No. 19-6482

IN THE
Supreme Court of the United States

DEMETRIUS DEWAYNE SMITH,
Petitioner,
v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TRAVIS G. BRAGG
Assistant Attorney General
Counsel of Record

Post Office Box 12548
Capitol Station
Austin, Texas 78711
512.936.1400
Travis.Bragg@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a jurisdictional question which has already been answered by the plain readings of both statutory and case law as well as the Federal Rules of Appellate Procedure.

2. Whether the Court should expend its limited resources to engage in further factual review and error correction of a high state court's decision on Smith's claim that a veniremember was improperly removed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

I. Trial Proceedings 2

II. State Direct Appeal 7

III. Federal Habeas Proceedings 9

REASONS FOR DENYING THE WRIT 12

I. This Court Should Deny Certiorari on Smith's First Question Because Plain Readings of 28 U.S.C. § 2253, Federal Rule of Appellate Procedure 22, and Supreme and Circuit Court Case Law, Clearly Do Not Require the State or Its Representative to Obtain a COA to Appeal a Grant of Habeas Relief. 12

II. This Court Should Deny Certiorari on Smith's Second Question Because Smith Simply Seeks Error Correction of the Fifth Circuit's Review of the State Court Decision, Which Was Not Objectively Unreasonable. 17

A. The proper standard of review 17

B. The state court's rejection of Smith's claim regarding the removal of Stringer was not objectively unreasonable. 19

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Adams v. Quarterman, 324 F. App'x 340 (5th Cir. 2009)........................34
Adams v. Texas, 448 U.S. 38 (1980)... 7, 17, 19
Burt v. Titlow, 571 U.S. 12 (2013) 20
Darden v. Wainwright, 477 U.S. 168 (1986)............................... 23, 24, 33
Dunn v. Madison, 138 S. Ct. 9 (2017) 18
Gonzalez v. Thaler, 565 U.S. 134 (2012) 12, 15
Harrington v. Richter, 562 U.S. 86 (2011) 18
Jennings v. Stephens 135 S. Ct. 793 (2015) 11, 13, 14
Lurie v. Wittner, 228 F.3d 113 (2d Cir. 2000) 16
Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000) 16
Ortiz v. Quarterman, 504 F.3d 492 (5th Cir. 2007) 19, 23, 24, 35
Reynolds v. United States, 98 U.S. 145 (1879)...30
Sutton v. Pfister, 834 F.3d 816 (7th Cir. 2016) 16
Szabo v. Walls, 313 F.3d 392 (7th Cir. 2002)..14
United States v. Cotton, 535 U.S. 625 (2002)...15
United States v. Gutman, 711 F. App'x 20 (2d Cir. 2017) 30
United States v. Snarr, 704 F.3d 368 (5th Cir. 2013).............................34
Uttecht v. Brown, 551 U.S. 1 (2007).. passim
Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001) 19
Varga v. Quarterman, 321 F. App'x 390 (5th Cir. 2009) 35
Wainwright v. Witt, 469 U.S. 412 (1985) .... passim
White v. Wheeler, 136 S. Ct. 456 (2015) .... passim
White v. Woodall, 134 S. Ct. 1697 (2014)..20

Williams v. Taylor, 529 U.S. 362 (2000) 18
Wilson v. Beard, 589 F.3d 651 (3d Cir. 2009) 16
Witherspoon v. Illinois, 391 U.S. 510 (1968) .... passim

Statutes

28 U.S.C. § 2253 .... 10, 11, 12, 13
28 U.S.C. § 2253(c) 12, 14, 15
28 U.S.C. § 2253(c)(2) 13
28 U.S.C. § 2254 17
28 U.S.C. § 2254(d) 12, 18, 28, 35
28 U.S.C. § 2254(d)(1) 18
28 U.S.C. § 2254(d)(2) 18
28 U.S.C. § 2254(e)(1) 11
28 U.S.C. § 2254(e)(1) 18

Rules

Fed. R. App. P. 22 .... 12, 15
Fed. R. App. P. 22(b)(3) 10, 15, 16
Sup. Ct. R. 10 16

BRIEF IN OPPOSITION

Petitioner Demetrius Dewayne Smith is a Texas inmate convicted of capital murder and sentenced to death. Smith appealed his conviction in the Court of Criminal Appeals (CCA) alleging, inter alia, that several members of the venire were improperly removed because of their general opposition to the death penalty, including Matthew Stringer. The CCA rejected these claims on the merits.

After seeking state habeas relief, Smith filed a federal habeas petition raising multiple grounds for relief, including his claims regarding the improper removal of Stringer. The district court found that Stringer was improperly removed and that the CCA's rejection of this claim on direct appeal was objectively unreasonable. Thus, it granted conditional habeas relief on that claim alone. But it denied relief and a certificate of appealability (COA) on all other claims.

