No. _____

I N T H E

SUPREME COURT OF THE UNITED STATES

October Term, 2018

JOHN URANGA, III,

Petitioner

-vs-

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

PETITION FOR WRIT OF CERTIORARI
T O T H E
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A P P E N D I C E S

JOHN URANGA, III, pro se
Robertson Unit, TDCJ No. 1500003
12071 FM 3522
Abilene, Texas 79601-8799

Petitioner

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 18, 2018
Lyle W. Cayce
Clerk

No. 15-10290

JOHN URANGA, III,

Petitioner-Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before DAVIS, HAYNES, and COSTA, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Treating the Respondent's Petition for Rehearing En Banc as a Petition for Panel Rehearing, it is GRANTED. The prior opinion, *Uranga v. Davis,* 879 F.3d 646 (5th Cir. 2018), is withdrawn, and the following opinion is substituted:

John Uranga, III, Texas prisoner # 1500003, appeals the district court's denial of his 28 U.S.C. § 2254 application for a writ of habeas corpus. Uranga was convicted by a jury of possession of methamphetamine in an amount

greater than one gram but less than four grams.[1] During the punishment phase of trial, the jury determined that Uranga was a habitual felony offender and sentenced him to life imprisonment.[2] A judge of this court granted Uranga a certificate of appealability ("COA") on the following issues: (1) whether the postjudgment motion Uranga filed after the district court's denial of his § 2254 application was not an unauthorized successive § 2254 application; (2) whether the postjudgment motion was timely filed for purposes of tolling the time period for filing a notice of appeal; and (3) whether Uranga is entitled to § 2254 relief on his claim of implied juror bias during the punishment phase of his trial.

Under our COA grant, we have jurisdiction to address whether Uranga's postjudgment motion was an unauthorized successive § 2254 application and will do so here, as it affects our appellate jurisdiction.[3] Specifically, if Uranga's postjudgment motion was a timely filed motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), then the deadline for filing a notice of appeal would be tolled until the entry of the order disposing of that motion.[4] However, a purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and would not toll the time for filing a notice of appeal.[5]

In *Gonzalez v. Crosby*, the Supreme Court instructed that a postjudgment motion should be treated as a successive § 2254 application if the motion adds a new ground for relief or attacks the district court's previous

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[1] *Uranga v. State*, 330 S.W.3d 301, 302 (Tex. Crim. App. 2010).
[2] *Id.* at 303.
[3] *See United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).
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[5] *See Williams v. Thaler*, 602 F.3d 291, 303-04 (5th Cir. 2010).

resolution of a claim on the merits.[6] Conversely, we should not treat a postjudgment motion as a successive § 2254 application when the motion "asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"[7] or when the motion "attacks . . . some defect in the integrity of the federal habeas proceedings."[8]

In his postjudgment motion, which Uranga purported to file pursuant to Rule 59(e), Uranga sought reconsideration of the denial of his prejudgment motion for leave to amend his § 2254 application. He also contended that the district court denied his § 2254 application prematurely by failing to first explicitly consider and rule on his motion for leave to amend. Thus, Uranga did not seek to add a new ground for relief, nor did he attack the district court's previous resolution of a claim on the merits. Rather, he asserted that a previous ruling (the denial of his motion for leave to amend) which precluded a merits determination was in error. Moreover, his argument that the district court denied his § 2254 application prematurely was, in effect, an attack on an alleged defect in the integrity of the § 2254 proceeding. Consequently, under *Gonzalez*, Uranga's purported Rule 59(e) motion was not an unauthorized successive § 2254 application and, if timely filed (the second issue upon which COA was granted), would toll the deadline for filing a notice of appeal until the entry of the order disposing of the motion.[9]

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[6] 545 U.S. 524, 532 (2005). Although *Gonzalez* involved a postjudgment motion under Rule 60(b), we have held *Gonzalez* applicable to postjudgment motions under Rule 59(e). *See Williams*, 602 F.3d at 303.

[7] *Gonzalez*, 545 U.S. at 532 n.4.

[8] *Id.* at 532 (footnote omitted).

[9] *See* FED. R. APP. P. 4(a)(4)(A)(iv).

A motion to alter or amend a judgment under Rule 59(e) must be filed within 28 days of the entry of the judgment.[10] The district court's judgment denying Uranga's § 2254 application was entered on March 11, 2014; therefore, the deadline for filing a Rule 59(e) motion was April 8, 2014. The district court, however, did not receive Uranga's motion until April 17, 2014. Uranga asserts that his motion nevertheless was filed timely under the prison mailbox rule.

In *Houston v. Lack*, the Supreme Court held that a *pro se* prisoner's notice of appeal under Federal Rule of Appellate Procedure 4(a)(1) is deemed filed as of the date the notice is delivered to prison officials for mailing.[11] We have extended the prison mailbox rule to other submissions of *pro se* inmates, including Rule 59(e) motions.[12] *Houston's* holding was eventually codified in Federal Rule of Appellate Procedure 4(c) and Rule 3(d) of the Rules Governing § 2254 cases.

Uranga contends that his Rule 59(e) motion was timely filed because it was delivered to prison officials for mailing on April 7, 2014, as stated in the motion's certificate of service. However, Uranga himself did not deliver the motion to prison officials. Another inmate named Gordon Ray Simmonds, who was assisting Uranga with his § 2254 application, delivered the motion to prison officials for mailing. Simmonds also signed Uranga's name to the Rule 59(e) motion. Although the prison mailroom logs reflected that the mailroom did not receive the motion until April 14, 2014, Uranga submitted the declaration of Simmonds who explained the reasons for the delay.

The district court did not reject Simmonds' explanation for the delay in the mailroom's receipt of the Rule 59(e) motion. Instead, the district court

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[10] FED. R. CIV. P. 59(e).

[11] 487 U.S. 266, 275 (1988).

[12] *See Brown v. Taylor*, 829 F.3d 365, 368 (5th Cir. 2016); *cf.* FED. R. APP. P. 25(a)(2)(C) (adopting prison mailbox rule for inmate filings in federal appellate courts).

reasoned that the motion would have been timely had Uranga *himself* signed and delivered the motion to prison officials for mailing on or before April 8, 2014. The district court determined that because Simmonds was a non-party and not a licensed attorney, he lacked authority under Federal Rule of Civil Procedure 11(a)[13] to sign the motion on Uranga's behalf. The district court further determined that the prison mailbox rule does not apply when a prisoner gives his motion to another prisoner to deliver to prison officials for mailing. We disagree.

First, in determining that Simmonds lacked authority to sign Uranga's motion, the district court failed to note the specific rules applicable to § 2254 proceedings allowing someone other than the prisoner or a licensed attorney to sign a habeas petition under certain circumstances. Rule 2(c)(5) of the Rules Governing § 2254 cases provides that the habeas petition must "be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242." That statute, in turn, provides that "[a]n application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*"[14]

We have noted that the authority under § 2242 of a so-called "next friend" to apply for a writ of habeas corpus on behalf of another may be established when the habeas application explains "(1) why the detained person did not sign and verify the petition and (2) the relationship and interest of the

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[13] Federal Rule of Civil Procedure 11(a) provides that "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name – or by a party personally if the party is unrepresented."

[14] 28 U.S.C. § 2242 (emphasis added). Although this matter does not involve the initial § 2254 application, we believe this statute may be applied to any filing made on behalf of a prisoner in a § 2254 proceeding, including a postjudgment motion under Rule 59(e).

would be 'next friend.'"[15] In this matter, Uranga submitted Simmonds' declaration to the district court in which Simmonds gave a detailed account of why it was necessary for him to sign Uranga's Rule 59(e) motion and his relationship with Uranga. Specifically, Simmonds explained that he and Uranga were unable to meet due to a lockdown situation at the prison so in light of the impending deadline for filing a Rule 59(e) motion, Simmonds signed Uranga's name to the Rule 59(e) motion. We find that these facts constitute an adequate explanation of the necessity for resorting to the "next friend" device and that Simmonds had authority under § 2242 to sign Uranga's Rule 59(e) motion.[16]

Second, in determining whether the prison mailbox rule applies, the relevant question for our consideration is whether the declaration of transmission to prison officials contemplated by the rules and our precedents requires the inmate himself to be the one to transmit the document to the prison officials responsible for the internal inmate mailing system. The Supreme Court has focused on the date the prison officials received the document.[17] We find no requirement of personal delivery by the prisoner himself and note that at least one other circuit evaluated the date based upon when the document was handed to the appropriate prison officials regardless of who did the handling.[18] We reaffirm that the operative date of the prison mailbox rule remains the date the pleading is delivered to prison authorities.

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[15] *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978).

