PD-0245-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/6/2020 2:43 PM
Accepted 8/10/2020 12:17 PM
DEANA WILLIAMSON
CLERK

No. PD-0245-20

In the Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
8/10/2020
DEANA WILLIAMSON, CLERK

Jeremy David Spielbauer, APPELLANT

v.

The State of Texas, APPELLEE

On Petition for Discretionary Review from the
Seventh Court of Appeals, Sitting In Amarillo
Case No. 07-18-00028-CR

On Appeal from the 251st District Court of
Randall County, Texas

Brief of Appellant

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Statement of Facts

The State's rendition of the facts in its brief is "derived, strained, and filtered through the prism" of its tortured analysis of the court of appeals' opinion. State's Brief 3. While appellant does not question the accuracy of the state's rendition of the facts, he does assert that it is incomplete. Accordingly, appellant takes this opportunity to present his own recitation.

Prior to formal jury selection, the court submitted written Jury Questionnaires to the venire panel. R.R. 11: 17 (D Voir Dire X 1 & 2). Among other questions, the survey asked: "If you have heard about this case, based upon what you have heard, have you formed an opinion as to the guilt or innocence of Jeremy Spielbauer as would influence your verdict?" Before bringing the jury panel into the courtroom on January 16, 2018, trial counsel challenged for cause a number of jurors for their affirmative answers to that question. Counsel advised the court that "it is very clear that if a person answers that question in the affirmative, no further questioning is to be had and they are to be discharged. It is not a subjective question." R.R. 3: 6. Over counsel's objection, the trial court brought the six objectionable jurors into the courtroom individually to allow the parties to ask additional questions. R.R. 3: 9-23. One of the jurors was thereafter dismissed pursuant to an agreed challenge for cause—the others when the prosecutor lodged no objection to trial counsel's challenges for cause. R.R. 3: 11, 19, 21, & 22.

With respect to Prospective Jurors Freethy and Havlik, however, the court overruled trial counsel's challenges. R.R. 3: 18. When

questioning Freethy, the following exchange occurred:

Mr. Farren: Question number 2 said: “If you have heard about this case, based upon what you have heard, have you formed an opinion as to the guilt of innocence of Jeremy Spielbauer as would influence you in finding a verdict?”

You checked “Yes.” Did you intend to check “Yes”?

Prospective Juror Freethy: Well, you know, my wife watches all these murder mysteries. I don’t know what blends in with what. I don’t know.

Mr. Farren: Let me ask you this: Do you believe you would be able to sit in the trial, listen to all the evidence and make a decision based on –

Mr. Wilson: Judge, I am sorry. I think we have got to have an answer to that first question. Because if he hasn’t answered that and on his questionnaire he answered “Yes,” then that disqualifies him. So until he answers that question, there is no further questioning to be had.

The Court: Okay, go ahead and answer the question.

Mr. Farren: Did you intend to check “Yes,” and what did you mean –

Prospective Juror Freethy: Ask me the question again. I don’t remember.

Mr. Farren: Okay. “If you have heard about this case, based upon what you have heard, have you formed an opinion as to the

guilt or innocence of Jeremy Spielbauer as would influence you in finding a verdict?"

Did you intend to say "Yes, I have already made up my mind"?

Mr. Wilson: Judge, that is not what the statute says. He is adding things to the question to try to coach the jury to answer something different. And we would ask –

Mr. Farren: How is that different than "Yes"?

The Court: Okay, can you answer the question that has been asked?

Prospective Juror Freethy: Well, I would say "No" at this point.

The Court: Why at this point?

Prospective Juror Freethy: I don't know anything about the case.

The Court: Why did you answer "Yes" yesterday?

Prospective Juror Freethy: (Shrugs.) I couldn't give you an answer to that.

The Court: Have you formed an opinion regarding the guilt or innocence of –

Prospective Juror Freethy: I don't know anything about it.

The Court: --Mr. Spielbauer?

I am sorry?

Prospective Juror Freethy: I don't know anything about it.

The Court: Okay, that wasn't my question.

Whether or not you know anything about it, have you formed an opinion on whether or not Mr. Spielbauer is guilt or not guilty?

Prospective Juror Freethy: No.

The Court: Thank you.

Do you have any questions for him, Mr. Wilson?

Mr. Wilson: I will just ask you again, sir – You obviously – you read the question and answered it yesterday. I would ask you again why you answered it "Yes" and you are answering it "No" today?