Respondent Lorie Davis (the Director) appealed this decision to the Fifth Circuit Court of Appeals. During oral argument proceedings, Smith for the first time asserted that the appellate court lacked jurisdiction because the Director did not first seek a COA from the court. In a published opinion, the Fifth Circuit held that a COA was not required for

the State to appeal. The appellate court also overturned the district court's grant of habeas relief finding that the CCA's decision was not unreasonable. Smith now seeks certiorari review from this Court on both issues. However, he fails to identify any compelling reasons for this Court to expend its limited judicial resources on further review. Thus, his petition should be denied.

STATEMENT OF THE CASE

I. Trial Proceedings

Smith shot to death his estranged girlfriend, Tammie Harris, and her eleven-year-old daughter, Kristina, within moments of each other.[1] *See Smith v. State*, 297 S.W.3d 260, 264 (Tex. Crim. App. 2009). For this, Smith was indicted for capital murder for the murder of more than one person during the same criminal transaction. ROA.867. Voir dire began on May 8, 2006. ROA.2210.

It appears to have proceeded in the typical fashion for capital cases in Texas. Questionnaires were sent to the venire and returned for review by the parties. *See, e.g.*, ROA.2211. The venire was divided into panels of

[1] The Director pretermits an extensive discussion of the facts underlying Smith's capital murder conviction as the only issue presently before the Court concerns matters arising from voir dire.

about seventy-five (sometimes referred to as "mini-panels" in Texas practice). *See, e.g.*, ROA.2211. Before a panel was seated, the parties would agree to excuse certain individuals. *See, e.g.*, ROA.2211–16. After dismissing the agreed excusals, the trial judge would conduct a general voir dire. *See, e.g.*, ROA.2213–52. The parties would then agree to excuse even more veniremembers. *See, e.g.*, ROA.2259–61. The remaining veniremembers would be questioned individually, usually beginning with the trial judge, followed by prosecutors, and then defense counsel. *See, e.g.*, ROA.2336–76. After questioning, the length of which varies per veniremember, the veniremember would either be excused by agreement, removed for cause, peremptorily struck, or accepted as a juror. *See, e.g.*, ROA.2376. This process continued until twelve jurors and two alternates were empaneled. *See* ROA.4010 (the twelfth juror), ROA.4083 (the first alternate), ROA.4120 (the second alternate).

This appeal concerns a single veniremember—Matthew Stringer. Stringer attended a general voir dire on May 18, 2006. ROA.3542, 3797. There, the trial judge explained that the veniremembers had been called for a capital murder case in which prosecutors were seeking a death sentence. ROA.3543. She also explained that the questionnaires were

relevant to the sentence sought—to provide insight into "who you are, how you feel, and how you think about things, specifically the death penalty." ROA.3543.

The trial judge inquired as to which veniremembers had previously served on a jury, told them that indictments were not evidence, explained that Smith was presumed innocent, and instructed them that the State bore the burden of proof beyond a reasonable doubt. ROA.3546–55, 3562–66. She went on to explain the elements of capital murder, that all witnesses begin with the same level of credibility, and that no adverse inference may be drawn from a defendant's choice not to testify at trial. ROA.3555–62, 3566–71.

The trial judge then turned to capital sentencing. She described the process, specifically the special issues (future dangerousness and mitigation), where the burdens of proof lie on those issues, and the type of evidence that might be presented and must be considered. ROA.3572–83. She concluded by explaining that, if the veniremembers answered "yes" to the future danger and "no" to the mitigation special issues, she would have no choice but to assess a sentence of death and, given that,

the veniremembers must "be able to take that oath, keep an open mind, and follow the law wherever it leads you." ROA.3582–83.

Stringer's individual voir dire occurred four days later on May 22, 2006. ROA.3764, 3797. The trial judge began by saying, "I noticed you the other day. I noticed that you were paying attention to what I was saying." ROA.3797. Immediately thereafter, she stated that "this is a very important case with potentially a very serious potential punishment," and then asked Stringer whether he had "any moral, religious, or conscientious objection to the imposition of death in an appropriate capital murder case?" ROA.3797. Stringer responded, "Death bothers me a little bit. Makes me uncomfortable talking about it, but other than that." ROA.3798. The trial judge followed up,

> 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 people 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 when 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. You are [number] 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?

ROA.3798–99. Stringer answered that question by saying, "Anything about it pretty much." ROA.3799. This prompted the trial judge to follow up again,

> 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 case?

ROA.3799. Stringer answered in the affirmative, saying that he had moral and conscientious objections. ROA.3799–800. Prosecutors then challenged Stringer. ROA.3800. The trial judge invited defense counsel

to question Stringer, but counsel declined the offer, stating that he did not believe that Stringer was "disqualified." ROA.3800.