[16] *See Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (determining that resort to "next friend" device was appropriate when petitioner "could not sign and verify the petition because prison was 'locked down'" and circumstances were "urgent").

[17] *Houston*, 487 U.S. at 275.

[18] *See Hernandez v. Spearman*, 764 F.3d 1071, 1074 (9th Cir. 2014). The respondent argues that Rule 3(d) of the Rules Governing § 2254 cases restricts application of the prison mailbox rule to filings made personally by the inmate-petitioner. Rule 3(d) provides: "A paper filed by an inmate in an institution is timely if deposited in the institution's internal mailing system on or before the last day of filing. If an institution has a system designed for legal

Therefore, Uranga's Rule 59(e) motion, which Simmonds delivered on Uranga's behalf to prison officials for mailing on April 7, 2014, was timely filed and tolled the deadline for filing a notice of appeal until the entry of the order disposing of the motion.[19] There is no dispute that Uranga's notice of appeal was filed timely from the entry of the order denying his motion.

The last issue upon which COA was granted involves Uranga's claim that he was denied an impartial jury during the punishment phase of trial because one of the jurors was impliedly biased against him.[20] During the punishment phase, the State introduced evidence of Uranga's two prior felony convictions and several unadjudicated offenses.[21] Evidence revealed that Uranga had driven his car onto someone's lawn to elude police. This extraneous offense was captured by the video camera in the police vehicle that was chasing Uranga.[22] After the videotape was played to the jury, one of the jurors realized that it was his lawn that had been damaged by Uranga's car during the chase and "reported his surprising discovery to the trial court."[23]

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mail, the inmate must use that system to receive the benefit of this rule." The respondent submits that because the first sentence of the rule states "an inmate," but the second sentence states "the inmate," then the prison mailbox rule applies only when the petitioner himself delivers his pleading to prison authorities. We are not persuaded. Moreover, we note that Federal Rule of Appellate Procedure 4(c), which also codified *Houston*'s holding, uses "an inmate" throughout the rule.

[19] *See* FED. R. APP. P. 4(a)(4)(A)(iv).

[20] Uranga also argues that the juror in question was biased against him during the entire trial, and not just during the punishment phase. He asserts that the juror was actually his neighbor, held animosity against him, and had made reports to the police alleging that Uranga was selling drugs out of his house. However, this issue is beyond the scope of our COA grant. By asserting this claim in his opening brief, Uranga, in essence, is seeking a rehearing of this Court's ruling on his motion for a COA. A petition for rehearing must be filed within 14 days of this Court's ruling, and Uranga's opening brief was filed more than five months later. *See* FED. R. APP. P. 40(a)(1). Therefore, we do not consider this claim.

[21] *Uranga*, 330 S.W.3d at 302.

[22] *Id.* The videotape of the car chase "suggest[ed] that Uranga [had] committed the crimes of evading arrest and criminal mischief" under Texas law. *See Uranga v. State*, 247 S.W.3d 375, 377 (Tex. App.—Texarkana 2008) (citations omitted).

[23] *Uranga*, 247 S.W.3d at 377.

The trial court conducted a hearing, questioning the juror outside the presence of the remaining jurors regarding the incident.[24] The juror indicated that he had not known who damaged his lawn until he saw the video, but that this information would not influence him in any way.[25]

Uranga then moved for a mistrial, arguing that because the juror's property was damaged by his actions, "it would have to affect [the juror] in [determining] punishment."[26] The trial court denied Uranga's request for a mistrial.[27] On appeal, Uranga argued that the Texas Court of Criminal Appeals had adopted the "implied bias" doctrine in limited circumstances and that such bias should be imputed to the juror in his case.[28] The Texas Court of Criminal Appeals, however, held that "[n]either the federal nor the state constitution has been held to require an 'implied bias' doctrine."[29] Instead, the court "held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."[30] The court further held that the hearing conducted by the trial court on the issue of actual bias in this case was appropriate and adequate and that "[t]here was no requirement of a mistrial on a theory that bias must be implied to the juror."[31] The court consequently affirmed Uranga's conviction and sentence.[32]

Under 28 U.S.C. § 2254(d)(1), habeas relief may not be granted on a claim that was adjudicated on the merits by a state court "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or

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[24] *Uranga*, 330 S.W.3d at 302.
[25] *Id.* at 302-03.
[26] *Id.* at 303.
[27] *Id.*
[28] *Id.* at 306.
[29] *Id.* at 304.
[30] *Id.* at 306 (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)) (internal quotation marks omitted).
[31] *Id.*
[32] *Id.* at 307.

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In this case, the "last reasoned state court decision"[33] determined that neither the federal nor state constitution provides for a claim of implied juror bias. Thus, the state court adjudicated Uranga's implied bias claim on the merits in that it determined the claim was not cognizable in the first instance. Consequently, we must defer to the state court's decision under § 2254(d)(1), unless its decision "was contrary to . . . clearly established Federal law, as determined by the Supreme Court."

The respondent argues that the doctrine of implied juror bias is not clearly established federal law and that this Court would have to create, in violation of *Teague v. Lane*,[34] a new constitutional rule in order to grant relief in this case. Uranga asserts that this circuit has adopted the rule that implied juror bias is a clearly established constitutional principle based on our decision in *Brooks v. Dretke*.[35] The respondent counters, however, that *Brooks* was bound by our earlier opinion in *Andrews v. Collins*,[36] which recognized that the Supreme Court has never embraced the implied bias doctrine.

Both sides presented persuasive arguments and cite language from our cases that can be read to support each side of the argument. Other circuits are split on the question. The Fourth and Ninth Circuits have found that the doctrine is clearly established law, and the Sixth Circuit takes a position it is not clearly established.

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[33] *See Wilson v. Sellers*, 138 S.Ct 1188, 1194 (2018) (holding "that federal habeas law employs a 'look through' presumption" in determining "the reasons for the [state] higher court's decision" denying habeas relief).

[34] 489 U.S. 288 (1989).

[35] 444 F.3d 328, 329-33 (5th Cir. 2006) (on denial of petition for rehearing en banc).

[36] 21 F.3d 612 (5th Cir. 1994).

In this case, however, it is unnecessary for us to delve into this question based upon the peculiar facts in this record. The facts on which Uranga relies in this case to establish that he suffered presumed bias are outside the extreme genre of cases Justice O'Connor pointed to in her concurring opinion in *Smith v. Phillips*[37] that would be sufficient to trigger application of the implied bias doctrine. In her concurrence, Justice O'Connor explored the cases where a hearing may be inadequate for uncovering a juror's bias:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.[38]

In *Brooks*, the juror in question was arrested during the trial because he brought a weapon into the courthouse with him.[39] The prosecuting authority, arguing for a conviction in the case being tried, had the prosecutorial discretion to pursue the juror on the weapons offense.[40] The juror's natural concern about whether the prosecutor would exercise his discretion to pursue charges against him was enough for the panel to conclude that it amounted to presumed bias that could not be corrected by the court's questions and instructions.[41]

This situation, where the juror/homeowner learned that the defendant had committed a misdemeanor by driving across his yard and causing damage that could be repaired for less than $500, does not fall in the same genre of cases given by Justice O'Connor in her concurrence or the juror's concern in

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[37] 455 U.S. 209, 222 (1982).
[38] *Id.*
[39] 418 F.3d 430, 430-31 (5th Cir. 2005).
[40] *See id.* at 435.
[41] *See id.*

Brooks that he would be charged with a weapons offense. Although Uranga did cause some damage to the juror's lawn during the car chase, the damage was minimal. As described by the juror, "[t]he ground was moved up a little bit."[42] Moreover, the juror testified that he did not intend to pursue any charges and that he could fix the damage himself.[43] This incident does not rise to the level of the extreme situations wherein courts have previously imputed juror bias.[44]

Based on the foregoing, the judgment of the district court denying Uranga's 28 U.S.C. § 2254 application is AFFIRMED.

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[42] *Uranga*, 330 S.W.3d at 302.

[43] *Id.*

[44] *See Solis v. Cockrell*, 342 F.3d 392, 399 n.42 (5th Cir. 2003) (listing cases where implied juror bias doctrine was applied and comparing to cases where the doctrine was refused).

HAYNES, Circuit Judge, dissenting:

I respectfully dissent from the determination to grant a panel rehearing and affirm, rather than reverse, the district court. I agree with the majority opinion up until the issue of the implicit juror bias; at that point, I diverge.

