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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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No. 18-70015

DEMETRIUS DEWAYNE SMITH,

Petitioner–Appellee, Cross-Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent–Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before CLEMENT, OWEN, and HAYNES, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

Demetrius Dewayne Smith was convicted of capital murder in Texas state court and sentenced to death. The state court's judgment was affirmed on direct appeal, and Smith's state habeas petition was denied. In this federal habeas proceeding, the federal district court held that the Texas Court of Criminal Appeals' application of *Witherspoon v. Illinois*[1] and its progeny was unreasonable because, the district court concluded, the state trial court violated Smith's constitutional right to an impartial jury under the Eighth and

[1] 391 U.S. 510 (1968).

Fourteenth Amendments when it excluded a member of the venire for having moral, conscientious, or religious objections to the death penalty. Respondent Lorie Davis (to whom we will refer as the State) appeals. We reverse the district court's judgment to the extent that it conditionally grants habeas relief, and we otherwise affirm the district court's judgment.

I

Smith was convicted by a jury in June 2006 of a capital offense for the murders of Tammie White, who was the mother of three, and her eleven-year-old daughter, Kristina White.[2] The facts regarding these brutal killings are set forth briefly in the opinion of the Texas Court of Criminal Appeals (TCCA) on direct appeal,[3] and we will not recount them here.

Based upon the jury's answers to the special issues submitted in the punishment phase, the trial court sentenced Smith to death.[4] Appeal to the TCCA was automatic,[5] and Smith presented numerous points of error.[6] The TCCA affirmed Smith's conviction and sentence.[7] The United States Supreme Court denied certiorari.[8]

Smith then filed an application for a writ of habeas corpus in Texas state court.[9] He presented nine grounds for relief.[10] After conducting an evidentiary hearing, the state trial court adopted the State's proposed findings of fact.[11]

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[2] *Smith v. State*, 297 S.W.3d 260, 264-65 (Tex. Crim. App. 2009).
[3] *Id.* at 265.
[4] *Id.* at 264; ROA.7455-56.
[5] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h) (West Supp. 2018).
[6] *Smith*, 297 S.W.3d at 264.
[7] *Id.* at 278.
[8] *Smith v. Texas*, 559 U.S. 975 (2010).
[9] ROA.5507.
[10] ROA.5511-13.
[11] ROA.7482-83, 7455.

The TCCA adopted the trial court's findings of fact and all but one of its conclusions of law and denied relief.[12]

In his habeas petition in federal court, Smith set forth five claims for relief: (1) he was denied an impartial jury when the trial court dismissed potential jurors Patricia Cruz and Matthew Stringer on the basis that they had moral, conscientious, or religious objections to the death penalty,[13] (2) the State's use of disciplinary records from his previous incarcerations violated the Confrontation Clause of the Sixth Amendment,[14] (3) his trial counsel provided ineffective assistance by failing to investigate mitigating evidence,[15] (4) trial counsel was ineffective because he failed to bring evidence to the court's attention that would have raised a doubt as to Smith's competency to stand trial,[16] and (5) under evolving standards of decency, executing the severely mentally ill violates the Eighth Amendment.[17]

The federal district court conditionally granted relief based on Smith's first claim and ordered the State to release him unless it either convenes a new sentencing hearing or imposes a sentence other than death.[18] The court denied relief on all other grounds and did not issue a certificate of appealability (COA).[19]

The State appeals, arguing that the district court did not accord the deference due to the TCCA's decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) regarding the dismissal of jurors for cause. Smith counters that the district court's ruling regarding the removal of

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[12] ROA.5719.
[13] ROA.143, 163-77.
[14] ROA.143-44, 177-84.
[15] ROA.144, 184-209.
[16] ROA.145, 209-12.
[17] ROA.145, 212-53.
[18] ROA.461.
[19] ROA.461.

Matthew Stringer from the venire was correct. Alternatively, Smith urges us to affirm the district court's judgment on other grounds: (1) trial counsel provided ineffective assistance by failing to conduct a reasonable sentencing investigation, and (2) the Eighth and Fourteenth Amendments prohibit the execution of the severely mentally ill. Smith initially urged an additional ground for affirmance, which was that potential juror Patricia Cruz was improperly excluded, but he abandoned that claim at oral argument. We may affirm a district court's judgment on any ground supported by the record, even though Smith has not obtained a COA.[20]

II

At oral argument, Smith for the first time asserted that this court lacks subject matter jurisdiction. Smith contends that 28 U.S.C. § 2253 requires the party seeking relief to obtain a COA before this court has subject matter jurisdiction over an appeal. Under § 2253(c)(1), "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding" in which the prisoner is in state custody.[21] Federal Rule of Appellate Procedure 22(b)(3) provides that a COA is not required when a state or its representative appeals.[22] The Supreme Court held in *Gonzalez v. Thaler* that a COA is a jurisdictional prerequisite to our review.[23] Smith argues that Rule 22 impermissibly exempts the State from seeking a COA to obtain relief, contrary to the plain text of § 2253.

The Supreme Court indicated in *Jennings v. Stephens* that the State is not required to obtain a COA in order to pursue an appeal after a federal

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[20] *See Jennings v. Stephens*, 135 S. Ct. 793, 802 (2015).
[21] 28 U.S.C. § 2253(c)(1)(A).
[22] FED. R. APP. P. 22(b)(3).
[23] 565 U.S. 134, 142 (2012).

district court has granted habeas relief. The Supreme Court reasoned that "[s]ection 2253(c) . . . provides that 'an appeal may not be taken to the court of appeals' without a certificate of appealability, which itself requires 'a substantial showing of the denial of a constitutional right.'"[24] The Court then explained that "[s]ection 2253(c) performs an important gate-keeping function, but once a State has properly noticed an appeal of the grant of habeas relief, the court of appeals must hear the case, and 'there are no remaining gates to be guarded.'"[25]

In *Jennings*, a Texas inmate had obtained habeas relief in federal district court, and the State of Texas appealed to the Fifth Circuit.[26] The inmate asked this court to affirm on grounds that had been rejected by the federal district court, and we held that we lacked jurisdiction over the rejected theory because the inmate failed to cross-appeal and failed to obtain a COA.[27] The Supreme Court reversed and remanded for consideration of the alternate ground asserted as a basis for upholding the district court's judgment.[28] Therefore, the issue that the Supreme Court decided was whether a state prisoner "was permitted to pursue the theory that the District Court had rejected without taking a cross-appeal or obtaining a certificate of appealability."[29] Neither party challenged this court's jurisdiction to hear the state's appeal. However, like all courts, the Supreme Court must *sua sponte* consider its subject matter jurisdiction.[30] The Supreme Court's statement regarding the Fifth Circuit's

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[24] *Jennings*, 135 S. Ct. at 802 (quoting 28 U.S.C. § 2253(c)).
[25] *Id.* (quoting *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002)).
[26] *Id.* at 798.
[27] *Id.*
[28] *Id.* at 802.
[29] *Id.* at 796.
[30] *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

jurisdiction to hear the state's appeal cannot be considered *obiter dictum*. If the Fifth Circuit had not had jurisdiction over the state's appeal, then its judgment should and would have been vacated on that basis, the Supreme Court would not have remanded the case to the Fifth Circuit for further proceedings, and the Supreme Court would not have reached the question of whether the inmate could assert claims rejected by the federal district court as an alternative basis for affirming the district court's judgment granting habeas relief.

Even if the discussion in *Jennings* were *dicta*, Smith's argument not only implicitly asserts that the Supreme Court has failed to recognize a jurisdictional issue for more than twenty-three years, his argument is inconsistent with the text of § 2253 for the reasons that the Court explained in *Jennings*. Section 2253(c), read in its entirety and in context, reflects that the COA requirements are intended to apply only to appeals by state or federal prisoners and that they were not intended to apply to appeals by states or the United States in habeas proceedings. Section 2253(c) applies to state inmates as well as those confined in federal penal institutions,[31] and subsections 2253(c)(2) and (3) provide:

> (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).[32]

The United States government, acting in its capacity to enforce federal criminal laws, does not have "constitutional rights." It would be non-sensical to require a "substantial showing of the denial of a constitutional right" as a

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[31] *See* 28 U.S.C. § 2253(c)(1).
[32] *Id.* § 2253(c).

prerequisite to an appeal by the United States in a habeas proceeding. If Congress had intended to foreclose the right of the United States or the States to appeal in habeas proceedings, it would have done so in a forthright manner. "Congress, [the Supreme Court has] held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[33]

This circuit and our sister circuits are, as noted above, required to examine our jurisdiction *sua sponte*. No circuit court has held that it lacks jurisdiction in an appeal from a district court's grant of habeas relief if the state or federal government, as the case may be, failed to obtain a COA. Our court and others have applied Rule 22(b)(3) in habeas proceedings.[34] In the present case, a COA was not required for the State to appeal.[35]

III

When a state court has adjudicated a claim on the merits, AEDPA provides that federal courts cannot grant habeas relief unless the state court proceedings resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[36] The TCCA resolved the merits of each of Smith's claims presently before our court.

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[33] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[34] *See Malchi v. Thaler*, 211 F.3d 953, 956 (5th Cir. 2000) (citing FED. R. APP. P. 22(b)(3)) ("A certificate of appealability is not required because a representative of the state is appealing the district court's grant of habeas relief."); *see also Sutton v. Pfister*, 834 F.3d 816, 819-20 (7th Cir. 2016); *Jones v. Stephens*, 541 F. App'x 399, 404 (5th Cir. 2013) (per curiam); *Wilson v. Beard*, 589 F.3d 651, 657 (3d Cir. 2009); *Lurie v. Wittner*, 228 F.3d 113, 121 (2d Cir. 2000).

[35] *See* FED. R. APP. P. 22(b)(3).

[36] 28 U.S.C. § 2254(d).

"Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims.'"[37] With regard to Matthew Stringer's dismissal as a potential juror, "[t]his is a straightforward inquiry" because the TCCA on direct appeal was "the last state court to decide [this] federal claim" and it "explain[ed] its decision on the merits in a reasoned opinion."[38]

Smith's claims that his state court trial counsel was ineffective and that it would violate the Eighth Amendment to execute a person who is mentally ill were decided in the state habeas proceedings.[39] The TCCA expressly adopted all of the state habeas trial court's recommended findings and conclusions relevant to those issues.[40] Accordingly, we will consider the state habeas trial court's findings and conclusions to be those of the TCCA.

IV

In Smith's direct appeal to the TCCA, he argued that the state trial court violated the Sixth and Fourteenth Amendments when it excused ten potential jurors for cause.[41] The state trial court determined that these members of the venire were substantially impaired because of beliefs or feelings about, or objections to, the death penalty.[42] The TCCA's opinion discussed the pertinent

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[37] *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (quoting 28 U.S.C. §2254(d) and *Hittson v. Chatman*, 135 S. Ct. 2126, 2126 (GINSBURG, J., concurring in denial of certiorari)).

[38] *Id.* at 1192; *see Smith v. State*, 297 S.W.3d 260, 274 (Tex. Crim. App. 2009) (rejecting this claim on its merits); ROA.5511-13 (not bringing this claim in the state habeas application).

[39] ROA.7476, 7478.

[40] ROA.5719.

[41] *Smith*, 297 S.W.3d at 267-68.

[42] *See id.* at 268-74.

Supreme Court decisions, citing *Witherspoon v. Illinois*,[43] *Adams v. Texas*,[44] and *Wainwright v. Witt*,[45] and then considered the evidence in the record regarding each person excluded from the venire.[46] As noted, only the TCCA's decision as to Matthew Stringer remains at issue in our court. If even a single potential juror is impermissibly excluded, "any subsequently imposed death penalty cannot stand."[47]

The federal district court conditionally granted habeas relief based on Stringer's exclusion.[48] The district court reasoned that Stringer had been removed from the venire "'because [he] voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction' . . . without any basis for determining that he would be substantially impaired in his ability to follow the law."[49]

It is unclear from the Supreme Court's decisions whether removal of a potential juror based on his or her views about the death penalty is to be reviewed as a factual determination, a legal issue, or a mixed question of law and fact. In its pre-AEDPA decision in *Wainwright v. Witt*, the Supreme Court held that the Eleventh Circuit had erroneously concluded that the issue is a mixed question of law and fact.[50] In *Witt*, the state trial court excluded a potential juror; the Florida Supreme Court affirmed on direct appeal, rejecting the *Witherspoon* claim; the Supreme Court denied certiorari; state

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[43] 391 U.S. 510 (1968).
[44] 448 U.S. 38 (1980).
[45] 469 U.S. 412, 429 (1985).
[46] *Smith*, 297 S.W.3d at 268-74.
[47] *Davis v. Georgia*, 429 U.S. 122, 123 (1976); *see also Gray v. Mississippi*, 481 U.S. 648, 666 (1987) (discussing *Davis v. Georgia* and reversing a Mississippi sentence of death because a single juror was improperly excluded).
[48] ROA.461.
[49] ROA.447-48 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)).
[50] 469 U.S. at 427-29.

postconviction review was unsuccessful; the federal district court denied habeas relief; but the Eleventh Circuit granted the writ of habeas corpus based on the *Witherspoon* claim.[51] The Supreme Court reversed.[52] Writing for the Court, Justice Rehnquist reasoned that "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record."[53] The Supreme Court therefore held that "[t]hese are the 'factual issues' that are subject to § 2254(d)."[54]

The text of 28 U.S.C. § 2254(d) as it existed when *Witt* was written is quoted in footnote seven of *Witt*,[55] and we will not reproduce it here. But § 2254(d) provided that in any federal habeas proceeding considering a state court decision on the merits, "a determination . . . of a factual issue . . . shall be presumed to be correct."[56] The Supreme Court held in *Witt* that the presumption of correctness, as explicated in *Patton v. Yount*,[57] "applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause."[58] Subsequently, in *Darden v. Wainwright*, in holding that a juror was properly excluded in a death penalty case, the Court reiterated that "*Witt* . . . made clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254."[59] It would seem from

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[51] *Id.* at 415 (citations omitted).
[52] *Id.* at 435.
[53] *Id.* at 429.
[54] *Id.*
[55] *Id.* at 426 n.7.
[56] *Id.*; *see also id.* at 426.
[57] 467 U.S. 1025 (1984).
[58] *Witt*, 469 U.S. at 429.
[59] 477 U.S. 168, 175 (1986).

these pre-AEDPA precedents that a state court's determination that a potential juror in a capital case is substantially impaired is a factual finding. However, subsequent decisions counsel that we should assess such a determination under both subsection (1), the "contrary to" or "unreasonable application of, clearly established Federal law" prong, and subsection (2), the "unreasonable determination of the facts in light of the evidence" prong, of § 2254(d).

Passages in the Supreme Court's decision in *Uttecht v. Brown*, which was governed by AEDPA,[60] continued to indicate that whether a state court's exclusion of a potential juror for cause was permissible is a factual issue.[61] However, in observing that AEDPA provided "additional" "directions to accord deference" that are "independent,"[62] the Court cited *both* subsections (1) and

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[60] 551 U.S. 1, 35-36 (2007) (STEVENS, J., dissenting) ("[T]his case comes to us under the standard of review imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).").

[61] *See*, *e.g.*, *id.* at 7 ("Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias."); *id.* ("The judgment as to 'whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less.'" (alteration in original) (quoting *Witt*, 469 U.S. at 429)); *id.* at 8 ("Even when '[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty,' the need to defer to the trial court remains because so much may turn on a potential juror's demeanor." (alterations in original) (quoting *Darden*, 477 U.S. at 178)); *id.* at 9 ("[I]n determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." (citing *Witt*, 469 U.S. at 424-34)); *id.* ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (citing *Witt*, 469 U.S. at 428)).

[62] *Id.* at 10 ("The requirements of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, of course, provide additional, and binding, directions to accord deference. The provisions of that statute create an independent, high standard to be met

(2) of § 2254(d). Nevertheless, the Court ultimately concluded in a single sentence that "[the Supreme Court of Washington's] decision, like the trial court's, was not contrary to, or an unreasonable application of, clearly established federal law."[63] The Court did not expressly make a determination under § 2254(d)(2).