The trial judge granted the challenge and defense counsel objected "under the Sixth, Eighth, and Fourteenth Amendments," mentioning a "right to a fair and impartial jury and the right to be free from cruel and unusual punishment[.]" ROA.3800. A jury was eventually empaneled and found Smith guilty of capital murder. ROA.4639. They also answered the special issues in a way that required imposition of a sentence of death. ROA.5123–24, 5126–27.

II. State Direct Appeal

On direct appeal, Smith alleged that Stringer (and other veniremembers not at issue here) was improperly removed from the venire in contravention of the Sixth and Fourteenth Amendments, relying on *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Adams v. Texas*, 448 U.S. 38 (1980). ROA.585–87, 594. This is because, according to Smith, Stringer was "a prospective juror who simply appreciate[d] the seriousness of what is involved in a death penalty case," but not a veniremember who was "disqualified under *Witherspoon* and *Adams*." ROA.594. The State disagreed with Smith's argument and opposed relief.

ROA.779–72, 798–99. In doing so, it supplemented the record on appeal with the questionnaires and information cards for the veniremembers Smith challenged on appeal, including Stringer. ROA.782, 825–26, 829–31, 8135–51.

The CCA considered Smith's point of error regarding Stringer and overruled it. ROA.696–97. It noted that Stringer, in his questionnaire, stated "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.'" ROA.696 (alterations in original). It also noted that the trial judge "attempted to get some clarification of this statement," that "Stringer answered that 'anything about [death]' bothered him," and that when the trial judge tried to get "a definitive answer" regarding this latter statement, "Stringer finally stated that he was morally and conscientiously opposed to the death penalty even in an appropriate capital-murder case." ROA.696 (alteration in original). It further recognized that "[d]efense counsel declined to question Stringer, but objected to the State's challenge for cause." ROA.696–97. It then 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." ROA.697. Smith's conviction and sentence were affirmed. ROA.706.

III. Federal Habeas Proceedings

Following the completion of Smith's state habeas process, Smith filed a federal habeas petition, ROA.27–100, which he eventually amended, ROA.142–255. Relevant here, Smith complained that the removal of Stringer from the venire was in violation of *Witherspoon* and that the CCA's rejection of this claim on direct appeal "was unreasonable in light of Supreme Court precedent." ROA.163–68, 171–77. The Director opposed, providing multiple rationales for why the state-court decision was objectively reasonable. ROA.358–67, 373–77.

The district court agreed with Smith. ROA.444–48. In doing so, the court noted that, unlike the veniremember in *Wainwright v. Witt*, 469 U.S. 412 (1985), Stringer never "specifically stated that [his] personal reservations about the death penalty would 'interfere with judging guilt or innocence of the Defendant in this case.'" ROA.446 (quoting ROA.366). The court also noted that, while Stringer "said that he was 'uncomfortable' with the death penalty, [he] 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." ROA.447. Finally, the court referenced Stringer's questionnaire, pointing out that Stringer believed the death penalty "should be used on the worst of crimes" and that he would "consider all of the penalties provided by the law and the facts and circumstances of the particular case." ROA.447 (quoting ROA.8148–49). As such, the court determined that the CCA's decision with regard to Stringer was "an unreasonable application of *Witherspoon* and its progeny to the facts of this case." ROA.448.

The Director appealed this decision to the Fifth Circuit and argument was held. *Smith v. Davis*, 927 F.3d 313, 317–19 (5th Cir. 2019); Pet.App.A 3–4. During oral argument, Smith for the first time asserted that the appellate court lacked jurisdiction because the Director was required to obtain a COA from the court under 28 U.S.C. § 2253. Pet.App.A 4. Smith further argued that Federal Rule of Appellate Procedure 22(b)(3) impermissibly conflicts with § 2253 by exempting the State or its representative from the COA requirement. Pet.App.A 4.

In a published opinion the Fifth Circuit disagreed with this logic and held that in this case the State's representative, the Director, was

not required to obtain a COA before proceedings with her appeal. Pet.App.A 4–7. The appellate court relied on the procedural history of *Jennings v. Stephens* 135 S. Ct. 793 (2015), as at least a strong indication, if not indeed an implicit holing, that the COA requirement of § 2253 does not apply to the State or its representative. Pet.App.A 4–6. The court also found that § 2253, by its plain requirement of a showing of the denial of a constitutional right, clearly cannot apply to the government "acting in its capacity to enforce federal criminal laws . . . ." Pet.App.A 6–7. Finally, the court noted that no circuit court has ever required the government to obtain a COA when appealing a grant of habeas relief. Pet.App.A 7.