Certainly the issue of implicit bias has caused some disagreement among the circuits. But I conclude that we are bound by *Brooks v. Dretke*, 418 F.3d 430 (5th Cir. 2005) which does not conflict with *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994) for the reasons stated in *Morales v. Thaler*, 714 F.3d 295, 304 n.7 (5th Cir. 2013). While *Andrews* does initially contain conflicting language regarding whether the Supreme Court has ever explicitly adopted the doctrine of implied juror bias, the decision (like the majority opinion here) ultimately focused on Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982), describing the "extreme situations that would justify a finding of implied bias." 21 F.3d at 620. Given the lack of actual conflict, we are bound by *Brooks*.

Turning to the facts of this case, the majority opinion concludes that Uranga's situation is not sufficiently "extreme"[1] to warrant relief. I respectfully disagree. The jury in this case was tasked with determining a sentence for Uranga. As part of the sentencing phase of the trial, the prosecution introduced the videotape in question of a car chase that rips through the juror's lawn. In closing argument, the prosecution describes Uranga's criminal history and specifically mentions the car chase immediately before stating: "I'm asking that you, with this history, give him a life sentence." The jury did so.

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[1] The state court never addressed this issue factually, having erroneously concluded that the law did not permit an implicit bias analysis.

Our original opinion correctly determined that this situation was sufficiently extreme to warrant relief holding:

> The videotape offered by the State during the punishment phase of Uranga's trial clearly showed that Uranga had damaged the juror's lawn during the car chase. Although the resulting property damage may have been minimal, the damage nonetheless was personal to the juror, as it affected the premises of his home. Moreover, the juror was unaware of how the damage had been caused and learned, for the first time, upon viewing the videotape during the punishment phase of trial that Uranga was the perpetrator of the damage. We believe that these particular facts "inherently create[d] in [the] juror a substantial emotional involvement, adversely affecting [his] impartiality" toward Uranga.[2] We conclude that this case presents one of those "extreme situations" in which we are justified in finding a violation of the Sixth Amendment based on implied juror bias. Consequently, although Uranga's conviction for possession of methamphetamine must stand, his sentence of life imprisonment cannot, at this point.

Uranga v. Davis, 879 F.3d 646, 653 (5th Cir. 2018)[3]. The juror in this very case was a victim of this very defendant in a crime deemed relevant by the prosecution to sentencing this defendant to life. Pretty extreme, it seems to me. I would deny the petition for panel rehearing and stand with the original opinion. Because the majority opinion determines otherwise, I respectfully dissent.

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[2] *See Solis v. Cockrell*, 342 F.3d 392, 399 (5th Cir. 2003) (internal quotation marks and footnote omitted).

[3] This is the opinion vacated by the majority opinion here.

IN THE UNITED STATES COURT OF APPEALS
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JOHN URANGA, III,

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v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

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Appeal from the United States District Court
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Before DAVIS, HAYNES, and COSTA, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

John Uranga, III, Texas prisoner # 1500003, appeals the district court's denial of his 28 U.S.C. § 2254 application for a writ of habeas corpus. Uranga was convicted by a jury of possession of methamphetamine in an amount greater than one gram but less than four grams.[1] During the punishment phase of trial, the jury determined that Uranga was a habitual felony offender and sentenced him to life imprisonment.[2] A judge of this court granted Uranga a certificate of appealability ("COA") on the following issues: (1) whether the postjudgment motion Uranga filed after the district court's denial of his § 2254

[1] *Uranga v. State*, 330 S.W.3d 301, 302 (Tex. Crim. App. 2010).
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APPENDIX B

application was not an unauthorized successive § 2254 application; (2) whether the postjudgment motion was timely filed for purposes of tolling the time period for filing a notice of appeal; and (3) whether Uranga is entitled to § 2254 relief on his claim of implied juror bias during the punishment phase of his trial.

Under our COA grant, we have jurisdiction to address whether Uranga's postjudgment motion was an unauthorized successive § 2254 application and will do so here, as it affects our appellate jurisdiction.[3] Specifically, if Uranga's postjudgment motion was a timely filed motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), then the deadline for filing a notice of appeal would be tolled until the entry of the order disposing of that motion.[4] However, a purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and would not toll the time for filing a notice of appeal.[5]

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default, or statute-of-limitations bar"[7] or when the motion "attacks . . . some defect in the integrity of the federal habeas proceedings."[8]

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[7] *Gonzalez*, 545 U.S. at 532 n.4.
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The district court did not reject Simmonds' explanation for the delay in the mailroom's receipt of the Rule 59(e) motion. Instead, the district court reasoned that the motion would have been timely had Uranga *himself* signed and delivered the motion to prison officials for mailing on or before April 8, 2014. The district court determined that because Simmonds was a non-party and not a licensed attorney, he lacked authority under Federal Rule of Civil Procedure 11(a)[13] to sign the motion on Uranga's behalf. The district court

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further determined that the prison mailbox rule does not apply when a prisoner gives his motion to another prisoner to deliver to prison officials for mailing. We disagree.

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We have noted that the authority under § 2242 of a so-called "next friend" to apply for a writ of habeas corpus on behalf of another may be established when the habeas application explains "(1) why the detained person did not sign and verify the petition and (2) the relationship and interest of the would be 'next friend.'"[15] In this matter, Uranga submitted Simmonds' declaration to the district court in which Simmonds gave a detailed account of why it was necessary for him to sign Uranga's Rule 59(e) motion and his relationship with Uranga. Specifically, Simmonds explained that he and Uranga were unable to meet due to a lockdown situation at the prison so in light of the impending deadline for filing a Rule 59(e) motion, Simmonds signed Uranga's name to the Rule 59(e) motion. We find that these facts constitute

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[14] 28 U.S.C. § 2242 (emphasis added). Although this matter does not involve the initial § 2254 application, we believe this statute may be applied to any filing made on behalf of a prisoner in a § 2254 proceeding, including a postjudgment motion under Rule 59(e).

[15] *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978).

an adequate explanation of the necessity for resorting to the "next friend" device and that Simmonds had authority under § 2242 to sign Uranga's Rule 59(e) motion.[16]

Second, in determining whether the prison mailbox rule applies, the relevant question for our consideration is whether the declaration of transmission to prison officials contemplated by the rules and our precedents requires the inmate himself to be the one to transmit the document to the prison officials responsible for the internal inmate mailing system. The Supreme Court has focused on the date the prison officials received the document.[17] We find no requirement of personal delivery by the prisoner himself and note that at least one other circuit evaluated the date based upon when the document was handed to the appropriate prison officials regardless of who did the handling.[18] We reaffirm that the operative date of the prison mailbox rule remains the date the pleading is delivered to prison authorities.

Therefore, Uranga's Rule 59(e) motion, which Simmonds delivered on Uranga's behalf to prison officials for mailing on April 7, 2014, was timely filed and tolled the deadline for filing a notice of appeal until the entry of the order

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[16] *See Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (determining that resort to "next friend" device was appropriate when petitioner "could not sign and verify the petition because prison was 'locked down'" and circumstances were "urgent").

[17] *Houston*, 487 U.S. at 275.

[18] *See Hernandez v. Spearman*, 764 F.3d 1071, 1074 (9th Cir. 2014). The respondent argues that Rule 3(d) of the Rules Governing § 2254 cases restricts application of the prison mailbox rule to filings made personally by the inmate-petitioner. Rule 3(d) provides: "A paper filed by an inmate in an institution is timely if deposited in the institution's internal mailing system on or before the last day of filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The respondent submits that because the first sentence of the rule states "an inmate," but the second sentence states "the inmate," then the prison mailbox rule applies only when the petitioner himself delivers his pleading to prison authorities. We are not persuaded. Moreover, we note that Federal Rule of Appellate Procedure 4(c), which also codified *Houston*'s holding, uses "an inmate" throughout the rule.

disposing of the motion.[19] There is no dispute that Uranga's notice of appeal was filed timely from the entry of the order denying his motion.

The last issue upon which COA was granted involves Uranga's claim that he was denied an impartial jury during the punishment phase of trial because one of the jurors was impliedly biased against him.[20] During the punishment phase, the State introduced evidence of Uranga's two prior felony convictions and several unadjudicated offenses.[21] Evidence revealed that Uranga had driven his car onto someone's lawn to elude police. This extraneous offense was captured by the video camera in the police vehicle that was chasing Uranga.[22] After the videotape was played to the jury, one of the jurors realized that it was his lawn that had been damaged by Uranga's car during the chase and "reported his surprising discovery to the trial court."[23] The trial court conducted a hearing, questioning the juror outside the presence of the remaining jurors regarding the incident.[24] The juror indicated that he had not known who damaged his lawn until he saw the video, but that this information would not influence him in any way.[25]

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[19] *See* FED. R. APP. P. 4(a)(4)(A)(iv).