Prospective Juror Freethy: I made a mistake.

Mr. Wilson: I pass the witness.

R.R. 3: 13-5. After Freethy left the courtroom, trial counsel made the following objection: "Judge, for the record, we are going to move to challenge him for cause based upon his answer on the questionnaire, because we believe that the questionnaire is part of *voir dire*; and the Code clearly says that when someone answers that question "Yes," you are not to ask them any more questions." The prosecutor responded, "He said he made a mistake. He stated he has no opinion one way or the other. He is a qualified juror." R.R. 3: 16.

Regarding Prospective Juror Havlik, the following exchange occurred:

The Court: Mr. Havlik, you indicated in your questionnaire that based upon what you have heard you have formed an opinion as to the

guilt or innocence of Jeremy Spielbauer that would influence you in finding a verdict. Is that true?

Prospective Juror Havlik: (No audible response.)

The Court: Have you already formed an opinion on whether or not Mr. Spielbauer is guilty or not guilty?

Prospective Juror Havlik: I read the question wrong. I don't have an opinion.

R.R. 3: 17. As with Freethy, trial counsel challenged Havlik for cause "based upon his answer to the questionnaire." R.R. 3: 18. The trial court then overruled both challenges. R.R. 3: 18.

At the conclusion of *voir dire*, trial counsel urged the judge to "reconsider [her] previous ruling and strike for cause Juror No. 4, Terry Freethy, based on the fact that he answered in the questionnaire that his knowledge of the case caused him to form a conclusion about the guilt or innocence of Mr. Spielbauer that would influence his verdict." R.R. 3: 258. The trial court, again, overruled the motion to reconsider. R.R. 3: 258. Trial counsel also made the same request with respect to Juror Havlik. R.R. 3: 268. That request was also denied. R.R. 3: 269. Trial counsel then asked the court "to grant us an additional two peremptory challenges" for the challenges for cause the court denied. R.R. 3: 259. Again, that request was denied. R.R. 3: 259.

Once the jury was seated, trial counsel advised the court that he was "forced to accept two jurors who [were] not acceptable to us because we did not have additional peremptory challenges. That would be Karla Stoffle and Valerie

Cooper." R.R. 3: 261. Then, shortly before the defense rested, trial counsel announced that "as a matter of housekeeping, [he] was going to offer the jury questionnaires from *voir dire* on the two jurors" he objected to, specifically, Jurors Freethy and Havlik. R.R. 9: 155-56. The trial court admitted the exhibits into evidence "for appellate purposes only." R.R. 9: 156.

Summary of Responses to Issue Presented

1. The state (the prevailing party in the trial court) raised new issues for the first time in a motion for rehearing, which the court of appeals was not obligated to address. And, since the court of appeals declined to address those issues, there is no "decision" with respect to them for the state to raise in a petition for discretionary review. Thus, this court should dismiss the state's petition as improvidently granted.
2. In the alternative, the court of appeals was correct in its conclusion that trial court abused its discretion in denying appellant's challenges for cause of Prospective Jurors Freethy and Havklik, both of whom were absolutely disqualified under article 35.16(a)(10) of the Code of Criminal Procedure.[1] Accordingly, this Court should affirm that judgment.

Argument—Preservation of Error

1. *Rochelle* as Binding Precedent

In *Rochelle v. State*, this Court held that when the State (the prevaili

[1] All references to article 35.16 are to the Texas Code of Criminal Procedure.

ng party in the trial on the facts of that case) raises an issue for the first time in a motion for rehearing, the court of appeals is not obligated to address the issue, and if it does not, there is no "decision" with respect to that issue for the state to raise in a petition for discretionary review. *Rhodes v. State*, 240 S.W.3d 882, 11 (Tex.Crim.App. 2007)(Price, J. *dissenting*)(*citing Rochelle v. State*, 791 S.W.2d 121, 124-5 (Tex.Crim.App. 1990)). In reaching this conclusion, the *Rochelle* court noted that "[t]he idea that a party may force a new issue on an appellate court after briefs have been filed is foreign to the rules" of appellate procedure. *Rochelle*, 791 S.W.2d at 124 (*referencing* the precursor to the current *Texas Rules of Appellate Procedure*).