Regarding the Stringer claim, the Fifth Circuit found that the district court failed to afford the proper deference to the CCA's factual determinations under 28 U.S.C. § 2254(e)(1). Pet.App.A 12–29. When viewed in the proper light, the appellate court held that there was, at the very least, "an ambiguity as to Stringer's ability to set aside his personal views and follow" the law. Pet.App.A 26. As such, the state courts were "entitled to resolve the ambiguity in favor of the State." Pet.App.A 26. Thus, the Fifth Circuit held that the CCA's decision was neither an unreasonable determination of the facts in light of the evidence nor an

unreasonable application of this Court's precedent. Pet.App.A 29 (applying 28 U.S.C. § 2254(d)). As such, the Fifth Circuit reversed the district court's decision to the extent it granted habeas relief on the Stringer claim. Smith now seeks a writ of certiorari from this Court to review both determinations by the Fifth Circuit. *See generally* Pet. for Writ of Cert. (Pet.).

REASONS FOR DENYING THE WRIT

I. This Court Should Deny Certiorari on Smith's First Question Because Plain Readings of 28 U.S.C. § 2253, Federal Rule of Appellate Procedure 22, and Supreme and Circuit Court Case Law, Clearly Do Not Require the State or Its Representative to Obtain a COA to Appeal a Grant of Habeas Relief.

In his first question presented, Smith contends that the Fifth Circuit lacked jurisdiction over the appeal because the State did not first obtain a COA. Smith urges three arguments in favor of this proposition. *First*, Smith maintains that 28 U.S.C. § 2253(c) requires a COA to issue before the appeal can proceed and that this requirement is jurisdictional in nature. Pet. 10–12. As this applies to a habeas petitioner, the Director agrees with Smith. *See Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012). However, Smith goes a step further by asserting that, because § 2253(c)

does not distinguish between a petitioner and the government, it necessarily applies to both. Pet. 12–13.

But this simply cannot be the case. Section 2253(c)(2) requires the applicant to make "a substantial showing of the denial of a constitutional right" to obtain a COA. And as the Fifth Circuit correctly noted, the government does not hold "constitutional rights" when acting in its capacity to enforce criminal laws. *See* Pet.App.A 6. Because the government can never make a substantial showing of such rights, then by Smith's reading of § 2253, it would be jurisdictionally foreclosed from the federal habeas appeals process. Congress cannot have intended this. Thus, the plain reading of § 2253 necessarily must be that the COA requirements apply only to habeas petitioners as they are the only ones that can allege the deprivation of a constitutional right.

Second, Smith argues that the Fifth Circuit misapplied *Jennings* because that case did not squarely address the issue presented here. Pet. 13–16. Smith notes that the parties did not raise the question of whether the COA requirement of § 2253, which Smith admits is jurisdictional, applies to the government. Pet. 14. Thus, per Smith, "neither the Fifth

Circuit nor this Court considered this jurisdictional question before proceeding to the merits." Pet. 14.

But Smith misses the point. Although the specific jurisdictional question here was not expressly presented by the parties in *Jennings*, it stared both the Fifth Circuit and this Court square in the face. In *Jennings*, the petitioner received habeas relief, and the Director appealed without seeking a COA. 135 S. Ct. at 798. Jennings cross-appealed also without seeking a COA. *Id.* The Fifth Circuit determined that, while it necessarily believed it had jurisdiction over the State's appeal, it lacked jurisdiction to review Jennings's claims. *Id.* This Court reversed and remanded instructing the Fifth Circuit to consider Jennings's arguments insofar as they countered the Director's assertions and provided a basis to uphold the district court's judgment. *Id.* at 802.

In doing so this Court 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,'" *Id.* at 802 (quoting *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002)). In stating this, the Supreme Court necessarily found that the Fifth Circuit had

jurisdiction to entertain the Director's appeal without a COA. Although neither party challenged the Fifth Circuit's ability to hear the Director's appeal despite the lack of a COA, "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented." *Gonzalez*, 565 U.S. at 141 (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)). And as the Fifth Circuit noted, to find this reading of *Jennings* erroneous is to say that this Court, the Fifth Circuit, and indeed all its sister circuits continue to turn a blind eye to a jurisdictional bar that has existed for more than two decades even when directly faced with the underlying issue. *See* Pet.App.A 6–7.

