EXHIBIT A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,118

EX PARTE DAVID SANTIAGO RENTERIA, Applicant

ON DIRECT APPEAL FROM DENIAL OF WRIT OF HABEAS CORPUS UNDER ARTICLE I, § 12 OF THE TEXAS CONSTITUTION AND TEXAS CODE OF CRIMINAL PROCEDURE 11.05 AND MOTION TO STAY THE EXECUTION IN CAUSE NO. 20020D00230 FROM THE 327TH JUDICIAL DISTRICT COURT EL PASO COUNTY

Per curiam. **YEARY, J., filed a dissenting opinion.**

O P I N I O N

Applicant appeals from a trial court order denying relief on the claims raised in his Application for Writ of Habeas Corpus Under Article I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Article 11.05.[1] He also asks this Court to stay his execution pending this appeal. Applicant presents four points of error. After reviewing the issues, we find Applicant's points to be without merit. Consequently, we affirm the

[1] References to Articles in this opinion are to the Texas Code of Criminal Procedure unless otherwise specified.

trial court's order denying relief.

I. *Background*

Applicant was convicted and sentenced to death in September 2003 for the capital murder of five-year-old Alexandra Flores. *See* TEX. PENAL CODE §19.03(a). This Court affirmed Applicant's conviction on direct appeal, but reversed his death sentence. *See Renteria v. State*, 206 S.W.3d 689 (Tex. Crim. App. 2006).

Applicant received a new punishment trial in 2008, and a jury again answered the punishment questions in a manner requiring the judge to sentence him to death. This Court affirmed his sentence on direct appeal. *See Renteria v. State*, No. AP-74,829 (Tex. Crim. App. May 4, 2011) (not designated for publication).

This Court also denied relief on the claims raised in Applicant's initial habeas application and his initial habeas application after the punishment retrial. *See generally* Art. 11.071; *see also Ex parte Renteria*, No. WR-65,627-01 (Tex. Crim. App. Dec. 17, 2014) (not designated for publication); *Ex parte Renteria*, Nos. WR-65,627-02 and -03 (Tex. Crim. App. Dec. 17, 2014) (not designated for publication). We further declared several guilt/innocence points raised in the -02 writ application to constitute a subsequent application and dismissed those allegations as an abuse of the writ. *Renteria*, Nos. WR-65,627-02 and -03. And this Court dismissed Applicant's most recent subsequent writ application as an abuse of the writ. *Ex parte Renteria*, No. WR-65,627-05 (Tex. Crim. App. Nov. 15, 2023) (not designated for publication).

II. *The Original Writ Application Filed in the Trial Court*

In Applicant's original writ application filed in the trial court, he raised three claims. First, Applicant asserted that the manner in which Texas officials intend to carry out his execution would violate the Fourteenth Amendment to the United States Constitution. Specifically, he asserted that, among other reasons, the Director refused to take precautions against "torture, ill treatment, or unnecessary pain" caused by the use of adulterated pentobarbital.[2] Second, Applicant complained that the Director's "purposeful, unnecessary, and unlawful use of degraded, adulterated chemicals" for executions violates the Eighth Amendment's prohibition against cruel and unusual punishment. Lastly, Applicant complained that the setting and resetting of his execution date violated his rights under the Fourteenth Amendment's Due Process Clause.

III. *The Trial Court's Ruling*

The trial court noted the United States Supreme Court's ruling in *Glossip* in which that Court held that "prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015). The trial court concluded that Applicant had only provided speculation regarding his claims and therefore had failed to meet the threshold requirement for relief. The trial court accordingly denied relief.

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[2] The "Director" is the Director of the Texas Department of Criminal Justice (TDCJ).

IV. *Applicant's Arguments on Appeal and the Court's Analysis*

In his first point of error, Applicant contends that the trial court denied him due process of law "when it purported to adjudicate his claims by merely copying verbatim the text of an order from a different case in which [Applicant] was not a party, was not served with either the petition or the response, and that raised different claims under different legal theories and with different facts and evidence." Although the trial court may have worded its order somewhat inartfully and included a recitation of some claims not actually raised in Applicant's writ application, the order was not wrong in its ultimate conclusion. The trial court properly found that Applicant had provided only speculation concerning his claims and, thus, he had failed to meet the threshold requirement for relief. Further, Applicant's conclusory statements—that the trial court failed to consider the claims he raised—are unsupported. Point of error one is overruled.

In his second and third points of error, Applicant asserts that the Director's acts and omissions have deprived him of due process of law. More particularly, Applicant argues that Texas law requires the Director to refrain from acting in a manner that causes him to suffer cruel and unusual punishment. Applicant asserts that the law requires the Director to choose a "substance or substances" that can be injected in a "lethal quantity sufficient to cause death." He contends the Director's practices in procuring, storing, and using the substances (compounded pentobarbital) violate laws prohibiting "the infliction of torture, ill treatment, and unnecessary pain on people who have been sentenced to

death." Applicant also argues that the Director is "deliberately indifferent" to laws prohibiting the torture, ill treatment, and infliction of unnecessary pain on death-sentenced inmates. But Applicant's allegations are unsupported. Without more, Applicant has failed to make a *prima facie* showing that *any* condemned inmate has been subjected to cruel and unusual punishment from the use of pentobarbital, much less that Applicant himself will be. Points of error two and three are overruled.

In his fourth point of error, Applicant contends that the trial court violated his right to due process and equal protection by setting, vacating, and resetting his execution without the 90 days notice he is entitled to under Texas law. Applicant's argument lacks merit. The trial court in June set Applicant's November execution date. In late August, the trial court vacated the date, but the State succeeded in getting the November date restored by securing mandamus relief from this Court. *See In re State of Texas ex rel. Bill D. Hicks*, No. WR-95,092-01 (Tex. Crim. App. Sept. 18, 2023) (not designated for publication). Our grant of mandamus held that the trial court had withdrawn the execution date without authority. Therefore, we ordered the reinstatement of the original setting for which Applicant had received proper notice. Applicant's fourth point of error is overruled.

V. *Conclusion*

Finding no reversible error in the proceedings below, we affirm the trial court's order denying relief on Applicant's Application for Writ of Habeas Corpus Under Article

I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Article 11.05.

No motions for rehearing will be entertained and the Clerk is instructed to immediately issue mandate. Applicant's motion to stay his execution is denied.

Delivered: November 16, 2023
Do Not Publish

EXHIBIT B

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327th JUDICIAL DISTRICT

STATE OF TEXAS	§	
	§	
v.	§	**CAUSE NO. 20020D00230**
	§	
DAVID SANTIAGO RENTERIA	§	

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS UNDER ARTICLE I, §12 OF THE TEXAS CONSTITUTION & TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.05

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1. On this date the Court considered Applicant, David Santiago Renteria's (hereinafter "Applicant" or "Renteria"), *Application for Writ of Habeas Corpus Under Article I, § 12 of the Texas Constitution & Texas Code of Criminal Procedure Article 11.05*, along with the State's Response, and the applicable law, the Court FINDS as follows:

2. Applicant's execution is scheduled for November 16, 2023.

3. In his Application, Renteria asserts that executing him with allegedly expired and/or fire damaged pentobarbital violates the United States Constitution, the Texas Constitution, and Texas Code of Criminal Procedure, Article 43.24. He also maintains that Respondents are without legal authority to execute him with fire-damaged pentobarbital; to procure, possesses, distribute or administer expired pentobarbital; to compound, procure, possess, distribute and administer pentobarbital, all allegedly in violation of the Texas Pharmacy Act; to dispense or administer pentobarbital to Applicant in violation of the Texas Controlled Substance Act; to dispense or administer pentobarbital to Applicant under the Texas Food, Drug and Cosmetic Act; or to provide or administer pentobarbital to Applicant in violation of the Texas Penal Code. Finally, Applicant claims the Texas Department of Criminal Justice's ("TDCJ") violation of state

laws protecting him from unnecessary pain violates the Due Process Clause, the Eighth Amendment, and the Equal Protection Clause.

4. In *Glossip v. Gross*, the United States Supreme Court held that "prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Glossip v. Gross*, 576 U.S. 863, 877 (2015)(*quoting Baze v. Rees*, 533 U.S. 35, 50 (2008)(plurality opinion))[1].

5. Applicant has only provided speculation with respect to his claims, and as such, Applicant fails to meet the threshold requirement for relief[2].

6. Therefore, Applicant's *Application for Writ of Habeas Corpus Under Article I, § 12 of the Texas Constitution & Texas Code of Criminal Procedure Article 11.05* is DENIED.

7. The Clerk of the Court of the Court is ORDERED to immediately transmit to the Court of Criminal Appeals certified copies of the following documents:

a. Applicant's Application for Writ of Habeas Corpus Under Article I, § 12 of the Texas Constitution & Texas Code of Criminal Procedure 11.05;

b. State's Response to Renteria's Writ of Habeas Corpus filed under CCP Art. 11.05, and

c. This Order.

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[1] *See also, Ex Parte Jedidiah Isaac Murphy, Applicant,* No. AP-77,116, 2023 WL 6586973, at *1 (Tex. Crim. App. Oct. 9, 2023), *cert. denied sub nom. MURPHY, JEDIDIAH I. v. TEXAS*, No. 23-5740, 2023 WL 6573352 (U.S. Oct. 10, 2023), recognizing the Supreme Court's standard as well as analyzing the appeal of similar issues from the 194th.

[2] In *Ex Parte Murphy*, Cause No. W00-02424- M(D), in the 194th District Court of Dallas County, Texas, Applicant therein raised substantially the same issues as Renteria raises in here. The 194th District Court denied Applicant's Application for Writ of Habeas Corpus, on essentially the same grounds, and the Texas Court of Criminal Appeals affirmed on appeal. Furthermore, Murphy also filed a Motion for Stay of Execution in the United States District Court for the Western District of Texas also raising substantially the same claims as Renteria makes here. The U.S. District Court also found Murphy had not met the requirements for a stay of execution and denied the Motion to Stay. *Murphy v. Lumpkin, et. al.*, Cause No. A-23-cv-01199-RP (U.S.D.C. West. Div. Texas-Austin). The United States Supreme Court denied Murphy's petition for writ of certiorari. *Murphy v. Texas,* 23A316 (2023).

8. The Clerk of the Court is further ORDERED to transmit a copy of this Order to counsel for Applicant and counsel for Respondent.

Signed this the 13th day of November, 2023.

M. Velarde-R

MONIQUE VELARDE REYES
JUDGE, 327TH DISTRICT COURT
EL PASO COUNTY, TEXAS

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 21, 2020
Lyle W. Cayce
Clerk

No. 19-70009

DAVID SANTIAGO RENTERIA,

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 Western District of Texas
USDC 3:15-CV-62

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

David Renteria seeks a certificate of appealability to appeal the district court's denial of his federal habeas corpus petition under 28 U.S.C. § 2254. We find that Renteria has not shown that jurists of reason could debate whether the district court erred in denying his petition, and so we deny his application.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

On November 18, 2001, five-year-old Alexandra Flores disappeared from a Wal-Mart store where she was shopping with her parents. The next day, in an alley sixteen miles from the Walmart, her body was discovered—nude, partially burned, and with a plastic bag over her head. A medical examiner found that the girl had received two blows to the head and was manually strangled before being set on fire.

Several people observed Renteria and his van at the Walmart on the day Flores disappeared. One of those people was a Walmart security guard who recalled speaking with Renteria because he had left his van running outside the store. Walmart surveillance video showed a man—wearing clothing resembling Renteria's—walking out of the store with Flores. A search of Renteria's van disclosed blood stains with Flores' DNA. A latent print lifted from the plastic bag found over Flores' head matched Renteria's palm print.

Renteria was arrested in El Paso, Texas, on December 3, 2001, and charged with capital murder in the death of five-year old Alexandra Flores. At that time, he was a 32-year-old registered sex offender on probation for committing an indecency offense against an eight-year-old girl. The day of his arrest, police obtained a written custodial statement, which the district court summarized:

> Renteria blamed an Azteca gang member—nicknamed "Flaco"—and several other people for Flores's murder. He explained he met Flaco while serving time in prison, but claimed he did not know the other people. Renteria maintained he participated in the offense out of fear the other participants would harm his family. He claimed he was "scared and . . . didn't know how to react . . . because they were threatening [his] family." Renteria asserted he only lured Flores out of the Walmart and helped Flaco and the others burn and dispose of her body.

Just before trial began in September 2003, Renteria moved for a continuance after the State disclosed that the victim's mother was the former wife of a gang member. Renteria claimed that he needed more time to investigate whether the murder was gang-related, as his custodial statement had suggested. The trial court denied the continuance and did not admit Renteria's custodial statement into evidence at trial because it was self-serving.[1] *Renteria v. State*, 206 S.W.3d 689, 705—06. (Tex. Crim. App. 2006). The jury found Renteria guilty of capital murder. *Id.*

At his first sentencing trial, the jury found "there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" and that there was not "sufficient mitigating… circumstances to warrant that a sentence of life imprisonment…rather than a death sentence be imposed." Based upon these answers, the trial court sentenced Renteria to death.

On direct appeal, the Texas Court of Criminal Appeals affirmed the guilty verdict but found that evidence of Renteria's remorse was improperly excluded at the punishment trial and vacated the death sentence. At his second punishment trial, the trial court re-sentenced Renteria to death, and the Court of Criminal Appeals affirmed. *Renteria v. State*, No. AP-74,829, 2011

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[1] According to Texas law:

> [S]elf-serving declarations of the accused are ordinarily inadmissible in his behalf, unless they come under some exception, such as: being part of the res gestae of the offense or arrest, or part of the statement or conversation previously proved by the State, or being necessary to explain or contradict acts or declarations first offered by the State.

Aldridge v. State, 762 S.W.2d 146, 152 (Tex. Crim. App. 1988) (*quoting Singletary v. State*, 509 S.W.2d 572, 576 (Tex. Crim. App. 1974)).

WL 1734067, at *1 (Tex. Crim. App. May 4, 2011).[2] The Supreme Court denied certiorari. *Renteria v. Texas,* 565 U.S. 1263 (2012).

After the Court of Criminal Appeals denied Renteria's three pending state applications for writs of habeas corpus, he filed for relief in the United States District Court for the Western District of Texas. The district court denied relief and a certificate of appealability. Renteria filed this timely appeal.

II.

A state prisoner does not have "an absolute right to appeal" from a federal district court decision denying a petition for a writ of habeas corpus. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing 28 U.S.C. § 2253(c)(1)). The prisoner must first obtain a certificate of appealability, which can be issued from this court "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* (quoting 28 U.S.C. § 2253(c)(2)). That is, the petitioner must establish that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Our inquiry, here, is only a threshold question decided without "full consideration of the factual or legal bases adduced in support of the claims." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El,* 537 U.S. at 336).

Additionally, "[i]n determining whether the district court's denial of a prisoner's petition is debatable, this court 'must be mindful of the deferential standard of review the district court applied to [the habeas petition] as required by the AEDPA.'" *Williams v. Stephens*, 761 F.3d 561, 566 (5th Cir.

[2] The Texas Court of Criminal Appeals has final appellate jurisdiction in criminal cases and, in death penalty cases, petitioners appeal to the Court of Criminal Appeals rather than to a Court of Appeals. TEX. CONST., Art. V, §§ 1,5.

2014) (quoting *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir.2003)). Where the state court adjudicated the claim on the merits, "we must defer to the state court unless its decision 'was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.'" *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000) (quoting 28 U.S.C. § 2254(d)(1)). A decision is contrary to clearly established law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412—413 (2000). The "unreasonable application" query focuses on whether "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

III.

First, Renteria claims that he was tried while incompetent in violation of the due process clause of the Fourteenth Amendment. And because his trial counsel failed to request a competency hearing and his habeas counsel failed to discover documentary evidence that he was not competent to stand trial, Renteria argues that he also received ineffective assistance of counsel in violation of the Sixth Amendment. Renteria concedes that because he did not present his substantive competency or his ineffective-assistance claim to any state court, they are unexhausted. Under the doctrine of procedural default, we are generally prohibited from reviewing the merits of such claims. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999) (citing *Coleman v. Thompson,* 501 U.S. 722, 735 n.1(1991)) (The procedural default rule also applies where "the petitioner fails to exhaust all available state remedies, and the state court to which he would be required to petition would now find the claims procedurally barred.").

Instead, Renteria argues that his ineffective-assistance claim falls under the exception to the procedural default rule: "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10. In the context of an ineffective-assistance claim, cause can be established where "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)."[3] *Martinez*, 566 U.S. at 14 (cleaned up). "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* In other words, Renteria must prove that both his trial counsel and his habeas counsel were ineffective.

The district court found no merit to Renteria's underlying claim that his trial counsel's performance was constitutionally deficient. We do not find this conclusion debatable, so our analysis of Renteria's ineffective-assistance claim begins and ends there, and we need not address his habeas counsel's performance.

As to his trial counsel, Renteria claims that he ineffectively failed to request a competency hearing despite having allegedly clear-cut indicia of Renteria's incompetency. A person is incompetent to stand trial if the person does not have: (1) a rational as well as factual understanding of the proceedings against him or (2) sufficient present ability *to consult with his lawyer* with a reasonable degree of rational understanding. *Indiana v. Edwards*, 554 U.S.

[3] *Strickland* requires a showing that (1) defense counsel's performance was deficient and (2) this deficient performance prejudiced the defense. 466 U.S. at 687. We must find that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

164, 170 (2008). Renteria argues the latter. Specifically, he points to a report issued by Dr. Alexandria H. Doyle (the Doyle Report)[4] indicating that: (1) Renteria suffered from dissociative amnesia, which rendered him "unable to provide some details of the circumstances and events"; and (2) his description of the events related to the death of the victim was "confabulated; that is, made up to cover an inability to remember."

The district court correctly observed that a dissociative amnesia diagnosis is not dispositive.[5] *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014) ("The two are not coextensive: A defendant can be both mentally ill and competent to stand trial."). Instead, in these amnesia cases, competency "is a question to be determined according to the circumstances of each individual case." *United States v. Swanson*, 572 F.2d 523, 526 (5th Cir. 1978).[6]

In performing that inquiry, the district court considered the Doyle Report along with numerous other factors bearing on Renteria's competency. For instance, despite the dissociative amnesia diagnosis, the Doyle Report itself also indicated that Renteria was "oriented appropriately, [] appeared to be able to relate to his attorneys, and generally was able to manage his emotional reactions, and think logically." Additionally, the court recognized that other psychological testing was conducted in 2002—at trial counsel's request—by Dr. James Schutte, a psychologist appointed by the court. Dr.

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[4] Though the report itself is not dated, it reflects that Renteria was evaluated on 1/30/03 and 1/31/03 and bears fax transmittal information dated 1/16/03.

[5] Renteria argues that the district court erred in relying on cases that reject "amnesia"—as opposed to "dissociative amnesia"—as a viable trial defense. But such a distinction is irrelevant because, again, the specific diagnosis is not the key inquiry and was only a factor in the district court's determination that "Renteria's claim—that his dissociative amnesia rendered him incompetent—simply fails."

[6] This is in recognition that "the district judge is in the best position to make a determination between allowing amnesia to become an unjustified haven for a defendant and, on the other hand, requiring an incompetent person to stand trial." *Id.* at 526.

Schutte's report[7] concluded that Renteria was "well within the normal range" and reflected that he had a penchant for responding untruthfully. Most importantly, at the time of his December 2001 arrest, Renteria gave a "five-page, single spaced, typewritten custodial statement to the police," which provided "meticulous details" about various aspects of the crime. Having that statement enabled trial counsel to investigate whether, as Renteria told the police, the victim was murdered by an Azteca gang member. Indeed, trial counsel even questioned the victim's mother (outside the presence of the jury) regarding her husband and ex-husband's potential gang affiliations.

In due consideration of all of the foregoing, the district court determined that Renteria failed to establish the requisite "real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial." *Bruce v. Estelle*, 536 F.2d 1051, 1058–59 (5th Cir. 1976) (quoting *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1973)). It followed, then, that Renteria did not overcome the "strong presumption" that his trial counsel's decision to forego a competency hearing was "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. No jurist of reason could debate the district court's conclusions.

That trial counsel formed a defense strategy around Renteria's police statement does not, as Renteria argues, raise questions about his mental health or trial counsel's effectiveness.[8] This is true even crediting the Doyle Report's vague assessment that Renteria's "descriptions of *some* of his actions are incredible and appear confabulated" (emphasis added). The record

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[7] Dr. Schutte's report, like Dr. Doyle's is not dated but has fax transmittal information dated 6/17/2002, and the district court opinion notes that counsel requested an appointment with Dr. Schutte at a March 2002 hearing.

[8] We note that Renteria's argument, in this regard, seems disingenuous considering that his brief later advances a defense theory that also relies on the veracity of Renteria's police statement.

demonstrates that trial counsel's decision to pursue this defense was made after he weighed the Doyle Report against his own thorough investigation into Renteria's competency and the other information that was available to him.[9] Indeed, counsel requested two mental health evaluations and there was a "rumor from the gang investigators in El Paso County," which could have confirmed Renteria's supposedly confabulated police statement. These types of "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Thus, we are also unable to debate the district court's conclusion that pursuing this defense "was a reasonable, strategic decision based on the facts known to counsel at the time of trial."[10] *Livingston*, 107 F.3d at 306; *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997) (finding effective assistance where "[t]here [wa]s sufficient evidence demonstrating that the decision not to proffer an insanity defense was a conscious and informed tactical one.") (internal quotations removed). Renteria's first argument does not provide grounds to issue a certificate of appealability.

IV.

Renteria next variously argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated when the trial court precluded testimony from his parole expert, William Habern. During Renteria's punishment trial, the jury was instructed, in accordance with Article 37.071 of the Texas Code of

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[9] The postconviction declaration by Renteria's psychologist agreeing that his symptoms were consistent with dissociative amnesia are irrelevant to our inquiry here. Trial counsel is judged on by the "facts known to [him] *at the time of trial*." *Livingston v. Johnson*, 107 F.3d 297, 306 (5th Cir. 1997) (emphasis added).

[10] We also find no error in the district court's decision to deny Petitioner's request for an evidentiary hearing. Renteria has identified no factual dispute, which if resolved in his favor, would entitle him to relief. *See Garcia v. Davis*, 704 F. App'x 316, 324-25 (5th Cir 2017) (*citing Norman v. Stephens*, 817 F.3d 226, 235 (5th Cir. 2016)).

Criminal Procedure, that if Renteria was sentenced to a life term, he would become eligible for release on parole after the actual time served by the defendant equaled forty years. The jury was also informed of Renteria's additional twenty-year and ten-year sentences for his child indecency offense and driving while intoxicated felony, respectively.

Mr. Habern was prepared to testify that Renteria would not be eligible for parole for 47.5 years. The seven-and-a-half-year year discrepancy was the product of Mr. Habern's calculation that Renteria would be required to serve part of those twenty-year and ten-year sentences on top of his life sentence. Because the jury was instructed that he would become parole eligible seven-and-a-half years early, Renteria contends, he was sentenced based upon jurors' consideration of false information in violation of his due process rights. The district court disagreed, and we do not find its conclusion debatable.

Renteria is correct that a sentencer's consideration of false information material to the sentencing decision renders the sentencing procedure invalid as a violation of due process. *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972). To that end, the district court found that:

> [T]he jury had before it evidence that Renteria would serve at least 40 calendar years on a life sentence for capital murder of Flores, Renteria faced additional sentences of twenty years for indecency with a child and ten years for felony DWI, and Renteria's expert witness opined the State would never release him from prison. Renteria has not met his burden of showing his due process rights were violated because he was, in fact, sentenced based on accurate information. He is not entitled to habeas relief on his due process claim.

Renteria faults the district court for conflating "parole eligibility, which is an objective fact that can be readily determined" with "when a person will actually be paroled, which is admittedly a more subjective and less certain

determination." But this argument fails because at the time of Renteria's punishment trial, it was unknown whether his life sentence would be "stacked" onto the prior sentences or served concurrently. Mr. Habern's proffered testimony that Renteria's sentences would be stacked and, therefore, that he would not be eligible for parole for 47.5 years was pure speculation. Mr. Habern conceded as much. Indeed, the only knowable fact regarding Renteria's parole was—as the trial court instructed—that once he began serving a life sentence, Renteria would be eligible after forty years.[11] We therefore agree with the district court and cannot say that Renteria's sentence was predicated on inaccurate information. *Rhoades v. Davis*, 914 F.3d 357, 375 (5th Cir.), *cert. denied*, 140 S. Ct. 166 (2019) (permitting testimony that defendant "would have been technically eligible for emergency furlough had he received a life sentence" even where such a furlough was unlikely).

Nor was Renteria entitled to present Mr. Habern's testimony to explain, deny, or mitigate evidence of his future dangerousness. Renteria's claim, at its core, relies on *Simmons v. South Carolina,* 512 U.S. 154 (1994). In *Simmons*, the Supreme Court held that due process requires a sentencing jury considering a death sentence be informed if a defendant is parole ineligible. *Id.* at 156. But as explained by the district court, Renteria does not enjoy such a right because our circuit has "reject[ed] an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole." *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995). Where, as here, "a defendant's ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently 'untruthful') and therefore cannot positively deny future dangerousness."

[11] For this same reason, the jury was not presented with a "false choice of sentencing options" in violation of the Eighth Amendment. As explained *supra*, there was nothing false or misleading about the jury instruction provided.

Allridge v. Scott, 41 F.3d 213, 222 (5th Cir. 1994). Renteria has made no argument justifying a divergence from our precedent in this instance.

Because a reasonable jurist could not debate the district court's conclusions—that the state court did not rule contrary to, nor did it unreasonably apply, law articulated by the Supreme Court— we cannot issue a certificate of appealability on Renteria's second argument either.

V.

Finally, Renteria seeks review of the district court's denial of his motion for additional funding to investigate a new witness statement that allegedly corroborates his custodial statement. "We review the denial of funding for investigative or expert assistance for an abuse of discretion. [A] COA is not necessary to appeal the denial of funds for expert assistance or investigative services." *Wilkins v. Davis*, 832 F.3d 547, 551–52 (5th Cir. 2016) (internal citations omitted). "In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018). Therefore, the court did err in denying Renteria's motion on grounds that his claims are unexhausted.

Rather, district courts are to determine whether the "the proposed services . . . [are] '*reasonably* necessary' for the applicant's representation." *Id.* at 1094. Whether the service is reasonably necessary depends, in part, upon "the potential merit of the claims that the applicant wants to pursue." *Id.* Renteria posits that further investigation into the new witness statement "could be relevant" to three claims: (1) a claim under *Brady v. Maryland*[12]; (2)

[12] 373 U.S. 83, (1963). A *Brady* violation occurs when the prosecution fails its affirmative duty to produce "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused." *Strickler v. Greene*, 527 US 263, 279 (1999).

a new claim for ineffective assistance of counsel; and (3) an actual innocence claim. The statement expresses that the witness' ex-husband told her information relating to the death of Flores.

As to Renteria's *Brady* and ineffective-assistance claims, both lack merit for the same reason: the statement was not provided to police until April 23, 2018—long after Renteria was convicted and sentenced in fall 2003. In her statement, the witness expressed that she did not come forward "back then because [she] was afraid" her ex-husband would retaliate against her and her children. Thus, she did not inform authorities that she suspected her ex-husband's involvement in Flores' death until April 23, 2018.[13] Accordingly, at the time of trial, there was no witness statement that the prosecution could have "suppressed" for the purpose of a *Brady* claim. *United States v. Cutno*, 431 F. App'x 275, 277 (5th Cir. 2011). Nor can Renteria establish that his trial counsel's performance was deficient for failing to find a document that did not exist. *Newbury v. Stephens*, 756 F.3d 850, 860 (5th Cir. 2014) (affirming district court's holding that "trial counsel could not be expected to discover and present evidence that no longer existed."). Finally, Renteria's last claim also fails because "claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). As established herein, no such constitutional violation occurred.

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[13] Renteria insists that the witness is "equivocal" on whether she provided information on his case before his trial. He points to a paragraph where the witness explains that her ex-husband was arrested for an unrelated attempted murder and that she "did talk to detectives on that case, and [] gave a written statement back then." The statement she references is clearly one given regarding her ex-husband's attempted murder case, not Renteria's. She did not indicate when the statement was given, who it was given to, or describe the substance of the statement. We are not convinced that such a statement could support Renteria's *Brady* or ineffective-assistance claims.

In sum, although the district court erred, we find remand unnecessary. Renteria seeks funds to pursue claims that lack merit; therefore, the funding he seeks is for investigative services not reasonably necessary for his representation. *Ayestas*, 138 S. Ct. at 1094.

VI.

We deny Renteria's application for a certificate of appealability and affirm the district court's denial of his motion for additional funding.

Certified as a true copy and issued as the mandate on May 21, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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May 21, 2020

Ms. Jeannette Clack
Western District of Texas, El Paso
United States District Court
525 Magoffin Avenue
Room 108
El Paso, TX 79901-0000

No. 19-70009 David Renteria v. Lorie Davis, Director
USDC No. 3:15-CV-62

Dear Ms. Clack,

Enclosed is a certified copy of the opinion issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

Enclosure(s)

cc: Mr. Jefferson David Clendenin
Mr. Edward Larry Marshall
Ms. Kate Sauer Pumarejo
Mr. Michael Wiseman

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

DAVID SANTIAGO RENTERIA, TDCJ # 999460, Petitioner,	§	
v.	§	**EP-15-CV-62-FM**
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	

MEMORANDUM OPINION AND ORDER

David Santiago Renteria petitions the Court for a writ of habeas corpus under 28 U.S.C. §§ 2241(d), 2254. Renteria challenges the death sentence imposed by a state trial court after a jury found him guilty of capital murder. After reviewing the record and for the reasons discussed below, the Court finds Renteria is not entitled to federal habeas relief. Accordingly, the Court will deny his petition. The Court will also deny him a certificate of appealability.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Renteria's Offense and Guilt Phase Trial

On November 18, 2001, a five-year-old girl named Alexandra Flores disappeared from a Walmart store in El Paso, Texas. *See Renteria v. State* (*Renteria I*), 206 S.W.3d 689 (Tex. Crim. App. 2006) (providing a detailed summary of the facts). The next day, her nude, partially burned body was discovered in an alley sixteen miles from the Walmart. Her autopsy revealed she was manually strangled before she was set on fire. A latent print lifted from the plastic bag found over her head matched Renteria's palm print.

Several people observed Renteria and his van at the Walmart on the day Flores disappeared. A Walmart security guard recalled briefly speaking with Renteria because he left his van running outside the store. Walmart surveillance videos showed a man—wearing

clothing like the attire worn by Renteria earlier that day—walking out of the store with Flores. A search of Renteria's van disclosed blood stains with Flores's DNA.

Police arrested Renteria on December 3, 2001. They obtained a written custodial statement. *See* Reporter's R., vol. 69 (Voluntary Statement of Accused), pp. 11–15, ECF No. 78-4.[1]

In his statement, Renteria blamed a Barrio Azteca gang member—nicknamed "Flaco"—and several other people for Flores's murder. He explained he met Flaco while serving time in prison, but claimed he did not know the other people. Renteria maintained he participated in the offense out of fear the other participants would harm his family. He claimed he was "scared and . . . didn't know how to react . . . because they were threatening [his] family." *Id.* at 13. Renteria asserted he only lured Flores out of the Walmart and helped Flaco and the others burn and dispose of her body.

At the time of his arrest, Renteria was a registered sex offender on probation for committing an indecency offense against a seven-year-old girl. *Renteria v. State* (*Renteria II*), AP-74,829, 2011 WL 1734067, at *2 (Tex. Crim. App. May 4, 2011). He also had three prior convictions for driving while intoxicated.

Shortly before trial, Renteria moved for a continuance after the State disclosed the victim's mother was the former wife of a Barrio Azteca gang leader. Clerk's R., vol. 2 (part 2 of 3), pp. 14–16 (Mot. for Continuance), ECF No. 73-7; *Renteria I*, 206 S.W.3d at 698–702. Renteria claimed the late disclosure of this relationship prevented him from adequately investigating whether Flores's murder was gang-related, as he suggested in his December 3, 2001, statement to the police.

The State explained it had just discovered the relationship between the victim's mother and the Barrio Azteca gang leader. Clerk's R., vol. 2 (part 2 of 3), p. 10 (District

[1] "ECF No." refers to the Electronic Case Filing number for documents docketed in this case. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

Attorney Letter), ECF No. 73-7; *Renteria I*, 206 S.W.3d at 698–702. The State added the marriage ended over ten years before Flores's kidnapping, and the ex-husband of the victim's mother became a gang member sometime after their divorce. The State also asserted the victim's family members maintained there were no ill feelings or problems arising out of the failed marriage.

The trial court denied the continuance. The Texas Court of Criminal Appeals later noted "[t]he record . . . reflects that defense counsel knew that appellant . . . claimed in his December 3rd statement, approximately two weeks after the offense and long before trial, that the victim's murder was gang-related." *Renteria I*, 206 S.W.3d at 702.

The trial court also did not admit Renteria's December 3, 2001, statement into evidence at trial because it was self-serving. *Renteria I*, 206 S.W.3d at 694. According to Texas law:

> "self-serving declarations of the accused are ordinarily inadmissible in his behalf, unless they come under some exception, such as: being part of the res gestae of the offense or arrest, or part of the statement or conversation previously proved by the State, or being necessary to explain or contradict acts or declarations first offered by the State."

Allridge v. State, 762 S.W.2d 146, 152 (Tex. Crim. App. 1988) (quoting *Singletary v. State*, 509 S.W.2d 572, 576 (Tex. Crim. App.1974)). Furthermore, none of the evidence admitted at trial—including the Walmart surveillance videos—supported Renteria's claim that others were involved in kidnapping and murdering Flores. *Renteria I*, 206 S.W.3d at 694 n.2.

"The State's trial theory was that Renteria, who was a complete stranger to the victim, committed the offense alone." *Renteria I*, 206 S.W.3d at 694 n.2. Renteria did not raise a duress defense. The jury found Renteria guilty of capital murder.

B. Renteria's First Penalty Phase Trial

According to the Supreme Court, "a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a

reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006).

The Texas capital sentencing statute in force at the time of Renteria's offense set forth two "special issues" for a jury to decide before sentencing. Under the first special issue—the future dangerousness issue—the jury must decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim. Proc. Code art. 37.071 § 2(b)(1) (Vernon 2001). If the jury unanimously answered this question in the affirmative, it must then consider a second special issue. Under the second special issue—the mitigation issue—the jury must determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment . . . rather than a death sentence be imposed." *Id.* § 2(e)(1). Texas law required the trial court to instruct the jurors (1) they must return an answer of "yes" or "no" on the mitigation issue, and (2) they may only answer "no" if they unanimously agree, and they may not answer "yes" unless ten or more jurors agreed. *Id.* § 2(f).

Based upon the jury's answers to the special issues, the trial court set Renteria's punishment at death.

C. Post-Conviction Proceedings

On direct appeal, the Texas Court of Criminal Appeals affirmed Renteria's conviction, but vacated his sentence. *Renteria I*, 206 S.W.3d at 710. It held the trial court denied Renteria his federal constitutional rights when it prohibited the defense from introducing evidence of Renteria's remorse. Renteria expressed remorse in his statement to the police. But a state expert claimed Renteria would be a future danger because he lacked remorse. And the State argued during closing that Renteria made no statement of remorse.

Id. at 694–99. The Court of Criminal Appeals remanded Renteria's case for a new punishment trial. *Id.* at 710.

D. Renteria's Second Penalty Phase Trial

1. Voir Dire

Renteria filed a motion to submit a comprehensive, 44-page jury questionnaire before jury selection for his punishment retrial. Clerk's R., vol. 3 (Mem. of Law in Supp. of Def's' Right to Submit a Comprehensive Capital Murder Juror Questionnaire), pp. 18–67, ECF No. 78-20; Reporter's R., vol. 77 ([Proposed] Juror Questionnaire), pp. 87–130, ECF No. 82-9. The trial court heard argument and denied the request. *Id.* at 68. The court instead used its own, 42-page jury questionnaire, which included substantive areas of inquiry like those in Renteria's proposed questionnaire. Reporter's R., vol. 2, pp. 6–14, ECF No. 79-14; Reporter's R., vol. 77 (Juror Questionnaire), pp. 21–62, ECF No. 82-9.

During individual voir dire, the trial court limited Renteria's questions about juror views on specific mitigating evidence. Clerk's R., vol. 9 (Mot. for New Trial), pp. 68–79, ECF No. 79-12. The trial court denied Renteria's for-cause challenges to 22 prospective jurors. *Id.* at pp. 89–135. But the trial court also granted Renteria seven additional peremptory challenges, giving him a total of 22 challenges.[2] Reporter's R., vol. 28 (voir dire of Robert Crosby), p. 63, ECF No. 80-20; Reporter's R., vol. 29 (voir dire of Robert L. Martinez), p. 233, not scanned into ECF; Reporter's R., vol. 30 (voir dire of Margaret A. Jackson), p. 69, not scanned into ECF; Reporter's R., vol. 34 (voir dire of Daniel Gurany), p. 66, not scanned into ECF.

[2] Texas state law entitles the defense to fifteen peremptory challenges. See Tex. Code Crim. Pro. art 35.15(a). Texas case law allows a trial court to allocate additional peremptory challenges when the defense expends their original allotment. See Cooks v. State, 844 S.W.2d 697, 717 (Tex.Crim.App.1992) ("It is clearly within the discretion of the trial court to grant additional peremptory challenges upon exhaustion of the statutory number of strikes.").

2. The State's Evidence

The State presented evidence of Flores's murder at Renteria's second punishment trial. *See Renteria II*, 2011 WL 1734067, at *1–3 (providing a more complete summary of the State's evidence). The State also presented evidence of Renteria's troubles with the law in the years leading up to Flores's murder.

The State showed that in 1992, Renteria was accused by a seven-year-old girl of molesting her in her home. Renteria pleaded guilty to indecency with a child in 1994, and was placed on deferred-adjudication probation for ten years.

The State further showed that while on probation, Renteria committed driving while intoxicated (DWI) offenses in 1995, 1997, and 2000. He pleaded guilty to the first two DWI offenses and was placed on probation for two years. He pleaded guilty to the third DWI offense—a felony—in September of 2000, and was placed on shock probation for ten years. He was incarcerated for approximately three months and released to community supervision in December 2000.

The State also showed that Renteria violated the terms of probation at various times by drinking alcohol, staying out past curfew, driving without a valid driver's license, traveling to Mexico, and spending time with children. He also failed at times to report to his probation officer. The State described his participation in sex-offender counseling as "inconsistent," "sporadic," and "enough just to get by." Moreover, the State claimed Renteria was dishonest with his sex-offender-treatment counselor, his probation officers, and his employers.

3. Renteria's Evidence

Renteria presented evidence through the testimony of his family, his childhood dance instructor, a high school classmate, the staff at his school, and a mental health expert. They described him as a good kid—quiet, friendly, respectful, studious, popular, altar boy,

National Honors Society member, scholarship recipient, and extracurricular activity participant—whose life came apart after his arrest and conviction for indecency with a child.

Renteria's mother, Eva Renteria, testified she grew up in Mexico. Reporter's R., vol. 67 (Testimony of Eva Renteria), p. 6, ECF 81-19. She had two sons and a daughter with her first husband. *Id.* She moved to the United States when she was twenty, and five years later she married Renteria's father. *Id.* at pp. 7, 10–11. She explained Renteria's father was forty-two years old when they married. *Id.* at p. 7. She claimed she stayed at home while Renteria's father worked three jobs. *Id.* at pp. 9–11. She described her family as "not wealthy," but able to pay for Renteria to attend private schools in El Paso. *Id.* at p. 17–20.

Renteria's mother and sister, Cecelia Esparza, described him as a smart student, achieving honors while in school. *Id.* at 30; Reporter's R., vol. 67 (Testimony of Cecelia Esparza), p. 100–01, ECF 81-19. His mother explained he graduated from high school and attended the University of Texas at El Paso. *Id.* 30. His sister described him as studious, popular, but also passive and "wimpy." *Id.* pp. 100–02, 118.

Renteria's mother testified Renteria engaged in extracurricular activities while in school. She said he participated in a dance group, and performed at various community and senior citizen functions. He also took part in the Border Patrol Explorer and Police Explorer programs, which allowed him to assist customs and police officials in their duties. *Id.* at p. 28.

Renteria's mother explained Renteria was also active in the church and served as an altar boy. *Id.* at pp. 21–22, 106. She noted he was once chosen by his school to travel to Rome, Italy, to visit the Pope. *Id.* at p. 28.

Renteria's sister testified that her parents rarely allowed Renteria to go out with friends. *Id.* at p.110. She described the domestic abuse she witnessed with her brother. *Id.* She described their father as occasionally physically abusive to their mother, hitting her with

his fists or a belt. She explained Renteria tried to protect her from witnessing the abuse, and recalled he once tried to intervene and stop his father from hitting their mother. *Id.* at p. 111.

Renteria's mother and sister also described how Renteria's personality changed after his conviction for indecency with a child. Prior to that offense, they depicted Renteria as always happy and frequently socializing with his friends. *Id.* at pp. 32, 119–21. Following the conviction, they described Renteria as often sad and abusing alcohol. *Id.* at pp. 30–36, 119–21, 142–45. They claimed the conviction made it difficult for him to find work. *Id.* at pp. 35–36, 143. Nonetheless, they noted Renteria helped his parents pay their bills when his father became unemployed. *Id.* at p. 35.

Renteria's mother testified the family lived on the Tigua reservation as enrolled tribal members. *Id.* at p. 13. They were "evicted" when the tribal council forced out 600 families. *Id.* at pp. 37–40. She explained the tribal council shut off their water supply and tribal members threatened them. *Id.* at p. 124. She claimed she saw some people walking in the neighborhood carrying guns and other people dragging residents from their homes. *Id.* at p. 124.

Renteria's mother explained Renteria and his father left the Tigua reservation to find work. *Id.* at p. 124. Unable to return, they lived in a van while she barricaded herself in the family's home for a month in her unsuccessful effort to save it. *Id.* at p. 39. After the tribal council forced the family off the Tigua reservation, they lived in a small apartment, which she described as "the worst." *Id.* at p. 38.

The defense also presented testimony of individuals who knew Renteria as a child.

Roberto Parra testified he led a dance group which performed at various locations in the community. Reporter's R., vol. 66 (Testimony of Roberto Parra), p. 19, ECF 81-18. Parra claimed he met Renteria in 1983 when he and his sister joined the dance group. *Id.* at pp. 19–20. Parra said he was impressed with Renteria's close relationship with his parents, although he noted that Renteria's parents did not allow Renteria to travel out of town with the

dance group. *Id.* at pp. 22–23. Parra described Renteria as very polite and respectful. *Id.* at p. 25.

Jorge Cortez identified himself as a high school classmate. Reporter's R., vol. 66 (Testimony of Jorge Cortez), pp. 34–35, ECF 81-18. Cortez labeled Renteria as quiet, friendly, respectful, and non–violent. *Id.* at p. 37. Cortez claimed he did not often see Renteria out of school. But recalled an incident when Renteria was out with friends, lost his class ring, and got his car stuck in the desert. Cortez described how Renteria's father unexpectedly arrived and argued with Renteria. *Id.* at pp. 38–39.

Lenore Armstrong identified herself as elementary school teacher. Reporter's R., vol. 66 (Testimony of Lenore Armstrong), p. 46, ECF 81-18. Armstrong claimed she knew Renteria from kindergarten through eighth grade. *Id.* at p. 47. Armstrong described Renteria as a good student with above average grades. *Id.* at p. 49.

Maria Schuerman declared she also taught at Renteria's elementary school. Reporter's R., vol. 66 (Testimony of Maria Schuerman), p. 54, ECF 81-18. Schuerman believed Renteria's parents cared very much for his welfare and education—and they always attended parent-teacher conferences. *Id.* at pp. 57–58. Schuerman described how Renteria's parents took him to the school's playground to play because the neighborhood where the family lived—the Tigua reservation— suffered from high rates of alcoholism and crime. *Id.* at p. 58. Schuerman depicted Renteria's parents as over-protective, but added they had good reason because their neighborhood was unsafe. *Id.* at p. 58. Schuerman described Renteria as respectful, an excellent student, artistic, and non-aggressive. *Id.* at p. 59. Schuerman testified that Renteria served in the school's safety patrol, collected certificates for his participation in academic tournaments, and received a scholarship from the Knights of Columbus. *Id.* at 67.

Oscar Santaella explained he served as the principal of Renteria's high school. Reporter's R., vol. 66 (Testimony of Oscar Santaella), p. 132, ECF 81-18. Santaella noted

Renteria was highly recommended by his elementary school teachers for admission into the school. *Id.* at p. 123. Santaella added Renteria was a good student—a member of the National Honor Society—and he participated in student council and in community service activities. *Id.* at p. 134. Santaella also noted Renteria received an award from the Daughters of the American Revolution to recognize his community service. *Id.* at p. 147.

Enrique Vaca claimed he met Renteria in 1986 when Renteria participated in a program called Police Explorers, which allowed young people to work with law enforcement personnel. Reporter's R., vol. 66 (Testimony of Enrique Vaca), p. 123, ECF 81-18. Vaca said he supervised Renteria for at least six months. *Id.* at p. 124. Vaca testified Renteria was the most active program participant, very responsible, and admired by the other participants. *Id.* at pp. 124–25.

Severo Jimenez explained he was a retired officer of the El Paso Police Department. Reporter's R., vol. 67 (Testimony of Severo Jimenez), p. 58, ECF 81-19. Jimenez claimed he met Renteria when Renteria worked as a housing project aid. *Id.* at p. 59. Jimenez described Renteria as dependable, punctual, trustworthy, and polite. *Id.* at p. 60.

The defense also presented testimony regarding Renteria's prior incarcerations.

Robert Kaminski—a correctional officer with the El Paso Sheriff's Department—testified Renteria was held in the county jail where he worked for two years. Reporter's R., vol. 67 (Testimony of Robert Kaminski), p. 64, ECF 81-19. Kaminski explained Renteria was not aggressive and was not a threat to the staff or other inmates. *Id.* at pp. 72–73.

James Nance—also with the El Paso Sheriff's Department—confirmed Renteria had not posed a threat of violence to the staff or other inmates in the county jail. Reporter's R., vol. 67 (Testimony of Robert Kaminski), p. 89, ECF 81-19.

Frank AuBuchon—a classification expert with the Texas Department of Criminal Justice—noted Renteria had no disciplinary records from his prior incarcerations in prison or on death row. Reporter's R., vol. 68 (Testimony of Frank AuBuchon), p. 80, ECF 81-20.

AuBuchon also noted the mental health evaluations Renteria underwent in prison showed he did not pose a risk to himself or others. *Id.* at p. 84. He testified that—if sentenced to life—Renteria would reside in a maximum-security facility. *Id.* at pp. 39–40.

The defense also presented the testimony of a forensic psychologist, Dr. Mark Cunningham.

Dr. Cunningham testified he was an expert in capital sentencing determinations, risk assessment, and forensic psychology. Reporter's R., vol. 69 (Testimony of Dr. Mark Cunningham), p. 41, ECF 82-1. Dr. Cunningham explained in preparation for his testimony, he interviewed Renteria, Renteria's family members, and other individuals who knew Renteria throughout his life. He also reviewed Renteria's education, jail, and prison records. *Id.* at pp. 46–49, 80. Dr. Cunningham testified that—based on his analysis—Renteria would likely have a "positive prison adjustment" and would likely not commit acts of serious violence while in prison. *Id.* at p. 92; Reporter's R., vol. 70 (Testimony of Dr. Mark Cunningham), pp. 84, 90, ECF 82-2. He noted Renteria exhibited no violence in jail or prison during his prior six years of incarceration. Reporter's R., vol. 70, pp. 23–24. Dr. Cunningham opined Renteria would likely die in prison. *Id.* at p. 88.

Like Renteria's mother and sister, Dr. Cunningham testified about Renteria's good character and "pro-social" activities as a child. *Id.* at pp. 33–36. Dr. Cunningham noted several factors indicated Renteria would not pose a future danger: (1) Renteria's "community stability," (2) employment history, (3) education, and (4) close ties to his family. *Id.* at pp. 33–36. Dr. Cunningham professed he had "never observed a childhood behavior pattern that [was] this positive in its involvement in church and school and community activities." *Id.* at p. 60.

Dr. Cunningham also described Renteria's family background. He explained that—while the family outwardly appeared "idyllic"—it was actually "pathological." *Id.* at pp. 60–62. He explained Renteria's mother was only fifteen years old when she first became

pregnant with an older man's child. *Id.* at pp. 62–63. She married that man and later had two more children with him. *Id.* at pp. 62–63. Her husband was murdered while she was pregnant with their third child. *Id.* at pp. 62–63. Renteria's father was also previously married. He married a sixteen-year-old woman with whom he had a child in 1942. *Id.* at pp. 63–64. He started dating Renteria's mother—who was seventeen years younger—soon after his first wife died. *Id.* at pp. 63–64. He proposed to Renteria's mother only three days after he met her. *Id.* at pp. 63–64. He never allowed Renteria's mother to see her children from her first marriage. *Id.* at p. 64. He also verbally and physically abused of Renteria's mother. *Id.* at pp. 64, 65. According to Dr. Cunningham, Renteria's father routinely beat his wife. *Id.* at p. 66. And Renteria and his sister witnessed the abuse, although Renteria was never beaten. *Id.* at pp. 67, 70.

4. The Sentence

Based upon the jury's answers to the first special issue—the future dangerousness issue—and the second special issue—the mitigation issue—at the second punishment trial, the trial court re-sentenced Renteria to death. The Court of Criminal Appeals affirmed the sentence. *Renteria II*, 2011 WL 1734067, at *48. The Supreme Court denied certiorari. *Renteria v. Texas*, 132 S. Ct. 1743 (March 19, 2012).

E. State Habeas Applications

The Court of Criminal Appeals denied Renteria's three pending state applications for writs of habeas corpus. *Ex parte Renteria*, WR-65,627-01 (filed August 28, 2006), -02 (filed August 1, 2012), -03 (filed August 7, 2014); ECF No. 83-14.

F. Claims for Relief

Renteria alleges the following grounds for federal habeas relief in his petition:

> Claim I - Renteria was tried while incompetent in violation of the Due Process Clause of the Fourteenth Amendment. Renteria's trial counsel ineffectively failed to bring clear-cut indicia of incompetence to the attention of the trial court and request a hearing and/or independent determination of competency. Pet'r's Pet. 13–16, ECF No. 53; Br. in Supp. 13–17, ECF No. 58.

Claim II - Renteria's trial counsel ineffectively failed to present mitigating evidence to the second penalty juror in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Pet'r's Pet. 16–20; Br. in Supp. 17–21.

Claim III - Renteria's rights under the Sixth, Eighth and Fourteenth Amendments were violated when (1) the trial court refused to permit him to offer accurate evidence of his lack of parole eligibility; (2) instructed the jury in a misleading and confusing manner and (3) permitted the State to offer false and misleading closing argument that Renteria could be released from prison. Pet'r's Pet. 21–28; Br. in Supp. 21–32.

Claim IV - Renteria's federal constitutional guarantees of effective assistance of counsel, trial by an impartial jury, an individualized sentencing determination, and due process of law were violated when the trial court prohibited questioning during voir dire regarding the jurors' ability to consider and give effect to mitigating circumstances and to consider the full range of punishment, and otherwise follow the law. Pet'r's Pet. 28–90; Br. in Supp. 32–46.

Claim V - Renteria's constitutional rights were violated in multiple respects by the trial court's jury charge at the second penalty trial. Pet'r's Pet. 91–99; Br. in Supp. 46–54.

Claim VI - Renteria's rights under the Fifth, Sixth and Fourteenth Amendments were violated when the State was permitted to question Dr. Cunningham regarding counsels' decision to not permit this expert to discuss the offense with Renteria. Pet'r's Pet. 99–101; Br. in Supp. 55–56.

II. STANDARD OF REVIEW

In the federal judicial system, "collateral review is different from direct review." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). The writ of habeas corpus is "an extraordinary remedy," reserved for those petitioners whom "society has grievously wronged." *Id.* at 633–34. It "is designed to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)). It provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[S]tate courts are the principal forum for asserting constitutional challenges to state convictions."). As a result, the federal habeas courts' role in reviewing state prisoner petitions is exceedingly narrow.

"The federal courts' statutory authority to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA)." *Wilson v. Cain*, 641 F.3d 96, 99–100 (5th Cir. 2011). The AEDPA "imposes a highly deferential standard of review for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (quoting *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam)).

A. Claims Adjudicated in State Court

A federal habeas court presumes that claims raised in state-court proceedings have been adjudicated "on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson v. Williams*, 568 U.S. 289, 298 (2013). It reviews adjudicated claims under 28 U.S.C. § 2254(d). *Harrington*, 562 U.S. at 98–99. Under this subsection, a federal habeas court's review "is limited to the record that was before the state

court." *Cullen v. Pinholster*, 536 U.S. 170, 181 (2011). It may not grant habeas relief unless the state-court adjudication of a 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.

28 U.S.C. § 2254(d); *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404–05 (2000).

The "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)(1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Pursuant to the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) ("A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.'"). A state court's failure to cite governing Supreme Court authority does not, *per se*, establish that the state court's decision is "contrary to" clearly established federal law; "the state court need not even be aware of [Supreme Court] precedents, so long as neither the reasoning nor the result of the state-court decisions contradicts them." *Mitchell*, 540 U.S. at 16 (citation omitted).

Pursuant to the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme

Court's decisions, but unreasonably applies that principle to the facts of the petitioner's case. *Brown*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *McDaniel v. Brown*, 558 U.S. 120, 132–33 (2010); *see also Wiggins*, 539 U.S. at 520–21. An "unreasonable" application is different from a merely "incorrect" one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Price v. Vincent*, 538 U.S. 634, 641 (2003) ("[I]t is the habeas applicant's burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner."). As the Supreme Court has explained, the petitioner "must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (quoting *Harrington,* 562 U.S. at 103).

Legal principles are "clearly established" for purposes of AEDPA review when the holdings—as opposed to the dicta—of Supreme Court decisions established those principles at the time of the relevant state-court decisions. *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). What constitutes "clearly established federal law" is determined through review of the decisions of the Supreme Court—not the precedent of other federal courts. *See Lopez v. Smith*, 135 S. Ct. 1, 2 (2014) (holding that the AEDPA prohibits the federal courts of appeals from relying on their own precedent to conclude that a constitutional principle is "clearly established").

When the state court rejects a claim pursuant to a state procedural rule which provides an adequate basis for the decision—independent of the merits of the claim—the procedural default bars a federal habeas claim. *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008) (citing *Coleman v. Thompson*, 501 U.S. 722, 729–32 (1991)). To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed" by the state courts. *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991).

The AEDPA also significantly restricts the scope of federal habeas review of state courts' findings of fact. Section 2254(d)(2) precludes federal habeas corpus relief on any claim adjudicated on the merits in the state court unless the state court's adjudication resulted in a decision based on an unreasonable determination of the facts considering the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even if reasonable minds reviewing the record might disagree about the factual finding in question—or the implicit credibility determination underlying the factual finding—"on habeas review that does not suffice to supersede the trial court's . . . determination." *Rice v. Collins*, 546 U.S. 333, 342 (2006); *Wood*, 558 U.S. at 301.

Moreover, § 2254(e)(1) requires that a petitioner challenging state court factual findings establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro*, 550 U.S. at 473–74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'"); *Rice*, 546 U.S. at 338–39; *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

However, the deference to which state-court factual findings are entitled under the AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El*, 545 U.S. at 240 (explaining that the standard is "demanding but not insatiable"); *Miller-El*

v. Cockrell, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

Finally, a federal habeas court reviewing a state court's rejection on the merits of a claim for relief pursuant to the AEDPA must focus exclusively on the propriety of the ultimate decision reached by the state court and not evaluate the quality—or lack thereof—of the state court's written opinion supporting its decision. *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*).

B. Claims Not Adjudicated in State Court

The AEDPA requires that a petitioner exhaust his available State remedies before raising a claim in a federal habeas petition. *See* 28 U.S.C. § 2254(b)(1) (stating that habeas corpus relief may not be granted "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). A petitioner satisfies the exhaustion requirement if he presents the substance of his federal habeas claim to the highest state court in a procedurally proper manner. *Baldwin v. Reese*, 541 U.S. 27, 29–32 (2004); *Moore v. Cain*, 298 F.3d 361, 364 (5th Cir. 2002).

In Texas, the highest state court for criminal matters is the Texas Court of Criminal Appeals. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). A petitioner must "present the state courts with the same claim he urges upon the federal courts" to properly exhaust a claim. *Picard v. O'Connor*, 404 U.S. 270, 276 (1971).

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court barred federal habeas relief on unexhausted or procedurally defaulted claims unless the petitioner demonstrated cause for the default and actual prejudice arising from the default—or showed

the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50; *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000). The Supreme Court added—because a petitioner "had no right to counsel to pursue his appeal in state habeas"—an attorney's negligence in a postconviction proceeding could not serve as "cause." *Coleman*, 501 U.S. at 755, 757. In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Renteria v. Thaler*, 569 U.S. 413 (2013), however, the Supreme Court revised its position and opined a petitioner could meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013).

A petitioner may not escape 28 U.S.C. § 2254(d)'s deferential review by "using evidence that is introduced for the first time" in federal court. *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011). Claims without a state-court merits adjudication are subject to § 2254(e)(2)'s limitation on new evidence. *Pinholster*, 563 U.S. at 185–86. A petitioner must first prove that he "made adequate efforts during state-court proceedings to discover and present the underlying facts." *Williams*, 529 U.S. at 430. If the petitioner was less than diligent in developing the facts, an evidentiary hearing is permissible only where (1) there is a new, retroactive rule of constitutional law, or (2) the facts could not have been discovered with due diligence and such facts demonstrate actual innocence of the crime by clear and convincing evidence. 28 U.S.C. § 2254(e)(2)(A)–(B).

If, on the other hand, the petitioner did exercise diligence, a district court nevertheless has discretion to deny a hearing. *Schriro*, 550 U.S. at 468. A district court should grant a hearing only where the inmate was denied a full and fair hearing in state court and the inmate's allegations, if true, would warrant relief. *Blue*, 665 F.3d at 655. But a district court

may deny a hearing if the federal record is sufficiently developed to make an informed decision. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998).

C. Ineffective Assistance of Counsel Claims

The standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective assistance of trial counsel claims. To prove such a claim, a petitioner must satisfy both prongs of the *Strickland* test by showing (1) constitutionally deficient performance by counsel, and (2) actual prejudice to his legal position. *Id.* at 689–94; *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994). A court need not address both components if the petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

To demonstrate deficiency, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. A court considering such a claim "must indulge a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* at 689.

To demonstrate prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter v. McCollum*, 558 U.S. 30, 38–39 (2009) (citation omitted). A mere allegation of prejudice is not enough to satisfy the prejudice prong of *Strickland*. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994). The probability "of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. Thus, counsel's performance is entitled to "a heavy measure of deference" by a reviewing court. *Cullen*, 563 U.S. at 197 (citation omitted).

Moreover, where a state court has adjudicated a petitioner's ineffective assistance of counsel claims, the federal court must review those claims "through the deferential lens of §

2254(d)," *id.* at 190, and must consider not only whether the state court's determination was incorrect, but also "whether that determination was unreasonable." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citing *Schriro*, 550 U.S. at 473). Pursuant to 28 U.S.C. § 2254(d), "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* As such, "[e]stablishing that a state court's application of *Strickland* was unreasonable . . . is all the more difficult." *Harrington*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

In those instances where a state court failed to adjudicate a claim under the *Strickland* test—such as when the state court summarily dismissed the claim under the Texas writ-abuse statute or the petitioner failed to fairly present the claim to the state court—a federal habeas court's review of the un-adjudicated claim is *de novo*. *See Porter*, 558 U.S. at 39 (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts failed to address this prong of the *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins*, 539 U.S. at 534.

III. ANALYSIS

A. Claim I - Renteria was tried while incompetent in violation of the Due Process Clause of the Fourteenth Amendment. Renteria's trial counsel ineffectively failed to bring clear-cut indicia of incompetence to the attention of the trial court and request a hearing and/or independent determination of competency. Pet'r's Pet. 13–16, ECF No. 53; Br. in Supp. 13–17, ECF No. 58.

1. Background

The trial court appointed the El Paso Public Defender's Office to represent Renteria on December 3, 2001. Clerk's R., vol. 1, p. 47 (Order Appointing Attorney), ECF No. 73-4. At an ex parte hearing on March 4, 2002, Renteria's trial counsel asked the trial court to appoint Dr. James Schutte, a licensed psychologist, to test and evaluate Renteria:

> We need to have Mr. Renteria tested and evaluated.
> Judge, I'm not raising an insanity defense nor am I suggesting that he is incompetent to testify or incompetent to stand trial.
> Quite the contrary. I believe -- I'm most assured that he is competent.

Reporter's R., vol. 5 (Ex Parte Hearing), p. 6, ECF No. 74-18. The trial court granted the request, as well as trial counsels' request on April 15, 2002, for additional funding to pay Dr. Schutte. *Id.* at 9; Reporter's R., vol. 7 (Ex Parte Hearing), pp. 4–5, ECF No. 74-20.