More recently, in *White v. Wheeler*, the Supreme Court concluded that "[t]he Court of Appeals was required to apply" § 2254(d)(1)'s "'contrary to, or . . . unreasonable application of, clearly established Federal law'" "deferential standard to the state court's analysis of [a] juror exclusion claim" in a death penalty case.[64] Citing *Witt* as the clearly established federal law,[65] the Court applied § 2254(d)(1)'s standard to both the state trial court's decision to exclude a potential juror and the Kentucky Supreme Court's decision that the trial court did not err.[66]

We conclude from these decisions that the prudent course is to apply AEDPA's presumption under § 2254(e)(1) that "a determination of a factual issue made by a State court" is "correct" and to apply both of § 2254(d)'s standards. The substance of the clearly established federal law, including the deference that is to be accorded a trial court's determination that a potential juror is substantially impaired, is set forth in *Witherspoon*, as modified by *Witt* and its progeny.

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before a federal court may issue a writ of habeas corpus to set aside state-court rulings. *See* 28 U.S.C. §§ 2254(d)(1)-(2) . . . .").

[63] *Id*. at 20.

[64] 136 S. Ct. 456, 460 (2015) (quoting 28 U.S.C. § 2254(d)(1)).

[65] *Id*. (citing *Witt*, 469 U.S. at 425-26).

[66] *Id*. at 461 ("The trial judge's decision to excuse Juror 638 did not violate clearly established federal law by concluding that Juror 638 was not qualified to serve as a member of this capital jury."); *id.* ("[T]he Kentucky Supreme Court's ruling that there was no error is not beyond any possibility for fairminded disagreement."); *id.* at 462 ("The Kentucky Supreme Court was not unreasonable in its application of clearly established federal law when it concluded that the exclusion of Juror 638 did not violate the Sixth Amendment.").

A

The voir dire in Smith's trial spanned several weeks. The venire consisted of four panels of more than seventy potential jurors each that were summoned and questioned at different times.[67] Potential jurors on each panel were first directed to complete a questionnaire.[68] The state trial court then conducted a general voir dire before individually questioning jurors.[69] The general voir dire of the first panel summoned began on May 8, 2006.[70]

Stringer, whose exclusion is at issue, was first summoned on Wednesday, May 17, 2006.[71] The questionnaire that he was given contained instructions from the state trial court, which explained that "[y]our oath requires that you truthfully answer the questions."[72] He averred in signing his questionnaire that his answers were given under oath.[73]

Stringer's answers revealed that he was 25 years old.[74] He checked "No" in response to "Have you ever been opposed to the death penalty?"[75] He checked "Yes" in response to "Should people ACCUSED of murder be treated differently than people accused of committing other crimes?"[76] When prompted to "please explain" his response to that question, he wrote, "Thats [sic] one of the most hanest [sic] crimes."[77] In response to "What are your feelings about the death penalty? Please explain," Stringer wrote, "Its [sic]

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[67] ROA.2211 (first panel); ROA.2656 (second panel) ROA.3184 (third panel); ROA.3542 (fourth panel).
[68] *See*, *e.g.*, ROA.2211.
[69] *See*, *e.g.*, ROA.2213-52, 2256-72.
[70] ROA.2210.
[71] ROA.3583.
[72] ROA.8136.
[73] ROA.8151.
[74] ROA.8137.
[75] ROA.8145.
[76] ROA.8147.
[77] ROA.8147.

good that we have it and should be used on the worst of crimes."[78] When asked "Do you think the death penalty in Texas is used too often or too seldom? Why?" Stringer wrote, "I'm sure it is being used often enough."[79] Stringer was instructed to check one of five options "which 'best' summarizes your general views about capital punishment (the death penalty)" ranging from "I am opposed to capital punishment under any circumstances" to "I am strongly in favor of capital punishment as an appropriate penalty."[80] He checked the middle option, which was "I am neither generally opposed nor generally in favor of capital punishment."[81] He was then asked to check one of five options after being instructed to "[a]ssume you are on a jury to determine the sentence for a defendant who has already been convicted of a capital murder. If the law gives you a choice of death or life imprisonment: (check only one)."[82] The five options ranged from "I could not vote for the death penalty regardless of the facts and circumstances of the case" to "I would always vote for the death penalty in a case where the law allows me to do so."[83] He chose the middle option, which was "I would consider all of the penalties provided by law and the facts and circumstances of the particular case."[84] Stringer was given a list of statements and asked to check "AGREE" or "DISAGREE" next to each.[85] He agreed that "[l]ife imprisonment is more effective than capital punishment," "[c]apital punishment is just and necessary," "[i]t doesn't make any difference to me whether we have capital punishment or not," "[c]apital punishment

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[78] ROA.8148.
[79] ROA.8148.
[80] ROA.8149.
[81] ROA.8149.
[82] ROA.8149.
[83] ROA.8149.
[84] ROA.8149.
[85] ROA.8150.

should be used more often than it is," "[p]rison makes convicted people worse," and "[p]rison rehabilitates people convicted of crimes."[86] He checked "DISAGREE" next to these statements: "[e]xecution of criminals is a disgrace to civilized society," "I do not believe in capital punishment, but it is not practically advisable to abolish it," "[c]apital punishment is the most hideous practice of our time," "[c]apital punishment gives the criminal what he deserves," "[t]he state cannot teach the sacredness of human life by destroying it," and "[c]apital punishment is justified only for pre-meditated murder."[87] Stringer checked "No" in response to "Do you want to be a juror in this case?" and in response to "Why or why not?" he wrote, "If this is a murder trial, I couldn't cause [sic] the talk of death an [sic] any way make [sic] me uncomfortable."[88]

Stringer attended a general voir dire on Thursday, May 18, 2006,[89] the day after he had first been summoned and filled out the questionnaire.[90] At the outset, the court told the venire that some of them would be excused based on their answers to the questionnaire, and the court then called out the names and prospective juror numbers of those who were excused.[91] The state trial court explained to the remaining members of the venire what Smith's trial rights were and then turned to the capital sentencing process.[92] The court told these prospective jurors that, if the jury convicted Smith, there would be a second phase of the trial in which the jury would determine whether Smith

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[86] ROA.8150.
[87] ROA.8150.
[88] ROA.8150.
[89] ROA.3542, 3797.
[90] ROA.3583.
[91] ROA.3544-46.
[92] *See* ROA.3550-83.

would receive a life sentence or a death sentence.[93] The judge explained that the jury would have to answer two special issues, and the answer to those issues would determine the sentence the judge imposed.[94] The court told the prospective jurors that the first question was "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?"[95] The court gave a lengthy explanation of the elements of this issue, emphasizing more than once that a "no" answer meant that the defendant would serve forty years in prison before being considered for parole, but a "yes" answer to this question could mean a sentence of death.[96] The state court then told the venire what the second issue would be, in phrases because of the length of the question, explaining each phrase in detail and advising that a "no" answer would mean that the defendant would receive the death penalty.[97]

The state trial court then explained that the purpose of voir dire was "to make sure that all jurors can keep an open mind; that they can follow the law that [the court] give[s]; that they can apply the facts to the circumstances that they hear to the law that [the court] give[s], wherever it leads them, however it leads [them] to answer these questions."[98] After the court concluded its

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[93] ROA.3571-73.

[94] ROA.3575-80; *see also* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (West Supp. 2018) (mandating that the jury answer two issues: (1) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and (2) "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed").

[95] ROA.3575.

[96] ROA.3575-3578.

[97] ROA.3579-3582.

[98] ROA.3582.

general voir dire, the prosecution and defense agreed to remove more members of the venire without further questioning.[99]

Stringer's individual voir dire began the following Monday, on May 22, 2006.[100] The exchange between Stringer and the court in its entirety was as follows:

> Court: Hello, Mr. Stringer. How are you?
>
> Stringer: Fine.
>
> Court: You may be seated. Mr. Stringer, I noticed you the other day. I noticed that you were paying attention to what I was saying. Obviously, this is a very important case with potentially a very serious potential punishment, if you find the Defendant guilty of capital murder, and if you answer these questions in a particular way as I explained.
>
> 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: And let me tell you this, it's not an easy job to be on a jury, it's hard because you're sitting in judgment of another person. No one is going to tell you that it's easy because it's not. But the fact of the matter is, just to be perfectly blunt and straightforward and bottom line, if this man is found guilty and you-all answer these questions in a particular way, I impose the sentence of death.
>
> There are some people that tell us they can participate, and some tell us they can't. There are some people that tell us, you know, Judge, I believe in the death penalty, but I could never be a participant where a person ultimately could get the death penalty. And those people, obviously, are not appropriate jurors for this type of case. So, only you know the answers and there are no right answers, and there are no wrong answers. We've already gone through 248 people.

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[99] ROA.3587.
[100] ROA.3764, 3797.

> You are No. 249. And we only have nine jurors. We got to have 12. So, we're still looking.
>
> 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: So, when you say, "anything about it," does that mean, and I don't want to put words in your mouth, you have to tell me, now is the time. Because the worst thing that would happen is for you to get past this process, you're sitting over there on Monday, June the 19th, and you go, hey, Judge, guess what, I've been thinking about this and I can't do it. By then it's too late. The worst thing is that you didn't say anything at all and you end up, not only lying to yourself but you're lying to us, the Court, so only you know.

So, let me ask you this question again and you have to say yes or no, not I think, maybe, you know, that kind of thing. We need to know precisely, yes, you can or no, you can't. Okay. How you feel. 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.[101]

The prosecution then moved to strike Stringer for cause.[102] Defense counsel responded, "I don't believe he's disqualified, Your Honor. I have no questions because I don't believe he's disqualified."[103] The trial court dismissed Stringer and overruled defense counsel's objection.[104]

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[101] ROA.3797-800.
[102] ROA.3800.
[103] ROA.3800.
[104] ROA.3800.

On direct appeal, the TCCA rejected Smith's argument that the dismissal of Stringer violated the federal constitution.[105] In addition to Stringer's answers during voir dire, the TCCA considered his questionnaire.[106] The TCCA quoted the statement in Stringer's questionnaire that, "[i]f this is a murder trial, I couldn't [be a juror] [be]cause the talk of death in any way make[s] me uncomfortable."[107] The TCCA recounted that

> [d]uring individual voir dire, the trial court attempted to get some clarification of this statement, and Stringer answered that "anything about [death]" bothered him. Again the trial court attempted to elicit a definitive answer from Stringer, and Stringer finally stated that he was morally and conscientiously opposed to the death penalty even in an appropriate capital-murder case.[108]

The TCCA concluded that "it is clear Stringer's personal feelings against capital punishment would prevent or substantially impair the performance of his duties as a juror, [and] the trial court did not abuse its discretion in granting the State's challenge for cause."[109]

The federal district court disagreed with the TCCA's analysis and conditionally granted habeas relief. The federal district court observed that "Stringer said that he was 'uncomfortable' with the death penalty, but never said, and was never specifically asked, if he was able to put aside his personal feelings and follow the law as instructed by the trial court."[110] The district court noted Stringer's statement in his questionnaire that "its [sic] good that we have [the death penalty] and [it] should be used on the worst of crimes"[111] and his selection of the statement in the questionnaire that "I would consider

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[105] *Smith v. Davis*, 297 S.W.3d 260, 274 (Tex. Crim. App. 2009).
[106] *Id.*
[107] *Id.* (second, third, and fourth alterations in original) (quoting ROA.8150).
[108] *Id.* (second alteration in original) (quoting ROA.3799).
[109] *Id.*
[110] ROA.447.
[111] ROA.447 (alterations in original) (quoting ROA.8148).

all of the penalties provided by the law and the facts and circumstances of the particular case."[112] The federal district court concluded that Stringer "is the kind of juror the Court cautioned about in *Witherspoon*"[113] and that there was no "basis for determining that [Stringer] would be substantially impaired in his ability to follow the law."[114]

The State seeks reversal. Smith urges us to uphold the federal district court's decision on this issue, presenting four arguments.

B

Smith's first contention is that the trial court's use of the phrase "in an appropriate capital murder case" did not establish 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 that would lead to a death sentence." Smith contends that a finding of impairment could not be made without additional questions regarding Stringer's objections to the death penalty and the affect those objections would have on his ability to serve.

Smith argues that the question posed to Stringer differs materially from the question the Supreme Court held in *Darden v. Wainwright* was adequate to elicit whether there was substantial impairment.[115] That question was: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"[116] In the present case, the question twice posed to Stringer was:

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[112] ROA.447 (quoting ROA.8149).
[113] ROA.447.
[114] ROA.448.
[115] *See Darden v. Wainwright*, 477 U.S. 168, 175-76 (1986).
[116] *Id.*

"Do you have any objections—any moral, conscientious, or religious objections to the imposition of the death penalty in an appropriate capital murder case?"[117] Smith asserts that part of this question was "expressly deemed inadequate in *Witherspoon*" and that "merely adding the phrase 'in an appropriate case' to the question expressly deemed inadequate" did not "render[] the question adequate."

The Supreme Court held in *Witherspoon v. Illinois* 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."[118] The Supreme Court explained that, "[i]f the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty."[119] "But," the Court said, when the State "swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality."[120]

Since that 1968 decision, the Supreme Court has clarified *Witherspoon*. In *Wainwright v. Witt*, the Court said, "We . . . take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may

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[117] ROA.3797, 3799.
[118] 391 U.S. 510, 522 (1968).
[119] *Id.* at 520.
[120] *Id.*

be excluded for cause because of his or her views on capital punishment."[121] The standard quoted from *Adams* was:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath*. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.[122]

In contrasting the *Adams* standard with that of *Witherspoon*, the Court observed that the now-applicable standard "does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism."[123] The Court continued,

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.[124]

The Court confirmed that "[d]espite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."[125] In those situations, "deference must be paid to the trial judge who sees and hears the juror."[126]

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[121] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

[122] *Id.* at 420 (quoting *Adams*, 448 U.S. at 45).

[123] *Id.* at 424.

[124] *Id.* at 424-25.

[125] *Id.* at 425-26.

[126] *Id.* at 426.

The *Wainwright v. Witt* decision then considered "the degree of deference that a federal habeas court must pay to a state trial judge's determination of bias."[127] The Court explained that "whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge."[128]

A subsequent decision of the Supreme Court explained that "[d]eference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias."[129]

> The judgment as to "whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less."[130]

"[T]he finding[s] may be upheld even in the absence of clear statements from the juror that he or she is impaired."[131] "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.'"[132]

> Even when "[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty," the need to defer to the trial court

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[127] *Id.*
[128] *Id.* at 422.
[129] *Uttecht v. Brown*, 551 U.S. 1, 7 (2007) (citing *Witt*, 469 U.S. at 430).
[130] *Id.* (alteration and omission in original) (quoting *Witt*, 469 U.S. at 428).
[131] *Id.* (citing *Witt*, 469 U.S. at 424-25).
[132] *Id.* (alterations in original) (quoting *Witt*, 469 U.S. at 434).

> remains because so much may turn on a potential juror's demeanor.[133]

Review of *Witherspoon–Witt* claims on federal habeas is "doubly deferential."[134] For a decision to be contrary to or an unreasonable application of federal law, it must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[135] Based on the Supreme Court's precedents and the record in this case, we cannot say the TCCA's decision is contrary to or an unreasonable application of federal law as determined by the Supreme Court.

Stringer said in his questionnaire that he "couldn't" be a juror because "the talk of death an [sic] any way" made him "uncomfortable."[136] During his individual voir dire, he said, "Death bothers me a little bit. Makes me uncomfortable talking about it, but other than that."[137] When the state court followed up on that answer, asking "You're telling me that you feel uncomfortable with death. What does that mean?" Stringer said, "Anything about it pretty much."[138] These statements would cause a reasonable jurist to question whether Stringer was substantially impaired as a juror in both the guilt and penalty phases of a murder trial.

Viewing the record as a whole, the state trial court communicated to Stringer that it needed to know whether he was a person who "could never be a participant where a person ultimately could get the death penalty" and that

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[133] *Id.* at 8 (alterations in original) (quoting *Darden v. Wainwright*, 477 U.S. 168, 178 (1986)).

[134] *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (per curiam) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

[135] *White v. Woodall*, 572 U.S. 415, 419-20 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[136] ROA.8150.

[137] ROA.3798.

[138] ROA.3798-99.