[20] Uranga also argues that the juror in question was biased against him during the entire trial, and not just during the punishment phase. He asserts that the juror was actually his neighbor, held animosity against him, and had made reports to the police alleging that Uranga was selling drugs out of his house. However, this issue is beyond the scope of our COA grant. By asserting this claim in his opening brief, Uranga, in essence, is seeking a rehearing of this Court's ruling on his motion for a COA. A petition for rehearing must be filed within 14 days of this Court's ruling, and Uranga's opening brief was filed more than five months later. *See* FED. R. APP. P. 40(a)(1). Therefore, we do not consider this claim.

[21] *Uranga*, 330 S.W.3d at 302.

[22] *Id.* The videotape of the car chase "suggest[ed] that Uranga [had] committed the crimes of evading arrest and criminal mischief" under Texas law. *See Uranga v. State*, 247 S.W.3d 375, 377 (Tex. App.—Texarkana 2008) (citations omitted).

[23] *Uranga*, 247 S.W.3d at 377.

[24] *Uranga*, 330 S.W.3d at 302.

[25] *Id.* at 302-03.

Uranga then moved for a mistrial, arguing that because the juror's property was damaged by his actions, "it would have to affect [the juror] in [determining] punishment."[26] The trial court denied Uranga's request for a mistrial.[27] On appeal, Uranga argued that the Texas Court of Criminal Appeals had adopted the "implied bias" doctrine in limited circumstances and that such bias should be imputed to the juror in his case.[28] The Texas Court of Criminal Appeals, however, held that "[n]either the federal nor the state constitution has been held to require an 'implied bias' doctrine."[29] Instead, the court "held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."[30] The court further held that the hearing conducted by the trial court on the issue of actual bias in this case was appropriate and adequate and that "[t]here was no requirement of a mistrial on a theory that bias must be implied to the juror."[31] The court consequently affirmed Uranga's conviction and sentence.[32]

Under 28 U.S.C. § 2254(d)(1), habeas relief may not be granted on a claim that was adjudicated on the merits by a state court "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." However, when a state court fails to adjudicate a claim on the merits, this deferential standard of review is inapplicable, and "the federal courts must instead conduct a

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[26] *Id.* at 303.
[27] *Id.*
[28] *Id.* at 306.
[29] *Id.* at 304.
[30] *Id.* at 306 (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)) (internal quotation marks omitted).
[31] *Id.*
[32] *Id.* at 307.

plenary review."[33] In this case, the state court never adjudicated Uranga's "implied bias" claim on the merits because the state court determined that neither the federal nor state constitution provided for such a claim.[34] Therefore, no deference is owed to the state court's judgment, and our review is plenary.[35]

The respondent argues that the doctrine of implied juror bias is not clearly established federal law and that this Court would have to create, in violation of *Teague v. Lane*,[36] a new constitutional rule in order to grant relief in this case. In *Brooks v. Dretke*, however, we rejected these same arguments, and we find it controlling.[37]

The Sixth Amendment guarantees in all criminal prosecutions that the accused receive a trial by an impartial jury.[38] Although the Sixth Amendment does not prescribe any specific tests, "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law."[39] "The determination of implied bias is an objective legal judgment made as a matter of law and is not controlled by sincere and credible

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[33] *Gonzales v. Thaler*, 643 F.3d 425, 429 (5th Cir. 2011) (footnote omitted).

[34] *See Uranga*, 330 S.W.3d at 308 (Price, J., dissenting) ("Without fanfare, the Court today announces that there is no such thing as the Sixth Amendment doctrine of implied bias.").

[35] The magistrate judge and district court determined that the state court's judgment was entitled to deference under the AEDPA because the state court had made an "implied legal conclusion" that the information discovered by the juror was not sufficient to produce implied bias. As described above, however, the state court made no such conclusion, implied or otherwise. Consequently, we conclude that the district court erred in extending any deference to the state court's judgment with respect to Uranga's implied bias claim.

[36] 489 U.S. 288 (1989).

[37] 444 F.3d 328, 329-33 (5th Cir. 2006) (on denial of petition for rehearing en banc). Contrary to Appellee's contentions, *Brooks* does not conflict with our decision in *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994). In *Andrews*, after noting the Supreme Court jurisprudence relating to the doctrine of implied juror bias, we went on to analyze the defendant's claim of implied juror bias, but "refused to impute bias to [the] juror" based on the specific facts presented in that case. 21 F.3d at 620-21.

[38] *See Solis v. Cockrell*, 342 F.3d 392, 395 (5th Cir. 2003).

[39] *Id.* (internal quotation marks and footnote omitted).

assurances by the juror that he can be fair."[40] However, it is only in "extreme situations" that implied juror bias may be found.[41] "Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."[42] Bias should not be inferred "unless the facts underlying the alleged bias are such that they would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality."[43]

Uranga contends that his case falls within one of the "extreme situations" that implied juror bias may be found. Specifically, Uranga asserts that the juror was a "victim" of the damage he caused during a car chase with the police, which the jury was allowed to consider during the punishment phase. We agree.

Under Texas law, the State is allowed, during the punishment phase of a criminal trial, to offer any evidence the trial court deems relevant to sentencing, including evidence of unadjudicated, extraneous offenses committed by the defendant.[44] The videotape offered by the State during the punishment phase of Uranga's trial clearly showed that Uranga had damaged the juror's lawn during the car chase. Although the resulting property damage may have been minimal, the damage nonetheless was personal to the juror, as it affected the premises of his home. Moreover, the juror was unaware of how the damage had been caused and learned, for the first time, upon viewing the videotape during the punishment phase of trial that Uranga was the

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[40] *Brooks v. Dretke*, 418 F.3d 430, 434 (5th Cir. 2005) (footnote omitted).
[41] *Andrews*, 21 F.3d at 620 (internal quotation marks and citations omitted).
[42] *Id.* (internal quotation marks and citations omitted).
[43] *Solis*, 342 F.3d at 399 (internal quotation marks and footnote omitted).
[44] *See* TEX. CODE CRIM. PROC. ART. 37.07, § 3(a)(1).

perpetrator of the damage. We believe that these particular facts "inherently create[d] in [the] juror a substantial emotional involvement, adversely affecting [his] impartiality" toward Uranga.[45] We conclude that this case presents one of those "extreme situations" in which we are justified in finding a violation of the Sixth Amendment based on implied juror bias. Consequently, although Uranga's conviction for possession of methamphetamine must stand, his sentence of life imprisonment cannot, at this point.

Based on the foregoing, we REVERSE the judgment of the district court denying Uranga's § 2254 application and REMAND this case to the district court. We further direct that a writ of habeas corpus be issued, unless within 90 days, or such additional reasonable time as shall be allowed by the district court on application to it by the State within that time, Uranga is resentenced in accordance with Texas law in effect at the time of his crime.

REVERSED and REMANDED with instructions.

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[45] *See Solis*, 342 F.3d at 399 (internal quotation marks and footnote omitted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-10290

JOHN URANGA, III,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion June 18, 2018, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

APPENDIX C

having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Judge Ho did not participate in the consideration of the rehearing en banc.

Doc. No. 41

Doc. No. 41

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

JOHN URANGA, III,
Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

Civil No. 7:11-CV-088-O-KA

ORDER ACCEPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files, and records in this case, of the Report and Recommendation of the United States Magistrate Judge, and of Petitioner's objections thereto, I am of the opinion that the findings of fact, conclusions of law, and reasons for dismissal set forth in the Report and Recommendation of the Magistrate Judge are correct and they are hereby adopted and incorporated by reference as the Findings of the Court.

Accordingly, the petition for writ of habeas corpus is DENIED.

SO ORDERED this 11th day of March, 2014.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX D

Doc. No. 42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

JOHN URANGA, III, Petitioner, v. WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	Civil No. 7:11-CV-088-O-KA

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the petition for writ of habeas corpus is DENIED.

SIGNED this 11th day of March, 2014.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

JOHN URANGA, III **Petitioner**	§	
V	§	**CIVIL ACTION NO: 7:11-CV-088–O-KA**
DIRECTOR TDCJ-CID **Respondent**	§	

Report and Recommendation

Petitioner Uranga seeks habeas corpus relief in this Court pursuant to 28 U.S.C. §2254. Under the authority of 28 U.S.C. § 636(b) and Rules 8(b) and 10 of the Rules Governing Section 2254 Proceedings for the United States District Courts, on December 10, 2013, this case was referred to the undersigned United States Magistrate Judge by Order of Reference (Docket No.34) for hearing, if necessary, and proposed findings of fact and recommendation for disposition. I recommend that the District Court deny Petitioner's Application for Writ of Habeas Corpus for the following reasons:

Custody Status

The Petitioner, John Uranga III, is currently in custody of the Texas Department of Corrections serving a sentence of life imprisonment[1] pursuant to a 2008 judgment and sentence out of the 78th District Court of Wichita County, Texas. Uranga was charged with possession of a

[1] The state court records submitted herein by the state of Texas on September 6, 2011, contain the following materials which shall herein be referenced as follows: "CR" refers to the state court clerk's record of the trial papers; "RR" refers to the state court reporter's transcript of trial court proceedings; "DAR" refers to the record on the direct appeal; and "SHCR" refers to the state court clerk's record of the state habeas corpus proceeding records.

controlled substance, namely methamphetamine in amount of one gram or more but less than four grams, enhanced to life imprisonment with two prior felony convictions. Uranga entered a plea of not guilty to a jury. On November 29, 2006, the jury found Uranga guilty as charged and, on November 30, 2006 assessed punishment at life imprisonment.

