No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEMETRIUS DEWAYNE SMITH,
Petitioner,

v.

LORIE DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Capital Case

Questions Presented

1. When a death-sentenced inmate obtains punishment-phase relief from the district court during federal habeas proceedings conducted pursuant to 28 U.S.C. § 2254, and the State desires to appeal, does 28 U.S.C. § 2253(c)(1)(A) require the State to obtain a certificate of appealability in order for the court of appeals to have subject-matter jurisdiction?

2. Where all available record-based evidence categorically demonstrates a venireperson is not disqualified from serving as a juror in a capital case under this Court's line of cases commencing with *Witherspoon v. Illinois*, is a state court decision finding the venireperson to be *Witherspoon*-excludable solely on the basis of the trial court's "impression" of the juror objectively unreasonable within the meaning of 28 U.S.C. 2254(d)?

List of Parties and Corporate Disclosure Statement

All parties to the proceeding in the court of appeals are listed in the caption.

Petitioner is not a corporate entity.

List of All Directly Related
Proceedings in State and Federal Courts

State court proceedings:

State v. Smith,
No. 1021168 (183rd Dist. Ct., Harris County, Tex. June 27, 2006)

Smith v. State,
297 S.W.3d 260 (Tex. Crim. App. 2009)

Ex parte Smith,
No. WR-70,593-01, 2015 WL 831610 (Tex. Crim. App. Feb. 25, 2015)

Federal habeas proceedings:

Smith v. Davis,
No. 4:15-cv-00707 (S.D. Tex. Apr. 16, 2018)

Smith v. Davis,
927 F.3d 313 (5th Cir. 2019)

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Introduction

During federal habeas corpus proceedings, Petitioner Demetrius Smith obtained punishment-phase relief when the district court determined a potential juror at Smith's capital murder trial had been wrongfully excluded for cause. The State of Texas filed a notice of appeal, but did not seek or obtain a certificate of appealability from the district court. The State also did not seek or obtain a COA from the United States Court of Appeals for the Fifth Circuit.

In the Fifth Circuit, Petitioner defended the district court's judgment. Petitioner also cross-appealed and, in its briefing before the Fifth Circuit (but not during oral argument), defended the district court's judgment on other grounds, by

arguing the lower court had incorrectly deemed another juror who was stricken for cause to be *Witherspoon*-excludable. Finally, Petitioner argued in the Fifth Circuit that the court of appeals lacked subject-matter jurisdiction because the State had neither sought nor obtained a COA, and that, without the issuance of a COA, the court of appeals lacked jurisdiction.

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on Jun3 13, 2009, and is reported at Smith v. Davis, 927 F.3d 313 (5th Cir., June 13, 2019); a copy is attached as Exhibit A. The order denying Smith's petition for en banc rehearing was issued on August 2, 2019; a copy is attached as Exhibit B.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "…nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Statement of the Case

The guilt phase of Demetrius Smith's trial for capital murder in Harris County, Texas, commenced on June 20, 2006. ROA 4169.[1] The jury returned a verdict of guilty on June 22, and punishment phase proceedings began that same day. ROA 4639, 4685. Punishment phase deliberations started on June 26, and on June 27, the jury returned answers to the special issues, which resulted in Smith's being sentenced to death. ROA 2108, 5126. The only aspects of the trial relevant to this Petition concern jury selection.

A. State Court Proceedings.

While seated in the Harris County jury assembly room on Friday, May 5, 2006, seventy-five potential jurors completed juror questionnaires as the initial step of being considered to serve as jurors in Smith's capital murder trial. ROA.2214; ROA.2163-64. Smith's attorneys and the State's attorneys reviewed the questionnaires over the weekend. ROA.2211. Voir dire proceedings began on Monday, May 8. ROA 2210. Nothing in the record suggests the trial court at any point reviewed the questionnaires, either over the weekend prior to voir dire or thereafter.

On that Monday, May 8, the trial court instructed these potential jurors on the law for the first time. *See* ROA.2224-52. Importantly, therefore, when the

[1] Citations to the Record on Appeal in the court of appeals are cited in this Petition as ROA.[page number], pursuant to that court's rule.

potential jurors filled out their questionnaires the previous Friday, they had not yet been apprised of the requirements of State law.