"[w]e need to know precisely, yes, you can or no, you can't."[139] The state trial court made two references to the special issues that would be asked in the penalty phase of a capital trial and explained that if they were answered "in a particular way," the death penalty would be imposed.[140] The trial court then said, "There are some people that tell us they can participate, and some people tell us they can't."[141] A reasonable interpretation of this statement is that some people can participate in the process and answer the questions based on the facts of the case and others could not participate in the process because they could not answer the questions in a way that would result in the death, regardless of the facts of the case. The question "Do you have any objections—any moral, conscientious or religious objections to the imposition of the death penalty in an appropriate capital murder case" is not as precise as it might have been. But it plausibly inquired whether, "in an appropriate capital murder case," meaning one in which Stringer thought it would otherwise be appropriate to impose the death penalty in light of the questions asked during the penalty phase, Stringer would personally have any moral, conscientious, or religious objections to voting to impose the death penalty. He said, "Yes," he would.[142] He then said his objection would be "[m]orally and conscientiously."[143]

Further, the trial court's statement that "I noticed you [Stringer] the other day. I noticed that you were paying attention to what I was saying," reflects that Stringer's demeanor was noteworthy to trial court.[144] This

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[139] ROA.3798, 3799.
[140] ROA.3575-82, 3797.
[141] ROA.3798.
[142] ROA.3799.
[143] ROA.3799-800.
[144] ROA.3797.

statement was not part of the trial court's pattern during the individual voir dires. At the least, there was an ambiguity as to Stringer's ability to set aside his personal views and to follow Texas's statutory scheme and truthfully answer the questions submitted by the state trial court. "[A]ided, as it undoubtedly [was] by its assessment of [the venireman's] demeanor," the state trial court was entitled to resolve that ambiguity in favor of the State.[145]

C

Smith argues that though the state trial court's decision to exclude Stringer is "due deference," that "does not foreclose the possibility of reversal." We of course agree that AEDPA's deferential standard of review does not foreclose the possibility of relief. "[A] reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."[146] "But where . . . there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion."[147]

Smith asserts that the state trial court's voir dire of Stringer "was anything but thoughtful and diligent." Applying AEDPA's "doubly deferential" standard of review, we cannot say that there was no basis for the state trial court's finding of substantial impairment. The TCCA did not unreasonably apply clearly established federal law in this regard.

Smith relies on an opinion by the TCCA to argue that "[b]efore a prospective juror may be excused for cause . . . , the law must be explained to him, and he must be asked whether he can follow that law, regardless of his

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[145] *See Uttecht v. Brown*, 551 U.S. 1, 7 (2007) (third alteration in original) (quoting *Wainwright v. Witt*, 469 U.S. 412, 434 (1985)).

[146] *Id.* at 20.

[147] *Id.*

personal views."[148] That rule was announced by a Texas court, not the Supreme Court, and it therefore does not constitute clearly established federal law. "[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."[149]

D

Smith contends that his trial counsel's decision not to question Stringer is not a reason to find it was proper to dismiss him for cause. The TCCA's opinion stated, "Defense counsel declined to question Stringer, but objected to the State's challenge for cause."[150] We do not take this statement as indicating that the TCCA relied on counsel's decision not to question Stringer as a basis for declining to reverse the state trial court's judgment. The statement was no more than a factual recitation regarding the proceedings in the trial court, as is evident from the statement's inclusion of the fact that defense counsel objected to the State's challenge for cause.

Smith's argument on this point is also responsive to arguments by the State that the federal district court should have considered other instances during voir dire when Smith's counsel asked questions of potential jurors. We need not consider this argument by the State, and accordingly, we do not consider Smith's response to it.

E

Arguing that there is no indication in the record that the state trial court considered Stringer's questionnaire and that Stringer had not been "instructed on the law" when he filled out the questionnaire, Smith contends that we

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[148] *Id.* at 28 (omission in original) (quoting *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009)).

[149] *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010).

[150] *Smith v. State*, 297 S.W.3d 260, 274 (Tex. Crim. App. 2009).

should not consider it. At oral argument, however, Smith's counsel conceded that the state trial court could properly rely on the questionnaire.

There is considerable evidence that the trial court had the potential juror's questionnaires during the individual voir dires. It was not unreasonable for the TCCA to have assumed that during Stringer's individual questioning, the state trial court sought clarification of a statement in Stringer's questionnaire.[151]

In any event, during his individual voir dire Stringer repeated the same statement from his questionnaire that the TCCA quoted in its decision on direct appeal, as the TCCA noted.[152] There can be no harm in the TCCA's consideration of this statement from the questionnaire when the statement was repeated in the presence of the trial court.

Nor did the TCCA, as contended by Smith, rely solely or even predominantly on this statement. The TCCA said, "Stringer finally stated that he was morally and conscientiously opposed to the death penalty even in an appropriate capital-murder case" and concluded that "[a]s it is clear Stringer's personal feelings against capital punishment would prevent or substantially impair the performance of his duties as a juror, the trial court did not abuse its discretion in granting the State's challenge for cause."[153]

F

In sum, the state court proceedings concerning the exclusion of Stringer as a juror did not "result[] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[154] Nor did the state court

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[151] *See id.*
[152] *Id.*
[153] *Id.*
[154] 28 U.S.C. § 2254(d)(1).

proceedings "result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[155] The federal district court did not give appropriate deference to the TCCA's determination that the trial court did not violate the federal constitution when it removed Stringer for cause. "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[156] Smith has not made that showing. "[F]ederal habeas review of a *Witherspoon–Witt* claim—much like federal habeas review of an ineffective-assistance-of-counsel claim—must be 'doubly deferential.'"[157]

V

The federal district court denied all of Smith's other claims for habeas relief. But Smith maintains that we should affirm the district's court's judgment on the alternate basis that he was denied effective assistance of counsel at the sentencing phase, citing *Strickland v. Washington*.[158] To prevail on a *Strickland* claim, he must show "(1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense."[159] Review of *Strickland* claims is always deferential, and when we review a state court determination under AEDPA, review is "doubly deferential."[160]

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[155] *Id.* § 2254(d)(2).

[156] *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (quoting *White v. Woodall*, 572 U.S. 415, 419-420 (2014)).

[157] *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

[158] 466 U.S. 668 (1984).

[159] *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010) (citing *Strickland*, 466 U.S. at 689-94).

[160] *Burt,* 571 U.S. at 15 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

A

Smith argues that trial counsel failed to conduct a reasonable sentencing investigation. He asserts that counsel failed to follow the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). He also argues that counsel was deficient by failing to present evidence that Smith suffered from schizophrenia.

To establish deficient performance, Smith must show "counsel's representation 'fell below an objective standard of reasonableness'" under prevailing professional norms.[161] "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[162]

When Smith was first incarcerated at the age of eighteen, he was admitted to a psychiatric unit because he was suicidal and depressed.[163] He was soon readmitted because he was reported to be delusional, paranoid, and experiencing auditory hallucinations.[164] He referred to fear of being killed by a demon and complained of seeing ghosts.[165] Immediately after he was released he was readmitted, claiming that he believed demons were going to stop his heart that night.[166] He later admitted to crisis center staff that he was not possessed by demons.[167] He reportedly rubbed a Bible on his chest to exorcise the demons, rubbing so hard that he injured himself and the Bible.[168]

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[161] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688).
[162] *Strickland*, 466 U.S. at 690.
[163] ROA.5857.
[164] ROA.5882.
[165] ROA.5883.
[166] ROA.5884.
[167] ROA.5884.
[168] ROA.5958.

Trial counsel was aware of these records and had Smith evaluated by mental health professionals.[169]

Trial counsel retained the type of defense team recommended by the ABA Guidelines.[170] Trial counsel engaged a fact investigator (Molli Steinle), a mitigation specialist (Bettina Wright), a neuropsychologist (Dr. Mark Lehman), and a psychiatrist (Dr. George Leventon).[171] After a "clinical interview," psychological and neuropsychological testing, and a "review of extensive records,"[172] Dr. Lehman concluded that Smith did not have significant psychological issues.[173]

Dr. Leventon also reviewed Smith's high school records, Social Security records, criminal history, disciplinary records from his prior incarceration, and medical records from his prior incarceration.[174] Smith told Dr. Leventon that he shot both victims.[175] Smith also told Dr. Leventon that he had fabricated the delusions reported in his prison records and that he never suffered from them.[176] Dr. Leventon diagnosed Smith with "malingering and an antisocial

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[169] ROA.6153 ("I was well aware of the record information concerning Mr. Smith's 'breakdown' while incarcerated in the penitentiary."); ROA.6154 ("We obtained all the available records with regard to Mr. Smith. All the records reviewed by Dr. Bekh Bradley-Davino, Ph.D., and mentioned in the affidavit referenced in Mr. Smith's application for writ of habeas corpus, were collected by the investigators pursuant to my direction and were reviewed by me. They were also made available to the psychiatrist, Dr. Leventon, who examined Mr. Smith.") ROA.6195; ROA.7461-62.

[170] *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 4.1A (2003) ("The defense team should consist of no fewer than two attorneys . . . an investigator, and a mitigation specialist" and "should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.").

[171] ROA.6153.

[172] ROA.7934 (capitalization omitted).

[173] ROA.7939.

[174] ROA.7846.

[175] ROA.7855-56.

[176] ROA.7857.

personality disorder" and conveyed the diagnosis to Smith's defense attorneys.[177] Dr. Leventon did not interview any of Smith's family members.[178]

Trial counsel interviewed Smith as well as his family members.[179] Counsel interviewed Smith's mother, father, sister, and brothers on multiple occasions.[180] Counsel interviewed Smith's aunt, ex-sister-in-law, ex-girlfriend, and teachers who remembered Smith from his days in school.[181] Counsel also interviewed a woman with whom Smith lived shortly after he was released from prison and not long before the murders for which Smith was convicted.[182] None indicated that Smith had any family history of mental illness.[183]

Smith now argues that counsel rendered deficient performance because the experts were not informed of a family history of mental illness or witness statements confirming his prior hallucinations. He argues that counsel did not follow ABA Guideline 10.7 and failed to conduct a "multi-generational investigation . . . extend[ing] as far 'as possible vertically and horizontally'" that included "at least three generations."[184] As part of his habeas application, Smith included affidavits from family members that claim other members of his family suffer from mental illness.[185] Habeas counsel also retained Dr. Bekh Bradley-Davino, Ph.D., to "conduct a comprehensive psychiatric evaluation of

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[177] ROA.7858.
[178] ROA.7875-76.
[179] ROA.6153-54
[180] ROA.6154.
[181] ROA.6154.
[182] ROA.6154.
[183] ROA.6154.
[184] *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.7 cmt. & n.216 (2003).
[185] ROA.256 (Johnny Carl Miles, uncle); ROA.260 (Felicia Davis, maternal cousin); ROA.262 (Deondrea Smith, younger brother); ROA.284 (Kendal Ray Smith, older brother); ROA.291 (Christopher Thurman, family friend); ROA.297 (Mark Lemons, cousin).

[Smith]."[186] Dr. Bradley-Davino diagnosed Smith with schizophrenia, paranoid type.[187] He considered a history of mental illness in Smith's family. Smith's maternal uncle, Johnny Miles, "indicate[d] that other members of Mr. Smith's maternal family displayed unusual symptoms and behaviors."[188] Miles specifically stated that another uncle, Craven Brooks, "was institutionalized at one point in his life."[189] Dr. Bradley-Davino reviewed the medical records of Vincent Davis,[190] Smith's cousin, who has been diagnosed with schizophrenia.[191] Two other family members, an uncle named Lee Arthur Miles and Smith's maternal grandmother, also apparently "had unusual experiences such as seeing spirits."[192]

Smith points to an affidavit by Dr. Lehman that states that, had he been provided the same affidavits that Dr. Bradley-Davino reviewed that allegedly corroborate Smith's symptoms, his own diagnosis of Smith might have been different.[193] Dr. Lehman said specifically he "would not exclude a diagnosis of schizophrenia."[194]

Smith relies on *Rompilla v. Beard*[195] to argue that counsel should have done more to investigate mitigating evidence, particularly his mental health. Smith quotes from *Rompilla*: "[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain

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[186] ROA.269.
[187] ROA.270.
[188] ROA.278
[189] ROA.257, 278.
[190] ROA.269.
[191] ROA.257, 260, 267.
[192] ROA.278.
[193] ROA.303.
[194] ROA.303.
[195] 545 U.S. 374, 377 (2005).

and review material . . . ."[196] However, Smith omits the end of that sentence: "his lawyer is bound to make reasonable efforts to obtain and review material *that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial*."[197] In *Rompilla*, the defendant's trial attorneys had presented weak mitigating evidence and the Supreme Court discussed the availability of potential mitigating evidence from the prisoner's school records and prior incarcerations.[198] However, the Court granted relief because "the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction."[199] Rompilla's trial attorneys never examined the file from a previous conviction for a similar crime, despite notice from the prosecution that it would rely on the details of that crime to prove aggravating factors and obtain the death penalty.[200] After finding that counsel's failure to review the file was unreasonable, the Court had no difficulty finding prejudice.[201] The file contained prison records that painted a wholly different picture of the defendant's mental health and childhood that would have led them down a different investigative path.[202]

Smith's evidence does not come close to the trove of easily accessible evidence in *Rompilla*. The state habeas court found that the affidavits that Dr. Bradley-Davino relied upon were "self-serving and unpersuasive to demonstrate that the applicant suffers from the negative phase of schizophrenia."[203] Further, nothing that Smith's trial attorneys had uncovered

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[196] *Id.*
[197] *Id.* (emphasis added).
[198] *See id.* at 381-83.
[199] *Id.* at 383.
[200] *Id.* at 383-85.
[201] *Id.* at 390-93.
[202] *Id.* at 390-91.
[203] ROA.7468.

prior to trial had led them to any family history of mental illness. Smith himself and his family all reported no mental illness in the family. Decisions not to investigate are reasonable to the degree the evidence makes those decisions reasonable.[204] In *Rompilla*, it was unreasonable to fail to investigate records because the prosecution indicated it would rely on those records, not because there was mitigating information in the file.[205] Smith has not shown that counsel's reliance on its retained mental health experts was unreasonable, let alone that the TCCA's determination of his *Strickland* claim was unreasonable.[206]

Nor has Smith shown that trial counsel performed in a constitutionally defective manner by failing to present evidence of his alleged mental illness. The state habeas court determined that Smith has not shown that he suffers from schizophrenia,[207] and Smith has not presented clear and convincing evidence that this factual determination was incorrect.[208] We have also recognized that evidence of mental illness can be a "double edge sword," in that it could be both aggravating and mitigating.[209] Further, adducing evidence of Smith's alleged schizophrenia would have opened the door to cross-examination. Smith told Dr. Leventon that the delusions described in his prison records had been feigned and that he never suffered from them.[210] Dr. Leventon diagnosed Smith with "malingering and an antisocial personality

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[204] *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)).

[205] *See Rompilla*, 545 U.S. at 383-85.

[206] *See Harrington v. Richter*, 562 U.S. 86, 107 (2011) ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

[207] ROA.7469.

[208] *See* 28 U.S.C. § 2254(e)(1).

[209] *Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000)).

[210] ROA.7857.

disorder" and conveyed the diagnosis to Smith's defense attorneys.[211] Cross-examination of Dr. Leventon would have opened the door to Smith's confession to Dr. Leventon that Smith shot and killed Tammie White and her eleven-year-old daughter Kristina White.[212] We agree with the TCCA that defense counsel made a reasonable tactical decision to pursue a mitigation strategy based on Smith's impoverished upbringing, religious faith, and deep remorse for the killings. In light of our "doubly deferential" review, Smith is not entitled to habeas relief on this claim.

B

Even assuming Smith's trial counsel's performance was deficient, Smith has not established prejudice. To establish prejudice, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[213] In sentencing, the evidence must be such that "there is a reasonable probability that at least one juror would have struck a different balance" among mitigating and aggravating factors that would result in a sentence of life instead of death.[214]

Smith points to the statement in Dr. Lehman's affidavit that he "would not exclude a diagnosis of schizophrenia,"[215] the report of Dr. Bradley-Davino,[216] and affidavits from family members and friends that purport to confirm Smith's mental illness.[217] He argues that this new evidence, if found

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[211] ROA.7858.
[212] *See* ROA.7855-56.
[213] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[214] *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).
[215] ROA.303.
[216] ROA.269.
[217] *See* ROA.256 (Johnny Carl Miles, uncle); ROA.260 (Felicia Davis, maternal cousin); ROA.262 (Deondrea Smith, younger brother); ROA.284 (Kendal Ray Smith, older brother); ROA.291 (Christopher Thurman, family friend); ROA.297 (Mark Lemons, cousin).

and presented to the jury, could cause at least one juror to weigh the aggravating and mitigating factors in favor of life.