Punishment Events

The same twelve person jury that served at the guilt/innocence stage also served and heard the evidence at the punishment stage. During the punishment stage, for sentence enhancement purposes, the State introduced evidence of Uranga's two prior felony convictions and a host of unadjudicated offenses, including one involving a car chase incident. This incident took place in September of 2006 when Uranga drove his car onto someone's property to elude the police during the car chase. This incident was captured in by a video camera in the police vehicle that was chasing Uranga. When the State offered the video recording into evidence and played it for the jury, one of the jurors discovered that it was his lawn that had been damaged by the Uranga's careening car. Outside the presence of the other jury members, the court questioned the juror regarding the incident with regard to any potential bias that may have affected the juror as a result of the incident. Following the colloque between the trial judge and the juror, Uranga's trial counsel verbally moved for a mistrial but the trial judge overruled the mistrial motion. It was this ruling that formed the foundation of Uranga's direct appeal, the discretionary review, his state habeas corpus proceeding, and this cause now before this court.

Post-Trial Procedural Status

On direct appeal Uranga's conviction was affirmed by the Sixth Court of Appeals of Texas in early 2008 with written opinion. *Uranga v. State* , 247 S.W.3d 375 (Tex. App.–Texarkana 2008,

pet. granted). Thereafter, the Texas Court of Criminal Appeals granted Uranga's petition for discretionary review. *Uranga v. State*, PSR No. 0385-08 (Tex. CIM. App. August 20, 2008). On November 17, 2010, the Court of Criminal Appeals affirmed the judgments of the appellate and trial courts with written opinion. *Uranga v. State* , 330 S.W.3d 301 (Tex. CIM. App. 2010). On April 25, 2011, Uranga filed an application for state writ of habeas corpus challenging this conviction. SHCR-01 at p. 2. On June 22, 2011, the Court of Criminal Appeals denied relief with written order. SHCR- 01at pp. 1-2. Then on July 8, 2011, Uranga filed his federal habeas corpus petition herein (Docket No. 1).

Factual Background of Offense

The Sixth Court of Appeals accurately summarized the factual background for the initial prosecution in its opinion[2] as follows:

> "Kimberly Pinner was working for the Sears department store in Wichita Falls August 19, 2005, when she detained two men (one of whom was Uranga) for suspected shoplifting. When Pinner searched through Uranga's Dillard's shopping bag (in which Pinner found several items believed to have been stolen from Sears), she found a satchel. Pinner then unzipped this satchel and saw what appeared to be drugs inside. Pinner closed the satchel, put it down in a location away from Uranga's reach, and continued questioning the suspects regarding the thefts. Meanwhile, Uranga kept repeatedly reaching toward his ankle in an attempt to retrieve something hidden inside his sock. These furtive movements made Pinner suspicious, and she repeatedly asked Uranga to remain still until police arrived. But Uranga did not heed Pinner's request; instead, he eventually regained possession of the satchel, which he opened to retrieve the drugs, and attempted to swallow those drugs. Sears employees were ultimately able to pull the drugs out of Uranga's mouth and regain control of the situation until police arrived."

Petitioner's Alleged Claims for Relief

By his petition Uranga makes four claims:

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2 *Uranga v. State, supra.* at p. 380.

1. *Implied Bias* -That he was deprived of a fair trial by jury since one juror learned during the sentencing proceedings that his lawn had been run over by Uranga during a car chase event making that juror "impliedly biased;"

2. *Failure to Investigate*-That he received ineffective assistance of trial counsel due to counsel's failure during pretrial to investigate to learn of, locate and view the video tape of the car chase- thereby causing him not to directly *voir dire* the juror which would have disclosed the juror's "actual bias" and would have lead to him being stricken from the jury panel for cause.

3. *Brady Violation* -That the prosecutor committed a *Brady* violation by failing to produce a video tape from the store which purportedly would show Uranga's lack of possession of the drugs; and,

4. *Actual Innocence* -That Uranga was "actually innocent."

State's Responses to the Claims

The State acknowledges that with respect to Uranga's claims (as paraphrased above) Uranga has exhausted his state remedies and that pursuit of such claims in this Court are not barred by limitations. The State's answers Uranga's claims follow.

As to the *Implied Bias* claim, the state asserts: (1) That the Court of Criminal Appeals (CCA) made express and implied fact and credibility findings which are entitled to deference. The CCA found Uranga had not proved juror's actual bias; (2) That the trial court properly conducted a hearing as to any actual bias of the juror and impliedly found that the juror was not biased; and, (3) That the doctrine of Implied Bias, if it has application at all in the State of Texas, applies only to "exceptional" or "extreme" cases, of which this case is not one.

As to the *Failure to Investigate* claim, the state asserts: (1) That Uranga made no showing

that had his counsel investigated and found the tape he could have tied the event (Uranga's car running over the juror's lawn) to the individual juror whose bias is alleged so as to have effectively excluded such juror from the jury; (2) That this conclusory allegation was decided adversely to Uranga by the Court of Appeals (CA) and such finding is entitled to due deference; and, (3) That, besides, even if the juror had been barred from the punishment stage proceedings, Uranga cannot show any prejudice since he cannot show that the sentence would have been any different.

As to the *Brady* claim, the state asserts: (1) That there was no evidence withheld; (2) That there were no surveillence tapes of the Sears store where offense events took place to show Uranga's lack of possession; (3) That Uranga's allegations of existence of such tapes or of prosecutor's possession. are conclusory only; and, finally, (4) that the CCA denial was not unreasonable.

As to Uranga's *Actual Innocence* claim, the state asserts that it is merely a disguised insufficiency of evidence claim that is precluded by the CCA's decision that is entitled to due deference. Besides, says the state, this claim is procedurally defaulted, unexhausted and barred since it was not raised on direct appeal and cannot now be raised in a habeas corpus proceeding.

Implied Bias Issue Discussion

After Uranga was convicted by the jury for possession of methamphetamine, and during the course of the State's evidence presentation during the punishment phase, a videotape of the car chase was shown to the jury. One of the jurors, Mr. Richardson, recognized as his own the yard Uranga drove through. For the first time, juror Richardson learned that Uranga was the previously unknown person who had driven through his yard in the middle of the night. Thus, juror Richardson was a victim of one of Uranga's unadjudicated extraneous offenses. Richardson reported the situation to the court after lunch and the trial judge conducted a hearing outside of the jury's presence to inquire

into the issue. The colloque between the trial judge and juror Richardson went as follows:

COURT: Okay. Come right over here next to the court reporter, if you would please, sir. You're Kenneth Richardson and you're number 12 on the jury panel, correct?

JUROR: Yes, sir.

COURT: I have told the lawyers what you told me this morning, but on the record I want to be sure my understanding is correct. Yesterday when you watched the video, during the punishment phase, of the car and it went up into somebody's yard and then came back out, my understanding is that you discovered that was your yard?

JUROR: Right, yes.

COURT: And, of course, you had no way of knowing, I don't suppose that that was going to be a part of this case or that it involved this Defendant?

JUROR: No, I didn't.

COURT: So the first time you learned anything about it was when you saw his car pulling up in that yard and pulling back out on that video, right?

JUROR: Right.

COURT: Let me ask you: Have you told anybody else about it?

JUROR: No. Just you.

COURT: Is there anything about that would affect your decision in this case or that would cause you to lean one way or the other?

JUROR: No, sir.

COURT: Was there anything torn up in your yard that might have made you mad that somebody did– somebody did something to your yard?

JUROR: The ground was moved up a little bit, but I can replace that. I'm not pressing no charges or anything like that.

COURT: Did you see the car come in there, or just saw it --

JUROR: No. I just saw it on the tape.

COURT: But as far as your yard, did you know anything had happened when it happened, or did you just see it out there later?

JUROR: In the morning, when I was going to work, I saw it.

COURT: So as far as seeing anything that happened about what car came in there or a policeman chasing somebody, you didn't see anything like that?