Dr. Schutte reported Renteria's psychological testing indicated he had obtained a full-scale IQ score of 102 and "exhibited twelfth-grade skills in reading, spelling, and math." Schutte Report 1, ECF No. 95-3. Dr. Schutte explained Renteria's performance on measures of neuropsychological functioning was normal, with only a deficit in "divided attention" and mild-to-moderate impairment on "the single most sensitive measure of brain impairment." *Id.* He added Renteria did not exhibit any indication of psychopathology. *Id.*

Dr. Schutte noted, however, Renteria did not respond to test questions on three personality inventories "in an open and honest manner. [Renteria] tried to present an overly favorable self-image, and denied even minor problems and flaws most people are willing to acknowledge." *Id.* He pointed out yet another test showed Renteria exhibited "a strong

tendency towards deceptive self-presentation, characterized both by a tendency to claim unrealistic virtue and a denial of even common problems and flaws most people are willing to acknowledge. [His] responses suggest[ed] he both want[ed] to impress others and lack[ed] insight into his own behavior. As such he appear[ed] to be deceiving both himself and those around him." *Id.* at 2.

Dr. Elizabeth Doyle evaluated Renteria beginning on January 30, 2003, to determine his competence to proceed to trial. Doyle Report 1, ECF No. 95-4. She reviewed the summary of prior psychological testing administered by Dr. Schutte; a social narrative written by Renteria's mitigation specialist, Amelia Castillo, LMSW-ACP; and prior records from Renteria's school, employment, and sexual offender treatment. *Id.* She interviewed Renteria for twelve hours over a two-day period. *Id.*

Dr. Doyle noted "Renteria did understand that he had been charged with capital murder." *Id.* She observed "Renteria understands the role of the judge, a jury, prosecutor and defense attorney. He was oriented appropriately, he appeared to be able to relate to his attorneys, and generally was able to manage . . . think logically." *Id.* She added "[h]e was able to describe some, but not all, of the events during the period of time in question." *Id.* at 2. Consequently, she diagnosed Renteria with dissociative amnesia:

> [H]e has episodes of amnesia in which he is unable to account for certain periods of time. He has no memory of certain actions he performed, unrelated to the crime, that have been described by others and which are likely to have other means of being corroborated. For instance, he has no-memory of making 2 out of 3 phone calls that he made to his wife during the period of time in question. The extent of this memory lapse is beyond that which would be explained by ordinary forgetfulness and is best characterized by the diagnosis of *dissociative amnesia.*

Id. (emphasis in original). Based on Renteria's diagnosis and his claimed inability to recall important events related to his case, Dr. Doyle found that he was not able to properly consult with his counsel and, she believed, he was therefore not competent to proceed to trial:

> In my professional opinion, Mr. Renteria is not currently competent to stand trial; that is, he does not have sufficient ability to consult with defense counsel. The symptoms of dissociative amnesia prevent the defendant from consulting with counsel regarding important factual elements of his actions during the evening the crime was committed. While the defendant does have a factual and rational understanding of the charges against him, the possible penalties arising from these charges and understands the relevant legal proceedings, he cannot provide a coherent and complete version of his actions that would allow his attorneys to formulate a competent defense.

Id.

On April 29, 2003, the trial court granted trial counsels' request to have Renteria undergo an additional psychiatric examination by Dr. Ann Salo. Clerk's R., vol. 1 (part 2 of 2), p. 40 (Order), ECF No. 73-5. The trial court ordered the "examination and confidential report to be made to the ATTORNEY for the Defendant ONLY." *Id.*

Renteria now claims he was tried while incompetent. He notes Dr. Doyle evaluated and diagnosed him with dissociative amnesia before his trial. *See* Pet'r's Pet. 13–16, ECF No. 53. Renteria observes Dr. Doyle determined—based on this diagnosis and his claimed inability to recall some of the events on the day of Flores's murder—he was incompetent to proceed to trial. He comments—despite this finding—his trial counsel failed to obtain another opinion from a mental health professional or bring this finding to the attention of the trial court. Renteria argues, "[i]n short, trial counsel ineffectively failed to act on this important finding with regard to competency." *Id.* at 15.

Renteria concedes "[t]his ground for relief was not presented on direct appeal or in state post conviction proceedings." *Id.* 15–16. He attributes this failure "to the ineffectiveness of direct appeal counsel, and initial post-conviction counsel." *Id.* at 16. Renteria explains "[t]his claim presents three procedural defaults." Pet'r's Reply 3, ECF No. 94. First, trial counsel did not raise the substantive competency claim during trial. Second, appellate counsel did not raise the competency claim on direct appeal. Finally, state habeas

counsel did not raise an ineffective assistance of trial and appellate counsel claim for failing to raise the competency issue in his state writ application. He argues "any default of the claim is overcome by prior counsels' ineffective failure to present it." Pet'r's Pet. 16, ECF No. 53.

2. Applicable Law

The Due Process Clause of the Fourteenth Amendment requires that a criminal defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

In Texas, "[a] person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." Tex. Code Crim. Proc. Ann. art. 46B.003(a) (West).

While due process requires competency for the trial of an accused person, a habeas court should only consider a claim alleging a defendant was incompetent to stand trial where the facts are "sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner" at the time of trial. *Bruce v. Estelle*, 536 F.2d 1051, 1058–59 (5th Cir. 1976). Indeed, "the [habeas] petitioner's initial burden is substantial" and "extremely heavy." *Enriquez v. Procunier*, 752 F.2d 111, 114 (5th Cir. 1984).

3. Discussion

Renteria concedes his claim is unexhausted in the state courts. Pet'r's Pet. 15–16, ECF No. 53. He contends he can overcome the procedural default because of his "trial counsel's ineffective failure to pursue it," and "by the ineffective assistance of initial state post-conviction counsel." Pet'r's Reply 6, ECF No 94.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court barred federal habeas relief on procedurally defaulted claims unless the petitioner demonstrates cause for the default and actual prejudice arising from the default—or shows the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50. In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Renteria v. Thaler*, 569 U.S. 413 (2013), the Supreme Court opined a petitioner could meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza*, 738 F.3d at 676.

The results of Renteria's psychological testing by Dr. Schutte were well within the normal range. Schutte Report at 1, ECF No. 95-3. More telling, Renteria's personality scales all indicated that Renteria "did not respond to the test questions in an open hand honest manner" and he was attempting "to be deceiving both himself and those around him." *Id.* at 2. Dr. Schutte subsequently explained his testing would not have shown dissociative amnesia:

> Dissociative amnesia, if it existed, would not necessarily appear on any of the memory testing that I administered. This is because my testing evaluated gross memory functioning, while a dissociative amnesia is due to the psychological impact of a past trauma and would manifest itself in event-specific amnesia.

Pet'r's Reply, Ex. (Declaration of James Schutte, Ph.D.), ECF No. 94-1.

Dr. Doyle diagnosed Renteria with dissociative amnesia because "[h]e was able to describe some, but not all, of the events during the period of time in question." *Id.* at 2. Importantly, Dr. Doyle based the dissociative amnesia diagnosis solely on Renteria's claim that he could not remember *some* details of Flores's kidnapping and murder.

But Dr. Doyle also found Renteria understood the charge against him and the role of the judge, jury, prosecutor and defense attorney. Doyle Report 1, ECF No. 95-4. She further found he was oriented appropriately, could relate to his attorneys, "and generally was able to manage . . . think logically." *Id.* In other words, she found Renteria had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. Thus, Renteria did not meet the requirements for mental incapacity to stand trial established by Texas Code of Criminal Procedure article 46B.003(a).

Other evidence readily contradicted Dr. Doyle's dissociative amnesia diagnosis.

At the time of his arrest on December 3, 2001, Renteria gave a five-page, single-spaced, typewritten custodial statement to the police. Reporter's R., vol. 69 (Voluntary Statement of Accused), pp. 11–15, ECF No. 78-4. In his statement, Renteria provided meticulous details about his trip to the Walmart on November 18, 2001—the day of Flores's murder—including where he parked his van, the entrance he used to enter the store, a detailed description of the clothing he was wearing, a list of items he purchased, a description of the cashier, and a summary of the conversation he had with a security guard in the parking lot:

> About two to three weeks ago on a Sunday I had gone shopping at Sam's on the east side with my family. I was with my mom my dad my wife my niece and maybe my 10 year old nephew Hector Chavez. We had gone to Sam's in my dad's Suburban. We got back home at about 4:00P and we unloaded the groceries. We waited a little while at the house and were watching television. My wife wanted to make a special dish to eat but she needed some chiles [sic] and we didn't have any. So I told her that I would go and get them while she got the rest of the stuff ready. So I went alone in my 1984 Chevrolet G-20

> conversion van. I went to the Wal-Mart on Alameda and Americas. This was at about 5:00P it was still light outside. I parked the van close to the gas station. The reason I parked there is because I had to leave it on. I was having problems with the starter. I went inside the Wal-Mart and entered through the west doors where the McDonalds is. I got a shopping cart from the parking lot. At the time I was wearing a white adjustable baseball cap that had "Taz" the Tasmanian devil on the front and he is like running, a plain green T-shirt, underneath the green T-shirt I was wearing a plain white T-shirt a pair black nylon swim trunks that are just above my knee, a pair of white socks at come up to the middle of my calf and a pair of white generic tennis shoes that are real old like about two years old. As soon as I walked into the Wal-Mart I headed to the produce section. I grabbed some red chiles [sic], some jalapeno peppers, chile [sic] serranos, some chile [sic] "guero" and I think I grabbed some limes. I also got some Campbell soups and that was it. I went through the check-outs and the cashier was a girl Hispanic. I left the store and went to the van. When I got to the van I saw that there was a security guard there. She asked me if it was my van and I told her yes. She said that she was there because she had seen it running and she wanted to check it out to make sure everything was ok. She wanted to make sure that no one would steal it. I told her the reason I had left it on was because I was having trouble with it. She said ok and that she didn't want nobody to rip it off. I put my groceries in the middle of the front two seats. Then I wanted to get some sweet bread so I went back inside the Wal-Mart.

Reporter's R., vol. 69 (Voluntary Statement of Accused), pp. 11–12, ECF No. 78-4.

Renteria explained how he encountered Flaco—a person he described as an "Azteca" prison gang member he previously met while in jail—and several of Flaco's companions when he went back inside the Walmart:

> I was looking over some sweet breads and that's when I was approached. I had made eye contact with two individuals. I recognized one of the guys and he goes by the nickname of "Flaco." He looked at me and he made this gesture like he knew me and then he walked over to where I was at. I know who this guy is from jail. I had met him while I was at the annex. I was at the annex when I got arrested in August of last year on a bench warrant for violation of probation. I know that "Flaco" is a lieutenant in the Azteca prison gang. While I was in jail the Aztecas provided me with protection from other people that were in jail.

Id. at 12. Renteria claimed Flaco asked him to lure a little girl outside the store:

> "Flaco" . . . motioned with his head and I looked in that direction and I saw some people . . . . He told me the one with the "pelo largo."[3] I did not see the

[3] Long hair.

> girl's face, I just saw her side and she had long black hair. He then told me . . . that was the girl he was referring to. I then asked him what he wanted. He then told me to tell her that Raul or Ruben was waiting for her outside.

Id. at 12–13. Renteria described how he escorted Flores to a waiting van and was told to follow the vehicle in his own van:

> I told her in English "Hey Raul is waiting for you outside." She looked like she knew the name and I then turned around and went outside and she followed me. . . . I exited through the east door and I paused to see if I could see them outside . . . . [A] 1988 or 1989 dark navy blue Grand Marquis with tinted windows and an early to mid-90s red or maroon min-van pulled up. "Flaco" was driving the Marquis and the other guy was with him. I saw that there was [sic] two guys in the min-van, but I did not get a good look at them. The stocky guy opened the front passenger door of the Marquis and came out. He came around to my side and got the little girl by the hand. He also told her "Vamos con Raul." I figured that they knew her or she knew them because she didn't say nothing and she went with them in the van. I saw that the guy walked the girl to the mini-van. This guy got into the mini-van with the girl through the sliding door. . . . Flaco . . . told me to follow them.

Id. at 13. Renteria explained how the men later transferred Flores's naked and lifeless body to his van, and directed him drive to an alley off Mesa Street in El Paso. He added when they arrived, they told him to take Flores's body from his van and place it on the ground. Then they covered her body with gasoline and set her on fire:

> I went into the van and got her. I saw that the girl was laying [sic] face up on the seat and she had a plastic bag over her head. . . . I knew that she was dead. I put my arms underneath her and picked her up from her back and her legs. As best as I could I took her out of the van and I just stood there holding her and waiting for this guy to tell me what to do. He then told me to put her down and pointed down to the ground. . . . He then went over to the Grand Marquis and I saw that he took out a container like a gas can from the trunk. . . . I saw that he was pouring something a liquid over the little girl all over her body. The liquid smelled like gas. . . . That's when he ignited the little girl.

Id. at 14–15. Renteria maintained he helped Flaco and his companions out of fear they would harm his family. He also claimed he limited his involvement to persuading Flores to walk out of the Walmart and helping the others dispose of her body.

Based on Renteria's statement, trial counsel attempted to determine whether Flores's family was involved with a gang. *See, e.g.*, Clerk's R., vol. 2 (part 2 of 3), p. 14 (Second Mot. for Continuance), ECF 73-7 ("The victim's family has close connections with the Azteca gang that the Defendant said in his statement ordered the hit on the child."); Reporter's R., vol. 16 (Hearing on Def's Mot. for Continuance), p. 5, ECF 75-9 ("[W]e received information yesterday from a private source and official notification less than four hours ago that the mother of the victim in this particular case had a ten-year relationship with an Azteca Gang member. The Court I'm sure has read the confession of the defendant in which he says that this was an Azteca Gang hit rather than a sexual assault."); Reporter's R., vol. 64 (Jury Trial – Trial on the Merits), pp. 24-31, ECF 77-19 (questioning Officer Jeffrey Gibson regarding intercepted jail correspondence between Azteca gang members, which included threatening statement directed at Renteria based on "an incident involving the daughter of Mrs. Rubio"). Indeed, trial counsel proffered questions to the victim's mother—outside the presence of the jury—to elicit testimony regarding whether her family had been threatened and to show that her daughter's murder was a gang related:

> Your Honor this was a gang hit. And were [sic] going to show that the family received a death threat prior to this -- this incident that this incident is gang related that -- prison gang related that she has a relative who has been in and out of prison on drug charges that there are a large number of tips that the police received that this was a gang activity involving the uncle. This is our entire defense.

Reporter's R., vol. 53 (Jury Trial – Trial on the Merits), p. 32, ECF 77-8. After hearing the testimony, the trial court concluded the victim's mother had "no personal knowledge of any gang affiliations of anyone." Reporter's R., vol. 53 (Jury Trial – Trial on the Merits), pp. 46–47, ECF 77-8.

A defendant's dissociative amnesia diagnosis—standing alone—does not establish a mental incapacity to stand trial. The Texas Court of Criminal Appeals observed in *Gonzalez*

v. State, 313 S.W.3d 840 (Tex. Crim. App. 2010), "that 'no case yet reported . . . has held that the inability to recall the event charged because of amnesia constitutes mental incapacity to stand trial.'" *Id.* at 842 (quoting *Morris v. State*, 301 S.W.3d 281, 292 (Tex. Crim. App. 2009)). The Court or Criminal Appeals reasoned amnesia does not *per se* render a defendant incompetent to stand trial because:

> (1) amnesia is akin to "missing" evidence, (2) a contrary rule "would unduly hamper the State's interest in the prosecution of violators of its criminal laws and jeopardize the safety and security of other citizens," and (3) amnesia can be easily feigned.

Id. (quoting *Morris*, 301 S.W.3d at 292-93). *See also United States v. Doke*, 171 F.3d 240, 248 (5th Cir. 1999) ("This court has previously held that amnesia by itself does not render a defendant incompetent; rather, the 'circumstances of each individual case' must be considered.") (citing *Swanson*, 572 F.2d at 526).; *United States v. Mota*, 598 F.2d 995, 998 (5th Cir. 1979) ("In this circuit amnesia does not constitute incompetency *per se* to stand trial."); *Davis v. Wyrick*, 766 F.2d 1197, 1202 (8th Cir. 1985) ("Amnesia alone is not a bar to the prosecution of an otherwise competent defendant."); *United States v. Borum*, 464 F.2d 896, 900 (10th Cir. 1972) ("[W]e must reject the argument that the amnesia is a *per se* deprivation of due process. Prejudice must be shown to exist—that there are, for example, facts available which could not be obtained from the file of the prosecution or from investigation by the defense. There is no suggestion as to the existence of a tenable defense which has been locked in by the amnesia."); *United States v. Stevens*, 461 F.2d 317, 320 (7th Cir. 1972) ("[W]e do not believe that due process requires an amnesiac defendant who claims loss of memory go free without trial."). Rather, the competency determination in a trial of a purportedly amnesiac defendant "is a question to be determined according to the circumstances of each individual case." *Swanson*, 572 F.2d at 526 (recognizing the potential for "amnesia to become an unjustified haven for a defendant").

Renteria's counsel were in the best position to determine their client's competence to stand trial. *Medina v. California*, 505 U.S. 437, 450 (1992) ("[T]he defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense."). The totality of the facts and circumstances surrounding this case show Renteria consulted with his lawyers with a reasonable degree of rational understanding and exhibited a factual understanding of the proceedings against him. Based on Renteria's multiple mental health examinations, detailed post-arrest statement, and the applicable law, his counsel made a well-reasoned, reasonable, strategic decision not to pursue a competency determination from the trial court.

Against this background, Renteria's claim—that his dissociative amnesia rendered him incompetent—simply fails. *Johnson v. Estelle*, 704 F.2d 232, 238 (5th Cir. 1983) ("Even assuming that Johnson was in fact suffering from a mental illness or disability at the time of trial, on the present facts we are unable to conclude that this mental deficiency precluded petitioner's meaningful participation in his defense."). The facts were not "sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner" at the time of trial. *Bruce*, 536 F.2d at 1058–59. Any attempt by counsel to convince the trial court that Renteria was incompetent under Texas law to stand trial based on his dissociative amnesia would have been unavailing.

Renteria has not shown that his trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. He has not overcome the presumption that his trial counsel made reasonable strategic decisions concerning his case. *See Richter*, 562 U.S. at 109 ("Although courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts

the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions."). He has not overcome the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As a result, Renteria's ineffective assistance of counsel at trial claim is not substantial. *Garza*, 738 F.3d at 676. Therefore, Renteria also fails to show good cause for his state habeas counsel's failure to exhaust his claim.

Consequently, Renteria has not demonstrated cause for his procedural default, actual prejudice arising from the default, or the failure to consider his claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50; *Barrientes*, 221 F.3d at 758. His procedurally defaulted claim is barred.

B. Claim II - Renteria's trial counsel ineffectively failed to present mitigating evidence [of his impaired mental health] to the second penalty juror in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Pet'r's Pet. 16–20, ECF No. 53; Br. in Supp. 17–21, ECF No. 58.

1. Background

As discussed at length above, Renteria's counsel performed an extensive mental-health investigation. They obtained appointment of, and funding for, Dr. Schutte to evaluate Renteria. Dr. Schutte's report indicated Renteria was of average intelligence, only exhibited deficits in divided attention, and was mildly-to-moderately impaired on "the single most sensitive measure of brain impairment." Schutte Report 1, ECF No. 95-3. Renteria's responses on four personality scales indicated he responded deceptively. *Id.* at 1–2 ("[R]enteria appears to be deceiving both himself and those around him.").

Trial counsel then obtained Dr. Doyle's assistance. Dr. Doyle diagnosed Renteria with dissociative amnesia based on his self-reported inability to recall some of his actions on the night of the Flores's murder, and concluded that he was incompetent to stand trial due to his inability to adequately consult with his counsel. Doyle Report at 1–2, ECF 95-4.

Renteria's counsel also had Dr. Steven Glusman's report recounting Renteria's history of closed head injuries, loss of consciousness, and childhood trauma. Dr. Glusman Report, ECF No. 95-5. And they had Renteria evaluated by psychiatrist Dr. Salo.

But Renteria's counsel did not present this evidence concerning his mental health to the jury.

Renteria claimed his counsel failed to present "readily available" mitigating evidence in allegation 9 of his second state writ application:

> Applicants death sentence violates the Sixth Amendment to the United States Constitution because Applicant was deprived the effective assistance of counsel at the punishment phase of his trial in that his trial counsel failed to investigate and present any substantial readily available evidence in mitigation of the death penalty.

State Habeas R, WR 65,627-02 (Am. Pet., Nov. 19, 2010), p. 80, ECF No. 83-21.

In response to this claim, the State offered the following proposed findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

93. During the punishment retrial defense counsel presented two full days of testimony from witnesses describing Renteria's character specifically that he was respectful and non-aggressive as a child and teenager. Defense counsel also presented testimony from Renteria's mother and sister describing his upbringing and family life including the fact that he was an altar boy and an honor student. Renteria's sister described for the jury some physical abuse of Renteria's mother by his father during Renteria's childhood years. And both Renteria's sister and mother testified that Renteria's personality changed after he was first placed on probation for indecency with a child in 1994 and he started making bad decisions.

94. Defense counsel also presented evidence that Renteria had no disciplinary problems while incarcerated. And counsel also presented the testimony of Dr. Cunningham who likewise described the extent of Renteria's pro-social activities, and who concluded that he Dr. Cunningham had "never observed a childhood behavior pattern that is this positive in its involvement in church and school and community activities. I've never observed th-at [sic] degree of extra curricular pro-social adjustment in a capital offender.

95. In his writ application Renteria does not allege what additional mitigating evidence was available or what additional mitigating evidence could and should have been presented to the jury at the punishment retrial.

. . . .

CONCLUSIONS OF LAW

. . . .

45. Because Renteria's trial counsel presented extensive mitigation evidence which in essence presented to the jury a complete picture of Renteria's entire life, Renteria's claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence is not firmly founded in the record. See *Ex parte Woods*, 176 S.W.3d 224 226 (Tex. Crim. App. 2005); *Boggess v. State*, 855 S.W.2d 645, 647 (Tex. Crim. App. 1991), *cert. denied* 509 U.S. 921, 113 S. Ct. 3034 125 L.Ed.2d 721 (1993). Renteria has thus failed in his

> burden of demonstrating ineffective assistance of counsel in this regard. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).
>
> 46. Because Renteria has failed to even allege what additional mitigating evidence could and should have been presented he has failed to plead any facts that would show his entitlement to relief. *See Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).
>
> 47. It was a reasonable trial strategy for defense counsel to focus primarily on the positive aspects of Renteria's childhood and upbringing to support the defensive theory that Renteria was not a future danger as opposed to emphasizing any alleged negative aspects of Renteria's childhood and upbringing in support of the mitigation issue such that Renteria has not shown and cannot show that defense counsel was ineffective for failing to further investigate and present evidence of alleged mitigation. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052-2066, 80 L.Ed.2d 674 (1984); *Ex parte Martinez*, 195 S.W.3d 713 728 Tex. Crim. App. (2006); *Ex parte Woods*, 176 S.W.3d at 228; *Butler v. State*, No. 01-94-00756-CR, 1995 WL 416892, at 3 (Tex. App.-Houston [1st Dist.], July 13,1995 pet. ref'd) (not designated for publication).
>
> 48. Renteria has failed to show and cannot show a reasonable probability that the presentation of any additional mitigation evidence, whatever that might be, would have resulted in a different answer by the jury to the mitigation special issue. *See Ex parte Gonzalez*, 204 S.W.3d 391, 393-94 (Tex. Crim. App. 2006); *Ex parte Martinez*, 195 S.W.3d at 731; *Ex parte Woods*, 176 S.W.3d at 228.
>
> 49. Based on Conclusions of Law 45-48, above Renteria has failed in his burden of showing and cannot show that his trial counsel was ineffective for failing to investigate and present mitigating evidence at the punishment retrial.

State Habeas R, WR 65,627-02 (State' Proposed Findings of Fact & Conclusions of Law), pp 157–58, 189–90, ECF No. 83-24 (citations to the record omitted).

The Court of Criminal Appeals adopted the trial court's findings and conclusions regarding allegation 9 and denied Renteria's state application for writs of habeas corpus:

> The convicting court entered findings of fact and conclusions of law and recommended that relief be denied as to all of the claims. We agree with the convicting courts recommendations and adopt its findings and conclusions as to allegations 1 through 9 . . . Accordingly we deny relief on allegations 1 through 9 . . .

Ex parte Renteria, WR-65,627-02 (filed August 1, 2012), p. 5, ECF No. 83-14.

Renteria claims in his federal petition that his trial counsel failed to present mitigating facts related to his impaired mental health at his second penalty trial. Pet'r's Pet. 16, ECF No. 53. Renteria argues "[t]hese failures constituted ineffective assistance of counsel that undermines confidence in the resulting death penalty verdict." *Id.* Renteria explains "[t]he only witness who . . . touched upon issues related to his mental health was Dr. Mark Cunningham." *Id.* And Dr. Cunningham "primarily addressed his view that Mr. Renteria would not pose a future danger while in the custody of the Texas Department of Corrections." *Id.* (citing Reporter's R., vol. 69 (Testimony of Dr. Mark Cunningham), pp. 42–44 (regarding Dr. Cunningham's expertise in assessing future dangerousness), ECF No. 82-1). "[W]hen asked what mental health related materials he reviewed, [Dr. Cunningham] indicated that he reviewed only the information from Norma Reed (a sexual offender therapist) and Mr. Renteria's Texas Correctional files." *Id.* at 17 (citing Reporter's R., vol. 69, p. 49). Notably, Dr. Cunningham did not claim he reviewed copies of Dr. Doyle's report diagnosing Renteria with dissociative amnesia; Dr. Steven Glusman's report recounting Renteria's history of closed head injuries, loss of consciousness, and childhood trauma; or Dr. Schutte's report finding Renteria had a moderate impairment; "and multiple references in the mental health materials showing that Petitioner had unspecified trauma during his young life." *Id.* at 17–20. Lastly, Renteria asserts that trial counsel were ineffective for failing to present evidence that Renteria might have been sexually abused as a child, possibly at the hands of the local clergy. *Id.* at 15.

Renteria acknowledges these claims remain unexhausted. *Id.* at 20. He argues "[t]he failure to present these claims was the result of the ineffectiveness of direct appeal counsel, as well as initial post-conviction counsel. Accordingly, any arguable procedural default of this claim can be overcome." *Id.*

2. Applicable Law

"The fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "Justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937).

Under Texas's capital sentencing statute, the jury must answer two "special issues" before a sentence of death may be assessed. Tex. Code. Crim. Proc. art. 37.071 § 2(b) (Vernon 2001). Under the first special issue—the future dangerousness issue—the jury must decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* Only after the State proves the defendant constitutes a continuing threat "beyond a reasonable doubt" will the jury consider the second special issue—the mitigation issue—the effect of *mitigating evidence* on the sentence. *Id.* §§ 2(c), (e)(1) (emphasis added).

"[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949). Consequently, "counsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Likewise, counsel must evaluate the information available to them before trial and determine what "conceivable line[s] of mitigating evidence" may exist to meet their professional obligation to their client. *Wiggins*, 539 U.S. at 533. Counsel must decide whether following any of those lines would likely lead to evidence which "would . . . assist the defendant at sentencing." *Id.*

"[A] tactical choice not to pursue one course or another 'should not be confused with the duty to investigate.'" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) (quoting *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir.1981)). In some circumstances, limited investigations into mitigating evidence may be reasonable. *See, e.g., Strickland*, 466 U.S. at 699 ("[T]he decision not to seek more character or psychological evidence than was already in hand was likewise reasonable."); *Burger v. Kemp*, 483 U.S. 776, 794-75 (1987) ("[C]ounsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. . . . Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past."); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) ("[T]he State could have responded with a psychiatric report. . . . For that reason, after consultation with petitioner, defense counsel rejected use of the psychiatric testimony."). But "counsel's failure to uncover and present voluminous mitigating evidence at sentencing" may not be justified as a tactical decision if counsel has not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Wiggins*, 539 U.S. at 522.

A reviewing court must decide whether the attorney's decision either to forego investigation, or to stop investigating at some later point, was reasonable "'under prevailing professional norms.'" *Wiggins*, 539 U.S. at 522–23 (quoting *Strickland*, 466 U.S. at 688). In evaluating whether counsel's decisions were reasonable under the norms of the profession, the reviewing court must defer to trial counsel's decisions required by *Strickland*, taking into consideration "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Counsel's performance must be viewed objectively and "'from counsel's perspective at the time.'" *Id.* at 533 (quoting *Strickland*, 466 U.S. at 689). Stated simply, the court must decide whether a reasonable attorney would consider the information available to defense counsel worthy of further investigation, and if so, how much additional investigation a reasonable attorney would perform.

After completing the investigation, counsel must then make a strategic decision as to whether there is a "reasonable basis" to believe the evidence will minimize "the risk of the death penalty." *Burger v. Kemp*, 483 U.S. 776, 795 (1987). This decision must be "supported by reasonable professional judgment" and based on the "investigation into petitioner's background in search of mitigating circumstances." *Id.* "'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Wiggins*, 539 U.S. at 521–22 (quoting *Strickland*, 466 U.S. at 690).

3. Discussion

Importantly, Renteria's claim does not allege his trial counsel failed to adequately investigate, but rather he focuses on his trial counsels' decisions about which evidence to present to the jury. Renteria argues that "[t]rial counsel failed to present a number of extant mitigating facts to the second penalty jury. These facts related primarily to Mr. Renteria's

impaired mental health." Pet'r's Pet. 11, ECF No. 53. He alleges Dr. Cunningham could have—and should have—presented such testimony. *Id.* at 11–12. Specifically, Renteria claims his trial counsel failed to elicit through Dr. Cunningham information from Dr. Doyle's competency report, neuropsychologist Dr. Steven Glusman's report, and Dr. Schutte's report, as well as an unsubstantiated allegation that Renteria suffered sexual abuse as a child. *Id.* at 12–15.

Dr. Doyle evaluated Renteria prior to trial and concluded that he was incompetent to stand trial due to his self-reported dissociative amnesia. Doyle Report 1–2, ECF No. 95-4. But Dr. Doyle also noted Renteria recalled some of the events which led to Flores's murder, which suggested Renteria's culpability:

> As part of the competence evaluation the defendant was asked to describe what he remembered about the events leading to his current charges. He was able to describe some, but not all, of the events during the period of time in question. *His descriptions of some of his actions are incredible and appear confabulated; that is, made up to cover an inability to remember.*

Id. at 2 (emphasis added).

Renteria next argues that trial counsel should have presented the evidence obtained through Dr. Glusman's neurologic evaluation. Pet'r's Pet. 13–14. He explains the evaluation revealed his "history of closed head injury, loss of consciousness, and childhood trauma." *Id.* at 13.

But Dr. Glusman's evaluation was unremarkable. It concluded Renteria had an "essentially . . . normal bedside neurologic examination." Glusman Report at 5. Dr. Glusman Evaluation, ECF No. 95-5. It noted Renteria had "an old history of closed head trauma." *Id.* at 1. It also noted Renteria claimed, "he drank beer *occasionally*." *Id.* at 3 (emphasis added).

This last comment would have brought Renteria's credibility in to question, because Renteria drank so heavily that he "committed three driving while intoxicated (DWI) offenses in 1995, 1997, and 2000." *Renteria II*, 2011 WL 1734067, at *2. And Renteria's mother, Eva Renteria, and sister, Cecelia Esparza, described at trial how Renteria's personality changed following his 1994 conviction for indecency with a child and how he started drinking to intoxication. They claimed that prior to the indecency with a child offense, Renteria was always happy and frequently socialized with his friends. Reporter's R., vol. 67 (Testimony of Eva Renteria), p. 31 ("He was always happy. He was a happy young man. He was studious. He would come home and greet us all. He would come home in a good mood and be very nice."); (Testimony of Cecelia Esparza) p. 119 ("Oh my brother was a real light spirited very well liked. He -- you know he still -- he liked going out. Like I said he was a Dallas dancer. He liked being with his friends."), ECF 81-19. They added after the conviction, Renteria became "morose" and started drinking alcohol excessively. *Id.* (Testimony of Eva Renteria) pp. 32–34 ("He started drinking. . . . He was sad he would cry. . . . It affected all of us a great deal."); (Testimony of Cecelia Esparza) p. 122 ("[B]efore that I didn't see him intoxicated. Maybe I saw him having a good time but then it got to a point where I would actually see him that I could tell that he was drunk.").

Renteria's probation officer, Rebecca Gonzales, testified Renteria was detained at the border under the influence of alcohol, picked up two arrests for DWI while on probation, and concluded he had a drinking problem. Reporter's R., vol. 63 (Testimony of Rebecca Gonzales), pp. 14, 25, 33, ECF No. 81-15. Another probation officer, Martha Cortez, gave evidence Renteria received 90 days' in prison on shock probation after his arrest for a third DWI. *Id.* (Testimony of Martha Cortez), p. 53, 80. Dr. Cunningham identified Renteria as

"alcohol abusing and then alcohol dependent." Reporter's R., vol. 70 (Testimony of Dr. Cunningham), p. 72, ECF No. 78-5. He described Renteria's downward spiral:

> We started out with this approval oriented sensitive kid and this is the downward spiral as I would view it. You know as he is in his late teens he has these aspirations of going to college and having a criminal justice career. And episodic alcohol abuse begins.
>
> And then at age 23 he is charged with his sexual indecency with a minor potentially alcohol related in the aftermath of drinking. That results in a profound loss of career aspirations. You're not going into criminal justice after that conviction nor many other occupations. And that results in some instability of employment some jobs he got and lost because of that. There's escalating alcohol and drug alcohol abuse and dependence.
>
> At age 25 he gets a DWI. That contributes to even greater employment instability exclusion from employment. Age 26 he gets another DWI. His probation is revoked and that's when he does the 90 days of shock probation in TDCJ. He goes into prison for three months. Age 31 there is another DWI and then this tragic offense.

Id. at pp. 75–76.

The results of neuropsychological testing administered by Dr. Schutte were also within the normal range. Schutte Report, ECF No. 95-3. But Renteria's personality testing indicated that he did not respond honestly and was attempting to deceive himself and others. *Id.* at 2.

> On the Personality Assessment Inventory (PAL), the validity scales indicate David did not respond to the test questions in an open and honest manner. He tried to present an overly favorable self-image, and denied even minor problems and flaws most people are willing to acknowledge. There was no indication of psychopathology in his profile, but this finding must be viewed with caution due to his test-taking defensiveness.
>
> On the Paulhus Deception Scales, David's responses indicate a strong tendency towards deceptive self-presentation, characterized both by a tendency to claim unrealistic virtue and a denial of even common problems and flaws most people are willing to acknowledge. David's responses suggest he both wants to impress others and lacks insight into his own behavior. As such, he appears to be deceiving both himself and those around him.

Id.

Consequently, the facts related to Renteria's impaired mental health in Dr. Doyle's competency report, Dr. Glusman's neurologic evaluation, and Dr. Schutte's neuropsychological testing present "double-edged mitigating evidence." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002). "*Strickland* requires . . . [courts to] defer to counsel's decision . . . not to present a certain line of mitigating evidence when that decision is both fully informed and strategic, in the sense that it is expected, on the basis of sound legal reasoning, to yield some benefit or avoid some harm to the defense." *Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir.1999). In other words, "a tactical decision not to pursue and present potentially mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance." *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir.1997)

Lastly, Renteria asserts that his trial counsel were ineffective for failing to present evidence that he "was sexually abused as a child, possibly at the hands of the local clergy." Pet'r's Pet. 15. He maintains "trial counsel's file is replete with evidence that [Renteria] was the victim of childhood sexual abuse." *Id.* (emphasis added). This evidence consists of lawsuits against the local clergy, "the fact that the victim's body was found outside a doctor's office that used to be the Church rectory," and references in Renteria's mental health records showing he had "unspecified trauma during his young life." *Id.*

Renteria does not identify a single witness willing and able to testify that he was the victim of childhood sexual abuse. For a movant "to demonstrate the requisite *Strickland* prejudice, [he] must show not only that this testimony would have been favorable, but also that the witness would have testified at trial." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). Consequently, Renteria's claim cannot form the basis of habeas relief. *Day v. Quarterman*, 566 F.3d 527, 538–39 (5th Cir. 2009).

Dr. Cunningham indicated during the State's voir dire examination that he investigated Renteria's "disturbed sexuality." Reporter's R. vol. 69 (Testimony of Dr. Cunningham), p. 53, ECF 82-1. Dr. Cunningham claimed he discovered that "Father Pete" from Mount Carmel School was seen having sex with a young boy and was transferred the following day. *Id.* at pp. 53–54. Dr. Cunningham said he learned of these incidents through affidavits that had been filed in a lawsuit—not involving Renteria—and during his interview of Renteria's high school principal, Oscar Santaella. *Id.* at 56–57. Dr. Cunningham acknowledged that Renteria did not inform him of the incident. *Id.* at 54. Indeed, Dr. Cunningham did not know whether Renteria knew of this incident or another purported incident of child sexual abuse at Renteria's high school. *Id.* at 54–55.

Renteria's counsel elicited Dr. Cunningham's testimony that Renteria, as a child, witnessed physical abuse against his mother, but did not report physical abuse against him. Reporter's R., vol. 70 (Testimony of Dr. Cunningham), pp. 67–70, ECF No. 82-2. Dr. Cunningham added that observing physical abuse of a mother may cause more harm to a child than physical abuse directed toward him:

> [W]hen you see your momma being demeaned and battered it doesn't wound your skin. It wounds your heart. And the wounds on your heart are so much harder to heal than the cuts on your skin or your butt or your legs. And that's a finding that has been confirmed again in our research data. This is a study by the American Psychological Association.

Id. at 70. The jury was aware, therefore, of trauma Renteria reported he sustained as a child.

Renteria piles inference upon speculation to assert that he was the victim of childhood sexual abuse. But he provides no evidence that he was the victim of childhood sexual abuse. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his . . . petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value."

Ross v. Estelle, 694 F.2d 1008, 1011–12 (5th Cir. 1983) (citing *Woodard v. Beto*, 447 F.2d 103, 104 (5th Cir. 1971)).

For these reasons, Renteria's claim—that his trial counsel provided constitutionally ineffective assistance by failing to adequately present mitigating evidence of his purportedly impaired mental health —is meritless. Counsel made a strategic decision that the available mental health information—if presented to the jury—would *not* minimize Renteria's risk of receiving the death penalty. Assessing all the aggravation and mitigation evidence available to trial counsel, Renteria cannot show there is a reasonable probability that—with the additional evidence of his rather unremarkable mental health records and his lack of truthfulness—the results of the proceeding would have been different. Renteria has not overcome the strong presumption that his counsels' representation was within the wide range of reasonable professional assistance.

Consequently, the Texas Court of Criminal Appeals' rejection on the merits of Renteria's broad ineffective assistance of trial counsel claims regarding mitigating evidence was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. Moreover, the decision was not based upon an unreasonable determination of the facts considering the evidence presented in Renteria's trial, direct appeal, and state habeas corpus proceedings.

For the same reasons, any attempt to establish cause and prejudice for any procedural default on this specific ineffective assistance of trial counsel claim also fails. Therefore, to the extent that Renteria did not present his claim to the state court, the claim is procedurally defaulted.

Hence, the Court concludes that Renteria's second ground for relief does not warrant federal habeas corpus relief.

C. Claim III - Renteria's rights under the Sixth, Eighth and Fourteenth Amendments were violated when the trial court (1) refused to permit him to offer accurate evidence of his lack of parole eligibility; (2) instructed the jury in a misleading and confusing manner; and (3) permitted the State to offer false and misleading closing argument that Renteria could be released from prison. Pet'r's Pet. 21–28, ECF No. 53; Pet'r's Br. in Supp. 21–32, ECF No. 58.

1. Background

Renteria proffered the testimony of William Habern—an attorney-expert on parole eligibility and sentencing—outside the presence of the jury. Reporter's R., vol. 68 (Testimony of William Habern), pp. 5–32, ECF No. 81-20. Renteria wanted Habern to explain to the jury that he "would never parole." *Id.* at p. 11. Renteria sought Habern's testimony to rebut the State's argument that the jury should make a finding under the first special issue—the future dangerousness issue—there was a probability he would commit criminal acts of violence which would constitute a continuing threat to society. Pet'r's Pet. 21, ECF No. 53.

The State objected to the proposed testimony as neither "relevant nor permitted under Texas law." Reporter's R., vol. 68, p. 4, ECF No. 81-20.

Habern conceded his testimony regarding parole was "speculative." *Id.* at pp. 18–19, 26. He suggested Renteria would, at a minimum, serve "47 and a-half years" in prison before he would be eligible for parole. *Id.* at 31.

After a hearing the arguments of counsel, the trial court explained it would "follow the law as it stands today," sustained the State's objection, and did not permit Habern to testify before the jury. *Id.* at 36.

The trial court instructed the jury on the issue of Renteria's parole eligibility if the jury recommended a life sentence in accordance with the Texas Code of Criminal Procedure

art. 37.071§ 2(e)(2)(B). Reporter's R., vol. 72 (Courts Charge to the Jury), p. 44, ECF No. 82-4.

The prosecutor argued during closing argument there was "no evidence" Renteria would be incarcerated "his whole life" if the trial court imposed a life sentence. Pet'r's Pet. 26, ECF No. 53.

Renteria maintains the prosecution's suggestion he "could be released from prison" was both "false and misleading." *Id.* at 21.

Renteria raised a claim challenging the trial court's exclusion of Habern's testimony on direct appeal.

> In point of error one, Renteria challenges the trial judge's exclusion of "evidence of the minimum amount of time [that he] would spend in prison." Renteria complains that the excluded evidence was "highly relevant" to the future dangerousness special issue. He further asserts that the exclusion of this evidence violated due process, destroyed his mitigation argument, and "pushed the jury towards death."

Renteria II, 2011 WL 1734067, at *42.

The Texas Court of Criminal Appeals rejected the claim, holding the trial court property excluded Habern's testimony because it was "speculative" and "parole [was] not a proper issue for jury consideration except to the extent explicitly provided for in Article 37.071, Section 2(e)(2)(B)" of the Texas Code of Criminal Procedure." *Id.* at *45. The Court of Criminal Appeals explained:

> Before 1999, parole was not a proper matter for the jury's consideration in any form. *Hankins v. State*, 132 S.W.3d 380, 384 (Tex. Crim. App. 2004). Effective September 1, 1999, the Legislature amended Article 37.071 of the Texas Code of Criminal Procedure to provide that a jury could be instructed on a capital defendant's eligibility for parole. The applicable law in the instant case authorized a trial judge, on written request of defense counsel, to instruct a jury on a capital defendant's parole eligibility as follows:
>
> > Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant

> will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted. Tex. Code Crim. Proc. art. 37.071 § 2(e)(2)(B).

> This amended statute was narrowly drawn and did not render every aspect of parole law an issue for jury consideration. *Hankins*, 132 S.W.3d at 385. It expressly discouraged speculation on the parole process. *Id.* The Legislature could have written it more broadly to impart more information but chose not to. *Id.* Thus, parole is not a proper issue for jury consideration except to the extent explicitly provided for in Article 37.071, Section 2(e)(2)(B). *Id.*

> The jury was instructed in accordance with Article 37.071, Section 2(e)(2)(B). Habern's speculative testimony was outside the scope of what was permitted by that statute. Thus, the trial judge did not abuse her discretion in excluding it. *See Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). Further, no harm is shown by the exclusion of Habern's . . . testimony. Tex. R. App. P. 44.2. Defense witness Cunningham testified that he believed Renteria would "die in prison" and would "never be at large in the community." Further, defense counsel argued at closing that it was undisputed that Renteria would spend the rest of his life in prison and would die in prison.

Renteria II, 2011 WL 1734067, at *45–46. Additionally, the Texas Court of Criminal Appeals noted the trial court admitted the indecency and the felony DWI judgments into evidence. "Both judgments showed that the 20-year indecency sentence and the 10-year felony DWI sentence were to run consecutively." *Id.* at *45.

Renteria's claims in his petition that he rights under the Sixth, Eighth and Fourteenth Amendments were violated when the trial court (1) refused to permit him to offer accurate evidence of his lack of parole eligibility; (2) instructed the jury in a misleading and confusing manner; and (3) permitted the State to offer false and misleading closing argument that Renteria could be released from prison. Pet'r's Pet. 21–28, ECF No. 53; Pet'r's Br. in Supp. 21–32, ECF No. 58.

2. Applicable Law

The Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. It "requires a jury . . . to find each fact necessary to impose a sentence of death." *Hurst v. Fla.*, 136 S. Ct. 616, 619 (2016). "The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed." *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994). It requires "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). It also invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Finally, a sentencer's consideration of false information material to the sentencing decision "renders the entire sentencing procedure invalid as a violation of due process." *Townsend v. Burke*, 334 U.S. 736, 740–741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (finding a due process violation when "a sentence [was] founded at least in part upon misinformation of constitutional magnitude." *Roberts v. United States*, 445 U.S. 552, 556 (1980) (reaffirming that due process precludes "sentences imposed on the basis of 'misinformation of constitutional magnitude'").

3. Discussion

a. Parole Eligibility

Renteria complains the trial court refused to permit him to offer accurate evidence of his lack of parole eligibility. He argues "[h]ere, Petitioner's parole eligibility was highly relevant to the Texas future dangerousness question. When the jury was considering whether Petitioner would be a danger in the future, that decision would reasonably be guided by

whether Petitioner would ever be at liberty, and if so, when." Pet'r's Br. in Supp. 23–24, ECF No. 58 (citing *Simmons*, 512 U.S. at 169 (1994); *id.* at 177–78 (O'Connor, J., concurring) ("[c]ommon sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole")).

(1). *Simmons v. South Carolina*

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Supreme Court held "where the defendant's future dangerousness is at issue, *and state law prohibits the defendant's release on parole*, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156 (emphasis added). The *Simmons* Court explained the critical importance of informing the jury about a defendant's possibility of a lifelong prison sentence *without the possibility of parole*:

> Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163–64.

But the *Simmons* Court specifically cautioned that, "[i]n a State in which parole is available," it would "not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Id.* at 168. And the Fifth Circuit noted that the Supreme Court "expressly held that its ruling did *not* apply to Texas because [Texas did] not have a life-without-parole alternative to capital punishment." *Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001) (citing *Simmons*, 512 U.S. at 168 n.8) (emphasis added).

In *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000), a Supreme Court majority clarified that "*Simmons* applies only to instances where, as a legal matter, there is *no*

possibility of parole if the jury decides the appropriate sentence is life in prison. *Id.* at 169 (emphasis added). In *Shafer v. South Carolina*, 532 U.S. 36 (2001), the Supreme Court implicitly acknowledged the continued vitality of the distinction first noted in *Simmons* by holding South Carolina's new capital sentencing scheme contained the same constitutional defect identified in *Simmons* because—at least under some circumstances—the sentencing jury faced a choice between a sentence of death and a sentence of life without the possibility of parole. *Id.* at 51. In *Kelly v. South Carolina*, 534 U.S. 246 (2002), the Supreme Court reiterated its holding in *Shafer*, emphasizing once again that South Carolina capital sentencing juries unanimously finding the presence of an aggravating circumstances were left to select between one of only two possible sentences: death or life imprisonment without the possibility of parole. *Id.* at 252 & n. 2. Finally, in *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), the Supreme Court reaffirmed its holding in *Simmons* that "due process entitled the defendant to rebut the prosecution's argument that he posed a future danger by informing his sentencing jury that he [was] parole ineligible." *Id.* at 1819. The *Lynch* Court also observed the possibility of executive clemency or changes in the law which might permit parole in the future for capital murderers were not proper grounds for declining to instruct the jury that the only alternative to a death sentence in a capital case was life without parole. *Id.* at 1819–20. Hence, "'where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole,' the Due Process Clause 'entitles the defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'" *Id.* at 1818 (quoting *Shafer*, 532 U.S. at 39).

Consequently, before the Texas Legislature amended Article 37.071 in 2005,[4] the Fifth Circuit consistently ruled that Texas had no constitutional obligation to inform a jury of a defendant's parole eligibility. *See Cantu v. Quarterman*, 341 F. App'x 55, 59 (5th Cir. 2009) ("[T]his circuit has repeatedly refused to apply *Simmons* so as to require that Texas juries be informed of a defendant's future parole eligibility"); *Thacker v. Dretke*, 396 F.3d 607, 617 (5th Cir. 2005) ("Since *Simmons* was decided, we have repeatedly held that neither the Due Process clause nor the Eighth Amendment requires Texas to allow presentation of parole eligibility issues, because Texas does not offer, as an alternative to capital punishment, life imprisonment without possibility of parole."); *Elizade v. Dretke*, 362 F.3d 323, 332–33 (5th Cir. 2004) ("We have repeatedly held that *Simmons* does not require a Texas trial court to instruct a jury as to the meaning of life in prison, because the defendant would not, if sentenced to life imprisonment, be ineligible for parole."); *Woods v. Cockrell*, 307 F.3d 353, 361 (5th Cir. 2002) (" We interpret *Simmons* to require that a jury be informed about the defendant's parole eligibility only when (1) the state argues that a defendant represents a future danger to society, and (2) the defendant is legally ineligible for parole."); *Johnson v. Cockrell*, 306 F.3d 249, 257 (5th Cir. 2002) ("[T]he *Simmons* Court specifically acknowledged that its holding did not apply to Texas, where life without any possibility of parole is not a sentencing option."); *Collier v. Cockrell*, 300 F.3d 577, 583 (5th Cir. 2002) ("[O]ur circuit has consistently emphasized that *Simmons* applies only when there is a life-without-possibility-of-parole alternative to capital punishment, an alternative not available under Texas law."); *Rudd v. Johnson*, 256 F.3d 317, 321 (5th Cir. 2001) ("Here, the jury did not confront a false choice that needed to be denied or explained. Under Texas law, Rudd

[4] *See Curry v. State*, AP-77,033, 2017 WL 781740, at *16 (Tex. Crim. App. Mar. 1, 2017) ("the Texas Legislature amended Article 37.071 in 2005, creating life without parole as the only alternative to the death penalty for defendants convicted of capital murder").

would have been eligible for parole after serving fifteen years in prison. Contrary to *Simmons*, the jury would not have been mistaken if it believed that it could only sentence Rudd to death or to a limited period of incarceration. And a jury instruction on Rudd's parole eligibility would not have denied or explained the State's argument that Rudd was a future danger to free society."); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001) ("We have repeatedly recognized that the *Simmons* rule applies only where there is a life-without-possibility-of-parole alternative to the death penalty, an alternative that does not exist in Texas."); *Miller v. Johnson*, 200 F.3d 274, 290–91 (5th Cir. 2000) ("[B]ecause Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* 'unavailing.'"); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999) ("We have repeatedly rejected identical claims based on *Simmons*."); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995) ("Montoya's *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole.").

In *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), the Fifth Circuit read "*Simmons* to mean that due process requires the state to inform a sentencing jury about a defendant's parole ineligibility when, *and only when*, (1) the state argues that a defendant represents a future danger to society, and (2) the defendant is legally ineligible for parole. Because Texas did not statutorily provide for parole ineligibility at the time of Allridge's conviction, we find Allridge's reliance on Simmons to be unavailing." *Id.* at 222 (emphasis in original). The Fifth Circuit reasoned "if a defendant's [parole] ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently 'untruthful') and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not,

do twenty or thirty years hence." *Id.* (emphasis in original). It explained for that reason, the Supreme Court "reaffirmed that states can properly choose to prevent a jury from engaging in such speculation." *Id.*

As the Court noted above, Renteria argues his "parole eligibility was highly relevant to the Texas future dangerousness question." Pet'r's Br. in Supp. 23–24, ECF No. 58 (citing *Simmons*, 512 U.S. at 169). But clearly established federal law, as determined by the Supreme Court, rejects Renteria's argument that *Simmons* and its progeny require that he should be permitted to raise parole eligibility with the jury.

(2). Inaccurate Information

Renteria avers in his reply that his claim is not based on *Simmons*. Pet'r's Reply Brief 26, ECF No. 94. He contends that his due process rights were violated because the sentencing jury relied on inaccurate information:

> This claim at its core is about providing a sentencing jury with accurate information. Because of then-existing Texas law, Petitioner's sentencing jury was instructed that if Petitioner were sentenced to life imprisonment, he would become parole eligible in forty-years. Vol. 72, 44. **This was false.** Through the proffer of an expert witness in Texas sentencing and parole practices, Petitioner let the Court know that telling the jury that Petitioner would be parole eligible in forty-years was false. In reality, and as a matter of state law, Petitioner would have not been parole eligible for 47.5 years. Thus viewed, this portion of the claim is not grounded in *Simmons v. South Carolina* – a straw man that the State has erected. This claim is predicated on cases predating *Simmons* requiring that a sentencer not be provided with inaccurate information.

Id. So, Renteria now argues he has a constitutional due process right to be sentenced based on accurate information. He is correct.

The Supreme Court has held convicted defendants have a right to a sentence based on accurate information. *Tucker*, 404 U.S. at 447; *Townsend*, 334 U.S. at 741. The foundation of that right is the due process protection against arbitrary government decisions. Indeed, a convicted offender has a right to a fair sentencing process where the court goes through a

rational procedure of selecting a sentence based on relevant considerations and accurate information. As the Supreme Court explained in *Townsend*:

> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Townsend, 334 U.S. at 741. In *Tucker*, the Supreme Court reinforced this right to accuracy. There the defendant was sentenced in part because of a prior conviction which was unconstitutional because he was not represented by counsel. The Supreme Court affirmed the court of appeals decision vacating the sentence:

> For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in *Townsend v. Burke*, 334 U.S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue."

Townsend, 334 U.S. at 741.

Under *Townsend* and *Tucker*, a sentence must be set aside where the defendant can show that extensively and materially false information was part of the basis for the sentence. The two elements of that showing are (1) the information before the sentencer was inaccurate, and (2) the sentencer relied on the misinformation in passing sentence. But the inaccurate information must be "critical" to the sentencing decision. *Simonson v. Hepp*, 549 F.3d 1101, 1107 (7th Cir. 2008). And the sentencer "demonstrates actual reliance on misinformation when [it] gives 'explicit attention'" to it, "'found[s]' its sentence 'at least in part' on it, or gives 'specific consideration' to the information before imposing sentence." *Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003) (quoting *Tucker*, 404 U.S. at 447).

In Renteria's case, the information before the sentencer was accurate. The trial court correctly explained to the jury that under Texas Code of Criminal Procedure Article 37.071 §

2(e)(2)(B), a defendant—convicted of capital murder and sentenced to life in prison—would be eligible for parole after serving 40 years in prison:

> if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted. Tex. Code Crim. Proc. art. 37.071 § 2(e)(2)(B).

Renteria II, 2011 WL 1734067, at *45.

Expert witness "Habern's speculative testimony [about parole eligibility] was outside the scope of what was permitted by that statute." *Id.* at *46. And even Habern conceded his testimony regarding parole was "speculative." Reporter's R., vol. 68, pp. 18–19, 26, ECF No. 81-20. *See Allridge*, 41 F.3d at 222 ("[I]f a defendant's [parole] ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently 'untruthful') and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.").

Besides, the indecency and felony DWI judgments were admitted into evidence. *Renteria II*, 2011 WL 1734067, at *45. Both judgments showed Renteria's twenty-year indecency sentence and ten-year felony DWI sentence would run consecutively. *Id.*

Finally, Renteria's expert "witness Cunningham testified that he believed Renteria would 'die in prison' and would 'never be at large in the community.'" *Id.* at *46.

In sum, the jury had before it evidence that Renteria would serve at least 40 calendar years on a life sentence for capital murder of Flores, Renteria faced additional sentences of

twenty years for indecency with a child and ten years for felony DWI, and Renteria's expert witness opined the State would never release him from prison.

Renteria has not met his burden of showing his due process rights were violated because he was, in fact, sentenced based on accurate information. He is not entitled to habeas relief on his due process claim.

(3). Mitigating Evidence

Renteria also argues the "ruling also prevented [him] from presenting mitigating evidence, in violation of the Eighth Amendment, and . . . a defense, such right secured by the Sixth and Fourteenth Amendments." Pet'r's Pet. 21–22, ECF No. 53.

Texas defines "mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." Tex. Crim. Proc. Code art. § 37.071 §2(f)(4) (Vernon 2001). The statute adds, if even one juror decides that, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," the court must impose a life sentence. *Id.* §§ 2(e)(1), (f)(2), (g). Notably, the definition does not include evidence regarding parole eligibility.

Renteria "has not cited and this Court has not found any Supreme Court opinion mandating a definition of mitigating evidence broader than the one provided by the Texas statute." *Runnels v. Stephens*, 2:12-CV-0074-J-BB, 2016 WL 1274132, at *26 (N.D. Tex. Mar. 15, 2016), *report and recommendation adopted*, 2:12-CV-0074-J, 2016 WL 1275654 (N.D. Tex. Mar. 31, 2016), *certificate of appealability denied sub nom. Runnels v. Davis*, 664 F. App'x 371 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 2653 (2018); *accord Bartee v.*

Quarterman, 574 F.Supp.2d 624, 710 (W.D. Tex. 2008). Indeed, the Supreme Court recently cited with approval a portion of the definition in the Texas statute. *See, e.g., Trevino v. Davis*, 138 S. Ct. 1793, 1795 (2018) ("If even one juror decides that, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," the court must impose a life sentence.") (quoting Tex. Code Crim. Proc. Ann., Art. 37.071 §§ 2(e)(1), (f)(2), (g)).

The Supreme Court has held—in the context of the Eighth Amendment—capital sentencing juries must be permitted to consider and give effect to "constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993), ("a reviewing court must determine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence") (quotation marks and citation omitted); *Boyde v. California*, 494 U.S. 370, 380 (1990) ("We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."). Nevertheless, "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Johnson*, 509 U.S. at 362 (quoting *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion))). In other words, "[t]he State must not cut off full and fair consideration of mitigating evidence;

but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." *Saffle v. Parks*, 494 U.S. 484, 493 (1990).

The Supreme Court has consistently employed the phrase "constitutionally relevant mitigating evidence" to describe evidence which tends to diminish a convicted capital murderer's moral blameworthiness or lessen the reprehensible nature of the offense—evidence which relates to the defendant's background or character or to the circumstances of the offense. *See, e.g., Trevino*, 138 S. Ct. at 1795 (noting that mitigating evidence included testimony that Trevino's father was largely absent, his mother had problems with alcohol, he was a loner and dropped out of school, and he was good with children"); *Tennard v. Dretke*, 542 U.S. 274, 288 (2004) ("Reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence."); *Penry v. Johnson* (*Penry II*), 532 U.S. 782, 796–97 (2001) (holding that jury instructions in a Texas capital sentencing proceeding did not adequately afford the jury a means of giving effect to mitigating evidence of the defendant's "mental retardation and childhood abuse"); *Buchanan v. Angelone*, 522 U.S. 269, 278–79 (1998) (holding that jury instructions in a Virginia capital sentencing proceeding adequately permitted consideration of mitigating evidence of the defendant's difficult family background and mental and emotional problems); *Johnson*, 509 U.S. at 368 (holding the Texas capital sentencing special issues given at the defendant's trial permitted adequate jury consideration of the defendant's youth at the time of his offense); *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 309 (1989) (holding an earlier Texas capital sentencing scheme did not permit the sentencing jury to give effect to the defendant's history of childhood abuse and mental retardation); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating* factor, any aspect of a defendant's character or record and any of

the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis in original); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

But the Supreme Court has never declared that "constitutionally relevant mitigating evidence" included information regarding state parole eligibility laws. Rather, the Supreme Court has "noted with approval . . . that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole. The decision whether or not to inform the jury of the possibility of early release is generally left to the States." *Simmons*, 512 U.S. at 176 (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013 n.30, 1014 (1983)).

Indeed, the Supreme Court has never declared that state statutes and administrative regulations addressing parole eligibility for defendants convicted of capital murder and sentenced to life imprisonment lessen a defendant's moral blameworthiness. There simply is no "clearly established" Supreme Court precedent holding that the Eighth Amendment mandates either the admission of evidence, submission of punishment-phase jury instructions, or voir dire examination of potential jurors regarding parole eligibility for life sentences in jurisdictions that do not furnish capital sentencing juries with the option of life without parole.

And, as the Court has noted above, if parole ineligibility is a question of fact, then evidence concerning that fact is purely speculative—and perhaps inherently untruthful.

Allridge, 41 F.3d at 222. Therefore, a finder of fact may not consider parole ineligibility on the first special issue—the future dangerousness issue. For that reason, "states can properly choose to prevent a jury from engaging in such speculation." *Id.*

(4). Conclusions

Having carefully reviewed Supreme Court case law, the Court finds the Texas Court of Criminal Appeals' rejection of Renteria's claim that the trial court erred when it refused to permit him to offer evidence of his lack of parole eligibility was neither contrary to, nor involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." 18 U.S.C. § 2254(d). The Supreme Court has never held that the Fourteenth Amendment's Equal Protection Clause, the Eighth Amendment, the Sixth Amendment, or the Fourteenth Amendment's Due Process Clause require a jurisdiction such as Texas—which, at the time of Renteria's sentencing, did not offer a capital sentencing jury the option of sentencing a convicted capital murderer to a term of life imprisonment without the possibility of parole—to allow a jury to hear evidence regarding the intricacies of parole law. In fact, the Supreme Court's Fourteenth Amendment jurisprudence—including *Simmons* and its progeny—makes an express distinction between the rule applied in *Simmons* and the due process requirements in jurisdictions such as Texas, where sentencing choices were not limited to either death or life without parole.