Beginning with the fourth potential juror to be questioned individually, Juan Corral, the trial judge began asking each potential juror whether he or she had any "moral, religious, or conscientious objections" to the imposition of the death penalty "in an appropriate case." ROA.2336. The judge asked this question of each potential juror before the lawyers for the State or for Smith asked any questions. The judge continued this curious practice with all of the remaining veniremembers who were questioned individually in this first panel of prospective jurors.[2] ROA.2336; ROA.2342; ROA.2380; ROA.2413; ROA.2449; ROA.2466; ROA.2485; ROA.2514; ROA.2547; ROA.2577; ROA.2584; ROA.2656.

The potential juror relevant to this Petition was Matthew Stringer. Stringer was in the fourth panel of potential jurors, and lawyers began questioning members of that panel on May 18. ROA.3542. As was true of the previous panels, these potential jurors completed their questionnaires before entering the court (i.e., two weeks earlier, on Friday, May 5), and there is nothing to suggest the trial court reviewed their questionnaires. ROA.3543. In addition, as indicated, Mr. Stringer, like all other potential jurors, filled out his questionnaire before being instructed by the trial court as to the content of state law.

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[2] As became clear during the course of voir dire, the judge began and continued using this approach in an attempt to get any "'conscientious objectors out of the way, without wasting any time on them.'" See *Witherspoon v. Illinois*, 391 U.S. 510, 514 (1968) (quoting the trial court judge from Witherspoon's case).

As she had done with the previous panels, the trial court instructed the potential jurors on the law during general voir dire, before they returned for individual questioning. ROA.3543-84. During individual voir dire, the judge continued her practice of asking whether they had any "moral, religious, or conscientious objections" to the imposition of the death penalty "in an appropriate case" before they were questioned by the attorneys for the State or for Smith. ROA.3592; ROA.3596; ROA.3602; ROA.3612; ROA.3618; ROA.3653; ROA.3680; ROA.3685; ROA.3704; ROA.3724; ROA.3729; ROA.3769; ROA.3797; ROA.3802; ROA.3833; ROA.3889; ROA.3932; ROA.3973; ROA.3975; ROA.4048; ROA.4088.

Matthew Stringer was the thirteenth person in the fourth panel to be brought back for individual questioning. Stringer never expressed anything that could be reasonably interpreted as indicating he could not follow the law. The trial court conducted the entire voir dire of Stringer:

> Court: Hello, Mr. Stringer. How are you?
>
> Stringer: Fine
>
> Court: Mr. Stringer, I noticed you the other day. I noticed that you were paying attention to what I was saying. … Do you have any moral, religious, or conscientious objection to the imposition of death in an appropriate capital murder case?
>
> Stringer: Death bothers me a little bit. Makes me uncomfortable talking about it, but other than that.
>
> Court: … Obviously, there are people that feel all types of ways. But how do you feel? You're telling me that you feel uncomfortable with death. What does that mean?
>
> Stringer: Anything about it pretty much.

Court: … Do you have any objections—any moral, conscientious, or religious objections to the imposition of the death penalty in an appropriate capital murder case?

Stringer: Yes.

Court: Yes; which, morally, religiously, conscientiously, which objection do you have?

Stringer: Morally and conscientiously.

Court: Okay. Morally and conscientiously.

State: State challenges.

Court: Did you want to ask any questions, Mr. Gaiser?

Defense: I don't believe he's disqualified, Your Honor. I have no questions because I don't believe he's disqualified.

Court: All right. I'm going to grant the State's challenge.

ROA.3797-3800. Smith's trial counsel objected. ROA.3800. The court overruled the objection and dismissed Stringer for cause. *Id.*

Stringer was not the first potential juror who answered the judge's "do you have any objections" question in the affirmative. However, whereas either the court or the lawyers for the State asked other potential jurors who answered that question affirmatively about the extent to which their individual beliefs might impair their ability to follow the law or serve as jurors, neither the court nor the State questioned Stringer in this manner -- that is, nobody asked him whether his beliefs would impair his ability to serve.