Third, Smith reasons that, per his reading of § 2253(c), Federal Rule of Appellate Procedure 22 cannot apply here because it would confer jurisdiction in direct contradiction with a federal statute. Rule 22—titled "Habeas Corpus and Section 2255 Proceedings"—is a part of Title VI—named "Habeas Corpus; Proceedings In Forma Pauperis." Rule 22(b)(3) provides that a COA is not required when a state or its representative appeals. When taking this rule, the context provided by its title, and a plain reading of § 2253(c), which requires only that a petitioner-applicant

make a substantial showing of the denial of a constitutional right because only s/he can make such a showing, then it seems necessary that Rule 22(b)(3) applies to federal habeas proceedings. Indeed, the Fifth Circuit along with several circuit courts do exactly that by not requiring a COA from the state or its representative. *See Malchi v. Thaler*, 211 F.3d 953, 956 (5th Cir. 2000) (citing Fed. R. App. P. 22(b)(3)) (holding that a COA is not required because a representative of the state is appealing the district court's grant of habeas relief); *Sutton v. Pfister*, 834 F.3d 816, 819-20 (7th Cir. 2016) (same); *Wilson v. Beard*, 589 F.3d 651, 657 (3d Cir. 2009) (same); *Lurie v. Wittner*, 228 F.3d 113, 121 (2d Cir. 2000) (same).

Smith's first question presented is not a novel, or even difficult, one. He has not identified a conflict among the circuits on this issue. In fact, he does not cite a single case where a court held that the State was required to seek a COA. Nor does he identify a similar case currently pending review on this issue in the Court. Smith has not furnished any compelling reason to grant certiorari review of this issue. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). As such, the Court should deny certiorari as to his first question.

II. This Court Should Deny Certiorari on Smith's Second Question Because Smith Simply Seeks Error Correction of the Fifth Circuit's Review of the State Court Decision, Which Was Not Objectively Unreasonable.

Smith next asks the court to review his claim that a veniremember, Matthew Stringer, was improperly removed from the panel in contravention of this Court's holdings in *Witherspoon*, *Adams*, and *Witt*. In granting habeas relief, the district court did what the federal habeas standard of review prohibits—it elevated its view of the facts over that of the state court's by failing to afford the substantial deference a state-court decision is due. That court ignored or significantly minimized numerous justifications demonstrating the objective reasonableness of the state-court decision rejecting Smith's claim. In applying the appropriate deference to the state court's findings of fact and its resolution of the claim in favor of the State, the Fifth Circuit reversed the district court's judgment on this issue and found the state court's decision was not objectively unreasonable. Pet.App.A 8–29.

A. The proper standard of review

"The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of

1996 (AEDPA)." *Harrington v. Richter*, 562 U.S. 86, 97 (2011). Under § 2254(d), relief must be denied unless the state-court adjudication (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court, (2) "'involved an unreasonable application of' such law," or (3) "'was based on an unreasonable determination of the facts' inlight of the record before the state court." *Id.* at 100 (quoting § 2254(d)(1)–(2)) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

"A habeas petitioner meets this demanding standard only when he shows that the state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Dunn v. Madison*, 138 S. Ct. 9, 11 (2017) (per curiam) (quoting *Richter*, 562 U.S. at 103). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

AEDPA also provides that state-court factual findings "shall be presumed to be correct" unless an inmate carries "the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1). "The presumption of [factual] correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings

which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001).

B. The state court's rejection of Smith's claim regarding the removal of Stringer was not objectively unreasonable.

A veniremember in a capital case cannot be removed for cause "simply because [he or she] voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, 391 U.S. at 522. Exclusion for cause, however, is proper when the veniremember's "views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45). In other words, a challenge for cause may be granted "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id*. at 425–26.

"Whether a [veniremember] is excludable under the *Witherspoon-Witt* standard is a question of fact." *Ortiz v. Quarterman*, 504 F.3d 492, 501 (5th Cir. 2007). "[R]eviewing courts are to accord deference to the trial court. 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. . . . And the finding may be upheld even in the absence of clear statements from the [veniremember] that he or she is impaired[.]" *Uttecht v. Brown*, 551 U.S. 1, 7 (2007). "And where, as here, the federal courts review a state-court ruling under the constraints imposed by AEDPA, the federal court must accord an additional and 'independent, high standard' of deference." *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (per curiam).

"As a result, federal habeas review of a *Witherspoon-Witt* claim—much like federal habeas review of an ineffective-assistance-of-counsel claim—must be 'doubly deferential.'" *Id*. (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). The "critical question" is this: "Was the [state court]'s decision to affirm the excusal of [a veniremember] for cause 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for a fairminded disagreement?'" *Id*. at 461 (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)). The answer here is "no."

During voir dire, Stringer was asked whether he had "any moral, religious, or conscientious objection to the imposition of death in an appropriate capital murder case?" ROA.3797 (hereinafter "the appropriate-case question"). This question was not simply seeking Stringer's broad views on the death penalty, as the district court believed. *See* ROA.447. Rather, the question sought to discover whether Stringer could "impos[e]," or whether he would "object[]" to, a sentence of death "in an appropriate capital murder case."