JUROR: No. No, sir.

COURT: You had no knowledge about anything happening until the next morning when you go out and see car tracks in your yard?

JUROR: Right.

COURT: And you're telling me that the fact that car involves this Defendant, allegedly, and was the one that was on that video in your yard, that would not influence you one way or the other?

JUROR: No, sir.

COURT: You will not hold that against the Defendant in any way?

JUROR: No. No.

COURT: All right. One thing I'm going to say to you is: Do not let it influence you in any way.

JUROR: No, I won't.

COURT: Number two: Do not share that experience with any of the other jury members until

after we get through.[3]

Following this colloque, the trial judge afforded defense counsel an opportunity to further examine the juror. That opportunity was declined. Thereafter, the trial judge denied defense counsel's oral motion for mistrial.[4]

State Court Findings and Conclusions

In addressing Uranga's *implied bias* claim on his direct appeal, the Sixth Court of Appeals discussed the then current status of the "implied bias" doctrine under both Texas constitutional, statutory and case law and federal case law. That court concluded that "Given that neither the Texas Court of Criminal Appeals nor the United States Supreme Court has adopted the implied bias doctrine when it is discovered in the middle of a punishment trial that a juror is a victim of the defendant's extraneous (misdemeanor-level) conduct, we shall not follow Uranga's suggestion that such a doctrine must be applied in this case." Proceeding from this legal conclusion, the court further determined that the record did not support a finding of "actual bias" by the juror since the trial judge's implied conclusion (which was entitled to deference, absent any evidence to the contrary in the record) that the juror could remain unbiased was supported in the record. The CA observed that the trial judge was "in the best position to weigh the believability of the juror's repeated promises...that in deciding Uranga's punishment, he would not take into account his status as a victim of Uranga's extraneous criminal mischief."[5] The CA further found that legally and factually sufficient evidence supported the jury's verdict.[6]

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3 RR, Reporter's Transcript of Proceedings, Volume 7, "Discussion with juror," pp. 5-7.

4 *Id.* pp.8-9.

5 *Uranga v. State*, 247 S.W.3d at 379.

6 *Id.* at 381.

Addressing this same issue on discretionary review[7] almost three jurisprudential years later, the Court of Criminal Appeals again discussed the then current status of the United States Supreme Court's acceptance of the "implied bias" doctrine raised by Judge O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209 (1982) at 221 and articulated its own declination to adopt the doctrine for the State of Texas. Then, applying its own interpretation of the Supreme Court's decision in *Smith v. Phillips*, the CCA concluded that the trial court's holding of a hearing on the issue of the juror's actual bias was "appropriate and adequate" precluding application of "implied bias doctrine" to mandate a mistrial. This decision by a majority of the CCA judges drew a scathing dissent from Justices Price and Holcomb saying, "Without fanfare, the Court today announces that there is no such thing as the *Sixth Amendment* doctrine of implied bias. The whole thing is apparently a figment of Justice O'Connor's imagination. I am here to attest that the implied bias doctrine does exist. I know it does; I have seen it."... "Notwithstanding the durability of the Sixth Amendment doctrine of implied bias, the Court today rejects it almost effortlessly, citing only the majority opinion in *Smith v. Phillips* for support."..." This Court's reliance on that majority opinion today to disown the *Sixth Amendment* doctrine of implied bias is, in my view, a grievous mistake."...."The Sixth Amendment implied bias doctrine is alive and well and ought to be applied on the facts of this case."[8]

This conflict between the majority decision and the dissent frames the need for the following analysis and discussion of this issue in the context of the restrictions upon this Court's authority to review state court decisions.

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[7] *Uranga v. State*, 330 S.W.3d 301 (2010).

[8] *Id.* at 308.

Standard for Review

The AEDPA provides in relevant part that: (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Interpreting Congress' express language in this section of AEDPA, many courts have adopted explanations of what these two standards mean in the factual contexts of the cases under consideration by those courts.

Under the "contrary to" clause, a federal court may grant the writ of habeas corpus if the state court either arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *Chambers v. Johnson* , 218 F.3d 360, 363 (5th Cir. 2000). Under the " unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court either unreasonably applies the correct legal rule to the facts of a particular case or unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407; see also, *Valdez v. Cockrell* , 274 F.3d 941 (5th Cir. 2001). A state court unreasonably applies clearly established federal law if it identifies the correct governing principal but unreasonably applies that principal to the facts of the case. *Brown v. Payton* , 544 U.S. 133, 141 (2005). The question is not whether a federal court believes the state court's determination was incorrect but whether that determination

was unreasonable- a substantially higher threshold. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The standard for determining whether a state court's application was unreasonable is an objective one, and applies to all federal habeas corpus petitions which, like the instant case, were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

Furthermore, in reviewing the determinations by the state courts, the Supreme Court further instructed the federal courts to be sure the determinations were made "on the merits" giving "due deference" to the state court's findings. In the context of habeas corpus, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). Upon a finding of state court compliance with the "contrary to" clause of 28 U.S.C. § 2254(d)(1), federal courts give deference to the state court's findings unless such findings violate the "unreasonable application" clause of 28 U.S.C. § 2254(d)(2). *Chambers, supra.* at 363. The "unreasonable application" clause concerns only questions of fact. *Hill v. Johnson*, 210 F.3d 48185 (5th Cir. 2000). The resolution of factual issues by the state court is afforded a presumption of correctness and will not be disturbed unless the habeas petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 550 (1981). Absent such evidence, the presumption of correctness is applied provided that the state court's findings are evidenced in writing, issued after a hearing on the merits, and are fairly supported by the record. 28 U.S.C. § 2254(d) ; *e.g., Burden v. Zant*, 498 U.S. 433, 436-37 (1991); *Williams v. Scott*, 35 F.3d 159, 161 (5th Cir. 1994). Furthermore, as discussed above, AEDPA put into place a deferential scheme, under which the federal court must defer to a state court adjudication on the merits. 28 U.S.C. § 2254(d). In the prefatory paragraph to (d)(1) and (d)(2), the statute provides that an application for a writ of habeas corpus "shall not be

granted with respect to any claim that was adjudicated on the merits in State court proceedings." The word "shall" is mandatory in meaning. *In re Armstrong*, 206 F.3d 465, 470 (5th Cir. 2000); *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 358 (5th Cir. 1999). Thus, the court lacks discretion as to the operation of this section. *Lopez v. Davis*, 531 U.S. 230, 240-41, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635 (2001); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-77, 104 S. Ct. 2105, 2110-2113, 80 L. Ed. 2d 753 (1984). The use of "any" makes clear that this section applies to all cases adjudicated on their merits in state court. The term "adjudication on the merits," like its predecessor "resolution on the merits," refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. *Neal v. Puckett*, 239 F.3d 683, 686-87 (5th Cir. 2001); *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999). It does not speak to the quality of the process. *See Green v. Johnson*, *supra* at 1121 (rejecting pre-AEDPA contention that "the resolution on the merits prerequisite is a proxy for the quality of the legal process resolving a dispute"); *Murphy v. Johnson*, 205 F.3d 809, 813 (5th Cir. 2000) (applying *Green* to "adjudication on the merits")

Discussion

Status of Implied Bias Standard

As noted above, the CCA decision was rendered on July 8, 2011. By that time, the CCA had itself already noted that the implied bias doctrine had been accepted by at least five of the circuits, including the Fifth Circuit, without qualification. *State v. Morales*, 253 S.W.3d 686, 696 (Tex. CIM. App. 2008).[9] As heatedly pointed out in their vehement dissent, Judges Price and Holcomb opined that the majority had wrongly interpreted the then status of acceptance of the implied bias doctrine by the Supreme Court of the United States and by the Circuits.

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[9] "The Second, Fifth, Seventh, Ninth, and Tenth Circuits..." at note 33

As to the acceptance of the doctrine, the Dissent was correct. The doctrine had been firmly accepted by the Supreme Court as well as by the majority of the Circuits. To the extent that the majority opined otherwise, it was wrong. Indeed in *Brooks v. Dretke*, 444 F. 3d 328 (2006), summarized by Judge Price in his dissent the Fifth Circuit, after discussing the very cases Supreme Court analyzed by the CCA in its decision, had already opined that the doctrine of implied bias is 'clearly established Federal law as determined by the Supreme Court."[10](emphasis supplied).