In 2005, however, this Court held that a procedural default theory not presented to the appellate court by the state was, nevertheless, implicitly rejected by it, resulting in a "decision of the Court of Appeals" and warranting review. *Haley v. State*, 173 S.W.3d 510, 514 (Tex.Crim.App. 2005). Then, in 2007, this Court held that "under the circumstances presented" in *Volosen v. State*, the failure of the prevailing party in the trial court to make an argument in its reply brief in the court of appeals did not prevent the Court from entertaining that argument on the merits when raised for the first time in a petition for discretionary review. 227 S.W.3d 77, 80 (Tex.Crim.App. 2007).

The *Haley* and *Volosen* cases notwithstanding, *Rochelle* is still legally binding precedent. Indeed, when given the opportunity in a subsequent case to formally disavow the *Rochelle* holding, this Court seemingly acknowledged its continued precedential value under the right fact pattern. *See Rhodes,* 240

S.W.3d at 892 n. 9. The case at issue presents just that fact pattern. Indeed, the facts upon which the *Rochelle* court based its decision are identical to the ones at issue here. That is to say, *Rochelle* is directly on point and should be given its due deference.

2. Application of *Rochelle* to the Facts

In its Counterpoint No. 1 of its reply brief on direct appeal, the state argued the following: "The trial court did not abuse its discretion in denying appellant's challenges for cause of venirepersons Freethy and Havlik when each declared that neither had reached a conclusion regarding appellant's guilt or innocence when requested to explain their answers to a juror questionnaire regarding pre-determined opinions of guilt or innocence of the accused." The state then seemingly assented to the notion that a written questionnaire was a formal part of *voir dire*. Furthermore, it tacitly accepted that the questionnaire's recitation of the article 35.16(a)(10) inquiry was sufficient to authorize a legitimate consideration of a juror's disqualification. The State's only responses to the issue raised in appellant's brief were that: (1) appellant failed to preserve error to lodge his claim on appeal; and (2) in any event, despite the prospective jurors' affirmative answers to an article 35.16(a)(10) inquiry, the trial court did not abuse its discretion in permitting further questioning of those individuals to determine whether their opinions as to an accused's guilt or innocence would, indeed, influence their verdict. Simply put, the state made no other argument (either by its brief or during oral arguments) and was content to accept that the written questionnaire upon which appellant principally relied constituted a formal part of

voir dire and substantially complied with the article 35.16(a)(10) disqualification inquiry.

The court of appeals rejected both of the state's responses and held that the trial court abused its discretion in overruling appellant's challenges to two prospective jurors. In its motion for rehearing the state, while acknowledging that the court of appeals' opinion focused on the issues of preservation of error and harm, suggested, with citation to no authority, that the decision "necessarily rests upon a finding that the trial court abused its discretion by denying challenges for cause based solely on a written questionnaire that did not track the language of the statute and contained contradictory responses." State's Motion for Rehearing 8. Then, for the first time, the state asserted that reliance on an answer contained in a juror questionnaire can never form the basis of a valid challenge for cause under article 35.16(a)(10). State's Motion for Rehearing 14. Furthermore, and again for the first time, the state maintained that "even assuming that there is merit to the suggestion that current law prohibited the trial judge from asking questions outside the context of the written inquiry, the trial court in this case did not abuse its discretion in its examination of the two veniremembers because the art. 35.16 inquiry at issue here was incorrect." State's Motion for Rehearing 18. The court of appeals chose not to address the state's revised arguments; thus the motion for rehearing was overruled without written opinion.

The State then utilized the "findings" it attributed to the court of appeals' opinion to form the basis of its argument in the petition for discretionary review.

Specifically, the state now contends that, "[t]he Court of Appeals erred in holding that a written response in a juror questionnaire, standing alone, establishes a proper challenge for cause, even if based upon an erroneous statutory ground for cause."

If a party raises a new ground for the first time on motion for rehearing, the clear import of the rules of appellate procedure is that the decision of whether to consider that new matter be left to the sound discretion of the court of appeals. *Rochelle*, 791 S.W.2d at 124. Here, the arguments upon which the state now relies in its request that this Court reverse the first-tier appellate court's opinion were not presented in a "timely or orderly fashion" to that court. *Id*. And, since the court of appeals did not issue a written opinion on rehearing, or provide any other indication to the contrary, this Court should assume that the court of appeals declined, in its discretion, to consider the new matter. *Id*. at 124-25. It follows that the overruling of such a motion for rehearing, without written opinion, should not be considered a ruling on an issue necessary to final disposition of the appeal and, thus, should not be part of the decision of the court of appeals upon which this Court will base its review. *Id*. at 125. To hold otherwise would encourage piecemeal appellate litigation in the courts of appeals. *Id*.

