No. 17-6405

In the Supreme Court of the United States

CHRISTOPHER ANTHONY YOUNG, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner raised (at various times) three claims regarding his punishment-phase jury charge and sought to use juror affidavits to support these claims. First, petitioner argued that the jury charge violated his Eighth and Fourteenth Amendment rights under *Mills v. Maryland*, 486 U.S. 367 (1988), by omitting the instruction—required by State statute—that jurors need not agree on what particular evidence supports a finding that a circumstance mitigated against a death sentence. Second, petitioner argued that trial counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by not objecting to the charge. Third, petitioner argued in his state habeas application that the jury charge also violated *Mills* because Texas's sentencing scheme allegedly required the jury to keep deliberating even if one juror had decided against the death penalty; he argued in his federal habeas petition that the charge violated *Simmons v. South Carolina*, 512 U.S. 154 (1994), on the basis that it did not inform the jury that deadlock on a sentencing issue would result in a life sentence.

The federal district court denied petitioner's habeas petition. The court found petitioner's juror affidavits inadmissible under Federal Rule of Evidence 606(b). The district court also ruled that petitioner's *Simmons* claim was procedurally barred and meritless, and that the state-court rulings rejecting his *Mills* and *Strickland* claims were not unreasonable applications of clearly established federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1). The Fifth Circuit denied petitioner's certificate-of-appealability (COA) application on the *Simmons* deadlock-instruction claim, and this Court denied certiorari. The Fifth Circuit granted a COA on petitioner's *Mills* nonunanimity-charge and *Strickland* ineffective-assistance claims and denied the claims on the merits. Petitioner has sought certiorari on these two questions:

1. Did the Fifth Circuit correctly determine that the trial court's jury charge did not violate *Mills* because jurors were never misled into believing that they were required to agree unanimously on mitigating circumstances to avoid imposing the death penalty, so petitioner could not establish juror confusion under any standard and the state courts' denials of his charge-error and related ineffective-assistance claims were not contrary to or unreasonable applications of clearly established federal law?

2. Does the Eighth Amendment require a rule that would allow a capital petitioner to rely on postconviction juror affidavits in support of constitutional claims of juror confusion regarding a punishment-phase jury charge, where the affidavits are barred by Rule 606(b), where they were not and could not have been part of the record before the state court that adjudicated petitioner's claims, and where those affidavits do not demonstrate that petitioner is entitled to relief on his constitutional claims?

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The petition does not warrant review of the Fifth Circuit's correct ruling that petitioner is not entitled to relief on his *Mills* nonunanimity-charge claim or his derivative *Strickland* ineffective-assistance claim. Nor does it warrant review of a correct ruling that petitioner cannot attack the validity of his sentence with juror affidavits.

STATEMENT

1. On November 21, 2004, petitioner sexually assaulted Daphane Edwards at gunpoint in view of her three young daughters. 17.RR.77-78, 80-81, 84-85.[1] Petitioner then stole Edwards's car. 12.RR.33-35; 17.RR.90-92. Petitioner drove down the block to a convenience

[1] "RR" refers to the court reporter's trial transcripts. "SX" refers to the State's trial exhibits. "CR" refers to the clerk's record of documents filed during petitioner's trial. "SHCR" refers to petitioner's state-habeas-proceeding clerk's record. References are preceded by volume number and followed by page or exhibit number, where applicable.

store, where he attempted to rob the owner and shot him to death when he resisted. 12.RR.49; 13.RR.52, 58; 19.RR SX8.

2. A Bexar County, Texas grand jury indicted petitioner for capital murder on February 15, 2005. CR.3. Voir dire began January 5, 2006. 2.RR.1; *see also* 4.RR.1; 5.RR.1; 6.RR.1; 7.RR.1; 8.RR.1; 9.RR.1; 10.RR.1 (individual voir dire).

The court and counsel engaged potential jurors extensively about how to consider mitigating evidence. The trial court told the panel that what each juror individually viewed as mitigating evidence could differ from person to person. 2.RR.16-17. The trial court explained that mitigation provided a "safety valve" if jurors found that the death penalty was not warranted. 5.RR.20, 128, 187; 6.RR.74, 145; 7.RR.9; 8.RR.36, 83, 169-70; 10.RR.42. At least ten of the twelve ultimately empaneled jurors were given examples of how mitigating evidence is considered individually. For example, Juror Luna was told he should decide individually whether the evidence presented a sufficient mitigating circumstance. 4.RR.25-27. Juror Lott was told, "[I]t's up to you, as a juror, to decide one way or another whether something is mitigating or not." 5.RR.22; *see also* 5.RR.128-31 (Juror Hairston); 5.RR.190 (Juror Thomas); 6.RR.75 (Juror Gonzalez); 6.RR.147 (Juror Pathaphone); 8.RR.37-38 (Juror Bazan); 10.RR.45 (Juror Avery); 9.RR.92 (Juror Rodriguez); 9.RR.172 (Juror Campbell-Davies).

Petitioner's trial began on January 30, 2006. 12.RR.1. On February 1, 2006, the jury found petitioner guilty of capital murder. CR.300; 14.RR.52-55.

3. The facts of the punishment phase of petitioner's trial are summarized in the opinions below, Pet. App. A, 11-17; Pet. App. B, 3-11, and the Texas Court of Criminal Appeals'

("CCA") direct-appeal opinion, *Young v. State*, 283 S.W.3d 854, 860-61 (Tex. Crim. App.) (per curiam), *cert. denied*, 558 U.S. 1093 (2009).

a. Petitioner's case in mitigation focused on his "tumultuous childhood." *Young*, 283 S.W.3d at 865. Petitioner's father was murdered when petitioner was eight. 17.RR.148-50, 163, 166-67; 18.RR.44-45. Shortly thereafter, it was discovered that petitioner's stepfather had raped and impregnated petitioner's older sister. 17.RR.170-71; 18.RR.48-49. Petitioner became angry and bitter after these events. 17.RR.169; 18.RR.46-47, 49-50. Petitioner also presented evidence that he drank fifteen to twenty beers and smoked marijuana the night before the murder, and smoked crack cocaine the morning of the murder. 18.RR.29-30. Petitioner had become involved with drugs to escape overwhelming feelings of anger and distrust. 18.RR.27-28. A forensic psychiatrist identified the murder of petitioner's father and the rape of petitioner's sister as events that shaped petitioner emotionally. 18.RR.25-26.

b. Following petitioner's capital-murder guilty verdict, Texas law required the trial court to submit two special issues to the jury. Special Issue One asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). In instructing the jury on Special Issue One, Texas law required the court to charge the jury that:

> (1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;
>
> (2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

> (3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

Id. § 2(d)(1)-(3).