This evidence is not as strong as Smith portrays it. Dr. Lehman's affidavit does not establish that Smith had schizophrenia. It says merely that he would not have excluded such a diagnosis.[218] In light of the other evidence that the jury likely would have heard in addition to Dr. Lehman's testimony, that slight suggestion of mental illness is insufficient to show prejudice. Evidence that Smith previously lied about experiencing hallucinations and was diagnosed with malingering would have damaged his credibility with the jury. Likewise, the report of Dr. Bradley-Davino, while more certain of its conclusion that Smith suffered from mental illness, ignored evidence that the State could have used to cast doubt on its findings. Indeed, the TCCA found that Dr. Bradley-Davino's diagnosis was unpersuasive based on his report and testimony at the evidentiary hearing because he (1) did not reference or acknowledge in his report any of Smith's admissions to Dr. Leventon and defense counsel that Smith lied about being possessed by demons, and (2) omitted several clinical notes from his report that support an alternative diagnosis of malingering, among other evidence that casts doubt on the schizophrenia diagnosis.[219] Smith has not explained how the state habeas court was unreasonable in its assessment of Dr. Bradley-Davino.

In contrast, the aggravating factors were overwhelming. In addition to the grisly details of the crime from the guilt–innocence phase, there is evidence that Smith intended to murder a third victim.[220] The State also introduced evidence of his long string of criminal activities. Smith had one juvenile

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[218] ROA.303.
[219] *See* ROA.7467.
[220] *Smith v. State*, 297 S.W.3d 260, 265 (Tex. Crim. App. 2009).

delinquency[221] and three felony drug convictions.[222] He admitted to burglarizing the home of a hospitalized, elderly woman.[223] Weighed against the State's strong evidence of future dangerousness, Smith's weak evidence of mental illness is insufficient to create "a reasonable probability that at least one juror would have struck a different balance" among mitigating and aggravating factors that would have resulted in a sentence of life instead of death.[224]

VI

Smith asks us to affirm the district court's grant of habeas relief on the basis that evolving standards of decency render those with "severe mental illness" ineligible for the death penalty under the Eighth Amendment. A glaring omission in Smith's filings in our court is that he does not challenge any of the state habeas court's factual findings or conclusions of law regarding his mental health in connection with his claim that he is ineligible for the death penalty. Accordingly, even were there authority from the Supreme Court establishing that the federal constitution prohibits the execution of the severely mentally ill, Smith does not challenge the state trial court's determination on the merits that he is not severely mentally ill.

In adjudicating Smith's claim that he suffers from schizophrenia and is ineligible for the death penalty, the state habeas court held an evidentiary hearing and made factual findings.[225] The state habeas court ultimately concluded that Smith had failed to "demonstrate by a preponderance of the evidence that he suffers from schizophrenia in light of his multiple admissions

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[221] ROA.5421-22.
[222] ROA.5233-42.
[223] ROA.4702.
[224] *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).
[225] ROA.7455-75.

of duplicity, evidence of malingering, and diagnosis of an antisocial personality disorder."[226] We cannot say that in adjudicating Smith's claim of ineligibility for the death penalty, the state-court determinations "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,"[227] since Smith has not challenged the reasonableness of the state court's determination of the facts regarding this ineligibility claim.

With regard to the TCCA's application of clearly established federal law, Smith does not cite any decision of the Supreme Court holding that the severely mentally ill are ineligible for execution. Instead, he argues that those who are severely mentally ill are similar to the intellectually disabled[228] and juvenile offenders[229] and therefore the severely mentally ill lack the moral culpability to permit a sentence of death. We have rejected this argument before.[230] Smith does not contend that his "'concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning and purpose' or the 'link between [his] crime and its punishment.'"[231] The TCCA's decision on this issue was not contrary to clearly established federal law.

* * *

For the foregoing reasons, we REVERSE the judgment of the district court in part, to the extent that it conditionally granted habeas relief to Smith

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[226] ROA.7476.

[227] 28 U.S.C. § 2254(d)(2).

[228] *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

[229] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[230] *See Rockwell v. Davis*, 853 F.3d 758, 763 (5th Cir. 2017); *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (per curiam).

[231] *Madison v. Alabama*, 139 S. Ct. 718, 723 (2019) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958, 960 (2007)); *see also id.* at 722 (holding that the Eighth Amendment does not "forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime . . . because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence").

on his first claim for relief, and we otherwise AFFIRM the district court's judgment.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70015

DEMETRIUS DEWAYNE SMITH,

Petitioner - Appellee Cross-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellant Cross-Appellee

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 6/13/19, 5 Cir., _____, _____ F.3d _____)

Before CLEMENT, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEMETRIUS DEWAYNE SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-15-0707
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

Memorandum and Order

This case is before the Court on Petitioner Demetrius Dewayne Smith's First Amended Petition for Writ of Habeas Corpus (Docket No. 18), and Respondent Lorie Davis' Motion for Summary Judgment (Docket No. 25).

I. Background

A. Procedural History

Petitioner Demetrius Dewayne Smith was convicted of capital murder and sentenced to death for murdering Tammie Harris and her 11 year old daughter Kristina. The Texas Court of Criminal Appeals ("TCCA") affirmed his conviction and sentence, *Smith v. State*, 297 S.W.3d 260 (Tex. Crim. App. 2009), and denied his application for a writ of habeas corpus, *Ex Parte Smith*, No. WR-70,593-01 (Tex. Crim. App. Feb. 25, 2015).

On February 5, 2016, Smith filed a petition for a writ of habeas corpus (Inst. # 11) in this Court. On October 25, 2016, he filed an amended federal petition (Inst. # 18). On May 24, 2017, Respondent moved for summary judgment (Inst. # 25). Smith responded to the motion on June 23, 2017 (Inst. # 28).

B. Factual History

The TCCA summarized the facts of this case in its decision affirming Smith's conviction and sentence:

> [Smith] had been dating Tammie White, a mother of three who was separated from her husband. [Smith] and White broke up in late January or early February of 2005. On the afternoon of March 24, 2005, at approximately 3:15 p.m.,[Smith] called White on her cell phone as she, her mother, and her sister were going to the hospital to visit a relative. [Smith] told White, "You think I'm playing with you, bitch? You're going to die today. White held the phone so her mother and sister could hear the threats. White hung up and [Smith] immediately called back, but White would not speak to him. White was not concerned about the calls.
>
> A neighbor reported that earlier on the same day, she witnessed [Smith] climbing over White's patio fence. White was not home, and [Smith] appeared to be locked out. Then around 3:00 p.m., she saw [Smith] again, sitting on White's porch, but White's car was gone at the time.
>
> Later that same day, White was home with her eleven-year-old daughter, Kristina. Kristina was playing with some neighborhood friends on the front porch, while White was in the back bedroom talking on the phone with her sister, Katherine. At approximately 6:00 p.m., [Smith] came up to the door. Kristina tried to stop him from entering her home, but [Smith] pushed her out of the way and went inside. [Smith] went to the back bedroom. Over the phone, Katherine twice heard White

> say, "[Smith], don't play with me." Katherine then heard gunshots and the phone went dead. [Smith] shot White in the chest, neck, and head at close range.
>
> Meanwhile, Kristina had followed [Smith] inside and got a knife from the kitchen. Immediately following the gunshots, Kristina came back out and told the other children that [Smith] had shot her mom and to run. Kristina ran around a car, dropped the knife, and got down in a ball, covering her head with her hands to protect herself. Within a minute, [Smith] came out of the house and approached Kristina. He then shot her twice, once through the top of the head, before running off. As he was leaving, witnesses heard [Smith] say that now he was going to get Tamara, referring to Kristina's fourteen-year-old sister who was not home at the time. [Smith] was apprehended shortly thereafter. Tamara, who had been taken into protective custody following the threat to her life, remained unharmed.

Smith v. State, 297 S.W.3d 260, 265 (Tex. Crim. App. 2009).

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas corpus relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Woodford v. Garceau*, 538 U.S. 202, 205-08 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Kittelson v. Dretke*, 426 F.3d 306, 318 (5th Cir. 2005). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and

discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc); *see also Pape v. Thaler*, 645 F.3d 281, 292-93 (5th Cir. 2011). The focus for a federal court under the "unreasonable application" prong is "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Neal*, 239 F.3d at 696, and *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'")

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2); *Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997).

This Court may only consider the factual record that was before the state court in determining the reasonableness of that court's findings and conclusions. *Cullen v. Pinholster*, 563 U.S. 170 (2011). Review is "highly deferential," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*), and the unreasonableness standard is "difficult [for a

petitioner] to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Summary Judgment Standard in Habeas Corpus Proceedings

In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (The "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). This principle is limited, however; Rule 56 applies insofar as it is consistent with established habeas practice and procedure. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (citing Rule 11 of the Rules Governing Section 2254 Cases). Therefore, § 2254(e)(1) – which mandates that findings of fact made by a state court are "presumed to be correct" – overrides the ordinary summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party. *See id.* Unless the petitioner can "rebut[ ] the presumption of correctness by clear and convincing evidence" regarding the state court's findings of fact, those findings must be accepted as correct. *See id.* Thus, the Court may not construe the facts in the state petitioner's favor where the prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness in 28 U.S.C. § 2254(e)(1) should not apply. *See*

Marshall v. Lonberger, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997).

III. Analysis

Smith's amended petition raises five claims for relief. These are addressed in turn.

A. Dismissal of Prospective Jurors

Smith contends that two prospective jurors, Patricia Cruz and Matthew Stringer, were improperly dismissed for cause by the State based solely on their expression of religious or conscientious objections to the death penalty. Both expressed reservations about the death penalty, and both were successfully challenged for cause by the State over defense objections.

Cruz was asked by the trial court: "Do you have any moral, religious, or conscientious objections to the imposition of the death penalty? In other words, are you against the death penalty?" She replied: "Yes, I am." Under further questioning, she described her objections as conscientious and religious, upon which the State challenged her for cause. Defense counsel objected to the challenge "under the Sixth, Eighth, and Fourteenth Amendments, specifically the due process clause of the Fourteenth Amendment." The court overruled the objection and excused Cruz. 14 Tr. at 209-11.[1]

Stringer was similarly asked about moral, religious, or conscientious objections to the

[1] "Tr." refers to the transcript of Smith's trial.

imposition of the death penalty, and he responded that "[d]eath bothers me a little bit. Makes me uncomfortable talking about it, but other than that." He further responded "yes" when asked again about moral, religious, or conscientious objections to the imposition of the death penalty, specifying that his objections are moral and conscientious. The State challenged him for cause, defense counsel objected, and the trial court granted the challenge. *Id.* at 34-38.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court noted that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." *Id.* at 519. Accordingly, the Court held 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.

Id. at 522. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), the Court clarified that *Witherspoon* established "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror . . . ." Smith now argues that the dismissal for cause of Cruz and Stringer violated his rights under *Witherspoon*.

Respondent concedes that the burden of proving that a prospective juror is unqualified to sit on a capital jury rests with the party seeking to excuse the juror. Motion for Summary

Judgment (Docket Entry No. 25) at 25 (citing *Wainwright v. Witt*, 469 U.S. 412, 423-24 (1985)). Respondent goes on to quote from the *voir dire* of a juror whose challenge for cause was upheld in *Witt*. The portion of the *voir dire* quoted, however, highlights the critical difference between that juror, and the two at issue in this case. The juror challenged in *Witt* specifically stated that her personal reservations about the death penalty would "interfere with judging guilt or innocence of the Defendant in this case." Motion for Summary Judgment at 26 (quoting *Witt*, 469 U.S. at 415-16)). Neither Stringer nor Cruz made any such statement.

Respondent emphasizes the fact that Cruz expressed *objections* to the *imposition* of the death penalty in an *appropriate* case. Motion for Summary Judgment at 29 (emphasis in Respondent's motion). Cruz specifically stated that she objected based on conscientious and religious grounds, but she was never asked, and never stated, that she could not follow the law as explained to her by the trial court. Neither the trial court nor the attorneys asked her any other questions. *See* 14 Tr. at 209-11.

Respondent also points to Cruz' juror questionnaire, where she again expressed opposition to the death penalty. She also, however, stated that she "honestly d[id]n't know if" she could assess a capital sentence, *id.* at 32 (quoting Cruz' Juror Questionnaire), and that she "would consider all of the penalties provided by the law and the facts and circumstances of the particular case." She also, however, stated that "I do not believe in capital punishment under any circumstances," Juror Questionnaire (Docket Entry 26), at JQ160, and that "we do

not have the right to terminate God's life expectancy . . .," *id.* at JQ158.

Similarly, respondent points out that the trial court asked Stringer whether he had "'any moral, religious, or conscientious objection to the *imposition* of death in an *appropriate* capital murder case?'" *Id.* at 33 (quoting 14 Tr. at 33)(emphasis in Respondent's motion). Stringer said that he was "uncomfortable" with the death penalty, but never said, and was never specifically asked, if he was able to put aside his personal feelings and follow the law as instructed by the trial court. Indeed, Stringer stated on his questionnaire that "its good that we have [the death penalty] and [it] should be used on the worst of crimes." Juror Questionnaire at JQ141. He further stated that "I would consider all of the penalties provided by the law and the facts and circumstances of the particular case." *Id.* at JQ142.

Cruz expressed a belief that the death penalty is always wrong and that it is an affront to God. While the prosecution and the trial court could have explored her feelings and her ability to follow the law in more depth, under the very deferential AEDPA standard of review, this Court cannot conclude that the TCCA was unreasonable in finding that it was permissible to dismiss Cruz for cause.

Stringer, on the other hand, is the kind of juror the Court cautioned about in *Witherspoon*. Respondent's argument that the Constitution allows dismissal of a prospective juror based solely on the juror's expression of reservations about the death penalty would render *Witherspoon* a nullity. Therefore, the jury that convicted and sentenced Smith "exclud[ed at least one] venirem[a]n for cause simply because [he] voiced general objections

to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon*, 391 U.S. at 522, without any basis for determining that he would be substantially impaired in his ability to follow the law. The removal of this prospective juror for cause by the State violated Smith's rights under the Sixth and Fourteenth Amendments to a jury comprised of a fair cross section of the community, *i.e.* of those who support the death penalty, and of those who have conscientious scruples against it, but are capable of following the law. *See Witherspoon*, 391 U.S. at 519-20. The TCCA's decision to the contrary with regard to Stringer was an unreasonable application of *Witherspoon* and its progeny to the facts of this case.

B. Confrontation

Smith next contends that the introduction into evidence of prison disciplinary records from his prior incarcerations during the punishment phase of his trial violated his Sixth Amendment right to confront witnesses against him. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that "testimonial evidence" is not admissible absent a showing that the declarant is unavailable to testify and that there was an opportunity for cross-examination, irrespective of indicia of reliability. *Id.* at 68.

Smith contends that the reports were testimonial in nature, *e.g.*, a statement that Smith fought with another inmate, and that the State did not prove that the declarants were unavailable to testify. The prosecution cited these reports during closing argument as evidence of Smith's future dangerousness. 22 Tr. 12, 34.

On appeal, the TCCA agreed that the documents were testimonial and that the trial court erred in admitting them, but found that the error was harmless because the State did not emphasize the reports, focusing instead on "the heinousness of the capital murder itself and appellant's disregard for anyone but himself." *Smith v. State*, 297 S.W.3d 260, 277 (Tex. Crim. App. 2009). Smith argues that this was unreasonable because the jury sent a note during deliberations requesting, among other things, copies of the disciplinary reports. 5 CR at 1184.[2] Smith also contends, though he cites no evidence, that the jury's punishment deliberations took much longer than usual. Petition at 40-42.[3] The TCCA did not mention the jury note, and Smith argues that the note and the allegedly lengthy deliberation show that the reports may have influenced the punishment verdict.

Respondent states, and Smith does not dispute, that the Supreme Court has never held that the confrontation clause is applicable in a sentencing proceeding. The Fifth Circuit has held that the confrontation clause is not applicable in sentencing proceedings. *See United States v. Fields*, 483 F.3d 313, 326 (5th Cir. 2007). In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that, except in very limited circumstances, a federal habeas court cannot retroactively apply a new rule of criminal procedure. The Court explained that

> a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule

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2 "CR" refers to the Clerk's Record.