Consequently, the Texas Court of Criminal Appeals' rejection on the merits of Renteria's claims regarding the trial court's refusal to permit him to offer evidence of his lack of parole eligibility was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. Moreover, the decision was not based upon an unreasonable determination of the facts in light of the evidence

presented in Renteria's trial, direct appeal, and state habeas corpus proceedings. Renteria is not entitled to relief on this claim.

b. Jury Instruction

Renteria maintains the trial court instructed the jury in a misleading and confusing manner. Renteria explains his counsel attempted to secure an instruction on parole eligibility which provided the jury with information concerning his prior sentences. Specifically, his counsel offered the following alternative instructions:

> You are instructed that the Defendant in this case has been previously sentenced in cause No. ___ to TWENTY years in the Institutional Division of the Texas Department of Criminal Justice; and to TEN years in the Institutional Division of the Texas Department of Criminal. Justice in Cause No. _. You are further instructed that the TEN year sentence will not begin to operate until the TWENTY year sentence ceases to operate. You are instructed that, under the law applicable in this case, if the Defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the Defendant will become eligible for release on parole, but not until the actual time served by the Defendant equals 40 years, without consideration of any good conduct time, except that the Defendant will not begin serving time on the life sentence until the two prior sentences have each ceased to operate, it cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted. You are not to consider the manner in which the parole law may be applied to this particular Defendant.
>
> Or
>
> You are instructed that the Defendant in this case has been previously sentenced in cause No. ___ to TWENTY years in the Institutional Division of the Texas Department of Criminal Justice; and to TEN years in the Institutional Division of the Texas Department of Criminal Justice in Cause No. ___. You are further instructed that the TEN year sentence will not begin to operate until the TWENTY year sentence ceases to operate. You are instructed that, under the law applicable in this case, if the Defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the Defendant will become eligible for release on parole when he has served a fun total of 40 years, day for day, without any credit of any kind, without consideration of any good conduct time, except that the Defendant will not begin serving time on the life sentence

> until the two prior sentences have each ceased to operate. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted. You are not to consider the manner in which the parole law may be applied to this particular Defendant.

Renteria v. State (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *156–*157.

At the time of Renteria's trial, Texas law provided that, upon written request by defense counsel, a capital sentencing jury be charged as follows:

> Under the law applicable to this case, if the defendant is sentenced to life imprisonment, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot be accurately predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on the decisions made by the prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

Tex. Code. Crim. P. art. 37.071 § 2(e)(2)(B) (Vernon 2001).

The trial court accordingly instructed the jury in accordance with the Texas Code of Criminal Procedure. Reporter's R., vol. 72 (Courts Charge to the Jury), p. 44, ECF No. 82-4. But the trial court also admitted the indecency and felony DWI judgments into evidence. *Renteria II*, 2011 WL 1734067, at *45. Both judgments showed the 20-year indecency sentence and the 10-year felony DWI sentence would run consecutively. *Id.* And "[d]efense witness Cunningham testified that he believed Renteria would 'die in prison' and would 'never be at large in the community.'" *Id.* at *46.

Renteria suggests the state trial court violated his due process rights by failing to instruct the jury that—if the jury elected to impose a life sentence—the trial court would stack his other sentences on his life sentence and he would not be eligible for parole for at least 47 ½ years. Yet, "under regimes that allow for parole eligibility, the decision whether to instruct the jury on that fact is reserved to the states, and the [Supreme] Court 'shall not

lightly second-guess' the decision." *Thacker*, 396 F.3d at 617 (quoting *Simmons*, 512 U.S. at 169). *Simmons* provides no support for Renteria's due process challenge. And the Fifth Circuit has "rejected the argument that the denial of a parole eligibility instruction violates the Eighth Amendment." *Collier*, 300 F.3d at 583.

Renteria's claim also lacks merit because his proposed jury instruction was, itself, misleading. It asserted as fact that the trial court would stack his prior two sentences onto a life sentence in this case. Reporter's R., vol. 72 (Objections to Courts Charge), p. 30, ECF No. 82-4; Clerk's R., vol. 8, pp. 148–49 (Requested Instruction to the Jury Regarding Parole Law), ECF No. 79-11. At the time of Renteria's second punishment trial, the trial court had not decided whether it would stack a capital-life sentence onto Renteria's prior two sentences. Habern conceded as much. Reporter's R., vol. 68 (Testimony of William T. Habern), p. 19, ECF 81-20. Renteria provides no authority for the proposition that he had a constitutional right to present the jury with his misleading jury instruction.

The Supreme Court has never held that the Fourteenth Amendment's Equal Protection Clause, the Eighth Amendment, the Sixth Amendment, or the Fourteenth Amendment's Due Process Clause require a jurisdiction—which did not offer the option of sentencing a convicted capital murderer to life imprisonment without parole—to allow a jury to receive instructions regarding the intricacies of the parole law applicable to life sentences.

As a result, the Texas Court of Criminal Appeals' rejection on the merits of Renteria's claims regarding the trial court's instructions to the jury on his eligibility for parole was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. Moreover, the decision was not based upon an unreasonable determination of the facts considering the evidence presented in Renteria's trial,

direct appeal, and state habeas corpus proceedings. Hence, Renteria is not entitled to habeas relief on this claim.

c. Closing Argument

Renteria claims the prosecutor made an improper jury argument which misstated the evidence and misled the jury. At issue is the prosecutor's closing argument that there was "no evidence" Renteria would be incarcerated "his whole life" if the trial court imposed a life sentence. Pet'r's Pet. 26, ECF No. 53. Renteria maintains the prosecution's suggestion that he "could be released from prison" was both "false and misleading." *Id.* at 21.

Renteria's counsel asked Dr. Cunningham, "based on your expertise and your research of prison life and prison sentencing, when is [Renteria] ever going to be at large in the community?" Reporter's R., vol. 71, p. 88, ECF No. 82-3. Dr. Cunningham answered, "I believe that he will die in prison, that he will never be at large in the community." *Id.*

The following exchange then occurred between Dr. Cunningham and Renteria's counsel:

> Q. [Defense Counsel Jaime Gandara] Is David Renteria -- is there a probability that he's going to commit continuing acts of violence that constitute a continuing threat -- that he will commit acts of violence that would constitute a continuing threat to society in the future?
>
> A. That likelihood is very low. It becomes even less likely as the severity of the criminal act increases. He -- as we compare him to other capital offenders his likelihood is well below that of the typical capital offender and well below that of the typical prison inmate. So he is neither disproportionately likely to commit violence in prison nor is he probable in terms of that having a meaningful definition of more likely than not or a substantial or disproportionate.
>
> There is always -- if possibility -- if probability means possibility then the answer is always yes for every capital defendant for everybody in this room the answer would be yes there's always some possibility.

Id. at 88–89.

The trial court instructed the jury in accordance with Texas Code of Criminal Procedure Article 37.071 § 2(e)(2)(B). Reporter's R., vol. 72 (Courts Charge to the Jury), p. 44, ECF No. 82-4; Clerk's R., vol. 8, pp. 174–75, ECF No. 79-11. It explained that if the jury elected to sentence Renteria to life in prison for murdering Flores, he would be eligible for parole after serving forty years in prison. *Id.*

During closing argument, Renteria's counsel asserted that Renteria would spend the rest of his life in prison. Reporter's R., vol. 72 (Argument of Defense Counsel), pp. 80 ("it is not undisputed [sic] that David Renteria will live the rest of his life and will die in prison"), 112 ("There is unrebutted and unchallenged testimony that David is going to be [in prison] for the rest of his life. If he gets a life sentence he's going to die in prison. He's not getting out."), ECF No. 79-11.

The State countered in his closing argument that Renteria remained a continuing threat, in or out of prison:

> And he is a continuing threat. He does not deserve the right to go to general population. We have no idea what kind of circumstances, crisis, that he might find possible, and then we'll see this. We'll see this.
>
> And they want to equivocate that continuing threat, the threat -- it doesn't have to be another homicide. It can be a variety of violent conduct and threat. Whether you want to give him credit for living in that prison society or in the free world. But obviously even Dr. Cunningham -- and I don't agree with much of what he says -- but Dr. Cunningham says that in the free world he is a continuing --

Reporter's R., vol. 72 (Argument of Prosecutor), p. 132, ECF No. 79-11.

Renteria's counsel objected, asserting that the "unrebutted testimony" was that, if Renteria received a life sentence, "he's going to be in prison his whole life." Reporter's R., vol. 72 (Argument of Defense Counsel), p. 132, ECF No. 79-11. After the trial court overruled the objection, the prosecution asserted, "[t]here's no evidence in [the record] that

he'll be in there his whole life. You can read that record all you want. There's no evidence of that." *Id.* Renteria's counsel did not object to the prosecution's claim.

(1). Procedural Bar

Renteria's appellate counsel raised this claim—that the trial judge improperly permitted the State to argue there was no evidence appellant would likely be in prison for the rest of his life—in Renteria's direct appeal. *Renteria II*, 2011 WL 1734067, at *47. The claim was dismissed under the Texas contemporaneous objection rule because Renteria's trial counsel failed to preserve it:

> Defense counsel objected when the prosecutor stated that Cunningham testified Renteria would be a continuing threat in the free world. But that is not what Renteria is complaining about on appeal. Here, he asserts that the trial judge improperly "permitted the State [to] argue that there was no evidence appellant would likely be in prison for the rest of his life." However, defense counsel did not object when the prosecutor argued that "[t]here's no evidence that he'll be in there his whole life." Thus, Renteria has failed to preserve his right to complain about this particular argument on appeal.

Id.

Under the procedural default doctrine, "Federal habeas courts reviewing convictions from state courts will not consider claims that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). "The procedural default doctrine [is] 'grounded in concerns of comity and federalism.'" *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (quoting *Coleman*, 501 U.S. at 730). It "'ensures that federal courts give proper respect to state procedural rules.'" *Muniz v. Johnson*, 132 F.3d 214, 220 (5th Cir. 1998) (quoting *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997).

Indeed, "federal habeas relief will be unavailable when (1) 'a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state

procedural grounds.'" *Walker v. Martin*, 562 U.S. 307 (2011) (quoting *Coleman*, 501 U.S. at 729–730). To qualify as an "adequate" procedural ground, the state rule must be "'firmly established and regularly followed.'" *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)).

It is well-settled that the Texas contemporaneous objection rule—which "ordinarily precludes the raising on appeal of the unpreserved claim of trial error"—constitutes an adequate and independent state ground for dismissal of a claim. *Puckett v. United States*, 556 U.S. 129, 134 (2009); *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005).

Renteria's claim was expressly dismissed on a state procedural rule because his objection was not properly preserved by his trial counsel, and the rule provided an independent and adequate ground for dismissal. Hence, Renteria procedurally defaulted his claim in the state courts. *See Allen v. Stephens*, 805 F.3d 617, 635–36 (5th Cir. 2015) (holding that rejection of claim based on the contemporaneous objection rule is an independent and adequate state-law procedural ground sufficient to bar federal habeas review of federal claims); *Amos v. Scott*, 61 F.3d 333, 45 (5th Cir. 1995) ("We hold, therefore, that the Texas contemporaneous objection rule . . . is an independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims.").

Renteria maintains the ineffective assistance of his trial, appellate, and state habeas counsel excuse his procedural default. "That is because if the waiver holding is valid, trial and appellate counsel were ineffective, and initial post-conviction counsel was also ineffective for failing to raise this claim." Pet'r's Pet. 27, ECF No. 53.

"Section 2254(i) provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief.' 'Cause,' however, is not synonymous with 'a ground for relief.'" *Martinez v. Ryan*, 566 U.S.

1, 17 (2012). "Cause is defined as 'something external to the petitioner, something that cannot fairly be attributed to him' that impedes his efforts to comply with the procedural rule." *Moore v. Roberts*, 83 F.3d 699, 704 (5th Cir. 1996) (quoting *Coleman*, 501 U.S. at 753). A showing of prejudice requires the petitioner to prove "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). "A finding of cause and prejudice does not entitle a petitioner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Martinez*, 566 U.S. at 17.

In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), the Supreme Court "treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal." *Davila*, 137 S. Ct. at 2062–63. But to establish cause to excuse the procedural default, a petitioner must show "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Segundo v. Davis*, 831 F.3d 345, 350 (5th Cir. 2016) (quoting *Garza*, 738 F.3d at 676). "Thus, a Section 2254 application seeking to excuse procedural default must show counsel was deficient at two different proceedings—both the counsel at the time of the state criminal conviction and then the counsel at the time of state habeas." *Soliz v. Davis*, No. 17-70019, 2018 WL 4501154, at *7 (5th Cir. Sept. 18, 2018).

While constitutionally ineffective assistance of counsel may provide cause to excuse a procedural default, it must first—like all other constitutional claims—be "presented to the

state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 489 (1986). "The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Id.* (quoting *Darr v. Burford*, 339 U.S. 200, 2041 (1950)). "In other words, the claim of ineffective assistance of counsel on direct appeal is an independent constitutional violation, which must itself be exhausted using state collateral review procedures." *Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009) (citing *Edwards v. Carpenter*, 529 U.S. 446, 451–53 (2000).

Renteria did not raise his ineffective assistance of counsel claims in state court. His allegations cannot constitute cause for the default of this claim because his claims are unexhausted. *Carrier*, 477 U.S. at 488; *Hatten*, 570 F.3d at 605 (citing *Carpenter*, 529 U.S. at 451–53). Therefore, alleged ineffective assistance of state habeas counsel cannot constitute cause for Renteria's claim regarding the State's closing argument.

Moreover, even if he had raised the claims in state court, he has not shown that something external which cannot fairly be attributed to him impeded his efforts to comply with the procedural rule or that the error infected his entire trial with error of constitutional dimensions.

Consequently, Renteria has failed to show cause and prejudice for the default of this claim and it may be dismissed on this ground alone. Nonetheless, as discussed below, the claim is without merit.

(2). Merits

"In order to be appropriate, jury argument must fall within the categories of (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement." *Darden v. State*, 629 S.W.2d 46, 52 (Tex. Crim. App. 1982). For a reviewing court, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Such unfairness exists 'only if the prosecutor's remarks evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.'" *Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (quoting *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir.1985)); *see also Menzies v. Procunier*, 743 F.2d 281, 288–89 (5th Cir.1984) ("[A] prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most 'egregious cases.' ") (quoting *Houston v. Estelle*, 569 F.2d 372, 382 (5th Cir. 1978)).

To the extent Renteria complains that the State improperly argued that there was no evidence he would spend the rest of his life in prison, such an argument was both a reasonable deduction from the evidence and a proper rebuttal to the defense's closing argument. Indeed, the trial court's jury charge properly instructed the jury that Renteria would be eligible for parole release after serving 40 years in prison. Reporter's R., vol. 72 (Courts Charge to the Jury), p. 44, ECF No. 82-4; Clerk's R., vol. 8, pp. 174–75, ECF No. 79-11. And although Dr. Cunningham testified that—in his opinion based on his research of prison life and sentencing—Renteria would spend the rest of his life in prison, Reporter's R., vol. 71, p. 88, ECF No. 82-3, he did not testify that Renteria could not and would not ever

attain parole eligibility. The State was therefore entitled to rebut Dr. Cunningham's testimony—and the defense's closing argument suggesting Renteria would die in prison—and direct the jury's attention to the trial court's instructions. There was no evidence before the jury that Renteria would never attain eligibility for parole, and the State was entitled to argue as much. Consequently, Renteria fails to show that the State presented an improper closing argument.

Moreover, Renteria fails to demonstrate harm. The complained-of argument by the State was not persistent and pronounced. Further, the argument merely reiterated what the jury charge properly informed the jury—that Renteria would become eligible for parole release. Lastly, Renteria cannot show—in light of the substantial aggravating evidence presented at trial—that but for the remarks no conviction would have occurred.

Renteria's claim is both barred and without merit. He is not entitled to relief.

D. Claim IV - Renteria's federal constitutional guarantees of effective assistance of counsel, trial by an impartial jury, an individualized sentencing determination, and due process of law were violated when the trial court prohibited questioning during voir dire regarding the jurors' ability to consider and give effect to mitigating circumstances and to consider the full range of punishment, and otherwise follow the law. Pet'r's Pet. at 28–90, ECF No. 53; Br. in Supp. 32–46, ECF No. 56.

1. Background

Renteria presents multiple claims regarding the voir dire process. First, he complains the venire members were "repeatedly instructed . . . that there must be a nexus between mitigation and the offense." Pet'r's Pet. 28–29, ECF No. 53. Second, he notes "the trial court prohibited counsel from any discussion regarding mitigation or providing examples of what the Supreme Court has held are significant [mitigating] factors." *Id.* at 29. Third, he protests "[t]he trial court refused to answer jurors' concerns and prohibited counsel from questioning them about whether they could sentence a defendant convicted of capital murder of a child to life with the possibility of parole." *Id.* Fourth, he claims "[c]ounsel was also disallowed to ask jurors if they could consider a sentence of life with the possibility of parole for a defendant convicted of capital murder who had prior felony convictions." *Id.* Finally, he also complains the jury "included members who were substantially impaired in their ability to follow the law." *Id.* at 30.

Renteria specifically claims Juror Donnie Malpass was seated without "questioning her about her ability to consider mitigating evidence and the full range of punishment." *Id.* at 28. Juror John Harton was seated after the "trial court endorsed an unconstitutional definition of mitigation" and was "unable to consider and give effect to mitigation." *Id.* at 43. Norman Thomas was seated after the trial "court endorsed unconstitutional definition of mitigation" and was "unable to consider and give effect to mitigation." *Id.* at 48. Brett Williams was seated while he was "unable to consider and give effect to mitigation." *Id.* at 49. Roxanne

Castricone was seated after the trial "court endorsed unconstitutional definition of mitigation" and "was unable to consider mitigation." *Id.* at 49. Washington Watley was seated after Renteria's challenged him for cause "on the grounds he is biased and cannot be impartial because he has two young daughters, and because he would automatically believe and lend more credibility to law enforcement officers." *Id.* at 86. "[T]he trial court overruled the challenge for cause, and because the defends had exhausted all peremptory challenges, Mr. Watley was seated as a juror." *Id.* Jeanette Sanchez was seated after stating "she would sentence a defendant to death after determining he was a future danger." *Id.* at 87. Renteria challenged Sanchez "for cause on the basis that she was unable to follow the law regarding sentencing." *Id.* at 89. The trial court denied the challenge for cause. *Id.*

Renteria notes he "requested additional peremptory challenges because the court denied proper challenges for cause." *Id.* at 76.

Renteria also claims the trial court placed unconstitutional and improper limitations on his voir dire of the following peremptorily challenged prospective jurors:

> 2. **Mr. Mark Anthony Tapia** – Peremptory Challenge – Preconceived Decision Regarding Punishment, Unable to Consider Mitigation, Shifts the Burden of Proof to the Defendant
>
> 3. **Mr. Joaquin Rivera** – Peremptory Challenge – Unable to Consider Mitigation
>
> 4. **Ms. Elizabeth Black** – Peremptory Challenge – Unable to Consider and Give Effect to Mitigation and Consider the Full Range of Punishment
>
> . . . .
>
> 6. **Annette Brigham** – Peremptory Challenge – Biased against Mr. Renteria – Unable to Consider Full Range of Punishment
>
> . . . .
>
> 9. **Mark Williams** – Peremptory Challenge – Unable to Consider the Full Range of Punishment – Unable to Follow the Law – Biased by Publicity

10. **Mark Robert Williams**[5] – Peremptory Challenge – Unable to Consider Full Range of Punishment – Expert Bias

11. **Carlos Martinez** – Peremptory Challenge – Unable to Consider Mitigation – Court Endorsed Unconstitutional Definition of Shifts Burden of Proof to Defendant

12. **Evangeline Rose Ramirez** – Biased against Mr. Renteria – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment

13. **Paul Steven Watt** – Peremptory Challenge -- Unable to Consider the Full Range of Punishment – Unable to Consider Mitigation – Shifted Burden of Proof to the Defense

. . . .

15. **Lorena Carreon** – Peremptory Challenge – Shifts Burden of Proof to the Defense – Unable to Consider Mitigation

16. **Anna Nava** – Peremptory Challenge – Unable to Consider Mitigation – Shifts Burden of Proof to Defense

17. **Longino Gonzalez** – Peremptory Challenge – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment

18. **Cruz Angel Ochoa, Jr.** – Peremptory Challenge – Court Endorsed Unconstitutional Definition of Mitigation – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment

19. **Howard Bryan** – Peremptory Challenge – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment – Law Enforcement Bias

20. **John Tobias** – Peremptory Challenge – Unable to Consider Mitigation – Unable to Consider Full Range of Sentence

21. **Robert Crosby** – Peremptory Challenge – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment – Unable to Consider Mitigation

22. **Robert Torres**[6] – Peremptory Challenge – Unable to Consider Mitigation – Unable to Consider Full Range of Punishment

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[5] Mark Williams and Mark Robert Williams are the same person.

[6] The Court believes this person is Robert P. Tomes.

23. **John David Turner** – Peremptory Challenge – Trial Court Endorsed Unconstitutional Definition of Mitigation – Unable to Consider the Full Range of Punishment – Unable to Consider Mitigation

24. **Margaret Jackson** – Peremptory Challenge – Biased against Mr. Renteria – Unable to Consider Mitigation

25. **Mr. Daniel Gurany** – Peremptory Challenge – Unable to Consider Mitigation – Unable to Follow the Law

26. **Leslie Potter** – Peremptory Challenge – Unable to Consider Full Range of Punishment – Unable to Consider Mitigation

27. **John Deslongchamps** – Peremptory Challenge – Unable to Consider the Full Range of Punishment – Unable to Consider Mitigation

. . . .

Pet'r's Br. in Supp. 41-45, ECF No. 58.

The Court of Criminal Appeals reviewed Renteria's claims concerning purported errors during voir dire in his direct appeal. *See Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *42–*154. The Court of Criminal Appeals affirmed the trial court in all respects. *Renteria II*, 2011 WL 1734067, at *4–*38.

2. Applicable Law

The Sixth and Fourteenth Amendments guarantee a defendant the right to an impartial jury. *Witherspoon v. State of Ill.*, 391 U.S. 510, 518 (1968). For this reason, a defendant is "entitled to be tried . . . by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States*, 158 U.S. 408, 413 (1895).

"[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart v. McCree*, 476 U.S. 162, 184

(1986). "[T]he proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). A court should, for example, excuse a prospective "juror who will automatically vote for the death penalty in every case" because he "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 727, 729 (1992).

As a result, a defendant must have an opportunity to expose bias, prejudice among prospective jurors. *Morford v. United States*, 339 U.S. 258 (1950). Voir dire performs a "critical function in assuring a criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). It enables a defendant to identify biased, prejudiced or unqualified jurors. *Morgan*, 504 U.S. at 727, 729; *Rosales-Lopez*, 451 U.S. at 188. It allows a defendant to challenge prospective jurors for cause before a judge able to rule on their removal. *Morgan*, 504 U.S. at 729–730; *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

Still, "the trial court retains great latitude in deciding what questions should be asked on voir dire." *Mu'Min*, 500 U.S. at 424. "'[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.'" *Id.* at 422 (quoting *Connors*, 158 U.S. at 413). "To be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id.* at 425–26; *Morgan*, 504 U.S. at 730 n.5.

"[A]lthough although there are no constitutional provisions directly addressing the use of hypothetical questions during voir dire, there may be circumstances where a party's manner of conducting voir dire renders a jury [non-]impartial and thereby triggers a Sixth Amendment violation." *Hobbs v. Lockhart*, 791 F.2d 125, 129 (8th Cir. 1986). For example, asking a potential jurors how they "would weigh evidence [they] had not heard" would "not be a proper line of inquiry." *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 257 (5th Cir. 1985).

Finally, a defendant does not have a constitutional right to peremptory challenges. "[T]he right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992). "They are a means to achieve the end of an impartial jury. "So long as the jury that sits is impartial, the fact that [the petitioner] had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *see also Soria*, 207 F.3d at 241–42 ("[B]ecause [the venire member] did not sit on [the petitioner's] jury, [the petitioner] is precluded from making a substantial showing of the denial of a federal right with respect to this claim."). And since the Constitution does not require peremptory challenges, "this benefit cannot be a basis for making 'content' questions . . . a constitutional requirement. *Mu'Min*, 500 U.S. at 424–25. So, "[t]he failure properly to grant a challenge for cause rises to the level of a constitutional violation and warrants reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. Absent such a showing, the defendant has not been denied his Sixth Amendment right to an impartial jury." *United States v. Webster*, 162 F.3d 308, 342 n.36 (5th Cir. 1998).

3. Discussion

a. Nexus Between Mitigation and the Offense

Renteria asserts his "death sentence is invalid because his second penalty jury was repeatedly instructed during the voir dire process there must be a nexus between mitigation and the offense." Pet'r's Pet. 28–29, ECF No. 53. He cites two examples. The first occurred during the voir dire of seated juror John C. Harton:

> THE COURT: I can't go into specific instances of what mitigation is because mitigation means different things to different people. You know what is less bad to some folks might be real bad for other folks. It's entirely up to you. We can only tell you that to be a fair impartial juror you must be able to consider mitigating evidence in compliance with that question and including those type of things like his character and background the circumstances of the offense and the persons moral culpability. My question to you is you limited to yourself when you said --
>
> A. I see. Yes, I do.
>
> THE COURT: And if you feel that way that's fine. And my question is can you consider those other things, his character and his background?
>
> A. Yes, I can consider that.
>
> . . . .
>
> A. So what you're saying is his background his character his moral culpability all that will have a bearing on what happened at -- at the time of the murder that could have affected the reason why he committed that murder is that what you're? I -- I could go along with that.
>
> Q. [Defense Counsel Jaime Gandara] It might or might not. And it doesn't have to have a bearing on what happened at the time of the murder in order to be considered by a juror to be mitigating.
>
> MS. MERAZ: [Prosecutor Diana E. Meraz] Objection misstatement. It has to do -- there has to be a nexus between the two.
>
> MR. GANDARA: Your Honor Tennard v. –
>
> THE COURT: I'm going to overrule the objection.
>
> MR. GANDARA: It doesn't have to be connected to the commission of the offense. Mitigation has been defined by -- by the Supreme Court

another court as being things that -- that in a juror's mind would -- that is of such a character that it might serve as a basis or a sentence less than death.

MS. MERAZ: Objection misstatement of the law.

THE COURT: As far as quoting any definition out of any cases, I'm going to sustain the objection. We shouldn't be -- the thing is can you consider mitigation as -- as required by that question [special issue two] is the ultimate issue sir?

A. Yes, I can.

Reporter's R., vol. 13 (voir dire of John C. Harton), pp. 83–84, ECF No. 80-5.

The other occurred during the voir dire of peremptorily challenged venire member Cruz A. Ochoa Jr.:

A. [Cruz A. Ochoa Jr.] And what is mitigating circumstance?

Q. [Prosecutor Lori C. Hughes] Mitigating circumstance is something that makes you think this person deserves life instead of death. It could be anything. And I can't tell you –

A. Oh.

Q. -- and I'm not -- I'm not allowed to ask you what you think that is.

A. Okay.

Q. Because the evidence is what the jury is to look at.

A. That's a big question there for me as far as --

Q. Okay.

A. -- what is mitigating. That would be answered through the trial or --

Q. We'll talk -- yeah its -- well we'll talk a little bit about it. You can have a robbery where someone threat -- I threaten another person to get that property let's say. You can have an aggravated robbery where I threaten them with a gun.

A. Okay.

Q. Would you agree the aggravated robbery is worse?

A. Yes because you actually showed a weapon.

Q. Right. And it -- it's call -- it's a different offense.

A. Uh-huh.

Q. It's actually a higher level of offense. It's aggravating.

MS. PAYAN: [Defense Counsel Edythe M. Payan] Objection, Your Honor. This is connecting mitigation to the actual crime and there's no requirement for mitigation that it actually be a nexus and I would state that this example is a misstatement and is misstating the law.

THE: COURT: Overruled.

Q. By Ms. Hughes -- Okay. So, we understand what aggravating means?

A. Yes.

Q. Mitigating is the opposite. Mitigating means it's not so bad. It's something that makes a crime less whatever that is.

MS. PAYAN: Objection. And again it's not something that makes the crime less. Under Tennard v. Dretke there is no nexus requiring that mitigation is anything that the evidence is such character that might serve as a basis for a sentence less than death.

Reporter's R., vol. 24 (voir dire of Cruz A. Ochoa Jr.), pp. 144–146, ECF No. 80-16.

(1). Procedural Bar

The Court of Criminal Appeals specifically declined to address Renteria's claim "the trial judge deprived him of due process and due course of law 'by permitting the State to inform the veniremen that [the] law required a nexus between the crime and mitigation evidence.'" *Renteria II*, 2011 WL 1734067, at *38. It reasoned "Renteria has provided no citation to the record or legal authority in support of this claim. Thus, it is inadequately briefed, and we decline to address it." *Id.* (citing Tex. R. App. P. 38.1).

When the state court rejects a claim pursuant to a state procedural rule which provides an adequate basis for the decision—independent of the merits of the claim—the procedural default bars a federal habeas claim. *Hughes*, 530 F.3d at 341 (citing *Coleman*, 501 U.S. at

729–32). To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed" by the state courts. *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991). "A survey of the [Texas Court of Criminal Appeals'] capital sentencing jurisprudence reveals that it regularly rejects claims—both on direct and postconviction review—on the basis that these claims are inadequately briefed." *Roberts v. Thaler*, 681 F.3d 597, 607 (5th Cir. 2012).

In this case, the Court of Criminal Appeals invoked the briefing requirements of Texas Rule of Appellate Procedure 38.1 to bar Renteria's claim. Its determination constituted an independent and adequate state ground for denial of relief which procedurally bars federal habeas review. *Id.* at 608.

Renteria contends "[t]he State's exhaustion and default arguments fail to take into account that to the extent trial counsel failed to raise the proper grounds during the voir dire, such failure would constitute cause through *Martinez/Trevino*." Pet'r's Reply 37, ECF No. 94.

The Supreme Court bars federal habeas relief on procedurally defaulted claims unless the petitioner demonstrated cause for the default and actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749-50. In *Martinez/Trevino*, the Supreme Court opines a petitioner could meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza*, 738 F.3d 676.

Here, Renteria's counsel made appropriate objections when the prosecutor improperly argued Renteria had to show a nexus between his mitigating evidence and the circumstances

surrounding the crime before the jury could consider it. Consequently, Renteria has not shown his trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. He has not overcome that "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* at 689. He has also not shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter*, 558 U.S. 38–39. As a result, Renteria's ineffective assistance of trial counsel claim has no merit. And Renteria has not shown cause which would permit him to overcome the procedural bar to his claim. He is not entitled to relief on this claim. Nonetheless, as discussed below, the claim is without merit.

(2). Merits

Renteria argues his "death sentence is invalid because his second penalty jury was repeatedly instructed during the voir dire process there must be a nexus between mitigation and the offense." Pet'r's Pet. 28–29, ECF No. 53. The record does not support his claim.

The prosecution erred when it claimed during voir dire that Renteria must show a nexus between mitigating evidence and Flores's murder. But the prosecution had an historical basis for the argument.

In *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302 (1989),[7] Texas Defendant Johnny Paul Penry presented mitigating evidence of mental retardation and organic brain damage resulting in poor impulse control and an inability to learn from experience. *Id.* at 308. Penry offered further mitigating evidence of his physical and mental abuse as a child. *Id.* at 309.

The jury decided Penry's sentence by answering the "special issues" in a former version of Texas Code of Criminal Procedure article 37.071:

[7] Abrogated by *Atkins v. Virginia*, 536 U.S. 304 (2002).

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Arts. 37.071(b) (Vernon 1981 and Supp.1989).
>
> If the jury unanimously answers "yes" to each issue submitted, the trial court must sentence the defendant to death. Arts. 37.071(c)–(e). Otherwise, the defendant is sentenced to life imprisonment. *Ibid.*

Penry I, 492 U.S. at 310.

The Supreme Court held the special issues in the Texas sentencing statute did not provide the jury with a vehicle to consider and give effect to Penry's mitigating evidence. The Court stated:

> [A] juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime "deliberately."
>
> . . . .
>
> Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. . . . The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's mitigating evidence . . .

Id. at 323. The Supreme Court found the appropriateness of a death sentence was not ensured when the jury could not consider and give effect to mitigating evidence relevant to a defendant's "background, character, or the circumstances of the crime." *Id.* at 328. The Court did not, however, provide a framework to review "*Penry* claims" and assist courts in

determining whether the jury was able to consider and give effect to specific mitigating evidence under article 37.071.

In response to this ruling, the Texas legislature substantially revised the capital sentencing statute in 1991 to incorporate the current sentencing provisions which address mitigating circumstances. *See* S.B. 880, 72nd Leg., 1991 Reg. Sess. (Tex. 1991) (showing that directives regarding the jury's consideration of mitigation evidence and the offender's moral culpability were added in the 1991 amendment). Under the revised capital sentencing statute—applicable at the time of Renteria's offense—a jury faced two "special issues" before sentencing. The first special issue—the future dangerousness issue—was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim. Proc. Code art. 37.071 § 2(b)(1) (Vernon 2001). If the jury unanimously answered this question in the affirmative, it then considered a second special issue—the mitigation issue—"[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed" *Id.* § 2(e)(1).[8]

And to resolve *Penry I* claims—that the jury was unable to consider and give effect to mitigating evidence—the Texas Court of Criminal Appeals adopted a "nexus" relevancy requirement. It explained that "mitigating evidence is relevant to the jury's individualized assessment of the propriety of death if there is a nexus between the mitigating evidence and the circumstances surrounding the crime that might, from the viewpoint of society, reduce the

[8] In 2005, the Texas Legislature amended the statute to allow for life imprisonment without the possibility of parole. *See* Tex. Penal Code § 12.31(a); Tex. Code Crim. Proc. art. 37.071 §§ 1, 2(a)(1), (g); S.B. 1507, 79th Leg., 2005 Reg. Sess. (Tex. 2005).

defendant's 'deathworthiness.'" *Goss v. State*, 826 S.W.2d 162, 165 (Tex. Crim. App. 1992). "This concept of deathworthiness is best understood as an individualized assessment of the appropriateness of the death penalty, given the offense and the offender." *Mines v. State*, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992). Hence, a defendant had to establish a nexus between the mitigating evidence and the circumstances of the offense which tended to excuse or explain the commission of the offense, suggesting that the defendant was less deserving of a death sentence. Otherwise the "evidence [was] not relevant, *beyond the scope of the special issues*, to the jury's individualized assessment of Appellant's moral culpability for the crime." *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1992) (quoting *Goss*, 826 S.W.2d at 166) (emphasis in original). Under the Court of Criminal Appeals' "nexus requirement the mitigating evidence must be directly linked to the defendant's moral culpability for the capital murder." *Earhart v. State*, 877 S.W.2d 759, 765 (Tex. Crim. App. 1994).

The Fifth Circuit followed the Texas Court of Criminal Appeals' lead and adopted a "constitutional relevance" screening test to address *Penry I* claims. *See, e.g., Bigby v. Cockrell*, 340 F.3d 259, 273 (5th Cir. 2003) ("The evidence presented must establish "(1) a uniquely severe permanent handicap[ ] with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition.") (quoting *Davis v. Scott*, 51 F.3d 457, 460–61 (5th Cir. 1995)), *opinion withdrawn and superseded sub nom. Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005), *and abrogated by Tennard*, 542 U.S. 274. Only after the court found that the mitigating evidence was "constitutionally relevant" would it consider whether that evidence was within "'the 'effective reach' of the jurors.'" *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002)

(quoting *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994), *abrogated by Tennard*, 542 U.S. 274).

Then in *Tennard v. Dretke*, 542 U.S. 274 (2004), the Supreme Court held the Fifth Circuit's test for determining the constitutional relevance of mitigating evidence had "no foundation in the decisions of this Court." *Id.* at 284. The Supreme Court noted "[n]either *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Id.* Rather, the Supreme Court held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by "'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Id.* 284–285 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). Consequently, "before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability *and* decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007) (emphasis added).

Renteria's counsel cited *Tennard* when the prosecution asserted the jury could not consider mitigating evidence unless Renteria established a nexus between evidence and the circumstances of the offense. Reporter's R., vol. 13 (voir dire of John C. Harton), p. 84, ECF No. 80-5; Reporter's R., vol. 24 (voir dire of Cruz A. Ochoa Jr.), p. 145, ECF No. 80-16. Renteria's counsel explained "[u]nder Tennard V. Dretke there is no nexus requiring that mitigation is anything that the evidence is such character that might serve as a basis for a sentence less than death." Reporter's R., vol. 24, p. 145. Indeed, Renteria's counsel raised

proper grounds for rejecting the prosecution's nexus argument during the voir dire. And the trial court did not accede to the prosecution's claim of a nexus requirement. The trial court described mitigating evidence as "things like his character and background the circumstances of the offense and the persons moral culpability." Reporter's R., vol. 13, p. 83. Further—as described in detail above—the trial court allowed Renteria's counsel to present substantial mitigating evidence of his personal history and characteristics unrelated to the circumstances of the offense.

Renteria's claim is both barred and without merit. He is not entitled to relief on this claim.

b. Questions About Specific Mitigating Circumstances

Renteria next asserts that "[b]ecause the trial court prohibited counsel from any discussion regarding mitigation or providing examples of what the Supreme Court has held are significant factors [during voir dire], jurors voted to sentence Mr. Renteria to death believing that mitigating circumstances were guilt defenses like insanity or self-defense." Pet'r's Pet. 29, ECF No. 53. He argues his "federal constitutional guarantees of effective assistance of counsel, trial by an impartial jury, an individualized sentencing determination, and due process of law were violated when the trial court prohibited questioning during voir dire regarding the jurors' ability to consider and give effect to mitigating circumstances . . ." Pet'r's Br. in Supp. 32, ECF No. 58 (citing U.S. Const. amends. VI, VIII, and XIV). He maintains that his "[c]ounsel was not requesting permission to ask improper commitment questions; rather counsel was requesting permission to make the constitutionally permitted, and, indeed, constitutionally-required, inquiry into whether jurors could consider and give effect to mitigating evidence." Pet'r's Reply 35, ECF No. 94.

Prior to Renteria's second punishment trial, his counsel filed a motion to submit a "comprehensive" juror questionnaire and objected to the trial court's proposed questionnaire for venire members. Reporter's R., vol. 2 (Judge's Conference), pp. 6–9, ECF 79-14. The trial court denied the motion and overruled the objection. *Id.* at 13.

During voir dire, Renteria's counsel attempted to question prospective juror Joaquin Rivera about his ability to consider specific factors as mitigating evidence:

> Q. [Defense Counsel Edythe Payan] Now again mitigation evidence can be anything. And you do not have to agree. You -- as jurors one juror may find one specific piece of information to be mitigating and another person might find something else to be different mitigation. You're not going to be asked to agree as to that.
>
> A. Yes.
>
> Q. Mitigating can be -- there are several relevant factors.
>
> MS. HUGHES: Objection, Your Honor, to contracting. Improper question.
>
> MS. PAYAN: I would just ask to give examples . . . so that we can intelligently exercise our peremptory which we are entitled.
>
> THE COURT: I'm not going to allow you to go into specifics.
>
> . . . .
>
> MS. PAYAN: And Your Honor for the record I would like the record to reflect that at this time we would like to ask this juror if he'd consider mitigation which the Court has found to be relevant such factors as drugs –
>
> MS. HUGHES: Objection, Your Honor.
>
> THE COURT: If you're making a Bill then you need to excuse the juror.
>
> MR. GANDARA: Can we go ahead and excuse the juror?
>
> THE COURT: Well not right now. At an appropriate time.

Reporter's R., vol. 9 (voir dire of peremptorily challenged venire member Joaquin Rivera), pp. 173–74, ECF No. 80-1.

Renteria's counsel subsequently presented a bill of exception, asking that the trial court allow the defense to propounded questions to prospective jurors about their ability to consider specific factors:

> MS. PAYAN: Your Honor, . . . under the law we are entitled to have jurors struck for cause who cannot consider and give mitigation. We are entitled to jurors who can consider and give effect to specific mitigating evidence, and a juror must be able to consider the individual defendant's mitigation . . . the questions we would ask the juror would be:
>
> Could you consider the mitigating factor of a person with a drug problem[?]
>
> Could you consider the mitigating factor of a person with a way turbulent family history[?]
>
> Could you consider mitigation of a person, a defendant, with emotional problems[?]
>
> Could you consider mitigation of the defendant's background[?]
>
> Could you consider mitigation of the defendant's upbringing[?]
>
> Could you consider mitigation of the defendant's character[?]
>
> Could you consider mitigation of the defendant's character, good character[?]
>
> And could you consider mitigation of the circumstances of the offense[?]
>
> . . . .
>
> And for the record we would ask that these are the questions we would ask each and every member of this venire under this subject.

Id., pp. 177–79.

Renteria's counsel re-urged this objection while questioning prospective juror Elizabeth Black. *See* Reporter's R., vol. 12 (voir dire of peremptorily challenged venire member Elizabeth Black), p. 130, ECF No. 80-4. The trial court responded with its ruling was "the same. I'll not allow that type of question to be asked regarding specific matters of

mitigation." *Id.* at 131. Renteria's counsel subsequently made the same bill of exception on several other occasions:

> MR. VELASQUEZ: We're entitled to do hypothetical questions, Your Honor. And in those hypothetical questions we're allowed to put facts to allow us to decide whether were going to use a peremptory challenge for cause or -- or a challenge for cause, Your Honor. And we would ask the Court to allow us to do that type of hypothetical questions, Your Honor.
>
> THE COURT: The Court has ruled already. Okay.
>
> . . . .
>
> THE COURT: Any specific instances of mitigation you cannot go into including defenses. Okay?

Reporter's R., vol. 14 (voir dire of seated Brett K. Williams), pp. 63–64, ECF No. 80-6. *Id.* at 63–64. Renteria's counsel argued the trial court should allow the defense to conduct a "full, fair, and constitutional voir dire." *Id.* at p. 58.

Renteria's counsel also filed a motion entitled "Propounded Specific Voir Dire Questions to Each Member of the Venire." In this motion, his counsel sought permission to ask the following questions:

1. If you heard evidence of sexual assault of a child and indecency with a child, what are your views regarding the death penalty?

2. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you heard MATTERS of sexual assault of a child and indecency with a child, what are your views regarding the death penalty?

3. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and the Defendant has a previous conviction of indecency with a child, what are your views regarding the death penalty?

4. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and the Defendant has a previous conviction of indecency with a child and felony driving while intoxicated, what are your views regarding the death penalty?

5. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, if you hear MATTERS of sexual assault of a child or indecency [with] a child, what are your views regarding the death penalty?

6. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and assume the most horrible of circumstance of the crime of capital murder, the worst you can think of for yourself, are you open to consider mitigation circumstances?

7. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, if you hear MATTERS of sexual assault of a child or indecency [with] a child, are you open to consider mitigating circumstances?

8. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and the Defendant has a previous conviction of indecency with a child, are you open to consider mitigation circumstances?

Renteria II, 2011 WL 1734067, at *6–7.

The trial court "overrule[d] the motion" and "disallow[ed] Defense counsel being able to ask those specific questions." *Id.* at 7. It reasoned the questions implicated the restrictions imposed by *Standefer v. State*, 59 S.W.3d 177, 181–83 (Tex. Crim. App. 2001), against commitment questions, and by *Barajas v. State*, 93 S.W.3d 36, 39–42 (Tex. Crim. App. 2002), against ambiguous questions.

In his direct appeal, Renteria argued the trial judge "abused her discretion by refusing to give him permission to ask the propounded questions included in his bill of exception . . . and his written motion." *Renteria II*, 2011 WL 1734067, at *7.

The Court of Criminal Appeals overruled the objection. It explained "[t]he trial judge was within her discretion to prohibit defense counsel from asking these improper questions." *Id.* at *8 (citing *Barajas*, 93 S.W.3d at 38).

Renteria claimed on direct appeal that the trial court erred in denying his request to pose questions to venire members regarding their willingness to consider specific factors as mitigating evidence. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Tex. Crim. App. filed Dec. 15, 2009), at *42–64. The Texas Court of Criminal Appeals opined "these questions implicate the restrictions imposed by *Standefer v. State*, against commitment questions." *Renteria II*, 2011 WL 1734067, at *7.

In *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001), the Court of Criminal Appeals explained commitment questions "commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." *Id.* at 179. Commitment questions often ask for a "yes" or "no" answer, which commit jurors to resolve issues in a particular way. *Id.* Commitment questions may be proper or improper, depending on whether they lead to valid challenges for cause. *Id.* at 181. Commitment questions are proper when the law requires a certain type of commitment from jurors and the attorneys ask prospective jurors whether they can follow the law. *Id.* Commitment questions are improper when (1) the law does not require a commitment or (2) when the question adds facts beyond those necessary to establish a challenge for cause. *Id.* at 181–182

> So, the inquiry for improper commitment questions has two steps: (1) Is the question a commitment question, and (2) Does the question include facts-and only those facts-that lead to a valid challenge for cause? If the answer to (1) is "yes" and the answer to (2) is "no", then the question is an improper commitment question, and the trial court should not allow the question.

Id. at 182–83.

In *Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002), the Court of Criminal Appeals provided an example of an improper commitment question. In *Barajas*, defense counsel attempted to ask whether prospective jurors could be "fair and impartial" in a case involving a nine-year-old victim. *Id.* at 37. The Court of Criminal Appeals explained it could interpret this question as an inquiry about the effect of the victim's age on three different matters: (1) guilt, (2) witness credibility, or (3) punishment. *Id.* at 39–40. It concluded inquiry into the third matter would constitute an attempt to obtain an impermissible commitment. *Id.* at 40.

In *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998), the Court of Criminal Appeals correctly noted "the law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating." *Id.* at 3 (Tex. Crim. App. 1998). If a trial court permitted a party to ask prospective jurors to react to specific mitigating evidence, the party could use peremptory challenges to fashion a favorable jury. While a defendant has a right to an impartial jury, he does not have a right to a sympathetic jury of his own creation. Hence, "[a] trial court does not abuse its discretion by refusing to allow a defendant to ask venire members questions based on facts peculiar to the case on trial (e.g. questions about particular mitigating evidence)." *Id.*

Renteria now argues that the state trial court's limitations on his efforts to voir dire prospective jurors on how they would view his mitigating evidence prevented his trial counsel from intelligently asserting challenges for cause against potentially biased jurors and exercising peremptory challenges. Pet'r's Br. in Supp. 35, ECF No. 58.

Although—as the Court of Criminal Appeals noted in *Raby*—a court must afford a defendant an opportunity to present mitigating evidence at the punishment phase of a capital trial, the fact that a juror might view the evidence as aggravating—as opposed to mitigating—does not implicate the Eighth Amendment. *See Johnson v. Texas*, 509 U.S. 350, 368 (1993) ("As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied."). So "a defendant in a capital case is not entitled to challenge prospective jurors for cause simply because they might view the evidence the defendant offers in mitigation of a death sentence as an aggravating rather than a mitigating factor." *Dorsey v. Quarterman*, 494 F.3d 527, 533 (5th Cir. 2007). Thus, Renteria's claim that the trial court deprived him of the ability to discover the basis for a challenge for cause—through questions which would help his counsel determine whether potential jurors viewed specific evidence as mitigating or aggravating—is without merit.

Furthermore, a defendant does not have a constitutional right to peremptory challenges. *McCollum*, 505 U.S. at 57. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross*, 487 U.S. at 88. And since the Constitution does not require peremptory challenges, "this benefit cannot be a basis for making 'content' questions . . . a constitutional requirement. *Mu'Min*, 500 U.S. at 424–25.

In *Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000), the Fifth Circuit confronted a similar challenge to a Texas trial court's refusal to permit voir dire questions which attempted to bind prospective jurors regarding their positions on the evidence. The Fifth Circuit found no constitutional error in the state trial court's ruling, given the extent of other voir dire questioning into potentially mitigating evidence that the trial judge did allow. *Id.* at 244. The

Fifth Circuit noted that while "the trial judge did not allow the particular phrasing [the petitioner] sought," it concluded that "the form of questioning permitted by the state trial court was sufficient to allow an intelligent exercise of his peremptory challenges." *Id.* Ultimately, the *Soria* Court found that "the voir dire questioning was sufficient to allow the petitioner to determine whether a prospective juror would consider the evidence proffered in mitigation by the defense" and that he was "entitled to no more" than this. *Id.* Consequently, petitioner "failed to make a substantial showing of the denial of a federal right." *Id.*

The Court reaches the same conclusion in this case. The state trial court used a lengthy questionnaire, which advised the prospective jurors:

> A person commits the offense of murder if he intentionally or knowingly causes the death of an individual.
>
> A person commits the offense of capital murder if he murders a child under 6 years of age.
>
> In asking questions about your feelings on the possible punishments (or sentences), you are not being asked what you would do in this particular case. You are only being asked about cases in general. Neither the attorneys nor the Court can ask you what you would do in this particular case because you have not yet heard evidence regarding the facts and circumstances of this case. And it is important for you to realize that you will not know about the particular facts and circumstances involved in this case during the jury selection process except for the limited language contained in this questionnaire. The details of the case are given to you later in the actual trial itself. The purpose of jury selection is to qualify jurors, to set forth the law applicable to the case, to see if jurors understand and can apply that law and to determine whether each prospective juror will consider the full range of punishment.
>
> Under Texas law, an individual found guilty of capital murder shall be sentenced to either confinement in the Institutional Division of the Texas Department of Criminal Justice prison for life or to the death penalty. In other words, a sentence of life imprisonment or death is mandatory upon a conviction for capital murder.
>
> In this case, the defendant has been convicted of capital murder by a jury of knowingly and intentionally causing the death of a child under six 6 years of age. Under the circumstances of this case, the Court will conduct a sentencing trial with the jury solely to determine the sentence of the defendant. In that hearing evidence may be presented as to any matter that the Court deems

relevant to sentencing. The State and the defense will also be permitted to present arguments to the jury for or against the imposition of the death penalty.

The death penalty is an option in a capital murder case if the defendant has been found guilty of capital murder by unanimous verdict of a jury. In this case the defendant has previously been found guilty of capital murder by unanimous verdict of a jury. In order to serve on a jury where the defendant has been convicted of capital murder each juror must be able to consider the full range of punishment life in prison or the death penalty.

Given the foregoing please check ONE of the following that most closely describes your views
_____ I am against the death penalty.
_____ I am neither in favor of nor against the death penalty.
_____ I am in favor of the death penalty.

Reporter's R., vol. 77 (Juror Questionnaire), p. 28–29, ECF No. 82-9. The questionnaire included questions which inquired into how potential jurors viewed potentially mitigating evidence and the death penalty.

42. A person is a product of his or her environment.
□ Agree □ Disagree
43. A person who abuses drugs or alcohol is less responsible for his or her actions.
□ Agree □ Disagree
44. The death penalty is never justified.
□ Agree □ Disagree
45. I think the death penalty is necessary for some crimes.
□ Agree □ Disagree
46. Executing a person for capital murder discourages others from committing that crime in the future.
□ Agree □ Disagree
47. The death penalty is not necessary in modern civilization.
□ Agree □ Disagree
48. The death penalty should be used more often than it is.
□ Agree □ Disagree
49. The desire for revenge is a legitimate reason for favoring the death penalty.
□ Agree □ Disagree
50. It is immoral for society to take a life regardless of the crime the individual has committed.
□ Agree □ Disagree
51. Society has a right to get revenge when murder has been committed.
□ Agree □ Disagree
52. Life in prison is a serious punishment.

□ Agree □ Disagree

53. The death penalty is the best crime preventative.

□ Agree □Disagree

54. Regardless of what the law says the accused in a criminal case should testify.

□ Agree □ Disagree

55. It is better to free nine guilty people than to convict one innocent man.

□ Agree □ Disagree

56. The criminal justice system favors the accused.

□ Agree □ Disagree

57. Please rank in order of importance to you the following purposes for punishment in a criminal case

□ Punishment/retribution □ Deterrence/prevention □ Rehabilitation/reform

Please explain your answer.

Id. at 29–30.

During individual voir dire, the trial court gave Renteria's trial counsel the latitude to ask potential jurors additional questions. The trial court also allowed Renteria twenty-two peremptory challenges. While the trial court refused to permit Renteria's trial counsel to commit the venire members to whether they could consider the mitigating aspects of double-edged evidence, the Court's independent review of the entirety of defense counsel's voir dire convinces the Court that it was enough to permit Renteria's counsel to determine whether a prospective juror would consider the mitigation evidence they proffered. In other words, the voir dire permitted Renteria's trial counsel to determine whether the potential jurors' views would prevent or substantially impair them in the performance of their duties as jurors in accordance with the trial court's instructions and their oath. Renteria was entitled to nothing more. *See Soria*, 207 F.3d at 244.

In addition, considering the extensive juror questionnaire utilized during jury selection, the restrictions imposed by the trial court, and the scope of the questioning by Renteria's trial counsel, the Court finds the voir dire of the potential jurors did not render Renteria's trial fundamentally unfair. *Mu'Min*, 500 U.S. at 425–26; *Morgan*, 504 U.S. at 730 n.5. And again, insofar as Renteria argues the trial court prevented his counsel from making

fully informed use of peremptory challenges, his argument does not invoke a federal constitutional right. *McCollum*, 505 U.S. at 57.

Consequently, the Texas Court of Criminal Appeals' rejection of Renteria's arguments on the merits in his direct appeal was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. It also was not based on an unreasonable determination of the facts in light of the evidence presented in Renteria's trial and direct appeal. Renteria is not entitled to relief on this claim.

c. Questions About Parole Eligibility

Renteria protests "[t]he trial court refused to answer jurors' concerns and prohibited counsel from questioning them about whether they could sentence a defendant convicted of capital murder of a child to life with the possibility of parole." Pet'r's Pet. 29, ECF No. 53. In a related claim, he complains "[c]ounsel was also disallowed to ask jurors if they could consider a sentence of life with the possibility of parole for a defendant convicted of capital murder who had prior felony convictions." *Id.*

Renteria argued in his direct appeal that parole eligibility was a proper inquiry for voir dire because, "for offenses committed on or after September 1, 1999, . . . the jury is now instructed on parole, if requested by the defense." *Renteria II*, 2011 WL 1734067, at *18 (citing Tex. Code Crim. Proc. art. 37.071 § 2(e)(2)).

The Texas Court of Criminal Appeals noted "[a] similar argument was raised in *Sells v. State*," 121 S.W. 3d 748 (Tex. Crim. App. 2003). *Id.* In *Sells*, the defendant wanted to ask the potential jury members the following questions:

1. Would the minimum length of time a defendant could serve in prison before he could be paroled be something you would want to know in answering the special issues?

2. On which special issue would this be important? How would this 40 year minimum sentence be important to you in answering the special issues?

3. Would you be more likely, or less likely, generally, to view a defendant as a continuing threat to society if you knew he could not be paroled for a minimum of 40 years?

4. What kind of evidence would you expect, as a juror, to help you in considering the 40-year parole ineligibility factor when answering the special issue?

Id. at 755. The Court of Criminal Appeals assumed the statutory change rendered questioning about parole permissible in some situations. *Id.* at 756. But it held Sells's questions "implicate[d] the strictures imposed by *Standefer* against commitment questions and by *Barajas* against ambiguous questions," and that "any attempt to commit prospective jurors to giving mitigating, aggravating, or even no effect to the parole instruction [was] impermissible." *Id.* at 756–57.

In this case, Renteria wanted to ask venire member Robert Crosby if "the only acceptable alternative to a death penalty in a capital case would be a life in prison without any possibility of parole," and if he "agree[d] with a law that might provide for parole." *Renteria II*, 2011 WL 1734067, at *18. The Court of Criminal Appeals noted Renteria's questions for Crosby were impermissible like the questions at issue in *Sells*. Consequently, the Court of Criminal Appeals held "the trial judge did not abuse her discretion by prohibiting the proposed questions. Further, the trial judge ultimately asked Crosby whether he could follow the instructions with regard to parole." *Id.*

Renteria wanted to ask venire member Robert P. Tomes whether "a life sentence without possibility of parole is the only reasonable range of punishment." *Id.* at *19. The Court of Criminal Appeals found this was essentially the same question he asked of Crosby. *Id.* It held "this is an improper commitment question, and the trial judge was within her

discretion to prohibit it. Further, defense counsel was ultimately permitted to ask Tomes if the possibility of parole would influence his verdict." *Id.*

In *Simmons*—the case discussed at length above—the Supreme Court held that if a defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole, due process requires the trial court to inform the sentencing jury the defendant is ineligible for parole. *Simmons*, 512 U.S. at 156. The *Simmons* Court specifically cautioned, however, "[i]n a State in which parole is available," it would "not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Id.* at 168.

Renteria would have been eligible for parole under Texas law after 40 years' imprisonment if sentenced to life by the trial court. *Simmons* is not applicable to his case.

Consequently, the Texas Court of Criminal Appeals' rejection of Renteria's arguments on the merits in his direct appeal was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. It also was not based on an unreasonable determination of the facts considering the evidence presented in Renteria's trial and direct appeal. Renteria is not entitled to relief on this claim.

d. Substantially Impaired Members

Renteria complains the jury "included members who were substantially impaired in their ability to follow the law." Pet'r's Pet. 30, ECF No. 53. Renteria specifically alleges Donnie Malpass was seated without "questioning her about her ability to consider mitigating evidence and the full range of punishment." *Id.* at 28. John Harton was seated after the "trial court endorsed an unconstitutional definition of mitigation" and was "unable to consider and give effect to mitigation." *Id.* at 43. Norman Thomas was seated after the trial "court endorsed unconstitutional definition of mitigation" and was "unable to consider and give

effect to mitigation." *Id.* at 48. Brett Williams was seated while he was "unable to consider and give effect to mitigation." *Id.* at 49. Roxanne Castricone was seated after the trial "court endorsed unconstitutional definition of mitigation" and "was unable to consider mitigation." *Id.* at 49. Washington Watley was seated after Renteria's challenged him for cause "on the grounds he is biased and cannot be impartial because he has two young daughters, and because he would automatically believe and lend more credibility to law enforcement officers." *Id.* at 86. "[T]he trial court overruled the challenge for cause, and because the defendants had exhausted all peremptory challenges, Mr. Watley was seated as a juror." *Id.* Jeanette Sanchez was seated after stating "she would sentence a defendant to death after determining he was a future danger." *Id.* at 87. Renteria challenged Sanchez "for cause on the basis that she was unable to follow the law regarding sentencing." *Id.* at 89. The trial court denied the challenge for cause. *Id.* Renteria notes he "requested additional peremptory challenges because the court denied proper challenges for cause." *Id.* at 76.

(1) Juror Donnie Malpass

Renteria claims Donnie Malpass was seated without "questioning her about her ability to consider mitigating evidence and the full range of punishment." Pet'r's Pet. 28, ECF No. 53. Specifically, Renteria complains the trial court did not permit him to ask Malpass what her verdict would be if the issue of self-defense was raised or where the defendant killed the victim in a "planned" or "cold blooded" manner. *Id.* at 30.

Renteria did not complain on direct appeal or in his state habeas application about the trial court's restrictions on Malpass's voir dire examination. Consequently, any claim alleging error concerning the trial court's ruling is unexhausted and procedurally defaulted. *See Ruiz v. Quarterman*, 460 F.3d 638, 642–43 (5th Cir. 2006) ("[I]n order for a claim to be exhausted, the state court system must have been presented with the same facts and legal

theory upon which the have been presented with the same facts and legal theory upon which the petitioner bases his current assertions."); *Nobles*, 127 F.3d at 420 ("The exhaustion requirement is not satisfied if the prisoner presents new legal theories or factual claims in his federal habeas petition.").

Federal habeas relief is barred on unexhausted or procedurally defaulted claims unless the petitioner demonstrates cause for the default and actual prejudice arising from the default—or shows the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50. A petitioner may meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza*, 738 F.3d at 676.

Renteria does not provide an explanation as to how the trial court's limitations on his counsel's questions were improper or how he was harmed by the trial court's rulings. Renteria fails to show the trial court erred in restricting the voir dire examination of Malpass as to how she would consider specific types of mitigating evidence before voting. *See Soria*, 207 F.3d at 244 ("We are not persuaded that the trial court abused its considerable discretion in finding that the questions posed by [the petitioner] constituted an attempt to improperly commit the prospective jurors to a certain view regarding mitigating evidence anticipated to be presented in his case."). Renteria has not shown his counsel provided constitutionally ineffective assistance. Indeed—as the extract from the transcript below shows—his counsel tenaciously pursued his questioning of Malpass despite the prosecutor's multiple objections. He has not shown cause for his default or actual prejudice arising from the default.

In addition, the claims lack merit. Renteria maintains his counsel could not ask Malpass "about her ability to consider mitigating evidence and the full range of punishment."

Pet'r's Pet. 28, ECF No. 53. Specifically, Renteria complains his counsel were not allowed to ask Malpass how she felt about imposing a death penalty on a defendant convicted of murdering a child under six years of age.

The prosecutor objected to this line of questioning, asserting it was global, not relevant, and asked for Malpass to contract. The prosecutor's objections were initially sustained by the trial court:

> Q. [Defense Counsel Jaime Gandara] Now to convict somebody of a murder or a capital murder, a jury has to listen to all the facts and come to a conclusion that they believe beyond a reasonable that this person knowingly and intentionally caused the death of somebody.
>
> And in the case of a child of a child under the age of six years old and the jury has to believe beyond a reasonable doubt that that happened.
>
> And when you convict somebody of murder of capital murder you -- you've gotten past the point where there's any question of insanity or mistake or accident. And there's no defense of third person no self-defense. Is that -- is that clear
>
> A. That's clear um-hmm.
>
> Q. In other words if you had a self-defense issue what would the verdict be?
>
> MS. MERAZ: [Prosecutor Diana Meraz] Your Honor I'm going to object at this point. It's global not relevant to the case.
>
> THE COURT: Counsel?
>
> MR. GANDARA: Your Honor were -- we're discussing the nature of conviction of an offense and that it's clear that when somebody is convicted that all defenses have been set aside and that there's a clear conviction and no defensive matter applies to the case.
>
> THE COURT: I'm going to sustain the objection.
>
> MR. GANDARA: Okay.
>
> Q. (By Mr. Gandara) All right. So, you understand that when you -- when there's a guilty verdict the person is convicted and no defenses or anything are -- all that has been set aside. Do you understand that?

MS. MERAZ: Objection same objection.

THE COURT: Sustained.