Upon answering "yes" to Special Issue One, the jury was required to answer Special Issue Two: "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 imprisonment without parole rather than a death sentence." *Id.* § 2(e)(1). Texas law provided the following regarding the jury instruction on Special Issue Two:

> The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> (1) shall answer the issue "yes" or "no";
>
> (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;
>
> (3) need not agree on what particular evidence supports an affirmative finding on the issue; and
>
> (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Id. § 2(f)(1)-(4).

At the end of the penalty phase, petitioner's jury was instructed as follows:

> In deliberating upon the special issues, you shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.
>
> . . .

> The jury may not answer the first issue "Yes" unless there is unanimous agreement of the individual jurors upon that answer.
>
> The jury may not answer the first issue "No" unless ten or more jurors agree upon that answer; however, the ten jurors need not agree on what particular evidence supports a "No" answer to the issue.

CR.309-10; 18.RR.68-69.

The jury instructions therefore did not include the language provided by Article 37.071, § 2(f)(3) or (4).[2] Trial counsel did not object to this jury charge. 18.RR.67.

The jury began deliberating on February 7, 2006 and returned a verdict in less than four hours. 18.RR.116-17. The jury answered "yes" to Special Issue One, CR.320; 18.RR.117, and "no" to Special Issue Two, CR.321; 18.RR.117. The trial court accordingly sentenced petitioner to death. CR.324; 18.RR.118.

4. Petitioner appealed his conviction and sentence, arguing that the trial court's failure to give the Article 37.071, § 2(f)(3) instruction violated his Eighth and Fourteenth Amendment rights. Pet. App. B, 12 n.13.

The CCA affirmed. *See Young*, 283 S.W.3d 854. It rejected petitioner's claim regarding Article 37.071, § 2(f)(3). *Id.* at 878-79. Because trial counsel did not object to the charge, petitioner had to show egregious harm under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). *Young*, 283 S.W.3d at 878. The CCA rejected petitioner's charge-omission argument that *Mills*, 486 U.S. 367, established that the lack of the Article 37.071, § 2(f)(3) instruction led to egregious harm; the CCA reasoned that *Mills* "did not go so far as to say

[2] The jury was also not charged that it could not answer Special Issue Two "yes" unless at least ten jurors agreed per Article 37.071, § 2(f)(2). *See* CR.309-11. The verdict form, however, which the trial court read to the jury, did require unanimity for a "no," and at least ten jurors' votes to answer "yes." 18.RR.70.

it is a constitutional requirement that every jury deliberating punishment in a capital case should be explicitly instructed that the jurors need not agree on the particular mitigating circumstances," and petitioner's jury unanimously found that no circumstance mitigated against death. *Id.* at 879. Thus, petitioner "was not deprived of the constitutional guarantee of a unanimous verdict and did not suffer egregious harm. Nor was [petitioner] denied a fair trial." *Id.*

5. Petitioner filed his state habeas application on September 25, 2009. SHCR.1-104. Among other arguments, that application argued that trial counsel rendered *Strickland* ineffective assistance by failing to request the Article 37.071, § 2(f)(3) charge. SHCR.11-35. The application also asserted that the State deprived him of due process and a fair trial by failing to instruct the jury at the punishment phase of trial under Article 37.071, § 2(f)(3) in violation of *Mills*. SHCR.35-50. And the application alleged a deadlock-instruction claim that petitioner's jury was misled in violation of *Mills* and *McKoy v. North Carolina*, 494 U.S. 433 (1990), because it was not informed that a single holdout juror on a special issue would yield a life sentence under Article 37.071, § 2(g); in other words, the application argued that Texas's "twelve-ten rule" unconstitutionally led jurors to continue deliberating toward agreement even if one juror had decided against the death penalty. SHCR.100-01.

On November 28, 2012, the state habeas trial court entered findings of fact and conclusions of law recommending that petitioner's state habeas application be denied. SHCR.389-422. The court determined that trial counsel's failure to object to the charge omission did not prejudice petitioner under *Strickland*. SHCR.397-98. The court also concluded that petitioner's *Mills* Article 37.071, § 2(f)(3)–omission claim failed because "the verdict forms and

jury instructions in this case, along with the other record evidence, did not create a substantial probability that the jury believed it was precluded from finding a particular circumstance mitigating unless unanimously agreed upon." SHCR.407. The court found petitioner's *Mills*/*McKoy* deadlock-instruction claim meritless. SHCR.421.

On June 5, 2013, the CCA adopted the state habeas trial court's findings and conclusions, denied relief on petitioner's claims, and held that petitioner's *Mills*/*McKoy* deadlock-instruction claim was also procedurally defaulted because he did not raise it on direct appeal. *Ex parte Young*, WR-70,513-01, 2013 WL 2446428 (Tex. Crim. App. June 5, 2013) (per curiam) (unpublished).

6. Petitioner filed his original federal habeas petition on March 18, 2014, an amended petition on May 16, 2014, and a second amended petition on June 27, 2014. R.86, 242, 425, 749-50.[3] Petitioner raised a new deadlock-instruction claim, arguing that his jury was misled in violation of *Simmons* because the trial court did not inform the jury that petitioner would receive a life sentence if a holdout juror deadlocked the jury. R.452-56. Petitioner also argued that the trial court erred under *Mills* by failing to instruct that jurors need not unanimously agree on what evidence constituted a sufficient mitigating circumstance to return a favorable answer on Special Issue Two, R.456-59, and a related *Strickland* ineffective-assistance claim, R.497-98. To support these claims, petitioner offered affidavits from several jurors purportedly explaining that they were confused by the jury charge. R.453-56, 458-59, 497-98; *see* R.501-12 (juror affidavits).

[3] The Fifth Circuit electronic record on appeal is cited as R.*p*.

The district court denied the habeas petition. Pet. App. B, 29-86. The court rejected petitioner's deadlock-instruction claim as procedurally defaulted—and as unexhausted and procedurally barred to the extent it rested on *Simmons*. *Id.* at 43-45. The court also found this claim meritless because no case required capital-sentencing juries be "informed of the impact of a single holdout juror on any of the Texas capital sentencing special issues." *Id.* at 48, 50.