3 Smith notes the time the jury spent deliberating, but cites nothing to support his claim that this was longer than usual.

> if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original). The AEDPA effectively codified the *Teague* non-retroactivity rule "such that federal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the conviction becomes final." *Peterson v. Cain*,302 F.3d 508, 511 (5th Cir. 2002) (citing *Williams v. Taylor*, 529 U.S. 362, 380-81 (2000)). Because the Supreme Court has never held that the confrontation clause applies in a sentencing proceeding, relief on this claim would announce a new rule of constitutional law. Therefore, Smith's confrontation clause claim is barred by the non-retroactivity rule of *Teague*.

C. Ineffective Assistance Of Counsel

Smith raises two related claims of ineffective assistance of counsel: He argues that trial counsel failed to conduct adequate investigation into his mental health history to develop mitigating evidence; and he contends that counsel failed to argue and present evidence that Smith was incompetent to stand trial.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong

of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

1. Failure to Investigate

Smith contends that he is schizophrenic. Relying on the American Bar Association's ("ABA") revised *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Smith argues that counsel based a decision not to present evidence that Smith is schizophrenic on an uninformed opinion by his retained experts. The experts' opinion was uninformed, Smith contends, because counsel failed to conduct an adequate investigation into Smith's history, and therefore failed to provide the experts with information about an alleged family history of schizophrenia, and statements from witnesses that Smith experiences auditory and visual hallucinations.

Smith acknowledges that counsel presented evidence from Smith's family and others who know Smith establishing that Smith's father was a substance abuser who neglected the family, was physically violent toward Smith's mother, and molested Smith's sister. Because of the family's poverty, Smith and his brothers stole food and sold drugs. The family's utilities were frequently shut off for nonpayment. Counsel also presented evidence that Smith regularly attended church and attended Bible studies, and that he was well-mannered, calm, and not aggressive, and that he was a good worker.

Smith contends, however, that his "family history is rife with severe mental illness." Petition at 59. In support of this claim, he alleges that a cousin has had hallucinations, and that several relatives believe they have interacted with spirits and demons and/or have supernatural powers. He claims that his own schizophrenia manifested itself when he was 18 years old and in prison, and that his bizarre behavior continued after his release.

Smith raised this claim in his state habeas application. His trial counsel submitted an affidavit, and the state trial court heard live testimony related to this issue. The court concluded that Smith failed to prove either deficient performance or prejudice. 11 SHCR[4] at 1924-25.

First, the state court found that Smith failed to prove that he is schizophrenic. *Id.* at 1916 (FF[5] 71). The court further found that counsel retained investigators and mental health experts and thoroughly investigated Smith's mental health. *Id.* at 1916-17 (FF 73-75). During the investigation, no witness, which included Smith's closest family members, expressed any belief or concern that Smith is mentally ill. Counsel also stated that he had experience representing mentally ill clients, and that Smith never gave counsel cause to believe that he is mentally ill. *Id.* at 1917 (FF 76). The court therefore concluded that counsel's investigation satisfied then-prevailing professional norms, and that, because he did not prove that he is schizophrenic, Smith suffered no prejudice. *Id.* at 1917 (FF 77), 1924-25

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4 "SHCR" refers to the Clerk's Record of Smith's state habeas corpus proceeding.

5 "FF" refers to the state habeas court's findings of fact.

(CL[6] 10).

To prevail on this claim, Smith must demonstrate not only that counsel rendered deficient performance and that he was prejudiced as a result, but also that the state habeas court's resolution of this claim was unreasonable.

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," [*Strickland*, 466 U.S.] at 689, 104 S.Ct. 2052; *Lindh v. Murphy,* 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S., at 123, 129 S.Ct. [1411], at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct., at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

Smith argues that counsel did not meet the requirements of the ABA Guidelines to conduct a multi-generational investigation into Smith's background. The Fifth Circuit has explained, however, that the ABA Guidelines do not control a federal habeas court's analysis. The Supreme Court has held that "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 558

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[6] "CL" refers to the state trial court's conclusions of law.

U.S. 4, 9 (2009) (quotation marks and citation omitted). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Strickland*, 466 U.S. at 690). Courts look for guidance about the norms in the relevant state as they existed at the time of the trial. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The Guidelines are helpful only if they "reflect prevailing norms of practice." *Van Hook*, 558 U.S. at 8 n.1 (quotation marks and citation omitted). The Guidelines also "must not be so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* (quotation marks and citation omitted). Whether a counsel's decisions are legitimate will depend on the circumstances. *Id.* at 7.

The record in this case shows that counsel retained an investigator, a mitigation specialist, a neuropsychologist, and a psychiatrist. 4 SHCR at 615, 656-57. Counsel obtained Smith's records, including his prison records. Based on suggestions of mental illness in the records, counsel asked the neuropsychologist, Dr. Lehman, and the psychiatrist, Dr. Leventon, to evaluate Smith. Dr. Lehman concluded that Smith's functioning was within normal limits with the exception of impaired short-term memory. Dr. Lehman attributed that impairment to the lack of stimulation caused by Smith's incarceration and segregation from other inmates. He also concluded that Smith had "a reasonable understanding of the charges

he is facing as well as the process which will determine guilt or innocence." 1 SHRR,[7] State's Exhibit 1 at 1,6. Dr. Leventon noted that Smith stated that the hallucinations and delusions he previously claimed he suffered in prison were fake. Dr. Leventon concluded that Smith was malingering, and had Antisocial Personality Disorder. 1 SHRR at 133.

Smith now argues that counsel rendered deficient performance because the experts were not informed of any family history of mental illness, or witness statements confirming his prior hallucinations. The record shows, however, that Smith was asked about family history, and mentioned only that his father had substance abuse problems. 1 SHRR at 146. The defense team also spoke to Smith's mother, sister, brothers, an aunt, an ex-sister-in-law, an ex-girlfriend, a close friend of Smith's, Smith's school teachers, distant relatives, and people who knew Smith from church. 4 SHCR at 616, 658. None of them suggested that Smith suffered from mental illness. *Id.* at 658.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S.510, 521 (2003) (internal quotation marks and alteration omitted) (quoting *Strickland*, 668 U.S. at 690-91). When assessing the reasonableness of an attorney's investigation, a court must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

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[7] "SHRR" refers to the Reporter's Record of the state habeas evidentiary hearing.

The record shows that the defense team spoke to numerous family members and other people who knew Smith over the course of his life, and that none of them suggested that Smith suffers from mental illness. Moreover, counsel had Smith evaluated by two mental health professionals, both of whom concluded that Smith is not mentally ill. Counsels' decision not to further investigate Smith's mental illness was reasonable, based on the information they gathered. Therefore, counsel did not render deficient performance by failing to further investigate, and Smith was not denied his Sixth Amendment right to effective assistance of counsel on this record.

Moreover, the state habeas court's conclusion that counsel was not deficient is reasonable under the facts of this case. Therefore, under the AEDPA, this Court must defer to that conclusion.

2. Competence to Stand Trial

Smith next contends that he received ineffective assistance of counsel because counsel failed to discover evidence of mental illness that would have given rise to a claim that Smith was incompetent to stand trial. Under Texas law, Smith was competent to stand trial if he had: (1) sufficient present (at the time of trial) ability to consult with his lawyer with a reasonable degree of rational understanding; *and* (2) a rational as well as factual understanding of the proceedings against him. TEX. CODE CRIM. PROC. art. 46B.003 (Vernon 2004). The federal standard is the same. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*)).

The only evidence Smith cites in support of his claim that he was incompetent is that, in his testimony during the punishment phase, Smith offered an alibi instead of expressing contrition as Smith and his counsel previously planned. He contends that a more thorough investigation into his mental health history would have prompted counsel to raise concerns about his competence.

This claim fails for multiple reasons. First, as discussed above, counsel conducted an adequate investigation. Second, even if counsel uncovered evidence that Smith is schizophrenic, Smith fails to demonstrate that he was incompetent. Mental illness and incompetence are not coextensive. While mental illness is a necessary precondition to a finding of incompetence, a defendant can be mentally ill and still have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him. Smith points to nothing indicating that he lacked the necessary ability to consult with his lawyer, or a lack of understanding of the proceedings. Indeed, a contemporaneous mental health evaluation at the time of trial concluded that Smith understood the proceedings.

Smith also claims, based on his counsel's admonition to "relax," during his testimony, that he was not acting like himself. He also claims that he was agitated during cross-examination. Neither nervousness nor agitation while testifying is unusual, and this is not evidence of incompetence. Because counsel conducted a constitutionally adequate investigation, and because there was no evidence that Smith was incompetent to stand trial,

Smith is not entitled to relief on this claim.

D. Eighth Amendment

In his final claim for relief, Smith argues that, under the evolving standards of decency that mark the progress of a maturing society, the Eighth Amendment bars the imposition of the death penalty on a person who is severely mentally ill. Smith cites no case so holding, but attempts to extrapolate this principle from cases holding that the Eighth Amendment bars the imposition of the death penalty on intellectually disabled murderers, and on juvenile murderers.

A federal habeas court may not announce a new rule of constitutional *law*. *Teague v. Lane*, 489 U.S. 288 (1989). "[F]ederal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the conviction becomes final." *Peterson v. Cain*,302 F.3d 508, 511 (5th Cir. 2002) (citing *Williams v. Taylor*, 529 U.S. 362, 380-81 (2000)). Because the Supreme Court has never held that the Eighth Amendment bars the imposition of the death penalty on mentally ill defendants, relief on this claim would announce a new rule of constitutional law. Therefore, Smith's Eighth Amendment claim is barred by the non-retroactivity rule of *Teague*.

IV. Conclusion

For the foregoing reasons, Respondent's Motion for Summary Judgment (Inst. # 25) is GRANTED IN PART AND DENIED IN PART, and Smith's First Amended Petition for

Writ of Habeas Corpus (Inst. # 18) is GRANTED IN PART AND DENIED IN PART. Smith is entitled to a new sentencing hearing under *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

V. Certificate of Appealability

Smith has not requested a certificate of appealability ("COA"), but this court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates

that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully and exhaustively considered each of Smith's claims. While the issues Smith raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims, with the exception of his *Witherspoon* claim as it relates to venireman Stringer, is foreclosed by clear, binding precedent. This Court concludes that under such precedents, Smith has failed to make a "substantial showing of the denial of a constitutional right" with regard to any claim other than his *Witherspoon* claim. 28 U.S.C. § 2253(c)(2). This Court concludes that Smith is not entitled to a certificate of appealability on the claims that are denied in this Memorandum and Order.

VI. Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Lorie Davis' Motion for Summary Judgment (Docket Entry 25) is GRANTED IN PART AND DENIED IN PART;

2. Petitioner Demetrius Dewayne Smith's Amended Petition For Writ Of Habeas Corpus (Docket Entry 18) is GRANTED as to his First Claim for Relief as it relates to venireman Stringer, and DENIED as to all other claims;

3. No Certificate of Appealability shall issue in this case;

4. The Respondent shall release Smith from custody unless, within 30 days of the effective date of this Order, the State of Texas either moves to convene a new sentencing hearing for Smith or resentences him to a sentence other than death

in accordance with Texas law in effect a the time of Smith's crime; and

5. This Order is STAYED pending the resolution of all appeals from this Order, including action on any petition for a writ of *certiorari*, or the expiration of the time to seek any such review.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 22nd day of March, 2018.

Vanessa Gilmore
United States District Judge

Appendix D

or confinement in cause number 3820 in the 216th Judicial District Court of Gillespie County.

KELLER, P.J., filed a dissenting opinion.

KELLER, P.J., dissenting.

The State mistakenly released applicant, and for ten months, it failed to do anything to rectify that mistake. I agree with the Court that applicant is entitled to credit for those ten months. I am less certain, however, about the remaining thirteen months. After ten months, the State did do something to rectify its mistake—it issued a warrant for arrest. If applicant had remained in Texas, that warrant could have been served and applicant returned to state jail to serve the remaining thirteen months of his sentence. But at the time the arrest warrant was issued, applicant was in China. I am aware of no extradition treaties existing between the United States and China that would have enabled the State to forcibly return applicant to custody. According to the trial judge's findings of fact, applicant and his father knew that applicant had not completed his sentence when they left for China.

I think an absconder/due diligence rule like that articulated in *Peacock v. State*[1] for probationers should apply to cases like this. As in the probation revocation context, no express statutory authority governs the situation before us, and the potential exists for the releasee to take advantage of the situation by hiding from the authorities.[2] Under the facts before us, it appears that applicant knowingly placed himself beyond the reach of the authorities while his sentence was still pending.

But the parties and the trial court have not been alerted to the possibility that an absconder/due diligence rule might apply in this context. I would remand this case to the trial court for further factfinding concerning the reasons for applicant moving to China, what the State knew about where applicant had gone, and any efforts the State made to bring applicant into custody. I would also order briefing by the parties on whether an absconder/due diligence rule should apply in this setting, and if so, whether applicant should be considered an absconder and whether the State exercised due diligence after the arrest warrant was issued to apprehend him, including whether there were any appropriate international avenues for seeking or obtaining custody of applicant.

Because the Court declines to consider the issue further, I respectfully dissent.

1. 77 S.W.3d 285 (Tex.Crim.App.2002).

2. *See id.* at 289 (no express statutory authority providing for or prohibiting the extension of jurisdiction over probationers beyond the expiration of the probationary period; an absconder should not benefit from his cunning in hiding from authorities but we should be sure that the person in question is in fact an absconder).

Demetrius Dewayne SMITH, Appellant,

v.

The STATE of Texas.

No. AP–75,479.

Court of Criminal Appeals of Texas.

May 6, 2009.

Rehearing Denied Aug. 19, 2009.

Background: Defendant was convicted in the 183rd District Court, Harris County,

Vanessa Velasquez, J., of capital murder, and he appealed.

Holdings: The Court of Criminal Appeals, Meyers, J., held that:

(1) amendment of indictment prior to trial did not impermissibly charge defendant with an additional or different offense;

(2) trial court could grant state's challenges for cause to venirepersons;

(3) defendant was not entitled to instruction on lesser-included offense of murder;

(4) defendant's rights to confrontation were violated at punishment phase by admission of prison records; but

(5) error was harmless.

Affirmed.

Keasler, J., filed a concurring opinion.

1. Criminal Law ⚿1139

The sufficiency of an indictment is a question of law and is reviewed de novo.

2. Indictment and Information ⚿71.2(2, 3)

An indictment must be specific enough to inform the defendant of the nature of the accusations against him so that he may prepare a defense. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, § 10.

3. Constitutional Law ⚿4556

A defendant's due-process right to notice of a charged offense may be satisfied by means other than the language in the charging instrument. U.S.C.A. Const. Amend. 14.

4. Indictment and Information ⚿142

When a motion to quash an indictment is overruled, a defendant suffers no harm unless he did not, in fact, receive notice of the state's theory against which he would have to defend. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, § 10.

5. Indictment and Information ⚿159(2)

Original indictment gave defendant notice that state was charging him with capital murder for shooting his ex-girlfriend and her daughter, even though original indictment was defective for failing to state whether the deaths were during the same criminal transaction, and thus amendment of indictment prior to trial to include the words "in the same criminal transaction" did not impermissibly charge defendant with an additional or different offense; original indictment on its face listed charge as capital murder, and defendant had worked for months prior to trial preparing his defense to capital murder charge. Vernon's Ann.Texas C.C.P. art. 28.10; V.T.C.A., Penal Code § 19.03(a)(7).

6. Indictment and Information ⚿125(44)

Capital murder defendant had actual notice that original indictment was charging him with capital murder for shooting his ex-girlfriend and her daughter, even though indictment failed to state that deaths were during the same criminal transaction, and thus indictment was not fatally defective for improperly joining two separate murders in one paragraph. Vernon's Ann.Texas C.C.P. arts. 21.19, 28.10.

7. Jury ⚿108

A veniremember in a capital murder case who can set aside his beliefs against capital punishment and honestly answer the special issues is not challengeable for cause.

8. Jury ⚿108

A veniremember in a capital murder case is challengeable for cause if his beliefs against capital punishment would prevent or substantially impair the performance of

his duties as a juror in accordance with the court's instructions and the juror's oath.