MR. GANDARA: Okay. Your Honor, I would like to submit to the court that I believe these questions are aimed at our procedural situation in this case. We have a final conviction. And these prospective jurors are entitled to understand the nature of the fact of the guilty finding and the guilty verdict and the fact that -- that all those matters of defense and justification are set aside.

THE COURT: I understand. I'm going to sustain the objection.

. . . .

Q. (By Mr. Gandara) Okay. Now please assume that a jury has convicted an individual of knowingly and intentionally killing somebody an innocent person that -- and not because he's crazy or because he -- he did it because he wanted to and that it was planned or it was cold blooded or no -- what is your –

MS. MERAZ: Again, were going to object to the nature of the question. It's global and not relevant.

THE COURT: Sustain the objection.

MR. GANDARA: Your Honor were entitled to ask a hypothetical question about feelings of a juror about the death penalty given a conviction in a hypothetical case.

THE COURT: You defined murder as being an intentional act and I think that you can go along in that vein. There's no problem with that. But the way you're going about it you are getting into specifics.

I'll sustain the objection.

Reporter's R. vol. 8 (voir dire of Donnie Malpass), pp.52–55, ECF No. 79-20.

The trial court subsequently allowed the questions after Renteria's counsel explained he needed to know what the individual jurors felt about the death penalty under the circumstances of this case:

MR. GANDARA: Your Honor I have not asked the juror what she's going to decide. I've asked her what her feelings about the death penalty are on the basis of somebody that's been convicted of capital murder of a child

under six years of age. And were -- that's the base fundamental inquiry in a voir dire jurors -- prospective jurors' feelings about the death penalty.

THE COURT: All right. I'm going to allow it.

. . . .

Q. (By Mr. Gandara) Ms. Malpass what are your feelings about the death penalty under circumstances where a person who has been convicted of killing a child under the age of six?

A. I can't say. I'd have to see the facts and evidence and everything. I can't say.

Q. So you -- you are not -- you're open to the full range of punishment either life in prison or the --

A. Death penalty, yes.

Q. Is that the case? You're sure of that?

A. Yes.

Q. All right. Now assume with me that there's a conviction for capital murder of a child under the age of six and you have heard evidence that convinces you beyond a reasonable doubt that that person is a future danger. Okay?

In other words, you've found that beyond a reasonable doubt you believe that question number one is yes that the person is a future danger. What are your feelings about the death penalty under those circumstances?

MS. MERAZ: I'm going to object again. Your Honor to contracting. He's not asking her if she can be fair. He' asking her for factors to -- to weigh and how she feels about it in other words are you leaning towards this side or this side.

MR. GANDARA: Your Honor, fundamentally we need to know what the individual juror's feelings are about the death penalty under each circumstance given that the law provides it.

THE COURT: The way you put the question, I'm going to allow it. Go ahead.

MR. GANDARA: All right.

Q. (By Mr. Gandara) What are your feelings about the death penalty when there's been a conviction for killing a child under the age of six years old knowingly and intentionally and you're a juror on a jury and the jurors have found unanimously that the person is a future danger?

You've answered that question number one yes. At that point what are your feelings about the death penalty?

A. I'm open to it.

Q. Okay. And what are your feelings about a life sentence?

A. I'm open to that too.

Q. Now I'd like to go to your questionnaire now. At page -- between pages eight and nine there's a long question. There's a great big preamble and then a three element question. All right?

A. Okay.

Q. Okay. The second paragraph on page nine says in this case the defendant has been convicted of capital murder by a jury of knowingly and intentionally causing the death of a child under six years of age. Under the circumstances of this case the court will conduct a sentencing trial with the jury solely to determine the sentence of the defendant. In that hearing evidence may be presented as to any matter that the court deems relevant to sentencing. The state and the defense will also be permitted to present arguments to the jury for or against the imposition of the death penalty.

Now -- then you're asked the question given the foregoing please check one of the following that most closely describes your views. You're asked how you feel about the death penalty.

Now you've indicated that given the foregoing -- that whole paragraph including the one that I just read word for word -- that you're in favor of the death penalty. That was your response. Correct?

A. Yes.

Q. And does that tell us that given the fact that there is a conviction of capital murder of knowingly and intentionally causing the death of a child under six years of age that you are going into the case in favor of the death penalty?

A. No. That's not the case.

Q. Tell us what you -- what you meant by marking I'm in favor of the death penalty given the foregoing?

A. That I'm just open to the death penalty until I find out what goes on you know.

Q. Well now that you're looking at the three responses how -- tell me what you think of the middle response ["I am neither in favor of nor against the death penalty"]?

A. I probably would have put that one.

Q. Is there -- can you give us any reason why you did not put that one down at the time

A. Probably because I was in a hurry to get home.

Q. You think so?

A. I was tired.

Q. Now when you're on a jury in a case like this and you get -- okay. You've got -- if you're on a jury you've got certain rights and certain obligations and certain work to do. Right now, you've got a right to decide for yourself based on your own moral judgment whether an individual lives or dies. There's nothing in the law is that requires a death penalty. Do you understand that?

A. Yes, I do.

Q. Do you agree with that?

A. Yes.

Q. If there's one vote for a life sentence under any circumstance there will not be a death penalty. Do you understand that?

A. Yes, I do.

Id. at 55–59. Hence, the record shows Malpass had the ability to consider mitigating evidence and the full range of punishment.

Renteria is not entitled to relief with respect to his claims concerning Malpass.

(2). Juror John Harton

Renteria also contends John Harton was seated after the "trial court endorsed an unconstitutional definition of mitigation" and was "unable to consider and give effect to mitigation." Pet'r's Pet. 38, ECF No. 53. Renteria claims the trial court's rulings caused Harton to believe that only the good qualities of a defendant could constitute mitigating evidence and that there must be a nexus between the offense and mitigating evidence. *Id.* at 39–40; Pet'r's Br. in Supp. 38 n.7, ECF No. 58. Renteria also claims trial counsel were ineffective for failing to exercise a peremptory strike as to Harton. Pet'r's Pet. 40.

Renteria did not raise any claim in state court alleging that the trial court erred during Harton's voir dire examination—or that his counsel were ineffective for failing to exercise a peremptory strike as to Harton. Consequently, Renteria's claims about juror Harton are unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. He has also not demonstrated cause for the default and actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

In any event, his claims are without merit.

During the State's voir dire examination, Harton stated that he would not be willing to vote in favor of the death penalty in a case where the defendant committed a murder while "high on methamphetamines." Reporter's R., vol. 13 (voir dire of John C. Harton), pp. 19–20, ECF No. 80-5. Harton also stated he would be willing to (1) vote in favor of a life sentence even after finding that a defendant was a future danger, (2) consider mitigating circumstances, and (3) consider the full range of punishment. *Id.* at pp. 32, 37, 54, 73, 75, 98. Harton expressed concern over executing innocent people and explained he had served as a juror in a criminal trial involving a DWI. *Id.* at 38, 40. Harton discussed his experience in

that trial, explaining that he reviewed the evidence "several times" and was "cautious" because he wanted to ensure he reached a proper verdict. *Id.* at 40.

On voir dire examination by Renteria's counsel, Harton did state he would only consider mitigating "factors that might affect the situation at the very moment the crime is being committed." *Id.* at 71. Later, Renteria's counsel sought clarification of Harton's statement. *Id.* at 82. The trial court intervened and the following exchange took place:

> THE COURT: In regard to -- in response to the question [by defense counsel]. You indicated that you could only consider mitigation concerning the events surrounding the commission of the offense. But if you look at this question, sir, it -- it -- tells you that you must take into consideration all the evidence, the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant. So --
>
> A. I guess --
>
> THE COURT: Like in things it involves things other than events surrounding the offense. Now, I heard that and I said, well, I wonder if Mr. Harton can -- can comply with the whole question? Are you going to reject evidence of defendant's character and background and his personal moral culpability? [B]ecause the only thing that you talked about is you can consider in response to your question remember is that first one, circumstances of the events. So, would you look at that and think about it.
>
> A. So, we're taking a look at the man's past, lifestyle, was he an outstanding member of society, had a good job, went to school, comes from a good family?
>
> THE COURT: Yeah.
>
> A. Or that sort of thing?
>
> THE COURT: I can't go into specific instances of what mitigation is because mitigation means different things to different people. You know, what is less bad to some folks might be real bad for other folks. It's entirely up to you. We can only tell you that to be a fair and impartial juror, you must be able to consider mitigating evidence in compliance with that question and including those type[s] of things like his character and background, the circumstances of the offense and the person's moral culpability. My question to you is you limited yourself when you said --
>
> A. I see. Yes, I do.

THE COURT: And if you feel that way, that's fine. And my question is can you consider those other things, his character and his background?

A. Yes, I can consider that.

THE COURT: Mr. Gandra [sic], follow. Go ahead.

Q. (By Mr. Gandara) All right. So that they have --

A. So, what you're saying is his background, his character, his moral culpability, all that will have a bearing on what happened at -- at the time of the murder that could have affected the reason why he committed that murder, is that what you're? I -- I could go along with that.

Q. It might or might not. And it doesn't have to have a bearing on what happened at the time of the murder in order to be considered by a juror to be mitigating.

MS. MERAZ: Objection, misstatement. It has to do -- there has to be a nexus between the two.

MR. GANDARA: Your honor, *Tennard v.*—

THE COURT: I'm going to overrule the objection.

MR. GANDARA: It doesn't have to be connected to the commission of the offense. Mitigation has been defined by -- by the Supreme Court, another court as being things that -- that in a juror's mind would -- that is of such a character that it might serve as a basis [f]or a sentence less than death.

MS. MERAZ: Objection, misstatement of the law.

THE COURT: As far as quoting any definition out of any cases, I'm going to sustain the objection. We shouldn't be -- the thing is can you consider mitigation as -- as required by that question is the ultimate issue, sir?

A. Yes, I can.

Id. at 82–84.

Later, during voir dire examination by the State, Harton offered an example of mitigating circumstances. He explained, in his experience in the military, he was aware that "community health nurses," child advocates, social workers, and mental health experts were assigned to investigate the home environment and background where a child was endangered.

Id. at 94. Harton said he was aware of cases where such children died in the care of their parents. *Id.* He added "when you take a look at those parents that killed [their] own child and you take a look at the background of those parents, those parents were abused and battered when they were kids, and that's the way they think they should bring up their kids." *Id.* Harton concluded he would consider the parents' abusive background in those cases to be mitigating circumstances. *Id.* at 94–95.

Renteria's counsel asked Harton how he would feel if he were the defendant and a juror with his state of mind served on his jury. *Id.* at 99. Harton answered the he would "feel comfortable because" he was fair and open-minded. *Id.*

Renteria's counsel challenged Harton for cause, stating that he could not give full effect to mitigation. *Id.* at 100–01. The trial court denied the challenge for cause. *Id.* at 101. Renteria's counsel did not exercise a peremptory strike, and Harton served as a juror. *Id.*

The record belies Renteria's claim the trial court "provided [Harton] an inaccurate and unconstitutional explanation of mitigation." Pet'r's Pet. 38, ECF No. 53. Indeed, the trial court gave an accurate definition of mitigating evidence, which was consistent with the jury instructions:

> THE COURT: Like in things it involves things other than events surrounding the offense. Now, I heard that and I said, well, I wonder if Mr. Harton can -- can comply with the whole question? Are you going to reject evidence of defendant's character and background and his personal moral culpability? [B]ecause the only thing that you talked about is you can consider in response to your question remember is that first one, circumstances of the events. So, would you look at that and think about it.
>
> . . . .
>
> THE COURT: I can't go into specific instances of what mitigation is because mitigation means different things to different people. You know, what is less bad to some folks might be real bad for other folks. It's entirely up to you. We can only tell you that to be a fair and impartial juror, you must be able to consider mitigating evidence in compliance with that question and

> including those type[s] of things like his character and background, the circumstances of the offense and the person's moral culpability.

Reporter's R., vol. 13 (voir dire of John C. Harton), pp. 82–83, ECF No. 80-5. And Harton spontaneously offered an example of a case involving mitigating circumstances where the defendant was raised in an abusive home. *Id.* at 94–95. Harton's example undercuts Renteria's assertion the trial court left Harton with the impression that mitigating circumstances only included "positive qualities of the defendant." Pet'r's Pet. 39, ECF No. 53.

The record also refutes Renteria's allegation that the trial court left Harton with the "false impression that there must be a nexus between mitigation and the offense." Pet'r's Pet. 40, ECF No. 53. The trial court overruled the State's objection asserting there must be a "nexus between" mitigating circumstances and the offense. Reporter's R., vol. 13 (voir dire of John C. Harton), p. 84, ECF No. 80-5. The trial court only sustained the State's objection to defense counsels' effort to recite a definition of mitigating circumstances from court opinions. *Id.* The State did not object to—and the trial court did not make any comment regarding—Renteria's counsel stating mitigating circumstances do *not* "have to be connected to the commission of the offense." *Id.*

Renteria does not explain how Harton could have been left with an incorrect impression about his ability to consider mitigating circumstances after his exchanges with the trial court. And Harton offered an appropriate example of a mitigating circumstance he would consider—an example which indicated he could consider mitigating circumstances which did not have a nexus with the offense. *Id.* at 94–95. For these reasons, all of Renteria's claims alleging that the trial court erred are without merit.

Finally, Renteria claims that trial counsel were ineffective for failing to exercise a peremptory strike as to Harton. Pet'r's Pet. 40, ECF No. 53.

Trial counsel may provide ineffective assistance by failing to exercise a peremptory strike where a venire member "clearly demonstrates actual bias, with no reassurance that she would attempt impartiality." *Seigfried v. Greer*, 372 F. App'x 536, 540–41 (5th Cir. 2010) (citing *Virgil v. Dretke*, 446 F.3d 598, 610 (5th Cir. 2006)). But, trial counsel are presumed to exercise peremptory strikes based on a reasonable trial strategy. *Morales v. Thaler*, 714 F.3d 295, 305 (5th Cir. 2013). And that presumption applies even where trial counsel chooses not to strike a venire member who admitted they would "probably" be biased against the defendant. *Id.*

"Informed strategic decisions of counsel are given a heavy measure of deference and will not be second guessed." *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999). Renteria makes no effort to rebut the presumption that trial counsel exercised a reasonable strategy in deciding not to strike Harton. Indeed, Renteria's counsel no doubt noted Harton's responses to several questions suggested he would serve as a favorable juror. For example, Harton stated that he would consider a defendant's abusive background as a mitigating circumstance. Reporter's R., vol. 13 (voir dire of John C. Harton), pp. 94–95, ECF No. 80-5. Renteria's counsel knew they would present evidence regarding domestic abuse in Renteria's childhood home. Harton also indicated he would consider a defendant's substance abuse as a mitigating circumstance. *Id.* at 19–20. Renteria's counsel knew they would present evidence regarding Renteria's alcohol abuse. Further, Harton suggested he would be a defense-friendly juror because he was "open-minded." *Id.* at 99. Finally, Harton relayed his prior experience on a criminal jury during which he claimed he carefully reviewed the evidence and was "cautious" to ensure a proper verdict. *Id.* at 40.

Renteria does not attempt to demonstrate that his counsel were ineffective for deciding that—based on the above responses—Harton would be an acceptable juror. For the

same reason, Renteria fails to demonstrate prejudice from trial counsels' decision not to exercise a peremptory strike as to Harton. Therefore, Renteria's claim that his counsel were ineffective for failing to exercise a peremptory strike as to Harton is meritless.

Renteria is not entitled to relief with respect to his claims concerning Harton.

(3). Juror Norman Thomas

Renteria asserts Norman Thomas was seated after the trial "court endorsed [an] unconstitutional definition of mitigation" and was "unable to consider and give effect to mitigation." Pet'r's Pet. 48, ECF No. 53. Renteria claims the trial court improperly sustained the State's objection to his counsel's statement to Thomas that the mitigation special issue is "based on [his] personal moral judgment on what [he] think[s] is mitigation." Pet'r's Pet. 43–44, ECF No. 53.

Renteria did not raise a claim in state court regarding Thomas. Renteria's claim is, therefore, unexhausted and procedurally defaulted in this Court. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. He has also not demonstrated cause for the default and actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Furthermore, the record does not support a conclusion the trial court endorsed an unconstitutional definition of mitigation during Thomas's voir dire. It also does not support a conclusion that Thomas was unable to give effect to mitigation evidence. With regard to the issue of personal moral judgment, the following exchange occurred:

> Q. [Defense Counsel Jaime Gandara] That the decision on whether to -- whether to give a life sentence or a death penalty in a capital murder case is the individual decision of each juror.
>
> A. Correct.

Q. And -- and it's based on -- on when you get down to questions of talking about mitigation, it's based on your personal moral judgment on what you think is mitigation and what you think --

MS. HUGHES: Objection Your Honor. It -- it's based on the evidence that's presented in the courtroom. It's an improper question.

THE COURT: I'm going to sustain the objection.

Q. (By Mr. Gandara) All right. You -- you know that nobody can tell you how to decide a case when you're in the jury room.

A. Correct.

Q. Correct, Okay. And you know that it's likely that you might be instructed and might already have been in the case you already sat in as a juror that you're not supposed to surrender your honest conviction.

A. Correct.

Q. -- about the case just -- in order to reach a verdict --

A. Correct.

Q. All right. And so -- so when you're in there you're operating on your own values and your own experiences and you're operating as an individual human being, correct?

A. Disagree with that.

Q. Tell me how.

A. Well, you're saying on my own values. I mean correct me if I'm wrong.

Q. Uh-huh.

A. Don't I have to set what I feel is right or wrong and review all the evidence versus what I think.

Q. And --

A. Do you understand what I'm saying?

Q. And -- and then how do you -- how do you gauge the evidence?

A. How its presented to me.

Q. Yeah, what's your scale but I mean once you're judging it what's the --

MS. HUGHES: Objection, Your Honor.

Q. Whose scale is it?

MS. HUGHES: Calls for contracting.

THE COURT: Sustained.

Q. (By Mr. Gandara) Are you going to use somebody else's intellect and somebody else's personality and somebody else's brain --

MS. HUGHES: Same objection --

Q. -- to -- to make decisions

THE COURT: I'm going to sustain the objection.

Q. (By Mr. Gandara) All right. All right. Let me ask you this. If you're on a jury and you've listened to the evidence okay and you feel -- and you've come to the conclusion that the State has not convinced you beyond a reasonable doubt that the defendant is going to be a future danger. And you're one out of 12 and the other 11 feel differently. And you feel honestly about the evidence that you've heard and that's your honest conviction about it, are you going to surrender?

A. No sir.

Reporter's R., vol. 13 (voir dire of Norman Thomas), pp. 253–56, ECF No. 80-5.

While it is true a jury must be provided a vehicle for expressing its reasoned moral response, the jury's reasoned moral response must be in response to the defendant's mitigating evidence. *See Abdul-Kabir*, 550 U.S. at 252–54. Consequently, Renteria fails to show that the trial court erred in sustaining the State's objection to his counsel's suggestion to Thomas that his verdict would be based solely on his values and experiences unconnected to any evidence.

Renteria is not entitled to relief on his claims concerning Thomas.

(4). Juror Brett Williams

Renteria claims Brett Williams was seated while he was "unable to consider and give effect to mitigation." Pet'r's Pet. 49, ECF No. 53. Renteria notes the trial court would not permit Renteria's counsel to question Williams whether he would consider specific factors as mitigating evidence. *Id.* at 45–46.

Renteria did not raise any claim in state court regarding juror Williams. Renteria's claim is, therefore, unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. He has also not demonstrated cause for the default and actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Nevertheless, Renteria's claim is without merit. Renteria makes the conclusory assertion that "federal law permits the questions counsel proposed." Pet'r's Pet. 45, ECF No. 53. The Fifth Circuit has held that a trial court may disallow a defendant's "attempt to improperly commit" a prospective juror "to a certain view regarding mitigating evidence anticipated to be presented in his case." *Soria*, 207 F.3d at 244. Consequently, Renteria fails to show that the trial court erred when it would not allow his counsel to question Williams about whether he would consider specific factors as mitigating evidence. Further, Renteria fails to show that Williams would not, in fact, consider mitigating evidence. Reporter's R., vol. 14 (voir dire of Brett Williams), p. 55, ECF No. 80-6 (affirming he would consider mitigating evidence in answering the special issues).

Renteria is not entitled to relief based on his claims concerning Williams.

(5). Juror Roxanne Castricone

Renteria asserts Roxanne Castricone was seated after the trial "court endorsed unconstitutional definition of mitigation" and "was unable to consider mitigation." Pet'r's

Pet. 50, ECF No. 53. He claims his counsel were ineffective for failing to object to the State's definition of mitigating evidence as "anything you find that tends to make the crime less bad or make it not so bad." Pet'r's Pet. 55; Br. in Supp. 39 n.10, ECF No. 58. He also claims that the trial court erred in disallowing trial counsel from providing Castricone a definition of mitigating evidence. Pet'r's Pet. 55.

Renteria's claims about Castricone are unexhausted and procedurally defaulted because he did not raise any claim in state court as to the voir dire examination of Castricone. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. He has also not demonstrated cause for the default and actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Additionally, his claims are without merit. During the State's voir dire examination of Castricone, the prosecutor described mitigating evidence as something which makes you think the defendant deserves to live:

> [Sufficient mitigating circumstances are] what the jury is looking for. And the question tells the jury, look at all the evidence. Basically, look at it all again. Okay. Look at everything and decide whether you think there is some reason, some fact, some circumstances, some whatever that makes you think this person deserves life instead of death. So, an answer of yes on this question results in life in prison. Okay.
>
> So, go ahead -- and we can look at the question whether taking into consideration all the evidence including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant. There is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death penalty imposed . . . . Okay. And it can be anything you find that tends to make the crime less bad or make it not so bad. Okay?

Reporter's R., vol. 19 (voir dire of Roxanne Castricone), p. 47, ECF No. 80-11.

The State accurately told Castricone that mitigating evidence included evidence regarding a defendant's character and background and the circumstances of the offense. Renteria does not show that the prosecutor's statements were objectionable. Renteria also

fails to show his counsel were deficient for failing to object to the State's discussion of mitigating evidence. Further, Renteria's counsel discussed mitigating evidence with Castricone using similar terms:

> Q. [Defense Counsel Jaime E. Gandara] Okay. Now, are you able to consider -- let's -- let's look at this here. What -- you say that you got an idea [of] what mitigation is?
>
> Second question is whether taking into consideration all the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant. Is there sufficient mitigating circumstance or circumstances to warrant the sentence of life imprisonment rather than a death sentence be imposed? Okay. Now, does that tell you that mitigation is just something that makes a crime less bad?
>
> MS. HUGHES: Objection, Your Honor. That's contracting.
>
> MR. GANDARA: Your Honor, if I may respond. Counsel for the State asked this juror questions with that definition of mitigation. Do you think you see that there's something that makes the crime less bad? And I'm just asking this juror if she is limited in her consideration of mitigation to something that makes the crime less bad, because it's obvious from question two that that's not the case.
>
> THE COURT: I'm going to sustain the objection.
>
> MR. GANDARA: All right.
>
> Q. Do you -- do you consider -- re you able to consider if you're on this jury, you've answered yes to question one. Are you able to consider all the evidence that -- that you've heard [i]n trial and determine if there's something in that, that to you is such a character that it might serve as a basis for a sentence less than death? In other words, are you able to examine all the evidence and see if there's anything there that says to you I think that means I should -- I should not kill --
>
> A. Yes.
>
> Q. -- Renteria? All right. You're able to do that?
>
> A. Yes.

Id. at 63–64.

Because Castricone was asked whether she could consider *all* of the evidence presented in determining whether a sufficient reason existed to impose a life sentence—and she answered that she could—Renteria fails to show that Castricone was an objectionable juror, that she had a misapprehension regarding the mitigation special issue, that the trial court erred in disallowing trial counsel's question, or that he was harmed by the alleged error. For the same reason, Renteria fails to show that his counsel were deficient or that he was prejudiced by the alleged deficiency.

Therefore, the claims are without merit and he is not entitled to habeas relief.

(6). Juror Washington Watley Jr.

Renteria maintains Washington Watley Jr. was seated after Renteria challenged him for cause "on the grounds he is biased and cannot be impartial because he has two young daughters, and because he would automatically believe and lend more credibility to law enforcement officers." Pet'r's Pet. 86, ECF No. 53. "[T]he trial court overruled the challenge for cause, and because the defendant had exhausted all peremptory challenges, Mr. Watley was seated as a juror." *Id.*

Watley expressed an opinion regarding the credibility of police officers in his response to Question 205 in the juror questionnaire:

> 205. Would you automatically believe the testimony by a law officer simply because he/she is a law enforcement officer? [X] YES [ ] NO
> Please explain: There [sic] are held to a higher standard and should only present the facts as known with no opinion.

Renteria v. State (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *151.

During questioning by Renteria's counsel about the credibility of police officers, Watley stated he could stay open-minded about the testimony of police officers:

> Q. [Defense Counsel Edythe Payan] So you are open on the possibility of an officer, a policeman in uniform could get up there take the oath and lie and make things up?

A. I've known it to happen.

Reporter's R., vol. 37 (voir dire of Washington Watley Jr.), p. 116, not scanned in ECF.

Watley also reported, in his answer to Question 216 of the questionnaire, that he had to two daughters close in age to the victim:

> 216. Is there anything not covered in this questionnaire that you feel either of the attorneys or the judge should know so that your ability to be a fair and impartial juror can be evaluated Please explain.
> "Thought [sic] I do have 2 daughters I believe I can be a fair and impartial Juror. Emotional could run high but I'm more of a 'thinker' than a 'Reactor'"

Renteria v. State (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *152.

During questioning by the State, Watley claimed he could be fair despite having two daughters close in age to the victim. Reporter's R., vol. 37 (voir dire of Washington Watley Jr.), p. 90, ECF No. 80-11.

Renteria moved to challenge Watley for cause because (1) his response to Question 205 suggested he could not be impartial about the credibility of a law enforcement witnesses, and (2) his response to Question 216 suggested he could be biased and unable to fairly decide the case due to his concern about his two daughters. The trial court denied the challenge. *Id.* at pp. 118–119. Renteria could not exercise a peremptory challenge because he had already exhausted his allotted challenges.

Renteria argued on direct appeal that the trial court erred in denying his challenge for cause. He claimed Watley was biased in favor of the State because he would tend to give credibility to law enforcement officers and he had two young daughters. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *151–*154.

The Texas Court of Criminal Appeals rejected his claim.

A federal habeas corpus court must initially presume a jury is impartial. *Smith v. Phillips*, 455 U.S. 209, 218 (1982). A state trial court's refusal of a petitioner's challenge for

cause—which inherently constitutes a finding of impartiality—is entitled to the presumption of correctness found in 28 U.S.C. § 2254(e)(1). *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9 (2007) (citation omitted).

The trial court's implicit factual determination that Watley could be fair and impartial has support in the record. Watley stated he could stay open-minded about police testimony. Watley also claimed he could be fair despite having two daughters close in age to the victim. The record is insufficient to show that Watley harbored a disqualifying bias.

Because Renteria has not presented clear and convincing evidence to overcome the trial court's finding that Watley could be impartial, this finding is presumed correct. 28 U.S.C. § 2254(e)(1). As such, this Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Renteria has not met this showing, and he does not otherwise demonstrate that the state court's decision to reject his constitutional claim was erroneous. It follows that Renteria is not entitled to relief with respect to this claim.

To the extent Renteria raises any claim other than that raised on direct appeal, such a claim is unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. Further, he does not demonstrate cause for any default or actual prejudice arising from the default—or show the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Renteria is not entitled to relief based on his claims concerning Watley.

(7). Juror Jeanette Sanchez

Renteria claims Jeanette Sanchez was seated following her statement "she would sentence a defendant to death after determining he was a future danger." Pet'r's Pet. 87, ECF No. 53. Renteria challenged Sanchez "for cause on the basis that she was unable to follow the law regarding sentencing." *Id.* at 89. The trial court denied the challenge for cause. *Id.* Renteria argues the trial court erred because Sanchez was unable to follow the law regarding sentencing.

Renteria also argued on direct appeal that the trial court erred in denying his challenge for cause as to Sanchez because she would not consider the mitigation special issue after answering the future dangerousness special issue affirmatively. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *98–*102.

The Court of Criminal Appeals rejected his claim:

> Sanchez ... clarified her understanding as she explained the process for determining punishment in her own words. She stated that "if all 12 of us agree that he will be [a future danger], we have to then go down to number two and revisit all the evidence again ... to see if there's anything that anybody objects to ... any little nagging detail that they may have thought this may have been a mitigating circumstance." She added, "If we decide there that there are no mitigating circumstances, then it's the death penalty." And she also acknowledged that all twelve jurors must find no mitigating circumstances and that "it has to be unanimous" to result in the death penalty.
>
> Finally, defense counsel asked Sanchez, "[I]f you get to question two ... are you willing to consider elements of the defendant's character and background to see if there's any mitigating circumstance there that would warrant a life sentence rather than a death penalty?" Sanchez responded in the affirmative. Defense counsel then challenged Sanchez for cause because "[s]he stated several times that once she had determined that there was a yes answer to the future danger question, that was the end of the inquiry and that was the death penalty case." Defense counsel further argued that the prosecutor failed to sufficiently "rehabilitate" Sanchez. The trial judge denied the challenge for cause, finding that "from the totality of the inquiry of the State and Defense that the juror understands the process" and that "she understands what's required of her under the law." The trial judge denied defense counsel's request for additional peremptory challenges. Defense counsel protested that Sanchez was an objectionable juror that he would have struck if the trial court

> had granted him another peremptory challenge. Sanchez was seated on the jury.
>
> The trial judge's ruling is supported by the totality of the record. Sanchez ultimately stated that she understood and could follow the law with regard to the mitigation special issue. Thus, the trial judge did not abuse her discretion in denying Renteria's challenge for cause.

Renteria II, 2011 WL 1734067, at *23–*24.

Renteria rejects this holding, asserting Sanchez indicated on several occasions she would not consider mitigating evidence:

> This holding is unreasonable . . . as demonstrated by the record and Ms. Sanchez's own repeated assertions to the contrary. Ms. Sanchez said numerous times that she would vote for the death penalty after finding the defendant to be a future danger, even after counsel painstakingly reviewed the process of answering Special Issue 1 and then Special Issue 2 with her. She also inaccurately described mitigation as a "little magic detail that -- that's just bugging us about it … something maybe bothering me or something may be bothering somebody else about the case."

Pet'r's Reply 69, ECF No. 94 (citing Reporter's R., vol. 41, not scanned into ECF).

But as the Court noted above, a state trial court's refusal of a petitioner's challenge for cause—which inherently constitutes a finding of impartiality—is entitled to the presumption of correctness found in 28 U.S.C. § 2254(e)(1). *Patton*, 467 U.S. at 1038. Renteria's disagreement with the holding of the Court of Criminal Appeals does not overcome the presumption, especially when, as here, the holding is supported by evidence in the record. Consequently, the Texas Court of Criminal Appeals' rejection on the merits of Renteria's claims regarding the trial court denying his challenge for cause against Sanchez was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. Moreover, the decision was not based upon an unreasonable determination of the facts considering the evidence presented in Renteria's trial, direct appeal, and state habeas corpus proceedings.

To the extent Renteria raises any other claim about the voir dire examination of Sanchez, such a claim is unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. Further, he does not demonstrate cause for any default or actual prejudice arising from the default—or show the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Renteria is not entitled to relief based on his claims concerning Sanchez.

e. Peremptorily Challenged Venire Members

Renteria also claims the trial court placed unconstitutional and improper limitations on his voir dire of the following peremptorily challenged prospective jurors: Annette Brigham; Elizabeth Black; Anna L. Nava; Howard R. Bryan; John Tobias; Robert Wayne Crosby; Robert P. Tomes; Evangeline Rose Ramirez; Carlos Martinez; Daniel Gurany; Cruz Angel Ochoa, Jr.; Longino Gonzalez, Jr.; Mark Robert Williams; Mark Anthony Tapia; Paul Steven Watt; John David Turner; Leslie D. Potter; John P. Deslongchamps; Joaquin Rivera; Lorena Carreon; and Margaret Jackson. Pet'r's Br. in Supp. 41–45, ECF No. 58. Renteria also contends that, because he "exhausted all his peremptory strikes . . . and . . . two incompetent jurors were seated [Washington Watley, Jr. and Jeanette Sanchez], the court's failure to grant this challenge for cause warrants reversal." Pet'r's Reply 43, ECF No. 94

(1). Venire Member Anette Brigham

Renteria claims the trial court erred in sustaining the State's objection to his counsels' questions regarding prospective juror Brigham's potential bias. Pet'r's Pet. 46–48, ECF No. 53. "Despite Ms. Brigham's admission that she was molested as a child, the trial court erred in not allowing counsel to question her about the bias she could have in sentencing a defendant who killed, and perhaps sexually assaulted, a child and had previously been

convicted of indecency with a child." Pet'r's Reply 48, ECF No. 94. Renteria also claims the trial court erred in improperly telling Brigham she could not use her own personal moral judgment in answering the special issues. Pet'r's Pet. 47.

In point of error four in his direct appeal, Renteria argued the trial judge improperly restricted his voir dire questioning of Brigham. *Renteria II*, 2011 WL 1734067, at *8. He complained the trial judge refused to permit an open-ended question about the hypothetical parameters for Brigham's decision-making in a case involving sexual abuse of a child. *Id.* at *9 (citing *Standefer*, 59 S.W.3d at 180). Renteria asserted—as a result—he could not intelligently exercise peremptory challenges and challenges for cause, and he was denied his constitutional rights to due process and effective assistance of counsel.

The Court of Criminal Appeals noted the trial judge limited her ruling to the form of Renteria's question, not its substance. *Id.* (citing *Howard v. State*, 941 S.W.2d 102, 111 (Tex. Crim. App. 1996) (explaining a defendant is not entitled to any particular form of question; rather, a defendant is authorized to ask "proper" questions in a particular area of inquiry)). In fact, the trial judge suggested that defense counsel ask Brigham directly whether she could be fair and impartial in light of her past experience. Defense counsel later asked Brigham if, "given [her] experiences," there was "anything that would affect [her] ability to sit as a juror and be impartial." *Id.* By rephrasing the question, defense counsel was able to elicit whether Brigham could be impartial despite experiencing a childhood sexual assault. *Id.* (citing *Howard*, 941 S.W.2d at 109) (finding no improper voir dire restriction when a trial court limited its ruling only to the form of the questions and not to their substance). The Court of Criminal Appeals overruled Renteria's point of error four.

Renteria now claims the "inquires . . . were far too cursory to root out bias." Pet'r's Reply 49, ECF No. 94.

During the voir dire examination by the State, Brigham stated she would be willing to consider the full range of punishment in a case involving the capital murder of a child under the age of six years old. Reporter's R., vol. 13 (voir dire of Anette Brigham), p. 132, ECF No. 80-5. She acknowledged that she was the victim of child molestation when she was in elementary school. *Id.* at 135. The prosecutor asked whether, considering that, she would be able to decide this case fairly based on the evidence. *Id.* at 137. Brigham stated that she did not "see a real correlation between the two" and that she could decide the case fairly based on the evidence. *Id.*

Renteria's counsel asked Brigham, "based on where you sit, given your experiences, given who you are, do you feel that there's anything that would affect your ability to sit as a juror and be impartial?" *Id.* at 197. Brigham answered, "[n]o." *Id.* She also stated that she could "listen to both sides," despite her experience as a child. *Id.* at 198–200.

Renteria's counsel also told Brigham, "this is going to come down to your own personal moral judgment, your own values, what you believe might fall into that just as your religious beliefs or your own personal values." *Id.* at 195. The State objected, stating the jury's verdict has "to be based on the evidence." *Id.* The trial court sustained the objection. *Id.* Trial counsel later stated, "whatever evidence you hear that—that falls into your personal views, that would be evidence that you can apply to [the mitigation special issue]." *Id.* at 196. Brigham agreed. *Id.*

The record shows the trial court asked the venire members to complete a lengthy questionnaire and allowed counsel latitude in asking potential jurors questions. The Court's independent review of the entirety of defense counsel's voir dire–including defense counsel's voir dire of Brigham—leads to a reasonable conclusion it was enough to permit Renteria's counsel to determine whether Brigham's views "would prevent or substantially impair the

performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" *Wainwright*, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45). Renteria was entitled to nothing more. *See Soria*, 207 F.3d at 244.

Further, the jury must give a "reasoned moral response" to a defendant's mitigating evidence. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252–54 (2007). Indeed, the Supreme Court has held that an "anti-sympathy" jury instruction is constitutionally permissible because "[w]hether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Saffle v. Parks*, 494 U.S. 484, 492–93 (1990).

Because Renteria has not presented clear and convincing evidence to overcome the Court of Criminal Appeals' conclusion the trial judge did not improperly restricted his voir dire questioning of Brigham, this finding is presumed correct. 28 U.S.C. § 2254(e)(1). As such, the Court cannot grant federal habeas relief, since the conclusion was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). It follows that Renteria is not entitled to relief with respect to this claim.

Further, Renteria's counsel exercised a peremptory strike as to Brigham. Reporter's R., vol. 13, p. 203, ECF No. 80-5. "So long as the jury that sits is impartial, the fact that [the petitioner] had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Ross*, 487 U.S. at 88; *Soria*, 207 F.3d at 241–42. "The failure properly to grant a challenge for cause rises to the level of a constitutional violation and warrants reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. Absent such a showing, the defendant has not been

denied his Sixth Amendment right to an impartial jury." *United States v. Webster*, 162 F.3d 308, 342 n.36 (5th Cir. 1998).

Finally, to the extent Renteria raises claims other than those raised on direct appeal, they are unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. Renteria does not demonstrate cause for any default or actual prejudice arising from the default—or show the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Renteria is not entitled to relief based on his claims concerning Brigham.

(2). Venire Members Elizabeth Black; Anna L. Nava; Howard R. Bryan; and John Tobias

Renteria claims the trial court improperly prohibited his counsel from asking Elizabeth Black whether she could consider specific factors—such as a defendant's substance abuse, family history, emotional problems, background, upbringing, character, or the circumstances of the offense—as mitigating evidence. Pet'r's Pet. 40–42, ECF No. 53. As a result, he says he was forced to exercise a peremptory strike as to Black. Reporter's R., vol. 12 (voir dire of Elizabeth Black), p. 133, ECF No. 80-4.

Renteria maintains "[t]he trial court erred in denying Petitioner's challenge for cause against [Anna L.] Nava because she was unable to follow the law, either in considering and giving effect to mitigating evidence or by automatically imposing the death penalty for anyone convicted of killing a child." Pet'r's Reply 58–59, ECF No. 94.

Renteria contends "[t]he trial court erred in denying Petitioner's challenge for cause against [Howard R.] Bryan because he has a law enforcement bias and favors the state." *Id.* at 60. He further contends "[t]he trial court also erred in prohibiting counsel from conducting a full and constitutional voir dire to permit development of challenges for cause and the intelligent use of peremptory challenges. *Id.*

Renteria claims "[t]he trial court erred in denying Petitioner's challenge for cause against [John] Tobias because he would automatically vote for the death penalty for certain crimes and could not consider and give effect to mitigating evidence." *Id.* at 62.

In points of error five through eight in his direct appeal, Renteria argued the trial judge improperly restricted his voir dire questioning of prospective jurors Black, Nava, Bryan, and Tobias. *Renteria II*, 2011 WL 1734067, at *9. He complained the trial judge prevented him from asking these prospective jurors if they were "biased against specific evidence that the defense intend[ed] to introduce in mitigation." *Id.* He asserted—as a result—he was unable to "intelligently exercise peremptory challenges and challenges for cause" and was "effectively deprived . . . of effective assistance of counsel." *Id.* The Court of Criminal Appeals explained "[a] prospective juror is not challengeable for cause simply because he or she does not consider a particular type of evidence to be mitigating." *Id.* at *11 (citing *Standefer*, 59 S.W.3d at 181). It further explained "[w]hether a juror considers a specific evidence mitigating is not a proper area of inquiry." *Id.* The Court of Criminal Appeals overruled Renteria's points of error five through eight.

Renteria now asserts he "had a right to an impartial jury and to adequate voir dire in order to identify unqualified jurors." Pet'r's Reply 46, ECF No. 94. He argues that without being able to present Black, Nava, Bryan, and Tobias with any examples of mitigating evidence, his counsel had no way of discerning whether they were qualified. *Id.* at 46, 59, 61, 62. He also maintains the Court of Criminal Appeals' "holding as to Mr. Bryan's bias in favor of law enforcement is also unreasonable." *Id.* at 61.

The Court discussed using examples of mitigating evidence during voir dire in section D above. The Court opined, although a court must afford a defendant an opportunity to present mitigating evidence at the punishment phase of a capital trial, the fact that a juror

might view the evidence as aggravating—as opposed to mitigating—does not implicate the Eighth Amendment. *Johnson*, 509 U.S. at 368. So "a defendant in a capital case is not entitled to challenge prospective jurors for cause simply because they might view the evidence the defendant offers in mitigation of a death sentence as an aggravating rather than a mitigating factor." *Dorsey*, 494 F.3d at 533. Thus, Renteria's claim that the trial court deprived him of the ability to discover the basis for a challenge for cause—through questions which would help his counsel determine whether potential jurors viewed specific evidence as mitigating or aggravating—is without merit.

The Court may grant federal habeas relief only if the conclusion of the state court "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Because Renteria has not presented clear and convincing evidence to overcome the Court of Criminal Appeals' conclusion the trial judge did not improperly restrict his voir dire questioning of Black, Nava, Bryan, and Tobias, this finding is presumed correct. 28 U.S.C. § 2254(e)(1). It follows that Renteria is not entitled to relief with respect to this claim.

Further, Renteria's counsel exercised peremptory strikes as to Black, Nava, Bryan, and Tobias. Therefore, any complaint about the trial court's rulings as to these potential jurors is necessarily without merit. *Soria*, 207 F.3d at 241–42.

Finally, to the extent Renteria raises any claim other than that raised on direct appeal, such a claim is unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. Renteria has not demonstrated cause for any default or actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Renteria is not entitled to relief based on his claims concerning Black, Nava, Bryan, and Tobias.

(3). Venire Members Robert Wayne Crosby and Robert P. Tomes

Renteria claims "[t]he trial court erred in denying Petitioner's challenge for cause against Mr. Crosby because he would automatically sentence a defendant to death after finding him to be a future danger." Pet'r's Reply 58–59, ECF No. 94. He further claims "[t]he trial court also unconstitutionally prohibited questioning regarding matters that would have led to a challenge for cause. Here, specifically, it was unclear that Mr. Crosby could consider the full range of punishment." *Id.* In this case, according to Renteria, "the full range of punishment . . . included the possibility of parole." *Id.* at 63.

Renteria also claims "[t]he court erred in denying Petitioner's challenge for cause against Mr. Tomes because he could not consider a punishment of life with the possibility of parole for someone convicted of killing a child." *Id.* at 63. He adds "[t]he trial court also erred in prohibiting counsel from conducting a full and constitutional voir dire that included the right to explicitly inquire as to Mr. Tomes' (and every other veniremember's) ability to consider the full range of punishment in this case. *Id.* (citing U.S. Const. amends. VI, VIII, and XIV); *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004 ("the trial judge's denial of a mistrial based on the juror's withholding of material information . . . violates the constitutional right of a trial by an impartial jury")).

In points of error nine and ten in his direct appeal, Renteria argued the trial judge improperly restricted him from questioning prospective jurors Crosby and Tomes about parole eligibility. *Renteria II*, 2011 WL 1734067, at *16. He claimed—as a result—he was "denied the ability to intelligently exercise his peremptory strikes" and "effectively deprived . . . of effective assistance of counsel." *Id.*

The Court of Criminal Appeals noted "[t]hese proposed questions were similar to the questions at issue in *Sells*." *Id.* at *18 (citing *Sells*, 121 S.W. 3d at 756–57 ("any attempt to commit prospective jurors to giving mitigating, aggravating, or even no effect to the parole instruction [was] impermissible."). It also noted the trial court ultimately asked Crosby whether he could follow the instructions on parole. *Id.* Consequently, the Court of Criminal Appeals concluded the trial judge had not abused her discretion by prohibiting the proposed questions. *Id.* The Court of Criminal Appeals overruled points of error nine and ten.

Renteria now argues that while he may not be entitled to question venire members about their views on parole laws, "he *is* entitled to question venire members regarding their ability to consider the full range of punishment, and for Mr. Renteria that included the possibility of parole." Pet'r's Reply 64, ECF No. 94 (emphasis in original).

In a criminal trial in Texas, "both the [defendant] and the State ha[ve] the right to have jurors who believe in the full range of punishment." *Woodkins v. State*, 542 S.W.2d 855, 862 (Tex. Crim. App. 1976). The right of the defendant arises from Texas Code of Criminal Procedure article 35.16(c)(2), and the right of the State arises from article 35.16(b)(3). *Smith v. State*, 573 S.W.2d 763, 764 (Tex. Crim. App. 1977), *overruled by Hernandez v. State*, 757 S.W.2d 744 (Tex. Crim. App. 1988); *Weaver v. State*, 476 S.W.2d 326, 327 (Tex. Crim. App. 1972). "Thus, if it is established that the [defendant] was forced, over objection, to have a juror sit on his case who could not consider the full range of punishment, a reversal of the cause would be warranted." *Smith*, 573 S.W.2d at 764.

In this case, Renteria exercised peremptory challenges against Crosby and Tomes. They did *not* "sit on his case." And, as discussed in Section C – Claim III above, the trial court instructed those who did sit on his case about the possibility of parole, in accordance with Texas Code of Criminal Procedure article 37.071 § 2(e)(2)(B).

The Court may grant federal habeas relief only if the conclusion of the state court "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Because Renteria has not presented clear and convincing evidence to overcome the Court of Criminal Appeals' conclusion the trial judge did not improperly restrict his voir dire questioning of Crosby and Tomes about the possibility of parole, this finding is presumed correct. 28 U.S.C. § 2254(e)(1). It follows that Renteria is not entitled to relief with respect to this claim.

Further, Renteria's counsel exercised peremptory strikes as to Crosby and Tomes. Therefore, any complaint about the trial court's rulings as to these potential jurors is necessarily without merit. *Soria*, 207 F.3d at 241–42.

Finally, to the extent Renteria raises any claim other than that raised on direct appeal, such a claim is unexhausted and procedurally defaulted. *Ruiz*, 460 F.3d at 642–43; *Nobles*, 127 F.3d at 420. Renteria has not demonstrated cause for any default or actual prejudice arising from the default—or showed the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50.

Renteria is not entitled to relief based on his claims concerning Crosby and Tomes.

(4). Venire Members Evangeline Rose Ramirez; Carlos Martinez; Daniel Gurany; Cruz Angel Ochoa, Jr.; Longino Gonzalez, Jr.; Mark Robert Williams; Mark Anthony Tapia; Paul Steven Watt; John David Turner; Leslie D. Potter; Margaret Jackson, Lorena Carreon; and John P. Deslongchamps

Renteria avers the trial court improperly disallowed his counsel from asking Evangeline Rose Ramirez whether she would consider mitigating evidence if the defendant "had a prior indecency with a child conviction." Pet'r's Pet. 55–57, ECF No. 53. He argues "[t]he trial court erred in denying Petitioner's challenge for cause against Ms. Ramirez, who

unequivocally stated that she would automatically sentence someone to death without considering mitigation after answering "yes" to Special Issue 1." Pet'r's Reply 54, ECF No. 94.

Renteria maintains his trial counsel were ineffective for failing to object to the State's "erroneous and unconstitutional definition of" mitigating evidence during the voir dire of Carlos Martinez. Pet'r's Pet. 53–54, ECF No. 53. "Moreover, the trial court erred in failing to grant Petitioner's challenge for cause based on (1) Mr. Martinez's belief that if a defendant did not testify about his remorse, Mr. Martinez 'probably wouldn't have any choice' but to vote for a death sentence; and (2) his belief, based on his religious conviction, that 'an eye for an eye' justifies the automatic imposition of a death sentence." Pet'r's Reply 54, ECF No. 94.

Renteria alleges "the trial court erred in denying counsel's challenge for cause because [Daniel] Gurany would impose the death penalty where a defendant's schools and parents had failed him and the defendant had 'failed himself." *Id.* at 65. He argues the Court of Criminal Appeals' rejection of this claim "was unreasonable . . . as they relied on a simple 'yes' given in response to the question of whether Mr. Gurany would be willing to consider Petitioner's character and background in answering the mitigation special issue . . ." *Id* at 65–66.

Renteria contends the trial court erred in denying his "challenge for cause against [Cruz Angel] Ochoa [Jr.] because he was unable to follow the law and consider a life sentence for someone convicted of killing a child under six or consider and give effect to mitigating evidence once he found a defendant to be a future danger." *Id* at 59.

Renteria claims Longino Gonzalez "felt death was the appropriate sentence for someone convicted of killing a child under six years old." Pet'r's Pet. 65, ECF No. 53. He

adds Gonzalez "formed an opinion that death was the appropriate punishment" when he first learned about the case in the media. *Id.*

Renteria asserts "[t]he trial court improperly denied the challenge for cause against Mr. [Mark Robert] Williams because (1) Mr. M. Williams felt death was the appropriate penalty for anyone found guilty of killing a child under the age of six; and (2) he could not guarantee that his preconceived notions of the case would not influence his verdict." Pet'r's Reply 51, ECF No. 94.

Renteria alleges "[t]he trial court erred in denying Petitioner's challenge for cause against [John] Tobias because he would automatically vote for the death penalty for certain crimes and could not consider and give effect to mitigating evidence." *Id.* at 62.

Renteria claims "[Margaret] Jackson expressed that her personal history and attitude toward child abuse and family abuse would prevent her from being fair and impartial." Pet'r's Pet. 79, ECF No. 53. He further claims "[t]he trial court denied [his] challenge, and [his] counsel was forced to exercise a peremptory challenge." *Id.* at 80.

Renteria maintains "[t]he trial court erred in denying Petitioner's challenge for cause against [Lorena] Carreon because she could not consider and give effect to mitigating evidence as required under *Penry I* if the circumstance of the crime were heinous." Pet'r's Reply 57, ECF No. 94.

Renteria complains Mark Anthony Tapia had a predetermined punishment verdict concerning the future dangerousness special issue, was unable to consider mitigating evidence, and indicated he would improperly shift the burden of proof regarding the mitigation special issue to Renteria. Pet'r's Pet. 36–38. He also claims that the trial court improperly disallowed his counsels' question to Tapia regarding his willingness to consider mitigating evidence. *Id.* at 37.

Renteria maintains his constitutional rights were violated "[b]ecause the [trial] court prevented [his] counsel from questioning [Paul Steven Watt and other] jurors about how evidence of a prior conviction for indecency of a child might affect their ability to consider mitigation and the full range of punishment." *Id.* at 57–60. He also claims that the trial court's ruling denied him effective assistance of counsel because the ruling prevented trial counsel from "intelligently exercise[ing] peremptories or develop challenges for cause." *Id.* at 60.

Renteria suggests his constitutional rights were violated because the State provided John David Turner with an unconstitutional definition of mitigating evidence. *Id.* at 77–79. Renteria also claims his counsel were not permitted to ask, "Turner proper questions that would have led to a challenge for cause." *Id.* at 78.

Renteria avers "[t]he trial court erred in denying Petitioner's challenge for cause against [Leslie] Potter because he could not consider and give effect to mitigating evidence and would automatically vote for a death sentence for a heinous crime." Pet'r's Reply 66, ECF No. 94.

Finally, Renteria contends the trial court improperly disallowed his counsel from explaining the definition of mitigating circumstances to John Deslongchamps. *Id.* at 82–85.

In points of error eleven through thirty-seven in his direct appeal, Renteria alleged the trial judge improperly denied his challenges for cause against eighteen venire members: Robert Wynn Crosby; Jeanette Sanchez; Evangeline Rose Ramirez; Anna L. Nava; Carlos Martinez; Howard R. Bryan, Jr.; Daniel Gurany; Cruz Angel Ochoa, Jr.; Longino Gonzalez, Jr.; Robert P. Tomes; Mark Robert Williams; Mark Anthony Tapia; John Tobias; Paul Steven Watt; John David Turner; Leslie D. Potter; John P. Deslongchamps; and Washington Watley, Jr. *Renteria II*, 2011 WL 1734067, at *19.

The Court of Criminal Appeals explained that—to establish harm—a defendant must show he asserted a clear and specific challenge for cause. *Id.* (citing *Green v. State*, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996)). A defendant must also show "he used all his peremptory strikes, asked for and was refused additional peremptory strikes, and was then forced to take an identified objectionable juror whom he would have struck had the trial court granted his challenge for cause or granted him additional peremptory strikes." *Id.* (citing *Lewis v. State*, 911 S.W.2d 1, 4 (Tex. Crim. App. 1995). The Court of Criminal Appeals found Renteria had complied with these requirements for eleven venire members: Robert Wynn Crosby; Jeanette Sanchez; Carlos Martinez; Howard R. Bryan, Jr.; Daniel Gurany; Cruz Angel Ochoa Jr.; Longino Gonzalez Jr.; Mark Williams; Mark Anthony Tapia; John Tobias; and Paul Watt. *Id.* at *19–*36.

But it further found the trial judge did not abuse her discretion in denying Renteria's challenges for cause to these eleven venire members. "Because Renteria has failed to show that at least eight of his complained-of challenges for cause were erroneously denied, he cannot show harm on appeal." *Id.* at *36 (citing *Chambers v. State*, 866 S.W.2d 9, 23 (Tex. Crim. App. 1993) ("Error is preserved for review by this Court only if appellant (1) used all of his peremptory strikes, (2) asked for and was refused additional peremptory strikes, and (3) was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror)." *Chambers*, 866 S.W.2d at 23). The Court of Criminal Appeals accordingly overruled points of error eleven through thirty-seven.

"So long as the jury that sits is impartial, the fact that [the petitioner] had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Ross*, 487 U.S. at 88; *Soria*, 207 F.3d at 241–42. "The failure properly to grant a

challenge for cause rises to the level of a constitutional violation and warrants reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. Absent such a showing, the defendant has not been denied his Sixth Amendment right to an impartial jury." *Webster*, 162 F.3d at 342 n.36.

Renteria contends that, because he "exhausted all his peremptory strikes . . . and . . . two incompetent jurors were seated (Mr. Watley and Ms. Sanchez . . .), the court's failure to grant this challenge for cause warrants reversal." Pet'r's Reply 43, ECF No. 94 (citing *Webster*, 162 F.3d at 342 n.36.

Renteria claims Watley was incompetent because he "answered 'yes' when asked on his juror questionnaire if he would automatically believe the testimony of a law enforcement officer *simply because he or she is a law enforcement officer*, which is constitutionally impermissible." Pet'r's Reply 68–69, ECF No. 94 (emphasis in original). He claims Sanchez was incompetent because she "said numerous times that she would vote for the death penalty after finding the defendant to be a future danger, even after counsel painstakingly reviewed the process of answering the first special issue—the future dangerousness issue—and the second special issue—the mitigation issue. *Id.* at 69 (citing Reporter's R., vol. 41 (voir dire of Jeanette Sanchez), pp. 70; 71; 73; 77–78, not scanned in ECF . He notes Sanchez also inaccurately described mitigation as a "little magic detail that -- that's just bugging us about it . . . something maybe bothering me or something may be bothering somebody else about the case." *Id.* (citing Reporter's R., vol. 41, p. 82).

A state court's factual findings are presumed to be correct, and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). "This deference extends not only to express findings of fact, but to the implicit findings of the state court." *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006) (citing

Summers v. Dretke, 431 F.3d 861, 876 (5th Cir. 2005); *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004)). If there is "some indication of the legal basis for the state court's denial of relief," the district court may infer the state court's factual findings even if they were not expressly made. *Goodwin v. Johnson*, 132 F.3d 162, 184 (5th Cir. 1997). *See also Thompson v. Linn*, 583 F.2d 739, 742 (5th Cir. 1978) (per curiam) (quoting *Townsend v. Sain*, 372 U.S. 293, 314 (1963)) (permitting the district court to "reconstruct the findings of the state court, 'either because (the state trial judge's) view of the facts is plain from his opinion, or because of other indicia'").

The trial court's implicit factual determination that Watley could be fair and impartial has support in the record. Watley stated he could stay open-minded about police testimony. Reporter's R., vol. 37 (voir dire of Washington Watley Jr.), p. 116, not scanned in ECF. He also claimed he could be fair—despite having two daughters close in age to the victim. *Id.* at 90. These views would not prevent or substantially impair Watley's performance of his duties as a juror in accordance with his instructions and his oath. The record is insufficient to show that Watley harbored a disqualifying bias.

A court may grant federal habeas relief only if the state court finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Renteria has not done this. He has not demonstrated the state court's decision to reject his constitutional claim was erroneous. Because Renteria has not presented clear and convincing evidence to overcome the trial court's finding that Watley could be impartial, this finding is presumed correct. *Id.* § 2254(e)(1).

Renteria argued on direct appeal that the trial court erred in denying his challenge for cause as to Sanchez because she would not consider the mitigation special issue after answering the future dangerousness special issue affirmatively. *Renteria v. State*

(Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *98–*102. The Court of Criminal Appeals rejected his argument. It noted Sanchez said she would consider mitigating evidence:

> Sanchez ... clarified her understanding as she explained the process for determining punishment in her own words. She stated that "if all 12 of us agree that he will be [a future danger], we have to then go down to number two and revisit all the evidence again ... to see if there's anything that anybody objects to ... any little nagging detail that they may have thought this may have been a mitigating circumstance." She added, "If we decide there that there are no mitigating circumstances, then it's the death penalty." And she also acknowledged that all twelve jurors must find no mitigating circumstances and that "it has to be unanimous" to result in the death penalty.
>
> Finally, defense counsel asked Sanchez, "[I]f you get to question two ... are you willing to consider elements of the defendant's character and background to see if there's any mitigating circumstance there that would warrant a life sentence rather than a death penalty?" Sanchez responded in the affirmative.

Renteria II, 2011 WL 1734067, at *23. The Court of Criminal Appeals reasoned "[t]he trial judge's ruling is supported by the totality of the record. Sanchez ultimately stated that she understood and could follow the law about the mitigation special issue. Thus, the trial judge did not abuse her discretion in denying Renteria's challenge for cause." *Id.* at *24.

Again, a state trial court's denial of a petitioner's challenge for cause is entitled to the presumption of correctness. 28 U.S.C. § 2254(e)(1); *Patton*, 467 U.S. at 1038. Renteria's disagreement with the Court of Criminal Appeals' holding does not overcome the presumption, especially when, as here, the holding is supported by evidence in the record. Consequently, the Texas Court of Criminal Appeals' rejection on the merits of Renteria's claims regarding the trial court denying his challenge for cause against Sanchez was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. It was also not based upon an unreasonable determination of the facts considering the evidence presented in Renteria's trial, direct appeal, and state habeas corpus proceedings.

The evidence does not support a conclusion Watley, Sanchez or any venire member who sat on the jury was unqualified. Renteria's complaints concerning the trial court's rulings as to the venire members are without merit. Renteria is not entitled to relief on these claims.

f. Cumulative Error

Renteria also suggests the "cumulative impact of [the alleged errors during voir dire] worked to deny [him] the above enumerated rights under the Federal Constitution." Pet'r's Pet. 84–85, ECF No. 53. But a federal habeas court may only grant relief on a cumulative error claim when the petitioner identifies individual errors of a constitutional magnitude, establishes the alleged errors are not procedurally defaulted, and shows the errors resulted in a due process violation. *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007); *Moore v. Quarterman*, 526 F. Supp. 2d 654, 710 (W.D. Tex. 2007) (citing *Spence v. Johnson*, 80 F.3d 989, 1000–01 (5th Cir. 1996)). As discussed above, *all* of Renteria's purported errors concerning the voir dire process are meritless, procedurally defaulted, or both. Consequently, he cannot allege any errors to cumulate.

Further, Renteria raised a claim on direct appeal alleging the cumulative effect of the trial court's alleged errors during voir dire denied him his right to due process. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *154–*156.

The Court of Criminal Appeals rejected the claim, holding Renteria failed to allege any error to cumulate. *Renteria II*, 2011 WL 1734067, at *37.

Renteria does not attempt to show that the state court's rejection of the claim was unreasonable. Therefore, he is not entitled to relief. *Coble*, 496 F.3d at 440 ("Coble has not identified errors of constitutional dimension. Accordingly, we cannot say that the state habeas court's rejection of Coble's cumulative error claim was objectively unreasonable).

E. Claim V - Renteria's constitutional rights were violated in multiple respects by the trial court's jury charge at the second penalty trial. Pet'r's Pet. 91–99, ECF No. 53; Br. in Supp. 43–50, ECF No. 58.

1. Background.

Renteria next complains about the admissibility of extraneous offenses, the constitutionality of the both special issues, and the jury charge.

First, Renteria notes that under Texas Code of Criminal Procedure Articles 30.07 and 37.071, "the State is permitted wide latitude to introduce evidence of 'extraneous' offenses during the penalty phase." Pet'r's Pet. 92, ECF No. 53. Indeed, the State may introduce evidence "'regardless of whether [the defendant] has previously been charged with or finally convicted of the crime or act.'" *Id.* at 93 (quoting Tex. Code Crim. Proc. art 37.07 § 3(a)(1)). But, he argues, "[t]he presentation of extraneous conduct to support a finding of the first special issue violates the Fifth Amendment's presumption of innocence, the Sixth Amendment's jury trial guarantee, and creates a risk of arbitrary and unreliable capital sentencing, in violation of the Eighth and Fourteenth Amendments." *Id.* He concedes "[t]his issue was not presented to the state courts." *Id.* at 94.