The district court also rejected petitioner's claim based on the Article 37.071, § 2(f)(3)–charge omission. *Id.* at 55-59. The court found that the CCA's decision rejecting this claim did not violate clearly established federal law because (1) *Smith v. Spisak*, 558 U.S. 139 (2010), rejected a similar claim; (2) the as-given jury charge did not violate *Mills* because it did not require unanimity before evidence could be considered mitigating; and (3) the jury was never led to believe that any juror was precluded from giving mitigating effect to any evidence that was before the jury. Pet. App. B, 55-59. The court then held that the CCA reasonably rejected the related *Strickland* ineffective-assistance claim because the charge error did not prejudice petitioner. *Id.* at 79-82. And the district court rejected the juror affidavits per Federal Rule of Evidence 606(b)[4]—and under AEDPA and *Cullen v. Pinholster*, 563 U.S. 170 (2011), as to the *Mills* nonunanimity-charge and *Strickland* ineffective-assistance claims. Pet. App. B, 45-46, 79-80.

[4] Rule 606(b) provides that "[d]uring an inquiry into the validity of a verdict or indictment," a juror may not "testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1). "The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." *Id.*

7. Petitioner applied to the Fifth Circuit for a COA. *Young v. Davis*, 835 F.3d 520, 523 (5th Cir. 2016). The court denied a COA for the *Simmons* deadlock-instruction claim because it was procedurally defaulted and meritless, and it explained that Rule 606(b) forbids consideration of petitioner's juror affidavits. *Id.* at 527-29. Petitioner filed an interlocutory petition for a writ of certiorari on November 28, 2016 from the denial of a COA on those claims, which this Court denied on March 6, 2017. *Young v. Davis*, 137 S. Ct. 1224 (2017).

The Fifth Circuit granted a COA for petitioner's *Mills* nonunanimity-charge and *Strickland* ineffective-assistance claims. *Young*, 835 F.3d at 529-30. Those claims related to the questions presented in petitioner's November 2016 certiorari petition, because the Fifth Circuit held that the juror affidavits "are inadmissible to support [petitioner]'s other issues on appeal." *Id.* at 529 n.43. Those claims also related to the second question presented in the instant certiorari petition because petitioner "again sought to introduce juror affidavits to demonstrate that the jurors had been confused by the instructions given," but those affidavits were "inadmissible under Rule 606(b)." *Id.* at 530 n.52.

On June 20, 2017, the Fifth Circuit affirmed the district court's denial of habeas relief. Pet. App. A, 23. The court rejected petitioner's *Mills* claim and his attempt to demonstrate juror confusion through juror affidavits. *Id.* at 19-21. The court also rejected petitioner's related *Strickland* claim. *Id.* at 22-23.

ARGUMENT

I. CERTIORARI REVIEW SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED (*MILLS* CLAIM).

A. Review of the First Question Presented Is Unwarranted Because the *Mills* Issue Is Not Fairly Presented.

The *Mills* question is not fairly presented because the error in *Mills* was not present in petitioner's sentencing. The Constitution requires that jurors not be "*precluded from considering* 'any relevant mitigating evidence,'" *Mills*, 486 U.S. at 374-75, 384 (citation omitted). The charge and verdict form given to the jury in *Mills* affirmatively told the jurors that they could not find a particular circumstance to be mitigating unless all twelve jurors agreed that the mitigating circumstance existed. *Id.* at 379-80, 384. The Court held that the verdict form and instructions were invalid because "there is a substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384; *accord McKoy*, 494 U.S. at 444 & n.8.

In contrast, "the jury instructions here did not say 'anything about how—or even whether—the jury should make individual determinations that each particular mitigating circumstance existed.'" Pet. App. A, 17 (quoting *Spisak*, 558 U.S. at 148). The jury was not "'required to make its decision based only on those circumstances it unanimously finds.'" Pet. 7 n.4 (quoting *McKoy*, 494 U.S. at 439). This Court in *Spisak* confirmed that such a charge presents no *Mills* error and that the Constitution does not require a nonunanimity instruction. *Spisak*, 558 U.S. at 147-49. *Mills* error is not implicated where jury instructions said nothing about whether to find mitigators unanimously. *Id.* This case is thus a poor vehicle to examine the standard by which courts evaluate *Mills* error.

In addition, the Fifth Circuit has held that *Mills* is inapplicable to Texas's capital-sentencing scheme because "[o]ne juror cannot preclude the entire jury from considering a mitigating circumstance" in answering Texas's capital-sentencing special issues. *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir. 1994). Texas's twelve-ten rule means that if the jury is unable to answer a special issue, a life sentence results. *See* Tex. Code Crim. Proc. Art. 37.071, § 2(g). The rule "implicitly urge[s] jurors toward consensus" rather than deadlock. *Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011). But Texas's sentencing scheme does not "create[] the risk that (1) one or more jurors would change a vote to satisfy the majority, [or] that (2) a reasonable juror would believe that his individual vote was not meaningful unless some threshold number of jurors were in agreement on that particular special issue." *Id.* at 543. As the Fifth Circuit explained when it rejected petitioner's nonunanimity-instruction argument based on *Simmons*, this Court has "disavowed the notion that 'the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process.'" *Young*, 835 F.3d at 528 & n.37 (quoting *Jones v. United States*, 527 U.S. 373, 382 (1999)). Thus, petitioner's suggestion that courts struggle to analyze the effect of *Mills* error on juror confusion, based on circuit cases arising from jurisdictions with different sentencing schemes than Texas's, could not possibly warrant review. *See* Pet. 15-24.[5]

[5] This case is also a poor vehicle because, although petitioner's jury was not given the Article 37.071, § 2(f)(3) instruction, there were no holdout jurors: the jury "unanimously found that no sufficient mitigating circumstance or circumstances warranted that a life sentence be imposed." *Young*, 283 S.W.3d at 879. The CCA thus denied relief because the jury's answer to Special Issue Two left "no possibility" that the trial court's charge rendered the jury "confused about a need to agree on a particular circumstance or circumstances." *Id.*

B. The Fifth Circuit Correctly Denied Relief on Petitioner's *Mills* Charge-Error and *Strickland* Ineffective-Assistance Claims.

Review is also unnecessary because the Fifth Circuit correctly affirmed the denial of relief on petitioner's *Mills* and *Strickland* claims.

1. The court of appeals correctly rejected petitioner's *Mills* claim. As the court of appeals held (Pet. App. A, 17), the CCA's determination that the Article 37.071, § 2(f)(3)-instruction omission did not violate petitioner's constitutional rights, *Young*, 283 S.W.3d at 879, is neither contrary to nor an unreasonable application of clearly established federal law, *see* 28 U.S.C. § 2254(d)(1). Petitioner is thus not entitled to relief under AEDPA.