Many Fifth Circuit cases both before and after the CCA decision have confirmed the viability and acceptance of the "implied bias doctrine" as the law of the land in both state and federal criminal jury trial prosecutions. *Freeman v. Thaler*, 491 Fed. Appx. 506 (5th Cir. 2012) (Unpublished)("We will find implicit bias as a matter of law only in extreme situations when "no reasonable person could not be affected in his actions as a juror and in which the Constitution refuses to accept any assurances to the contrary"); *Wiley v. Grimmer*, 476 Fed. Appx. 292 (5th Cir. 2012) ("Because there is no evidence of express bias here, Wiley must show specific facts demonstrating such a close connection between Townsend and the circumstances at hand that bias is implied as a matter of law. *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988). Juror bias is imputed only in extraordinary circumstances, *Andrews v. Collins*, 21 F.3d 612, 620 (5th Cir. 1994), and no such circumstances were presented in this case. See *Scott*, 854 F.2d at 699-700; *United States v. Buckhalter*, 986 F.2d 875, 879 (5th Cir. 1993); *Brooks v. Dretke*, 444 F.3d 328, 332 (5th Cir. 2006);" *Hatten v. Quarterman*, 570 F.3d 595 (5th Cir. 2009), cert. denied 559 U.S. 906 (2010) (There is also a narrow class of relationships described by Justice O'Connor's concurrence in Smith v. Phillips, and recognized by this court on several occasions, for which a juror can be presumed biased.)

Similarly, the District Courts in the Fifth Circuit have likewise found the "implied bias

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[10] At p. 332.

doctrine" to be firmly entrenched in their districts. *Bernuchauz v. Cain*, 2013 U.S. Dist. LEXIS 117083 (ED la. 2013)(recognizing the "implied bias" doctrine has been adopted in the 5th Circuit, citing *Brooks v. Dretke*, but found that the facts did not fall implicate the doctrine); *Garcia v. Thaler*, 2009 U.S. Dist. LEXIS 116390 (WD Tex. 2009): "The Fifth Circuit recognizes three categories of disqualifying jury bias...Implied bias arises in a narrow category of cases in which a juror can be presumed biased. (citing *Hatten v. Quarterman*). See Especially Magistrate Judge Karen L Haynes' Report and Recommendation in *Ingram v. Goodwin*, 2013 U.S. Dist. LEXIS 157215 (ED La 2013), adopted by district court 2013 U.S. Dist. LEXIS 157215 (W.D. La., Sept.17, 2013) in which Magistrate Judge Haynes reviewed the entire field of cases on implied bias in the 5th Circuit as they related to the Supreme Court decisions. Magistrate Judge Haynes also found that "the Louisiana Supreme Court's conclusion to the contrary constitutes an objectively unreasonable application of the doctrine of implied bias."

To the extent the CCA's decision was a determination that the "implied bias doctrine" was neither viable nor accepted, it was wrong. Nonetheless, Supreme Court and Fifth Circuit jurisprudence instructs us that ".... it is the state court's "ultimate decision " that is to be tested for unreasonableness, and not every jot of its reasoning. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); see also *Catalan v . Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (". . . we review only the state court's decision, not its reasoning or written opinion . . . ."). Indeed, state courts are presumed to know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19 (2002) at 24. And, even where the state court fails to cite to applicable Supreme Court precedent or is unaware of such precedent, AEDPA's deferential standard of review nevertheless applies "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002); *Harrington v. Richter*, 131 S. Ct. 770 (2011) at 786."

Thus, a fair reading of the majority decision by the CCA is that it founded its decision, not upon the lack of viability or acceptance of the doctrine, but upon a departure from or narrowing of the application of the doctrine due to the critical facts distinguishing the case before them from those cases in the state and in the federal courts preceding their decision, to-wit; that the information tending to raise an inference of bias in the juror was communicated during the sentencing phase, rather than the guilt-innocence phase of the trial and, further, that the potential for bias was curable and was cured by hearing and determination by the trial court. These critical facts led the CCA to announce its departure or narrowing from the "implied bias doctrine," saying:

> "In this case, the trial court held a hearing during the trial on the issue of actual bias. We hold, in accordance with the Supreme Court's reasoning in Smith v. Phillips, that such a procedure was appropriate and adequate. There was no requirement of a mistrial on a theory that bias must be implied to the juror." p. 306.

Thus, the CCA was relying upon the context in which the potentially biasing information was communicated to the juror and upon the opportunity for and the effect of a cure. For the CCA, given that the defendant had already been found guilty of the offense before the information came to the attention of the juror, the possibility of juror bias as to guilt of the defendant was diminished. And the CCA determined that in the light of the colloque between the judge and the juror, actual bias of the juror by was negated as well. Therefore, CCA concluded that the court could not "imply" that the juror was biased to the extent that the trial court should have granted a mistrial.

Application of the Standard

As observed by Justice O'Connor, juror bias may manifest itself in many contexts during the guilt/innocence phase or during the punishment phase of a trial, such as: lying on *voir dire*, being a victim of a similar crime, applying for law enforcement job, taking a bribe. Since the Supreme Court's decision in *Smith v. Phillips*, state and federal courts have been required to explore and

determine the context, scope and effect of the "implied bias doctrine" articulated by Justice O'Connor in her concurring opinion. Because of the many contexts in which juror bias may arise, it is just such a required exploration that the Supreme Court itself recognized in *Yarborough v. Alvarado*, 541 U.S. 652 (2004) wherein the Court opined, "We begin by determining the relevant clearly established law. For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). We look for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Locker v. Andrae*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)."[11]

The Court further explored the scope of the "unreasonable application" saying: "The meaning of "unreasonable" can depend in part on the specificity of the relevant legal rule. If a rule is specific, the range of reasonable judgment may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over time. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations."

One issue the CCA majority relied upon in avoiding the application of the implied bias doctrine was that the bias-causing or bias-initiating information came to juror Richardson during the punishment phase of the trial. Because juror bias may arise or manifest itself even in the punishment phase of a trial, the mere fact that it is discovered during the punishment phase does not preclude the application of the implied bias doctrine. Rather, the issue becomes whether that bias potential is curable or must be presumed or imputed to the juror even after a curative hearing. It was just this

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[11] At p. 661.

situation that was addressed by Justice O'Connor in *Smith v. Phillips* where she stated, "Because there may be circumstances in which a postconviction hearing will not be adequate to remedy a charge of juror bias, it is important for the Court to retain the doctrine of implied bias to preserve Sixth Amendment rights."[12] This issue of the opportunity and effect of cure (or rehabilitation) is the same principal and results in the same determination the trial court must make during *voir dire* examination when a juror discloses some connection to or information about the offense, the witnesses, parties, law enforcement, etc. Certainly, as recognized by Justice O'Connor, there are some circumstances in the context of a criminal trial both as to guilt/innocence or punishment phases that the bias-generating circumstance or knowledge is so potentially strong that it precludes curing or rehabilitation. For instance, consider the circumstance that a female rape victim is empaneled on the juror for a rape trial. No matter how unlikely it is that such a juror would "escape" discovery during *voir dire*, it would still be unlikely that a trial judge would allow such a juror to remain on the jury during the punishment phase notwithstanding the juror's assurances of impartiality. It would be as unlikely that a court, in the appeal context, would not have difficulty with a trial court's determination that the potential bias could be cured by hearing and juror assurance. It is just such "exceptional" or "extraordinary" situations that "state-court proceedings resulting in a finding of "no bias" are by definition inadequate to uncover bias that the law conclusively presumes."[13]

Exceptional or Deference

Addressing those circumstances where juror bias potential is great, the Fifth Circuit has opined, "We will find implicit bias as a matter of law only in extreme situations when "no reasonable person could not be affected in his actions as a juror and in which the Constitution refuses to accept any assurances to the contrary." *Brooks*, 444 F.3d at 331; see also *Solis v. Cockrell*,

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[12] O'Connor concurrence in *Smith v. Phillips*, at p. 223.

[13] *Id.* p. 222.

342 F.3d 392, 396 (5th Cir. 2003). We will "not readily presume that a juror is biased solely on the basis that he or she has been exposed to prejudicial information about the defendant outside the courtroom." *Willie v. Maggio*, 737 F.2d 1372, 1379 (5th Cir. 1984).[14]

On the other hand, the same Fifth Circuit opined, "A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of that decision. And the more general the rule being considered, "the more leeway courts have in reaching outcomes in case-by-case determinations."

Findings on Implied Bias Claim

I find that the Texas Court of Criminal Appeals reached a wrong legal conclusion when it misconstrued the status of acceptance and application of the"implied bias doctrine" applicable to state as well as federal prosecutions. Nonetheless, the court's legal conclusion that the potential for bias of a juror could and should be explored by a factual hearing at the trial court level as to the source, cause and effect of a bias-generating condition or event was a correct application of the Supreme Court's holdings in the *Rammer* and *Smith* cases and their progeny. I find that the Court's implied legal conclusion, that the information discovered by juror Richardson was not so bias-producing as to render juror Richardson "impliedly biased" thereby precluding rehabilitation or cure, was supported by the record. I further find that the trial court's implied fact finding that juror Richardson lacked "actual bias" was supported by the trial court record. I conclude that the Texas Court of Criminal Appeals reached the right result albeit for the wrong reason.