Certainly, there may be circumstances that may compel an intermediate court to consider a new matter raised for the first time on a motion for rehearing; however, this is not such a scenario. *See Rochelle,* 791 S.W.2d at 125 (*holding* that where the statute upon which the state relied for relief for the first time in its motion for rehearing had been in existence for over a year prior to the filing of the

state's brief, the appellate court was not compelled to consider the new argument). Here, in his original brief, however, appellant discussed at length this Court's decisions in *Garza* and *Gonzales* regarding the use of written questionnaires during *voir dire*. *Garza v. State*, 7 S.W.3d 164 (Tex.Crim.App. 1999); *Gonzales v. State,* 3 S.W.3d 915 (Tex.Crim.App. 1999). During that discussion, appellant distinguished the facts of each of those cases from his own. Those cases were not given even a passing reference in the state's reply brief.

After the court of appeals handed down an opinion reversing the trial court, however, the *Garza* and *Gonzale*s opinions figured prominently in the state's revised position in its motion for rehearing that written questionnaires can never form the basis of a prospective juror's disqualification under article 35.16(a)(10). In addition, the state suggested for the first time that an unpublished 2006 opinion by this Court definitively resolved the article 36.16(a)(10) issue advanced by appellant in his original brief.

Clearly, the cases upon which the state relied in its motion for rehearing and now in its petition for discretionary review were decided years before the state cited them as authority to support its revised position. And the state, in its motion for rehearing, conceded it was mistaken in focusing in its reply brief "on that body of case law interpreting art. 35.16(a)(10) and its interplay with the *voir dire* phase of the trial." State's Motion for Rehearing 7. In an effort to remedy that oversight, the state advised the court that it intended to "seiz[e] the opportunity here and now to discuss the applicable law pertinent to the panel's holdings and apply that law to the uncontested facts." State's Motion for

Rehearing 8. That opportunity was available to the state when it filed its reply brief. Nevertheless, either by a conscious decision to advance a different argument or through negligence in failing to be cognizant of relevant case law, the state chose not to "seize" that opportunity at that time. This is precisely the situation the *Rochelle* court sought to prevent and one that would, if permitted by this Court, "encourage piecemeal appellate litigation in the courts of appeals" in contravention of the clear "object sought to be attained by the promulgation of the rules" of appellate procedure. *Rochelle*, 791 S.W.2d at 125.

The pertinent contention which the state requested to be addressed, that a written questionnaire that does not track the language of article 35.16(a)(10) could never form the basis of juror disqualification under that article, was not a matter determined by the court of appeals on original submission. *Id*. The state has, therefore, failed to preserve the alleged error for review. *Id.* As a result, this Court should dismiss the state's petition as improvidently granted. In the alternative, the Court should overrule the state's issue and affirm the judgment of the court of appeals.

Argument—The State's Revised Attack

Without waiving his argument that the state failed to preserve the error it now asks this Court to review, appellant now addresses what the state characterizes as the "counts, which individually or in concert, are fatal to [the court of appeals' opinion's] validity." State's Brief on Petition for Discretionary Review 19.

1. Written Questionnaire as "Mere Tool"

The state maintains that a written answer to a questionnaire cannot trigger an absolute disqualification under article 35.16(a)(10) because questionnaires are "merely tools to facilitate jury selection." In support of this argument, the state relies on the *Garza* and *Gonzales* cases, each of which was discussed at length by appellant in his brief on direct appeal. Appellant's analysis of those cases is no different in the context of the state's petition for discretionary review.

Appellant recognized on direct appeal and continues to acknowledge now that defense counsel has an obligation of diligence in eliciting pertinent information from prospective jurors during *voir dire* in an effort to *uncover potential prejudice or bias*. *Gonzales v. State*, 3 S.W.3d at 917 (*emphasis added*). And counsel's burden to use diligence is no less important in the case of written questionnaires. *Id*. Indeed, counsel cannot rely solely upon written questions to supply any information she deems material to the case. *Gonzales*, 3 S.W.3d at 917. And, counsel must ask follow-up questions, and not rely on broad ones to satisfy this obligation. *Id*.