Petitioner's brief on direct appeal was filed in the Texas Court of Criminal Appeals on January 31, 2008. ROA.552. Ten of its nineteen claims alleged the trial

court erred in improperly excusing potential jurors for cause. ROA.585-95. The twelfth claim was that the trial court erred in excusing Matthew Stringer for cause. ROA.594.

Perhaps realizing the record was not sufficient to affirm the trial court's decision to remove Stringer from the panel, contemporaneous to filing its brief on direct appeal, the State asked the trial court to unseal the questionnaires and juror cards of the ten veniremembers Smith claimed on direct appeal were improperly removed for cause. ROA.829. This request encompassed the questionnaire Mr. Stringer had filled out. The trial court granted the State's motion and ordered the clerk to unseal the juror cards and questionnaires. ROA.831.

The Texas Court of Criminal Appeals (CCA) affirmed Smith's conviction and sentence on May 6, 2009.[3] ROA.706. Regarding his claim alleging the trial court erred in dismissing Stringer for cause, the CCA relied on Stringer's questionnaire. Specifically, the court noted Stringer had indicated on his questionnaire that death makes him uncomfortable. ROA.696; *see also* ROA.8150. The CCA's opinion suggests that the trial court was aware of this answer contained in Stringer's questionnaire. *See* ROA.696 ("the trial court attempted to get some clarification on this statement"). There is nothing in the record, however, to support this suggestion. *See* ROA.3797-3800. To be sure, Stringer did provide a statement consistent with his questionnaire when, in response to the trial court's question

[3] The opinion is reported at 297 S.W.3d 260 (Tex. Crim. App. 2009), and a copy is attached to this Petition as Exhibit D.

regarding whether he had any "moral, religious, or conscientious" objections to the death penalty, he replied that death makes him uncomfortable. ROA.3798. But he gave no indication this discomfort would prevent him from being able to serve on the jury. *Id.* Nor did either the court or the State inquire as to whether his discomfort with death would substantially impair his ability to follow State law.

Smith's conviction became final on March 1, 2010, when this Court denied his petition for a writ of *certiorari*. *Smith v. Texas*, 559 U.S. 975 (2010).

B. Federal Habeas Proceedings.

Petitioner's initial federal habeas petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Texas on February 5, 2016. ROA.27. A little over two months later, on April 21, 2016, the district court appointed undersigned Counsel to represent Smith. ROA.124. Counsel filed Smith's First Amended Petition for a Writ of Habeas Corpus on October 25, 2016. ROA.142. The first claim raised in the petition was that Smith was denied an impartial jury, in violation of the Sixth and Fourteenth Amendments, because the trial court erred in removing Matthew Stringer. ROA.163-77. (Petitioner also claimed the removal of potential juror Patricia Cruz for cause was error, but does not press that claim in this Petition.)

On March 22, 2018, the district court entered its Memorandum and Order, granting in part Smith's petition, on the basis the removal of Stringer for cause was a violation of Petitioner's right to a fair and impartial jury, under this Court's line of cases commencing with *Witherspoon*. ROA.438. The district court noted Stringer

had never stated his personal reservations would interfere with his ability to serve as a juror and that he was never asked whether, irrespective of any personal feelings he might have, he would be able to follow the law. ROA.447. In addition, the district court considered the answers Stringer had written in his juror questionnaire before the law had been explained to him (even though nothing in the record suggests the trial court was aware of his answers). *See* ROA.447. The district court concluded that Smith was entitled to relief on his claim pertaining to Stringer because the court believed Stringer to be "the kind of juror the Court cautioned about in *Witherspoon*" – i.e., a juror who holds philosophical views about the death penalty, but whose views would not substantially impair his ability to follow State law. ROA.447. The district court held that the CCA's decision to the contrary "was an unreasonable application of *Witherspoon* and its progeny to the facts of this case." ROA.448.

