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we find no error in the court's instruction on malice. *Lamb v. Jernigan, supra,* 683 F.2d at 1340. *954

IX. EXCLUSION OF MITIGATING EVIDENCE

Hance's testimony in response to questions from his standby attorney was the only evidence presented in his behalf during the sentencing phase of the trial. At one point counsel stated: "You told us just yesterday that you didn't kill these girls." After Hance responded that he did not kill them, the prosecutor objected because, "that issue has been decided, it's over and behind us, it cannot be in mitigation from punishment at this time." Counsel explained to the judge that Hance's "thoughts around the subject are relevant." He expressed concern that the jury would "consider in aggravation the fact that he denied doing something they decided he did." He indicated that his questioning was to allow the jury "to consider his emotions for denying this crime in mitigation." The judge allowed the questioning to proceed. Hance was then asked if he believed that he had killed the girls, if he recalled having killed the girls, if he was speaking to the court sincerely during his trial and if he believed his testimony had been true. At this point the prosecutor objected and the court sustained the objection, directing counsel not to follow this line of questioning.

Petitioner claims that by sustaining the prosecutor's objection the court prevented the jury from considering relevant mitigating evidence, thereby violating the Eighth and Fourteenth Amendments as interpreted in *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 874-76, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).[13] We find it significant that petitioner has never proffered any evidence that he was precluded from presenting. There is nothing in the record to suggest that the line of questioning that was objected to would have continued. Apparently, petitioner was trying to show the jury his reasons for pleading innocent. The questions that he was allowed to answer were sufficient for this purpose. Petitioner has failed to make out a constitutional violation.

> In *Eddings* the Supreme Court stated that "the sentencer [may] 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." 102 S.Ct. at 874.

X. REMOVAL OF PROSPECTIVE JURORS WHO OPPOSED THE DEATH PENALTY

A state may exclude for cause, related to their opposition to the death penalty, only those veniremembers who "[make] unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Witherspoon v. Illinois,* 391 U.S. 510, 522-23 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968) (emphasis in original); *accord Adams v. Texas,* 448 U.S. 38, 44-45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980) ("[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); *Burns v. Estelle,* 592 F.2d 1297, 1300 (5th Cir. 1979) ("[O]nly the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on *Witherspoons* grounds."), *adhered to,* 626 F.2d 396 (5th Cir. 1980) (en banc). The Fifth Circuit has strictly adhered to *Witherspoon*'s mandate. In *Granviel v. Estelle,* 655 F.2d 673 (5th Cir. 1981), *cert. denied,* **455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870** (1982), this Court held that a veniremember's exclusion constituted a *Witherspoon* violation. When asked if he could ever vote to inflict the death penalty, the challenged veniremember had replied, "No, I don't *think* I could." He was then asked, "You don't *feel* like you would be *955 entitled to take another person's life in that fashion?" He nodded and said, "No, I could not." The *Granviel* Court held that these questions and answers fell far short of the automatic rejection of the death penalty required under *Witherspoon. Id.* at 677 (emphasis in original).

Petitioner argues that two members of the venire, Syble Melton and Mary Turpin, were improperly excluded for cause in violation of *Witherspoon.* We agree. Their responses regarding the death penalty were not automatic and unequivocal. On the contrary, they expressed uncertainty about their convictions and ambiguity about their feelings. Their answers did not indicate that their views about capital punishment would substantially impair the performance of their duties as jurors under oath. *See Adams v. Texas, supra,* 448 U.S. at 45, 100 S.Ct. at 2526.

Mrs. Melton's answers vacillated. In response to some questions she appeared firm about refusing to vote for the death penalty, but her responses to other questions indicated a lack of conviction.

> PROSECUTOR: No matter what the facts or circumstances of this case might be, you do not believe that you could follow the instructions of the Court to consider the death penalty and vote to impose it, is that right?
>
> MRS. MELTON: No, sir, as I said before, I feel there are times when the death penalty is warranted. I do not believe that I with my conscience could vote to impose the death penalty.
>
> PROSECUTOR: No matter what the facts or circumstances of the case might be?

MRS. MELTON: In some cases I might.

Before excusing her for cause, the judge asked a final question.