Here, however, trial counsel, in posing the question at issue sought not to expose a bias or prejudice on the part of the jurors in favor of or against appellant under article 35.16(a)(9). Instead, his concern was whether the prospective jurors *had formed a conclusion as to appellant's guilt or innocence and whether that conclusion would influence their verdicts*. (*emphasis added*). That question, unlike those that might be used to expose bias and prejudice under article 35.16(a)(9), was not subject to misinterpretation. *Cf. Gonzales*, 3 S.W.3d at 917 (*holding* that trial counsel did not preserve error because he

failed to ask any oral questions in an effort to verify whether prospective jurors who had returned questionnaires had been involved in criminal cases as that question was meant to be understood). Neither did it require further explanation to ensure the jurors understood the law and still could not overcome their verdict before discharging them. *Comeaux v. State*, 445 S.W.3d 745, 748 (Tex.Crim.App. 2014).

The question in this case was clear and unequivocal and substantially tracked the language of the statute. Not only did the jurors indicate that they had formed an opinion as to appellant's guilt, but also, they acknowledged that that opinion would affect their decisions during deliberation. *Cf. Curry v. State*, 910 S.W.2d 490, 493 (Tex.Crim.App. 1995)(*quoting Harris v. State*, 784 S.W.2d 5 (Tex.Crim.App. 1989), *cert. denied*, 494 U.S. 1090 (1990))(*holding* trial counsel failed to preserve error by not adducing evidence from the veniremember that his conclusion on the defendant's guilt would indeed affect his decision). In short, the cases upon which the state relies for its updated argument in this regard are factually distinguishable from the case at bar. Indeed, neither *Garza* nor *Gonzales* involved a written questionnaire containing the distinct article 35.16(a)(10) absolute disqualification inquiry at issue here. As a result, the state's reliance on them is misplaced.

2. <u>"Fidelity to the Exact Language Drafted"</u>

Next, the state suggests that, even if the written questionnaire was considered a formal part of *voir dire*, "it failed to adhere strictly to the language of the statute." State's Brief on Petition for Discretionary Review 20. Specifically, the state faults the questionnaire in the following regards: (1) by utilizing "have

you heard about this case" in the article 35.16(a)(10) inquiry rather than asking whether the prospective jurors had formed a conclusion as to the guilt or innocence of the defendant "from hearsay or otherwise"; and (2) referring to a prospective juror's "opinion" of, as opposed to a "conclusion" about, appellant's guilt or innocence.

Regarding the first of its complaints, the state protests that such "linguistic deficiencies" are not "insignificant matters of semantics or an exercise in a hair-splitting, hyper-technical application of rules." State's Motion for Rehearing 18. And yet, the questionnaire went on to direct jurors who had "heard" something to detail the source of that information, whether it was through "radio, TV, newspaper, internet/social media, or word of mouth." Recalling that hearsay is an out-of-court statement offered into evidence by a party to prove the truth of the matter asserted in the statement, it is difficult to imagine any sources of hearsay other than those provided in the questionnaire. *Tex. R. Evid*. 801(d). Thus, to suggest there is a substantive distinction between the wording of the questionnaire in this regard *vis a vis* the statute is farcical.

In support of its proposition that there is a qualitative distinction between whether prospective jurors had an "opinion or belief" that the defendant was guilty and whether the juror had reached a "conclusion" as to the guilt or innocence of the defendant the state urged the court of appeals to consider as "controlling" authority an unpublished opinion by this Court. *Rodriguez v. State*, AP-74,399 (Tex.Crim.App. 2006)(*not designated for publication*). In response to the state's argument, appellant urges this Court to consider its published opinions in *Richardson v. State*, 744 S.W.2d 65 (Tex.Crim.App. 1989), *vacated*

on other grounds, 492 U.S. 914 (1989) and *Curry v.State*, 910 S.W.2d 490 (Tex.Crim.App. 1995).

In *Richardson*, the Court considered the appropriate predicate for a juror's excusal under article 35.16(a)(10). During *voir dire*, the prosecutor, potential juror, and the court engaged in the following colloquy:

> Juror: You used a couple of words there, bias and impartial that I think you might want to pursue.
>
> Prosecutor: Well, are you biased in some manner about the case?
>
> Juror: Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know – I don't disregard what I see in the paper.
>
> The Court: Have you already formed an *opinion* as to the guilt or innocence?
>
> Juror: Yes, Your Honor, I think it's only fair to say that I have formed an opinion.