The State filed its notice of appeal (attached as Appendix E) on April 20, 2018, ROA.490-91, and Petitioner filed a notice of cross-appeal (attached as Appendix F). The State did not seek a COA from either the district court or the court of appeals. Following the submission of briefing, the Fifth Circuit heard oral argument on February 7, 2019. At argument, Counsel for Petitioner, having considered the issue for the first time while preparing for his appearance before the court of appeals, argued the court of appeals lacked subject-matter jurisdiction because the State had not obtained a COA. The Fifth Circuit issued its opinion on June 13, 2019, concluding it possessed subject-matter jurisdiction, and reversing

the district court's determination that the state court decision upholding the removal of Stringer for cause was objectively unreasonable.

Reasons for Granting the Petition

Petitioner's principal argument is that the court below lacked subject-matter jurisdiction, because no COA issued from either the district court or the court of appeals, and this Court should grant the petition and hold a U.S. court of appeals lacks jurisdiction over an appeal from a district court in a proceeding under 28 U.S.C. § 2254 unless a COA issues, regardless of which party prevails in the district court.

However, if the court of appeals did have jurisdiction, Petitioner's additional argument is that the Court should grant the Petition to resolve an important issue concerning the adjudication of *Witherspoon* claims and hold a state court unreasonably applies federal law, within the meaning of 28 U.S.C. § 2254(d), when it permits a juror to be removed for cause based on nothing more than the trial court's intuition about that juror, rather than anything the juror said or believes.

1. Under the plain language of 28 U.S.C. § 2253(c), the court of appeals lacks jurisdiction over an appeal in connection with proceedings conducted under 28 U.S.C. § 2254 unless either the district court or the court of appeals issues a COA. This Court should grant *certiorari* to address an important question of first-impression regarding whether the State must obtain a COA when it wishes to appeal a grant of habeas relief and subsequently hold that because a COA did not issue in this case, the Fifth Circuit lacked subject matter jurisdiction.

For nearly a quarter-century, both this Court and the lower federal courts appear to have assumed the answer to a question of subject-matter jurisdiction this

Court has never explicitly addressed. Yet that commonly assumed answer lacks any statutory or other lawful basis.

28 U.S.C. § 2253, which regulates habeas corpus proceedings in federal courts, provides as follows:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(3). This statutory provision has received considerable attention from this Court. And crucially, the Court has expressly observed that the requirement enumerated in § 2253(c)(1) is jurisdictional -- meaning that, in the absence of the issuance of a COA, the federal court of appeals lacks jurisdiction over the appeal from the district court. See *Gonzalez v. Thaler*, 565 U.S. 134, 142-48 (2012); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); see also *Gonzalez,* 565 U.S. at 147-48 (noting that, in contrast to § 2253(c)(1), § 2253(c)(2) and (3) are *not* jurisdictional).

In addition, the Court has, on several occasions, addressed the criteria governing the issuance of a COA and elucidated the meaning of the statutory requirement that a COA not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). See, e.g., *Miller-El*, 537 U.S. at 327. If

a prisoner wishes to appeal a district court's denial of habeas relief, this Court has explained, the prisoner succeeds in establishing this "substantial showing" when the prisoner demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Where the district court has granted relief to the habeas applicant, it may well follow that § 2253(c)(2) has been satisfied; this inference, however, will not perforce dictate that a COA should issue, because in some cases, the district court may determine that the *State's* position is not even arguable, and under this Court's COA jurisprudence, the implausibility of the State's position could operate to preclude jurisdiction in the courts of appeals. Consequently, where jurists of reason would not disagree with the district court's conclusion that the habeas applicant *is* entitled to relief, the fact § 2253(c)(2) is satisfied does not entail a COA should issue to permit the State to appeal.

The question, therefore, is whether the plain language of § 2253(c)(1), which does not itself distinguish between a habeas petitioner and the government, can be ignored when the prisoner prevails in the § 2254 proceedings in the district court.

This Court and the lower courts have assumed, without either explaining or examining this assumption, that the requirement to obtain a COA in order to create subject-matter jurisdiction in the court of appeals does not apply to the government. This assumption, however, cannot be reconciled either with the plain meaning of

the statute or with the Rules Enabling Act, 28 U.S.C. § 2072. This Court has repeatedly held that it is "bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (internal quotations and citations omitted); see also *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399 (1988) (looking to the "plain language of the statute" to determine jurisdiction); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 237 (1986) (observing that in assessing existence of jurisdiction, "[a]bsent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling") (quoting Judge Davis's opinion from the court of appeals).