9. Criminal Law ⚿1158.17

An appellate court reviews with considerable deference a trial court's ruling on a challenge of a venireperson for cause, because the trial court is in the best position to evaluate the veniremember's demeanor and responses.

10. Criminal Law ⚿1158.17

In an appeal of a trial court's decision on a challenge of a venireperson for cause, when the potential juror's answers are vacillating, unclear, or contradictory, particular deference is accorded to the trial court's decision.

11. Criminal Law ⚿1152.2(2)

An appellate court will reverse a trial court's ruling on a challenge of a venireperson for cause only if a clear abuse of discretion is evident.

12. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in voir dire that he could not participate in answering special issues in such a manner that a death sentence would be imposed, even though he appeared to vacillate regarding the death penalty on his juror questionnaire.

13. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who equivocated at voir dire concerning his ability to follow the evidence and the law; although venireperson stated that he believed in the death penalty and could follow the law, he continuously qualified his answers even when he was asked to give a firm response, repeatedly stated that he did not want to participate in the punishment phase of the trial, and stated that he would not follow the evidence if that meant he could ensure a life sentence.

14. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated that her religious beliefs would prevent her from sentencing someone to death, stated that she could not participate as a juror and would not be able to give a death sentence to anybody, and never stated that she could follow the law and answer the special issues according to the evidence.

15. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in juror questionnaire that she did not feel that she could judge a death-penalty case, stated to judge that she was not comfortable answering special questions in a way that would cause defendant to be sentenced to death, and answered yes to question of whether she had any moral, religious, or conscientious objections to the imposition of the death penalty in an appropriate capital-murder case.

16. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in voir dire that he would seek any and every mitigating factor that he could potentially find in order to ensure a life sentence, that he would hold the state to a burden higher than the law required, and that he had essentially pre-judged the case because he would always find defendant's young age to be a sufficient mitigating circumstance.

17. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated that due to his religion, he would be unable to answer

special issues in such a way that the death penalty would be imposed.

18. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who agreed in voir dire that it would violate her conscience, morals, or religion to participate in the death-penalty process, and stated that the death penalty violated her conscience in that she did not feel comfortable in making a decision that would result in a death penalty, and agreed that she would be inclined to answer special questions in such a way that defendant got life instead of death.

19. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in voir dire that it would violate his conscience to sit on the jury in a death-penalty case, and that he could not honestly answer the special issues knowing appellant could receive the death penalty.

20. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in voir dire that any "talk about death" bothered him, and that he was morally and conscientiously opposed to the death penalty even in an appropriate capital-murder case.

21. Jury ⚿108

Trial court in capital murder trial could grant state's challenge for cause of a venireperson who stated in juror questionnaire that "we do not have the right to terminate God's life expectancy of that person," and that she was opposed to capital punishment under any circumstances, stated in voir dire that she "pleaded the Fifth Amendment," indicated that she was against the death penalty for both religious and conscientious reasons, and stated that she had objections to the imposition of the death penalty in an appropriate capital-murder case.

22. Homicide ⚿1456

Evidence in capital murder trial permitted a rational jury only to conclude that defendant's murder of his ex-girlfriend and subsequent murder of ex-girlfriend's daughter occurred as part of same transaction, and thus defendant was not entitled to instruction on lesser-included offense of murder; almost immediately after shooting ex-girlfriend, defendant exited apartment and deliberately sought out daughter, who was balled up in a defensive position behind a car with no weapon in her hand, shot her twice at point blank range, and then stated he was going after daughter's older sister. V.T.C.A., Penal Code § 19.03(a)(7)(A).

23. Criminal Law ⚿795(2.1)

In determining whether a defendant is entitled to a charge on a lesser-included offense, a court must consider all of the evidence introduced at trial, whether produced by the state or the defendant.

24. Criminal Law ⚿795(1.5, 2.10)

In determining whether a defendant is entitled to a charge on a lesser-included offense, a two-pronged test is used: first, the lesser-included offense must be included within the proof necessary to establish the offense charged; second, there must be some evidence in the record that would permit a rational jury to find that if the defendant is guilty, he is guilty only of the lesser-included offense.

25. Criminal Law ⚿795(2.1)

The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should be given.

26. Criminal Law ⚿800(2)

Defendant in capital murder trial was not entitled to a jury instruction defining term "same criminal transaction," as a requirement for finding him guilty of capital murder for shooting his ex-girlfriend and her daughter; jury was presumed to attach a common understanding to the meaning of term.

27. Criminal Law ⚿800(2)

Words that are not statutorily defined are to be given their usual meanings in a jury charge in a criminal trial, and no specific instructions are required.

28. Criminal Law ⚿662.40

Defendant's rights to confrontation were violated by admission, at punishment phase of capital murder trial, of prison records purporting to document, in detailed terms, defendant's disciplinary offenses, since statements in records were testimonial and state failed to make prison officials making the statements available for cross-examination or show that officials were unavailable; reports' description of alleged offenses, which included fighting with another inmate in the showers and exposing himself and masturbating in front of a jailer, appeared to have been copied from corrections officers' reports. U.S.C.A. Const.Amend. 6.

29. Sentencing and Punishment ⚿1789(9)

Trial court error at punishment phase of capital murder trial, in admitting, in violation of defendant's rights to confrontation, prison disciplinary records containing detailed descriptions of alleged disciplinary offenses, was harmless, since error did not contribute to defendant's punishment; although the inadmissible reports were read aloud to the jury, they were never emphasized again by the state in any way, and state concentrated its punishment arguments on the heinousness of the capital murder itself and defendant's disregard for anyone but himself. U.S.C.A. Const. Amend. 6.

30. Sentencing and Punishment ⚿1788(5)

Defendant's argument, on appeal of conviction for capital murder, that lethal-injection protocol violated Eighth and Fourteenth Amendments of United States Constitution, was not ripe for review and would be overruled, since defendant's execution was not imminent. U.S.C.A. Const. Amends. 8, 14.

Frances M. Northcutt, Houston, for Appellant.

Carol M. Cameron, Assistant District Attorney, Houston, Jeffrey L. Van Horn, State's Attorney, Austin, for State.

OPINION

MEYERS, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, HOLCOMB, and COCHRAN, JJ., joined.

Appellant was convicted in June 2006 of capital murder. TEX. PENAL CODE § 19.03(a). Based upon the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071 §§ 2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071 § 2(g).[1] Direct appeal to this Court is automatic. Art. 37.071 § 2(h). Appellant raises twenty-six points of error, but he does not

1. Unless otherwise indicated, all future references to Articles refer to the Texas Code of Criminal Procedure.

challenge the sufficiency of the evidence. After reviewing appellant's points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death.

Appellant was convicted of murdering more than one person during the same criminal transaction. TEX. PENAL CODE § 19.03(a)(7)(A). A brief summary of the evidence reveals that appellant had been dating Tammie White, a mother of three who was separated from her husband. Appellant and White broke up in late January or early February of 2005. On the afternoon of March 24, 2005, at approximately 3:15 p.m., appellant called White on her cell phone as she, her mother, and her sister were going to the hospital to visit a relative. Appellant told White, "You think I'm playing with you, bitch? You're going to die today." White held the phone so her mother and sister could hear the threats. White hung up and appellant immediately called back, but White would not speak to him. White was not concerned about the calls.

A neighbor reported that earlier on the same day, she witnessed appellant climbing over White's patio fence. White was not home, and appellant appeared to be locked out. Then around 3:00 p.m., she saw appellant again, sitting on White's porch, but White's car was gone at the time.

Later that same day, White was home with her eleven-year-old daughter, Kristina. Kristina was playing with some neighborhood friends on the front porch, while White was in the back bedroom talking on the phone with her sister, Katherine. At approximately 6:00 p.m., appellant came up to the door. Kristina tried to stop him from entering her home, but appellant pushed her out of the way and went inside. Appellant went to the back bedroom. Over the phone, Katherine twice heard White say, "[Appellant], don't play with me." Katherine then heard gunshots and the phone went dead. Appellant shot White in the chest, neck, and head at close range.

Meanwhile, Kristina had followed appellant inside and got a knife from the kitchen. Immediately following the gunshots, Kristina came back out and told the other children that appellant had shot her mom and to run. Kristina ran around a car, dropped the knife, and got down in a ball, covering her head with her hands to protect herself. Within a minute, appellant came out of the house and approached Kristina. He then shot her twice, once through the top of the head, before running off. As he was leaving, witnesses heard appellant say that now he was going to get Tamara, referring to Kristina's fourteen-year-old sister who was not home at the time. Appellant was apprehended shortly thereafter. Tamara, who had been taken into protective custody following the threat to her life, remained unharmed.[2]

In points of error one through three, appellant argues that the trial court erred by denying his motion to quash and amending the indictment to insert the language, "during the same criminal transaction." He claims this violated Article 28.10, due process, and his right to a grand-jury indictment under both the federal and state constitutions. Specifically, appellant complains that the amendment, which was made before jury selection began, transformed the charged offense from two separate counts of murder to one count of capital murder. Therefore, he

2. Appellant did not threaten to harm Danyale, Kristina's three-year-old sister, who was playing outside at the time as well.

alleges that this altered the charge against him without proper notice.

In analyzing these issues, some background information is helpful. On March 25, 2005, appellant was charged by complaint with capital murder as follows:

> [Appellant], hereafter styled the Defendant, heretofore on or about March 24, 2005, did then and there unlawfully, during the same criminal transaction, intentionally and knowingly cause the death of [K]RISTINA HARRIS by SHOOTING [HER] WITH A DEADLY WEAPON TO WIT, NAMELY A FIREARM, and intentionally and knowingly cause the death of TAMMIE HARRIS by SHOOTING [HER] WITH A DEADLY WEAPON TO WIT, NAMELY A FIREARM.

On May 23, 2005, appellant was indicted by the grand jury. In the title area of the indictment, the felony charge is listed as "CAPITAL MURDER." The body of the indictment in one paragraph states:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, [appellant], hereafter styled the Defendant, heretofore on or about March 24, 2005, did then and there unlawfully, intentionally and knowingly cause the death of KRISTINA HARRIS by SHOOTING KRISTINA HARRIS WITH A DEADLY WEAPON, NAMELY A FIREARM, and intentionally and knowingly cause the death of TAMMIE HARRIS by SHOOTING TAMMIE HARRIS WITH A DEADLY WEAPON, NAMELY A FIREARM.

On August 16, 2005, the State served its "Notice of Intent to Seek the Death Penalty." On May 4, 2006, appellant filed a Motion to Set Aside the Indictment because the Texas death penalty scheme is unconstitutional. He also filed a motion to declare the Texas death penalty scheme unconstitutional and to preclude imposition of the death penalty. These motions were denied during the initial pre-trial hearing on May 4, 2006. At this same hearing, defense counsel noted that they had been working on the mitigation issues in the case for several months. Appellant was also arraigned by the trial court. After reading the indictment, the trial court asked, "All right. [Appellant], to the offense of capital murder, how do you plead, guilty or not guilty?" Appellant pleaded "not guilty."

On May 5, 2006, the trial court heard the State's request to amend the indictment to insert the phrase, "during the same criminal transaction." Appellant objected that the indictment could not be amended under Article 28.10 because the amended indictment would charge an offense not charged in the original indictment. He argued that the original indictment charged two murders in one paragraph and that, as such, the offenses were improperly joined. He claimed that the State needed to seek re-indictment and that an amendment would also violate the due-process clause of the United States Constitution. The trial court overruled appellant's objection but allowed appellant leave to file a motion to quash the indictment. The amended indictment read:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, [Appellant], hereafter styled the Defendant, heretofore on or about March 24, 2005, did then and there unlawfully, *during the same criminal transaction,* intentionally and knowingly cause the death of KRISTINA HARRIS by SHOOTING KRISTINA HARRIS WITH A DEADLY WEAPON, NAMELY A FIRE-

ARM, and intentionally and knowingly cause the death of TAMMIE HARRIS by SHOOTING TAMMIE HARRIS WITH A DEADLY WEAPON, NAMELY A FIREARM.

(Emphasis added to amendment handwritten on face of indictment).

Appellant's written motion argued, in pertinent part, that the indictment alleged two separate murders which statutorily would not support a death sentence; and, although the offenses were improperly joined, it was a valid indictment presenting two non-capital offenses. Therefore, under Article 28.10, the indictment could not be amended because to do so would charge appellant with a different offense. He also argued that indicting him for capital murder would violate his substantial rights to a grand jury and due process. The trial court denied appellant's motion.

[1–4] The sufficiency of an indictment is a question of law and is reviewed *de novo*. *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App.2004) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997)). The right to notice is set forth in both the United States and Texas Constitutions. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. In addition, the Texas Code of Criminal Procedure provides guidelines relating to the sufficiency of an indictment. *See, e.g.*, Articles 21.03, 21.04, and 21.11. Thus, the indictment must be specific enough to inform the defendant of the nature of the accusations against him so that he may prepare a defense. *Moff*, 154 S.W.3d at 601. However, the due-process requirement may be satisfied by means other than the language in the charging instrument. *Kellar v. State*, 108 S.W.3d 311, 313 (Tex.Crim.App.2003). When a motion to quash is overruled, a defendant suffers no harm unless he did not, in fact, receive notice of the State's theory against which he would have to defend. *Id.*; *see also* Art. 21.19 ("An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect of form which does not prejudice the substantial rights of the defendant").

[5] Texas Penal Code § 19.03(a)(7) defines capital murder as murdering more than one person: (A) during the same criminal transaction; or (B) during different criminal transactions but pursuant to the same scheme or course of conduct. Murder is defined as the death of "an individual." TEX. PENAL CODE § 19.02. The original indictment on its face lists the charge as "CAPITAL MURDER," and, in a single paragraph, alleges that appellant knowingly caused the death of more than one person. The indictment notified appellant of the nature of the charge against him although it was defective for failing to state whether the deaths were during the same criminal transaction, or same scheme or course of conduct. Appellant, in fact, worked for months preparing his defense to a capital-murder charge. Therefore, the amendment was not barred by Article 28.10(c), which prohibits amendments if the new indictment charges the defendant with an additional or different offense.

[6] Further, appellant's substantial rights were not harmed. *See* Arts. 21.19 & 28.10; *Kellar*, 108 S.W.3d at 313. The record in this case clearly shows that appellant had actual notice of the capital charge upon which the State was basing its allegations. We reject appellant's argument that this Court should presume the indictment was defective due to misjoinder and in contradiction of the listed felony charge title in the indictment that was signed by the grand jury. Points of error one, two, and three are overruled.

[7, 8] In points of error four through thirteen, appellant claims that the trial

court erroneously granted the prosecution's challenges for cause to ten veniremembers based on their personal beliefs against capital punishment in violation of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). A veniremember who can set aside his beliefs against capital punishment and honestly answer the special issues is not challengeable for cause. *See Witherspoon,* 391 U.S. at 522–23, 88 S.Ct. 1770; *Colburn v. State,* 966 S.W.2d 511, 517 (Tex.Crim.App.1998). A veniremember is challengeable for cause if his beliefs against capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with the court's instructions and the juror's oath. *See Colburn,* 966 S.W.2d at 517.

[9–11] We review a trial court's ruling on a challenge for cause with "considerable deference" because the trial court is in the best position to evaluate the veniremember's demeanor and responses. *See Wainwright v. Witt,* 469 U.S. 412, 429, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Guzman,* 955 S.W.2d at 89 (appellate courts afford "almost total deference" to the trial court's resolution of issues that turn on an evaluation of credibility and demeanor). When the potential juror's answers are vacillating, unclear, or contradictory, particular deference is accorded to the trial court's decision. *Colburn,* 966 S.W.2d at 517. We will reverse a trial court's ruling on a challenge for cause "only if a clear abuse of discretion is evident." *See id.*

[12] Appellant first complains that the trial court erroneously granted the State's challenge to venire member Juan Corral. Corral stated on his written juror questionnaire that he had "mixed feelings" about the death penalty and his answers to several of the questions regarding the death penalty were conflicting. During voir dire, the trial court first questioned Corral before turning him over to counsel:

> [COURT]: Bottom line is this: Anything religiously or morally that would prevent you from answering these questions in such a way that you would know that I would impose the death penalty as punishment in a capital murder case?
>
> [Juror]: Religiously, I guess, I am against it.
>
> * * *
>
> [COURT]: Is there something about your religious belief that you could not participate as a juror in a case like this knowing the way you answered those questions could require me to impose death upon [appellant]?
>
> [Juror]: Yeah, I guess, yes.

