control), (2) those suffering from compromised executive functioning typically engage in socially inappropriate behavior, are unable to apply the consequences from past actions, and are unable to experience or display remorse, (3) by the time of petitioner's 2000 capital murder trial fetal alcohol syndrome and fetal alcohol effects had been recognized as disabilities for fifteen years, and (4) by the time of petitioner's capital murder trial it was recognized that untreated primary disabilities, such as those listed above, are the basis for maladaptive behaviors.[123]

Petitioner's new ineffective assistance claims consisted of arguments that petitioner's trial counsel rendered ineffective assistance virtue of (1) the state trial court's denial of petitioner's motions for appointment of an investigator and mental health expert, (2) said trial counsel's failure to request a continuance to complete the investigation into potentially mitigating evidence available in Missouri, (3) said counsel's

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[123] Affidavit of Dr. Natalie Novick Brown, atached to petitioner's First Supplement to Subsequent Application for Post-Conviction relief, filed September 30, 2010 in Val Verde County, Texas, found at Third State Habeas Proceeding Supplemental Transcript, at pp. 33-45.

failure to subpoena out-of-state witnesses, including petitioner's family members, and others who could have testified regarding petitioner's background and abused and neglected childhood, (4) said counsel's failure to ask Dr. Dickerson unspecified questions that would have "personalized" petitioner, (5) said counsel's failure to investigate, develop, and present available, potentially mitigating, evidence showing petitioner suffers from fetal alcohol syndrome, (6) restrictions the state trial court placed on the ability of the defense team to interview petitioner's family and friends located in other jurisdictions, (7) said counsel's failure to obtain petitioner's mental health records and to seek a mental health evaluation of petitioner, including neuropsychological testing of petitioner, (8) said counsel's failure to object to the prosecutor's argument that ten votes were needed for petitioner to receive a life sentence, (9) said counsel's failure to inform petitioner's appellate and state habeas counsel that the scope of trial counsel's investigation into petitioner's background has been restricted financially and geographically, and (10) petitioner's original state habeas counsel failed to investigate, develop, and present all the claims contained in petitioner's third state habeas corpus application.

Petitioner attached to his third state habeas corpus application a plethora of affidavits, sworn statements, and