Although *Mills* holds that the Eighth and Fourteenth Amendments forbid jury charges that explicitly require unanimity to find evidence mitigating, petitioner identifies no decision from this Court affirmatively *requiring* a jury instruction that mitigators need not be found unanimously. *See Young*, 283 S.W.3d at 879. To the contrary, *Spisak* confirms such an instruction is not constitutionally required. *See* 558 U.S. at 148-49. Here, as in *Spisak*, "the punishment phase jury arguments, the general voir dire examination, and individual voir dire examination of the jurors who served on Petitioner's jury" reveal "no evidence suggesting any of the jurors were ever informed they could not consider any evidence as 'mitigating' unless the entire jury unanimously agreed upon the existence of that evidence." Pet. App. B, 57.

The record also shows that the charge omission was not responsible for the purported confusion petitioner identifies. "[T]he court's charge is not the sole source of relevant jury instruction," and "[n]othing in the court's other admonitions or the arguments of counsel created a reasonable likelihood that a juror would conclude that unanimity was required to

give effect to mitigating evidence." Pet. App. A, 15. For example, beginning with general voir dire, the trial court explained at length that in assessing mitigating evidence, "You're entitled to rule on it as you see fit. You can give it what weight you want yourself. But you're to consider it . . . and give it whatever weight you want." 2.RR.17. The empaneled venirepersons were told that the mitigation special issue acted as a "safety valve" if they believed the death penalty was unwarranted, and at least ten of the individuals who were ultimately empaneled were instructed to evaluate mitigating circumstances on an individual basis. *See supra* p.2.[6] In short, because the "record before" the court of appeals indicated neither a "reasonable likelihood" not a "'substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance,'" the court "*[a] fortiori* . . . c[ould]not conclude that the state courts unreasonably applied *Mills*." Pet. App. A, at 17 & n.70 (quoting *Mills*, 486 U.S. at 384).[7]

2. The court below also correctly affirmed the denial of relief on petitioner's related *Strickland* claim. *See* Pet. App. A, 22-23. Petitioner's *Strickland* ineffective-assistance claim is based on the same nonunanimity-charge omission as his *Mills* claim. There was not, however, a "substantial" likelihood that the jury would have reached a different conclusion

[6] In addition, petitioner's mitigation theories were hardly distinct. Petitioner linked his substance abuse to anger-management issues and tied those problems to childhood trauma. *See supra* p.3. So the chance that the jury instructions dissuaded the jury from rejecting the death penalty because a juror would have found petitioner's substance abuse mitigating but not his traumatic childhood, or vice versa, is highly unlikely.

[7] Thus, the charge also could not merit federal habeas relief because there was no "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *accord Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998).

if trial counsel had obtained the correct jury charge—required by State statute—affirmatively telling jurors that they did not have to unanimously agree on what mitigating evidence could affect their verdict. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). As the district court found, "the constitutional error in *Mills* was not present at [p]etitioner's trial." Pet. App. B, 81. The state habeas court concluded that the verdict form and jury charge indicated that the jury "understood the right to have each juror consider different mitigating evidence in reaching a unanimous verdict that there was no mitigating circumstance or combination of circumstances that called for a life sentence rather than one of death." SHCR.402. That decision was neither contrary to, nor an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).[8]

C. Review Is Also Inappropriate Because Petitioner Merely Challenges State-Law Error that Could Not Justify Federal Habeas Relief.

"'[F]ederal habeas corpus relief does not lie for errors of state law,'" so petitioner cannot prevail unless his "conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see* 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitioner argues that the trial court's jury charge omitted the statutorily required instruction that jurors need not agree about which evidence was mitigating, but Texas's instruction is a prophylactic measure that goes beyond what the Constitution requires: *Spisak* explained that the Constitution does not require the jury be instructed at all about unanimity

[8] The state habeas trial court explained that petitioner failed to show how trial counsel's "single act" of failing to object to the jury charge "amounts to deficient conduct." SHCR.397. The court held that even if trial counsel's performance had been deficient, petitioner's *Strickland* claim fails because he had not demonstrated prejudice. SHCR.397-98. The federal district court correctly rejected petitioner's *Strickland* claim on prejudice grounds without needing to resolve the state court's application of the deficiency prong. Pet. App. B, 80-82; *see Strickland*, 466 U.S. at 697.

in evaluating mitigating evidence. *See supra* pp.10-12. Petitioner concedes that Texas created its statutorily required capital-sentencing instruction to "'foreclose the potential for challenges' based on *Mills*." Pet. 6 n.2 (quoting *Rousseau v. State*, 855 S.W.2d 666, 687 n.26 (Tex. Crim. App. 1993) (en banc)). At most, the omission of that instruction is a state-law error, not a constitutional violation.

Even if petitioner had identified a federal-law basis for his claim, because trial counsel did not object to the charge, petitioner could receive no more than plain-error review. *See Jones*, 527 U.S. at 388–89; *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983) ("We greatly doubt that Congress . . . intended to authorize broader federal review of state court . . . determinations than are authorized in appeals within the federal system itself."). There is no plain error here. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 732, 734 (1993) (plain error requires "[d]eviation from a legal rule" that is "clear under current law," and that "affect[s] substantial rights"). The CCA reached this conclusion when it rejected petitioner's *Mills* nonunanimity-charge claim under *Almanza*, in which the CCA established that reversal for unopposed charge error is inappropriate unless the harm is so egregious that the defendant was effectively denied a fair trial. 686 S.W.2d at 171.[9]

[9] Such egregious-harm review is a merits adjudication for purposes of AEDPA's relitigation bar. *E.g.*, *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1210 (11th Cir. 2013); *see* Pet. App. A, 4 ("[A]ll claims before [the court] were adjudicated on the merits in the Texas courts[.]"). *Almanza* also functions as a contemporaneous-objection procedural rule that is an independent and adequate state ground to bar federal habeas review, *see, e.g.*, *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007); *see also Smith v. Texas*, 550 U.S. 297, 325 (2007) (Alito, J., dissenting) (stating that *Almanza* is an independent and adequate state ground). Even when state law provides limited review of unpreserved error, "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009). That bar can apply even if the state court renders a limited merits ruling, *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), as the CCA did here, *Young*, 283 S.W.3d at 879.

At a minimum, the lack of a contemporaneous objection makes the case a poor vehicle for review petitioner's *Mills* question. That problem is compounded because the omission of a prophylactic instruction required by State law is fact-bound and unlikely to recur.

D. Any Supposed "Uncertainty" in Applying *Mills*, *Boyde v. California*, or Their Progeny Is Irrelevant to this Case's Outcome and Is, in Any Event, Illusory.

1. In *Boyde v. California*, 494 U.S. 370 (1990), the Court held that "[t]he legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence," *id.* at 378, 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," *id.* at 380. The Court continues to use this same test. *E.g.*, *Kansas v. Carr*, 136 S. Ct. 633, 642-43 (2016).