Second, Renteria asserts "[t]he first special issue is unconstitutionally vague, and fails to provide the Constitutionally-required guided discretion to the sentencing jury" in the Eighth and Fourteenth Amendments. *Id.* at 94. He notes "[n]either the statute nor the required jury charge define the terms 'probability,' 'criminal acts of violence,' and 'continuing threat to society.'" *Id.* And both use the term "'probability' in conjunction with an issue which the trial court instructs the jury to determine beyond a reasonable doubt. *Id.* Renteria adds his defense raised these issues before trial and on direct appeal. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Tex. Crim. App. filed Dec. 15, 2009), at *188–

*195. Yet the Court of Criminal Appeals affirmed the lower court in all respects. *Renteria II*, 2011 WL 1734067, at *47–*48.

Third, Renteria protests the "10–12 rule"—which "requires capital jurors to be instructed that they can answer 'Yes' to the future-dangerousness special issue and 'No' to the mitigation special issue only if all twelve of them agree to do so and that they can give the opposite answers only if ten or more of them agree to do so"[9]—is unconstitutional and the sentencing statute improperly bars the trial court from instructing the jury that, if it is unable to reach "a unanimous or at-least-ten verdict on either special issue, the trial court is required to sentence the defendant to life in prison." Pet'r's Pet. 95, ECF No. 53 (citing Tex. Code Crim. Proc. Art 37.071 § 2(a) (barring instruction on the effect of a failure to agree)).

Renteria raised this issue on direct appeal. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Tex. Crim. App. filed Dec. 15, 2009), at *197–*201. The Court of Criminal Appeals affirmed the lower court in all respects. *Renteria II*, 2011 WL 1734067, at *47–*48.

Finally, Renteria complains the trial court did not instruct "the jury that mitigating circumstances need not be proven beyond a reasonable doubt." Pet'r's Pet. 97, ECF No. 53. He explains "[t]he statute does not specify a burden of proof for mitigating circumstances." *Id.* at 98. He argues "any reasonable juror would assume that the only burden of proof described in the instructions applied to all the issues . . . . This violated Petitioner's Eighth and Fourteenth Amendment rights to individualized, reliable capital sentencing." *Id.* at. 97.

Renteria raised this issue at trial and on direct appeal. *Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Tex. Crim. App. filed Dec. 15, 2009), at *208–*211. The Court

[9] *Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011).

of Criminal Appeals affirmed the lower court in all respects. *Renteria II*, 2011 WL 1734067, at *47–*48.

2. Discussion

a. "Extraneous" Evidence

Renteria claims that the trial court erred by permitting the State wide latitude to introduce extraneous offenses into evidence during his sentencing trial. He argues the trial court's error violated his Fifth, Eighth, and Fourteenth Amendment rights.

Renteria concedes this claim is unexhausted and procedurally defaulted. Pet'r's Pet. 89, ECF No. 53. He argues his default is excused because his appellate and state habeas counsel were ineffective for failing to raise the claim. *Id.*

(1). Procedural Bar

"[T]he exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings,' generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 488–89 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). "In other words, the claim of ineffective assistance of counsel on direct appeal is an independent constitutional violation, which must itself be exhausted using state collateral review procedures." *Hatten*, 570 F.3d at 605 (citing *Edwards v. Carpenter*, 529 U.S. at 451-53). Further—as noted above—the exception to procedural default recognized in *Martinez* and *Trevino* applies only to defaulted ineffective assistance of trial counsel claims.

Here—because Renteria did not exhaust his ineffective counsel argument—his claim is procedurally barred and cannot furnish the basis for cause and prejudice enabling federal review of the underlying unexhausted habeas claims.

(2). Merits

Nonetheless, Renteria's claim fails on the merits for two reasons.

First, the jury was instructed it could only consider evidence of Renteria's extraneous offenses if it found—beyond a reasonable doubt—that he committed the offenses:

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you if it does in determining the proper punishment for the offense for which you have found the Defendant guilty. You cannot consider the testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other acts if any were committed.

Clerk's R., vol. 8 (Jury Charge), p. 175, ECF No. 79-11.

Second, "the Supreme Court has never held that the federal constitution requires a state to prove an extraneous offense beyond a reasonable doubt." *Hughes*, 412 F.3d at 593. "[T]here is no constitutional prohibition on the introduction at a trial's punishment phase of evidence showing that the defendant has engaged in extraneous, unadjudicated, criminal conduct. . . . [T]he 'admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments.'" *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005) (quoting *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987). Even "[t]he introduction of evidence of extraneous offenses of which the defendant has been acquitted is consistent with due process." *Harris*, 313 F.3d at 246.

Consequently, Renteria's claim is meritless. Renteria is not entitled to relief on this claim.

b. Defective Jury Instruction

Renteria claims the trial court provided the jury with a defective jury instruction on special issue one—the future dangerousness issue—because it did not define the terms "probability," "criminal acts of violence," and "continuing threat to society."

The jury verdict form asked the jury:

> SPECIAL ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt that there is a *probability* that the Defendant DAVID RENTERIA would commit *criminal acts of violence* that would constitute a *continuing threat to society*?

Clerk's R., vol. 8 (Jury Charge), p. 177, ECF No. 79-11 (emphasis added).

Renteria argues the verdict form was infirm because the jury charge did not define the terms "probability," "criminal acts of violence," and "continuing threat to society." He also notes the verdict form inexplicably used the term "'probability' in conjunction with an issue which the trial court instructs the jury it must determine beyond a reasonable doubt.

The Fifth Circuit has held the terms used in the future dangerousness verdict form are permissible because they "have a plain meaning of sufficient content that the discretion left to the jury [is] no more than that inherent in the jury system itself." *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009). The Fifth Circuit has specifically rejected challenges to the failure to define these terms. *See Blue v. Thaler*, 665 F.3d 647, 667–68 (5th Cir. 2011) ("Blue has not identified any authority that holds that the absence of such a supplemental instruction renders Texas's amended special-issues scheme constitutionally infirm."); *Scheanette v. Quarterman*, 482 F.3d 815,827–28 (5th Cir. 2007) ("The future dangerousness issue has been held constitutional by the Supreme Court and we have repeatedly held that the term 'probability' as used in the Texas special issue is not so vague as to require additional instructions (such as definition by the court).") (citing *Jurek v. Texas*, 428 U.S. 262 (1976)); *Hughes*, 191 F.3d at 615–16 (holding that the lack of a definition for the term "probability" in future dangerousness instruction did not render the instruction constitutionally infirm); *Woods v. Johnson*, 75F.3d 1017, 1033–34 (5th Cir. 1996) (collecting cases). Renteria cites

no constitutional authority which would have required the trial court to give any express definition to these terms.

The Court of Criminal Appeals rejected these claims in Renteria's direct appeal. *Renteria II*, 2011 WL 1734067, at *47–*48. Renteria fails to cite Supreme Court precedent suggesting that the Constitution requires that Texas define the terms expressly or that the Court of Criminal Appeals unreasonably rejected the claim. Renteria's claim amounts to a request for a new rule which would be barred by the rules against retroactivity. *Kerr v. Thaler*, 384 F. App'x 400, 404(5th Cir. 2010) (unpublished) (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment). In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, *cf. Younger v. Harris*, 401 U.S. 37, 43–54 (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982), "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.")).

The Texas Court of Criminal Appeals' rejection on the merits of Renteria's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court.

Renteria is not entitled to relief on this claim.

c. The "12/10" Rule

Renteria asserts the Texas "12/10 Rule" violates the Eighth Amendment by failing to accurately instruct the jury that the vote of a single juror could result in a life sentence. Pet'r's Pet. 95–96, ECF No. 53. He explains, instead, the jury is only told that it may answer "no" to the future dangerousness issue or "yes" to the mitigation issue only if "10 or more jurors agree." In other words, he complains the jury is instructed that answers in favor of a life sentence require ten votes and answers in favor of a death sentence require unanimity, but they are not told that if less than ten jurors vote in favor of a life sentence, the defendant will still be given a life sentence.

The Court of Criminal Appeals rejected this claim in Renteria's direct appeal. *Renteria II*, 2011 WL 1734067, at *47–*48.

The Supreme Court has specifically rejected the argument that the Eighth Amendment requires jurors to be instructed regarding the consequences of their failure to agree or on a breakdown in the deliberative process. *Jones v. United States*, 527 U.S. 373, 383 (1999). "*Jones* insulates the 10–12 Rule from constitutional attack." *Blue*, 665 F.3d at 670.

The Fifth Circuit has consistently held the "12/10" Rule does not violate the Eighth Amendment or the Fourteenth Amendment. *See Reed v. Stephens*, 739 F.3d 753, 779 (5th Cir. 2014) ("Reed's second argument, that the jury should have been informed that a lack of unanimity during the penalty phase would result in a life sentence, is a challenge to Texas's so-called '12–10 Rule.' Arguments similar to Reed's repeatedly have been rejected by this court and Texas courts."); *Sprouse v. Stephens*,748 F.3d 609,623 (5th Cir. 2014) ("Clear Supreme Court and Fifth Circuit precedent forecloses granting a COA on this issue."); *Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011) ("To the extent Petitioner's challenge to

Texas's 12–10 rule rests on . . . the Eighth Amendment, . . . it is foreclosed by Fifth Circuit precedent.").

Renteria has not shown that the state court's rejection of this issue involved an unreasonable application of Supreme Court precedent. 28 U.S.C. § 2254(d). Any attempt to extend the Supreme Court's precedent to this case is barred by the rules against retroactive application of a new constitutional rule in habeas proceedings. *See Teague*, 489 U.S. at 311.

Consequently, Renteria is not entitled to relief on this claim.

d. Burden of Proof

Renteria claims the trial court erred by failing to instruct his jury he was not required to prove the existence of mitigating circumstances beyond a reasonable doubt. Pet'r's Pet. 97–98, ECF No. 53. He notes "the statute does not specify a burden of proof for mitigating circumstances." Pet'r's Pet. 98. He contends that "any reasonable juror would assume that the only burden of proof described in the instructions applied to all the issues to be determined at the penalty phase." Br. in Supp. 53, ECF No. 58.

The jury verdict form explained the burden of proof for special issue one—the continuing threat issue—was beyond a reasonable doubt:

> SPECIAL ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant DAVID RENTERIA would commit criminal acts of violence that would constitute a continuing threat to society?

Clerk's R., vol. 8 (Jury Charge), p. 177, ECF No. 79-11 (emphasis added). Notably, the jury verdict form did not establish a burden of proof for special issue two—the mitigation issue:

> SPECIAL ISSUE NO. 2
>
> Taking into consideration all of the evidence including the circumstances of the offense, the Defendant's background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Id. at p. 178.

Renteria provides no support for his suggestion that his jury would have or could have improperly inferred—based on the instructions—a burden of proof attended the mitigation special issue. Indeed, the lack of a burden of proof in the mitigation special issue plainly indicates there is no such burden, especially where the charge instructed the jury the State was required to prove the future dangerousness special issue beyond a reasonable doubt.

Further, the Fifth Circuit has repeatedly held Texas's mitigation instruction is constitutional. *Blue*, 665 F.3d at 668–69. And because Renteria identifies no Supreme Court precedent requiring that a jury be informed that mitigating circumstances need not be proven beyond a reasonable doubt, this claim is barred by *Teague*. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) (stating "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof.").

Renteria is not entitled to relief on this claim.

F. Claim VI - Renteria's rights under the Fifth, Sixth and Fourteenth Amendments were violated when the State was permitted to question Dr. Cunningham regarding counsels' decision to not permit this expert to discuss the offense with Renteria. Pet'r's Pet. 99–101, ECF No. 53; Pet'r's Br. in Supp. 54–56, ECF No. 58.

1. Background

Lastly, Renteria claims that the trial court erred by allowing the State to ask his expert, Dr. Cunningham, whether he discussed Flores's murder with Renteria. Pet'r's Pet. 99–101, ECF No. 53. Renteria argues the question violated his Fifth Amendment and Sixth Amendment rights.

Dr. Cunningham—a board certified forensic psychologist—first testified outside the presence of the jury. Reporter's R., vol. 69 (testimony of Dr. Cunningham), pp. 41–62, ECF No. 82-1. Dr. Cunningham explained to the trial court that Renteria's counsel engaged him to address two issues. First, "whether there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 61. Second, "how he came to be damaged." *Id.* at 50.

As part of his evaluation, Dr. Cunningham interviewed Renteria, his family, and one of his high school teachers. *Id.* at 46–47. Dr. Cunningham also reviewed Renteria's criminal history and sex offender treatment records. *Id.* at 49. Dr. Cunningham did not, however, ask Renteria questions about Flores's murder or any unadjudicated offenses for two reasons. First, Renteria's counsel instructed him not to ask questions about these matters. *Id.* at 50. Second, he believed the information was not relevant to his assessment of Renteria's future dangerousness. *Id.*

The prosecution did not object to Dr. Cunningham appearing as an expert witness. *Id.* at 63. Dr. Cunningham continued testifying before the jury.

During the State's cross-examination, the prosecutor probed whether Dr. Cunningham asked Renteria about Flores's murder. Reporter's R., vol. 71 (testimony of Dr. Cunningham), p. 12, ECF No. 82-3. Renteria's counsel objected, claiming "[i]t invade[d] the defendant's right to invoke his Fifth Amendment." *Id.*

The trial court initially overruled the objection, but then held a bench conference. *Id.* at 12–17. During the bench conference, defense counsel argued Renteria did not waive his Fifth Amendment rights regarding Flores's murder when Dr. Cunningham interviewed him:

> MR. GANDARA: [Defense Counsel Jaime Gandara] Your Honor. Soria says that you waive your Fifth Amendment right when you talk to your own mental health expert, that you've effectively waived it for the purposes of having a state's expert interview him and so forth. Well he did not. And that's the point. He says I'm not going to answer any questions about the offense. He invoked his Fifth Amendment right. Bottom line.
>
> Now . . . neither Soria nor Chamberlain[10] nor any of the other cases that's [sic] construct Soria say that it's proper to let the jury know that a man's [sic] invoked his Fifth Amendment right. And in all cases, in every case, to traditionally historically you don't tell the jury, well, he took the Fifth. It's improper.
>
> THE COURT: I'm going to sustain the objection to that question. However, I believe based on the law he's entitled to ask your expert witness why he did not ask about the capital murder offense.

Id. at 13–14.

Renteria's counsel objected to this ruling, maintaining it also related to an "invocation of the Fifth Amendment right." *Id.* at 14. At that point—and while not objecting to the trial court's ruling—the State proposed a "compromise":

> [T]he Fifth Amendment right goes to the defendant, not to his lawyers. The answers go into that my lawyers told me -- on my lawyer's advice I'm not answering any questions regarding the offense.
>
> The problem with that is then I have to further inquire that the Fifth Amendment is his right and belongs to no one but him, and he asserts his

[10] *Chamberlain v. State*, 998 S.W.2d 230, 234 (Tex. Crim. App. 1999).

> right. And so we're going to have to go on a and he's a forensic psychologist, and so he meshes the law with his mental health issues. I prefer just to tell him that the defendant refused to answer the questions period. And then I think Soria and Lagrone[11] clearly say that I can go into that without ever having him say he has to assert his Fifth, so that the jury never hears that. Although I think that's fair game, but as a compromise we don't talk about the Fifth. I just lead him into it, he says no, and we move on.

Id. at 14–15.

Renteria's counsel objected to the so-called "compromise" and pointing out the proposed questions still invaded Renteria's right to remain silent. Renteria's counsel also noted in Dr. Cunningham's voir dire—initially conducted outside the presence of the jury—Dr. Cunningham testified he did not ask Renteria any questions about the offense on the direction of counsel, and therefore, Renteria never refused to answer such questions. *Id.* at 15.

The trial court overruled the second objection. *Id.* at 17.

The State proceeded to ask Dr. Cunningham whether he asked Renteria about Flores's murder. *Id.* at 17–18. Dr. Cunningham answered he did not. *Id.* at 18. The State then asked Dr. Cunningham why. *Id.* Dr. Cunningham testified he did not ask Renteria about the capital murder because Renteria's counsel instructed him not to ask and a discussion of the facts surrounding the murder would not inform either of the two issues before him:

> Well there were two reasons for that. One of them is that I was instructed by defense counsel not to inquire of the defendant about the capital offense or about any prior unadjudicated conduct which means offenses that he might have committed and never been convicted of.
>
> Additionally there is nothing about that inquiry that would inform either of the two issues before me. A report from him of his conduct or his thoughts or feelings during the offense itself would not tell me what had happened to him developmentally that had damaged him. It would represent an expression of that damage but it wouldn't tell me how he came to be damaged.
>
> Individuals whose bad life decisions and criminal behavior is an expression of the bad things, things that have happened to them aren't thinking

[11] *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

> at the time that occurs, gee, I think that I'll beat up this person because I was beaten up. It's more like you've been exposed to radiation and then later on you grow tumors from that without any conscious connection of the two events being connected.
>
> So it wasn't going to tell me how he became to be damaged and it also -- beyond defense reports and beyond what he was convicted of his own personal report doesn't tell me anything about what kind of inmate he's likely to be in the future.
>
> Those are the two issues that were before me, how did we get here and where do we go from here. And his self-report of his thoughts, feelings, and actions during the time period of events don't inform either one of those.
>
> Now if there was an issue of what sort of psychological disturbance he was having at that moment then that kind of inquiry would have been relevant but under the two issues that I was looking at it was not.

Id. at 18–19.

Renteria raised the Fifth Amendment issue on direct appeal. *See Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at * 172–*181. Renteria argued that under *Soria*, the scope of the State's cross-examination was "limited to the issues raised by the defense expert." *Renteria II*, 2011 WL 1734067, at *42 (citing *Soria v. State*, 933 S.W.2d 46, 58 (Tex. Crim. App. 1996)). Renteria maintained Dr. Cunningham "did not question [him] about the offense and did not testify to any conversations with [him] about the offense." *Id.* Thus, Renteria asserted, he "did not raise any issues that would open the door" for the State to cross-examine Dr. Cunningham as to why he did not question Renteria about the offense. *Id.* The Court of Criminal Appeals affirmed the trial court in all respects. It reasoned:

> The State did not exceed the scope of proper cross-examination. Defense counsel called Cunningham to testify that Renteria would not be a future danger in prison. It was permissible for the State to test Cunningham's credibility by questioning him as to how he arrived at that conclusion. A criminal defendant may not testify through a defense expert and then use the Fifth Amendment as a shield against cross-examination on disputed issues.

Id. (citing *Lagrone*, 942 S.W.2d at 611).

2. Applicable Law

The Fifth Amendment forbids comment by the prosecution on a defendant's silence. *Griffin v. California,* 380 U.S. 609, 615 (1965); *Gongora v. Thaler,* 710 F.3d 267, 274 (5th Cir. 2013). The prosecution may not treat the defendant's exercise of his Fifth Amendment rights as substantive evidence of guilt. *Gongora,* 710 F.3d at 274 (citing *United States v. Robinson,* 485 U.S. 25, 34 (1988)). A defendant may, however, waive his Fifth Amendment right.

Where a defendant presents psychiatric evidence at trial, the defendant has no Fifth Amendment privilege against the introduction of rebuttal psychiatric testimony by the prosecution. *Kansas v. Cheever,* 571 U.S. 87, 94 (2013); *Buchanan v. Kentucky,* 483 U.S. 402, 422–23 (1987) ("if a defendant . . . presents psychiatric evidence, then . . . the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."); *Vanderbilt v. Collins,* 994 F.2d 189, 196 (5th Cir. 1993) ("If a defendant requests an examination on the issue of future dangerousness or presents psychiatric evidence at trial, the defendant may be deemed to have waived Fifth Amendment privilege."); *Williams v. Lynaugh,* 809 F.2d 1063, 1068 (5th Cir. 1987) ("[W]hen a defendant introduces psychiatric evidence on a critical issue, he waives his [F]ifth and [S]ixth [A]mendment objections to the state's psychiatric testimony, provided that the state's evidence is used solely in rebuttal and properly limited to the issue raised by the defense.").

Further, once privilege is waived, the defendant cannot dictate the questions the State may ask on cross-examination. *See Cheever,* 571 U.S. at 94 ("The admission of rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a

criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination."); *see also McGautha v. California,* 402 U.S. 183, 213 (1971) ("It does no violence to the privilege [against compelled self-incrimination] that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case."), *overruled on other grounds, Crampton v. Ohio,* 408 U.S. 941 (1972). And while cross-examination must be limited to the issues raised by the defense expert, *Williams,* 809 F.2d at 1068, the State is certainly permitted to test the expert's opinion by asking how he arrived at that opinion. *See* Tex. R. Evid. 705(a) ("[A]n expert may state an opinion—and give the reason for it—without first testifying to the underlying facts or data. But the Expert may be required to disclose those facts or data on cross-examination."); *Chamberlain,* 998 S.W.2d at 234 ("Appellant cannot claim a fifth amendment privilege in refusing to submit to the State's psychiatric examinations and then introduce evidence gained through his participation in his own psychiatric examination."); *Milam v. State,* 2012 WL 1868458, at *18 (Tex. Crim. App. 2012) ("Appellant may not testify through a defense expert and then use the Fifth Amendment as a shield against cross-examination of that expert on disputed issues.").

3. Discussion

Here, Renteria waived his Fifth Amendment rights by speaking with his expert, Dr. Cunningham, and then introducing Dr. Cunningham's testimony at trial. *Cheever,* 571 U.S. at 94. Dr. Cunningham's testimony addressed Renteria's future dangerousness. The State's inquiry as to the basis of Dr. Cunningham's conclusion—that Renteria was not a future danger—fell squarely within this issue. *Williams,* 809 F.2d at 1068. The State did not exceed the scope of proper cross-examination by asking whether Dr. Cunningham discussed the facts of the crime with Renteria before arriving at his conclusion. Tex. R. Evid. 705(a).

Hence, the State acted permissibly by inquiring into the evidence relied on by Dr. Cunningham to arrive at his conclusion.

Given that Renteria waived his Fifth Amendment rights, he was not entitled to dictate the questions the State could ask on cross-examination. *Cheever*, 571 U.S. at 94. This was especially true where—as the Court of Criminal Appeals has recognized— "the facts of the crime alone, if severe enough, can be sufficient to support [an] affirmative finding to the special issue." *Miller*, 200 F.3d at 286 (citing *Vuong v. State*, 830 S.W.2d 929, 935 (Tex. Crim. App. 1992)). Consequently, whether Dr. Cunningham discussed the facts of the crime with Renteria before he reached his conclusion on Renteria's future dangerousness was an appropriate subject for inquiry and for the jury to consider.

Indeed, a defendant cannot testify through an expert and then use his Fifth Amendment right to silence as a shield against cross-examination of the expert on relevant issues. *Milam*, 2012 WL 1868458, at *18. Once Dr. Cunningham testified, the State was entitled to ask—and the jury was entitled to know—the basis for his opinion. *Cheever*, 571 U.S. at 94. Renteria had "no right to set forth to the jury all the facts which tend[ed] to his favor without laying himself open to a cross-examination upon those facts." *Id.* (citing *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900)). The rule advocated by Renteria "would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime" and would undermine "the core truth-seeking function of the trial." *Id.* at 95.

The Court of Criminal Appeals rejected Renteria's Fifth Amendment claim on direct appeal, holding that he waived his privilege by presenting Dr. Cunningham's testimony and that the State was entitled to probe the credulity of Dr. Cunningham's conclusions by asking

whether he discussed the capital murder with Renteria. *Renteria II*, 2011 WL 1734067, at *42; *see also Cheever*, 571 U.S. at 94; *Buchanan*, 483 U.S. at 408. Renteria fails to show that the state court's rejection of this claim involved an unreasonable application of controlling Supreme Court precedent. *Richter*, 562 U.S. at 99–102.

But even if Renteria could show that the State's questioning of Dr. Cunningham violated his Fifth Amendment rights, an improper comment on a defendant's silence at trial is subject to harmless error analysis. *See Gongora,* 710 F.3d at 274. Therefore, Renteria "must still clear the hurdle of [*Brecht v. Abrahamson,* 507 U.S. 619 (1993)]." *Id.* at 275. Under that analysis, a court must "assess the prejudicial impact of the [prosecutor's comments on the defendant's silence] under the 'substantial and injurious effect' standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under . . . *Chapman*." *Id.* (citing *Fry v. Plier,* 551 U.S. 112, 121–22 (2007)). Factors a court should consider include whether (1) the comment was extensive, (2) an inference of guilt is stressed as the basis of conviction, and (3) there is evidence that could have supported acquittal. *Anderson v. Nelson,* 390 U.S. 523, 524 (1968); *Gongora,* 710 F.3d at 278.

The State's questions about Dr. Cunningham's failure to discuss the facts of the crime with Renteria were neither extensive nor stressed as a basis for a death sentence. The State limited its inquiry into this issue during a rather lengthy direct and cross-examination of Dr. Cunningham. The State did not reference Dr. Cunningham's failure to inquire into the facts of the crime during closing argument, although the State posed several reasons for the jury to discount Dr. Cunningham's opinion on future dangerousness. Reporter's R., vol. 72 (Closing Argument by Prosecutor Lori C. Hughes), pp. 49–74, 115–40, ECF No. 82-4. The State never suggested Dr. Cunningham's failure to question Renteria about the facts of the capital

murder provided a basis for the jury to answer the future dangerousness special issue in the affirmative or to sentence Renteria to death.

Further, Renteria does not attempt to—and cannot—show harm.

Dr. Cunningham addressed his decision not to inquire into the facts of the crime with Renteria, and he noted the information was not relevant to his inquiry. Reporter's R., vol. 71, p. 18, ECF No. 82-3. In other words, Dr. Cunningham posed a separate and independent basis for his decision not to ask those questions of Renteria. Therefore, it is unlikely that the State's inquiry regarding Dr. Cunningham's failure to discuss Flores's murder with Renteria had any impact on the jury's determination of the future dangerousness issue.

For the same reason, Renteria cannot show harm from the State's questioning of Dr. Cunningham. Dr. Cunningham's failure to question Renteria regarding the capital murder was used to impeach Dr. Cunningham's credibility and his conclusion that Renteria was not a future danger. It was not used to suggest that Renteria had something to hide from the jury. And, as noted above, the jury was made aware Renteria did not discuss the capital murder with Dr. Cunningham. Further, the jury was made aware that Dr. Cunningham believed Renteria's self-reporting of the facts was irrelevant to his future dangerousness assessment.

Finally, the trial court instructed the jury it could not use the fact that Renteria elected remain silent and not testify against him in any way. Clerk's R., vol. 8, p. 175, ECF No. 79-11. The court's instruction presumably cured any error. *See Gongora,* 710 F.3d at 278 (explaining a court should consider the effect of any cautionary or curative instruction given to jury); *see also Zafiro v. United States,* 506 U.S. 534, 540–41 (1993) (explaining jurors are presumed to follow instructions). Any error was harmless beyond a reasonable doubt, and there is no reasonable likelihood that the State's questions, even if erroneous, had a "substantial and injurious effect or influence" on the jury's verdict. *Brecht,* 507 U.S. at 637.

As the state court found, "[t]he State did not exceed the scope of proper cross-examination," as it was "permissible for the State to test [Dr.] Cunningham's credibility by questioning him as to how he arrived at" the conclusion that Renteria was not a future danger. *Renteria II*, 2011 WL 1734067, at *42. For the reasons discussed above, Renteria fails to rebut the state court's findings or show that the state court's rejection of this claim was unreasonable. Consequently, he is not entitled to relief. *Richter*, 562 U.S. at 99–102.

Insofar as Renteria alleges a Sixth Amendment violation arising from the State's cross-examination of Dr. Cunningham, his claim is unexhausted and procedurally defaulted. Renteria did not argue on direct appeal or in his state habeas application that his Sixth Amendment rights were violated because the jury learned that he followed the advice of his counsel and did not discuss Flores's murder with Dr. Cunningham. *Compare* Pet'r's Pet. 96, ECF No. 53, and Pet'r's Br. in Supp. 52, ECF No. 58, *with Renteria v. State* (Appellant's Brief), 2009 WL 5453014 (Dec. 15, 2009), at *171–*182. Furthermore, Renteria identifies no authority supporting the claim. Consequently, the claim is conclusory and Renteria is not entitled to relief. *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990).

IV. REQUEST FOR A FEDERAL EVIDENTIARY HEARING

Renteria requested an evidentiary hearing to permit more factual development of his claims. Pursuant to the AEDPA, the proper place for development of the facts supporting a claim is in the state court. *See Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997) (explaining that the AEDPA clearly places the burden on a petitioner to raise and litigate as fully as possible his federal claims in state court). Renteria had a full and fair opportunity during in his state habeas corpus proceedings to present the state habeas trial court with all available evidence supporting his claims.

In addition, where a petitioner's claims have been rejected on the merits, further factual development in federal court is effectively precluded by the Supreme Court's holding in *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011):

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Cullen, 563 U.S. at 181–82.

Thus, Renteria is not entitled to a federal evidentiary hearing on any of his claims the state courts rejected on the merits, either on direct appeal or during his state habeas corpus proceedings. *See Woodfox v. Cain*, 772 F.3d 358, 368 (5th Cir. 2014).

Likewise, where a federal habeas corpus petitioner's claims lack merit on their face, further factual development is not necessary. *See Register v. Thaler*, 681 F.3d 623, 627–30 (5th Cir. 2012) (recognizing that district courts possess discretion regarding whether to allow factual development, especially when confronted with claims foreclosed by applicable legal

authority). This Court has conducted a *de novo* review of all of Renteria's unexhausted claims and concludes that all lack merit.

"In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Richards v. Quarterman*, 566 F.3d 553, 562 (5th Cir. 2009) (quoting *Schriro,* 550 U.S. at 468). "In determining whether to grant a hearing, under Rule 8(a) of the habeas Court Rules 'the judge must review the answer [and] any transcripts and records of state-court proceedings . . . to determine whether an evidentiary hearing is warranted.'" *Richards*, 566 F.3d at 562–63 (quoting *Hall v. Quarterman,* 534 F.3d 365, 368 (5th Cir. 2008). In making this determination, a court must consider whether an evidentiary hearing could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Richards*, 566 F.3d at 563 (quoting *Schriro,* 550 U.S. at 474).

Here, the state courts properly rejected many of Renteria's claims on their merits during either his direct appeal or state habeas corpus proceedings. Renteria is not entitled to further evidentiary or factual development of those claims. Additionally, Renteria's unexhausted claims are procedurally defaulted, without legal merit, and do not require factual or evidentiary development.

Therefore, Renteria is not entitled to an evidentiary hearing to developing any of his claims. *See Segundo*, 831 F.3d at 350–51 ("Given the extent of the factual development during trial and during the state habeas proceedings, the district court did not abuse its discretion in determining it had sufficient evidence and declining to hold a hearing.").

V. CERTIFICATE OF APPEALABILITY

Before a petitioner may appeal the denial of a habeas corpus petition, he must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 335–36. Further, appellate review of a habeas petition is limited to the issues on which a certificate of appealability is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding that a certificate of appealability is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding that the scope of appellate review of denial of a habeas petition is limited to the issues on which certificate of appealability has been granted). In other words, a certificate of appealability is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which a certificate of appealability is granted. 28 U.S.C. § 2253(c)(3); *Crutcher*, 301 F.3d at 658 n.10.

A certificate of appealability will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). To make such a showing, the petitioner need *not* show that he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) that the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard*, 542 U.S. at 282; *Miller-El*, 537 U.S. at 336. A habeas court is required to issue or deny a certificate of appealability when it enters a final order, such as this one, adverse to a federal habeas petitioner. Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.

The showing necessary to obtain a certificate of appealability on a claim depends upon the way a district court has disposed of it. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). In a case where the petitioner wishes to challenge on appeal a court's dismissal of a claim for a reason not of a constitutional dimension, such as a procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether the federal habeas court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484.

In death penalty cases, any doubt as to whether a certificate of appealability should issue must be resolved in the petitioner's favor. *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009); *Bridgers v. Dretke*, 431 F.3d 853, 861 (5th Cir. 2005). Nonetheless, a certificate of appealability is not automatically granted in every death penalty habeas case. *See Miller-El*, 537 U.S. at 337 ("It follows that issuance of a COA must not be *pro forma* or a matter of course.").

In this case, reasonable minds could not disagree with the Court's reasoned conclusions. No certificate of appealability will issue.

VI. CONCLUSION AND ORDERS

For the reasons discussed above, the Court concludes that Renteria is not entitled to an evidentiary hearing, federal habeas corpus relief, or a certificate of appealability. Accordingly, the Court enters the following orders:

IT IS ORDERED that Petitioner David Santiago Renteria's request for an evidentiary hearing is **DENIED.**

IT IS FURTHER ORDERED that Petitioner David Santiago Renteria's "Petition for a Writ of Habeas Corpus" (ECF No. 53) is **DENIED,** and his cause is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that Petitioner David Santiago Renteria is **DENIED** a certificate of appealability.

IT IS FURTHER ORDERED that all pending motions are **DENIED AS MOOT.**

IT IS FINALLY ORDERED that the Clerk shall **CLOSE** this case.

SIGNED this 12 day of February 2019.

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

EXHIBIT E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-65,627-02 & WR-65,627-03

EX PARTE DAVID SANTIAGO RENTERIA

ON APPLICATION FOR WRITS OF HABEAS CORPUS
CAUSE NO. 20020D00230-41-02 IN THE 41ST DISTRICT COURT
EL PASO COUNTY

***Per curiam*. PRICE, J., filed a dissenting statement in -02.**

O R D E R

This is a post conviction application for writ of habeas corpus and a subsequent application for writ of habeas corpus, filed pursuant to the provisions of the Texas Code of Criminal Procedure article 11.071.[1]

In October 2003, applicant was convicted of capital murder and, based upon the jury's answers to the special issues set forth in Article 37.071, the trial court set applicant's

[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

punishment at death. On direct appeal, the Court affirmed applicant's conviction, but reversed and remanded for a new punishment trial. *Renteria v. State*, 206 S.W.3d 689 (Tex. Crim. App. 2006).[2] After applicant's punishment retrial, the trial court again set applicant's punishment at death. Applicant's punishment retrial was affirmed on direct appeal. *Renteria v. State*, No. AP-74,829 (Tex. Crim. App. May 4, 2011)(not designated for publication).

Applicant timely filed this application for writ of habeas corpus in the convicting court following his punishment retrial. Applicant presents 19 allegations in which he challenges the validity of his conviction and sentence. The trial court entered findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the allegations made by applicant. Allegations 1 through 9, part of allegation 11, and allegations 13, 15 through 17, and 19, all involve claims that challenge the validity of applicant's sentence as imposed in the punishment retrial and therefore constitute an initial application. Art. 11.071. This initial application is numbered WR-65,627-02. Allegation 10, part of allegation 11, and allegations 12, 14, and 18, all involve claims that challenge the validity of applicant's conviction as determined at the guilt/innocence phase of applicant's first trial. Because applicant has already filed an application for writ of habeas corpus challenging the validity of his conviction as determined at the guilt/innocence phase of his first trial, these claims constitute a subsequent application.

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[2] Applicant timely filed in the convicting court an initial application following his first trial. That application is numbered WR-65,627-01 in this Court and is ruled upon by separate order.

Art. 11.071 § 5. This subsequent application is hereby numbered WR-65,627-03.

The convicting court entered findings of fact and conclusions of law and recommended that relief be denied as to all of the claims. We agree with the convicting court's recommendations and adopt its findings and conclusions as to allegations 1 through 9, the part of allegation 11 pertaining to applicant's sentence, and allegations 13, 15 through 17, and 19. Accordingly, we deny relief on allegations 1 through 9, the specified part of allegation 11, and allegations 13, 15 through 17, and 19. Allegations 10, the part of allegation 11 pertaining to applicant's conviction, and allegations 12, 14, and 18, fail to satisfy the requirements of Article 11.071 § 5(a). We dismiss allegations 10, the specified part of allegation 11, and allegations 12, 14, and 18, as an abuse of the writ without considering the merits of such claims. Art. 11.071 § 5(c).

IT IS SO ORDERED THIS THE 17TH DAY OF DECEMBER, 2014.

Do Not Publish

EXHIBIT F

No. 20020D00230-41-2

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AND

IN THE 41st DISTRICT COURT OF EL PASO COUNTY, TEXAS

EX PARTE DAVID SANTIAGO RENTERIA

THE STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION, AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the State's answer, and official court documents and records in cause numbers 20020D00230, 20020D00230-41-1, and 20020D00230-41-2, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Procedural history

1. The applicant, David Santiago Renteria, was initially convicted of capital murder and sentenced to death on September 23, 2003, in the 41st District Court of El Paso County, Texas.

2. Renteria was represented in this first trial by the El Paso County Public

Defender's Office, specifically, Assistant Public Defenders Scott Segall, Robert Riley, and Daniel Marquez.

3. The State was represented in this first trial by the 34th Judicial District Attorney Jaime Esparza and Assistant District Attorneys Lori Swopes (now Lori Hughes) and John Gibson.

4. On direct appeal, the Court of Criminal Appeals, on October 4, 2006, affirmed the judgment of guilt but reversed the judgment assessing the death penalty and remanded the case to the 41st District Court for a new punishment hearing. *See Renteria v. State*, 206 S.W.3d 689 (Tex.Crim.App. 2006).

5. Renteria was represented on this first direct appeal by the El Paso County Public Defender's Office, specifically, Assistant Public Defenders Scott Segall, Janet W. Chavez, Greg S. Velasquez, Robert R. Riley, Bruce J. Ponder, and Peter L. Bright.

6. On January 26, 2006, while this first direct appeal was pending in the Court of Criminal Appeals, Renteria timely filed an application for article 11.071 post-conviction writ of habeas corpus challenging his first conviction and death sentence. This writ application was assigned cause number 20020D00230-41-1 in the trial court, and cause number WR-65,627-01 in the Court of Criminal Appeals.

7. Renteria was represented in this first writ proceeding by attorney Louis

Elias Lopez.

8. On August 18, 2006, the 41st District Court entered its findings of fact and conclusions of law, recommending that Renteria's requested writ relief be denied. This first writ application is still pending in the Court of Criminal Appeals.

9. On May 14, 2008, following the punishment retrial, Renteria was again sentenced to death.

10. Renteria was again represented in the punishment retrial by the El Paso County Public Defender's Office, specifically, Assistant Public Defenders Jaime Gandara, Edythe M. Payan, and Gregorio S. Velasquez.

11. In the direct appeal of the punishment retrial (the second direct appeal), Renteria was again represented by the El Paso County Public Defender's Office, specifically, Assistant Public Defenders Greg S. Velasquez, Bruce Ponder, and Janet Burnett.

12. On direct appeal of the punishment retrial, Renteria's appellate counsel filed a 212-page brief raising 49 points of error.

13. The State was represented in the punishment retrial by the 34th Judicial District Attorney Jaime Esparza and Assistant District Attorneys Lori Hughes and Diana Meraz.

14. On May 4, 2011, on direct appeal of the punishment retrial, the Court of Criminal Appeals affirmed the judgment assessing the death penalty. *See Renteria v. State*, No. AP-74289, 2011 WL 1734067 (Tex.Crim.App., May 4, 2011)(not designated for publication).

15. On November 19, 2010, Renteria timely filed an amended application for article 11.071 post-conviction writ of habeas corpus, challenging his second death sentence. This second writ was assigned cause number 20020D00230-41-2 in the trial court.

16. Renteria was initially represented in this second writ proceeding by attorney Louis Elias Lopez, and is now represented by attorney Robin Norris.

17. The State, after receiving one extension of time, timely filed its answer to this second writ on May 23, 2011.

Ground 1: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's ruling that Renteria's writ counsel lacked standing to urge a motion for continuance of the punishment retrial

18. On April 18, 2008, just before the start of evidence at the punishment retrial, Renteria's writ attorney, Louis Elias Lopez, filed: (1) a motion to supplement the first writ and set aside the trial court's findings of fact and conclusions of law, (2CR 8 at 2823-62); and (2) a motion for continuance of the

punishment retrial. (2CR 8 at 2863-2903).

19. At the hearing on these motions, writ attorney Lopez acknowledged that it was probably proper for the trial court to deny him standing to urge these motions, and the trial court denied the motions. (2RR 50 at 5-6).

20. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

Ground 2: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for new trial after the punishment retrial

21. On June 13, 2008, Renteria's trial counsel timely filed a motion for new trial following the punishment retrial, raising 20 grounds for relief. (2CR 9 at 3102-3263).

22. At the hearing on the motion for new trial on July 21, 2008, Renteria presented no witnesses or evidence, and the only ground argued by trial counsel concerned the sufficiency of evidence as to future dangerousness. (2RR 75 at 4-14).

23. The trial court denied Renteria's motion for new trial in its entirety. (2RR 75 at 14).

24. In his motion for new trial, Renteria challenged the sufficiency of

evidence supporting the jury's finding of future dangerousness. (2CR 9 at 3104-35).

25. This complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *1-4.

26. Prior to the start of jury selection for the punishment retrial, Renteria filed a motion to submit a comprehensive, written jury questionnaire. (2CR 3 at 1062-1111).

27. The trial court heard and denied the request on October 5, 2007, and the court instead submitted its own written jury questionnaire, which included all of the same general substantive areas of inquiry as Renteria's proposed questionnaire. (2RR 2 at 6-14); *see also* (CX1 – the court's questionnaire), and (DX1 – Renteria's proposed questionnaire).

28. In his motion for new trial, Renteria complained of the trial court's refusal to submit his proposed written questionnaire. (2CR 9 at 3135-66). Renteria's appellate counsel did not challenge, on direct appeal of the punishment retrial, the trial court's ruling.

29. In his motion for new trial, Renteria complained of the trial court's restrictions on his voir dire questioning concerning the prospective jurors' views on mitigating evidence and the circumstances of the offense. (2CR 9 at 3166-87).

30. This complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *4-8.

31. In his motion for new trial, Renteria complained of the trial court's denial of his for-cause challenges to 22 prospective jurors. (2CR 9 at 3187-3233). These 22 jurors were:

> Mark Anthony Tapia, Elizabeth Ann Black, Annette Brigham, Mark Williams, Carlos Martinez, Evangeline Rose Ramirez, Paul Steven Watt, Lorena Carreon, Anna L. Nava, Longino Gonzalez, Jr., Cruz Angel Ochoa, Jr., Howard Ray Bryan, Jr., John Tobias, Robert Wayne Crosby, Robert Paul Tomes, John David Turner, Margaret A. Jackson, Carla Monsivais, Leslie Potter, Daniel Gurany, Gary Keith Hill, and John Deslongchamps.

32. On direct appeal of the punishment retrial, Renteria raised complaints as to the trial court's denial of his for-cause challenges to 15 of these jurors. The Court of Criminal Appeals rejected each of these 15 claims. *See Renteria v. State*, 2011 WL 1734067, at *19-37.

33. The seven jurors complained-of in the motion for new trial who were not included in the direct-appeal claims were:

> Elizabeth Ann Black, Annette Brigham, Lorena Carreon, Robert Paul Tomes, Margaret A. Jackson, Carla Monsivais, and Gary Keith Hill.

34. During individual voir dire, the trial court granted Renteria seven additional peremptory challenges, giving him a total of 22 challenges. (2RR 28 at

63); (2RR 29 at 233); (2RR 30 at 69, 128); (2RR 34 at 66).

35. The entirety of Prospective Juror Elizabeth Ann Black's voir dire shows that she would not automatically vote for the death penalty upon a finding of future dangerousness, that she would properly consider all of the evidence in answering the mitigation special issue, and that she would be willing to consider any mitigating circumstances. (2RR 12 at 68-77, 119-20).

36. At trial, Renteria challenged Prospective Juror Annette Brigham on grounds that: (1) she had been sexually molested as a child and could not be impartial; and (2) she thought the death penalty should be sought more often, such as when there is an aggravated assault that results in murder. (2RR 13 at 203).

37. In his motion for new trial, Renteria complained that: (1) the trial court unreasonably restricted his voir dire of Prospective Juror Brigham regarding her childhood molestation experience; and (2) that Brigham had expressed an opinion in her juror questionnaire that the death penalty should be automatic. (2CR 9 at 3194-97).

38. Prospective Juror Brigham expressly stated during questioning by both the prosecutor and defense counsel that she could be fair and impartial in this case despite her childhood molestation experience. (2RR 13 at 135-37, 196-200).

39. Prospective Juror Brigham stated during questioning by both the

prosecutor and defense counsel that she believed the death penalty should be an option only for capital murder and not "plain murder." (2RR 13 at 141-42, 180-81).

40. Renteria's complaint in his motion for new trial regarding the trial court's restriction of his voir dire of Prospective Juror Brigham regarding her childhood molestation experience was in fact raised and rejected on direct appeal. *See Renteria v. State*, 2011 WL 1734067, at *8-9.

41. Renteria challenged Prospective Juror Lorena Carreon for-cause on grounds that: (1) she would have to hear evidence from the defense in order to make a determination of guilt or innocence, in violation of the Fifth Amendment; and (2) she could not be impartial and fairly consider the full range of punishment for a crime this heinous. (2RR 22 at 56-58).

42. Prospective Juror Carreon stated during questioning by both the prosecutor and defense counsel that she could base her decision on the evidence presented, whether the defense presented any evidence or not. (2RR 22 at 25-31, 49-50).

43. Prospective Juror Carreon consistently stated, upon questioning by both the prosecutor and defense counsel, that she could keep an open mind as to the full range of punishment and both special issues, even in a case where the defendant

was convicted of killing a child under six. (2RR 22 at 33-41, 52-54).

44. In his motion for new trial, Renteria did not complain about the trial court's denial of his for-cause challenge to Prospective Juror Carreon.

45. In his motion for new trial, Renteria asserted that Prospective Juror Robert Paul Tomes was "disgusted" by what he had heard about this crime and thus had a predisposition toward the death penalty in this case. (2CR 9 at 3217-18).

46. Prospective Juror Tomes stated that he could "definitely" put aside what he had heard in the media and base his verdict on the evidence presented. (2RR 28 at 78-80, 94-108, 117-27).

47. Renteria did not challenge Prospective Juror Margaret A. Jackson for-cause. (2RR 30 at 68).

48. Renteria did not challenge Prospective Juror Carla Monsivais for-cause. (2RR 30 at 126).

49. Renteria challenged Prospective Juror Gary K. Hill for-cause on one ground, that Hill "has expressed that he is concerned with matters regarding parole, and therefore these matters make him – would cause a bias and make him ineligible to be a fair juror." (2RR 35 at 60).

50. Prospective Juror Hill stated, during questioning by the prosecutor, that

the possibility of parole would not affect his deliberations on the special issues. (2RR 35 at 17, 58).

51. In his motion for new trial, Renteria asserted that Prospective Juror Hill was objectionable because he would allegedly shift the burden of proof to the defendant to convince him (Hill) not to impose the death penalty. (2CR 9 at 3226-27).

52. After the prosecutor explained to Prospective Juror Hill that neither party had the burden of proof on the mitigation special issue and that the jurors were required to consider all of the evidence in deliberating on that issue, Hill stated that he could find sufficient mitigating circumstances even if the defendant presented no evidence. (2RR 35 at 42-44, 56-57).

53. Prospective Juror Chester Dowling was accepted by both parties as Juror Number 10. (2RR 27 at 57).

54. Renteria subsequently requested that he be allowed to retroactively use a peremptory strike on Juror Dowling, which request was denied by the trial court. (2RR 30 at 68-71).

55. In his motion for new trial, Renteria asserted that this ruling by the trial court violated due process, due course of law, and his right to effective assistance of counsel. (2CR 9 at 3233-36).

56. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

57. In his motion for new trial, Renteria asserted that "the procedure which requires counsel to exercise all their peremptory challenges before they may preserve their challenges for cause" violates due process, due course of law, and his right to effective assistance of counsel. (2CR 9 at 3234-36).

58. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

59. In his motion for new trial, Renteria complained that "the cumulative effect of all the alleged instances of trial court's errors during the jury selection process injected reversible error into the trial." (2CR 9 at 3236-38).

60. This cumulative-error complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *37-38.

61. In his motion for new trial, Renteria complained that the trial court allowed the State to improperly comment on Renteria's alleged invocation of his Fifth Amendment right against self-incrimination through the prosecutor's questioning of Renteria's future-dangerousness expert (Dr. Cunningham) as to

why Dr. Cunningham did not ask Renteria about this offense. (2CR 9 at 3238-48).

62. This complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *40-42.

63. In his motion for new trial, Renteria complained that the trial court erred in excluding the testimony of Renteria's parole expert (William T. Habern) that Renteria, because of his prior sentences for indecency with a child and felony DWI, would have to serve at least 47½ years in prison before he would become eligible for parole, and would likely never be paroled, should he be sentenced to life in this case. (2CR 9 at 3248-49).

64. This complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *42-46.

65. In his motion for new trial, Renteria complained that the trial court erred in excluding the expert and/or lay opinion testimony of Frank AuBuchon, Renteria's TDCJ and corrections expert, that Renteria would not commit violent acts in the future and was not a future danger. (2CR 9 at 3249-57).

66. This complaint was raised and rejected on direct appeal of the punishment retrial. *See Renteria v. State*, 2011 WL 1734067, at *38-40.

67. Frank AuBuchon, Renteria's TDCJ and corrections expert, testified that, if Renteria was sentenced to life in prison, TDCJ would be able to securely house

and control Renteria while he was in prison. (2RR 68 at 116-17).

68. In testing this opinion testimony on cross-examination, the prosecutor inquired into AuBuchon's familiarity with the "Texas Seven" and other escape incidents from TDCJ, and defense counsel failed to timely or sufficiently object to such evidence. (2RR 68 at 135-46).

69. In testing the opinion of Renteria's future-dangerousness expert, Dr. Cunningham, that Renteria would not be a future danger while in prison, the prosecutor likewise elicited, without objected, evidence of the "Texas Seven" escape incident and another specific escape incident. (2RR 71 at 28-29).

70. During their arguments to the jury, the prosecutors never mentioned the "Texas Seven" or any other specific, unrelated escapes from or violent incidents in TDCJ.

71. In his motion for new trial, Renteria complained of the trial court's admission of the previous escape from TDCJ by the "Texas Seven." (2CR 9 at 3257-60).

72. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

Ground 3: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his request for jury lists prior to the punishment retrial

73. Two panels of prospective jurors for Renteria's punishment retrial were originally summoned and sworn in, the first panel on October 10, 2007, (2RR 4), and the second panel on October 11, 2007. (2RR 5).

74. On January 16, 2008, after the selection of 12 jurors and one alternate consumed these two original panels, the trial court indicated his intent to bring in another (third) panel that day for the selection of one additional alternate juror. (2RR 44 at 5-6).

75. Renteria then filed and urged a motion requesting, pursuant to art. 34.04 of the Texas Code of Criminal Procedure, two-days notice of the jury list for the new panel to prepare for the individual voir dire of the new prospective jurors. (2CR 4 at 1390-91); (2RR 44 at 6-8).

76. The trial court denied the request for two-days notice. (2RR 44 at 7-9); (2CR 4 at 1392).

77. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

Ground 4: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's decision to allow the State's psychological expert to examine the defendant and to collect raw data from the defense expert

78. On August 22, 2007, the State filed motions: (1) to allow the State's psychiatric/psychological expert to examine Renteria, (State's Writ Exhibit B); and (2) requesting the raw data obtained by defense psychiatric/psychological expert's testing of Renteria. (2CR 3 at 887).

79. At the hearing on the motions on October 8, 2007, defense counsel did not object to either motion and submitted a proposed order outlining the acceptable conditions of such examination by the State's expert. (2RR 3 at 8-20).

80. The trial court orally granted the State's motions and signed the proposed order submitted by defense counsel. (2RR 3 at 13-14, 19); (2CR 3 at 1114).

81. The State did not present any expert psychiatric or psychological testimony during trial.

82. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court granting the State's motions for psychiatric/psychological testing and for raw data obtained by the defense psychiatric/psychological expert's testing

of Renteria.

Ground 5: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for mistrial during jury selection

83. Prospective Juror Robert Wayne Crosby asked whether a life sentence meant life without parole, the trial court instructed Crosby that the possibility of parole was not a matter for the jury's consideration, and Crosby then stated that the possibility of parole would not influence his deliberations on the special issues. (2RR 28 at 20-21, 42-44).

84. The trial court ruled that the prospective jurors in this case could be informed of the possibility of parole, but that they were not to consider it or try to calculate how it would be applied, and that the proper inquiry in this regard was whether the possibility of parole would influence the juror to such a degree that he would not be able to follow the court's instructions. (2RR 28 at 43-44).

85. Renteria requested a mistrial, asserting that he was being denied his right to ask whether the prospective jurors had any bias against the law that, if sentenced to life, the defendant would be eligible for parole after 40 years. (2RR 28 at 51-52). The trial court denied the motion for mistrial. (2RR 28 at 52-53).

86. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by

the trial court.

Ground 6: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for new trial filed and heard prior to the punishment retrial

87. After the Court of Criminal Appeals affirmed Renteria's conviction and remanded the case for a new trial as to punishment, and before this punishment retrial commenced, Renteria filed four motions for new trial requesting that the trial court set aside the original guilty verdict and order a new trial as to both guilt/innocence and punishment. *See* (State's Writ Exhibit C); (2RR 6 at 8-11); (2CR 8 at 3080); (2CR 4 at 1396-1421, 1451-82); (2RR 46 at 18); (2CR 4 at 1483-1520); (2RR 47 at 4-7); (State's Writ Exhibit D); (2RR 48 at 14-18).

88. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, the trial court's denial of these motions for new trial.

Ground 7: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion to preclude the death penalty as a sentencing option filed and heard prior to the punishment retrial

89. On October 23, 2007, prior to the punishment retrial, Renteria filed a motion to preclude the death penalty as a sentencing option, asserting that the decision to seek the death penalty is arbitrary and should be made by the Grand

Jury, not the prosecuting attorney. (2CR 3 at 1140-49). The trial court heard and denied the motion on November 6, 2007. (2RR 6 at 24-27); (2CR 8 at 3087).

90. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

Ground 8: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion to declare article 37.071, sec. 2(a) unconstitutional on its face filed and heard prior to the punishment retrial

91. On October 24, 2007, prior to the punishment retrial, Renteria filed a motion to declare article 37.071, sec. 2(a) of the Texas Code of Criminal Procedure unconstitutional on its face, asserting: (1) that it "fails to set objective standards regarding the possible universe of relevant considerations for the imposition of the death penalty;" and (2) that it is vague and improperly provides unfettered discretion to the trial court to admit evidence the court "deems relevant to sentencing." (2CR 3 at 1164-78). The trial court heard and denied the motion on November 6, 2007. (2RR 6 at 24-27); (2CR 8 at 3086).

92. Renteria's appellate counsel from the El Paso County Public Defender's Office did not challenge, on direct appeal of the punishment retrial, this ruling by the trial court.

Ground 9: Renteria's claim of ineffective assistance of trial counsel regarding counsel's alleged failure to investigate and present mitigating evidence

93. During the punishment retrial, defense counsel presented two full days of testimony from witnesses describing Renteria's character, specifically, that he was respectful and non-aggressive as a child and teenager. *See, e.g.*, (2RR 66 at 20-25, 37-40, 49, 59-61, 122-26, 135-45); (2RR 67 at 60-61). Defense counsel also presented testimony from Renteria's mother and sister describing his upbringing and family life, including the fact that he was an altar boy and an honor student. *See, e.g.*, (2RR 67 at 5-32, 100-05, 108, 117-20, 126-27). Renteria's sister described for the jury some physical abuse of Renteria's mother by his father during Renteria's childhood years. (2RR 67 at 108-12). And both Renteria's sister and mother testified that Renteria's personality changed after he was first placed on probation for indecency with a child in 1994, and he started making bad decisions. (2RR 67 at 32-34, 120-23, 142-46).

94. Defense counsel also presented evidence that Renteria had no disciplinary problems while incarcerated. (2RR 67 at 64-68, 72-75, 88-91). And counsel also presented the testimony of Dr. Cunningham, who likewise described the extent of Renteria's pro-social activities, (2RR 70 at 29-61), and who concluded that he (Dr. Cunningham) had "never observed a childhood behavior

pattern that is this positive in its involvement in church and school and community activities. I've never observed th-at [sic] degree of extra curricular pro-social adjustment in a capital offender." (2RR 70 at 60).

95. In his writ application, Renteria does not allege what additional mitigating evidence was available or what additional mitigating evidence could and should have been presented to the jury at the punishment retrial.

Ground 10: Renteria's *Brady* claim concerning witness Jay Dee Trujillo

96. During the initial investigation of this case, Detectives Guillermo Martinez and Jesus Pantoja showed witness Jay Dee Trujillo a photograph of Renteria and/or a photographic line-up including Renteria's picture, and witness Trujillo told the detectives that she was not able to identify Renteria as the person she had encountered in the Wal-Mart parking lot at the time of this incident. *See* (State's Writ Exhibits E, F, and G); (1RR 10 at 12, 34-35, 51-52, 99-102); (1RR 54 at 142-47); (2RR 53 at 64-65); (2RR 54 at 55-56).

97. Witness Trujillo did not affirmatively tell the detectives that the person she encountered in the Wal-Mart parking lot was not Renteria. *See* (affidavit of Jesus Pantoja, dated May 25, 2011, and filed June 13, 2011).

98. Nor did witness Trujillo did affirmatively tell any of the prosecutors before Renteria's first trial that the person she encountered in the Wal-Mart

parking lot was not Renteria. *See* (State's Writ Exhibit H).

99. Neither the prosecutors nor the investigating detectives were in possession of any affirmative statement by witness Trujillo, prior to Renteria's first trial, that the man she encountered in the Wal-Mart parking lot was not Renteria.

100. Renteria himself acknowledged to both the investigating detectives and to his mother that he had in fact encountered witness Trujillo in the Wal-Mart parking lot just as described by witness Trujillo. (1RR 54 at 68-70); (2RR 54 at 46-48); (2RR 67 at 47-48).

101. Witness Trujillo's affidavit, dated January 17, 2008, in which she states that she affirmatively told both the investigating detectives and the prosecutors before Renteria's first trial that the person she encountered in the Wal-Mart parking lot was not Renteria, is not credible, as it conflicts with the report, affidavit, pretrial, and trial testimony of (then) Det. Jesus Pantoja, the report, pretrial, and trial testimony of Det. Martinez, the affidavit of prosecutor Lori Hughes, Renteria's own admissions to the detectives and to his mother that he did in fact encounter witness Trujillo in the parking lot, Trujillo's own written statement of January 4, 2002, and Trujillo's own testimony during Renteria's first trial, in which she specifically testified that she could not identify anyone in the

pictures the detectives showed her because she did not get a good look at the person's face. (1RR 54 at 142-44).

102. On April 10, 2003, during a suppression hearing before Renteria's first trial, Renteria's defense counsel noted that the issue of whether witness Trujillo was merely unable to identify Renteria as the person she encountered in the Wal-Mart parking lot, or whether witness Trujillo affirmatively stated that the person she encountered was not Renteria, was an issue "vital" to the defense. (1RR 10 at 100-02).

103. On May 14, 2003, at a continuation of that pretrial suppression hearing, Renteria's defense counsel called witness Trujillo to testify, but despite counsel's previous assertion that the information was "vital" to the defense, counsel did not ask Trujillo if she was merely unable to identify Renteria from the photograph or whether she affirmatively stated that the person in the photograph was not the person she encountered. (1RR 11 at 5-6).

104. In his writ application, Renteria does not make any claim of actual innocence based upon witness Trujillo's affidavit of January 17, 2008.

Ground 11: Renteria's *Brady* claim concerning witness Alicia Garay

105. Renteria's claim that the State failed to disclose exculpatory (*Brady*) evidence that a witness, Alicia Garay, reported to Wal-Mart employees and police

that she saw a girl matching the victim's description leave the store with a man who was not Renteria was litigated in Renteria's first writ filed by writ attorney Lopez in 2006, and the 41st District Court expressly found the claim to be without merit. *See* (State's Writ Exhibits J, K, and L).

106. Renteria alleges no new facts or evidence supporting the claim in this writ application.

107. The Court hereby adopts its findings of fact from Renteria's first writ in this regard, specifically: (1) The Court finds that the statements in the affidavit provided by Alicia Garay are not truthful and she is not credible; (2) Neither the investigating law-enforcement agency, the El Paso Police Department, and its personnel, nor the prosecutor's office, the District Attorney's Office for the 34th Judicial District, nor their personnel, ever had any knowledge about Alicia Garay or the information or documentation referred to in her affidavit; and (3) Even if the information provided by Garay had been disclosed, it is not reasonably probable that the outcome of the trial would have been different. First, Garay never identified the little girl that she states that she saw as being the victim, Alexandra Flores. Second, security tapes from the Wal-Mart recorded at the time of the abduction of the victim confirm that the victim had already left the store at the time that Garay states that she saw a little girl wearing a red dress in the store.

Thus, the little girl that Garay states that she saw could not have been the victim. Finally, Garay never states that she saw the little girl that she claims to have seen in the Wal-Mart leave with anyone such that, in light of the evidence inculpating Renteria, Garay's information is not material.

Ground 12: Renteria's claim of ineffective assistance of counsel during his first trial

108. Renteria's claim that he was denied effective assistance of counsel at his first trial due to counsel's alleged failure to preserve for appellate review any error regarding the trial court's denial of his motion to continue the first trial was litigated in Renteria's first writ filed by writ attorney Lopez in 2006, and the 41st District Court expressly found the claim to be without merit. *See* (State's Writ Exhibits J, K, and L).