In this case involving Mr. Smith, because the issue was raised before it, the Fifth Circuit addressed the jurisdictional issue. That court expressly held, in opposition to the plain language of the statute, that AEDPA does not require the government to seek or obtain a COA when it elects to appeal a district court's decision granting habeas relief. That court offered three reasons in support of its conclusion regarding subject-matter jurisdiction. None is adequate to warrant a departure from the plain meaning of the statutory language.

First, the court of appeals misread this Court's decision in *Jennings v. Stephens*, 574 U.S. 271 (2015), as having answered the jurisdictional questions. In *Jennings*, a habeas petitioner who had raised three challenges to his death sentence obtained punishment phase relief from the district court on the basis of one of the three claims. The State (without seeking or obtaining a COA) appealed; Jennings

did not cross-appeal (and did not seek or receive a COA). In the Fifth Circuit, in defending the grant of habeas relief, Jennings asserted all the grounds raised in the district court, and did not limit himself to defending the ground on which relief had been granted.

The Fifth Circuit reversed the district court's grant of habeas relief, and it held Jennings could not defend the judgment below on the basis of the other claims raised in the district court because Jennings had not sought a COA with respect to those other issues. This Court granted the petition for writ of *certiorari* and reversed, ruling Jennings could defend the grant of relief without seeking a COA. The question presented here by Petitioner Smith was not raised, discussed, analyzed, or mentioned in *Jennings*. Nevertheless, the Fifth Circuit inferred that *Jennings* resolved the question presented here because, if this Court had believed the State was required to obtain a COA, it would have said so and dismissed for want of jurisdiction.

But the Fifth Circuit's conclusion is inapt. Although Jennings could have argued (as Smith argues in the present case) that Texas needed to obtain a COA, he failed to do so. Moreover, neither the Fifth Circuit nor this Court considered this jurisdictional question before proceeding to the merits. When a jurisdictional issue is not considered at all in a given case, that case cannot be viewed as having decided the issue. This Court has explicitly said exactly that. "[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Similarly, in *Steel Co. v. Citizens for*

Better Environment, this Court considered a previous case where jurisdiction "had been assumed by the parties, and was assumed without discussion by the Court." 523 U.S. 83, 91 (1998). The Court declared that "drive-by jurisdictional rulings of this sort…have no precedential effect." *Id.*

Jennings was not even a "drive-by jurisdictional ruling"; there was no jurisdictional ruling at all. *Jennings* does not resolve this case because there this Court did not even purport to address the issue raised by Smith in this Petition.

Second, the Fifth Circuit buttressed its misreading of *Jennings* by noting that if its reading were incorrect, that fact would mean this Court (and the lower federal courts) have been misapprehending a jurisdictional issue for many years. But there are several other prominent jurisdictional holdings from this Court that depart dramatically from the implicit assumption of prior cases. For example, this Court has noted how, under the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "the federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938). Justice Story's opinion for the Court in *Swift*, however, did not so much *decide* that there is federal common law as employ a mode of reasoning that *assumed* there was; and this assumption persisted for nearly one hundred years, until finally, in *Erie*, the Court identified the "fallacy underlying" *Swift*. See *Erie*, 304 U.S. at 823. *Swift* rested on the idea there existed some "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," and this fallacious idea persisted until the Court accepted the critique of that notion

articulated by Justice Holmes five years before. See *Black & White Taxicab v. Brown & Yellow Taxicab,* 276 U.S. 518, 532 (1928) (Holmes, J., dissenting). In short, the fact a mistaken idea lies at the core of a line of decisions for many years does not immunize that line of decisions from correction once the mistake is identified.[4]