> THE COURT: Let me just ask her my question too, then, are you so conscientiously opposed to capital punishment that you would not vote for the death penalty under any circumstances?
>
> MRS. MELTON: As I said before, I believe there are circumstances where the death penalty is warranted. I do not believe that I could vote for it.

Mary Turpin was even less resolute in her feelings about the death penalty. Although her initial responses to the prosecutor's questions indicated that she would not vote for a sentence of death, upon further examination she changed her mind.

> COUNSEL: If you thought from the facts you heard in the whole case that that was the proper decision to make, that he should be electrocuted, could you vote that that was what you thought should be done?
>
> MS. TURPIN: Well, this is hard, I don't know. I'm just too confused. I don't

* * * * * *

> THE COURT: Well, what we want to find out is if he should be found guilty, after you've heard all the circumstances about this case, do you think that there is any way that you could vote to have him executed, that is, to find for the death penalty?

MS. TURPIN: Well, I guess I could.

* * * * * *

> THE COURT: Well, that's what we need to find out whether or not you could vote for death if the circumstances of the trial, after you've learned all about it, whether or not you could, not that you would, whether you could vote to impose the death penalty?
>
> MS. TURPIN: Well, I don't know. I just say that I don't think I could.
>
> THE COURT: You don't think you could? I believe the juror should be excused for cause. . . .

If veniremembers who express serious reservations about the death penalty are excluded from a jury, that jury cannot fairly represent a cross-section of the community. It is a jury "uncommonly willing to condemn a man to die." *Witherspoon, supra,* 391 U.S. at 521, 88 S.Ct. at 1776. Such a jury lacks the impartiality required by the Sixth and Fourteenth Amendments. *Id.* at 518, 88 S.Ct. at 1775. A sentence of death imposed by such a jury cannot stand. *Id.* at *956 522-23, 88 S.Ct. at 1777-78. We hold that the exclusion of Syble Melton and Mary Turpin was a constitutional violation requiring reversal of Hance's sentence.

The state argues that even if Ms. Turpin's exclusion was a *Witherspoon* violation it was harmless error because she was excluded only from a pool of possible alternate jurors, and would not have been considered for this jury or for an alternate position. The state's argument is precluded by *Davis v. Georgia,* 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976) (per curiam), which held that the improper exclusion of even one out of 83 veniremembers was grounds for reversal of a death sentence. The scope of this holding is clarified by Justice Rehnquist in dissent who refers to it as "a *per se* rule that precludes application of even the harmless-error test of *Chapman v. California,* 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (1967)." 429 U.S. at 123-24, 97 S.Ct. at 399-400; *accord Burns v. Estelle,* 592 F.2d 1297, 1299-1300 (5th Cir. 1979), *adhered to,* 626 F.2d 396 (1980) (en banc); *Moore v. Estelle,* 670 F.2d 56, 57 (5th Cir.), *cert. denied,* ___ **U.S.** ___ **102 S.Ct. 3495, 73 L.Ed.2d 1375** (1982). The state's argument that the *Witherspoon* violation was harmless because two peremptory challenges remained after the jury was selected also must fall under the holding of *Davis. Burns v. Estelle, supra,* 592 F.2d at 1299-1300; *Moore v. Estelle, supra,* 670 F.2d at 57; *Blanken ship v. State,* **280 S.E.2d 623, 623** (Ga. 1981).

Petitioner's argument that the trial court denied him due process by refusing to exclude veniremember Kathryn Hamilton for cause after she showed bias in favor of the death penalty, while excluding veniremembers Turpin and Melton for their opposition, lacks merit. We read *Adams v. Texas, supra,* 448 U.S. at 45, 100 S.Ct. at 2526, to suggest that if veniremembers cannot be excluded because of their views against the death penalty unless those views would substantially impair the performance of their duties, the same standard should apply to a veniremember in favor of the death penalty.[14] A person who favors the death penalty can be entrusted to make the choice between death and life imprisonment unless that person's bias for capital punishment is unequivocal and absolute. *See Witherspoon, supra,* 391 U.S. at 519, 522 n. 21, 88 S.Ct. at 1775, 1777 n. 21. In this case, Ms. Hamilton indicated that she would follow the court's instructions even though she favored imposing the death penalty. Because her decision would not be automatic, the trial court's decision not to exclude her for cause was not a denial of due process.