Stringer understood what an "appropriate capital murder case" was as the State explained it during general voir dire. He knew that the State had to prove beyond a reasonable doubt that Smith murdered two individuals in the same criminal transaction. ROA.3554–57, 63–68. He knew that if the State made its case in guilt-innocence, the jury would hear evidence bearing on the special issues, future danger and mitigation, during the punishment phase. ROA.3573–82. He knew that if the jury answered "yes" to future danger and "no" to mitigation, the trial judge had "to give [Smith] the death penalty." ROA.3582. And before asking Stringer the appropriate-case question, the trial judge harkened back to general voir dire: "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." ROA.3797. So Stringer was not asked whether he objected to the death penalty generally but whether he objected to its imposition "in an appropriate capital murder case."

Stringer answered the appropriate-case question affirmatively and it proved substantial impairment—Stringer had moral and conscientious "objections to the imposition of death" in a case where the State proved beyond a reasonable doubt that Smith murdered two individuals in the same criminal transaction, proved beyond a reasonable doubt that Smith was a future danger, and where there were insufficient mitigating factors to warrant a sentence other than death, i.e., "an appropriate capital murder case." Because a fairminded jurist could interpret the appropriate-case question in the way described above, and considering the context of Stringer's entire voir dire, his affirmative "answer[], on [its] face, could have led the trial [judge] to believe that [Stringer] would be substantially impaired in his ability to impose the death penalty," *Uttecht*, 551 U.S. at 17, the state court's decision is objectively reasonable.

Indeed, one need only look at *Darden v. Wainwright*, 477 U.S. 168 (1986), to see the reasonableness of the state-court decision. There, in a case decided before the enactment of AEDPA, an affirmative answer to the following question demonstrated substantial impairment: "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?" *Darden*, 477 U.S. at 176. Both the question there and the one here begin almost identically, inquiring about moral, religious, or conscientious opposition to the death penalty. *Compare* ROA.3797, *with Darden*, 477 U.S. at 176. The second half of the question in *Darden*—being "unable without violating your own principles to vote to recommend a death penalty"—easily equates to the second half of the question here, albeit with the trial judge using shorthand to describe Texas's sentencing process—objecting "to the imposition of death in an appropriate capital murder case." *Compare* ROA.3797, *with Darden*, 477 U.S. at 176. The similarity in the form of these questions further proves that the state-court decision is reasonable. *See Ortiz*, 504

F.3d at 503 (comparing the question asked in *Darden* with the question asked in Ortiz's case).

This Court has held that "[d]eference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment[.]" *Uttecht*, 551 U.S. at 7. Indeed, "even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Id.* "And the finding [of substantial impairment] may be upheld even in the absence of clear statements from the [veniremember] that he or she is impaired[.]" *Id.*; *see Ortiz*, 504 F.3d at 503 ("Clearly established law, however, does not mandate precise voir dire questions, as 'determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.'" (quoting *Witt*, 469 U.S. at 424)). In other words, Stringer did not have to say "substantial impairment" for the trial judge to find it.

Further, Stringer gave other answers during his individual voir dire that also demonstrate that the CCA's affirmance of the challenge for cause was objectively reasonable. When Stringer was asked whether he had personal opposition "to the imposition of death in an appropriate capital murder case," he did not say "no," thereby facially qualifying him,

but instead said, "Death bothers me a little bit. Makes me uncomfortable talking about it[.]" ROA.3798. That answer alone can be interpreted as demonstrating substantial impairment. In this case, there was no escaping talk of death—it is both the basis of the offense charged and the subject of the punishment sought. If death bothered Stringer and made him uncomfortable talking about it, one could interpret that answer, at the very least, as substantially impairing his ability to engage in punishment deliberations regarding the special issues—"talking about" whether to answer the special issues in a way that the jurors knew would result in "it," i.e., death.

The trial judge clarified that she was asking Stringer about whether his personal views would substantially impair his ability to serve. Following up on Stringer's death-bothers-me statement, the trial judge reiterated that certain answers to the special issues would require imposition of a death sentence and explained that "some people . . . believe in the death penalty, but . . . could never be a participant when a person ultimately could get the death penalty." ROA.3798. "[T]hose people, obviously, are not appropriate jurors for this type of case." This makes clear that the trial judge's appropriate-case

question—that Stringer had only moments earlier answered—was asked to determine whether Stringer "could . . . be a participant when a person ultimately could get the death penalty" and would therefore be an "appropriate juror[] for this type of case." ROA.3798.

The trial judge then offered Stringer a chance to explain his death-bothers-me statement. And instead of saying that death would not interfere with his ability to "be a participant when a person ultimately could get the death penalty," thereby facially qualifying him, he said that "[a]nything about [death] pretty much" bothered him. ROA.3799. By reiterating his death-bothers-me statement and thus his substantial impairment to serve as a juror, this statement sustains Stringer's removal from the venire for the same reasons as his initial death-bothers-me statement.