Finally, in support of its conclusion, the Fifth Circuit offered a conclusory citation to Rule 22 of the Federal Rules of Appellate Procedure. See *Smith*, 299 F.3d at 320-21, nn. 34, 35 (citing FRAP 22(b)(3)). To be sure, the appellate rule identified by the court of appeals does purport to exempt the government from the COA requirement imposed by § 2253(c)(1). See FRAP 22(b)(3) ("A certificate of appealability is not required when a state or its representative or the United States

[4] A similar phenomenon of noticing and addressing an implicit jurisdictional assumption after many years is also evident in the corporate personal jurisdiction cases. Prior to this Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011); *Daimler, A.G. v. Bauman*, 134 S. Ct. 746, 754 (2014); and *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773, 1778 (2017), this Court and the lower federal courts assumed courts have general jurisdiction over corporations doing substantial business in the state. Although this Court does not appear to have embraced that assumption expressly, it certainly underlies the decisions in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980); and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985). Following *Goodyear* and *Daimler*, however, general jurisdiction over a corporation exists only in the state of incorporation and in the state which is the corporation's principal place of business. Moreover, following *Bristol-Myers*, and again contrary to prior assumption, even if a plaintiff is similarly situated to other consumers in a state where the plaintiff wishes to sue, the particular plaintiff cannot subject the corporate defendant to jurisdiction in a given state unless the plaintiff's claim is specifically connected to that state. See generally Andrew D. Bradt & D. Theodore Rave, Aggregation on Defendant's Terms: *Bristol-Myers Squibb* and the Federalization of Mass-Tort Litigation, 59 B.C. L. Rev. 1251 (2018).

or its representative appeals.") However, as Counsel maintained during oral argument, the rules of appellate procedure cannot confer jurisdiction where that jurisdiction is denied by statute. As the Rules Enabling Act provides, although this Court can prescribe rules of practice, those rules "shall not . . . enlarge any substantive right." See 28 U.S.C. § 2072(b).

Moreover, this Court has specifically held rules adopted pursuant to the Rules Enabling Act cannot extend or restrict jurisdiction conferred by statute. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (citing *Sibbach v. Wilson*, 312 U.S. 1 (1941)). And it is clear beyond any doubt that the COA requirement is jurisdictional. *Gonzalez*, 565 U.S. at 141-43. Consequently, insofar as FRAP 22(b)(3) extends the jurisdiction created by § 2253(c)(1) by exempting the government from the statute's plain language, FRAP 22(b)(3) impermissibly extends jurisdiction restricted by statute, and it is therefore ineffective.

*****

In sum, three propositions suggest that this Court should grant *certiorari*, address the important question of subject-matter jurisdiction presented here, and reverse the judgment below. First, in interpreting a statute, as Justice Gorsuch has recently noted, this Court "will not presume . . . that any result consistent with . . . the statute's overarching goal must be the law"; instead, the Court "will presume more modestly instead that [the] legislature says . . . what it means and means . . . what it says." *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (internal quotations and citation omitted).

Second, for nearly as long as federal courts have existed, the rule has been that "[c]hallenges to subject-matter jurisdiction can . . . be raised at any time prior to final judgment." *Grupo Dataflux v. Atlas Global Group,* 541 U.S. 567, 571 (2004) (citing *Capron v. Wan Noorden*, 6 U.S. (2 Cranch) 126 (1804)). The reason for this rule is that in the absence of subject-matter jurisdiction, there is no judicial power. Insuring that federal courts not rule in cases where they lack subject-matter jurisdiction is so important that a lack of subject-matter jurisdiction may be raised even by the very party who initiated the litigation in the federal forum. See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011) ("Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction.") (internal citation omitted). When federal courts adjudicate matters where they lack congressionally-conferred subject-matter jurisdiction, they overstep their constitutional bounds, and this Court has not hesitated to pull them back.

Third and finally, there is neither any legal basis nor any policy reason for permitting a flawed jurisdictional premise to continue to hold sway. If Congress wishes to permit states to appeal without a COA when a habeas petitioner obtains relief in federal district court, Congress can amend § 2253(c)(1). If it does not do so, or until it does, the government may appeal such decisions in favor of a habeas

petitioner so long as it obtains a COA from either the district court or the court of appeals, as the statute requires.