Petitioner argues that there is uncertainty among the lower courts in "how to meet the threshold burden of 'substantial probability'" (under *Mills*) or "'reasonable likelihood'" (under *Boyde*), and that "courts have applied both, or neither," standard to claims of *Mills* charge error. Pet. 15. But any possible "uncertainty" makes no difference here. *Id.* at 4. The court below noted that *Mills* inquiries are governed by *Boyde*'s standard that "the proper inquiry . . . 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." Pet. App. A, 9 & n.58 (quoting *Boyde*, 494 U.S. at 380). The court also analyzed and rejected petitioner's claim under *both Mills* and *Boyde*. *Id.* at 17.

Moreover, this Court in *Spisak* provided the only guidance needed here to reject petitioner's claims. *See supra* pp.10-12, Petitioner is wrong that the "silent omission of the

Boyde standard from *Spisak*" has caused any confusion. Pet. 14-15. Rather, *Spisak* confirms that when a jury charge does not erroneously require unanimity to find a circumstance mitigating, courts need not analyze the likelihood of juror confusion on that basis.[10]

In all events, petitioner provides no basis to conclude that the difference between "substantial probability" and "reasonable likelihood" has any practical effect. For example, these concepts overlap for *Strickland* prejudice. *See Harrington*, 562 U.S. at 111-12 (requiring a "substantial" "likelihood of a different result" to show that "it is 'reasonably likely' the result would have been different" but for counsel's performance).

2. Furthermore, lower courts are not confused by the interaction of *Boyde* and *Mills*. Lower courts have had no difficulty evaluating *Mills* error, regardless of *Boyde*'s later "reasonable likelihood" phrasing for reviewing charge-error challenges generally.

a. Regarding the First Circuit, petitioner recognizes that *Boyde*'s "reasonable likelihood" standard would be applied to juror-confusion claims. *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007). *Sampson* explained in dicta that the *Mills* formulation was "obsolete" in light of *Boyde*. *Id.* at 32 n.8. Whatever purported difference could be said to exist between *Mills* and *Boyde*, however, did not arise in that case, since it did not involve a *Mills*

[10] Insofar as petitioner argues that a charge that is silent on whether mitigators should be found unanimously could still mislead jurors to believe that unanimity is required to preclude a death sentence under Texas's capital-sentencing scheme, that argument could not possibly justify federal habeas relief because Texas's twelve-ten rule and lack of an affirmative deadlock instruction have been consistently upheld and do not warrant review. *See, e.g.*, *Young*, 835 F.3d at 528 ("[T]he Supreme Court has never suggested that *Simmons* requires informing jurors of the consequences of a breakdown in deliberations."); Pet. App. B, 53 (noting that the Fifth Circuit has rejected the "argument that the Texas twelve-ten rule violates" a capital-murder defendant's Eighth and Fourteenth Amendment rights"). Such a claim would in any case be barred under AEDPA's relitigation bar or by *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion).

nonunanimity claim at all. *See id.* at 32. At most, this opinion reflects that the *Boyde*'s phrasing is more current than *Mills*'s, not tension between those standards.

b. Petitioner's Third Circuit cases apply *Boyde* as a clarification of *Mills*. *See Abu-Jamal v. Sec'y, Penn. Dep't of Corr.*, 643 F.3d 370, 375-76 & n.4 (3rd Cir. 2011) (noting *Mills*'s consistency with *Boyde* because "a 'substantial probability' is neither more nor less than a 'reasonable likelihood'"); *Hackett v. Price*, 381 F.3d 281, 300 (3rd Cir. 2004) (same); *Frey v. Fulcomer*, 132 F.3d 916, 921 (3rd Cir. 1997) (holding that, for *Mills* claims, "our standard is that of *Boyde*"). The Third Circuit cases indicate consistency, not confusion.

c. Petitioner claims that the Fourth Circuit "has never utilized *Boyde* as the applicable standard" in the *Mills* context. Pet. 17. But that assertion is wrong. The Fourth Circuit did so in *Atkins v. Moore*, 139 F.3d 887, at *7 (4th Cir. 1998) (unpublished), and *Middleton v. Evatt*, 77 F.3d 469, at *13-14 (4th Cir. 1996) (per curiam) (unpublished). The two earlier Fourth Circuit cases petitioner cites (*see* Pet. 17-18) also track *Boyde* without quoting it. *See Maynard v. Dixo*n, 943 F.2d 407, 419 (4th Cir. 1991) (characterizing the relevant inquiry as whether it "was reasonably likely that . . . the jury could be prevented by one holdout juror from considering mitigating factors."); *McDougall v. Dixon*, 921 F.2d 518, 531 (4th Cir. 1990) (comparing the facts in that case with *Boyde*'s facts and result).[11]

[11] Petitioner cites (Pet. 18) a third case, *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001), which is inapposite. The verdict form in that case asked the jury for each mitigator to either mark that they unanimously agreed as to the factor's existence or that some but not all jurors thought the mitigator existed, *Id.* at 586-87. The jury had marked that they unanimously found against the relevant mitigator. *Id.* at 587. The court thus concluded that the jury was not misled to believe it was required to find the mitigator unanimously, obviating the chance of juror confusion under any standard. *Id.*

d. The Fifth Circuit's cases evince no inconsistency. Petitioner's authority (Pet. 19) confirms *Mills*'s inapplicability to Texas's twelve-ten instruction because, unlike in *Mills*, "[u]nder the Texas system," one juror "cannot preclude the entire jury from considering a mitigating circumstance." *Jacobs*, 31 F.3d at 1329. There is no confusion whether *Boyde*'s "reasonable likelihood" standard applies to jury-instruction challenges. *See e.g., Sprouse v. Stephens*, 748 F.3d 609, 618 (5th Cir. 2014) ("*Boyde* sets the standard for reviewing a claim of jury-charge error[.]"). And the Fifth Circuit found petitioner's claim unavailing under either the "substantial probability" or "reasonable likelihood" test. *See* Pet. App. A, 17.

e. Petitioner is wrong that "the Sixth Circuit's *Mills* decisions epitomize the inconsistency plaguing the lower courts." Pet. 20. Contrary to petitioner's suggestion that the Sixth Circuit has departed from permissible standards when assessing *Mills* error (*id.*), the Sixth Circuit invoked the *Boyde* standard in the case he cites, *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). *Coe* merely cited a later case espousing the "reasonable likelihood" standard, *Estelle*, 502 U.S. at 72, instead of citing *Boyde* directly. *Coe*, 161 F.3d at 329.[12] As petitioner notes (Pet. 26), although *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), was vacated and remanded for reconsideration on other grounds, it found the *Boyde* standard applicable to *Mills* claims. *Id* at 709. The Sixth Circuit has repeatedly applied this standard. *E.g.*, *Davis*