Richardson, 744 S.W.2d at 68 (*emphasis* added).

The court then excused the juror *sua sponte*, and the defense attorney lodged the following objection, "[i]f the Court please, the [d]efendant objects to [the juror] being excused, the entire predicate not having been laid for his excuse." *Id*. The court responded, "[t[he statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning." *Id*. Counsel

then asked, "[d]oes it say one more sentence?" *Id.* That question went unanswered.

On appeal, the state argued that the objection was not sufficiently specific to preserve appellant's complaint on appeal that an article 35.16(a)(10) challenge for cause requires more than that the juror express that he has established a conclusion as to the defendant's guilt or innocence. *Id*. Rejecting that argument, this Court noted that it was "readily apparent that appellant's counsel was attempting to alert the trial judge that [the juror] needed to be asked whether, in his opinion, the conclusion [reached by the challenged juror] would influence him in his action in finding the verdict."

Inherent in the Court's ruling that appellant had, in fact, preserved error is its acknowledgment that the trial court's question whether the juror had "already formed an opinion as to the guilt or innocence of the Defendant" was substantively no different than the article 35.16(a)(10) question whether the juror had reached a conclusion as to the guilt or innocence of the defendant. Where the trial court erred, this Court said, was in refusing to allow the defendant to conduct the second part of the article 35.16(a)(10) inquiry in the face of the juror's affirmative answer to the first—that is, whether, in the juror's opinion, that conclusion would influence him in his actions in finding a verdict. *Id*.

Here, jurors who answered on their written questionnaires that they had heard about the case were then asked whether if, based upon what they had heard, they had formed an opinion as to appellant's guilt or innocence. And that question was asked in conjunction with the inquiry whether the jurors' opinions would influence their verdicts. It follows that, under the holding in *Richardson*,

the written questionnaire here adequately laid the predicate for the excusal of the challenged jurors under article 35.16(a)(10). The predicate so laid, the jurors were "absolutely disqualified," and the trial court, thus, erred in permitting further questioning of those jurors.

Likewise, in *Curry* a prospective juror stated that "some picture of guilt" had already been created in his mind by the proceedings of the court. *Curry*, 910 S.W.2d at 493. This Court, however, characterized appellant's complaint on appeal as a challenge to the trial court's denial of his challenge for cause to a juror who had reached a "conclusion" as to his guilt. The Court began its analysis by acknowledging that under article 35.16(a)(10) the challenging party must show that the venire member has established in his mind a conclusion as to the guilt or innocence of the defendant, and that this conclusion will influence his verdict. *Id.* However, the Court then noted with approval its holding in *Richardson* "that it was error to excuse a venire member who had told the trial court that he had formed an *opinion* as to the guilt or innocence of the accused when the venire member had not been asked whether that *opinion* would influence his verdict." *Curry*, 910 S.W.2d at 493 (*emphasis added*). In the end, this Court concluded that there was no evidence adduced from the venire member "that his conclusion would have affected his verdict," and, as a result, appellant had failed to preserve error under article 35.16(a)(10).

In *Richardson* and *Curry*, this Court utilized the words "opinion" and "conclusion" interchangeably in its interpretation of the first part of the article 35.16(a)(10) predicate. Simply put, this Court presumed a juror's "opinion" was, in fact, her "conclusion." Thus, the State's reliance on an unpublished opinion for

the proposition that there is a qualitative difference for purposes of an article 35.16(a)(10) analysis between a prospective juror's opinion on guilt or innocence *vis a vis* a "firmly held conclusion" is in direct contrast to the Court's previously published opinions in *Richardson* and *Curry*. Under *Curry* and *Richardson*, then, the challenged jurors here were "absolutely disqualified," thus invoking the mandatory nature of article 35.16(a)(10) and prohibiting the trial court from allowing any further questioning.