2. In order to insure that *Witherspoon*'s guarantee of a fair and impartial jury in capital proceedings not be eviscerated, this Court should grant *certiorari* and hold that where all available record-based evidence (including a venireperson's colloquy with the trial court and the venireperson's 17-page questionnaire) categorically demonstrates a venireperson is not disqualified from serving as a juror in a capital case, a state court's decision finding the venireperson to be *Witherspoon*-excludable solely on the basis of the trial court's "impression" of the juror must be deemed objectively unreasonable within the meaning of 28 U.S.C. § 2254(d).

Witherspoon holds that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). Potential jurors may be stricken for cause only if their "beliefs about capital punishment would lead them to ignore the law" and automatically answer the questions they are asked to decide during punishment deliberations in a way that would lead to a non-death sentence.[5] *Adams v. Texas*,

[5] Texas juries are required to answer two questions (called special issues) during punishment proceedings in a death-penalty trial. The first special issue is "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). The second special issue, which a jury answers only if it answers "yes" to the first special issue, is "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of

448 U.S. 38, 50 (1980). It is not enough to remove a juror that the potential juror has philosophical views about the death penalty; instead, the juror is *Witherspoon*-excludable only if those philosophical views would preclude the juror from following state law. See also *Darden v. Wainwright*, 767 F.2d 752, 759 (11th Cir. 1985) (Johnson, J., dissenting) ("if philosophical beliefs alone were treated as a substantial impairment of duty it would destroy the balance established in" *Witherspoon* and *Wainwright v. Witt*, 469 U.S 412 (1985)).

The party challenging the venireperson in question has the burden of establishing that the challenged panel member will be substantially impaired in his ability to follow the law. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Clark v. State*, 929 S.W.2d 5, 8 (Tex. Crim. App. 1996). Where the State seeks to remove a potential juror as excludable under *Witherspoon*, the trial court, before allowing such removal, must explain the law to that juror and explicitly ask "whether he can follow that law, regardless of his personal views." *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). Only if the juror answers that she is incapable of answering the special issues in a way that would lead to death in any case is it proper for her to be dismissed for cause. *Adams*, 448 U.S. at 50.

In Texas, jurors fill out questionnaires prior to being questioned during voir dire. As a result, they fill out those questionnaires before they receive instructions as to the content of state law. *Garza v. State*, 7 S.W.3d 164, 166 (Tex. Crim. App.

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life imprisonment … rather than a death sentence be imposed." *Id.* art. 37.071, § 2(e)(1).

1999); see also *Johnson v. State*, No. AP-77,030, 2015 WL 7354609, at *20 (Tex. Crim. App. Nov. 18, 2015) (unpublished) ("The requirements of the law are explained during voir dire and after the questionnaire or juror card is answered"); *Cade v. State*, No. AP-76,883, 2015 WL 832421, at *29 (Tex. Crim. App. Feb. 25, 2015) (unpublished) ("a veniremember cannot be sufficiently questioned regarding possible prejudice revealed in the questionnaire . . . without, at least, some minimum amount of interaction on the part of the veniremember during voir dire"). A potential juror's answers on the questionnaire will therefore not ordinarily demonstrate *Witherspoon*-excludability because the trial court has not yet explained the law to that juror, and because the juror has not been asked whether personal philosophical or moral views will interfere with following state law.

As Petitioner's summary of voir dire proceedings in this case reveals,[6] the trial court used the phrase "in an appropriate capital murder case" in its questioning of potential jurors. In denying Petitioner relief on his *Witherspoon* claim related to Matthew Stringer, the CCA seemed to impart talismanic qualities to this phrase. ROA.696. This phrase, however, does nothing to accomplish the inquiry required by *Witherspoon*, which makes expressly clear simply having objections to the death penalty does not make a juror excludable. *Witherspoon*, 391 U.S. at 522. The question that must be asked is whether the potential juror could *set aside her objections* in an appropriate case if she believed the evidence presented in court was sufficient to answer the special issues presented to the jury in a way

[6] See *supra* pp. 3-5.

that would lead to a death sentence. Stringer was not asked anything close to this. He was not asked whether his objections would have substantially impaired his ability to serve on a jury. See *Witt*, 469 U.S. at 424. Instead, the State issued its challenge and the trial court granted it, apparently on the basis of nothing more than its intuition, before Stringer had been asked even a single question about the effect his objections would have on his ability to serve. ROA.3799-3800. The court below then deemed this state court action to be entitled to AEDPA deference despite the absence in the record of anything demonstrating substantial impairment.