109. Renteria alleges no new facts or evidence supporting the claim in this writ application.

110. The Court hereby adopts its findings of fact from Renteria's first writ in this regard, specifically: (1) Renteria failed to allege – must less demonstrate – what particular kind of prejudice could have been shown to establish that he was harmed by the denial of his motion for continuance; (2) The record affirmatively demonstrates that Renteria suffered no prejudice by the denial of his motion for

continuance, and there was no reversible error that trial counsel could have preserved; (3) All areas that Renteria complained about in the motions for continuance were addressed and developed adequately at trial either by the prosecutor or the defense. Specifically, the record shows that Renteria was well able, at trial, to confront and cross-examine witnesses on the material released by the State that occasioned the motions for continuance: (a) he cross-examined the State's DNA expert on the FBI lab flubbing of test results in other cases (there was no evidence that the DNA results in this case were suspect); (b) he examined two detectives concerning Crime Stopper tips, including the case agent, and all were cleared; and (c) he examined the mother of the victim outside of the jury's presence concerning what she knew about her Azteca ex-husband Frausto, but for whatever reason, he decided not to renew his questions to her on that issue before the jury even though there was no ruling by the Court preventing him from doing so; (4) Renteria never suggested a time frame that he needed for his investigation and never showed what voir dire questions he was prevented from asking due to the claimed late release of the information by the State that occasioned his motions for continuance; and (5) Renteria had two months to investigate the State's information that occasioned the motions for continuance before the start of evidence in the trial and almost one month from the end of voir dire until evidence

commenced to conduct his investigation.

Ground 13: Renteria's claim of ineffective assistance of counsel at the punishment stage of his trial

111. Renteria's claim in this writ that he was denied effective assistance of counsel at the punishment stage of his trial is a verbatim repeat of a claim litigated in Renteria's first writ filed by writ attorney Lopez in 2006. *See* (State's Writ Exhibit J).

112. The 41st District Court expressly found the claim in that first writ to be without merit. *See* (State's Writ Exhibit L).

113. Renteria alleges no new facts or evidence supporting the claim in this writ application.

114. The Court hereby adopts its findings of fact from Renteria's first writ in this regard, specifically: (1) Renteria does not allege or demonstrate what evidence could have been presented at punishment (in the first trial) on the mitigation issue; (2) Renteria does not allege or demonstrate how the failure to present any certain evidence on the mitigation issue prejudiced him (in the first trial); (3) trial counsel ably presented evidence directly on the mitigation issue at punishment and detailed Renteria's entire life history before the jury (in the first trial); and (4) Renteria does not allege or demonstrate how any failure to consult a

mitigation expert actually led to a less-than-professional presentation of his mitigation evidence or how such failure prejudiced him (in the first trial).

115. Renteria's defense counsel in the punishment retrial consulted with and obtained multiple mitigation experts to assist in the presentation of mitigation evidence. *See* (2CR 2 at 592-98); (2CR 4 1424-82, 1521-50, 1554-55).

116. Renteria's defense counsel in the punishment retrial presented extensive mitigation evidence, in the form of character witnesses and Renteria's family, who provided the jury with a complete picture of Renteria's entire life history, *see, e.g.*, (2RR 66 at 20-25, 37-40, 49, 59-61, 122-26, 135-45); (2RR 67 at 5-34, 60-61, 100-05, 108-12, 117-27, 142-46); and the testimony of Dr. Cunningham, a forensic psychologist, who testified at great length as to many potentially mitigating aspects of Renteria's character and background. *See* (2RR 70 at 29-61).

117. In his writ application, Renteria does not allege what additional mitigating evidence was available or what additional mitigating evidence could and should have been presented to the jury at the punishment retrial.

Ground 14: Renteria's claim of ineffective assistance regarding trial counsel's alleged failure to preserve for review his *Franks* claim

118. Renteria's claim that he was denied the effective assistance of counsel

at the guilt/innocence stage of his trial (the first trial) due to trial counsel's alleged failure to preserve for appellate review a challenge [pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)] to the legality of the search warrant that led to the discovery of evidence from Renteria's van was litigated in Renteria's first writ filed by writ attorney Lopez in 2006, and the 41st District Court expressly found the claim to be without merit. *See* (State's Writ Exhibits J, K, and L).

119. Renteria alleges no new facts or evidence supporting the claim in this writ application.

120. On direct appeal of his first trial, the Court of Criminal Appeals addressed the merits of Renteria's *Franks* claim, holding that even if the claim had been preserved for review, it was without merit. *See Renteria v. State*, 206 S.W.3d at 703-04.

Ground 15: Renteria's claim of ineffective assistance of counsel at the punishment retrial due to counsel's alleged failure to require that prospective jurors be passed for peremptory challenge first by the prosecution

121. On October 16, 2007, prior to the punishment retrial, Renteria filed a motion requesting the following procedure for jury selection: that each prospective juror be passed first to the State for any for-cause challenge, then to the defense for any for-cause challenge, then, after a sufficient number of prospective jurors

have qualified, that the State first make its peremptory challenges from the remaining pool of qualified jurors before the defense makes its peremptory challenges. (2CR 3 at 1116-19). The trial court heard and denied the motion on November 6, 2007. (2RR 6 at 39-41); (2CR 8 at 3088).

122. The procedure employed by the trial court in this case was to pass each prospective juror, immediately upon conclusion of the juror's individual voir dire, first to the State for any for-cause challenge, then to the defense for any for-cause challenge, then to the State for a peremptory challenge, then to the defense for any peremptory challenge. *See, e.g.*, (2RR 8 at 70-71 – representative example of challenge procedure employed by trial court in this punishment retrial).

123. Consequently, each prospective juror was in fact passed for peremptory challenge first by the prosecution.

Ground 16: Renteria's claim of ineffective assistance of counsel at the punishment retrial due to counsel's alleged failure to oppose the State's for-cause challenges to jurors based on the juror's opposition to the death penalty

124. In his writ application, Renteria does not allege any specific prospective jurors who were allegedly excluded erroneously by the trial court upon the State's for-cause challenge based on the juror's opposition to the death penalty.

125. The State lodged for-cause challenges to eight prospective jurors based

on the juror's opposition to the death penalty:

> Juror No. 2, Rosaura Hernandez; Juror No. 3, David J. Carreira; Juror No. 73, Maria S. Chase; Juror No. 82, Armando C. De Leon; Juror No. 107, Scott M. Felix; Juror No. 249, Catalina Elizalde; Juror No. 138 [panel two], Martha B. Gonzalez; and Juror No. 208 [panel two], Silvio Karisch.

126. Renteria's defense counsel did in fact oppose the State's for-cause challenge to four of these prospective jurors:

> Juror No. 3, David J. Carreira, (2RR 7 at 75-76); Juror No. 82, Armando C. De Leon, (2RR 15 at 66-67); Juror No. 107, Scott M. Felix, (2RR 17 at 38-39); and Juror No. 249, Catalina Elizalde, (2RR 24 at 117).

127. The trial court denied the State's for-cause challenge to Juror No. 73, Maria S. Chase. (2RR 14 at 176-77).

128. Three prospective jurors were challenged for-cause by the State with no opposition by defense counsel: Juror No. 2, Rosaura Hernandez; Juror No. 138 [panel two], Martha B. Gonzalez; and Juror No. 208 [panel two], Silvio Karisch.

129. Prospective Juror No. 2, Rosaura Hernandez, made it unmistakably clear, during questioning by both the prosecutor and defense counsel, that she would, in every case, answer the special issues in such a way, dishonestly if necessary, to avoid the death penalty. (2RR 7 at 34-38, 41).

130. Prospective Juror No. 138 [panel two], Martha B. Gonzalez, stated that

her views against the death penalty were so strong that she could not consider the death penalty as an option in any case and that she would always answer the mitigation special issue in such a way that a life sentence would result, regardless of the evidence. (2RR 34 at 77-78, 87-91).

131. Prospective Juror No. 208 [panel two], Silvio Karisch, stated that he could never consider the death penalty as an option and that he would always answer the mitigation special issue in such a way to result in a life sentence, regardless of the evidence. (2RR 105-06, 112-13).

Ground 17: Renteria's claim that the remand for a punishment retrial only violates his rights to due process and equal protection

132. Renteria failed to object, either in the Court of Criminal Appeals at the time of the remand (by way of a motion for rehearing) or in the trial court before the punishment retrial, to conducting the punishment retrial before a second jury.

Grounds 18-19: Renteria's claims regarding the change-of-venue issue

133. Renteria requested a change of venue before his first trial, which was denied by the trial court, and his appellate counsel challenged that ruling in the direct appeal of his first trial. This complaint was rejected by the Court of Criminal Appeals. *See Renteria v. State*, 206 S.W.3d at 709.

134. Renteria did not request a change of venue for the punishment retrial.

CONCLUSIONS OF LAW

Ground 1: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's ruling that Renteria's writ counsel lacked standing to urge a motion for continuance of the punishment retrial

1. Because Renteria was represented in the punishment-retrial proceedings by the El Paso County Public Defender's Office, the trial court was not required to consider any motions purportedly filed on Renteria's behalf by anyone else. *Robinson v. State*, 240 S.W.3d 919, 921-22 (Tex.Crim.App. 2007); *In re Wingfield*, 171 S.W.3d 374, 381 (Tex.App.–Tyler 2005, orig. proceeding).

2. Because Renteria has not shown, and cannot show, any actual prejudice due to the denial of the motion for continuance of the punishment retrial filed by writ attorney Lopez, Renteria has not shown, and cannot show, any abuse of the trial court's discretion in so ruling. *See Gallo v. State*, 239 S.W.3d 757, 764 (Tex.Crim.App. 2007), *cert. denied*, 553 U.S. 1080, 128 S.Ct. 2872, 171 L.Ed.2d 813 (2008).

3. Based on Conclusions of Law 1 and 2 above, Renteria has not shown, and cannot show, that an appellate complaint as to the trial court's denial of the motion for continuance had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence. Renteria has

thus failed to show that he was denied the effective assistance of his appellate counsel in this regard. *See Ex parte Miller*, 330 S.W.3d 610, 623-25 (Tex.Crim.App. 2009).

Ground 2: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for new trial after the punishment retrial

4. Because Renteria's motion-for-new-trial complaint that the evidence was insufficient to support the jury's finding of future dangerousness was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999).

5. Renteria has not shown, and cannot show, that the trial court abused its discretion by refusing to submit Renteria's proposed written jury questionnaire. *See* TEX. CODE CRIM. PROC. art. 35.17(2); *Howard v. State*, 941 S.W.2d 102, 108-11 (Tex.Crim.App. 1996), *cert. denied*, 535 U.S. 1065, 122 S.Ct. 1935, 152 L.Ed.2d 840 (2002); *Curry v. State*, 910 S.W.2d 490, 492 (Tex.Crim.App. 1995); *Powell v. State*, 897 S.W.2d 307, 311 (Tex.Crim.App. 1994), *cert. denied*, 516 U.S. 808, 116 S.Ct. 54, 133 L.Ed.2d 19 (1995), *overruled on other grounds by Prystash v. State*, 3 S.W.3d 522 (Tex.Crim.App. 1999); *Martinez v. State*, 867

S.W.2d 30, 35 (Tex.Crim.App. 1993), *cert. denied*, 512 U.S. 1246, 114 S.Ct. 2765, 129 L.Ed.2d 879 (1994).

6. Based on Conclusion of Law 5, Renteria has not shown, and cannot show, that an appellate complaint as to the trial court's refusal to submit his proposed written jury questionnaire had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence. Renteria has thus failed to show that he was denied the effective assistance of his appellate counsel in this regard. *See Ex parte Miller*, 330 S.W.3d at 623-25.

7. Because Renteria's motion-for-new-trial complaint regarding the trial court's allegedly "unreasonable and overly restrictive voir dire procedures" was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

8. Because Renteria's motion-for-new-trial complaints that the trial court erroneously denied his for-cause challenges to 15 prospective jurors, namely, Mark Anthony Tapia, Mark Williams, Carlos Martinez, Evangeline Rose Ramirez, Paul Steven Watt, Anna L. Nava, Longino Gonzalez, Jr., Cruz Angel Ochoa, Jr., Howard Ray Bryan, Jr., John Tobias, Robert Wayne Crosby, John David Turner,

Leslie Potter, Daniel Gurany, and John Deslongchamps, were in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise these issues. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

9. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his for-cause challenge to Prospective Juror Elizabeth Ann Black. *See Gardner v. State*, 306 S.W.3d 274, 295-300 (Tex.Crim.App. 2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 103, 178 L.Ed.2d 64 (2010); *Saldano v. State*, 232 S.W.3d 77, 93 (Tex.Crim.App. 2007), *cert. denied*, 552 U.S. 1232, 128 S.Ct. 1446, 170 L.Ed.2d 270 (2008). Renteria thus has not shown, and cannot show, that a complaint on direct appeal as to this ruling by the trial court would have been successful, such that he has failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

10. As for Prospective Juror Annette Brigham, because Renteria's complaints in the motion for new trial do not comport with his trial objections, his motion-for-new-trial claims were not preserved for appellate review. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex.Crim.App. 2009). Renteria thus cannot show that a complaint on direct appeal as to the trial court's denial of his motion for new

trial as to Prospective Juror Brigham would have been successful, and he further has not shown, and cannot show, that his appellate counsel was ineffective for failing to raise this claim on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

11. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his for-cause challenge to Prospective Juror Annette Brigham. *See Davis v. State*, 329 S.W.3d 798, 810-13 (Tex.Crim.App. 2010); *Gardner v. State*, 306 S.W.3d at 295; *Mooney v. State*, 817 S.W.2d 693, 700-01 (Tex.Crim.App. 1991). Renteria thus has not shown, and cannot show, that a complaint on direct appeal as to this ruling by the trial court would have been successful, such that he has failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

12. Because Renteria's motion-for-new-trial complaint regarding the trial court's restriction of his voir dire of Prospective Juror Brigham regarding her childhood molestation experience was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

13. Because Renteria failed to argue, in his motion for new trial, that the trial court erred in denying his for-cause challenge to Prospective Juror Lorena Carreon, he failed to preserve this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a). Renteria therefore has not shown, and cannot show, that appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

14. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his for-cause challenge to Prospective Juror Lorena Carreon. *See Ladd v. State*, 3 S.W.3d 547, 560-61 (Tex.Crim.App. 1999), *cert. denied*, 529 U.S. 1070, 120 S.Ct. 1680, 146 L.Ed.2d 487 (2000); *Little v. State*, 758 S.W.2d 551, 559-60 (Tex.Crim.App.), *cert. denied*, 488 U.S. 934, 109 S.Ct. 328, 102 L.Ed.2d 346 (1988). Renteria thus has not shown, and cannot show, that a complaint on direct appeal as to this ruling by the trial court would have been successful, such that he has failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

15. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his for-cause challenge to Prospective Juror Robert Paul Tomes. *See Gardner v. State*, 306 S.W.3d at 295-300. Renteria thus has not

shown, and cannot show, that a complaint on direct appeal as to this ruling by the trial court would have been successful, such that he has failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

16. Because Renteria did not lodge a for-cause challenge to Prospective Juror Margaret A. Jackson, no appellate complaint regarding the trial court's alleged erroneous denial of such for-cause challenge could have been successful. Renteria has thus failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

17. Because Renteria did not lodge a for-cause challenge to Prospective Juror Carla Monsivais, no appellate complaint regarding the trial court's alleged erroneous denial of such for-cause challenge could have been successful. Renteria has thus failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

18. As for Prospective Juror Gary Keith Hill, because Renteria's complaint in the motion for new trial does not comport with his trial objection and was never presented to the trial court, his motion-for-new-trial claim was not preserved for

appellate review. *See Pena v. State*, 285 S.W.3d at 464. Renteria thus cannot show that a complaint on direct appeal as to the trial court's denial of his motion for new trial as to Prospective Juror Hill would have been successful, and he further has not shown, and cannot show, that his appellate counsel was ineffective for failing to raise this claim on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

19. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his for-cause challenge to Prospective Juror Hill. *See Gardner v. State*, 306 S.W.3d at 295. Renteria thus has not shown, and cannot show, that a complaint on direct appeal as to this ruling by the trial court would have been successful, such that he has failed to show, and cannot show, that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

20. Because Renteria was granted seven additional peremptory challenges by the trial court, and because Renteria has not shown, and cannot show, that the trial court erroneously denied at least eight of his for-cause challenges, Renteria has not shown, and cannot show, any harm from the trial court's rulings. *See Saldano v. State*, 232 S.W.3d at 93; *Newbury v. State*, 135 S.W.3d 22, 30-32 (Tex.Crim.App.), *cert. denied*, 543 U.S. 990, 125 S.Ct. 496, 160 L.Ed.2d 376

(2004).

21. Renteria has not shown, and cannot show, that the trial court's denial of his request to retroactively use a peremptory strike on Juror Chester Dowling violated due process, due course of law, or his right to effective assistance of counsel. *See* TEX. CODE CRIM. PROC. art. 35.13; *Rocha v. State*, 16 S.W.3d 1, 5-6 (Tex.Crim.App. 2000). Renteria thus has not shown, and cannot show, that any complaint as to the trial court's denial of his request to retroactively use a peremptory strike on Juror Dowling had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence. Renteria has thus failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel due to appellate counsel's failure to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

22. Renteria has not shown, and cannot show, that "the procedure which requires counsel to exercise all their peremptory challenges before they may preserve their challenges for cause" violates due process, due course of law, and his right to effective assistance of counsel. *See Davis v. State*, 329 S.W.3d at 807; *Newbury v. State*, 135 S.W.3d at 30-31. Renteria thus has not shown, and cannot show, that any complaint as to the error-preservation rules had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his

second death sentence. Renteria has thus failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel due to appellate counsel's failure to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

23. Because Renteria's motion-for-new-trial complaint that "the cumulative effect of all the alleged instances of trial court's errors during the jury selection process injected reversible error into the trial" was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

24. Because Renteria has failed to show, and cannot show, that any of the individual complained-of voir dire rulings were erroneous, he further cannot show that in their cumulative effect, such rulings violated his rights to due process or due course of law. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999), *cert. denied*, 528 U.S. 1082, 120 S.Ct. 805, 145 L.Ed.2d 678 (2000). Renteria thus has not shown, and cannot show, that any complaint as to "cumulative error" during jury selection had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, that he was

denied the effective assistance of his appellate counsel due to appellate counsel's failure to raise this issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

25. Because Renteria's motion-for-new-trial complaint that the trial court erroneously allowed the State to comment on his alleged invocation of his Fifth Amendment right against self-incrimination and to use such alleged invocation against him was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

26. Because Renteria's motion-for-new-trial complaint that the trial court erred in excluding the testimony of William T. Habern was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

27. Because Renteria's motion-for-new-trial complaint that the trial court erred in excluding the testimony of Frank AuBuchon was in fact raised (and rejected) on direct appeal, Renteria has not shown, and cannot show, any ineffective assistance of appellate counsel for failing to raise the issue. *See Ex*

parte Miller, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

28. Because Renteria failed to timely object to the Texas Seven evidence, failed to obtain a running objection to that evidence, failed to object to other evidence of specific escapes from TDCJ, and himself elicited evidence of other violent incidents in and escapes from TDCJ, he failed to preserve for appellate review any complaint as to the Texas Seven evidence. *See Geuder v. State*, 115 S.W.3d 11, 13 (Tex.Crim.App. 2003); *Martinez v. State*, 98 S.W.3d 189, 193 (Tex.Crim.App. 2003). And since Renteria failed to preserve this complaint for appellate review, he has not shown, and cannot show, that any challenge on direct appeal to the admission of this evidence would necessarily have been successful, such that he has not shown, and cannot show, that his appellate counsel was ineffective for failing to raise that issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

29. Renteria has failed to show, and cannot show, that the trial court abused its discretion by admitting the Texas Seven evidence. *See Wheeler v. State*, 67 S.W.3d 879, 881-86 (Tex.Crim.App. 2002); *Goldberg v. State*, 95 S.W.3d 345, 376-78 (Tex.App.–Houston [1st Dist.] 2002, pet. ref'd), *cert. denied*, 540 U.S. 1190, 124 S.Ct. 1436, 158 L.Ed.2d 99 (2004). Because Renteria has not shown, and cannot show, that the trial court abused its discretion by admitting the Texas

Seven evidence, he has not shown, and cannot show, that any challenge on direct appeal to the admission of this evidence would necessarily have been successful, such that he has not shown, and cannot show, that his appellate counsel was ineffective for failing to raise that issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

30. Any error in the admission of the Texas Seven evidence was harmless, in that it had no significant impact on the jury's finding of future dangerousness in this case. *See* TEX. R. APP. P. 44.2(b); *Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex.Crim.App. 2002). Renteria thus has not shown, and cannot show, that any challenge on direct appeal to the admission of this evidence would necessarily have been successful, such that he has not shown, and cannot show, that his appellate counsel was ineffective for failing to raise that issue on direct appeal. *See Ex parte Miller*, 330 S.W.3d at 623-25.

31. Renteria has not shown, and cannot show, that any of the individual complaints raised in his motion for new trial had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence had any such issues been raised on direct appeal. Renteria has thus failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 3: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his request for jury lists prior to the punishment retrial

32. Renteria has not shown, and cannot show, that the trial court erred in denying his request for two-days notice of the names of the prospective jurors in the third panel. *See* TEX. CODE CRIM. PROC. art. 34.04; *Wyle v. State*, 777 S.W.2d 709, 713-14 (Tex.Crim.App. 1989). Renteria has not shown, and cannot show, that any complaint regarding the trial court's denial of his request for two-days notice of the names of the prospective jurors in the third panel had "indisputable merit under well-settled law" that would necessarily would have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 4: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's decision to allow the State's psychological expert to examine the defendant and to collect raw data from the defense expert

33. Because Renteria did not object to the complained-of orders and, in fact, agreed to the orders and procedures adopted by the trial court in this regard, he cannot now be heard to complain about those orders and procedures. *See Woodall v. State*, ___ S.W.3d ___, No. PD-1379-09, 2011 WL 743844, at *8

(Tex.Crim.App., Mar. 2, 2011)(not yet reported); *Prystash v. State*, 3 S.W.3d 522, 531 (Tex.Crim.App. 1999), *cert. denied*, 529 U.S. 1102, 120 S.Ct. 1840, 146 L.Ed.2d 782 (2000).

34. Because the State did not call any psychiatric or psychological expert to testify, or otherwise present any such expert testimony during trial, Renteria could not have been harmed in any way by these now-complained-of orders by the trial court. As such, any complaint as to these orders regarding examination of Renteria by the State's expert is moot. *Cf. Gonzalez v. State*, 296 S.W.3d 620, 633 (Tex.App.–El Paso 2009, pet. ref'd).

35. Based on Conclusions of Law 33 and 34 above, Renteria has not shown, and cannot show, that an appellate complaint as to the trial court's ruling had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence. Renteria has thus failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel in this regard. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 5: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for mistrial during jury selection

36. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his motion for mistrial during jury selection. *See Simpson v.*

State, 119 S.W.3d 262, 272 (Tex.Crim.App. 2003), *cert. denied*, 542 U.S. 905, 124 S.Ct. 2837, 159 L.Ed.2d 270 (2004); *Howard v. State*, 941 S.W.2d at 108-11; *Mays v. State*, 726 S.W.2d 937, 949-50 (Tex.Crim.App. 1986), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1059, 98 L.Ed.2d 1020 (1988). Renteria thus has not shown, and cannot show, that any complaint as to the trial court's denial of his motion for mistrial had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 6: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion for new trial filed and heard prior to the punishment retrial

37. Renteria's motions for new trial, filed before the punishment retrial and some 4-5 years after his initial conviction and sentencing, were untimely, such that the trial court had no discretion to entertain those untimely motions. *See* TEX. R. APP. P. 21.4; *State v. Moore*, 225 S.W.3d 556, 566 (Tex.Crim.App. 2007).

38. Because the Court of Criminal Appeals remanded the case to the trial court for a new punishment hearing only, the trial court's jurisdiction was limited to punishment issues, such that the trial court had no jurisdiction at that point to

entertain a motion for new trial complaining of errors occurring at the guilt/innocence phase of trial. *See* TEX. CODE CRIM. PROC. art. 44.29(c); *Lopez v. State*, 18 S.W.3d 637, 639-40 (Tex.Crim.App. 2000).

39. Based on Conclusions of Law 37 and 38 above, Renteria has not shown, and cannot show, that an appellate complaint as to the trial court's ruling had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence. Renteria has thus failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel in this regard. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 7: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion to preclude the death penalty as a sentencing option filed and heard prior to the punishment retrial

40. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his motion to preclude the death penalty as a sentencing option. *See Luna v. State*, 268 S.W.3d 594, 608-09 (Tex.Crim.App. 2008), *cert. denied*, ___ U.S. ___, 130 S.Ct. 72, 175 L.Ed.2d 51 (2009); *Gallo v. State*, 239 S.W.3d at 779-80; *Threadgill v. State*, 146 S.W.3d 654, 671-72 (Tex.Crim.App. 2004); *Rayford v. State*, 125 S.W.3d 521, 533-34 (Tex.Crim.App. 2003), *cert. denied*, 543 U.S. 823, 125 S.Ct. 39, 160 L.Ed.2d 35 (2004). Renteria thus has not

shown, and cannot show, that any complaint as to the trial court's denial of his motion had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 8: Renteria's claim of ineffective assistance of appellate counsel for failing to raise on direct appeal of the punishment retrial a complaint as to the trial court's denial of his motion to declare article 37.071, sec. 2(a) unconstitutional on its face filed and heard prior to the punishment retrial

41. Renteria has not shown, and cannot show, that the trial court abused its discretion by denying his motion to declare article 37.071, sec. 2(a) unconstitutional on its face. *See Saldano v. State*, 232 S.W.3d at 107-09 (and cases cited therein); *Aranda v. State*, 736 S.W.2d 702, 708 (Tex.Crim.App. 1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2916, 100 L.Ed.2d 947 (1988). Renteria thus has not shown, and cannot show, that any complaint as to the trial court's denial of his motion had "indisputable merit under well-settled law" that would necessarily have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, that he was denied the effective assistance of his appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Grounds 1-8 inclusive

42. Renteria has failed in his burden of showing, and cannot show, both: (1) that appellate counsel's decision not to raise on direct appeal the specific claims discussed in grounds one through eight in this writ was objectively unreasonable; and (2) that any of the unraised claims discussed in grounds one through eight in this writ would necessarily have been successful if raised on direct appeal.

43. Renteria has failed to show, and cannot show, that any of the unraised claims discussed in grounds one through eight in this writ were clearly stronger than the 49 issues appellate counsel did raise, and he has certainly failed to show, and cannot show, that any of the unraised claims discussed in grounds one through eight in this writ were "lead pipe cinch" or "sure-fire winner" points of error.

44. Based on Conclusions of Law 42 and 43 above, Renteria has failed in his burden of showing, and cannot show, that any of the unraised claims discussed in grounds one through eight in this writ had indisputable merit under well-settled law and would necessarily have resulted in a reversal of his second death sentence, such that he has further failed to show, and cannot show, any ineffective assistance of his appellate counsel as alleged in grounds one through eight in this writ. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 9: Renteria's claim of ineffective assistance of trial counsel regarding counsel's alleged failure to investigate and present mitigating evidence

45. Because Renteria's trial counsel presented extensive mitigation evidence which, in essence, presented to the jury a complete picture of Renteria's entire life, Renteria's claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence is not firmly founded in the record. *See Ex parte Woods*, 176 S.W.3d 224, 226 (Tex.Crim.App. 2005); *Boggess v. State*, 855 S.W.2d 645, 647 (Tex.Crim.App. 1991), *cert. denied*, 509 U.S. 921, 113 S.Ct. 3034, 125 L.Ed.2d 721 (1993). Renteria has thus failed in his burden of demonstrating ineffective assistance of counsel in this regard. *See Thompson v. State*, 9 S.W.3d at 813.

46. Because Renteria has failed to even allege what additional mitigating evidence could and should have been presented, he has failed to plead any facts that would show his entitlement to relief. *See Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex.Crim.App. 1989); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex.Crim.App. 1985).

47. It was a reasonable trial strategy for defense counsel to focus primarily on the positive aspects of Renteria's childhood and upbringing to support the defensive theory that Renteria was not a future danger, as opposed to emphasizing

any alleged negative aspects of Renteria's childhood and upbringing in support of the mitigation issue, such that Renteria has not shown, and cannot show, that defense counsel was ineffective for failing to further investigate and present evidence of alleged mitigation. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984); *Ex parte Martinez*, 195 S.W.3d 713, 728 (Tex.Crim.App. 2006); *Ex parte Woods*, 176 S.W.3d at 228; *Butler v. State*, No. 01-94-00756-CR, 1995 WL 416892, at *3 (Tex.App.–Houston [1st Dist.], July 13, 1995, pet. ref'd)(not designated for publication).

48. Renteria has failed to show, and cannot show, a reasonable probability that the presentation of any additional mitigation evidence (whatever that might be) would have resulted in a different answer by the jury to the mitigation special issue. *See Ex parte Gonzalez*, 204 S.W.3d 391, 393-94 (Tex.Crim.App. 2006); *Ex parte Martinez*, 195 S.W.3d at 731; *Ex parte Woods*, 176 S.W.3d at 228.

49. Based on Conclusions of Law 45-48 above, Renteria has failed in his burden of showing, and cannot show, that his trial counsel was ineffective for failing to investigate and present mitigating evidence at the punishment retrial.

Ground 10: Renteria's *Brady* claim concerning witness Jay Dee Trujillo

50. This *Brady* claim implicates the guilt/innocence portion of Renteria's first trial and resulting conviction for capital murder, and does not implicate the

punishment retrial.

51. Renteria has failed to show, and cannot show, that the legal basis for this claim was unavailable to him on the date he filed his previous article 11.071 writ application. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(1) & 5(d).

52. Renteria has failed to show, and cannot show, that the factual basis for this claim was unavailable to him on the date he filed his previous article 11.071 writ application. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(1) & 5(e).

53. Renteria has failed to allege or show, and cannot make a prima facie showing of, innocence based on the complained-of Trujillo evidence. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(2); *Ex parte Reed*, 271 S.W.3d 698, 733-51 (Tex.Crim.App. 2008).

54. Based on Conclusions of Law 50-53 above, this Court is precluded from considering the merits of Renteria's *Brady* claim. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(c).

55. Because neither the prosecutors nor the investigating detectives were in possession of any affirmative statement by witness Trujillo, prior to Renteria's first trial, that the man she encountered in the Wal-Mart parking lot was not Renteria, Renteria has not shown, and cannot show, that any favorable evidence was suppressed by the State. *See Harm v. State*, 183 S.W.3d 403, 406-07

(Tex.Crim.App. 2006).

56. Because Renteria was aware, prior to his first trial, of witness Trujillo, of her role in the investigation of this case, and of the alleged importance of whether Trujillo merely could not identify Renteria as the man she encountered in the Wal-Mart parking lot or whether she affirmatively stated that Renteria was not the man she encountered, Renteria has not shown, and cannot show, any *Brady* violation because he could have obtained that information from Trujillo through the exercise of any reasonable diligence. *See Wilson v. State*, 7 S.W.3d 136, 145-46 (Tex.Crim.App. 1999); *Jackson v. State*, 552 S.W.2d 798, 803-04 (Tex.Crim.App. 1976), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978); *Menefee v. State*, 211 S.W.3d 893, 903-04 (Tex.App.–Texarkana 2006, pet. ref'd); *Pham v. State*, No. 05-04-01143-CR, 2006 WL 10092, at *4-5 (Tex.App.–Dallas, Jan. 3, 2006, no pet.)(not designated for publication).

57. Because there was no real dispute at trial that Renteria was in fact the man Trujillo encountered in the Wal-Mart parking lot, Renteria has not shown, and cannot show, that Trujillo's alleged affirmative statements of non-identification were material, such that Renteria has not shown, and cannot show, any *Brady* violation. *See Ex parte Reed*, 271 S.W.3d at 715-16; *Harm v. State*, 183 S.W.3d at 409.

Ground 11: Renteria's *Brady* claim concerning witness Alicia Garay

58. The Court here adopts its conclusion of law from Renteria's first writ in this regard, specifically: Because the statements in the Garay affidavit are not truthful and she is not credible, and because no member of the prosecution team, either police or prosecutor personnel, had knowledge of Garay or her information, and because the Garay evidence is not material, there was no *Brady* violation.

Ground 12: Renteria's claim of ineffective assistance of counsel during his first trial

59. The Court here adopts its conclusion of law from Renteria's first writ in this regard, specifically: Because in his [first] writ application, Renteria only states conclusions without alleging – and demonstrating – any supporting facts concerning how he was specifically prejudiced by the denial of a continuance, and because the record shows that defense counsel was well able, at trial, to confront and cross-examine witnesses on the material released by the State that sparked the motions for continuance, and because defense counsel had two months to investigate the State's information before the start of trial and almost one month from the end of voir dire until evidence commenced to conduct his investigation, no prejudice could possibly be demonstrated by denial of a continuance. Consequently, Renteria's ground for relief that he received ineffective assistance

of counsel due to trial counsel's failure to preserve for appellate review the issue of the denial of his motion for continuance by not demonstrating prejudice is without merit and the relief requested under that ground for relief should be denied.

Ground 13: Renteria's claim of ineffective assistance of counsel at the punishment stage of his trial

60. To any extent this claim is a repeat of the claim raised in Rentieria's first writ, the Court here adopts its conclusion of law from Renteria's first writ in this regard, specifically: Because trial counsel ably presented evidence on the mitigation issue, appeared to have painted a complete picture of Renteria's life, and because writ counsel does not suggest one item of evidence that was not presented, Renteria's claim that he received ineffective assistance of counsel at the punishment phase is without merit as there was no suggestion or showing of either deficient performance or prejudice.

61. Because: (1) Renteria's defense counsel at the punishment retrial did in fact consult with multiple mitigation experts to assist in the presentation of mitigation evidence; (2) Renteria's defense counsel at the punishment retrial presented extensive mitigation evidence, including family and character witnesses who painted for the jury a complete picture of Renteria's entire life history, and

expert witnesses who testified as to many potentially mitigating aspects of Renteria's character and background; and (3) Renteria has failed to even allege what additional mitigating evidence could and should have been presented, Renteria's claim of ineffective assistance of counsel at the punishment retrial is not firmly founded in the record, and Renteria has not shown, and cannot show, that he was denied effective assistance of counsel in this regard. *See Ex parte Woods*, 176 S.W.3d at 226; *Thompson v. State*, 9 S.W.3d at 813.

Ground 14: Renteria's claim of ineffective assistance regarding trial counsel's alleged failure to preserve for review his *Franks* claim

62. The Court here adopts its conclusion of law from Renteria's first writ in this regard, specifically: Because the allegedly false statements of omission were unnecessary to the finding of probable cause for the issuance of the search warrant for Renteria's van, his *Franks* claim, and *ipso facto*, his ineffective-assistance claim for failure to preserve *Franks* error, is without merit. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); *Cates v. State*, 120 S.W.3d 352, 355 (Tex.Crim.App. 2003). Moreover, because in Texas a *Franks* challenge cannot be made to alleged omissions of fact in a search-warrant affidavit, Renteria's claim that his trial lawyers (in the first trial) were ineffective because they failed to preserve his *Franks* issue for appellate review, in that trial

counsel did not allege in the motion to suppress material *omissions* from the search-warrant affidavit by the police-office affiant, is without merit.

63. Because the Court of Criminal Appeals previously determined that there was no *Franks* violation in Renteria's first trial, *see Renteria v. State*, 206 S.W.3d at 703-04, Renteria has not shown, and cannot show, that his trial counsel was ineffective for failing to preserve for appellate review his *Franks*-error claim. *See Ex parte Miller*, 330 S.W.3d at 623-25.

Ground 15: Renteria's claim of ineffective assistance of counsel at the punishment retrial due to counsel's alleged failure to require that prospective jurors be passed for peremptory challenge first by the prosecution

64. Because the record shows that each prospective juror at the punishment retrial was in fact passed for peremptory challenge first by the prosecution, Renteria's claim of ineffective assistance of counsel is not firmly founded in the record, and Renteria thus has not shown, and cannot show, any ineffective assistance in this regard. *See* TEX. CODE CRIM. PROC. art. 35.13; *Hughes v. State*, 24 S.W.3d 833, 841 (Tex.Crim.App.), *cert. denied*, 531 U.S. 980, 121 S.Ct. 430, 148 L.Ed.2d 438 (2000); *Janecka v. State*, 739 S.W.2d 813, 833-34 (Tex.Crim.App. 1987).

Ground 16: Renteria's claim of ineffective assistance of counsel at the punishment retrial due to counsel's alleged failure to oppose the State's for-cause challenges to jurors based on the juror's opposition to the death penalty

65. Because Renteria has failed to allege in his writ application any specific juror that was allegedly erroneously excluded without opposition by defense counsel, he has failed in his burden to both plead and prove his allegation of ineffective assistance of counsel in this regard. *See Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex.Crim.App. 2002); *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex.Crim.App. 1995), *cert. denied*, 518 U.S. 1021, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); *Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex.Crim.App. 1994), *cert. denied*, 513 U.S. 1084, 115 S.Ct. 739, 130 L.Ed.2d 641 (1995); *Ex parte Maldonado*, 688 S.W.2d at 116.

66. Because Renteria's defense counsel did in fact oppose the State's for-cause challenge to four of the eight prospective jurors challenged by the State based on the juror's opposition to the death penalty, namely, Juror No. 3, David J. Carreira, (2RR 7 at 75-76); Juror No. 82, Armando C. De Leon, (2RR 15 at 66-67); Juror No. 107, Scott M. Felix, (2RR 17 at 38-39); and Juror No. 249, Catalina Elizalde, (2RR 24 at 117), Renteria's claim of ineffective assistance for failing to oppose these challenges is not firmly founded in the record and is without merit.

67. Because the trial court denied the State's for cause challenge to Juror

No. 73, Maria S. Chase, (2RR 14 at 176-77), Renteria's claim of ineffective assistance for failing to oppose this challenge is not firmly founded in the record and is without merit.

68. Because Prospective Juror No. 2, Rosaura Hernandez, made it unmistakably clear, during questioning by both the prosecutor and defense counsel, that she would, in every case, answer the special issues in such a way, dishonestly if necessary, to avoid the death penalty, (2RR 7 at 34-38, 41), she was subject to a valid challenge for cause, and Renteria has not shown, and cannot show, that the trial court abused its discretion by sustaining the State's for-cause challenge to Juror Hernandez. *See Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492 (1992); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 852-53, 83 L.Ed.2d 841 (1985); *Colburn v. State*, 966 S.W.2d at 518; *Smith v. State*, 907 S.W.2d 522, 527-29 (Tex.Crim.App. 1995). Therefore, defense counsel was under no obligation to object to the dismissal, and the failure to so object does not constitute deficient performance. *See Butler v. State*, 872 S.W.2d 227, 241-42 (Tex.Crim.App. 1994), *cert. denied*, 513 U.S. 1157, 115 S.Ct. 1115, 130 L.Ed.2d 1079 (1995); *Holland v. State*, 761 S.W.2d 307, 315-17 (Tex.Crim.App. 1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1560, 103 L.Ed.2d 863 (1989); *Meanes v. State*, 668 S.W.2d 366, 373-74 (Tex.Crim.App. 1983), *cert.*

denied, 466 U.S. 945, 104 S.Ct. 1930, 80 L.Ed.2d 476 (1984).

69. Because Prospective Juror No. 138 [panel two], Martha B. Gonzalez, stated that her views against the death penalty were so strong that she could not consider the death penalty as an option in any case and that she would always answer the mitigation special issue in such a way that a life sentence would result, regardless of the evidence, (2RR 34 at 77-78, 87-91); she was subject to a valid challenge for cause, and Renteria has not shown, and cannot show, that the trial court abused its discretion by sustaining the State's for-cause challenge to Juror Gonzalez. *See Morgan v. Illinois*, 112 S.Ct. at 2233; *Wainwright v. Witt*, 105 S.Ct. at 852-53; *Colburn v. State*, 966 S.W.2d at 518; *Smith v. State*, 907 S.W.2d 522, 527-29 (Tex.Crim.App. 1995). Therefore, defense counsel was under no obligation to object to the dismissal, and the failure to so object does not constitute deficient performance. *See Butler v. State*, 872 S.W.2d at 241-42; *Holland v. State*, 761 S.W.2d at 315-17; *Meanes v. State*, 668 S.W.2d at 373-74.

70. Because Prospective Juror No. 208 [panel two], Silvio Karisch, stated that he could never consider the death penalty as an option and that he would always answer the mitigation special issue in such a way to result in a life sentence, regardless of the evidence, (2RR 105-06, 112-13), he was subject to a valid challenge for cause, and Renteria has not shown, and cannot show, that the

trial court abused its discretion by sustaining the State's for-cause challenge to Juror Gonzalez. *See Morgan v. Illinois*, 112 S.Ct. at 2233; *Wainwright v. Witt*, 105 S.Ct. at 852-53; *Colburn v. State*, 966 S.W.2d at 518; *Smith v. State*, 907 S.W.2d 522, 527-29 (Tex.Crim.App. 1995). Therefore, defense counsel was under no obligation to object to the dismissal, and the failure to so object does not constitute deficient performance. *See Butler v. State*, 872 S.W.2d at 241-42; *Holland v. State*, 761 S.W.2d at 315-17; *Meanes v. State*, 668 S.W.2d at 373-74.

Ground 17: Renteria's claim that the remand for a punishment retrial only violates his rights to due process and equal protection

71. Renteria procedurally defaulted any complaint that the Court of Criminal Appeals erred in remanding the case for a punishment retrial only by failing to timely raise it in a motion for rehearing of the Court's opinion. *See Clark v. State*, 994 S.W2d 166, 169 (Tex.Crim.App. 1999)(Johnson, J., concurring), *cert. denied*, 528 U.S. 1162, 120 S.Ct. 1177, 145 L.Ed.2d 1085 (2000).

72. Renteria procedurally defaulted any complaint that art. 44.29(c) of the Texas Code of Criminal Procedure is unconstitutional by not objecting to the constitutionality of the statute in the trial court. *See Estrada v. State*, 313 S.W.3d 274, 309 (Tex.Crim.App. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 905, 178

L.Ed.2d 760 (2011); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009); *Curry v. State*, 910 S.W.2d 490, 496 (Tex.Crim.App. 1995).

73. Renteria procedurally defaulted any complaint as to the constitutional fairness of having different juries decide guilt/innocence and punishment by failing to object at trial. *See Aldrich v. State*, 104 S.W.3d 890, 894-95 (Tex.Crim.App. 2003).

74. Because Renteria failed to timely assert his challenges to art. 44.29(c) and the different-juries issue, he is not now entitled to habeas corpus relief. *See Ex parte Pena*, 71 S.W.3d 336, 337 (Tex.Crim.App. 2002).

75. Because Renteria's complaints regarding art. 44.29(c) and the different-juries issue are purely legal issues that could have been raised on direct appeal, these complaints are not cognizable in this post-conviction writ proceeding. *See Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex.Crim.App. 2004).

76. Renteria has not shown, and cannot show, that the mandatory language of art. 44.29(c) requiring a remand for a new punishment hearing only if the error is one that affects punishment only is in any way unconstitutional. *See Smith v. State*, 74 S.W.3d 868, 873-74 (Tex.Crim.App. 2002); *Clark v. State*, 994 S.W.2d at 168; *Ransom v. State*, 920 S.W.2d 288, 297-98 (Tex.Crim.App.)(op. on reh'g), *cert. denied*, 519 U.S. 1030, 117 S.Ct. 587, 136 L.Ed.2d 516 (1996); *Erazo v.*

State, 260 S.W.3d 510, 513 (Tex.App.–Houston [14th Dist.] 2008, pet. ref'd)(citing *Thompson v. State*, No. AP-73431, 2007 WL 3208755, at *2-3 (Tex.Crim.App., Oct. 31, 2007)(not designated for publication)).

Grounds 18-19: Renteria's claims regarding the change-of-venue issue

77. Because Renteria did not request a change of venue for the punishment retrial, his claims of trial-court error and ineffective assistance of counsel at the punishment retrial are without merit.

78. Because Renteria's challenge to the trial court's denial of his request to change venue in his first trial was raised and rejected on direct appeal of his first trial, *see Renteria v. State*, 206 S.W.3d at 709, his venue-change complaint is not cognizable in this post-conviction writ proceeding. *See Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex.Crim.App. 2008); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex.Crim.App. 1997).

79. Because Renteria's appellate counsel did in fact raise on direct appeal of his first trial a complaint as to the trial court's denial of his request to change venue, Renteria's claim of ineffectiveness of appellate counsel is not firmly founded in the record, and he cannot show any deficient performance by appellate counsel. *See Ex parte Miller*, 330 S.W.3d at 623-24; *Thompson v. State*, 9 S.W.3d at 813.

RECOMMENDATION

Renteria has failed to plead and prove sufficient facts or otherwise demonstrate that his sentence of death upon his punishment retrial was unlawfully obtained. Accordingly, it is recommended to the Court of Criminal Appeals that Renteria's requested relief be denied in its entirety. AND BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NUMBER 20020D00230-41-2.

SIGNED this the 29 day of July, 2014.

Hon. Annabell Perez
Judge, 41st District Court
El Paso County, Texas

APPENDIX G

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-74,829

DAVID SANTIAGO RENTERIA, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 20020D00230 IN THE 41st DISTRICT COURT
EL PASO COUNTY

KEASLER, J., delivered the unanimous opinion of the Court.

O P I N I O N

Renteria was convicted in September 2003 of capital murder.[1] Based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e), the trial judge sentenced Renteria to death.[2] In October 2006, we

[1] TEX. PENAL CODE § 19.03(a).

[2] *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(g).

affirmed the trial court's judgment as it related to Renteria's conviction, reversed it as it related to his punishment, and remanded the case to the trial court for a new punishment hearing.[3] Following the new punishment hearing in May 2008, the trial judge again assessed Renteria's punishment at death. Renteria now raises forty-nine issues on direct appeal from the second punishment hearing. After reviewing Renteria's points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment.

I. Sufficiency for Future-Dangerousness

In his second point of error, Renteria challenges the legal sufficiency of the evidence to support the jury's affirmative answer to the future dangerousness special issue.[4] When reviewing the legal sufficiency of the evidence to support the jury's answer to this special issue, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have believed, beyond a reasonable doubt, that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[5]

The State presented evidence of the capital offense at the punishment trial. Renteria was convicted of murdering five-year-old Alexandra Flores, who Renteria had kidnapped from a Walmart store in El Paso on November 18, 2001. The Walmart video surveillance

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[3] *Renteria v. State,* 206 S.W.3d 689 (Tex. Crim. App. 2006).

[4] TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1).

[5] *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

depicted Renteria exiting the store with Flores at approximately 5:15 p.m. A security video from a 7-Eleven store in El Paso showed Renteria buying two thirty-two-ounce cans of beer at 9:00 that night.

Flores's nude, partially burned body was discovered in an alley the next day. A partially burned plastic bag covered her head. The medical examiner testified that Flores had two separate bruises on her skull that indicated two separate blows on opposite sides of her head. He concluded that Flores died from "asphyxia due to manual strangulation" and that "she was dead when she was burned." He testified that an extreme amount of force was applied when Flores was strangled "because she had more hermorrhage than many cases [he had] done on strangulations." He found no evidence of sexual assault but explained "that doesn't mean that she was not touched." He found pieces of orange wedges in Flores's stomach, and he opined that she probably ate the oranges within three hours of her death. Evidence showed that Renteria had bought oranges earlier that day, and he was at the Walmart with his van when Flores disappeared. A gasoline container was discovered in Renteria's van. DNA extracted from blood stains found in the van was consistent with Flores's DNA. Renteria's palm print matched a latent palm print on the plastic bag that was covering Flores's head when her body was found.

The State also presented evidence of Renteria's troubles with the law in the years leading up to the instant offense. In 1992, he committed the offense of indecency with a child. The victim of that offense testified that Renteria molested her in her home when she

was seven years old. She testified that Renteria called her into the bathroom where he was sitting on the toilet with his pants and underwear pulled down. Renteria asked her to sit on his lap, told her "that his private area hurt and that he needed [her] to rub it for him," and touched her in her "private area in the front." They later "ended up on the floor," where Renteria unsuccessfully attempted to have intercourse with her and she saw him ejaculate. Afterward, Renteria told her "not to tell anybody" about their "secret." Renteria pled guilty to this offense in 1994 and was placed on deferred adjudication probation for ten years.

While on probation, Renteria committed three driving while intoxicated (DWI) offenses in 1995, 1997, and 2000. He pled guilty to the first two DWI offenses and was placed on probation for two years in both cases. He pled guilty to the third DWI offense, a felony, in September 2000, and was placed on shock probation for ten years. He was incarcerated for approximately three months and was released on community supervision in December 2000.

Renteria violated the terms of probation at various times by drinking alcohol, staying out past curfew, driving without a valid driver's license, traveling to Mexico, and being around children. He also failed to report to his probation officer at times. His participation in required sex-offender counseling was described as "inconsistent," "sporadic," and "enough just to get by." The evidence further showed that Renteria was dishonest with his sex-offender treatment counselor, his probation officers, and his employers. Norma Reed, his counselor, testified that Renteria initially admitted committing the indecency with a child

offense but then denied it until he was faced with possible termination from the program. When Reed administered an "Abel Assessment" test, Renteria scored 85% on the "social desirability" section, which indicated "a significant concern that he was likely not to be responding truthfully on the self-report portions [of the test]." Renteria informed Reed after the fact that he had been living with his eighteen-year-old pregnant girlfriend, and he admitted that he failed to tell his probation officer this information. When Renteria was employed at a parking lot less than a block away from a school, he informed probation officer Rebecca Gonzales that his employer was not aware of his indecency offense. Reed testified that Renteria informed her in 1999 that he had lost a job because he had lied about his criminal history on his job application. Martha Cortez, who was Renteria's probation officer from 1998 to 2001, described him as a "[b]elow average" probationer.

The State presented further evidence of incidents that occurred while Renteria was on probation. Sonia Monique Hayes testified about her encounters with Renteria when they worked together at GC Services. Hayes and Renteria met in April 1999 and began talking to each other at work and on the phone. During a phone conversation that took place a few days after they met, Renteria questioned Hayes about why she had left the break room at work to talk to a friend. Renteria told Hayes, "Well, you can have friends, but you have to clear it with me first." Hayes responded, "I don't have to clear anything with anybody." Renteria then stated, "Well, you're mine. You're always going to be mine, and if I can't have you, nobody can." Hayes became scared, threatened to call the police, and hung up the

phone. When Hayes attended a group outing with coworkers the next evening, Renteria kept trying to talk to her after she repeatedly told him to leave her alone. Hayes later filed a police report and a human resources complaint against Renteria. She did not see him again after he stopped working at GC Services in June 1999.

Kay Sequera testified about an incident that occurred in 2001, approximately seven months before the instant offense. Sequera, who had recently met Renteria and believed that he was "really good with kids," asked Renteria to pick up her three-year-old son from day care and take him to Peter Piper Pizza for a few hours while she was at work. When Sequera later called Renteria and asked him to bring her son home, he told her that he had taken her son to a horse ranch for a family member's birthday party. Sequera became nervous as the hours passed, despite the fact that Renteria called her several times and told her not to worry because her son was "having a good time" and "riding ponies." Sequera was "pretty upset" because Renteria did not bring her son home until 9:00 or 10:00 p.m. that night. Sequera testified that she did not know about Renteria's indecency offense, and probation officer Cortez testified that Renteria had denied being around children at that time.

Renteria argues that the State's evidence "essentially rehashed the circumstances of the murder and did not address the issue of future dangerousness beyond the circumstances of the murder." Renteria presented evidence at trial that he had no prior history of disciplinary offenses while incarcerated. Defense witness Frank G. AuBuchon testified that, if Renteria received a life sentence, he would be classified as a G-3 offender and housed in

a "level 5" maximum security facility. Forensic psychologist Dr. Mark Cunningham, who conducted a violence risk assessment of Renteria, acknowledged the probability that Renteria would commit acts of violence if he were "at large in the community." However, Cunningham concluded that there was "statistically a very low probability" that Renteria would commit acts of violence while in prison, based on factors such as his lack of disciplinary history, his age, his education level, his history of gainful employment, his history of "positive childhood activities," and his "continued relationship and correspondence and visitation with family members and other community members." Renteria contends that this evidence, combined with the fact that he would not have "access to young children" in prison, demonstrates that he does not pose any realistic threat of future violence if sentenced to life in prison instead of death.

That Renteria has a clean prison disciplinary record does not, by itself, resolve the future dangerousness special issue.[6] "This Court's case law has construed the future-dangerousness special issue to ask whether a defendant would constitute a continuing threat 'whether in or out of prison' without regard to how long the defendant would actually spend in prison if sentenced to life."[7] The future dangerousness special issue "focuses upon the character for violence of the particular individual, not merely the quantity or quality of the

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[6] *See Coble v. State,* 330 S.W.3d 253, 267-69 (Tex. Crim. App. 2010).

[7] *Estrada v. State,* 313 S.W.3d 274, 281 (Tex. Crim. App. 2010), *cert. denied,* 131 S. Ct. 905 (2011).

institutional restraints put on that person."[8] The appropriate focus is "the defendant's individual character for violence and the probability that he would commit acts of violence in whatever society he found himself."[9]

Further, that Renteria would not have "access to young children" in prison does not necessarily mean that he poses no threat of future violence. For example, we noted in another case that "[a] middle-aged serial killer of children is not subject to the 'aging out' of that predilection, but remains dangerous to children regardless of time spent in prison or age at the time of release."[10] And the evidence in this case supports a finding that Renteria is dangerous to an even broader range of potential victims than only young children, as demonstrated by his multiple DWI offenses and his threatening behavior toward his former adult female coworker Sonia Monique Hayes.[11]

Further, the circumstances of the offense "can be among the most revealing evidence of future dangerousness and alone may be sufficient to support an affirmative answer to that special issue."[12] Here, the evidence showed that Renteria abducted five-year-old Flores and used extreme force to strangle her. Then, in a particularly cold and brutal fashion, he

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[8] *Coble,* 330 S.W.3d at 269.

[9] *Id.*

[10] *Berry v. State,* 233 S.W.3d 847, 863 n.5 (Tex. Crim. App. 2007).

[11] *See Estrada,* 313 S.W.3d at 283.

[12] *Bell v. State,* 938 S.W.2d 35, 41-42 (Tex. Crim. App. 1996).

dumped her naked body in an alley, set it on fire, and bought beer afterwards.

In sum, by the time Renteria murdered Flores, he had already committed indecency with a child and three DWI offenses, violated his probation on numerous occasions, frightened a female coworker with his jealous and possessive behavior, and upset another woman when he babysat her three-year-old son by failing to return him home until late at night. This escalating pattern of threatening behavior, violence, and disrespect for the law supports a finding of future dangerousness.[13] As a result, the evidence was legally sufficient to support the jury's affirmative answer to the future dangerousness special issue. Point of error two is therefore overruled.

II. Limitations on Voir Dire Questioning

In point of error three, Renteria contends that the trial judge's "unreasonable and overly restrictive voir dire procedures denied [his] fundamental rights to empanel an impartial jury of his peers." He complains that the trial judge refused to permit him "to elicit answers to proper questions propounded for the purpose of discovering challenges for cause and for the intelligent exercise of peremptory challenges." He asserts that the trial judge improperly restricted voir dire on both "mitigating factors" and the "circumstances of the offense."

The trial judge has broad discretion over the process of selecting a jury.[14] The main

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[13] *See King v. State,* 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

[14] *Barajas v. State,* 93 S.W.3d 36, 38 (Tex. Crim. App. 2002).

reason for this is that, without such discretion, voir dire could go on forever.[15] We will not disturb a trial judge's decision regarding the propriety of a particular question absent an abuse of discretion.[16] A trial judge abuses his or her discretion only when a proper question about a proper area of inquiry is prohibited.[17]

Before the beginning of individual voir dire, defense counsel indicated his desire to ask prospective jurors "if there were evidence that there were more than one person involved in the commission of the offense, whether they . . . could consider that as a mitigating factor." The trial judge responded that asking whether "they could accept a specific fact as mitigating" was "not an appropriate question" under the law. The trial judge further stated:

> You can -- if -- if you want to put it in when you're addressing the juror, you -- you can ask him whether they would be open. You can reference perhaps certain evidence, but you cannot ask them whether they would be open to something. In other words, certain people would consider intoxication, problems as a child, you know, certain people would consider that mitigation, other certain people won't, you know. And -- but to ask -- go ahead and ask them whether those are the kind of things they can consider, I think would be inappropriate.

Defense counsel then stated, "I'll ask a question and if the Court allows it, you allow it. And if you don't, you don't. We'll live with it." The trial judge replied, "Sure. Okay."

When defense counsel questioned prospective juror Joaquin Rivera, the following exchange occurred:

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[15] *Id.*

[16] *Id.*

[17] *Id.*

Q. Now, again mitigation evidence can be anything. And you do not have to agree. You -- as jurors, one juror may find one specific piece of information to be mitigating and another person might find something else to be different mitigation. You're not going to be asked to agree as to that.

A. Yes.

Q. Mitigating can be -- there are several relevant factors.

[PROSECUTOR]: Objection, Your Honor, to contracting. Improper question.

[DEFENSE COUNSEL]: Your Honor, we're entitled to voir dire on their views and opinions, if they can consider mitigation. I'm just asking --

THE COURT: You can't go into any specific areas that would be considered mitigation.

[DEFENSE COUNSEL]: I would just ask to give examples not for purposes of motion for cause [but] so that we can intelligently exercise our peremptory [to] which we are entitled.

THE COURT: I'm not going to allow you to go into specifics.

VENIREPERSON RIVERA: I think I understood what mitigation means.

[DEFENSE COUNSEL]: And, Your Honor, for the record, I would like the record to reflect that at this time we would like to ask this juror if he'd consider mitigation which the Court has found to be relevant, such factors as drugs --

[PROSECUTOR]: Objection, Your Honor.

THE COURT: If you're making a Bill, then you need to excuse the juror.

[DEFENSE COUNSEL]: Can we go ahead and excuse the juror?

THE COURT: Well, not right now. At an appropriate time.

Shortly thereafter, defense counsel presented a bill of exception, outside of Rivera's presence, to show the questions she desired to ask:

> [DEFENSE COUNSEL]: Your Honor, we would -- under the law we are entitled to have jurors struck for cause who cannot consider and give mitigation. We are entitled to jurors who can consider and give effect to specific mitigating evidence, and a juror must be able to consider the individual defendant's mitigation . . . the questions we would ask the juror would be:
>
> Could you consider the mitigating factor of a person with a drug problem.
>
> Could you consider the mitigating factor of a person with a way turbulent family history.
>
> Could you consider mitigation of a person, a defendant, with emotional problems.
>
> Could you consider mitigation of the defendant's background.
>
> Could you consider mitigation of the defendant's upbringing.
>
> Could you consider mitigation of the defendant's character.
>
> Could you consider mitigation of the defendant's character, good character.
>
> And could you consider mitigation of the circumstances of the offense.
>
> * * *
>
> And for the record we would ask that these are the questions we would ask each and every member of this venire under this subject.

In addition, while later questioning prospective juror Elizabeth Black, defense counsel obtained a "running objection" regarding the specific questions she wished to ask of each

individual juror. Defense counsel reurged this objection multiple times during the voir dire proceedings.

A week later, defense counsel filed and presented to the trial judge a motion entitled "Propounded Specific Voir Dire Questions to Each Member of the Venire." In this motion, defense counsel sought permission to ask the following questions:

1. If you heard evidence of sexual assault of a child and indecency with a child, what are your views regarding the death penalty?

2. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you heard MATTERS of sexual assault of a child and indecency with a child, what are your views regarding the death penalty?

3. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and the Defendant has a previous conviction of indecency with a child, what are your views regarding the death penalty?

4. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and the Defendant has a previous conviction of indecency with a child and felony driving while intoxicated, what are your views regarding the death penalty?

5. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, if you hear MATTERS of sexual assault of a child or indecency [with] a child, what are your views regarding the death penalty?

6. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and assume the most horrible of circumstance of the crime of capital murder, the worst you can think of for yourself, are you open

to consider mitigation circumstances?

7. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, if you hear MATTERS of sexual assault of a child or indecency [with] a child, are you open to consider mitigating circumstances?

8. Assume that the defendant has been convicted of capital murder, of intentionally and knowing[ly] causing the death of a child under 6, and you and 11 others have found yes, the defendant is a future danger, and the Defendant has a previous conviction of indecency with a child, are you open to consider mitigation circumstances?

The trial judge "overrule[d] the motion" and "disallow[ed] Defense counsel being able to ask those specific questions."

Renteria argues that the trial judge abused her discretion by refusing to give him permission to ask the propounded questions included in his bill of exception (hereinafter referred to as the first set of proposed questions) and his written motion (hereinafter referred to as the second set of proposed questions). However, these questions implicate the restrictions imposed by *Standefer v. State*, against commitment questions, and by *Barajas v. State*, against ambiguous questions.[18]

A commitment question is one that commits a prospective juror to resolve, or refrain from resolving, an issue a certain way after learning a particular fact.[19] Such questions often ask for a "yes" or "no" answer, in which one or both of the possible answers commits a juror

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[18] *Standefer v. State,* 59 S.W.3d 177, 181-83 (Tex. Crim. App. 2001); *Barajas,* 93 S.W.3d at 39-42.

[19] *Standefer,* 59 S.W.3d at 179.

to resolving an issue a certain way.[20] An open-ended question may also be a commitment question if it asks a prospective juror to set the hypothetical parameters for his or her decision-making.[21] Renteria's proposed questions tend to either directly or indirectly commit prospective jurors to resolve or refrain from resolving an issue in the case on the basis of one or more specific facts contained in the question.[22]

However, not all commitment questions are improper.[23] When the law requires a certain type of commitment from jurors, the attorneys may ask prospective jurors whether they can follow the law in that regard.[24] However, where the law does not require the commitment, a commitment question is invariably improper.[25] For example, a prospective juror is not challengeable for cause simply because he or she does not consider a particular type of evidence to be mitigating.[26] Thus, whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[27] Renteria's first set of proposed questions were improper commitment questions because they specifically asked if the

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[20] *Id.*

[21] *Id.* at 180.