The trial judge followed up on Stringer's second death-bothers-me statement by making the point of her questions perfectly clear. She told Stringer that "the worst thing that would happen is for you to get past this process, you're sitting over there [when the trial was scheduled to start], and you go, hey, Judge, guess what, I've been thinking about this and I can't do it." ROA.3799. To avoid the "worst thing," the trial judge

demanded a categorical answer—"yes, you can, or no, you can't. Okay." ROA.3799. She then asked again if Stringer's personal feelings would cause him to "object[] to the imposition of the death penalty in an appropriate case," and Stringer said, "Yes." ROA.3799. With the appropriate-case question framed in this way, Stringer's answer told the trial judge that he could not vote to impose a death sentence even if it were warranted by the evidence—in other words, that he was substantially impaired.

After the challenge was granted, the trial judge thanked Stringer for his honesty in answering the questions posed. ROA.3800. She then added, "[w]e don't want you to sit on this jury if you can't do it or you don't want anything to do with death, that kind of thing because obviously you would have to." ROA.3800. This demonstrates that the trial judge, at least, viewed the appropriate-case question as getting to the issue of whether "you [can] sit on this jury," and interpreted Stringer's answer that he "can't do it" as substantial impairment. It also makes clear that the trial court viewed Stringer's death-bothers-me statement as proving substantial impairment too, because "obviously [he] would

have to" deal with death in Smith's case but Stringer did not "want anything to do with death."

Even if the appropriate-case question and Stringer's answer were somehow unclear, Stringer's "answer[] during voir dire w[as] at least ambiguous as to whether he would be able to give appropriate consideration to imposing the death penalty." *Wheeler*, 136 S. Ct. at 461. "And as th[e] Court made clear in *Uttecht*, 'when there is ambiguity in the prospective juror's statements,' the trial court is 'entitled to resolve it in favor of the State.'" *Id.* (quoting *Uttecht*, 551 U.S. at 7)). The above interpretations of the colloquy between the trial judge and Stringer demonstrate that the trial court's and CCA's decision was not objectively unreasonable under § 2254(d).

If this were not enough, the record gives hints that the trial judge at least noticed, and even considered, Stringer's demeanor during voir dire. Four days after the general voir dire that Stringer attended, the trial judge recognized him immediately—"I noticed you the other day. I noticed that you were paying attention to what I was saying." ROA.3797. For the vast bulk of veniremembers, the trial judge made no such observation. In two instances where similar comments were made, the

trial judge granted the State's challenges for cause. ROA.3054, 3068, 3177, 3183. In two other such instances, the veniremembers were accepted as alternate jurors. ROA.4047, 4083, 4086, 4120. The trial judge's recognition statement could have been her remembering Stringer as someone who appeared to be paying attention because of anxiety and therefore substantially impaired (supported by the two prior challenge grants). It could have been her recalling Stringer as someone expressing genuine interest in the proceeding and therefore a good potential juror (supported by the two subsequent juror empanelings). Or it could have been something completely unrelated to jury service and therefore neutral. But that is a judgment call left to the trial judge.

The second hint is the trial judge's repeated effort to get Stringer to clarify his death-bothers-me comments. The demeanor of a witness during cross-examination when repeatedly asked questions in order to clarify an answer can convey as much information to the trier of fact as the answer itself. *Cf. Uttecht*, 551 U.S. at 9 ("Leading treatises in the area [of jury selection] make much of nonverbal communication."); *Witt*, 469 U.S. at 428 n.9 ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words."

(alteration in original) (quoting *Reynolds v. United States*, 98 U.S. 145, 156–57 (1879)). Whether or not Stringer looked nervous after having to answer the same question twice, or whether he looked increasingly uneasy as he answered the question multiple times, or whether he looked unaffected by the questioning is something the trial judge was best positioned to observe.

The third hint is the language used by Stringer in answering the appropriate-case question. He said that talk of death made him "uncomfortable." ROA.3798. People routinely say that a person "looks uncomfortable." *See, e.g.*, *United States v. Gutman*, 711 F. App'x 20, 23 (2d Cir. 2017) ("She was always looking uncomfortable[.]"). And the trial judge was undoubtedly able to observe whether Stringer looked uncomfortable or not when he was forced to talk about death.

Only the trial judge observed Stringer and was able to interpret his demeanor. The CCA properly recognized this. ROA.684 (citing *Witt*, 469 U.S. at 429). "[A] trial court's contemporaneous assessment of a [veniremember's] demeanor, and its bearing on how to interpret or understand the [veniremember's] responses, are entitled to substantial deference[.]" *Wheeler*, 136 S. Ct. at 462. The record here—"and . . . a

common-sense understanding of the jury selection process"—demonstrate that Stringer's demeanor bore on the trial judge's decision. *Id.*

It is also notable that defense counsel declined to question Stringer after being given the opportunity to do so. In *Uttecht*, the Supreme Court noted that defense counsel did not object to the challenge for cause lodged by prosecutors. 551 U.S. at 18. Although not holding that defense counsel must object to preserve a *Witherspoon-Witt* claim, the Supreme Court found the lack of objection "especially significant because of frequent defense objections to the excusal of other jurors[.]" *Id.* at 19.