[12] The court distinguished *Mills*'s holding that "the proper inquiry is whether a reasonable jury *might have interpreted* the instructions in a way that is constitutionally impermissible, *Coe*, 161 F.3d at 337 (citing *Mills*, 486 U.S. at 375-76), from Coe's case, where the instruction could not "reasonably be taken to require unanimity as to the presence of a mitigating factor," *id.* at 338.

v. Mitchell, 318 F.3d 682, 685 (6th Cir. 2003); *Abdur'Rahman v. Bell*, 226 F.3d 696, 711 (6th Cir. 2000).[13]

f. The Seventh Circuit has similarly confirmed that *Boyde* refined the jury-instruction-challenge standard, noting that "the proper inquiry" 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." *Williams v. Chrans*, 945 F.2d 926, 938 (7th Cir. 1991); *accord Benefiel v. Davis*, 357 F.3d 655, 663 (7th Cir. 2004). The Seventh Circuit did not (*see* Pet. 21) abandon *Boyde* in *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993).[14] *Gacy* involved one of a series of challenges to the same jury instruction by various defendants and noted a separate appeal that same year from the district court decision in *United States ex rel. Free v. Peters*, 806 F. Supp. 705 (N.D. Ill. 1992). *Gacy,* 994 F.2d at 308. When that case came before the Seventh Circuit later that year, the court applied *Boyde*. *Free v. Peters*, 12 F.3d 700, 703 (7th Cir. 1993). Nor did the Seventh Circuit abandon *Boyde* (Pet. 21) in *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001). Rather, the court found "no support for Mr. Hough's contention that the jury was instructed that 'it could only consider mitigating circumstances found to exist beyond a reasonable doubt,'" so there was no need to apply *Mills* or *Boyde*. *See id.* at 908.

[13] *Thompson v. Parker*, 867 F.3d 641 (6th Cir. 2017), did not apply a conflicting juror-confusion standard (*see* Pet. 20). There, the Sixth Circuit merely held that the challenged jury instructions were analogous to those at issue in *Spisak*, which this Court found did not to violate the Constitution, so the state court's application of *Mills* could not be faulted on that basis. *Thompson*, 867 F.3d at 648, 651-52.

[14] Petitioner's reliance (Pet. 21) on *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), is misplaced since *Kubat* predates *Boyde*.

g. The Eighth Circuit has consistently applied *Boyde* to allegations that jury-instruction error precluded jurors from conducting the appropriate consideration of the evidence. *United States v. Paul*, 217 F.3d 989, 1000 (8th Cir. 2000); *Gary v. Dormire*, 256 F.3d 753, 760 (8th Cir. 2001). Petitioner's assertion that the Eighth Circuit has not applied *Boyde* to a *Mills* claim (Pet. 21) is inaccurate. In *Battle v. Delo*, 19 F.3d 1547 (8th Cir. 1994), the Eighth Circuit found that when faced with a *Mills* or *McKoy* claim, "the federal court must consider 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence.'" *Id.* at 1561.

In both Eighth Circuit cases petitioner cites (Pet. 22), the court found no error like that present in *Mills*, and thus did not analyze what likelihood-of-confusion standard applied. Accordingly, neither case demonstrates that the Eighth Circuit has departed from *Boyde*. *See Dansby v. Hobbs*, 766 F.3d 809, 826 (8th Cir. 2014); *Griffin v. Delo*, 33 F.3d 895, 903 (8th Cir. 1994).

h. The Ninth Circuit in *Payton v. Woodford*, 346 F.3d 1204, 1211 (9th Cir. 2003) (en banc), *rev'd sub nom. Brown v. Payton*, 544 U.S. 133 (2005), confirmed that the "standard for reviewing jury instructions that allegedly are 'ambiguous and therefore subject to an erroneous interpretation'" 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.'" Although this Court reversed that decision on other grounds, it found that the court below correctly "identif[ied] *Boyde* as the starting point for its analysis." *Brown*, 544 U.S. at 141. Petitioner cites *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992)

(per curiam) for the supposed contrary proposition. Pet. 22. But that case is hardly instructive since the court did not even evaluate the likelihood of confusion under an erroneous jury charge. The *Mak* court merely reversed on other grounds and remanded the entire case, including consideration of the potential *Mills* error from the erroneous charge. 970 F.2d at 625.

i. The Tenth Circuit has also applied *Boyde* to *Mills* claims. *Castro v. Ward*, 138 F.3d 810, 823-24 (10th Cir. 1998). The Tenth Circuit has continued to apply *Boyde* to challenges, including those after *Spisak*, alleging that jury instructions hindered juries from properly considering mitigating factors. *See, e.g.*, *Hanson v. Sherrod*, 797 F.3d 810, 850 (10th Cir. 2015).

j. The Eleventh Circuit has cited *Boyde* as providing the general standard for challenging jury instructions on the basis that the instructions misled the jury. *See United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993). Petitioner cites *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992), as purportedly applying a different standard in *Mills* cases. Pet. 23. Not so. In *Cave*, the court found an argument based on *Mills* to be meritless because the trial judge had responded correctly to the jury's question about the effect of a split decision and had polled jurors individually about their votes. Thus, no "reasonable jury could have misinterpreted the judge's instruction," and the "trial court clearly set forth that if the jury found that by six or more votes the defendant should not be sentenced to death, its recommendation should be a sentence of life." *Cave*, 971 F.2d at 1523. The case did not require analyzing the likelihood of juror confusion given the instructions' clarity and correctness.

The other Eleventh Circuit case petitioner cites (Pet. 23), *Lucas v. Warden, Georgia Diagnostic & Classification Prison*, 771 F.3d 785 (11th Cir. 2014), did implicate *Mills*. But the court in *Lucas* differentiated the jury instructions at issue from those at issue in *Mills* and found that "[u]nlike in *Mills* and *McKoy*, there was no danger that a reasonable juror would have felt compelled to vote for death if she were moved by a mitigating factor not found by another juror." *Id.* at 807. Although *Lucas* did not quote *Boyde*, the result is the same. If there was "no danger" that a "reasonable juror" would find in a particular way, then there is necessarily no "reasonable likelihood" that a jury would find that way.