[22] *See id.*

[23] *Id.* at 181.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

prospective juror could consider particular types of evidence to be mitigating. Questions 1 through 5 in his second set of proposed questions were also improper because these ambiguously worded questions indirectly attempted to determine how certain facts would influence prospective jurors' deliberations and if they would give aggravating effect to certain types of evidence.[28]

For a commitment question to be proper, one of the possible answers to that question must give rise to a valid challenge for cause.[29] If a prospective juror was not "open to consider mitigation circumstances," as Renteria asked in questions 7 and 8 in his second set of proposed questions, then that prospective juror would be challengeable for cause.[30] However, a proper commitment question must contain only those facts necessary to test whether a prospective juror is challengeable for cause.[31] These particular questions were improper because they included facts in addition to those necessary to establish a challenge for cause.[32]

Further, we have held that a voir dire question that is so vague or broad in nature as to constitute a global fishing expedition is not proper and may be prohibited by the trial

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[28] *See Sells v. State,* 121 S.W.3d 748, 756-57 (Tex. Crim. App. 2003).

[29] *Id.* at 182.

[30] *See* TEX. CODE CRIM. PROC. art. 35.16(c)(2).

[31] *Standefer,* 59 S.W.3d at 182.

[32] *See id.*

judge.[33] Question six in Renteria's second set of proposed questions falls within this category. This question, which asked prospective jurors "to assume the most horrible of circumstance of the crime of capital murder, the worst you can think of for yourself," was so vague and broad as to be improper.

The trial judge was within her discretion to prohibit defense counsel from asking these improper questions.[34] Point of error three is overruled.

In point of error four, Renteria argues that the trial judge improperly restricted his voir dire questioning of prospective juror Annette Brigham. He contends that, as a result, he was prevented from intelligently exercising peremptory challenges and challenges for cause, and he was denied his constitutional rights to due process and effective assistance of counsel.

During voir dire questioning by the prosecutor, Brigham acknowledged that she had been a victim of child molestation when she was in elementary school. However, Brigham stated that she "[did not] see a real correlation" between her past experience and the instant case. She also agreed that she could decide the case fairly based on the evidence.

During defense counsel's voir dire questioning of Brigham, the following exchange occurred:

Q. Now, going back to your experiences as a young child and --

A. Uh-huh.

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[33] *Barajas,* 93 S.W.3d at 39.

[34] *Id.* at 38.

Q. That there are different kinds of cases, different kinds of experiences. Again, that's why we're here. Let's say hypothetically if this were a case of sexual assault of a child. In that case, you probably would not be the best juror given your past experiences.

[PROSECUTOR]: Objection to the --

A. Is that a question?

[PROSECUTOR]: -- culmination of the question.

Q. [By defense counsel] Yes.

[PROSECUTOR]: That's not relevant here, Your Honor.

THE COURT: Overruled. You might ask her directly whether it be -- because of that, she could be a fair and impartial juror.

Q. [By defense counsel] Because [of] your past experiences, in a case in which the allegations solely are the sexual assault of a child or which allegations that there may be some evidence involving --

A. Uh-huh.

Q. -- sexual abuse of a child.

A. Uh-huh.

Q. How would that affect your ability to be impartial?

[PROSECUTOR]: Objection to the nature -- she's contracting. Now, she's --

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor, we're -- one, I'm -- we're allowed to ask hypothetical questions to -- to ascertain any biases they may [have] towards the law. Additionally, we're allowed to ask questions if not for the sake of exercising peremptories and again, there may be evidence of such a nature in this case. And given this juror's experience, as the Defense, we're entitled to ask if that would affect

her, bias her in any way?

THE COURT: Sustain the objection. Next question.

Defense counsel later asked Brigham: "And based on where you sit, given your experiences, given who you are, do you feel that there's anything that would affect your ability to sit as a juror and be impartial?" Brigham replied, "No." Brigham reiterated that she did not think that her past experience and the instant case were connected. She acknowledged that it would not be "pleasant" to sit as a juror in the instant case, but she agreed that she could be impartial and that she would listen to both sides before making decisions.

Following Brigham's voir dire, defense counsel challenged her for cause, arguing in part that "this juror cannot be impartial due to the fact that she has been sexually molested as a child." The trial judge overruled the challenge for cause. Defense counsel exercised a peremptory challenge against Brigham, and requested an additional peremptory challenge because she was "not able to fully voir dire with regard to [Brigham's] biases of her experiences as a sexually molested child" and she was "denied the chance to make this specific inquiry of the juror on the subject." The trial judge took her request for an additional peremptory challenge under advisement.

The trial judge refused to permit an open-ended question that asked Brigham to set the hypothetical parameters for her decision-making in a case specifically involving sexual

assault or sexual abuse of a child.[35] But the trial judge limited her ruling to the form of Renteria's question and not its substance.[36] In fact, the trial judge suggested that defense counsel instead ask Brigham directly whether she could be fair and impartial in light of her past experience. Defense counsel later asked Brigham if, "given [her] experiences," there was "anything that would affect [her] ability to sit as a juror and be impartial." By rephrasing the question, defense counsel was able to elicit whether Brigham could be impartial despite the fact that she had been sexually molested as a child.[37] Point of error four is overruled.

In points of error five through eight, Renteria argues that the trial judge improperly restricted his voir dire questioning of prospective jurors Elizabeth Black, Anna L. Nava, Howard R. Bryan, and John Tobias. He complains that the trial judge prevented him from asking these prospective jurors if they were "biased against specific evidence that the defense intend[ed] to introduce in mitigation." He asserts that, as a result, he was unable to "intelligently exercise peremptory challenges and challenges for cause" and was "effectively deprived . . . of effective assistance of counsel."

In response to voir dire questioning by defense counsel, Elizabeth Black stated that she felt that the death penalty would be appropriate in a case in which a defendant murdered

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[35] *See Standefer,* 59 S.W.3d at 180.

[36] *See Howard v. State,* 941 S.W.2d 102, 111 (Tex. Crim. App. 1996) (a defendant is not entitled to any particular form of question; rather, a defendant is authorized to ask "proper" questions in a particular area of inquiry).

[37] *See id.* at 109 (finding no improper voir dire restriction when a trial court limited its ruling only to the form of the questions and not to their substance).

a woman in the course of committing aggravated sexual assault. Defense counsel then continued to question Black as follows:

Q. And you cannot think of anything that would mitigate that offense?

[PROSECUTOR]: Objection to contracting, Your Honor.

THE COURT: Sustained.

Q. So at that point you would not go on to consider question two?

A. I would go on to consider question two.

Q. Oh, you would?

A. That's another -- I was -- I was believing that that was another way of look [sic] at it again kind of thing. So I would certainly consider it.

Q. Okay. And so you -- there is -- you can think of something without -- I'm not asking you what it is -- but you can think of something, some factor that in that case and those circumstances would cause you to say life penalty rather than death?

[PROSECUTOR]: Objection, Your Honor, to contracting.

THE COURT: Question number two asks about mitigating circumstances. We can't go into the specifics. But can you consider mitigating circumstances or a circumstance that would be sufficient to satisfy you it ought to be life rather than death.

VENIREPERSON BLACK: That's your question. Right? That's different than what he --

THE COURT: That's what the law says.

VENIREPERSON BLACK: Yes. Yes, I can. Yes, I can consider that. Um-hmm.

Q. So you're open to mitigating circumstances and to considering them, if you feel that they're mitigating, and giving -- considering to give a life

> sentence rather than the death penalty under the -- having convicted somebody of murder and rape?
>
> A. I'm open to considering that.
>
> * * *
>
> Q. Serious consideration.
>
> A. Right.

The prosecutor then asked Black if she could "honestly consider question number two" in a case where the defendant "committed a horrible murder," such as "death of a child under six, a brutal rape and murder, [or] murder of a policeman or a fireman in the line of duty." Black responded that she could consider mitigating circumstances, even if she found the defendant to be a future danger and knew that life in prison would result.

Defense counsel later made a bill of exception outside of Black's presence, stating as follows:

> And we would ask each and every juror if they could consider mitigation with regard to the defendant's drug problem, with regard to defendant's turbulent family history, with regard to the defendant's emotional problems, with regard to the defendant's background, with regard to defendant's upbringing, with regard to the defendant's character, with regard to the defendant's good character, with regard to the circumstances of the offense, with regard to any specific facts which may or may not include any other party involved.

The trial judge refused to allow defense counsel to ask these questions and granted "a running objection in that regard . . . [a]s to each individual juror." After the trial judge overruled his challenge for cause against Black, defense counsel exercised a peremptory challenge against her.

As we previously stated, Renteria's proposed questions in his bill of exception were improper commitment questions because they specifically asked if the prospective juror could consider particular types of evidence to be mitigating. A prospective juror is not challengeable for cause simply because he or she does not consider a particular type of evidence to be mitigating.[38] Whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[39]

It was also improper for defense counsel to ask Black, "And you cannot think of anything that would mitigate that offense?" That question was in reference to a hypothetical example of a rape and murder of an adult woman, whereas this case involved the murder of a child under the age of six. It asked Black to set the hypothetical parameters for her decision-making with regard to certain facts.[40] It attempted to elicit what kinds of evidence Black would consider mitigating with regard to a particular offense.[41] The trial judge did not abuse her discretion in prohibiting that question.[42] Point of error five is overruled.

We next turn to the voir dire questioning of prospective juror Anna L. Nava. During initial questioning by the prosecutor, Nava stated that she would not automatically vote for

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[38] *Standefer,* 59 S.W.3d at 181.

[39] *Id.*

[40] *Id.* at 180.

[41] *Id.* at 181.

[42] *Barajas,* 93 S.W.3d at 38.

the death penalty because "there might be extenuating circumstances or mitigating circumstances." Nava asked if the jury could "still render a life sentence" in this case "if there are any mitigating circumstances or issues that are brought up." The prosecutor then explained the "two step process" by which the jury would answer the future dangerousness and mitigation special issues. When Nava expressed some confusion about the process, the prosecutor explained it further. Nava then agreed that, even if the jury had affirmatively answered the future dangerousness question, she would still be open to a life sentence and she would consider evidence of mitigating circumstances when answering question number two.

Defense counsel later questioned Nava about an answer on her juror questionnaire:

> Q. A person is a product of his or her environment. That's question 42 and you disagreed with that. Would you tell us why you disagree with that statement.
>
> A. I -- I think that's -- that's a cop out when people cite that as a result of certain consequences or certain actions they have taken. I grew up in my extended family. We all grew up in the same environment. And I've had cousins that are in trouble or, you know, that did drugs growing up. And my sister and my brother and I, we were over achievers and we grew up in the same environment. So that's why I tend to disagree with that. I think people use that as a crutch to say, oh, well, poor boohoo me. That's what I grew up in.

When defense counsel began to explain the mitigation special issue, the following exchange occurred:

> Q. Question number two here asks the juror whether taking into consideration all of the evidence, including circumstances of the offense, the defendant's character and background, and the personal moral culpability.

> There is a sufficient mitigating circumstance. Now, so are you telling us that -- that you would not consider [the] defendant's character and background to see if there's anything mitigating in there because of what you've told us about being a product of your environment.
>
> [PROSECUTOR]: Objection, contracting.
>
> THE COURT: Sustained.
>
> Q. You would -- you would not consider any evidence about being a product of your environment about [the] defendant's character and background as mitigation in this case, would you?
>
> [PROSECUTOR]: Objection, contracting.
>
> THE COURT: Sustained.

After additional discussion, defense counsel asked Nava the following question:

> Q. All right. Okay. Now -- and this asks you to take into consideration the defendant's character and background. Are you willing to do that and to [do that] honestly? Nobody says that you have to give up your philosophy, your feelings, the way you see life or your world view. Nobody says you have to give that up just to be on a jury. Right? Because it wouldn't be right. Now, you will or you won't. And if you won't, all you gotta say is I won't consider [the] defendant's character and background to see if there's anything mitigating. And if that's the way you feel, say it.
>
> A. That is the way I feel actually. Every time I read that sentence, I kind of glossed over that --
>
> THE COURT: I'm sorry, let me understand. How is it that you feel about that? Could you or could you not consider the defendant's character and background.
>
> A. I -- I probably -- I could not.

When next questioned by the prosecutor, Nava expressed some confusion about the mitigation special issue. The prosecutor provided further explanation, and Nava responded:

Q. Okay. What you believe, I mean that, you know, that -- that's fine. But one statement that -- that question requires you . . . to look at it and that's part of it, his character and background. Are you telling me you're not going to look at it?

A. No, I'm just saying I'm going to listen to everything and I'm going to process it. Just like said [sic], mitigating for one juror could be mit -- could be a different level of mitigation for another juror.

Q. Okay. Like I said, you know, we can't ask you what you find to be mitigating or not. The thing that this question requires you [to do] is to keep an open mind and consider all that then decide based on that. Do you know what I'm saying? Not to be committed one way or another. Just to look at all the evidence.

Nava stated, "I can do that." And when the prosecutor asked her if she could consider "all the evidence," including "the defendant's character and background," Nava replied in the affirmative.

Defense counsel then continued to pursue his desired line of questioning:

Q. You told us you're solidly against using anything about your -- about a person's background, about how you grew up, your environment and all that is an excuse for any of your actions. You've told us that already.

[PROSECUTOR]: We're going to object to contracting. Because he's asking her, Judge, specific mitigating factors.

THE COURT: Sustained.

Q. Correct?

THE COURT: I'm going to sustain the objection.

* * *

[DEFENSE COUNSEL]: Excuse me. I'm just -- that question's already been asked and answered. It's on the record that way that's the only

reason I ask it that way, Your Honor.

THE COURT: All right.

* * *

Q. When you're talking to [the prosecutor] and she asked you -- got you passed [sic] question one. Okay. You -- she asked you all right. Are you going to still -- are you still going to be open to a life sentence and you very clearly said I don't think I could be. Right?

A. I think that's when I was a little confused about the break down and then she spent a considerable amount of time explaining it to me.

Q. All right. And that's before you told us that there's [sic] parts of question two that you won't -- will not consider.

[PROSECUTOR]: Objection. That's a misstatement of what the juror said, Your Honor.

THE COURT: I'm going to overrule it. If you understand the question, then answer it.

Q. Right.

A. What I see on number two are several factors there. There's evidence including the circumstances of the offense --

Q. Yeah.

A. -- evidence, circumstances, defendant's character, moral background, personal culpability and mitigating circumstances. So would I have to look at number two and -- and find favor with all of those factors?

Q. Number two says whether taking into consideration all the evidence including the defendant's character and background. Now, that's where you -- where you told us that you would not go, correct?

A. If the only thing that is presented to me is just moral background --

[PROSECUTOR]: We're going to object, Your Honor. It's contracting.

THE COURT: I'm going to sustain it. We can't go -- we can't go into what supposedly the evidence would be. We can only talk to you about it very abstractedly unfortunately, Ms. Nava. So if you would keep it in that -- in that vain [sic]. And there's, you know, at any given case there's a lot of evidence that might come in, but we can't -- we can't speculate about what that would be.

A. No, I'm sorry. I don't understand the question.

THE COURT: Yeah. What number two -- and only you can tell us is whether you could by [sic] a fair juror. That's what we're looking for, somebody that could fairly listen to all the evidence and fairly consider the circumstances of the offense, the defendant's character, background and the personal moral culpability of the defendant. Right now we can't commit you as to what you would be in favor of or not. This is just that you would fairly consider the evidence given your background and experience and your views?

A. Yes, I can. And to me, all of those factors is -- are evidence whether they're presented to me. Am I making myself understood?

THE COURT: Next question.

Q. But you would not take into consideration the defendant's character and background, and personal moral culpability. That's where you stop?

[PROSECUTOR]: Objection, contracting.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Pass the juror.

The prosecutor questioned Nava again after this exchange, and Nava continued to affirm that she would be open minded and consider all of the evidence when answering the mitigation question. At the conclusion of Nava's voir dire, the trial judge overruled defense

counsel's challenge for cause, and defense counsel exercised a peremptory challenge against her.

The mitigation special issue asks the jury to determine whether, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life instead of death.[43] The trial judge did not restrict defense counsel from pursuing this proper area of inquiry. Defense counsel was permitted to specifically ask Nava if she could "consider the defendant's character and background to see if there's anything mitigating." And the trial judge also asked Nava if she "could fairly listen to all the evidence and fairly consider the circumstances of the offense, the defendant's character, background and the personal moral culpability of the defendant." To the extent that defense counsel attempted to ask Nava if she thought "being a product of your environment" was mitigating, the trial judge was within her discretion to prohibit that question. Whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[44] Point of error six is overruled.

Renteria next complains about the trial judge's rulings with regard to the defense counsel's voir dire questioning of Howard R. Bryan, Jr. When initially questioned by the prosecutor, Bryan affirmed that he could keep an open mind and consider all of the evidence

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[43] *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(1).

[44] *Standefer,* 59 S.W.3d at 181.

when answering the mitigation special issue. When defense counsel questioned Bryan, the following exchange occurred:

> Q. Now, back to your questionnaire, page nine. You answered to question 42, a person is a product of his or her environment. And you told us you disagree. Could you please elaborate on that for me?
>
> A. I think environment is a factor in a person's nature, character, but I -- I think a more accurate statement is that a person . . . is a product of their environment plus their response to their environment.
>
> I've known many people who grew up in very harsh environments who did not become harsh people. I've known siblings who grew up in the same families, sometimes even violent families, who came out to be very different people. So I think significant -- I think it's a -- an incomplete statement.
>
> Q. Okay. And then so much as you mentioned growing up in a harsh environment in that sense that would be their background.
>
> A. Right.
>
> Q. And so when it comes to mitigating circumstances and evidence you are to consider with regard to question two you're asked to consider with all of the evidence including the circumstances of the offense, the defendant's character and background. Is their background that something that you cannot consider in terms of mitigation?
>
> A. No. I -- I think it has to be considered. I think it has to be understood and considered, but I don't think it's an automatic predictor of a person's character or behavior.
>
> Q. And how about with question number 43, a person who abuses drugs or alcohol is less responsible for his or her actions. And you disagree. Why is that?
>
> A. Because I think -- I think people have the responsibility to decide to either use or -- or not use those substances. And in that way they are responsible for the outcome if they perform -- if they do something while they're in a compromised state. I think they're responsible for the choice.

> Q. And so would matters of addiction or alcoholism be something that you would not be able to consider as mitigation?
>
> [PROSECUTOR]: I'm going to object, Your Honor, as to contracting.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: And, Your Honor, for the record, we're entitled to ask these questions under [*Standefer*].

Following Bryan's voir dire, defense counsel unsuccessfully challenged him for cause. Defense counsel then exercised a peremptory challenge against him.

The trial judge was within her discretion to prohibit defense counsel from asking Bryan if matters of addiction or alcoholism would be something that he would not be able to consider as mitigation. Again, whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[45] Point of error seven is overruled.

We next turn to the voir dire questioning of prospective juror John Tobias. In response to initial questioning by both the prosecutor and defense counsel, Tobias affirmed that he would keep an "open mind" after answering the future dangerousness question and that he would answer the mitigation question based on the evidence. After Tobias made this affirmation, defense counsel continued to question him on the topic of mitigation. Renteria specifically complains about the following exchange between defense counsel and Tobias:

> Q. Now, back to your questionnaire on page nine. Question number 42 you're asked [if] a person is a product of his or her environment. You disagreed with that statement. Could [y]ou tell us a little bit about that?

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[45] *Id.*

> A. I think a person is a product of their upbringing, their parents first and foremost. I think their environment takes a part of it, but I don't think that that determines where or what a person is going to turn out to be. You have -- and I know people who have come from worse environments and they're successful people. And I credit, you know, these peoples' parents, you know, as the reason because they were there with them . . . through their school years, they were there you know, encouraging them. I think the mitigating factor in how we -- what we turn out to be has to do a lot with family, either your immediate family or your surrounding family.
>
> Q. And so with regard to the fact that in question number two, whether taking into consideration all the evidence including the circumstances of the offense, the defendant's character and background, can you consider the background in terms of a mitigating factor?
>
> [PROSECUTOR]: Objection to contracting.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Your Honor, they need to be open to all mitigation and any and all evidence. So if there's a specific factor that the juror cannot keep an open mind tom [sic] then we would be entitled to pursue that line of questioning for a challenge.
>
> THE COURT: As you put the question, I'll sustain the objection.

Immediately following this exchange, defense counsel stated, "With regards to the factors in question two -- and one of them is the background -- you see how you need to be able to consider all those things when you're answering the question." Tobias replied, "Um-hmm." At the conclusion of voir dire, the trial judge overruled defense counsel's challenge for cause against Tobias, so defense counsel exercised a peremptory challenge against him.

To the extent that defense counsel attempted to ask Tobias if he thought a defendant's "background" was mitigating, the trial judge was within her discretion to prohibit that

question because whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[46] Further, the trial judge limited her ruling to the form of Renteria's question and not its substance.[47] By rephrasing the question, defense counsel was essentially able to elicit the desired information.[48] Point of error eight is overruled.

In points of error nine and ten, Renteria argues that the trial judge improperly restricted him from questioning prospective jurors Robert W. Crosby and Robert P. Tomes about parole eligibility. He contends that, as a result, he was "denied the ability to intelligently exercise his peremptory strikes" and "effectively deprived . . . of effective assistance of counsel."

After the prosecutor initially explained to Crosby that the jury's answers to the special issues could result in either life in prison or the death penalty, the following exchange occurred:

> A. I'm pretty sure I understand what the death penalty is.
>
> Q. Yes, sir.
>
> A. But I have a lot of doubt on that if I understand what life in prison is. Does life in prison mean life in prison without any chance of parole or does life in prison mean at some point in the future, parole would be considered?
>
> Q. Okay.

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[46] *Id.*

[47] *See Howard,* 941 S.W.2d at 111.

[48] *See id.* at 109.

THE COURT: Yeah, in this case, those are matters that the jury cannot consider.

A. Okay.

THE COURT: It cannot, cannot be considered. And I guess the question would be -- would be -- that'd be something Mr. Crosby that would so be in your mind that would influence the way you decide the issues in the case?

A. No, I can answer the question as presented, but I -- it's just a -- something in my mind if that was part of my process --

THE COURT: Yeah, no, it's not.

A. Okay.

THE COURT: That's for -- that's for people in the other place --

A. Okay.

THE COURT: -- other places of authority.

A. Okay.

Crosby also affirmed that he could keep an open mind and consider both life in prison and the death penalty in a case in which the defendant was found guilty of murdering a child under the age of six.

Defense counsel then attempted to ask Crosby his thoughts about the possibility of parole:

Q. Okay. Now, you've told us that essentially and you were pretty emphatic about it now, we're talking about a life sentence here. Does that mean life sentence without the possibility of parole?

A. Yes.

Q. And that's a -- that's a strong opinion to have about the law.

A. Correct.

* * *

Q. And I take it then that you're [sic] feeling about the law in that regard is it's the only good alternative, the only acceptable alternative to a death penalty in a capital case would be a life in prison without any possibility of parole?

[PROSECUTOR]: Objection to contracting, Your Honor.

A. I think --

THE COURT: I'm going to sustain the objection. Rephrase it.

[DEFENSE COUNSEL]: Your Honor --

Q. Okay. Let me ask another question. Well, I'm asking you if you agree, if you agree with a law that might provide for parole --

[PROSECUTOR]: I'm going to object.

THE COURT: I'm going to sustain the objection.

Defense counsel argued that since the jury would be instructed as to the applicable parole law, he was entitled to "question [the prospective juror] about that with regard to whether he can follow that law, whether he agrees with it and how it . . . would or might affect him in deciding the case." The trial judge pointed out that she had previously informed Crosby "that the jury is not allowed to consider how the parole law would have any [e]ffect in the case" and "[t]hat is a decision for other authorities to make." The trial judge continued to explain the issue and questioned Crosby as follows:

> THE COURT: The Jury in a criminal case is informed and same as in this -- this capital case informed that [there] is a parole law. But they are not to be given [sic] any thought or consideration nor talk about how that law would be calculated or affect a particular defendant because that is a decision for other authorities to make. So they cannot consider it during deliberation. They can be informed of it that the fact there is possibly parole -- probability of parole. That eligibility does not mean that they get it. It's just they're informed of that they can't take into consideration.
>
> * * *
>
> And in [sic] the issue for the juror in this case is whether is that an issue of parole as you mentioned earlier when you were commenting whether that would influence you to such a degree that you would not follow the instructions of the Court and that's the -- that's the issue in the case. What would be your response to that, sir?
>
> [CROSBY:] When I asked the question, I was trying to decide in my own mind whether if I had listened to the evidence and decided that life in prison was what I thought was best for the defendant, would I also have to be the one to decide whether he was going to be eligible for parole or whether it would be life without parole. I didn't know that and you answered the questions for me and now I understand it that somebody else makes that decision. I only make the decision of whether I think it's death or life in prison.

Defense counsel continued to insist that he was entitled to ask his proposed parole questions, and he moved for a mistrial on that basis. The trial judge denied defense counsel's motion for a mistrial. After the trial judge overruled a challenge for cause against Crosby, defense counsel exercised a peremptory challenge against him.

Renteria argues that parole eligibility is a proper inquiry for voir dire because "for offenses committed on or after September 1, 1999, of course, the jury is now instructed on

parole, if requested by the defense."[49] A similar argument was raised in *Sells v. State*.[50] In *Sells*, we assumed without deciding that the statutory change rendered questioning about parole permissible in some situations.[51] Sells sought to ask the following four questions:

> 1. Would the minimum length of time a defendant could serve in prison before he could be paroled be something you would want to know in answering the special issues?
>
> 2. On which special issue would this be important? How would this 40 year minimum sentence be important to you in answering the special issues?
>
> 3. Would you be more likely, or less likely, generally, to view a defendant as a continuing threat to society if you knew he could not be paroled for a minimum of 40 years?
>
> 4. What kind of evidence would you expect, as a juror, to help you in considering the 40-year parole ineligibility factor when answering the special issue?[[52]]

We held that these questions "implicate the strictures imposed by *Standefer* against commitment questions and by *Barajas* against ambiguous questions" and that "any attempt to commit prospective jurors to giving mitigating, aggravating, or even no effect to the parole instruction is impermissible."[53]

Renteria wanted to ask Crosby whether "the only acceptable alternative to a death

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[49] *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(2).

[50] 121 S.W.3d 748 (Tex. Crim. App. 2003).

[51] *Id.* at 756.

[52] *Id.* at 755.

[53] *Id.* at 756-57.

penalty in a capital case would be a life in prison without any possibility of parole" and whether he "agree[d] with a law that might provide for parole." These proposed questions were similar to the questions at issue in *Sells*. Consequently, the trial judge did not abuse her discretion by prohibiting the proposed questions. Further, the trial judge ultimately asked Crosby whether he could follow the instructions with regard to parole. Point of error nine is overruled.

We next turn to the voir dire questioning of prospective juror Robert P. Tomes. In response to initial questioning by the prosecutor, Tomes stated:

> Q. Okay. Now, the death penalty is only an option for someone convicted of capital murder. And even then, it's not an automatic. It's just one option that the jury can consider. The other option is life in prison. So really you only have two options where a person [is] convicted of capital murder. It's life in prison or the death penalty.
>
> A. Is that life in prison without possibility of parole[?]
>
> Q. Well, we can't get into --
>
> A. Oh.
>
> Q. -- that right now. So that's basically all I can tell you. The only options are life in prison or the death penalty.
>
> A. Okay.

Defense counsel later questioned Tomes in the following exchange:

> Q. Okay. Now, in your view, I take it that a life sentence without possibility of parole is the only reasonable range of punishment with -- with the death penalty?
>
> [PROSECUTOR]: Objection, Your Honor. Improper -- improper

question.

THE COURT: Sustained.

Q. You started asking about parole, is that correct?

A. Right. Yes, I asked her the possibility of life -- is there life without parole.

Q. All right. And if you're not told that as a juror --

A. Uh-huh.

Q. -- then you won't know, it's going to affect you in your verdict in deciding whether to go with a life sentence or not?

A. Yes. Yeah, I guess it probably would just based on what I hear and, you know, what I would find out in the court.

Finally, the trial judge explained to Tomes that "the jury would be instructed as to a parole law . . . but they are not permitted to calculate, analyze or anything to try to apply that parole law in their decision." The trial judge asked Tomes if that would influence his verdict, and Tomes stated that it would not. Tomes also replied in the negative when the trial judge asked him if he would be "tempted to try to calculate" or "figure out things." The trial judge overruled a challenge for cause against Tomes, and defense counsel exercised a peremptory challenge against him.

Renteria's question to Tomes—whether "a life sentence without possibility of parole is the only reasonable range of punishment"—is essentially the same question he asked of Crosby—whether "the only acceptable alternative to a death penalty in a capital case would be a life in prison without any possibility of parole." As discussed in point of error nine, this

is an improper commitment question, and the trial judge was within her discretion to prohibit it. Further, defense counsel was ultimately permitted to ask Tomes if the possibility of parole would influence his verdict. Point of error ten is overruled.

III. Denial of Challenges for Cause

In points of error eleven through thirty-seven, Renteria alleges that the trial judge improperly denied his challenges for cause against eighteen veniremembers: Robert Wynn Crosby; Jeanette Sanchez; Evangeline Rose Ramirez; Anna L. Nava; Carlos Martinez; Howard R. Bryan, Jr.; Daniel Gurany; Cruz Angel Ochoa, Jr.; Longino Gonzalez, Jr.; Robert Paul Tomes; Mark Robert Williams; Mark Anthony Tapia; John Tobias; Paul Steven Watt; John David Turner; Leslie D. Potter; John P. Deslongchamps; and, Washington Watley, Jr.

To establish harm, Renteria must show that he asserted a clear and specific challenge for cause.[54] He must also show that he used all his peremptory strikes, asked for and was refused additional peremptory strikes, and was then forced to take an identified objectionable juror whom he would have struck had the trial court granted his challenge for cause or granted him additional peremptory strikes.[55] Renteria complied with these requirements with regard to the venirepersons addressed below.

When the trial judge errs in overruling a challenge for cause against a venireperson, the defendant is harmed if he or she uses a peremptory strike to remove the venireperson and

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[54] *See Green v. State,* 934 S.W.2d 92, 105 (Tex. Crim. App. 1996).

[55] *Lewis v. State,* 911 S.W.2d 1, 4 (Tex. Crim. App. 1995).

thereafter suffers a detriment from the loss of the strike.[56] Because Renteria received seven additional peremptory challenges, he can demonstrate harm only by showing that the trial judge erroneously denied at least eight of his challenges for cause.[57]

When reviewing a trial judge's decision to deny a challenge for cause, we review the entire record to determine if there is sufficient evidence to support the ruling.[58] We give great deference to the trial judge's decision because the trial judge is present to observe the demeanor and tone of voice of the venireperson.[59] When a venireperson's answers are vacillating, unclear, or contradictory, we accord particular deference to the trial judge's decision.[60]

Robert Wynn Crosby

Renteria argues that Crosby was biased against a law applicable to the case upon which he was entitled to rely.[61] To support his claim, Renteria points to a statement made by Crosby during defense counsel's voir dire questioning:

> Q. All right. And so if you heard evidence, having found that somebody is a future danger, you heard evidence that you consider mitigating --

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[56] *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex. Crim. App. 1986).

[57] *See Chambers v. State,* 866 S.W.2d 9, 23 (Tex. Crim. App. 1993).

[58] *Feldman v. State,* 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

[59] *Id.*

[60] *Id.*

[61] TEX. CODE CRIM. PROC. art. 35.16(c)(2).

A. I haven't heard the mitigating evidence yet.

Renteria asserts that Crosby "gestured toward the Prosecution" when he made this statement, but this is not reflected in the record. Based solely on this exchange, Renteria contends that Crosby was "substantially impaired in his ability to consider mitigating evidence and to consider the full range of punishment" because he indicated that "he sides with law enforcement and he was not going to listen to any mitigating evidence unless he hears it from the State."

The entire record of Crosby's voir dire provides sufficient evidence to support the trial judge's denial of Renteria's challenge for cause against Crosby. Before the statement described above, defense counsel asked Crosby if he would automatically assess the death penalty after answering the future dangerousness question affirmatively. Crosby answered, "No, because I still have to answer the second question." In response to the prosecutor's questioning, Crosby indicated his understanding that neither the State nor the defense had the burden to prove mitigation. He agreed that he could consider the mitigation question after answering the future dangerousness question affirmatively regardless of whether his answer resulted in life in prison or the death penalty. Despite indicating on his juror questionnaire that he was in favor of the death penalty in general, Crosby stated that he could keep an "open mind" and could consider both life in prison and the death penalty in the instant case. He also agreed that he would not automatically believe law enforcement witnesses.

The trial judge did not abuse her discretion in denying Renteria's challenge for cause.

Renteria has not shown that Crosby had a bias that would have substantially impaired his ability to carry out his oath and instructions in accordance with the law.[62]

Jeanette Sanchez

Renteria asserts that Sanchez was biased against a law applicable to the case upon which he was entitled to rely.[63] He specifically contends that Sanchez "expressed a presumption and an inherent personal bias towards the death penalty and an inability to consider the full range of punishment."

Sanchez first stated that she understood the prosecutor's explanation of the procedures for determining punishment. She responded affirmatively when the prosecutor asked her if she could keep her "mind open to life in prison and the death penalty at each step in that process." She stated that, even if she answered yes to the future dangerousness question, she would not automatically assess the death penalty because she would "still want to . . . take into account other circumstances."

Sanchez, however, gave different responses when she was next questioned by defense counsel. Defense counsel first asked Sanchez what would happen if she answered the future dangerousness question affirmatively, and she responded as follows:

> Q. Okay. And -- and so you get to question one and assume hypothetically that you're convinced, yeah. Well, yes.
>
> A. Uh-huh. Correct.

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[62] *Feldman,* 71 S.W.3d at 744.

[63] TEX. CODE CRIM. PROC. art. 35.16(c)(2).

Q. Is that the end or have you stopped?

A. If I'm convinced that the evidence says that he is going to be a threat?

Q. Yeah.

A. And I answered yes? Yes. That's it, that's the end.

Q. That's the end of what?

A. My understanding is we go no further.

Q. No further than that?

A. And that's the death penalty.

Q. Your understanding is that once you find future danger, that's the end of the line?

A. Uh-huh.

Q. Okay. All right. Now, are you telling me that based on the fact that -- that that's the way you feel, that if I find that somebody is a future danger, I think he ought to get a death penalty? Are you saying it because of that or are you saying it because you think that that's the way it's been presented to you, that you stop the inquiry there?

A. No, I think --

Q. Did you understand my question?

A. I think I understand. You're saying do I personally believe this or is this just because this is what I've been told that that's --

Q. Yes.

A. -- the end of the line.

Q. Yes.

A. No, I personally believe that I am, through this whole process, am getting this -- this information. So I think that I don't have to necessarily get to point -- to question two if I have been strongly convinced of question one.

* * *

Q. On finding -- once again, I'm going to go over it again.

A. Uh-huh.

Q. Upon making your determination that beyond a reasonable doubt the accused will probably commit criminal acts of violence that would constitute a continuing threat to society, prison society or otherwise --

A. Correct.

Q. -- that that's the end of the line for you? That's a death penalty case for you period?

A. Yes.

Q. You're not going to make any further consideration beyond that?

A. If that's what I'm required to do by law, that's exactly how far it goes, but I'm happy with that --

Q. Do you --

A. Decision.

Q. Do you think that that's what you're required by law to do?

A. I think that's what I've been instructed to do that I should weigh all the evidence and decide that whether he would -- whether based on the evidence that they present, if I'm convinced that he will be a threat to society as a whole.

Q. Okay. Now, you're saying that based on your understanding of what the law requires you to do, you think if you say -- answer yes to question one, that that's the death penalty?

A. Yes.

Sanchez next added that in her "personal view" she "would have to eliminate mitigating circumstances" before assessing the death penalty. When defense counsel asked Sanchez at what point she would consider the mitigation question, she responded:

> I think I would -- that would be a consideration from me from the very beginning. I think if I even had a nagging suspicion or a nagging -- something nagging me, it would not make me answer yes to number one if upon hearing their evidence there was something there, I wouldn't have said yes on number one.

Sanchez added that "basically what [she] understood [was] that once you say yes to the first one, you really don't have to go to the second question." Defense counsel again explained the process for determining punishment, stating that "the jury cannot assess a death penalty without going on to consider question two," and that "there's no death penalty unless all of the jurors say no, there is no sufficient mitigating circumstance to warrant a life sentence rather than the death penalty." Sanchez agreed that was clear to her. Defense counsel then questioned Sanchez as follows:

> Q. Okay. Now, I'm going to ask you again. If you're on the jury and you're considering the evidence and it's -- it has convinced you --
>
> A. Uh-huh.
>
> Q. -- that this accused person is going to be a threat to society in the future because of criminal acts of violence, okay. Is that the end of the -- of the line for your inquiry in the case about the death penalty?
>
> A. As far as I'm concerned?
>
> Q. Yeah.

A. Yes, because it's my responsibility to just vote for myself if I say yes, I say no. If I'm convinced, I say yes and I'm done.

Q. So you're still at the point where if you say yes to future danger, that's a death penalty period.

A. If I say yes, I guess because it is a collective -- we have to have 12 agreements --

Q. Yes.

A. -- then I guess, but for me p[e]rsonally, if I said yes --

Q. Right.

A. -- I don't have to take it a step further unless everybody else has voted and we have two people that disagree.

Next, the prosecutor again explained the process for determining punishment, and Sanchez repeatedly stated that she understood the process. In the following exchange with the prosecutor, she expressed her understanding and explained the logic behind her previous statements to defense counsel:

Q. Now, what I thought you said is that okay, we've -- we're -- now, we've all 12 agreed. We're looking at number two, but I don't really need number two because I'd already decided they're are [sic] a future danger and they ought to get the death penalty. Is that what you said?

A. No, it's because I think I was misunderstanding because I'm thinking that there are other people that are in disagreement [on number one].

Q. Got it. Okay.

A. Not --

Q. So if we're all in agreement on one --

A. If we're all in agreement on one, we then have to look at the next step.

Q. Two.

A. Right, to see if there's mitigating circumstances or if there's some little magic detail that -- that's just bugging us about it that's not or not us in general but just something maybe [sic] bothering me or something may be bothering somebody else about the case.

Q. Right. And if you find that circumstance and then at least 10 people find such a circumstance, whatever it is, then you answer the question yes --

A. Uh-huh.

Q -- and what results?

A. If we answer to the bottom --

Q. To number two yes.

A. -- to number two yes, that warrants the life imprisonment, then he would be life imprisonment would be --

Q. Right.

A. -- the result.

Q. And if all 12 find no circumstance --

A. Then it's back to the death penalty.

Sanchez further clarified her understanding as she explained the process for determining punishment in her own words. She stated that "if all 12 of us agree that he will be [a future danger], we have to then go down to number two and revisit all the evidence again . . . to see if there's anything that anybody objects to . . . any little nagging detail that they may have thought this may have been a mitigating circumstance." She added, "If we decide there that

there are no mitigating circumstances, then it's the death penalty." And she also acknowledged that all twelve jurors must find no mitigating circumstances and that "it has to be unanimous" to result in the death penalty.

Finally, defense counsel asked Sanchez, "[I]f you get to question two . . . are you willing to consider elements of the defendant's character and background to see if there's any mitigating circumstance there that would warrant a life sentence rather than a death penalty?" Sanchez responded in the affirmative. Defense counsel then challenged Sanchez for cause because "[s]he stated several times that once she had determined that there was a yes answer to the future danger question, that was the end of the inquiry and that was the death penalty case." Defense counsel further argued that the prosecutor failed to sufficiently "rehabilitate" Sanchez. The trial judge denied the challenge for cause, finding that "from the totality of the inquiry of the State and Defense that the juror understands the process" and that "she understands what's required of her under the law." The trial judge denied defense counsel's request for additional peremptory challenges. Defense counsel protested that Sanchez was an objectionable juror that he would have struck if the trial court had granted him another peremptory challenge. Sanchez was seated on the jury.

The trial judge's ruling is supported by the totality of the record. Sanchez ultimately stated that she understood and could follow the law with regard to the mitigation special issue. Thus, the trial judge did not abuse her discretion in denying Renteria's challenge for cause.

Carlos Martinez

Renteria argues that Martinez was challengeable for cause for two reasons. First, he contends that Martinez "would place the burden of proof on the defense as to mitigation." However, we have held that a veniremember is not challengeable for cause simply because he would place the burden of proof for mitigation on the defense.[64] Second, he complains that Martinez "would require [the] defendant to testify in violation of the Fifth Amendment to the United States Constitution."

The prosecutor initially explained that a defendant has a Fifth Amendment right not to testify, and Martinez indicated that he understood that concept. Martinez agreed that if a defendant chose not to testify he could put that out of his mind and decide the case just based on the evidence in front of him. He understood that the defense did not have to present any witnesses at trial. He also acknowledged that the State had the burden of proof on the future dangerousness issue and that neither party had the burden of proof on the mitigation issue.

When defense counsel next asked Martinez if his religious beliefs would affect his answers to the special issues, Martinez stated that it would depend "on the reaction of the defendant, if he has any remorse toward what he's done." Defense counsel continued to question him as follows:

> Q. Before you decide to put him to death you're going to have to hear him get up on the stand and testify and say that he is remorseful. Is that correct?

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[64] *Saldano v. State,* 232 S.W.3d 77, 92 (Tex. Crim. App. 2007).

A. No. I don't have to. No. I just -- it's whatever, you know, I hear from -- with -- well, the evidence. You know, if -- I don't know if he -- if we get to hear what he has to [say] about how he feels. I don't know. Like this is my first time. So --

Q. I understand. Okay. Well, you reviewed a moment ago with the prosecutor about the fact that every person accused of an offense has the right not to testify, not to take the stand.

A. Uh-huh.

Q. And the bottom line, not to present any evidence. The reasoning -- did you understand the reason for that? The reason for that is because the burden of proof is on the State.

A. Okay. I understand what you're saying.

Q. And the State has to convince you beyond a reasonable doubt that somebody's a future danger. Before you can -- you know, before you can even consider a death penalty the State has the burden of proving that beyond a reasonable doubt.

A. Yes.

Q. Do you understand that?

A. Yes, sir.

Q. Okay. So I'm asking you if before you consider a life sentence --

A. Um-hmm.

Q. -- you have to hear testimony from the accused or evidence from the defense about his remorse.

A. Well, I think -- I think it would help. I mean that would help to make a decision, you know.

Q. And if you did not hear that evidence you would be in favor of a death penalty?

A. I feel I probably wouldn't have any choice, you know, based on the evidence.

Q. Based on -- on conviction of knowingly and intentionally killing a child under six and finding that he's a future danger, if you did not hear testimony or evidence of any kind from the defense that the accused was remorseful, you would automatically impose the death penalty?

A. Yes.

When the prosecutor next questioned Martinez on this issue, Martinez stated that he was okay with the defendant not testifying and that he would not hold it against him "[a]s long as the evidence is clear." He agreed that he could follow the law and answer the special issues based on the evidence in such a way that a life sentence would result, even if the defendant did not testify.

Finally, the trial judge questioned Martinez on this issue:

Q. Mr. Martinez, earlier when [defense counsel] asked you about that, what I heard you say is that it would be easier or something to the effect that it would be easier for you if you heard from the defendant or some evidence from them. What -- what did you mean?

A. Well, I mean, I know it's his right to take the Fifth Amendment. Right? But I think it helps to hear how he feels about -- it would help me to decide how he -- about either the death penalty or life in prison if I heard. I think it would be helpful if he had any remorse for what he did.

Q. And if --

A. But it's not possible.

Q. If you didn't, is that going to affect you -- this is something I need to really ask you to think about. Is that going to affect you when you're trying to decide? Is that going to be the turning point for you? I mean what -- how do you feel? How is that going to affect you?

A. Well, if the evidence is clear and there's you know --

Q. What if it's not clear?

A. Well, I would have to go -- if it's not clear, I would have to go with life, you know, if it's not clear enough.

Q. Even if you didn't -- even if you didn't hear from the defendant . . . or heard evidence from them and . . . you're not sure . . . are you going to hold it against the defendant for not testifying? Or are you going to tend to go, well, since I didn't hear from him maybe I ought to go for the other side even though I'm not sure?

A. No. I'd have to be positive that I -- you know, that there's enough evidence to make a decision, both sides, either life or death.

Q. Because the Fifth Amendment, I mean, if you -- if you take into consideration that the defendant didn't testify, then the law is just like it shouldn't even be on the books, I mean . . . it's not worth anything. It is our law. But you would -- if a person gives effect to the fact that a person didn't testify it's like -- it's like it doesn't mean anything, you'd just be throwing that right out the window.

So that's why I need to ask you to look at your conscience and see whether that would . . . bother you so much that if the defendant didn't testify that . . . you'd tend to hold it against him?

A. No, I -- I wouldn't. I mean if it's -- that's his right. I just have to weigh the evidence.

Defense counsel challenged Martinez for cause, arguing that he would automatically impose the death penalty if the defendant did not testify or present evidence of remorse. The prosecutor responded that once the law was explained to Martinez, he said he could follow the law and that "he would not expect to hear from the defense and [he would] decide just based on the evidence." The trial judge denied the challenge for cause, and defense counsel exercised a peremptory challenge against Martinez.

The trial judge's decision to deny the challenge for cause is supported by the totality of the record. Although Martinez vacillated when questioned by the prosecutor and defense counsel, he ultimately affirmed, when questioned by the trial judge, that he could follow the law and that he would not hold a defendant's failure to testify against him. When a venireperson vacillates, we defer to the trial judge, who was in the best position to evaluate the venireperson's responses.[65]

Howard R. Bryan, Jr.

Renteria claims that Bryan was challengeable for cause because he was biased against the defense. He specifically contends that Bryan "expressed a bias that he would favor the State because they have the law enforcement officers as witnesses." A juror who cannot impartially judge the credibility of the witnesses is challengeable for cause for having a bias or prejudice in favor of or against the defendant.[66]

The prosecutor initially explained to Bryan that the law asks jurors to "not prejudge any class of witnesses" and to "put everyone on the same level until you hear what they have to say." Bryan agreed that he could follow the law. The prosecutor asked, "Do you think that you would be inclined to automatically believe a law enforcement officer?" Bryan replied, "No, I don't." The prosecutor later revisited this issue in the following exchange:

> Q. On page 37, number 205, we asked if you would automatically believe the testimony of a law enforcement officer, and you said no but that

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[65] *Feldman,* 71 S.W.3d at 744.

[66] *Id.* at 745; TEX. CODE CRIM. PROC. art. 35.16(a)(9).

you would tend to believe them. And then the next question, 206, would you favor the side that had law enforcement as witnesses, and you said yes.

A. (Nods head).

Q. We talked a little bit about this earlier --

A. Yes.

Q. -- in discussing how jurors should be able to address witnesses regarding their credibility. And what I need to know is if -- if you're going to be able to keep an open mind regardless of a class of witness that testifies as to whether or not they are telling the truth or telling a lie. Are you able to keep an open mind on that?

A. Yes, I think so. I -- I would tend to believe a law enforcement officer.

Q. Okay.

A. And my feeling about that are -- is a couple of things. Number one, I think mostly their role would be a disinterested person. I mean they're not necessarily -- they're not a person involved in the activities that are being considered.

Q. Okay.

A. And number two, the people I've known who are law enforcement officers were really good observers. They are careful about what they see and making mental notes of things. And so I -- I would tend to think that they would be very careful in relating what they see and know and experience maybe more than the average person and certainly more than a person who has a kind of vested interest.

Q. And so I think you're saying that based on the officer's training in learning to be aware and observe and do all that -- you can take into consideration their training, certainly.

A. Right.

Q. The issue is with all of that, let's suppose that you hear an officer

and you don't believe them. Can you accept that, okay, this officer is lying to me?

A. I can, yes, ma'am.

Q. And it happens. Would you agree with that?

A. It's happened to me.

Q. Okay. Then you know.

A. I do, yes.

Q. Okay.

A. And I -- for me, the personal involvement is a key thing here.

Q. Okay.

A. I mean I -- I know law enforcement people who have said to me something I either knew at the time or later discovered was not true but it was because I had a personal involvement --

Q. All right.

A. -- rather than an objective, disinterested observation.

Q. Okay. And the bottom line here is that you're keeping an open mind and not automatically believing or disbelieving.

A. (Nods head).

Q. Can you do that?

A. Yes, ma'am.

When defense counsel next questioned Bryan on this topic, he responded as follows:

Q. Now, let me get you back to page 37, question 206. When you answered your questionnaire on October 10th, when you didn't have anybody, I guess, picking on your answers, you told us you were in favor of the side that

had law enforcement officers as witnesses. Correct?

A. Correct.

Q. And so will you agree that an extension of this answer is, as the State, they have the cops for their witnesses.

A. Right.

Q. So based on that you are going to favor the State because they have the law enforcement witnesses. Correct?

A. Correct.

Q. And so your opinion based on this is that you have a tendency to favor the State. Correct?

A. Well, I have a tendency to put greater credence in what a law enforcement officer is going to say because of their training as an observer and because of the fact that they in my experience are people interested in uncovering truth.

Q. So law officers kind of get a head start in your opinion in terms of credibility. Is that correct?

A. I -- let me see if I can say this appropriately in a way that I'm really comfortable with. I wouldn't say they have a head start, but I would say that -- my experience is that most people don't just give their testimony, they kind of plead their case. And I'm talking -- I'm not talking about legal things, I'm talking about all kinds of human circumstances. And my experience is that law enforcement officers tend to be people who -- who make assessments on the basis of what they personally observed or what evidence they uncover, that sort of thing.

Q. But you will -- but you keep saying --

A. I think they're more objective is my statement.

Q. Okay. And you do tend to -- you would tend to -- you would tend to favor the side with the law enforcement officers?

A. Yes.

Bryan further clarified his answers when he was again questioned by the prosecutor:

Q. In that regard, Mr. Bryan, you're not going to automatically believe law enforcement simply because they are law enforcement?

A. No.

Q. You're not suggesting that you favor the side with law enforcement -- which in most cases is the State, not always -- but that you would favor that side and so you're going to do whatever the State wants. Is that not -- that's not what you're saying either, is it?

A. That's not what I'm saying, no.

Q. If the evidence shows you that you should do something contrary to what the State is asking you for, will you be able to make that decision?

A. Yes, ma'am.

Q. Regardless of law enforcement involvement?

A. Yes, ma'am.

Following this exchange, defense counsel challenged Bryan for cause, arguing that Bryan "clearly stated that he would favor the State." The trial judge denied the challenge for cause, and defense counsel exercised a peremptory challenge against Bryan.

A defendant is entitled to jurors who will be genuinely open-minded and subject to persuasion, with no extreme or absolute positions regarding the credibility of any witness.[67] However, a venireperson who is "simply more or less skeptical of a certain category of

[67] *Feldman,* 71 S.W.3d at 747.

witness" is not subject to a challenge for cause.[68] Although Bryan expressed a tendency to be less skeptical of law enforcement witnesses, he explained that he would keep an open mind and that he would not automatically believe them. The entirety of the voir dire supports the ruling of the trial judge, who was in the best position to evaluate Bryan's responses.

Daniel Gurany

Renteria asserts that Gurany was biased against a law applicable to the case upon which he was entitled to rely.[69] When the prosecutor initially asked Gurany why he indicated in his juror questionnaire that he thought there should be a death penalty, he responded:

> Growing up I didn't feel the death penalty was necessary in the United States. I always felt maybe because that's what guided me towards education is that through education, we could alleviate and educate our communities and our people too to not have a death penalty as a necessary option. As I've grown older, I see stuff in the newspaper. I see horrendous crimes. I've changed my view in that and think that there's some people that are not able to rehabilitate into the normal society. Either education has failed them, their parents have failed them. They have failed themselves. So I think in some cases the death penalty is required.

Defense counsel next questioned Gurany on the topic:

> Q. Okay. Now, when you were talking about your responses to question 45, you -- you mentioned there are certain circumstances in which -- in which education has failed an individual, his parents failed, [he] has failed himself and you indicate that's where you thought the death penalty should be considered. Am I quoting you fairly?
>
> A. I did say those words, but not the context of people behave a certain way based on their upbringing, their education or lack of education, but that

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[68] *Id.*

[69] TEX. CODE CRIM. PROC. art. 35.16(c)(2).

doesn't mean they automatically have to commit a crime.

* * *

Q. Okay. Now, you were talking about education having failed an individual, and parents having failed him, and having failed himself. If you look up here. Assuming you've already been convicted [sic] beyond a reasonable doubt that somebody is probably going to do something in the future, assuming that, you are directed to take into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant to see if there's sufficient mitigating circumstance. Are you willing to consider information about the defendant's character and background to see if you find something mitigating?

A. I -- I --

[PROSECUTOR]: Objection to contracting.

THE COURT: Overruled.

A. I am.

Defense counsel later challenged Gurany for cause, arguing as follows:

> We challenge for cause, Your Honor. This juror cannot be impartial because it's his opinion that character and background under circumstances where an individual's education failed them, and parent's [sic] failed them and he failed himself would be sufficient for a death penalty for him, which means that he's taking mitigating circumstances and twisting them into aggravating circumstances. He's not able to consider things that are by law mitigating and ought to be considered, and he cannot be fair.

The trial judge overruled the challenge for cause and defense counsel exercised a peremptory challenge against Gurany.

The trial judge did not abuse her discretion in denying the challenge for cause. Renteria has not shown that Gurany had a bias that would have substantially impaired his

ability to carry out his oath and instructions in accordance with the law.[70] Gurany agreed that he was willing to consider Renteria's character and background in determining whether there were sufficient mitigating circumstances to warrant a sentence of life rather than death. Even if we were to assume that Gurany would not consider Renteria's educational, parental, or personal failings to be mitigating, he was not challengeable for cause on that basis.[71]

Cruz Angel Ochoa, Jr.

Renteria claims that Ochoa was challengeable for cause "because he expressed a presumption and an inherent personal bias towards the death penalty and an inability to consider the full range of punishment." He contends that Ochoa had "such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict."[72]

The trial judge initially questioned Ochoa about statements in his juror questionnaire that he heard about the case in the news and already formed an opinion about what the punishment should be. Ochoa responded in the negative when the trial judge asked him if this would influence his verdict if he were seated as a juror. Ochoa explained that his answer on his juror questionnaire was an "emotional response" from what he had heard on the news, and he agreed that he could listen to the evidence and return a verdict based on the evidence

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[70] *Feldman,* 71 S.W.3d at 744.

[71] *Standefer,* 59 S.W.3d at 181 (a prospective juror is not challengeable for cause simply because he does not consider a particular type of evidence to be mitigating).

[72] *See* TEX. CODE CRIM. PROC. art. 35.16(a)(10).

alone.

When next questioned by the prosecutor, Ochoa acknowledged that he would not automatically find Renteria to be a future danger because he had been found guilty of intentionally killing a child under age six. He agreed that he could put aside everything that he had previously heard about the case and base his verdict solely on the evidence presented in the courtroom. He further agreed that, even if he found Renteria to be a future danger, he would still have an open mind to both life in prison and the death penalty. He acknowledged that he answered that he was in favor of the death penalty on his juror questionnaire. However, he explained that this was a general statement and that the punishment should be decided based on the facts and circumstances of each case. He also agreed that he was not predisposed towards the death penalty and was still open to both life and death in the instant case.

Defense counsel and Ochoa then had an exchange regarding his juror questionnaire:

> Q. And on page 3 of your questionnaire you had told us that you had heard when asked have you heard anything about this case and or the defendant and you answered yes.
>
> A. Yes.
>
> Q. What do you remember hearing about this case?
>
> A. I remember about a child being missing and that was later found dead. And then later Mr. Renteria was -- was charged and taken into custody. And -- and that it had been a molestation. Okay.
>
> Q. And the second question on this questionnaire was do you already have an opinion about what the punishment should be? And you answered

yes, correct?

A. No.

Q. You answered yes on this question?

A. Oh, that's -- that was in regard to in general.

* * *

Q. Okay. So on October 10th you had an opinion about what the punishment should be, correct?

A. That's when I filled out the questionnaire.

Q. Okay. And now, you -- you come here today to follow up on these questions and so we can talk to you. And you've told us that it was an emotional response and so you're [sic] opinion was based on that.

A. Yes.

Q. Okay. Now, given that you do have an opinion, based on that opinion, would you have to be talked out of your opinion?

A. No.

Q. Okay. So whatever you heard on the news, on the media and your opinion that you formed, you're telling us in no way is it going to influence your verdict if you're seated as a juror?

A. That is correct.

Q. Now, let me --

A. Can I state why?

Q. Sure.

* * *

A. It's because I believe in the law. And we can all form lynching squads and go out and find whoever did something and we have an opinion. I mean, you've never had opinions when you've been out there.

Q. Right.

A. And you feel like killing -- I mean not killing, but like ringing [sic] somebody's neck or something, but that's your opinion at that time. But once you settle down and listen to what happened, you say well, maybe that wasn't really the rational thing to do. So that is what I'm telling you right now. When I said that, that was because I walked in. I found out what the case was about. I had heard about it in the television and the newspaper and I felt again the same thing that you -- when you become emotional. But there's another side that wants [sic] you have to sit in court, you have to set aside your emotions. You have to listen to the case which I've done before. I have to base it on what -- what is presented to me and I have to make my decision on that.

* * *

Q. And again, my concern is because you've had that opinion twice. You had it back in 2001 or whenever you were first hearing about it and you had it again when you walked into Liberty Hall on October 10th. And so you've had that, these tense emotional reactions twice. And so when it comes [to] being charged with following the law, some people, that opinion is just something that's too strong for them.

A. Right. And you asked me if -- if you had to talk me out of it. I said no.

Q. Okay. [A]nd so you can honestly walk into the courtroom, put aside your opinion, blank slate and move forward?

A. Yes, because I really -- you know, if I serve [on] this jury or not it is -- it is not that important to me.

Q. Okay.

A. I mean, I'm just telling you what I fe[e]l.

Defense counsel later asked Ochoa about his "views on the death penalty" for a

defendant who had been convicted of murdering a child under age six. Ochoa responded, "I would say yes to the death penalty," but he also added that he would not have to be "talked out of" the death penalty. Defense counsel continued to question him as follows:

> Q. Now, the question is if a situation in which a person has already been convicted of intentionally, knowingly causing the death of a child under six years old and you have found that he is a future danger that he will commit criminal acts of violence that constitutes a continuing threat to society, at that stage, what are your views regarding the death penalty?
>
> A. Okay. You're implying I'm already saying that he is a future threat?
>
> Q. Yes, that's my hypothetical question. He's been convicted, intentionally, knowingly killing a child under six and he has been found to be a future danger. What are your views regarding the death penalty?
>
> A. Okay. You're setting up scenarios for me?
>
> Q. Yes, sir.
>
> A. That I'm supposed to ans[w]er?
>
> Q. Yes, sir.
>
> A. And I feel cornered.
>
> Q. I'm sorry.
>
> A. So I'd rather not answer it.
>
> Q. Unfortunately we need answers.
>
> A. Yes?
>
> Q. Yes.
>
> A. Yes.

Q. Yes. Death penalty?

A. Yes.

Q. Okay.

A. I mean, I'll give you an answer.

When next questioned by the prosecutor, Ochoa acknowledged that he had said there should be a death penalty for a defendant who murdered a child under age six, but he added that he was still open to life in prison. Then, he confirmed to defense counsel that in his view a defendant who murdered a child under age six should get the death penalty. Finally, the trial judge questioned Ochoa:

> THE COURT: Okay. [J]ust a concern on my part that I want to just absolutely be clear on and that's you view this question and know he's already been convicted. You're sent to the deliberation room and you're going to answer these two questions and -- and she asked you about tendencies. Honestly, these -- all right. A tendency to go toward death rather than life?

A. No.

> THE COURT: When you're answering these questions --

A. No, I didn't have a tendency.

> THE COURT: Okay. All right. And if you -- if you decided with all the rest of the jurors that the answer would be yes that he is a future danger. At that point is there later a -- a tremendous leaping on your part, tendency that really you're not going -- you're not going to -- you're not going to find any sufficient mitigating circumstance. And as a result, death penalty results?

A. No, I consider myself fair and I would consider in two [sic].

Defense counsel then challenged Ochoa for cause because he could not "be impartial

and consider a life sentence," he had already decided that the death penalty would be appropriate for a defendant who murdered a child under six, and he would assess the death penalty if the defendant was found to be a future danger. The trial judge overruled the challenge for cause to Ochoa, and defense counsel exercised a peremptory challenge against him.

The trial judge did not abuse her discretion in denying the challenge for cause. Although Ochoa vacillated in his answers, he ultimately stated that he would not favor the death penalty and would consider mitigating circumstances. When a venireperson vacillates in his answers, we accord particular deference to the trial judge's decision.[73]

Longino Gonzalez, Jr.

Renteria claims that Gonzalez was challengeable for cause for the same reasons as Ochoa. He contends that Gonzalez had "a presumption and an inherent personal bias towards the death penalty," an "inability to consider the full range of punishment," and a "conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict."

The trial judge initially questioned Gonzalez about his answer on his juror questionnaire that he had formed an opinion on punishment after hearing about the case in the news. The trial judge asked Gonzalez if this would influence his verdict if he were seated as a juror, and Gonzalez answered:

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[73] *Feldman,* 71 S.W.3d at 744.

> I spent a lot of time from when we got called in the first time avoiding the opportunity of going through or considering in my mind what was about to come so that I would not have a prejudgment on what would be my decision if I got called to serve. So I was trying to avoid it at that time even though I marked this yes because up to this point from what I had gathered, newspaper and television, yes, I had marked it a yes because at that point not knowing that I would serve, of course, I would. Yes.