Accordingly giving due deference to the express and implied findings of the state trial and appellate courts' findings and legal conclusions, I conclude that Uranga has not shown that the state courts' decisions on the merits of his implied bias claim meet either of the criteria under AEDPA

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[14] *Freeman v. Thaler*, supra. p. 507.

warranting relief. They did not (1) result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Accordingly I recommend to the District Court that Petitioner's implied bias claim be denied.

Ineffective Assistance of Counsel Claim

Ineffectiveness of Counsel Review Standard

The Sixth Amendment of the United States Constitution guarantees a criminal defendant "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a convicted defendant seeks relief on the ground of ineffective assistance of counsel, he must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland*, at 687-91 & 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. "It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged ineffective by hindsight. Rather, inquiry must be made into the totality of the circumstances surrounding counsel's performance to determine whether reasonably effective representation was provided." *Tiering v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the challenged action might be considered sound trial strategy. A court reviewing an ineffectiveness claim need not consider the two inquires under *Strickland* in any particular order since a failure to establish either requirement necessarily defeats the claim. *Strickland*, at 697; *Smith v. Paced*, 907 F.2d 581, 584 (5th Cir. 1990).

"The proper measure of attorney performance remains simply reasonableness under prevailing

professional norms." *Strickland*, at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689 "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690; *Knowles v. Mirzayance*, 556 U. S. 111, 124 (2009). When the court's review is governed by AEDPA—as is the case here—the review of the state court's resolution of the ineffective-assistance-of-counsel claim is "doubly deferential", since the question is "whether the state court's application of the Strickland standard was unreasonable." *Harrington v. Richter*, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011). Importantly, "[t]his is different from asking whether defense counsel's performance fell below *Strickland's* standard," because the "state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* Consequently, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 786. Rather, in order to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87.

Uranga asserts his trial attorney was ineffective because he failed to "adequately investigate videotape of the evading arrest prior to voir dire."[15] Additionally, Uranga claims that due to counsel's failure "adequately investigate" the videotape, counsel failed to "pro-pound (sic) appropriate question regarding the extraneous offense during the voir dire" and thus, Uranga "forfeited the right to thereafter impute bias to the juror."[16] Finally, Uranga contends that counsel

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[15] Docket No.1 at 7.

[16] *Id.*

was ineffective because he allowed the jury to separate without Uranga's consent.[17]

Uranga presented these claims in his application for state writ of habeas corpus, which was denied with written order, wherein the court observed, "Applicant contends that the State failed to disclose evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), that his rights under the Sixth and Fourteenth Amendments were violated, *and that trial counsel rendered ineffective assistance.*"(emphasis added). Then the court stated, "Based on our independent review of the record, we conclude that Applicant's claims related to his possession of controlled substance conviction are without merit and are denied."[18] This was clearly an adjudication on the merits. *Singleton v. Johnson*, 178 F. 3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than its merits). Therefore, Uranga must demonstrate this decision was either an unreasonable application of clearly established federal law or an unreasonable application of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

Strickland requires a defendant to establish deficient performance and prejudice. Uranga can establish neither. Uranga has not shown "that counsel's representation fell below an objective standard of reasonableness" *Strickland*, at 687-688. Uranga makes no allegation or showing that a pre-trial viewing of the video tape of the car chase incident would have disclosed to Uranga's trial counsel that any prospective juror on the panel, much less that juror Richardson, was the owner of the lawn where Uranga's car traveled during the car chase. According to juror Richardson's own testimony during his colloque with the court, Richardson confirmed that he was not there when the car careened through his yard but discovered the tracks the next morning.[19] Without some sort of notice

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[17] *Id.* at 5.

[18] SHCR-0 1 (EventID: 2447551) at cover, 6, 11-14, 2626-29.

[19] RR, Reporter's Transcript of Proceedings, "discussion with juror," pp. 5-7.

(visual or otherwise) of a connection between the lawn shown in the video and a juror, Uranga's trial counsel would have no reason to *voir dire* any member of the panel as to a potential connection of the juror's lawn with Uranga or to challenge Richardson on his ownership of the impacted lawn. Therefore, there was no occasion or causation for Uranga's trial counsel to make a strategic or other reasoned choice to investigate or view the video tape. Adequate effectiveness of counsel, not perfection, is the standard. Uranga's trial counsel did not fail by either measure. Every effort must be made to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The state court's express finding, that Uranga's claims of ineffectiveness of his trial counsel were without merit, is entitled to due deference and was indeed correct. Accordingly, I recommend that the District Court deny Uranga's claims regarding his trial counsel's performance.

Brady Violation Claim

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused after a request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Impeachment material is evidence "favorable to the accused," and as such comes under the Brady rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972). To establish a Brady violation, Uranga must prove the following: (1) the prosecutor suppressed or withheld evidence; (2) which was favorable; and (3) material to the defense. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Ogle v. Estelle*, 641 F.2d 1122, 1124 (5th Cir. 1981).

Uranga alleges that the State violated *Brady* because "the State failed to bring any and all pictures, films videotapes of this incident."[20] But he wholly fails to identify any particular item or category of items he claims were withheld. Presumably, Uranga is referring to security tapes from

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[20] Docket No.1, p. 17 "Error Three."

the Sears store where the theft took place. During the trial there was a discussion of the potential location of security videos from security cameras at the Sears building where the incident occurred, but the transcript of that examination does not demonstrate the video's ever existed or were ever in possession of the prosecution.[21] Uranga fails to demonstrate that any pictures, films, or videotapes of the theft existed. Uranga has not shown that the determination by the Texas Court of Criminal Appeals to deny his claim on its merit was legally or factually unreasonable. Because Uranga has not met his burden, I recommend that the District Court deny this claim.

Actual Innocence Claim

To leap over the *Kuhlmann*[22] hurdle Uranga claims his "actual innocence" of the drug possession charge. In support of his claim of "actual innocence" of the offense of possession of a controlled substance, Uranga claims (1) that the State "did not allege that the weight contained adulterants or dilutants and did not offer sufficient proof that the controlled substance sized and tested weighed at least on gram or more but less than four grams" and (2) the law enforcement witnesses did not tie Uranga to the "Dillard's bag" that contained the drugs, so there was no evidence that Uranga had possession of them. This is merely a "sufficiency of the evidence" challenge masquerading as a claim of actual innocence.

On Uranga's direct appeal, the Texas Sixth Court of Appeals directly addressed Uranga's sufficiency of the evidence challenge as to the evidence of his possession of the drugs. The court expressly found that "Because...(2) legally and factually sufficient evidence supports the jury's

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21 RR, Reporter's Transcript of Proceedings, Vol. 4, pp. 40-48.

22 *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) wherein the court stated "In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions *only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence*."(emphasis added).

verdict, we affirm the trial court's judgment."[23] That finding is entitled to deference. That finding is not an unreasonable determination of the facts. That finding is correct. Furthermore, the factual sufficiency of the evidence cannot be considered on state habeas corpus review[24] and is procedurally barred from consideration here. Accordingly, I recommend that the District Court deny Uranga's claim of actual innocense.

No Necessity for Hearing

Petitioner requests an evidentiary hearing[25] for purposes of further developing the record in support of his claims. 28 U.S.C. § 2254(e)(2). However, the Supreme Court case *Cullen v. Pinholster,* 131 S. Ct. 1388, 2011 U.S. LEXIS 2616, 179 L. Ed. 2d 557 (2011) made clear that federal habeas review under the deferential 28 U.S.C. § 2254(d)(1) standard applicable to claims adjudicated on the merits in state-court proceedings is limited to the record before the state court. Uranga is not entitled to an evidentiary hearing.

Recommendation

Based upon the foregoing, I recommend that the District Court deny all relief on Uranga's petition.

Standard Instruction to Litigants

A copy of this report containing findings and recommendations shall be served on all parties in the manner provided by law. Any party who objects to any part of this order, report, findings and recommendations must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the

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[23] *Uranga v. State*, supra. at p. 16-17.

[24] *Ex parte Grimsby*, 137 S. W. 2d 673, 674 (Tex. CIM. Ap. 2004); *West v. Johnson*, 92 F.3d 1385, 1398, n. 18 (5th Cir. 1996).

[25] Application, Docket No. 1, p. 20.

aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

It is so ORDERED, this 18th day of February, 2014.

Robert K. Roach

Robert K. Roach
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.