Similarly, in *Ward v. Hall*, 592 F.3d 1144 (11th Cir. 2010), the court rejected a *Mills* claim because "[t]he trial court's unanimity instruction only pertained to the jury's verdict. The jury was never instructed that it had to agree unanimously on the existence of a particular mitigating circumstance before it could be considered. Ward's construction of the trial court's instructions strains credulity and we cannot credit it." *Id.* at 1188. As in *Lucas*, the wording difference would not dictate a different result than if the court had quoted *Boyde*. An interpretation that "strains credulity" is not one that there is a "reasonable likelihood" a jury would adopt.

* * *

In sum, virtually every Circuit would apply at least *Boyde*'s reasonable-likelihood standard to a *Mills* claim. But courts also track this Court's approach in *Spisak*: where jury instructions do not contain the flaw present in *Mills*—an affirmative instruction that unanimity is required to find a circumstance mitigating—there is no constitutional violation and no requirement to assess whether there was either a "substantial probability" or a "rea-

sonable likelihood" of juror confusion from that charge. The Fifth Circuit reasoned similarly here. At most, petitioner shows some variation in how courts precisely phrase the standard for juror-confusion claims, but that variation does not yield inconsistent results or change the outcome—particularly when the claim here is squarely foreclosed by *Spisak*.

II. THE SECOND QUESTION PRESENTED (JUROR-AFFIDAVIT CLAIM) DOES NOT WARRANT REVIEW BECAUSE THE FIFTH CIRCUIT CORRECTLY REJECTED PETITIONER'S RELIANCE ON JUROR AFFIDAVITS, AND THOSE AFFIDAVITS WOULD NOT ENTITLE PETITIONER TO RELIEF.

Petitioner's evidentiary question does not warrant certiorari review. The Fifth Circuit correctly held that Rule 606(b) and *Pinholster* bar reliance on petitioner's juror affidavits, which he did not proffer in state court. There are also significant vehicle problems because petitioner's juror affidavits would not entitle him to habeas relief anyway. *See* Pet. App. A, 17, 23.

A. The Fifth Circuit Correctly Denied Petitioner's Reliance on Juror Affidavits.

1. As an initial matter, before it issued its merits decision, the Fifth Circuit denied petitioner a COA on the district court's ruling that Federal Rule of Evidence 606(b) bars petitioner's use of juror affidavits to support his constitutional claims. Petitioner has already sought certiorari review on that issue, which this Court denied. *See* 137 S. Ct. 1224.

Petitioner proffered the affidavits for the first time in federal district court. *See* Pet. App. A, 21. The Fifth Circuit correctly determined at the COA stage that Rule 606(b) bars petitioner's use of the juror affidavits. *See Young*, 835 F.3d at 528-29. Petitioner has abandoned any argument that Rule 606(b) does not apply on the theory that he does not offer the affidavits to challenge the validity of his death sentence. *Cf. id.* at 528 (describing petitioner's argument). The court of appeals correctly determined that "affidavits of this

genre—seeking to disclose jury deliberations—[are] inadmissible under Federal Rule of Evidence 606(b)." Pet. App. A, 19-20 & nn.76-77.

Petitioner argues that the "traditional rule of 'no-impeachment' of jury verdicts" must yield for *Mills* claims because it is an "arbitrary evidentiary hurdle[]" that "interfere[s] with [his] opportunity to demonstrate the presence and magnitude of" the risk of juror confusion. Pet. 25, 26. Petitioner likens that scenario to *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). Pet. 25. Petitioner notes that "this Court in *Pena-Rodriguez* . . . recently relaxed" the no-impeachment rule because "preventing racial animus from impacting the legal process was compelling enough to warrant an exception." *Id.* He argues that an exception like *Pena-Rodriguez*'s is necessary here because the "unique scourge of racial prejudice is no greater an injustice than an improvident death sentence." *Id.*

The court of appeals, however, rightly rejected this argument. *See* Pet. App. A, 20-21. It noted *Pena-Rodriguez*'s guidance that when a juror "'makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant,'" the Sixth Amendment "'requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.'" *Id.* at 21 & n.82 (quoting *Pena-Rodriguez*, 137 S. Ct. at 869). But the court below "decline[d] the invitation to extend further the reach of *Pena-Rodriguez*" beyond such evidence of racial prejudice. *Id.* at 21. Petitioner suggests that issues of race and capital punishment "overlap." Pet. 25 n.5 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2761-62 (2015) (Breyer, J., dissenting)). But the record here includes no evidence of racial prejudice in the deliberations of petitioner's sentencing jury—unlike *Pena-Rodriguez*. Petitioner does not indicate that the court of appeals misapplied this Court's precedent, or that other

courts of appeals have reached a different conclusion.[15] In any event, such a rule could not help petitioner overcome AEDPA's deferential standard of review of the CCA's rulings, since no clearly established federal law requires the no-impeachment-rule exception that petitioner seeks. *See* 28 U.S.C. § 2254(d)(1).

2. The court of appeals also correctly ruled that, alternatively, the affidavits that petitioner seeks to introduce are barred from consideration under AEDPA and *Pinholster*, 563 U.S. at 185-86. Pet. App. A, 21. The CCA denied petitioner's *Mills* and *Strickland* claims on the merits, but petitioner "never presented these affidavits to the Texas courts" to support his claims. *Id.* at 4, 21. *Pinholster*'s interpretation of 28 U.S.C. § 2254(d)(1) prohibits courts considering federal habeas petitions from reviewing evidence that was not before the state court that reviewed the merits of a petitioner's claim. 563 U.S. at 185-86. *Pinholster* thus bars consideration of petitioner's juror affidavits because petitioner did not proffer them to the state court that reviewed petitioner's *Mills* nonunanimity-charge and *Strickland* ineffective-assistance claims. Pet. App. A, 21; Pet. App. B, 55.

Petitioner is wrong that "*Pinholster* presents no barrier to the[] consideration" of his juror affidavits. Pet. 26 n.7. His theory is that "Under Tex[as] R[ule of] Evid[ence] 606(b), juror affidavits are inadmissible during an inquiry into the validity of the verdict and thus would not have been considered by the state court even if they had been presented." *Id.* at 26-27 n.7. He argues that *Pinholster* exists merely to "'channel prisoners' claims first to the

[15] Petitioner also overemphasizes the supposed absence of capital-habeas finality concerns, *see* Pet. 26, without resolving the concern that jurors' recollections of how they understood charge language and evaluated mitigating evidence may shift or fade over time. Juror affidavits submitted years after sentencing are hardly the "best evidence" of purported juror confusion. Pet. 4.

state courts,'" which he contends he did by submitting his *Mills* and *Strickland* claims to the CCA. *Id.* at 27 n.7 (quoting *Pinholster*, 563 U.S. at 182). But the true "import of *Pinholster* is clear: because [petitioner's] claims have already been adjudicated on the merits, § 2254 limits [federal] review to the record that was before the state court." *Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). By petitioner's admission, Texas evidentiary rules would have rendered the affidavits on which petitioner relies inadmissible to support his claims. But that did not excuse petitioner from proffering the evidence to ensure that "the record that was before the state court," *id.*, included the affidavits so that the CCA could consider in the first instance whether an exception to the evidentiary rule was required. *Pinholster* thus prohibits petitioner from relying on those affidavits to show that the CCA's rulings were contrary to or an unreasonable application of *Mills* or *Strickland*. *See Pinholster*, 563 U.S. at 185 & n.7.