The trial judge asked him again if his prior opinion would influence his verdict, and Gonzalez responded: "No, I think I would want to hear the details before making a a [sic] conclusion."

Gonzalez next affirmed to the prosecutor that he would have an open mind on punishment, that he could put aside what he had heard about the case on the news, and that he would base his decision on the evidence presented in court. Gonzalez agreed that there is a place for the death penalty and a place for life in prison and that he was open to both options in the instant case. He confirmed that even if he answered yes to the future dangerousness question, he would still be open to a life sentence and would consider evidence of mitigating circumstances.

When defense counsel asked Gonzalez if his prior opinion about the case would influence his verdict, Gonzalez replied that he "would want . . . to hear the facts." Defense counsel continued to question Gonzalez as follows:

> Q. Okay. Now, my question was just generally speaking based on your values, your views, your experiences, generally speaking with regard to the situation which somebody has been convicted of capital murder and killing a child under six years old, and you've already indicated that you felt there was a -- and the -- I don't think results in a previous case involving children by your general views, in regard to the case which someone has intentionally

caused the death of a child under si[x] years old, what do you personally believe with regard to the death penalty?

A. At that time?

Q. Right now. I mean how are you right now? Just what's your snap fingers what do you think about that situation?

A. Well, in that situation is from what you're defining or reading, you're saying that capital murder of a child under the age of six.

Q. Yes. That that --

A. I am stating that my opinion is death penalty.

Q. Yes, sir.

A. Right.

Q. Yes, sir. I'm trying to clarify that.

A. Yes. Then up to this point I am going to say yes.

Q. Your opinion is death penalty?

A. Yes.

Q. Okay.

* * *

A. Now, I have stated before that I would have the ability to separate because I don't know the facts. Do you understand what I'm saying?

Q. So let me go ahead and ask you. That's your opinion, death penalty. So now you're going to try to separate facts, but basically what you're going to try to do is separate facts to -- to have to be talked out of the death penalty is the situation?

A. No, I don't think so.

Q. Would be no?

A. No, I don't think so. I don't see it that way. The way I see it is that in other words, I already know that there has been a conviction. I already know that.

Q. Yes, you do.

A. Okay. Now, my view now has to be to mak[e] a decision as to what is being asked there and I cannot make a decision until I hear the facts.

Q. Okay.

A. In other words if I had not been called to be in the situation, my opinion would have stayed -- stayed in that manner.

Gonzalez later stated to defense counsel that he generally thought that the death penalty "needs to be applied" if a defendant murdered a child under age six and was found to be a future danger. However, he added that he could still consider a life sentence for such a defendant. He then confirmed to both the prosecutor and defense counsel that he would be open to both a life sentence and the death penalty and would honestly and fairly consider mitigation evidence in making that decision.

Defense counsel challenged Gonzalez for cause, arguing that he was biased in favor of the death penalty and that he could not give full and honest consideration to the mitigation special issue. The trial judge overruled the challenge for cause, and defense counsel exercised a peremptory challenge against Gonzalez.

The trial judge's decision to deny the challenge for cause is supported by the totality of the record. Although Gonzalez expressed that he would generally support the death

penalty for a defendant who murdered a child under age six, he repeated several times that he was open to a life sentence and that he could consider mitigating evidence in the instant case. The trial judge did not abuse her discretion in denying the challenge for cause.

Mark Williams

Renteria also alleges that Williams was challengeable for cause because he expressed "an inherent personal bias towards the death penalty and an inability to consider the full range [of] punishment." He further contends that Williams had established a conclusion in his mind about Renteria's guilt that would influence his verdict.[74]

In response to initial questioning by the trial judge and the prosecutor, Williams acknowledged that, although he had heard about the case through the media and conversations with others, he had not reached a conclusion about what punishment would be appropriate. He also agreed that he would base his verdict solely on the evidence presented in the courtroom.

Williams next stated to defense counsel that he was generally in favor of the death penalty for a defendant who murdered a child under age six, but he did not have an opinion about what the punishment should be in the instant case because he had not yet heard the evidence. He stated that, in the event that he found a defendant to be a future danger, he would lean towards the death penalty but he "would still want to hear the mitigating circumstances." He affirmed that his impression when he first heard about the case was

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[74] *See* TEX. CODE CRIM. PROC. art. 35.16(a)(10).

"how bad the crime seemed to be." However, when defense counsel asked him if that impression would influence his verdict, he responded: "No, sir, because I haven't heard the evidence." Defense counsel then continued to question him as follows:

> Q. You're saying that you can -- that you can completely ignore what you've already taken pretty seriously to heart and just ignore it completely?
>
> A. Up until the point I'd been called as a juror on this trial I'd totally forgotten about it. So I have not thought about it in the last three or four years, whatever it's been.
>
> Q. But when you remembered --
>
> A. Um-hmm.
>
> Q. -- how you reacted to hearing about it you remembered that it was a--
>
> A. Yes, I did.
>
> Q. -- very strong impression, and it came back to you the same impression?
>
> A. Yes, sir.
>
> Q. And when you get into the jury room, that impression is going to come back, isn't it? I mean when you -- when you search deep down in your heart you're not -- you can't escape that?
>
> A. I -- I don't know if it will or not.
>
> Q. You're not sure that it will or not?
>
> A. I don't know.
>
> Q. Okay. Because you're not anymore [sic] sure of that than you are about not using some of your own knowledge on things when it might conflict with what some expert says from the witness stand. Right?

A. Correct.

Q. And you're not sure you can set that aside completely. At this point you cannot tell us honestly from your heart of hearts that you -- that that's not going to influence you?

A. I can't rule it out one hundred percent, no.

When the prosecutor next questioned Williams on this topic, he responded as follows:

Q. And you said if you go back to the jury room, of course, you're human. You know, we have memories, and we can't forget everything. Right?

A. Right.

Q. And you said it might come back. And which is fine. But the question is, you know, if it comes back, though . . . can you still decide those questions just based on the evidence?

A. Yes, I think I can.

Q. And not on that impression?

A. Correct.

Q. Okay. So that impression, even if it comes back, it wouldn't have an effect on your decision?

A. I don't believe it would.

Q. Okay. You don't believe it would. It would or will not?

A. It will not.

When again questioned by defense counsel, Williams stated he believed he could "get past" his impression and base his verdict on the evidence presented at trial. He acknowledged the possibility that he could not one hundred percent set his impression aside,

but he believed that he could "get past it" and "be impartial."

Defense counsel argued that Williams was challengeable for cause because he could not be impartial and was unsure whether his negative impression would influence his verdict. The trial judge overruled the challenge for cause, so defense counsel exercised a peremptory challenge against Williams.

Williams stated during voir dire that he could not say with one hundred percent certainty that his impression of the case would not influence his verdict, but he ultimately affirmed that he could set it aside and base his verdict on the evidence presented at trial. When the record reflects that a veniremember vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge.[75] We decline to hold that the trial judge abused her discretion in denying the challenge for cause to Williams.

Mark Anthony Tapia

Renteria asserts that Tapia was biased against a law applicable to the case upon which he was entitled to rely.[76] He specifically complains that Tapia "shifted the burden of proof and imposed it on the Defendant with regard to mitigation."

A veniremember is not challengeable for cause simply because he or she would place

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[75] *Gardner v. State,* 306 S.W.3d 274, 295 (Tex. Crim. App. 2009), *cert. denied,* 131 S. Ct. 103 (2010).

[76] TEX. CODE CRIM. PROC. art. 35.16(c)(2).

the burden of proof on mitigation on the defense.[77] Further, Tapia expressed that he would keep an open mind on punishment, that he would consider mitigating circumstances before making his decision, and that he would not hold the defense to any burden. The totality of the voir dire provides sufficient evidence to support the trial judge's ruling.

John Tobias

Renteria argues that Tobias was challengeable for cause because he would automatically assess the death penalty for certain crimes. He contends that Tobias expressed "an inherent personal bias towards the death penalty and an inability to consider the full range [of] punishment."

When the prosecutor initially questioned Tobias about his juror questionnaire, Tobias responded as follows:

> Q. On page eight of your questionnaire you're being asked whether you believe there should be a death penalty, and you said yes. Now why do you believe that?
>
> A. There's certain crimes in my mind that that [sic] are committed where I believe, if he is the person, should pay with their life.
>
> Q. Okay.
>
> A. If it's -- I mean I know that there's different types of crimes and stuff. I mean there's just certain things that go over and beyond in my mind.

The prosecutor then stated to Tobias that, although the death penalty is an option in capital murder cases, that "doesn't mean that it's an automatic." The prosecutor then explained the

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[77] *Saldano,* 232 S.W.3d at 92.

process in which the jury must answer the future dangerousness and mitigation special issues. Tobias indicated that he understood the process and that he could answer both questions based on the evidence, regardless of whether his answers resulted in life in prison or the death penalty. Tobias stated, "I don't favor the death penalty over a life sentence," and he agreed that he had an open mind with regard to both options at every stage of the proceeding. Tobias acknowledged that he could still keep an open mind for a defendant convicted of murdering a child under age six.

When he was next questioned by defense counsel, Tobias stated that in his personal opinion certain crimes "should result in the death penalty" and the death penalty should serve "as a deterrent to certain crimes." Tobias asserted that, despite his personal opinion, he would still keep an open mind with regard to answering the future dangerousness question. Tobias also stated that even if he found the defendant to be a future danger, he would keep an open mind and answer the mitigation question based on the evidence presented at trial.

Defense counsel challenged Tobias for cause, arguing that he was "not impartial" because he believed certain crimes deserved the death penalty and he could not give full consideration to the special issues. The trial judge overruled the challenge for cause, and defense counsel exercised a peremptory challenge against Tobias.

The trial judge's ruling is supported by the record. Although Tobias expressed a general belief in the death penalty as a deterrent to certain crimes, he continually stated that he had an open mind and that he could answer the special issues based on the evidence.

Thus, the trial judge did not abuse her discretion in denying the challenge for cause.

Paul Watt

Renteria claims that Watt was challengeable for cause for two reasons. First, he alleges that Watt "would place the burden of proof on the defense as to mitigation." However, Renteria did not specifically challenge Watt on this basis.[78] Further, we have held that a veniremember is not challengeable for cause simply because he would place the burden of proof on mitigation on the defense.[79]

Renteria also argues that Watt was challengeable for cause because he would require a defendant to testify in violation of the Fifth Amendment to the United States Constitution. When the prosecutor initially explained a defendant's right not to testify, Watt agreed that he would not hold it against a defendant if he did not take the stand and would not require the defense to prove anything at trial. However, Watt stated that he would want to "hear both sides of the story" before making a decision. The prosecutor reminded him that the State has the burden to prove future dangerousness, that the defendant has a right not to testify, and that the defense has a right not to put on any evidence. Watt stated that he could follow the law and hold the State to its burden even if the defense did not present any evidence.

When next questioned by defense counsel, Watt agreed that remorse and accepting responsibility are very important factors to consider when determining if someone should

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[78] *See* TEX. R. APP. P. 33.1.

[79] *Saldano,* 232 S.W.3d at 92.

receive the death penalty. Watt stated that he would expect to hear something about a defendant's intent and motivation for his actions. He added, "I would like to understand what happened to know if I would consider that they would do it again." However, he stated that he would not hold it against the defense if they presented no evidence. He affirmed that he could answer the future dangerousness question even if he heard nothing from the defense on that issue. He further affirmed that he would not expect the defense to present evidence of mitigating circumstances.

Defense counsel challenged Watt for cause on the grounds that he needed to hear from both sides before making a decision, he indicated that remorse would be a factor in his decision, and he was biased against a defendant's Fifth Amendment right to remain silent. The trial judge overruled the challenge for cause, and defense counsel exercised a peremptory challenge against Watt.

The trial judge's ruling is supported by the record. Although Watt stated that he would want to hear about a defendant's remorse, responsibility, intent, and motivation, he consistently stated that he would not hold it against the defendant if he did not testify. He stated that he could follow the law and answer the special issues even if the defense did not present evidence at trial. The trial judge did not abuse her discretion in denying the challenge for cause.

The trial judge did not abuse her discretion in denying Renteria's challenges for cause to Crosby, Sanchez, Martinez, Bryan, Gurany, Ochoa, Gonzalez, Williams, Tapia, Tobias,

and Watt. Because Renteria has failed to show that at least eight of his complained-of challenges for cause were erroneously denied, he cannot show harm on appeal.[80] Points of error eleven through thirty-seven are overruled.

IV. Cumulative Voir Dire Error

In point of error thirty-eight, Renteria alleges that "the cumulative effect of all the alleged instances of [the] trial court's errors during the jury selection process injected reversible error into the trial" and denied him due process. This Court has recognized the proposition that a number of errors may be found harmful in their cumulative effect; however, we have rejected each of Renteria's voir dire points of error individually. Without error, there is no cumulative effect.[81]

Renteria further asserts in point of error thirty-eight that one of "the alleged instances of the trial court's errors during the jury selection process" occurred when the trial judge deprived him of due process and due course of law "by permitting the State to inform the veniremen that [the] law required a nexus between the crime and mitigation evidence." This complaint is not included in any of his other specifically enumerated points of error. Renteria has provided no citation to the record or legal authority in support of this claim. Thus, it is

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[80] *Chambers,* 866 S.W.2d at 23.

[81] *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999).

inadequately briefed,[82] and we decline to address it. Point of error thirty-eight is overruled.

V. Exclusion of AuBuchon's Testimony

In point of error forty-one, Renteria claims that the trial judge erroneously excluded "relevant testimony by Frank G. AuBuchon that David Renteria would not commit criminal acts of violence in the future and would not be a continuing threat to society." He contends that AuBuchon's testimony was admissible as either expert or lay testimony. He asserts that the exclusion of this testimony violated his "federal constitutional right to due process, his state constitutional right to due course of law, and his Sixth Amendment right to present a defense at the sentencing phase of his trial."

Defense witness AuBuchon, who had been employed in the prisoner classification section of the Texas Department of Criminal Justice for nearly twenty years, reviewed Renteria's prison records before testifying at trial. AuBuchon testified at length regarding prison classification and security measures and how they would be applied to Renteria. AuBuchon testified that he was not concerned that Renteria would be a threat to prison inmates or staff because "he doesn't have any history of institutional misbehavior, violence, [or] acts of aggression." When defense counsel further questioned AuBuchon about future dangerousness, the prosecutor objected and the trial judge ruled as follows:

> Q. And all right. Does this mean, if you talk about the word probability meaning more likely than not --
>
> A. Okay.

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[82] TEX. R. APP. P. 38.1.

Q. Is there a probability that David Renteria will commit criminal acts of violence so that he constitutes [a] continuing threat to society in the future?

[PROSECUTOR]: Objection, Your Honor. Calls for a conclusion. It is the province of this jury to determine and he's not been qualified as an expert in this area.

[DEFENSE COUNSEL]: Your Honor, his credentials have made him obviously an expert in corrections and an expert in judging character and the potential danger of inmates.

[PROSECUTOR]: Furthermore, the definition of probability is within the jury's province to determine. His probability may not be the same as the jury's.

THE COURT: Sustained.

Immediately thereafter, defense counsel asked AuBuchon the following question:

Q. Mr. AuBuchon, from your point of view as a corrections officer and classification officer and classification direction and operations director in the Texas Department of Corrections Institutional Division, does David Renteria pose a threat of violence to inmates or staff at TDC?

A. I don't believe so.

Following that exchange, defense counsel twice more asked AuBuchon his opinion on Renteria's future dangerousness in prison:

Q. So why do you say that he will not be a risk of harm to the staff or the inmates of TDC?

A. I'm saying that based on the review of his records and the total absence of disciplinaries in his history.

* * *

Q. Is he a danger to the people in prison and to society down there?

A. I don't think so.

The prosecutor withdrew her previous objection at the bench the following morning:

> [PROSECUTOR]: The other thing, there was a question yesterday wherein defense [counsel] defined probability and then asked do you think there is a probability that the defendant would be a continuing threat to society. I objected to the definition of probability. But I would not object to them asking the question as it's phrased in the two special issues, that is, is there a probability that David Renteria would commit criminal acts of violence so that he constitutes a continuing threat to society. I would not object to that question as I do believe that's a proper question even for a lay person to answer.
>
> So that the record is clear, if the defense wants to ask that question before passing the witness or has other questions that they want to ask, I want to make sure it's clear, I will not object to that as long as there's no defining of probability.
>
> [DEFENSE COUNSEL]: If I ask him the question, I would ask him to distinguish between the word possibility and the word probability.
>
> [PROSECUTOR]: Which I think is a -- there's some definition there, Judge. I -- the question as it is phrased I think is the appropriate way to ask the question as it's phrased in the Court's charge and in the Code.
>
> THE COURT: Well, I'm not going to tell anyone how to ask a question at this point in time. Ask your questions, raise your objections, if you have any.
>
> [PROSECUTOR]: I'm just saying we withdraw our objection as to asking the question as it is in the Code.
>
> THE COURT: Well, that wasn't the objection yesterday. The objection was to the definition that the attorney had placed on the word probability.
>
> [PROSECUTOR]: Yes, ma'am.
>
> THE COURT: So let's proceed.

Defense counsel then proceeded to ask AuBuchon his opinion regarding Renteria's future dangerousness in prison:

> Q. And is David Renteria a future danger in prison? Is he -- is he going to commit -- knowing what you know of him and knowing where he's going to be is he going to commit criminal acts of violence that constitute a threat to that society over there?
>
> A. Not that I'm aware of.
>
> * * *
>
> Q. After all, after all, do you consider that David Renteria is going to be a threat of violence, of criminal acts of violence in the future that he will be a continuing threat to society in -- where he's going to be in prison?
>
> A. In the prison I don't -- I don't see that. I don't see any evidence or see anything in his -- in his past institutional behavior that would make me think that.

Renteria argues on appeal that the trial judge "abused [her] discretion in refusing to allow Mr. AuBuchon's testimony, as to, whether there was a probability that David Renteria will commit criminal acts of violence so that he constitutes [a] continuing threat to society in the future." He contends that "[t]his error harmed [him] by preventing him from presenting persuasive evidence that would have shown the jury that he was not a future danger and that, as a result, would have saved his life."

Even if we assumed that the judge erred, no harm is shown.[83] AuBuchon repeatedly testified that he did not believe that Renteria would be a future danger in prison. In addition,

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[83] *See* TEX. R. APP. P. 44.2.

defense witness Dr. Mark Cunningham testified that there was "not a probability" that Renteria would commit criminal acts of violence in prison if he were to receive a life sentence instead of the death penalty. Renteria was not prevented from presenting the evidence at issue. Point of error forty-one is overruled.

VI. Fifth Amendment

In point of error forty-two, Renteria alleges that "the State was allowed to use [his] invocation of his right to remain silent as substantive evidence against him in violation of the Fifth Amendment." He specifically complains that, during the cross-examination of forensic psychologist Dr. Mark Cunningham, "the State was allowed to prove that defendant and his attorneys refused to allow defendant to be questioned by [Cunningham] regarding the facts of the capital murder offense." He contends that the State's adverse use of this evidence was constitutionally impermissible.

During voir dire examination outside the presence of the jury, Cunningham testified regarding the future dangerousness special issue. Cunningham affirmed that he was "engaged to give testimony regarding whether there is a probability that [Renteria] would commit criminal acts of violence that would constitute a continuing threat to society." He stated that he interviewed Renteria about his family, his background, his childhood extracurricular activities, his prison experience, and his employment history. However, he did not ask Renteria any questions about the instant offense. When the prosecutor asked him why he did not do so, Cunningham responded:

Q. And just so the Court knows, would you tell the Court why you did not inquire?

A. Yes, sir. Two primary reasons. One, defense counsel had instructed that the defendant was not to be questioned about the instant offense or prior unadjudicated conduct. Second, an inquiry --

THE COURT: About prior what conduct?

THE WITNESS: Prior unadjudicated conduct. The second reason is that that information would not inform either of the two issues that I was looking at. It would not tell me how he came to be damaged. It would not inform what kind of inmate he would be confined on a capital life term in the Texas Department of Criminal Justice. Beyond the facts of the offense that I'm accepting from his conviction and from the trial my inquiry of him beyond that doesn't inform any issue that's before me.

After voir dire examination, but before Cunningham's testimony before the jury, the parties discussed the Fifth Amendment issue at the bench:

[PROSECUTOR]: This issue about inquiring into specific facts of the case, and I don't think he has the right to take the Fifth at that point. I just -- is there a way you want to get into this area?

[DEFENSE COUNSEL]: Well, the defendant has a right to invoke the Fifth Amendment protection, and it was done through counsel, and it's improper to comment on it in any fashion, to comment on his invocation of his Fifth Amendment right.

[PROSECUTOR]: Well, except that he's going to say that he interviewed him and then he didn't interview him in certain areas.

[DEFENSE COUNSEL]: That he what?

[PROSECUTOR]: That he interviewed him, but he didn't interview him in the area of the instant offense.

[DEFENSE COUNSEL]: That's a comment on the Fifth Amendment right. I mean it's that simple.

THE COURT: So what is your objection or --

[PROSECUTOR]: Well, I believe that I --

THE COURT: -- what you're wanting me to rule on?

[PROSECUTOR]: -- I believe I'm entitled to inquire that he did not answer, that it was not a complete interview, and he asserted his Fifth whether there was counsel or not, that he asserted his Fifth, that he was not able to get those facts from him.

[DEFENSE COUNSEL]: That's improper evidence for the jury.

THE COURT: All right. Well, we're not -- we're not even at your portion of the questioning anyway.

[PROSECUTOR]: Okay.

THE COURT: So let's get the testimony from him on direct. And then when it's time to begin your cross-examination we can approach the subject again.

Cunningham then testified before the jury. When defense counsel asked him to describe the "primary area that [he was] asked to focus on in David Renteria's case," he responded:

> Stated most simply, it was where do we go from here, what kind of . . . inmate is he likely to be in prison, and even more specifically, what's the likelihood that he would commit acts of serious violence [if] confined for life in the Texas Department of Criminal Justice.

Cunningham opined that there was "not a probability" that Renteria would commit criminal acts of violence in prison if he were to receive a life sentence instead of the death penalty. He testified that his opinion was based in part on his interview of Renteria. He explained that he interviewed Renteria about his prior confinement in jail and prison, his educational

history, his history of extracurricular activities, his occupational history, his parents' marital history, and his own dating and marital history. The prosecutor asked, "You did not question the defendant regarding the capital offense?" Defense counsel objected to the question because "[i]t invades the defendant's right to invoke his Fifth Amendment." The trial judge overruled the objection, and Cunningham responded, "I did not." The parties then approached the bench and the prosecutor stated, "My next question, Your Honor, is the defendant refused to answer any questions regarding the capital murder offense." The trial judge sustained defense counsel's objection to that question, but ruled that the prosecutor could ask Cunningham "why he did not ask [Renteria] about the capital murder offense."

The prosecutor then continued his cross-examination of Cunningham. Over defense counsel's objection, the prosecutor asked Cunningham why he did not question Renteria regarding the capital offense. Cunningham responded that he did not question Renteria about the offense because defense counsel instructed him not to do so and because "there is nothing about that inquiry" that would show "how he became to be [sic] damaged" or "what kind of inmate he's likely to be in the future."

If a defendant breaks his or her silence to speak to his own psychiatric expert and introduces testimony that is based on that interview, then the defendant has constructively taken the stand, thereby waiving the Fifth Amendment right to remain silent.[84] The focus of

[84] *Chamberlain,* 998 S.W.2d at 234 (citing *Lagrone v. State,* 942 S.W.2d 602 (Tex. Crim. App. 1997); *Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996)).

the analysis is the defendant's choice to break his or her silence.[85] The issue is whether the psychiatric testimony that the defendant intended to introduce was based on his or her own participation in the psychiatric testing and examination.[86] Here, Renteria introduced psychiatric testimony based upon his own participation in a psychiatric examination. This constituted a waiver of Renteria's Fifth Amendment privilege in the same manner as would his election to testify at trial.[87]

Renteria argues that under *Soria v. State,* the scope of the State's cross-examination is "limited to the issues raised by the defense expert."[88] Renteria points out that Cunningham "did not question [him] about the offense and did not testify to any conversations with [him] about the offense." Thus, Renteria contends that he "did not raise any issues that would open the door" for the State to cross-examine Cunningham as to why he did not question Renteria about the offense.

The State did not exceed the scope of proper cross-examination. Defense counsel called Cunningham to testify that Renteria would not be a future danger in prison. It was permissible for the State to test Cunningham's credibility by questioning him as to how he arrived at that conclusion. A criminal defendant may not testify through a defense expert and

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[85] *Id.*

[86] *Id.*

[87] *See id.* (citing *Soria,* 933 S.W.2d at 54).

[88] 933 S.W.2d at 58.

then use the Fifth Amendment as a shield against cross-examination on disputed issues.[89] Point of error forty-two is overruled.

VII. Exclusion of Parole Evidence

In point of error one, Renteria challenges the trial judge's exclusion of "evidence of the minimum amount of time [that he] would spend in prison." Renteria complains that the excluded evidence was "highly relevant" to the future dangerousness special issue. He further asserts that the exclusion of this evidence violated due process, destroyed his mitigation argument, and "pushed the jury towards death."

In a hearing outside the presence of the jury, defense counsel presented the testimony of William T. Habern, an attorney whose practice focused on matters of sentencing and post-conviction remedies. Defense counsel presented evidence that, following the revocation of his probation, Renteria was sentenced to twenty years for indecency with a child and ten years for felony DWI on June 10, 2002. His ten-year sentence was ordered to run consecutively with his twenty-year sentence. Defense counsel also presented evidence that the State had filed a "Motion for Cumulation of Sentences," requesting that the trial judge to stack the life sentence on top of the twenty-year and ten-year sentences in the event that Renteria was sentenced to life in the instant case.

Habern opined that Renteria "would never parole" because "[o]btaining parole on a capital life murder is next to impossible in Texas." Habern also responded to defense

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[89] *Lagrone,* 942 S.W.2d at 611.

counsel's questioning as follows:

> Q. And what is the likelihood that the inmate we're talking about doing a 20 with a ten stacked on it and a life stacked on those is going to do less than 20 years on the 20 year sentence by the Parole Commission . . . issuing an order that that sentence cease to operate?
>
> A. Unless there were drastic changes in the way the system works -- and I can't predict the future -- there is next to no chance he would be paroled.
>
> Q. What are the chances that this inmate, that the Parole Commission would cause the ten year sentence to cease to operate before a full ten?
>
> A. Next to nothing.
>
> Q. What are the chances that the Parole Commission would cause a life sentence to cease to operate at any time before that one expires of its own accord?
>
> A. I would be very very seriously surprised if parole were granted in serious cases.

Habern also opined that Renteria "would have to do all 70 years" before being considered for release on parole, and he did not believe that Renteria would actually be released on parole at that point. Habern was further questioned by defense counsel about parole eligibility:

> Q. So hypothetically speaking, if the Court -- if the jury gives a life sentence and this Court cumulates that sentence on those other two, does the Parole Commission or anyone else have the discretion or the authority to cause a 20-year sentence to cease to operate at any time before 20 years day per day?
>
> A. They have the discretion to.
>
> Q. And at what point do they have the discretion to cause the 20-year sentence to cease to operate?

A. My recollection of that is that when he is parole eligible they have the opportunity to parole him.

Q. And when is that?

A. My recollection is it's ten years. It's not a 3-G offense. I'm subject to being corrected, but I believe it's 50 percent. It may be earlier. But none the less, in a situation that's been identified for me to consider here parole boards are not going to parole him.

Q. And on the ten year sentence, when does the board have discretion to cause that sentence to cease to operate?

A. I was thinking it's two years seven months but it may be two and a-half. I'm not sure.

Q. If the indecency is not a 3-G, when will the discretion of the board arise after how many years?

A. When he had earned one fourth of the sentence.

Q. So that would be five years?

A. Well, yes, when he earned five.

Q. And then on the ten year sentence at one fourth is two and a-half?

A. Yes.

Q. So he could conceivably after he does five on the 20 cause that sentence to cease to operate and have him start on the ten?

A. That's correct.

Q. And after two and a-half on that one cause it to cease to operate and he starts the life sentence?

A. That's correct.

Q. And he's got to do 40 on the life?

A. That's correct.

Q. So the leasts [sic] number of years that he could do under any circumstances would be 40 plus five plus two and a-half?

A. That's correct.

[DEFENSE COUNSEL]: That's 47 and a-half years.

On cross-examination, Habern acknowledged the speculative nature of his testimony:

Q. And [the statute] basically says that the jury is not to consider parole because parole authorities, the eligibility of parole is no guarantee because basically it's up to prison officials?

A. It's not up to prison officials. It's up to parole officials.

Q. Parole officials. I stand corrected. Up to parole officials?

A. That's correct.

Q. And everything is speculative sometimes when you make a request on behalf of one of your clients the Parole Board will grant them parole and you might even be surprised that they did it on that occasion and while others they denied and you think wow, I thought they were going to grant it. Isn't that fair?

A. That's correct.

Q. And just for the record, I know you know this, but just for the record, the possibility that one, that this defendant would get a life sentence versus a death sentence, one, is speculative?

A. Sure. That's in the jury's hands.

Q. And if the defendant were to receive a life sentence, 40 calendar years before [being] eligible for parole, the possibility that the Judge would stack that sentence over any other sentence existing is also speculative?

A. That's absolutely correct.

Q. And any testimony you were to provide to a jury would be in that regard speculative?

A. Yes, based on the hypothetical that was posed to me when I started my testimony.

* * *

Q. I'm not talking about the 40 year life because that, I think we've agreed that the 40 year life sentence is really speculative, especially in this case since we haven't even got there?

A. That's right.

Q. So I'm just talking about the 20 and the ten. And all of that, when he would be released is all really in the hands of prison officials and the Parole Board?

A. That's absolutely correct.

Q. And the Judge is absolutely right when she says application of those laws, meaning the parole laws will depend on the decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted?

A. That is true in all three.

The prosecutor objected that the proffered testimony was speculative and should not be considered by the jury. Defense counsel responded that the evidence was necessary to inform the jury that, if Renteria received a stacked life sentence, then the "40-year minimum becomes a myth" and he would have "to do more than 40 [years]" before becoming eligible for release on parole. The trial judge excluded the proffered testimony.

Habern did not testify before the jury; however, defense witness AuBuchon testified

about Renteria's prior sentences as follows:

> He currently last [sic] a 20-year sentence for indecency with a child, offense was committed about 1992 with commence date of sometime in 2001.
>
> Then there's a ten year felony DWI that started I believe in the early 2000 [sic] that will not be up until the 10-year sentence seizes [sic] to operate. So the ten is consecutive to the 20. Then I saw the commitment for the capital murder death sentence.

The State objected that "this is in violation of the Court's order," and also added:

> Your Honor, regarding the Court's order on Mr. Habern's testimony about when these sentences will run and how they will run, going into this information suggests to the jury that it will be 20 years before the ten year sentence starts, which puts me in the position of having to ask this witness well, but that's not true because there's parole, which I'm not going to go into.
>
> So I'd ask that this question and this response be struck because it is an improper assessment of what exactly will happen. It leaves a false impression with this jury that cannot be cured without going into parole.

The trial judge sustained the objection, struck AuBuchon's answer from the record, and ordered the jury not to consider it. The indecency judgment and the felony DWI judgment were later admitted into evidence. Both judgments showed that the 20-year indecency sentence and the 10-year felony DWI sentence were to run consecutively. At the State's request, the felony DWI judgment was redacted to delete language indicating that the 10-year sentence would commence when the 20-year sentence ceased to operate.

Before 1999, parole was not a proper matter for the jury's consideration in any form.[90] Effective September 1, 1999, the Legislature amended Article 37.071 of the Texas Code of

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[90] *Hankins v. State,* 132 S.W.3d 380, 384 (Tex. Crim. App. 2004).

Criminal Procedure to provide that a jury could be instructed on a capital defendant's eligibility for parole. The applicable law in the instant case authorized a trial judge, on written request of defense counsel, to instruct a jury on a capital defendant's parole eligibility as follows:

> Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.[91]

This amended statute was narrowly drawn and did not render every aspect of parole law an issue for jury consideration.[92] It expressly discouraged speculation on the parole process.[93] The Legislature could have written it more broadly to impart more information but chose not to.[94] Thus, parole is not a proper issue for jury consideration except to the extent explicitly provided for in Article 37.071, Section 2(e)(2)(B).[95]

The jury was instructed in accordance with Article 37.071, Section 2(e)(2)(B). Habern's speculative testimony was outside the scope of what was permitted by that statute.

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[91] TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(2)(B).

[92] *Hankins,* 132 S.W.3d at 385.

[93] *Id.*

[94] *Id.*

[95] *Id.*

Thus, the trial judge did not abuse her discretion in excluding it.[96] Further, no harm is shown by the exclusion of Habern's or AuBuchon's testimony.[97] Defense witness Cunningham testified that he believed Renteria would "die in prison" and would "never be at large in the community." Further, defense counsel argued at closing that it was undisputed that Renteria would spend the rest of his life in prison and would die in prison. Point of error one is overruled.

VIII. Denial of Parole Instruction

In point of error thirty-nine, Renteria argues that the trial judge improperly denied his requested jury instruction regarding parole. Renteria specifically complains that the trial court should have granted his request to instruct the jury that: he had been previously sentenced to twenty-years for indecency with a child and ten years for felony DWI; his ten year sentence would not begin to operate until his twenty year sentence ceased to operate; and if he were sentenced to life in the instant case, then his life sentence would not begin to operate until the two prior sentences ceased to operate.

As previously discussed, parole is not a proper issue for jury consideration except to the extent explicitly provided for in Article 37.071, Section 2(e)(2)(B).[98] Here, the jury was properly instructed in accordance with Article 37.071, Section 2(e)(2)(B). Renteria's

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[96] *See Shuffield v. State,* 189 S.W.3d 782, 793 (Tex. Crim. App. 2006).

[97] TEX. R. APP. P. 44.2.

[98] *Hankins,* 132 S.W.3d at 385.

speculative and potentially incorrect proposed instruction was outside the scope of what was permitted by that statute.

In this same point of error, Renteria also complains that the trial judge erroneously denied his requested jury instruction "regarding the Texas Department of Criminal Justice." That request involved instructing the jury not to "speculate" whether Renteria would commit violent acts in prison and to "presume" that the Texas prison system would "competently carry out its responsibility to safely and securely house the defendant and other prisoners in the system should he be sentenced to life in prison." Renteria makes two distinct arguments in one point of error, and he fails to provide legal authority in support of this particular claim. Thus, we decline to address this portion of his argument because it is multifarious and inadequately briefed.[99] Point of error thirty-nine is overruled.

IX. Improper Jury Argument

In point of error forty, Renteria argues that the prosecutor made an improper jury argument that misstated the evidence and misled the jury. At issue is the following portion of the prosecutor's closing argument regarding the future dangerousness issue:

> [PROSECUTOR]: And when you're -- when you're looking to answer this, I don't shy away from the fact that the State of Texas must prove this beyond a reasonable doubt. I think the evidence is overwhelming, overwhelming that he is a continuing threat.
>
> When we watch him 365 days a year, he's a good boy. We can't watch him 365 days a year every day of the week, every hour of the year. We can't do that.

[99] TEX. R. APP. P. 38.1.

> And he is a continuing threat. He does not deserve the right to go to general population. We have no idea what kind of circumstances, crisis, that he might find possible, and then we'll see this. We'll see this.
>
> And they want to equivocate that continuing threat, the threat -- it doesn't have to be another homicide. It can be a variety of violent conduct and threat. Whether you want to give him credit for living in that prison society or in the free world. But obviously even Dr. Cunningham -- and I don't agree with much of what he says -- but Dr. Cunningham says that in the free world he is a continuing --
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Outside the record. The unrebutted testimony is that Mr. Renteria, if he gets a life sentence, he's going to be in prison his whole life.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: There's no evidence in there that he'll be in there his whole life. You can read that record all you want. There's no evidence of that.

Defense counsel objected when the prosecutor stated that Cunningham testified Renteria would be a continuing threat in the free world. But that is not what Renteria is complaining about on appeal. Here, he asserts that the trial judge improperly "permitted the State [to] argue that there was no evidence appellant would likely be in prison for the rest of his life." However, defense counsel did not object when the prosecutor argued that "[t]here's no evidence that he'll be in there his whole life." Thus, Renteria has failed to preserve his right to complain about this particular argument on appeal.[100] Point of error forty is overruled.

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[100] *See* TEX. R. APP. P. 33.1.

X. Death Penalty Statute

Renteria's remaining points of error consist of various challenges to Article 37.071 of the Texas Code of Criminal Procedure. In point of error forty-three, Renteria argues that the trial judge erred by instructing the jury, as required by the statute, that the definition of mitigating evidence limits the concept of mitigation to "evidence that a juror might regard as reducing the defendant's moral blameworthiness." In points of error forty-four, forty-five, and forty-eight, he complains about the statute's failure to define the phrases "continuing threat to society," "criminal acts of violence," and "militates." In point of error forty-six, he contends that the Eighth and Fourteenth Amendments were violated because the trial judge, in accordance with the statute, "failed to provide a vehicle for a juror to return a life verdict where the aggravating factors are not so severe as to call for death." In point of error forty-seven, he argues that the "10-12 rule" is unconstitutional and that the trial judge violated his rights by instructing the jury in this manner. In point of error forty-nine, he complains that the statute should require the State to bear the burden of proof and persuasion with regard to the mitigation issue.

We have repeatedly rejected these arguments, and Renteria fails to persuade us that our prior decisions were incorrect.[101] Points of error forty-three through forty-nine are

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[101] *See Mays v. State,* 318 S.W.3d 368, 397 (Tex. Crim. App. 2010), *cert. denied,* No. 10-8172, ___ S. Ct. ___, (Mar. 7, 2011); *Russeau v. State,* 291 S.W.3d 426, 434-36 (Tex. Crim. App. 2009); *Smith v. State,* 297 S.W.3d 260, 278 (Tex. Crim. App. 2009), *cert. denied,* 130 S. Ct. 1689 (2010); *Murphy v. State,* 112 S.W.3d 592, 606 (Tex. Crim. App. 2003); *Cantu v. State,* 939 S.W.2d 627, 649 (Tex. Crim. App. 1997).

overruled.

The judgment of the trial court is affirmed.

DATE DELIVERED: May 4, 2011
DO NOT PUBLISH

APPENDIX H

CASE NO. 20020D00230
INCIDENT NO./TRN: N/A

THE STATE OF TEXAS	§	IN THE 41ST DISTRICT COURT
	§	
V.	§	
	§	
DAVID SANTIAGO RENTERIA	§	EL PASO COUNTY, TEXAS
	§	
STATE ID NO.: 05012298	§	TX05012298

JUDGMENT OF CONVICTION AND RE-SENTENCING BY JURY

Judge Presiding:	HON. Mary Anne Bramblett	Date Judgment Entered:	5-14-08
Attorney for State:	Jaime Esparza Lori Hughes Diana Meraz	Attorney for Defendant:	Jaime Gandara Edy Payan Greg Velasquez

Offense for which Defendant Convicted: **CAPITAL MURDER**

Charging Instrument: **INDICTMENT**	Statute for Offense: **Texas Penal Code § 19.03 (a) (8)**
Date of Offense: **11-18-01**	
Degree of Offense: **CAPITAL**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **AFFIRMATIVE, TO WIT: AN UNKNOWN OBJECT OR A HAND**

Punished Assessed by: **JURY**	Date Sentence Imposed: **5-14-08**	Date Sentence to Commence: **5-14-08**
Punishment and Place of Confinement:	**DEATH PENALTY**	

On SEPTEMBER 8, 2003, this cause was initially called for trial, and the State appeared by her District Attorney, and the defendant, DAVID SANTIAGO RENTERIA, appeared in person in open court with his counsel. It appeared to the Court that the defendant was mentally competent. The defendant entered a plea of NOT GUILTY to the charge of CAPITAL MURDER contained in the indictment, both parties announced ready for trial, and a jury was selected and seated consisting of STEVEN DARLING and eleven others who were duly sworn. The indictment was read and the defendant entered his plea of NOT GUILTY to the charge of CAPITAL MURDER contained in the indictment and read to the jury by the State.

All of the evidence was presented by both the State and the defendant and the charge was read to the jury by the Court. The jury heard the arguments of both sides and retired in charge of the proper officer to consider their verdict. Afterward, the jury was brought into open court by the proper officer, the defendant and his counsel being present, and returned the following verdict which was received by the Court and entered upon the minutes of the Court, to wit:

SEPTEMBER 17, 2003

VERDICT FORM A

We, the jury, find the Defendant, DAVID RENTERIA, guilty of the offense of Capital Murder as charged in the indictment.

Signed: STEVEN DARLING
PRESIDING JUROR

On APRIL 22, 2008, this cause being called for the re-trial of the sentencing phase, the State appeared by her District Attorney and the defendant, DAVID SANTIAGO RENTERIA, appeared in person in open court with his counsel. It appeared to the Court that the defendant was mentally competent. Both parties announced ready for trial and a jury was selected and seated consisting of ROXANNE CASTRICONE and eleven others who were duly sworn.

All of the evidence was presented by both the State and the defendant and the charge was read to the jury by the Court. The jury heard the arguments of both sides and retired in charge of the proper officer to consider their verdict. Afterward, the jury was brought into open court by the proper officer, the defendant and his counsel being present, and returned the following verdict which was received by the Court and entered upon the minutes of the Court, to wit:

MAY 7, 2008

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, DAVID RENTERIA, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES".

Signed: ROXANNE CASTRICONE
PRESIDING JUROR

SPECIAL ISSUE NO. 2

Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER

We, the Jury, unanimously find that the answer to this Special Issue is "NO".

Signed: ROXANNE CASTRICONE
PRESIDING JUROR

DISTRICT COURTS EL PASO COUNTY, TEXAS

VERDICT

We, the Jury, return in open court the above answers to the Special Issues submitted to us, and the same is our verdict in this case.

Signed: ROXANNE CASTRICONE
PRESIDING JUROR

It is therefore considered and adjudged by the Court that the defendant, DAVID SANTIAGO RENTERIA, is guilty of the offense of Capital Murder as found by the jury.

Furthermore, a separate jury having answered that beyond a reasonable doubt there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and that there was not a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed, the Court, as required by law, shall sentence the defendant to the DEATH PENALTY.

Thereupon on MAY 14, 2008, the Defendant, DAVID SANTIAGO RENTERIA, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and the Defendant answered nothing in bar thereof, whereupon the Court proceeded, in the presence of said Defendant, DAVID SANTIAGO RENTERIA, to pronounce sentence against him as follows:

It is the ORDER of the Court that the Defendant is sentenced to DEATH; but the law further providing for an automatic appeal to the Court of Criminal Appeals of the State of Texas, no execution date shall be set until the decision of the Court of Criminal Appeals has been received by this Court.

The Defendant is now remanded to the custody of the Sheriff of El Paso County, Texas, to be transported to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further Orders of this Court.

Signed and entered on 5 / 28 / 2008

Lori C. Hughes
ATTORNEY FOR THE STATE

ATTORNEY FOR THE DEFENDANT

MARY ANNE BRAMBLETT
JUDGE 41ST DISTRICT COURT

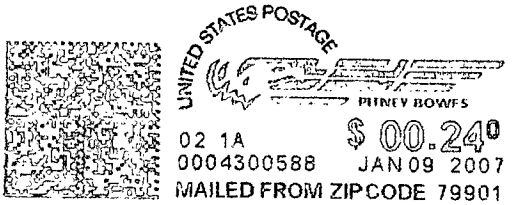
Right Thumbprint of David Santiago Renteria:

A TRUE COPY, I CERTIFY
NORMA FAVELA BARCELEAU
District Clerk
BY R Martinez Deputy
10/18/2023

DISTRICT COURTS EL PASO COUNTY, TEXAS

APPENDIX I

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



12/11/2006
AP-74,829
RENTERIA, DAVID SANTIAGO
COA No. Tr. Ct. No. 20020300230
El Paso County, 41st District Court

I have this day, 12/19/06, received the mandate of the Court of Criminal Appeals in the above numbered and styled case.

RETURN CARD IMMEDIATELY.

Carolyn Holmes
Signature

Louise Pearson, Clerk
Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711

787[illegible] ATTN: ABEL ACOSTA

TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

M A N D A T E

THE STATE OF TEXAS,

TO THE 41st JUDICIAL DISTRICT COURT OF EL PASO **COUNTY** —

GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on the 4th day of **OCTOBER**, A.D. 2006. the cause upon appeal to revise or reverse your Judgment between;

DAVID SANTIAGO RENTERIA

VS.

THE STATE OF TEXAS

CCRA NO. AP-74,829

TRIAL COURT NO. 20020D00230

was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the of the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was error, it is **ORDERED, ADJUDGED AND DECREED** by the Court that **the judgment of the trial court on guilt is AFFIRMED and the judgment of the trial court on punishment is REVERSED and the cause REMANDED to the trial court**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

State's motion for rehearing is DENIED November 22, 2006.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE SHARON KELLER, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS**, with the Seal thereof

Annexed, at the City of Austin,

this 11th day of **DECEMBER**, A.D. 2006.

LOUISE PEARSON, Clerk

COPY

_____, Chief Deputy Clerk

Abel Acosta

APPENDIX J

NO. AP-74,289

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AND

NO. 20020D00230-41-01

IN THE 41ST DISTRICT COURT EL PASO COUNTY, TEXAS

EX PARTE DAVID RENTERIA,

APPLICANT.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AS PROPOSED BY THE STATE

The Court, having considered the application for writ of habeas corpus filed by applicant, David Renteria (hereinafter Renteria), the State's answer and its attachments, the writ application and its attachments, and official court documents and records in cause number 20020D00230-41, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. Background

1. Renteria was indicted, convicted, and sentenced to death for the offense of capital murder in cause number 20020D00230 in the 41st District Court of El Paso County, Texas, on October 2, 2003.

2. Renteria's direct appeal was pending in the Texas Court of Criminal Appeals at the time of the entry of these findings.

B. *Brady* claim – failure to demonstrate a *Brady* violation

3. The Court finds that the statements in the affidavit provided by Alicia Garay are not truthful and she is not credible.

4. Neither the investigating law-enforcement agency, the El Paso Police Department, and its personnel, nor the prosecutor's office, the District Attorney's Office for the 34th Judicial District, nor their personnel, ever had any knowledge about Alicia Garay or the information or documentation referred to in her affidavit.

5. Even if the information provided by Garay had been disclosed, it is not reasonably probable that the outcome of the trial would have been different. First, Garay never identified the little girl that she states that she saw as being the victim, Alexandra Flores. Second, security tapes from the Wal-Mart recorded at the time of the abduction of the victim confirm that the victim had already left the store at the time that Garay states that she saw a little girl wearing a red dress in the store. Thus, the little girl that Garay states that she saw could not have been the victim. Finally, Garay never states that she saw the little girl that she claims to have seen in the Wal-Mart leave with anyone such that, in light of the evidence inculpating Renteria, Garay's information is not material.

C. Ineffective-assistance-of-counsel claim – failure to demonstrate prejudice due to denial of continuance

6. Renteria failed to allege – much less demonstrate – what particular kind of

prejudice could have been shown to establish that he was harmed by the denial of his motion for continuance.

7. The record affirmatively demonstrates that Renteria suffered no prejudice by the denial of his motion for continuance, and there was no reversible error that trial counsel could have preserved.

8. All areas that Renteria complained about in the motions for continuance were addressed and developed adequately at trial either by the prosecutor or the defense. Specifically, the record shows that Renteria was well able, at trial, to confront and cross-examine witnesses on the material released by the State that occasioned the motions for continuance: (1) he cross-examined the State's DNA expert on the FBI lab flubbing of test results in other cases (there was no evidence that the DNA results in this case were suspect); (2) he examined two detectives concerning Crime Stopper tips, including the case agent, and all were cleared; and (3) he examined the mother of the victim outside of the jury's presence concerning what she knew about her Azteca ex-husband Frausto, but for whatever reason, he decided not to renew his questions to her on that issue before the jury even though there was no ruling by the Court preventing him from doing so.

9. Renteria never suggested a time frame that he needed for his investigation and never showed what voir dire questions he was prevented from asking due to the claimed late release of the information by the State that occasioned his motions for continuance.

10. Renteria had two months to investigate the State's information that occasioned

the motions for continuance before the start of evidence in the trial and almost one month from the end of voir dire until evidence commenced to conduct his investigation.

D. Ineffective-assistance-of-counsel claim – failure to preserve error on constitutionality of death-penalty procedure's failure to assign burden of proof on mitigation issue

11. Trial counsel did not raise in the trial court the issue of the constitutionality of the Texas death-penalty procedure's failure to require a burden of proof on the mitigation issue.

E. Ineffective assistance of counsel at punishment – failure to consult mitigation expert

12. Renteria does not allege or demonstrate what evidence could have been presented at punishment on the mitigation issue.

13. Renteria does not allege or demonstrate how the failure to present any certain evidence on the mitigation issue prejudiced him.

14. Trial counsel ably presented evidence directly on the mitigation issue at punishment and detailed Renteria's entire life history before the jury.

15. Renteria does not allege or demonstrate how any failure to consult a mitigation expert actually led to a less-than-professional presentation of his mitigation evidence or how such failure prejudiced him.

F. Ineffective-assistance-of-counsel claim – failure to preserve error on

***Franks* claim**

16. All of the following alleged omissions are immaterial to the finding of probable cause necessary for the issuance of the search warrant for Renteria's van such that if trial counsel had raised them in the trial court, Renteria's *Franks* claim would still be meritless: (1) that the prior consensual search of the van by Martinez and Pantoja revealed no evidence of the crime; (2) that Renteria claimed that his van was not operable at the time of the consensual search; and (3) that there was no evidence that the victim had been sexually molested.

CONCLUSIONS OF LAW

17. ***Brady* claim – failure to demonstrate a *Brady* violation**: Because the statements in the Garay affidavit are not truthful and she is not credible, and because no member of the prosecution team, either police or prosecutor personnel, had knowledge of Garay or her information, and because the Garay evidence is not material, there was no *Brady* violation.

18. **Ineffective-assistance-of-counsel claim – failure to demonstrate prejudice due to denial of continuance**: Because in his writ application, Renteria only states conclusions without alleging – and demonstrating – any supporting facts concerning how he was specifically prejudiced by the denial of a continuance, and because the record shows that defense counsel was well able, at trial, to confront and cross-examine witnesses on the material released by the State that sparked the motions for continuance,

and because defense counsel had two months to investigate the State's information before the start of trial and almost one month from the end of voir dire until evidence commenced to conduct his investigation, no prejudice could possibly be demonstrated by denial of a continuance. Consequently, Renteria's ground for relief that he received ineffective assistance of counsel due to trial counsels' failure to preserve for appellate review the issue of the denial of his motion for continuance by not demonstrating prejudice is without merit and the relief requested under that ground for relief should be denied.

19. **Ineffective-assistance-of-counsel claim – failure to preserve error on constitutionality of death-penalty procedure's failure to assign burden of proof on mitigation issue**: Because the issue of the constitutionality of the capital murder special-issue procedure for failure to assign a burden of proof on the mitigation issue can be raised for the first time on appeal, and because the constitutionality of such procedure has been upheld, trial counsel were not ineffective for failure to raise such challenge in the trial court.

20. **Ineffective assistance of counsel at punishment – failure to consult mitigation expert**: Because trial counsel ably presented evidence on the mitigation issue, appeared to have painted a complete picture of Renteria's life, and because writ counsel does not suggest one item of evidence that was not presented, Renteria's claim that he received ineffective assistance of counsel at the punishment phase is without merit as

there was no suggestion or showing of either deficient performance or prejudice.

21. **Ineffective-assistance-of-counsel claim – failure to preserve *Franks* claim**: Because the allegedly false statements of omission were unnecessary to the finding of probable cause for the issuance of the search warrant for Renteria's van, his *Franks* claim, and *ipso facto*, his ineffective-assistance claim for failure to preserve *Franks* error, is without merit. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); *Cates v. State*, 120 S.W.3d 352, 355 (Tex.Crim.App. 2003). Moreover, because in Texas a *Franks* challenge cannot be made to alleged omissions of fact in a search-warrant affidavit, Renteria's claim that his trial lawyers were ineffective because they failed to preserve his *Franks* issue for appellate review, in that trial counsel did not allege in the motion to suppress material *omissions* from the search-warrant affidavit by the police-officer affiant, is without merit.

RECOMMENDATION

22. Based upon the foregoing findings of fact and conclusions of law, it is recommended to the Court of Criminal Appeals that Renteria's requested writ relief be DENIED. And by the following signature, the Court adopts the State's proposed findings of fact and conclusions of law in this cause number.

ORDER

23. The Clerk is hereby ordered to prepare a transcript of all papers in cause number 20020D00230 and transmit same to the Court of Criminal Appeals, as provided

by article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the applicant's pleadings, including his application for writ of habeas corpus and attachments thereto;

2. All of the State's pleadings, including the State's answer to the writ application and the attachments thereto;

3. This Court's findings of fact, conclusions of law, recommendation, and order to the court clerk;

4. Any other orders entered by this Court;

5. Any proposed findings of fact and conclusions of law submitted by either the applicant or the State; and

6. The indictment, judgment, sentence, docket sheet, and appellate record, unless they have been previously forwarded to the Court of Criminal Appeals.

The Clerk is further ordered to send a copy of the Court's findings of fact, conclusions of law, recommendation, and order to applicant's writ counsel: Louis Lopez, 300 E. Main St. #700, El Paso, Texas 79901; and to the attorney representing the State: John L. Davis, 203 El Paso County Courthouse, 500 E. San Antonio, El Paso, Texas 79901.

SIGNED this the 18 day of August, 2006.

Hon. Mary Anne Bramblett
Judge, 41st District Court
El Paso County, Texas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on August 2, 2006, a copy of the State's Proposed Findings of Fact, Conclusions of Law, Recommendation, and Order was faxed and mailed to applicant's attorney: Louis Lopez, 300 E. Main St. #700, El Paso, Texas 79901, FAX (915) 543-9804.

JOHN L. DAVIS

CLERK'S CERTIFICATE

THE STATE OF TEXAS

COUNTY OF EL PASO

I, GILBERT SANCHEZ, CLERK OF THE 41ST DISTRICT COURT OF EL PASO COUNTY, TEXAS, DO HEREBY CERTIFY THAT THE DOCUMENTS CONTAINED IN THIS RECORD TO WHICH THIS CERTIFICATION IS ATTACHED ARE ALL OF THE DOCUMENTS SPECIFIED BY TEXAS RULE OF APPELLATE PROCEDURE 34.5(a) AND ALL OTHER DOCUMENTS TIMELY REQUESTED BY A PARTY TO THIS PROCEEDING UNDER TEXAS RULE OF APPELLATE PROCEDURE 34.5(b).

GIVEN UNDER MY HAND SEAL OF SAID COURT, THIS 22ND DAY OF AUGUST, A.D., 2006.

GILBERT SANCHEZ, CLERK
DISTRICT COURTS
EL PASO COUNTY, TEXAS

BY Carolyn Holmes
Carolyn Holmes, Deputy

APPENDIX K

The State of Texas
vs.
DAVID SANTIAGO RENTERIA

Cause No. 20020D00230
In The 41ST District Court
of El Paso County, Texas

JUDGMENT ON JURY VERDICT OF GUILTY
DEATH PENALTY

Judge Presiding: MARY ANNE BRAMBLETT **Date of Judgment:** SEPTEMBER 23, 2003
Attorney for State: JAIME ESPARZA, LORI SWOPES & JOHN GIBSON
Attorney for Defendant: SCOTT SEGALL, ROBERT RILEY & DANIEL MARQUEZ
Offense: CAPITAL MURDER (TPC 19.03)
Degree: CAPITAL **Date of Offense:** NOVEMBER 18, 2001
Charging Instrument: Indictment **Plea:** NOT GUILTY
Jury Verdict: GUILTY **Foreperson:** STEVEN DARLING
Findings of Use of Deadly Weapon: AFFIRMATIVE, TO WIT: AN UNKNOWN OBJECT OR A HAND
Punishment Assessed By: JURY **Costs:** $223.00
Date Sentenced: OCTOBER 02, 2003 **Date to Commence:** OCTOBER 02, 2003
Punishment: DEATH PENALTY

On SEPTEMBER 08, 2003, this cause was called for trial, and the State appeared by her District Attorney, and the defendant DAVID SANTIAGO RENTERIA appeared in person in open court, his counsel also being present, and the said defendant having been duly arraigned, entered a plea of NOT GUILTY to the charge contained in the indictment herein, both parties announced ready for trial, and thereupon a jury having been selected and seated consisting of STEVEN DARLING and eleven others who were duly sworn. Thereupon the indictment was read and the defendant entered his plea of NOT GUILTY to the following charge contained in the indictment and read to the jury by the State: Capital Murder.

All of the evidence was presented by both the State and the Defendant, and the charge was read to the jury by the Court, and thereupon the jury heard the arguments of both sides and retired in charge of the proper officer to consider their verdict and afterward were brought into open court by the proper officer, the defendant and his counsel being present, and returned the following verdict which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

SEPTEMBER 17, 2003

VERDICT FORM A

We, the jury, find the Defendant, DAVID RENTERIA, guilty of the offense of Capital Murder as charged in the indictment.

Signed: STEVEN DARLING
PRESIDING JUROR

And on SEPTEMBER 23, 2003, this cause being again called, the State appeared by her District Attorney and the defendant DAVID SANTIAGO RENTERIA appeared in person, his counsel also being present, and the same jury being called to assess the punishment, evidence was presented to the same jury in the matter of assessing punishment. The same jury after hearing all the evidence presented by the State and the defendant for the purpose of assessing punishment, and after having heard argument of counsel, again retired in charge of the proper officer to consider the verdict, and afterward were again brought into court by the proper officer, the defendant and his counsel being present, and the jury returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

SEPTEMBER 23, 2003

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, DAVID RENTERIA, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this "Special Issue" is "YES".

Signed: STEVEN DARLING
PRESIDING JUROR

SPECIAL ISSUE NO. 2

Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER

We, the Jury, unanimously find that the answer to this Secial Issue is "NO".

Signed: STEVEN DARLING
PRESIDING JUROR

VERDICT

We, the Jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

Signed: STEVEN DARLING
PRESIDING JUROR

It is therefore CONSIDERED and ADJUDGED by the Court that the defendant, DAVID SANTIAGO RENTERIA, is guilty of the offense of Capital Murder as found by the jury, and the jury having further answered that beyond a reasonable doubt there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and that there was not sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death sentence be imposed, and the law providing that on such jury finding, the Court shall assess the **death** penalty to the defendant.
It is, therefore, the Order of the Court that the defendant be punished by having the **death** penalty assessed against him/her.
Thereupon on October 02, 2003 the Defendant, DAVID SANTIAGO RENTERIA, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and the Defendant answered nothing in bar thereof, whereupon the Court proceeded, in the presence of said Defendant, DAVID SANTIAGO RENTERIA, to pronounce sentence against him as follows:

It is the Order of the Court that the Defendant is sentenced to **death**; but the law further providing for an automatic appeal to the Court of Criminal Appeals of the State of Texas, the sentence is suspended until the decision of the Court of Criminal Appeals has been received by this Court.

The Defendant is now remanded to the custody of the Sheriff of El Paso County, Texas, to be transported to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further Orders of this Court.

Entered this the 28 day of Oct A.D., 2003.

MARY ANNE BRAMBLETT, Presiding Judge

STATE'S ATTORNEY, Approved as to From

DEFENSE ATTORNEY, Approved as to Form

Defendant's Right
Thumb Impression:

A TRUE COPY, I CERTIFY
NORMA FAVELA BARCELEAU
District Clerk
BY R Martinez Deputy
10/18/2023

DISTRICT COURTS EL PASO COUNTY, TEXAS

APPENDIX L

FILE NO.: 01-322241 20020D00230-243 INDICTMENT PID/CONTRLNO. 722687/01-12633

STATE OF TEXAS

VS.

DAVID RENTERIA

OFFENSE: *CAPITAL MURDER*

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

The Grand Jurors for the County of El Paso, State of Texas, duly organized as such, at the JULY Term, A.D., **2001** of the 168TH Judicial District Court for said County, upon their oaths in said Court, present that on or about the ***18th day of November, 2001*** and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, ***DAVID RENTERIA*, hereinafter referred to as Defendant,**

PARAGRAPH A
did then and there intentionally and knowingly cause the death of an individual, namely, **ALEXANDRA FLORES, by choking ALEXANDRA FLORES about the neck by unknown means,** and the said **ALEXANDRA FLORES** was then and there an individual younger than six years of age,

PARAGRAPH B
did then and there intentionally and knowingly cause the death of an individual, namely, **ALEXANDRA FLORES, by choking ALEXANDRA FLORES about the neck with the Defendant's hand**, and the said **ALEXANDRA FLORES** was then and there an individual younger than six years of age,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Grand Jury Foreperson

FILED THE JAN 23 2002 BY _____ DEPUTY

THE STATE OF TEXAS
COUNTY OF EL PASO

I certify that the foregoing is a true and correct copy of the original Indictment on file in my office. Given under my hand and seal of the court at my office in El Paso, Texas on the JAN 23 2002.

EDIE RUBALCABA, District Clerk, El Paso County, Texas

BAIL AMOUNT: $_____ by _____ Deputy

A TRUE COPY, I CERTIFY
NORMA FAVELA BARCELEAU
District Clerk
BY RMartinez Deputy
10/18/2023

DISTRICT COURTS EL PASO COUNTY, TEXAS

Witnesses

Dr. Juan Contin
Detective Arturo Ruiz
Detective A Fonseca
Alejandra Renteria
Cecilia Renteria
Santiago Renteria
Eva Renteria