In reversing the district court's determination that the state court's exclusion of Stringer for cause was objectively unreasonable, the Fifth Circuit applied triple deference to the state court's decision, reasoning it was entitled to deference under § 2254(d)(1), (2), and § 2254(e)(1). See *Smith*, 927 F.3d at 324-25. This Court has not previously spoken to the specific effect of § 2254(d)(2)'s deference requirement on *Witherspoon*'s holding that a juror is not excludable for cause unless that juror is "substantially" impaired; in particular, the Court has not examined whether AEDPA's deference requirement essentially compels the federal court to defer to a trial court's intuition based on a juror's demeanor that the juror is in fact substantially impaired, even if the record does not itself reveal substantiality. And on this issue of whether § 2254(d)(2) somehow obviates the need for the record itself to demonstrate substantial impairment, the courts of appeals appear divided. Compare, e.g., *Martini v, Hendricks*, 348 F.3d 360, 367-68 (3d Cir. 2003) (deferring to state court's conclusion despite absence of record evidence showing substantial

impairment); and *Gentry v. Sinclair*, 785 F.3d 884, 912-13 (9th Cir. 2013) (deferring to trial court's assessment of potential juror's "attitude" to establish substantial impairment), with *Szuchon v Lehman*, 273 F.3d 299, 329-31 (3d Cir. 2001) (holding record itself must show substantial impairment); *Feldman v. Thaler*, 695 S.W.3d 372, 386-87 (5th Cir. 2012) (looking to printed record to ascertain substantial impairment); and *Knight v. Quarterman*, 186 F. App'x 518, 536 (5th Cir. 2006) (reviewing potential juror's testimony to determine substantial impairment).

This Court has, however, addressed the relationship between the requirement that a juror be substantially impaired and the general deference appellate courts show to trial courts' assessment of demeanor. Thus, the Court has stressed that the "need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." *Uttecht v. Brown*, 551 U.S. 1, 20 (2007). In *Brown*, this Court noted that demeanor is not irrelevant, but the touchstone of *Witherspoon*-excludability is credibility; the relevance of a juror's demeanor is that it aids the trial court in evaluating what the prospective juror actually says. See *Brown*, 551 U.S. at 7 ("Thus, *when there is ambiguity in the prospective juror's statements*, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.") (emphasis added; citations omitted; brackets in original).

In this case, there could have been no ambiguity in Stringer's statements concerning whether his beliefs would substantially impair his ability to serve as a juror because he was never asked the question. Nor is there any basis for inferring from Stringer's questionnaire, which was filled out before he was apprised of state law, that he would be substantially impaired in adhering to state law, and indeed, there is no evidence the trial court even read Stringer's questionnaire.[7] This case therefore presents this Court with an opportunity to clarify the relationship between AEDPA's deference requirement on the one hand and, on the other, a capital murder defendant's entitlement to a fair and impartial jury -- one where potential jurors are not excludable for cause solely because they hold philosophical views about the death penalty and where a trial court's action of removing such jurors in violation of *Witherspoon* is not immunized from federal habeas correction by § 2254(d) or (e).

[7] Even if it is appropriate to consider the answers given in the juror questionnaires, the state court's decision was nevertheless unreasonable, because Stringer's statement (i.e., "the talk of death in any way makes me uncomfortable," ROA.696) is entirely consistent with the testimony Stringer gave during voir dire and in no way relates to whether Stringer could follow the law and certainly does not mean he would always answer the special issues in a way that would result in a life sentence, regardless of the facts.

Conclusion and Prayer for Relief

In view of the foregoing, Petitioner requests this Court grant *certiorari* and schedule the case for briefing and oral argument.

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Respectfully submitted,

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