The State then moved to challenge, and defense counsel objected. The trial court denied the challenge. The State then began its voir dire:

> [State]: I guess the Judge kind of gave me my lead-off question, are you opposed to the death penalty? What are your thoughts? What do you think about it?
>
> [Juror]: I'm for it and against it.
>
> [State]: When you say you're for it, there are certain fact patterns in your mind that you could think of that make you say, o.k., yes, that person should receive the death penalty?
>
> [Juror]: Yes.
>
> * * *
>
> [State]: Here's kind of an interesting twist, you're a potential juror. You have to listen to all the evidence and find the person guilty or you can find him not guilty. If you find them not guilty, they walk out the door. You

find them guilty, we go into the punishment phase of trial.

In the punishment phase, you are going to hear more evidence, possibly from the State, possibly from the Defense; and then at the conclusion of that evidence, you get to consider everything you heard in the guilt/innocence phase including any additional evidence that may be brought to you in the punishment phase, and then you have to answer Issue No. 1. If you answer Issue No. 1, yes, you go on to Issue No. 2. And if you answer Issue No. 2 no, by law the Judge is required to impose a death sentence. It's not that the judge can say, well, I've changed my mind; I think I'm going to give him life. She's required in the way you answer those questions to sentence that man sitting right there in the orange shirt to death by lethal injection. It's a pretty big responsibility. Can you do that? Can you participate in this trial?

[Juror]: I don't think so. That's pretty strong.

[State]: Oh, it is strong and that's why we wanted to chat with you a little bit and because this is so serious, we need definite answers. I'm not trying to be ugly to you, but it's yes I can or no I can't, not maybe or possibly. Can you participate in this?

[Juror]: No.

[State]: You would have—you mentioned a religious objection or a moral objection, to participating in the capital murder trial where a person could be sentenced to death; is that correct?

[Juror]: Uh-huh, yes.

[State]: So, what I am understanding you to say is that you have a conscientious scruples [sic] in regards to the infliction of punishment of death for a crime in a capital case where the State is seeking the death penalty; is that correct?

[Juror]: Yes.

The trial court then granted the State's challenge for cause. Defense counsel objected to the trial court's ruling; however, defense counsel did not attempt to rehabilitate the juror.

Here, the voir dire record supports the trial court's ruling. Although Corral appeared to vacillate regarding the death penalty on his questionnaire, he clearly stated that he could not participate in answering the special issues in such a manner that a death sentence would be imposed. According appropriate deference to the trial court's decision, we hold that the court did not abuse its discretion in sustaining the State's challenge for cause. Appellant's fourth point of error is overruled.

[13] In his fifth point of error, appellant complains about the challenge of venire member James Pettitt, Jr., for cause. Pettitt was a 65–year–old retiree and veteran of the Vietnam War. In his written questionnaire and during questioning by the State, Pettitt stated that he believed in the death penalty as a valid punishment for capital murder. However, as questioning continued, Pettitt began to equivocate in his answers:

[State]: And I want to ask you whether you personally can sit on this jury knowing that if you find him guilty and I prove to you beyond a reasonable doubt he committed the crime, and if you have evidence such that convinces you beyond a reasonable doubt that the answer to Issue No. 1 is yes, and you believe that the answer to Issue No. 2 should be no, then he's sentenced to die by lethal injection. Can you participate in this process?

[Juror]: It's very difficult.

* * *

[State]: I got to know now because I've got to decide whether to put you on this jury. [Defense counsel] has to decide whether or not to put you on this jury. And I've got to know, if I prove my case beyond a reasonable doubt to you and I prove Issue No. 1 to you, and you believe that the answer to Issue No. 2 is no, the law says I'm entitled for you to answer the questions that way if the evidence is there. I want to make sure that you're going to answer it that way or if you're going to say, you know what, I can't do it. This is why we're here now to find out about you.

[Juror]: I understand that. It's very difficult for me to come out and say this, I mean, you know.

[State]: I'm giving you the out to say whatever you want to say, whichever way it is.

[Juror]: Like I said before, it's really a tough decision for me at this point.

[State]: And I got to ask you now, can you be on the jury or not?

[Juror]: I don't think so.

[State]: And is that because something about you, whether you have scruples or whatever about you personally being on a jury where the imposition of death is a possibility?

* * *

[Juror]: Yes.

[State]: Is that your answer? Do you have scruples about being on this jury or something about you being on this jury or against the death penalty for you personally as a juror, if I asked that right?

[Juror]: Well, I don't have anything, I guess I don't have—I say "guess," I don't have a problem, I guess, with the death penalty, but my personal feelings right now, I'm just—it's kind of questionable. I'm sorry.

[State]: Does that mean that you can't guarantee me that your verdict will be based solely on the evidence that you hear in the courtroom, that there is a possibility that your personal feelings or morals or whatever it is, may cause you to answer the questions differently than the evidence, knowing that the death penalty could be assessed? I'm reading your answer as yes.

[Juror]: Yes.

[State]: Judge, we have a challenge.

[COURT]: I need to hear it out of your mouth. I think what he's getting at, and I know he's trying to ask it in different ways, but the bottom line is this: Would you violate your own conscience, I mean your own moral conscience if you sat on this case knowing that ultimately your decision on how you answer these questions would result in me sentencing this man to death?

[Juror]: I think it would bother me, yes.

[COURT]: Okay. You said "I think," would it?

[Juror]: Yes.

* * *

I guess it's because I've been through this Vietnam thing and whatever else.

Defense counsel then began his voir dire of Pettitt, explaining that the defense was looking for a cross-section of the community with differing views. Counsel also explained that Pettitt would be hearing evidence from both sides. Counsel then inquired:

[Defense]: But all you are called upon to do is to answer those issues based upon the evidence. Are you telling the Judge and all of us that you can't

answer those issues honestly based on the evidence?

[Juror]: I can answer those questions honestly, but in my own mind, I don't want to take somebody's life. Okay. You understand what I'm saying? Yes, I understand what they're saying, can I go along with that to the point, you know, everything, what he has talked to me about. I just in my own personal feelings, I just don't think I need to be here.

[Defense]: You just don't want to is that what you're saying?

[Juror]: I just don't want to be involved in this or morally—

[Defense]: But you could answer those issues?

[Juror]: Sir?

[Defense]: You could honestly answer those issues based upon the evidence?

[Juror]: I'm sure I could, yes.

[Defense]: Participate in a verdict, you just don't want to do it; is that correct?

[Juror]: I just don't want to be—

[Defense]: Part of the process?

[Juror]: No, I don't want to be part of this type of trial. Sorry.

As can be seen from the record, Pettitt continuously qualified his answers even when he was asked to give a firm response. He stated that he believed in the death penalty and could follow the law, but repeatedly stated that he did not want to participate in the punishment phase of the trial. He went so far at one point as to say that he would not follow the evidence if that meant he could ensure a life sentence. In sum, he was an "equivocating" juror and, therefore, we defer to the trial judge who was able to observe Pettitt's demeanor and assess his capacity to serve. The trial judge who hears the answers of an equivocating venire person has the opportunity to observe the tone and demeanor of the prospective juror in determining the precise meaning intended, while we have only the cold record. *See Briddle v. State,* 742 S.W.2d 379, 384 n. 4 (Tex.Crim.App. 1987). Therefore, as the trial court's decision falls within the zone of reasonable disagreement, we shall defer to its ruling. Appellant's fifth point of error is overruled.

[14] Appellant next complains about the State's challenge to prospective juror Beverly Calhoun. Prior to allowing the State or defense to question her, the trial court asked Calhoun if she had any moral, religious, or conscientious objections to the death penalty. Calhoun said that her religious beliefs would prevent her from sentencing someone to death. She further stated that she could not participate as a juror and "would not be able to give a death sentence to anybody or, say, go that route." Calhoun never stated that she could follow the law and answer the special issues according to the evidence. Defense counsel objected to the challenge, but declined to question the juror. It is clear from the record that Calhoun's beliefs against capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath. *See Colburn,* 966 S.W.2d at 517. The trial court did not abuse its discretion in granting the State's challenge for cause. Point of error six is overruled.

[15] In point of error seven, appellant argues that venire person Juanita Prieto was improperly excused for cause. In her written juror questionnaire, Prieto stated that she did not feel that she could judge a death-penalty case and that she should not have the death penalty "on her hands." Following general voir dire by the trial court, Prieto requested to speak with the

judge. Prieto told the trial court: "I don't think I'm comfortable making the decision or answering [in a way] that will basically have you sentence him to death." She further stated that she could not sleep at night knowing her answers to the issues caused a death sentence to be imposed; this violated her conscience. The State challenged her at that time, but because defense counsel objected, the trial court had her brought back for individual voir dire.

At individual voir dire, the trial court inquired further into Prieto's feelings regarding the death penalty. The court explained to her that it did not matter whether the process made her feel uncomfortable; what the court needed to know was whether she had any moral, religious, or conscientious objections to the imposition of the death penalty in an appropriate capital-murder case. Prieto answered, "Yes." The trial court granted the State's challenge for cause over appellant's objection. Defense counsel did not attempt to elicit any further responses from Prieto.

It is clear from the record that Prieto's beliefs against capital punishment would prevent or substantially impair the performance of her duties as a juror. *See Colburn*, 966 S.W.2d at 517. The trial court did not abuse its discretion in granting the State's challenge for cause. Point of error seven is overruled.

[16] In his eighth point of error, appellant contends that the trial court abused its discretion in granting the State's challenge for cause to venire member Craig Fronckiewicz. The record shows that Fronckiewicz consistently stated that he would seek any and every mitigating factor that he could potentially find in order to ensure a life sentence. He stated that he would hold the State to a burden higher than the law required, and that he had essentially pre-judged the instant case because he would always find appellant's young age to be a sufficient mitigating circumstance under the second special issue. Following numerous questions by the State, the trial court stepped in to confirm his answer:

> [COURT]: That's why the question is being asked. We want to make sure that you can take an oath to follow the law, apply the facts to the evidence wherever it leads you. Because for you to sit on the jury, to potentially have an agenda such that you would answer these questions in such a way as to make sure the Defendant only gets life, it wouldn't be right. You would be lying to the Court, et cetera. You see what I'm saying? All we're trying to do is just establish, if you're selected to sit as a juror, you could follow the questions wherever they lead you.
>
> When you get to Special Issue No. 2, I don't know what you're going to hear. You may hear something mitigating. You may not hear something mitigating. It's up to each individual juror, and we gave examples of what might be mitigating, what might not be mitigating to another juror. The bottom line is, have you heard anything; and if you have, is it sufficient for you to give life instead of death. But to automatically give it just because you heard something mitigating wouldn't be right. Do you see what I'm saying? It all has to be weighed out and, I guess, that's where you always or would you—are you telling us that if you heard something mitigating, period, you would always say that was sufficient such that you would answer that question, yes.
>
> [Juror]: I would say that's a fair way of saying it. I think to be—almost any-

thing that would allow me to say yes to the second question.

The trial court did not abuse its discretion in granting the State's challenge for cause. This Court has upheld challenges for cause in similar situations. *See Colburn,* 966 S.W.2d at 518 (juror could honestly answer question but in his mind there would always be sufficient mitigating circumstances for a life sentence); *Smith v. State,* 907 S.W.2d 522, 529 (Tex.Crim.App.1995)(juror believed that "there are always mitigating circumstances in the nature of life" and so would always find sufficient mitigating circumstances). Point of error eight is overruled.

[17] In point of error nine, appellant complains regarding the State's challenge for cause to prospective juror Hubertus Thomeer. During initial voir dire by the trial court, Thomeer made it plain that, due to his religion, he would be unable to answer the special issues in such a way that the death penalty would be imposed. In order to obtain a final clarification of his response, the trial court asked the following:

[COURT]: Because of your religious and moral beliefs, would you answer these questions in such a way that [appellant] got life instead of death?

[Juror]: Yes.

The trial court did not abuse its discretion in granting the State's challenge for cause. *See Colburn,* 966 S.W.2d at 518; *Smith,* 907 S.W.2d at 529. Point of error nine is overruled.

[18] In his tenth point of error, appellant complains regarding venire member Donna Frac. In her juror questionnaire, Frac stated, "I don't feel that I can be truly honest with my feeling regarding capital murder." During individual voir dire by the State, she clarified her statement by agreeing that it would violate her conscience, morals, or religion to participate in the death-penalty process. The trial court continued to question Frac. Frac stated that the death penalty violated her conscience in that she did not "feel comfortable in making the decision in a death decision of someone," and that she did not think that she could "ultimately make that decision." The trial court sought further clarification and finally asked:

[COURT]: Hypothetically, if you were to sit on this jury, do you think that you would be inclined to answer these questions in such a way that the Defendant got life instead of death?

[Juror]: Yes, yes.

The trial court did not abuse its discretion in granting the State's challenge for cause. *See Clark v. State,* 929 S.W.2d 5, 8–9 (Tex.Crim.App.1996) (a prospective juror who maintains she will consciously distort her answers must be excused on challenge for cause); *see also Colburn,* 966 S.W.2d at 518; *Smith,* 907 S.W.2d at 529. Point of error ten is overruled.

[19] In point of error eleven, appellant complains regarding the trial court's granting of the State's challenge to Timothy Towsen. During voir dire, Towsen stated that it would violate his conscience to sit on the jury in a death-penalty case and that he could not do it. Towsen repeatedly told the trial court that he "wouldn't feel comfortable" sitting on a capital jury. The trial court explained that his comfort was irrelevant, but what was relevant was whether it would violate his conscience in such a way that he could not honestly answer the special issues knowing appellant could receive the death penalty. Towsen responded, "I can't." The State challenged Towsen for cause. Defense counsel did not conduct any voir dire, but objected to the challenge.

The trial court did not abuse its discretion in granting the State's challenge. The State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. *Adams,* 448 U.S. at 50, 100 S.Ct. 2521; *see also Lockett v. Ohio,* 438 U.S. 586, 595–96, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (no *Witherspoon* violation if prospective juror's conviction so strong he could not take oath, knowing death penalty possible). Point of error eleven is overruled.

[20] In point of error twelve, appellant avers the trial court erred in granting the State's challenge to prospective juror Matthew Stringer. Stringer stated in his written juror questionnaire that, "If this is a murder trial, I couldn't [be a juror] [be]cause the talk of death in any way make[s] me uncomfortable." During individual voir dire, the trial court attempted to get some clarification of this statement, and Stringer answered that "anything about [death]" bothered him. Again the trial court attempted to elicit a definitive answer from Stringer, and Stringer finally stated that he was morally and conscientiously opposed to the death penalty even in an appropriate capital-murder case. Defense counsel declined to question Stringer, but objected to the State's challenge for cause. As it is clear Stringer's personal feelings against capital punishment would prevent or substantially impair the performance of his duties as a juror, the trial court did not abuse its discretion in granting the State's challenge for cause. *See Colburn,* 966 S.W.2d at 517. Point of error twelve is overruled.

[21] In point of error thirteen, appellant argues that the trial court abused its discretion in granting the State's challenge to venire member Patricia Cruz. In her written juror questionnaire, Cruz stated, "We do not have the right to terminate God's life expectancy of that person," and that she was opposed to capital punishment under any circumstances. Upon entering the courtroom for individual voir dire, she immediately stated, "I plead the Fifth Amendment." In response to questioning by the trial court, Cruz indicated that she was against the death penalty for both religious and conscientious reasons, and that she had objections to the imposition of the death penalty in an appropriate capital-murder case. Neither the State nor the defense questioned her.

The trial court did not abuse its discretion in granting the State's challenge for cause over appellant's objection. *See King v. State,* 29 S.W.3d 556, 567–68 (Tex.Crim. App.2000) (no error in sustaining challenge to prospective juror who could not impose the death penalty). Point of error thirteen is overruled.

[22] In points of error fourteen and fifteen, appellant complains that the trial court erred when it denied his request for a jury charge on the lesser-included offense of murder. Specifically, he argues that the evidence could have allowed the jury to conclude that the two deaths did not occur in the "same transaction." He posits that the evidence shows that White's murder was his objective and that the death of the child was a completely separate transaction. Appellant contends that the jury could have believed that he killed Kristina only because she threatened him with a knife; thus the two murders were not the product of the same transaction.