Petitioner cannot evade *Pinholster*'s bar on new evidence by suggesting that the affidavits are merely cumulative of the record before the state court. *See infra* p.29. AEDPA and *Pinholster* flatly prohibit the introduction of any new evidence to attack a state-court adjudication. *See* 563 U.S. at 187 n.11. For the same reason, petitioner cannot argue that, because the record before the CCA when it adjudicated his *Mills* and *Strickland* claims on the merits lacked the affidavits, his claims were unadjudicated and should receive federal *de novo* review. "[A]llow[ing] a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first

instance effectively *de novo*" "would be contrary to [the] purpose" of AEDPA's exhaustion requirement. *Id.* at 182.[16]

Moreover, even if § 2254(d)(1) and *Pinholster* did not bar the affidavits, 28 U.S.C. § 2254(e)(2) would. Section 2254(e)(2) bars consideration of evidence outside the record of petitioner's state-court proceedings. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam) (holding § 2254(e)(2) applies even "when a prisoner seeks relief based on new evidence *without* an evidentiary hearing"); Resp. Br. 32-39, *Ayestas v. Davis*, No. 16-6795 (S. Ct. Aug. 1, 2017). Petitioner identifies no basis to overcome § 2254(e)(2). Nor could he. Neither petitioner's *Mills* nor *Strickland* claim rests on a new rule of constitutional law, so he cannot introduce new evidence in federal court on the basis that his claim relies "on a new rule of constitutional law, made retroactive to cases on collateral review" by this Court. 28 U.S.C. § 2254(e)(2)(A)(i). Nor does petitioner argue that he "failed to develop the factual basis" of his claim to include the affidavits because they "could not have been previously discovered" during state-court proceedings. *Id.* § 2254(e)(2)(A)(ii). The purported inadmissibility of the affidavits under Texas evidentiary rules did not prohibit petitioner from at least proffering them in state court. *See supra* p.27.[17] The affidavits would also be barred

[16] Petitioner does not argue his claims are "new" claims on the basis that the affidavits constitute "'*material* additional evidentiary support'" that was not presented to the CCA. *Lewis v. Quarterman*, 541 F.3d 280, 284 (5th Cir. 2008) (citation omitted). Even if he did, those "new" claims would be unexhausted. *See id.* The CCA would find petitioner's claim defaulted because his (hypothetical) successive state habeas application would be barred as an abuse of the writ; petitioner invoked no circumstances that would permit a successive habeas application. *See* Tex. Code. Crim. Proc. art. 11.071 § 5(a)(1)-(3). Thus, the claim would be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

[17] Moreover, antiretroactivity principles would preclude creating no-impeachment-rule exceptions. *See* C*aspari v. Bohlen*, 510 U.S. 383, 389-90 (1994); *Teague*, 489 U.S. at 299-316

because they are not "clear and convincing evidence" that "no reasonable factfinder would have found" petitioner "guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Review is also inappropriate because whether the Eighth Amendment requires an exception to *Pinholster*, Texas Rule of Evidence 606(b), or § 2254(e)(2) was not pressed or passed upon in the court of appeals. "[I]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quotation omitted). Petitioner argued below merely that federal Rule 606(b) did not apply to the scenario for which he sought to introduce the affidavits (Pet. C.A. Br. 15-16 n.4), and that *Pinholster* did not bar the district court from considering the affidavits "in conjunction with his claim," because the CCA's denial of relief on his juror-confusion claims "was unreasonable on the record before it" (Pet. COA Reply 7 n.7). Because petitioner never argued that the Eighth Amendment required an exception to the various other doctrines that preclude consideration of his juror affidavits, there was no reason for the court below to create one.

(plurality opinion). A new Texas- or Federal-Rule-606(b) exception could not apply retroactively to petitioner's sentencing since it does not satisfy one of *Teague*'s two narrow exceptions: it does not "narrow the scope of a criminal statute by interpreting its terms," or "place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citations omitted); *see also Teague*, 489 U.S. at 311 (plurality opinion). Nor is it a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993). To the contrary, the new rule petitioner seeks would upend "traditionally inviolate" no-impeachment rules, and is "antithetical to the privacy of jury deliberations." Pet. App. A, 21.

B. This Case Is a Poor Vehicle to Review the Juror-Affidavit Question Because the Affidavits Do Not Demonstrate that Petitioner Was Entitled to Habeas Relief.

This case is a poor vehicle to address the juror-affidavit question because the affidavits do not (*cf.* Pet. 4, 26) demonstrate that petitioner's sentencing was unreliable or that he is entitled to habeas relief. The trial court did not "'affirmatively misle[a]d'" jurors about their "'role in the sentencing process.'" *Jones*, 527 U.S. at 381-82 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)); *see supra* pp.12-13. The State "did not object or argue that the jury was precluded from independently considering" any mitigating circumstances, or suggest that all twelve jurors "had to agree that a particular circumstance was mitigating" to deliver a life sentence. SHCR.403. The jury sent no notes to the court during its four-hour deliberation. SHCR.403. Petitioner's affidavits do not establish that the charge omission was responsible for the purported confusion he identifies.[18]

In all events, petitioner seeks relief on meritless claims. And petitioner's affidavits could not help him overcome AEDPA's deferential standard of review of the CCA's rulings, since no clearly established federal law requires the no-impeachment-rule exception petitioner seeks. *See supra* pp.25-26.

[18] Petitioner is wrong that the affidavits demonstrate the jurors "interpret[ed] their instructions in a way that impermissibly precluded them from giving effect to mitigating evidence that would have led them to determine a sentence less than death." Pet. 26 n.6. Although two jurors explained they had believed unanimity was required to find a circumstance mitigating, "[e]ach affidavit contains precisely worded paragraphs that appear calculated to challenge various aspects of the penalty phases, such as the 10-12 instruction and the lack of an instruction regarding the outcome if jury deliberations broke down." Pet. App. A, 20 n.75. The affidavits thus reflect that the jurors may not have understood the effect of a hung jury or how to deadlock. But the trial court was not constitutionally obligated to supply that information. *See supra* pp.10-12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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