> Dictum in *Stroud v. United States,* 251 U.S. 15, 20-21, 40 S.Ct. 50, 52, 64 L.Ed. 103 (1919), *reh'g denied,* 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920), indicated "it may well be" that a challenge for cause to a veniremember who was "in favor of nothing less than capital punishment" should have been sustained. Petitioner relies on *Stroud* for the proposition that a juror should be excused for cause if that juror is reasonably certain to render a verdict of death. But *Stroud* was not a habeas case, and the Supreme Court did not indicate that the trial court's refusal to excuse for cause was an error of constitutional magnitude.

XI. THE JURY CHARGE ON VENUE

Petitioner claims that the trial court's failure to specifically charge the jury on the issue of venue was constitutional error. He argues that venue is an essential element of a criminal offense, *Parks v. State,* 212 Ga. 433, 93 S.E.2d 663 (1956), so under *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), it must be properly charged and proved beyond a reasonable doubt. Although under Georgia law venue is part of the state's case and must be proved beyond a reasonable doubt, *Dickerson v. State,* **186 Ga. 557, 199 S.E. 142** (1938), the State of Georgia treats venue as a jurisdictional fact, *id.,* not as an element of the offense of murder; therefore, *In re Winship* does not apply. *See Engel v. Isaac,* 456 U.S. 107, 119-21, 102 S.Ct. 1558, 1567-68, 71 L.Ed.2d 783 (1982). The Constitution does not require that venue be proved beyond a reasonable doubt. *See United States v. Turner,* 586 F.2d 395, 397 (5th Cir. 1978), *cert. denied,* **440 U.S. 926, 99 S.Ct. 1258, 59 L.Ed.2d 480** (1979). *957

Under Georgia law, if the trial court charges the jury generally on the law of reasonable doubt and there is sufficient evidence of venue,[15] the court need not specifically charge the jury that proof of venue is a material allegation of the indictment. *Harwell v. State,* 230 Ga. 480, 197 S.E.2d 708, 709 (1973). In this case the state's prima facie showing on venue was uncontradicted by the petitioner who introduced no contrary evidence. The trial court instructed the jury that each material element of the indictment must be proved beyond a reasonable doubt. The court's failure to specifically instruct on venue was therefore not error under state law. There is no question that it was not error of constitutional magnitude. *See, e.g., United States v. Jenkins,* 510 F.2d 495, 498 (2d Cir. 1975) (court's only reference to venue was made in reading the indictment — not reversible error).

> Evidence as to venue, though slight, is sufficient where there is no conflicting evidence. *Ellard v. State,* 233 Ga. 640, 212 S.E.2d 816, 818 (1975).

XII. EVIDENTIARY HEARING IN THE DISTRICT COURT

The written factual findings of a state court are presumed to be correct unless one of the exceptions set out in 28 U.S.C.A. § 2254(d) is established. *Sumner v. Mata, supra,* 449 U.S. at 544-45, 101 S.Ct. at 767-68. This is true even if the factual findings are made by a state appellate court. *Id.* at 545-46, 101 S.Ct. at 768-69. When a state court has afforded the petitioner a full and fair evidentiary hearing on all legitimate factual issues, a district court is not required to conduct an evidentiary hearing. *Heyd v. Brown,* 406 F.2d 346, 347 (5th Cir.), *cert. denied,* **396 U.S. 818, 90 S.Ct. 53, 24 L.Ed.2d 69** (1969).

Hance submitted a 35-page petition to the district court, alleging numerous constitutional violations and claiming that he was denied a full evidentiary hearing on these matters. The district court denied his application without a hearing. After a study of the record, we conclude that the State of Georgia has afforded the petitioner a full and fair hearing on all the factual issues involved in this case. The district court's denial of an evidentiary hearing was therefore proper.

For the reasons stated in Parts VII and X of this opinion, petitioner's death sentence must be set aside. The case is remanded to the district court with directions that the State of Georgia determine within a reasonable time whether (1) to conduct a new sentencing proceeding, in the manner provided by state statute, or (2) to vacate petitioner's sentence and impose a sentence less than death in accordance with state law.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

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Comments

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