[23–25] In determining whether appellant is entitled to a charge on a lesser-included offense, we must consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Goodwin v. State,* 799 S.W.2d 719, 740 (Tex.Crim.App.1990). This Court uses a two-pronged test in its review. *Rousseau*

v. State, 855 S.W.2d 666, 672–75 (Tex. Crim.App.1993); *Goodwin,* 799 S.W.2d at 740–41. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *Id.* Second, there must be some evidence in the record that would permit a rational jury to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should be given. *Banda v. State,* 890 S.W.2d 42, 60 (Tex.Crim.App.1994).

This Court has long held that murder is a lesser-included offense of capital murder. *See Feldman v. State,* 71 S.W.3d 738, 750 (Tex.Crim.App.2002); *Thomas v. State,* 701 S.W.2d 653, 656 (Tex.Crim.App.1985). Therefore, appellant has met the first prong of the test. However, appellant fails to meet the second prong. The evidence shows that almost immediately after shooting her mother, appellant exited the apartment and deliberately sought out Kristina, who was balled up in a defensive position behind a car with no weapon in her hand. With the same gun, he shot Kristina twice at point blank range and then stated he was going after Kristina's older sister. There is no evidence that Kristina ever threatened appellant with the knife or that he was ever aware that she had the knife in her possession. Furthermore, it is irrelevant whether Kristina threatened appellant with the knife. Even if appellant had originally intended only to kill White, there is no evidence that he did not kill Kristina during "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events." *See Feldman,* 71 S.W.3d at 752; *see also Massey v. State,* 933 S.W.2d 141, 155–56 (Tex. Crim.App.1996).

Given these facts, we conclude that there is no evidence in the record from which a rational trier of fact could determine that appellant was guilty only of murder. The trial judge did not err in refusing the instruction. Points of error fourteen and fifteen are overruled.

[26] In points of error sixteen and seventeen, appellant argues that the trial court erred in failing to define the term "same criminal transaction" in the jury charge. He contends that the term is vague and may be inconsistently applied. Appellant further argues that he specifically was harmed because whether the deaths were caused "during the same criminal transaction" was at issue in his case.

[27] The Texas Legislature did not define the term "same criminal transaction." *See Feldman,* 71 S.W.3d at 752. Words which are not statutorily defined are to be given their usual meanings, and no specific instructions are required. *Martinez v. State,* 924 S.W.2d 693, 698 (Tex.Crim.App. 1996); *Garcia v. State,* 887 S.W.2d 846, 859 (Tex.Crim.App.1994). Because jurors are presumed to attach a common understanding to the meaning of this term, there was no error in rejecting appellant's request for a definition. Further, as there was no evidence in the record from which a rational jury could find appellant was guilty only of murder (*see* points of error fourteen and fifteen, *supra*), any error resulting from the failure to define "same criminal transaction" would not have contributed beyond a reasonable doubt to appellant's conviction or punishment. *See* TEX.R.APP. P. 44.2. Points of error sixteen and seventeen are overruled.

[28] In points of error eighteen and nineteen, appellant contends that the trial court erred in admitting State's Exhibits 73 and 74 over his objection that they

violated his Sixth Amendment right to confront and cross-examine the witnesses against him. We agree that the admission of certain portions of State's Exhibit 73 violated appellant's Sixth Amendment rights; however, appellant was not harmed by their admission.

State's Exhibits 73 and 74 are penitentiary packets containing "TDCJ–ID disciplinary report and hearing records" regarding appellant's conduct within the prison population during some previous incarcerations. The trial court admitted these reports under the business records exception to the hearsay rule. *See* TEX.R. EVID. 803(6). The records contained offense descriptions, and most of the documents designated that the evidence came from the "officer's report" although the officers' reports were not included in the admitted documents. The record further reflects that offense descriptions from the disciplinary reports were read aloud to the jury at the punishment phase.

In *Russeau v. State*, 171 S.W.3d 871, 880 (Tex.Crim.App.2005), we held that jail records containing specific incident reports written by corrections officers graphically documenting their detailed observations of the defendant's numerous disciplinary offenses were testimonial and inadmissible under *Crawford v. Washington*, 541 U.S. 36, 51–55, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), when those officers did not testify at trial. We specifically held that "[t]he trial court erred in admitting *those portions* of the reports that contained the testimonial statements." *Russeau*, 171 S.W.3d at 881 (emphasis added). Only those portions of the otherwise admissible jail business records that contained testimonial descriptions of specific facts and observations were inadmissible. We have further held that "boilerplate" language that does not contain any such testimonial statements, narratives of specific events, or written observations is admissible. *See Segundo v. State*, 270 S.W.3d 79, 106–07 (Tex.Crim.App.2008) (op. on reh'g). Texas courts have recognized this distinction between (1) official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a bare-bones disciplinary finding and (2) a factual description of specific observations or events that is akin to testimony.[3]

The disciplinary report and hearing records in State's Exhibits 73 and 74 mostly contain bare-bones recitations of infractions committed by appellant or involve trivial non-violent disciplinary violations. The violations include, for example: failure

3. *See Campos v. State,* 256 S.W.3d 757, 761–62 (Tex.App.-Houston [14th Dist.] 2008, pet. ref'd.) (holding that admission of autopsy report did not violate Confrontation Clause and explaining that distinction between a testimonial and non-testimonial report does not "depend solely on the inclusion or omission of detailed and graphic personal observations, but rather on the extent to which the records are either sterile recitations of fact or a subjective narration of events" related to the person's potential guilt); *Azeez v. State,* 203 S.W.3d 456, 466 (Tex.App.-Houston [14th Dist.] 2006) (challenged records contained sterile recitations and were admissible over *Crawford* Confrontation Clause objection), *rev'd on other grounds,* 248 S.W.3d 182 (Tex. Crim.App.2008); *Grant v. State,* 218 S.W.3d 225, 229–32 (Tex.App.-Houston [14th Dist.] 2007, pet. ref'd) (some entries in high school disciplinary records contained testimonial statements; "Because the State did not show that the various teachers and school administrators who provided these statements were both unavailable to testify and had been cross-examined previously, we hold the trial court erroneously admitted the testimonial portions of these records."); *Ford v. State,* 179 S.W.3d 203, 208–09 (Tex.App.-Houston [14th Dist.] 2005, pet. ref'd) (upholding admission of inmate disciplinary records that contained only a sterile recitation of offenses and the punishments received).

to show up for work assignments, failure to show up for medical appointments, being in a place he was not supposed to be at that time, and unauthorized exchange of commodities such as soup, cookies and candy. Although these are trivial infractions, the reports still contain testimonial statements regarding appellant's conduct.

However, two particular documents go beyond a sterile description and violate appellant's rights as set out in *Russeau*. The reports contain descriptions of the offenses which appear to have been copied from the corrections officers' reports and which purport to document, in detailed terms, appellant's disciplinary offenses. Appellant pleaded "not guilty" to the offenses and the hearings took less than six minutes. Appellant's alleged disciplinary offenses included fighting with another inmate in the showers and exposing himself and masturbating in front of a jailer. None of the individuals who supposedly observed appellant's disciplinary offenses testified at the instant trial.

These disciplinary reports contain testimonial statements which were inadmissible under the Confrontation Clause because the State did not show that the declarants were unavailable to testify, and appellant never had an opportunity to cross-examine any of them. *Russeau*, 171 S.W.3d at 880. The trial court erred in admitting those portions of the reports that contain the testimonial statements.

[29] Having found constitutional error, we need not reverse the trial court's judgment if we conclude beyond a reasonable doubt that the error did not contribute to appellant's punishment. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see generally*, W. LaFave, et al., Criminal Procedure § 27.6(e) (2d ed. 1999). Here, although the inadmissible reports were read aloud to the jury, they were never emphasized again by the State in any way. The State concentrated its punishment arguments on the heinousness of the capital murder itself and appellant's disregard for anyone but himself.[4] Given the record before us, we conclude beyond a reasonable doubt that appellant was not harmed by the introduction of this evidence. *Cf. Russeau*, 171 S.W.3d at 881. Points of error eighteen and nineteen are overruled.

[30] In appellant's twentieth point of error, he argues that the Texas lethal-injection protocol violates the Eighth and Fourteenth Amendments to the federal constitution. Because appellant's execution is not imminent, his claim is not ripe for review. *Gallo v. State*, 239 S.W.3d 757, 780 (Tex.Crim.App.2007). Furthermore, appellant did not litigate this issue in the trial court, and so the record is not sufficiently developed for this Court to resolve his claim. *See Bible v. State*, 162 S.W.3d 234, 250 (Tex.Crim.App.2005). Appellant's twentieth point of error is overruled.[5]

In points of error twenty-one and twenty-two, appellant argues that the Texas capital sentencing scheme is unconstitutional because it fails to assign a burden of proof on the mitigation special issue, and that the trial court erred in rejecting his request for an instruction assigning the burden to the State. We have previously rejected this argument. *See Blue v. State*,

4. The one jail altercation referred to by the State in closing arguments took place in the county jail shortly after appellant's arrest for the immediate offense. This altercation was documented in an exhibit not objected to by appellant.

5. We note that the Supreme Court recently held in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), that the Kentucky lethal-injection protocol, which is very similar to the Texas protocol, does not violate the Eighth Amendment.

125 S.W.3d 491, 500–01 (Tex.Crim.App. 2004). Further, this Court has held that the mitigation special issue is a defensive issue in which the State has no burden of proof. *Williams v. State*, 273 S.W.3d 200, 221–22 (Tex.Crim.App.2008). Points of error twenty-one and twenty-two are overruled.

Appellant contends in his twenty-third point of error that Article 37.071 is unconstitutional under the Eighth and Fourteenth Amendments because the mitigation special issue permits the very type of open-ended discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). We have previously rejected this claim, and appellant raises nothing new to persuade us to reconsider this issue. *See Raby v. State*, 970 S.W.2d 1, 7 (Tex.Crim.App.1998); *Pondexter v. State*, 942 S.W.2d 577, 586–87 (Tex.Crim.App.1996). Point of error twenty-three is overruled.

In point of error twenty-four, appellant posits that the mitigation issue is unconstitutional because meaningful appellate review of the sufficiency of the evidence is impossible. We have rejected the claim that the issue deprives a defendant of "meaningful appellate review" under the federal constitution. *Russeau*, 171 S.W.3d at 886; *Prystash v. State*, 3 S.W.3d 522, 535–36 (Tex.Crim.App.1999); *Green v. State*, 934 S.W.2d 92, 106–07 (Tex.Crim.App.1996); *McFarland v. State*, 928 S.W.2d 482, 498–99 (Tex.Crim.App.1996). Point of error twenty-four is overruled.

In point of error twenty-five, appellant contends that Article 37.071 is unconstitutional because the death penalty constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. Relying upon Justice Blackmun's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting), appellant claims that the Texas scheme violates the prohibition against cruel and unusual punishment because it is the product of paradoxical constitutional commands. This Court has repeatedly rejected this argument. *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex.Crim.App.2004); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999); *McFarland*, 928 S.W.2d at 520. This point of error is overruled.

Finally, in appellant's twenty-sixth point of error, he contends that Article 37.071 violates the Eighth and Fourteenth Amendments because it fails to require that jurors be informed that a single hold-out juror on any special issue would result in an automatic life sentence. Appellant further argues that the "10–12 rule" violates the Eighth Amendment principles discussed in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and that the trial court violated his constitutional rights by instructing the jury in this manner. We have previously decided these issues adversely to appellant. *Russeau*, 171 S.W.3d at 886 (10–12 Rule); *Shannon v. State*, 942 S.W.2d 591, 600–01 (Tex.Crim.App.1996) (single hold-out juror); *Lawton v. State*, 913 S.W.2d 542, 558–59 (Tex.Crim.App.1995) (single hold-out juror and 10–12 Rule). Point of error twenty-six is overruled.

We affirm the judgment of the trial court.

KEASLER, J., filed a concurring opinion.

PRICE, WOMACK, and JOHNSON, JJ., concurred.

KEASLER, J., concurring.

I join the Court's opinion with the exception of its resolution of points of error

eighteen and nineteen.[1] I would hold that State's Exhibits 73 and 74, the TDCJ–ID penitentiary packets containing disciplinary reports and hearing records concerning Demetrius Dewayne Smith's past prison conduct, are business records that do not constitute testimonial hearsay under *Crawford v. Washington.*[2] The analysis set out in *Ohio v. Roberts*[3] controls, and because the records fall within a firmly rooted hearsay exception, Smith's rights under the Confrontation Clause were not violated.

Ex parte Armando Cortez ARCE, Applicant.

No. AP–76,098.

Court of Criminal Appeals of Texas.

June 24, 2009.

Rehearing Denied Aug. 19, 2009.

Background: After his conviction for failure to register as a sex offender, defendant filed application for a writ of habeas corpus, alleging that his sentence for sexual assault had discharged on effective date of retroactive sex offense registration law. The application was forwarded from the 206th District Court, Hidalgo County, Rose Guera Reyna, J.

Holding: The Court of Criminal Appeals, Keller, P.J., held that defendant was required to register.

Writ denied.

Mental Health ⚿469(2)

Defendant had not discharged his sentence for sexual assault on the effective date of the retroactive sex offender registration law, and thus he was required to register as a sex offender, although defendant had been released prior to effective date and original 10-year sentence would have expired prior to that date, where defendant had a four-year sentence for an in-prison weapons conviction stacked onto his original sentence, and after release defendant's mandatory supervision was revoked; since defendant's sentences had been stacked under prior scheme and were considered a single sentence for the purpose of obtaining early release, the effect of the revocation of defendant's mandatory supervision was that his sex-offense sentence had not been discharged on effective date. Vernon's Ann.Texas C.C.P. art. 62.11 (2005).

Nicolas R. Hughes, Huntsville, for Appellant.

Theodore C. Hake, Assistant Criminal District Attorney, Edinburg, Jeffrey L. Van Horn, State's Attorney, Austin, for State.

KELLER, P.J., delivered the opinion of the Court in which MEYERS, WOMACK, KEASLER, HERVEY and HOLCOMB, JJ., joined.

Applicant challenges the validity of his conviction for failure to register as a sex offender. The resolution of his claim de-

1. *Russeau v. State,* 171 S.W.3d 871, 887–88 (Tex.Crim.App.2005) (Keasler, J., dissenting.).

2. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

3. 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEMETRIUS DEWAYNE SMITH, *Petitioner*,	§	
v.	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent*.	§	ACTION NO. 4:15-CV-707 (Death Penalty Case)

NOTICE OF APPEAL

Notice is given that Director Lorie Davis, Respondent in the above-named case, appeals to the United States Court of Appeals for the Fifth Circuit the Memorandum and Order (ECF No. 29), entered on March 23, 2018, and the Amended Final Judgment (ECF No. 34), entered on April 16, 2018, conditionally granting Petitioner Demetrius Smith a writ of habeas corpus.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I do herby certify that on April 20, 2018, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Southern District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Electronic Filing" (NEF) to the following counsel of record, who consented in writing to accept the NEF as service of this document by electronic means:

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Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEMETRIUS DEWAYNE SMITH	§	
	§	
Petitioner,	§	
	§	
	§	
-vs-	§	CIVIL NO. 4:15-CV-00707
	§	
	§	* CAPITAL CASE*
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

NOTICE OF CROSS-APPEAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE VANESSA D. GILMORE:

Petitioner Demetrius Dewayne Smith appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment of this Court entered in this case on April 16, 2018. Petitioner appeals to the Court of Appeals the Court's decision that he is not entitled to a certificate of appealability on his claims that: 1) He was deprived an

impartial jury by the trial court's removing for cause venireperson Cruz because she had conscientious or religious scruples against the death penalty in violation of the Sixth and Fourteenth Amendments to the United States Constitution; 2) He was deprived the effective assistance of counsel in the sentencing phase of his capital murder trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution; and 3) The "evolving standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments prohibit the execution of the severely mentally ill.

Respectfully submitted,

s/ David R. Dow

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CERTIFICATE OF SERVICE

I certify that on May 8, 2018, I electronically filed the foregoing pleading with the Clerk for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. A notice of filing was sent to Matthew Dennis Ottoway, attorney for Respondent Davis.

s/ Jeffrey R. Newberry

_____

Jeffrey R. Newberry