3. Article 35.16(a)(10) is Different

Finally, the state complains the trial court's decision to question prospective jurors regarding what it describes as "contradictory answers" in the questionnaire, and its evaluation of the credibility of those jurors' responses, was not afforded the proper deference by the court of appeals. As noted in the state's reply brief on direct appeal, "[e]xtant case law on art. 35.16(a)(10) is limited." State's Brief 24. As a result, with the exception of the unpublished *Rodriguez* opinion, the state cannot provide, and appellant has failed to uncover, any case that directly addresses the unique facts of this case. *Cf. Newbury v. State*, 135 S.W.3d 22, 30 (Tex.Crim.App. 2004)(*suggesting* appellant failed to preserve error in his challenge for cause under article 35.16(a)(10) and noting that, in any event, there is no record evidence demonstrating that the prosecution was permitted to rehabilitate veniremembers); *Cade v. State*, No. AP-76,883 (Tex.Crim.App. January 27, 2016)(*not designated for publication*)(*holding* trial court did not abuse its discretion in denying appellant's non-article 35.16(a)(10) challenges for cause); *Feldman v. State*, 71 S.W.3d 738, 744 (Tex.Crim.App. 2002)(*finding* trial court did not abuse its discretion in denying appellant's

challenge for cause under article *35.16(c)(2)*)(*emphasis added*); *Gardner v. State*, 306 S.W.3d 274, 300 (Tex.Crim.App. 2010)(*finding* that the issue of whether a venireman is disqualified under article *35.19* is one of fact)(*emphasis added*); *Cardenas v. State*, 325 S.W.3d 179, 185-86 (Tex.Crim.App. 2010)(*holding* appellant preserved error regarding his challenges for cause against jurors who could not consider the minimum range of punishment); *Gonzales,* 3 S.W.3d at 917 (*finding* counsel should not rely on written questionnaires to supply answers to support challenges for cause under article *35.16(a)(9)*)(*emphasis added*) *Colburn v. State*, 966 S.W.2d 511, 517 (Tex.Crim.App. 1998)(*holding* that trial court is entitled to deference in its determination of the credibility of prospective jurors' answers to questions about their beliefs regarding the death penalty) .

While article 35.16 provides a rather exhaustive list of the reasons upon which parties may base their challenges for cause, (a)(10) is the only section that provides a mechanism for absolute disqualification of a juror. And, that provision provides quite a bit of detail about how that procedure should work. First, it must be established that from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict. *Tex. Code Crim. Proc*. art. 35.16(a)(10). In determining whether that a valid challenge for cause exists, the juror shall be asked whether, in the juror's opinion, her conclusion will influence her verdict. *Id*. If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court. *Id.*

Here, appellant maintains, as he has articulated above, that the written questionnaire adequately addressed the law thus obviating the need for any further instruction on the issue of article 35.16(a)(10). So, when the trial court permitted the prosecution to engage in follow-up questions in an effort to rehabilitate disqualified jurors, it abused its discretion.

In short, appellant submits that article 35.16(a)(10) is different. Because (a)(10) is the only section under 35.16 that provides a detailed, seemingly mandated, procedure for a challenge for cause, a trial court's role in evaluating the credibility of the prospective jurors is, necessarily, greatly restricted *vis a vis* the other sources for challenges for cause under that statute. Appellant recognizes that the legislature's intent in adding "without further interrogation by either party" to the article 36.16 (a)(10) inquiry was to save the court and counsel time by eliminating unproductive questioning of prospective jurors who had already reached decisions about an accused's guilt or innocence. *Newbury,* 135 S.W3d at 30. And, appellant acknowledges this Court's further assessment that the language was not meant to prohibit a party from accurately explaining the law to the veniremembers. *Id.* But the state's attempt to engraft upon an article 35.16(a)(10) inquiry the entire body of case law associated with the other bases for challenges for cause under the statute threatens to vitiate it.

There is a reason the article 35.16(a)(10) inquiry is treated differently than the other bases for challenges for cause detailed by the statute. That inquiry goes directly to the heart of a criminal defendant's Fifth Amendment right to the presumption of innocence. Here, because jurors Freethy and Havlik demonstrated through their answers in the written questionnaire that they had

formed a conclusion as to appellant's guilt or innocence and that that conclusion would influence their verdict, further interrogation was prohibited. The trial court, therefore abused its discretion in permitting further questioning. And the court of appeals was correct in so finding.

Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Honorable Court of Criminal Appeals dismiss the state's Petition for Discretionary Review as improvidently granted. *Tex. R. App. P*. 69.3. In the alternative, Appellant prays that the Court affirm the judgment of the Court of Appeals. *Tex. R. App. P.* 78.1(a).

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing Brief of Appellant has been served upon the parties in the following manners:

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