Here, although defense counsel did object to Stringer's removal from the venire, he was given the opportunity to question Stringer following the State's challenge for cause, but declined to do so (claiming that he did not "believe [Stringer's] disqualified"). ROA.3800. But defense counsel, on many occasions, took the opportunity to question veniremembers that the State had challenged for cause. ROA.2462–65 (James Pettitt, Jr.), 2929–37 (William McCain), 3181–82 (Mary Garner), 3681–84 (Julie Gutman). And for the most part, in instances where defense counsel did not question the challenged veniremember, it was

beyond doubt that the juror was substantially impaired. ROA.2340–41 (Juan Corral affirming that he could not "participate in this trial"), 2909–22 (Beverly Calhoun stating that she "would not be able to give a death sentence to somebody"), 3053 (Orelia Keys affirming that "due to [her] belief system [she] would be unable to sit on this jury"), 3067–68 (Craig Fronckiewicz affirming that "morally . . . it would violate [his] conscience"), 3138 (Marcia Pepper affirming that she "would answer those questions in such a way to make sure that he got life instead of death"), 3385–86 (Hubertus Thomeer affirming that he "would . . . answer these questions in such a way that Mr. Smith got life instead of death"), 3600 (Donna Frac affirming that she "would be inclined to answer these questions in such a way that the Defendant got life instead of death"), 3611 (Melinda Delossantos affirming that she "probably wouldn't be able to be a very fair person on this jury because of what just happened"), 3726–27 (Timothy Towsen affirming that he "cannot sit on this jury without violating [his] conscience"). The trial judge was permitted to take into account this pattern of defense counsel—that he sometimes questioned challenged veniremembers and, when he did not, they were usually unmistakably substantially impaired.

Thus, when defense counsel declined to question Stringer, this was information that the trial judge could consider in granting the State's challenge and it supports the state court decision's reasonableness. *See Uttecht*, 551 U.S. at 18–19; *Darden*, 477 U.S. at 178 (noting that, in affirming a challenge for cause, that "[n]o specific objection was made to the excusal of [the veniremember] by defense counsel").

If there is ambiguity in the questions asked of Stringer or his answers, his questionnaire makes it exceptionally clear that he was substantially impaired: "If this is a murder trial, I couldn't [serve] [be]cause the talk of death in any way make[s] me uncomfortable." ROA.8150. While the district court acknowledged Stringer's questionnaire, ROA.447, it did not acknowledge that Stringer said he "couldn't [serve]" as a juror "[i]f this is a murder trial[.]" This is clearly substantial impairment, which the CCA correctly recognized. ROA.696–97.

As the district court pointed out, there are statements in favor of the death penalty in Stringer's questionnaire, along with answers that he could consider all available penalties. But as the trial judge aptly noted, "There are some people that tell us, you know, Judge, I believe in

the death penalty, but I could never be a participant when a person ultimately could get the death penalty." ROA.3798. The question is not whether Stringer supported the death penalty in theory, but whether he could answer special issues in such a way that a death sentence would be imposed, i.e., substantial impairment. *See United States v. Snarr*, 704 F.3d 368, 380–81 (5th Cir. 2013) (affirming excusal of veniremember who had previously "served on a jury that imposed the death penalty" because "he did not think he could impose the death penalty a second time"); *Adams v. Quarterman*, 324 F. App'x 340, 355–56 (5th Cir. 2009) (finding reasonable a for-cause excusal where "a member of the venire . . . stated she personally could never vote for the death penalty despite its being proper and appropriate in some cases"). The trial judge properly recognized that distinction.

As to Stringer's statement on the questionnaire that he could consider all available penalties, that answer conflicts with Stringer's statement that he "couldn't [serve]" as a juror "[i]f this is a murder trial[.]" ROA.8150. In other words, one cannot consider a full range of punishment options if one cannot sit as a juror in a particular case. But such conflicts can be resolved in favor of the State's challenge for cause

de novo, and especially under § 2254(d). *See Wheeler*, 136 S. Ct. at 458, 462 (finding state-court decision affirming challenge for cause objectively reasonable despite the veniremember's "equivocal and inconsistent answers when questioned about whether he could consider voting to impose the death penalty"); *Ortiz*, 504 F.3d at 502 ("Even though Doporto gave conflicting signals of her ability to serve on the jury given her opposition to capital punishment—she seemed to both 'agree[] with the death penalty' in some cases but did not 'feel' that she could impose it herself—ambiguity alone does not undermine the trial court's decision to exclude her."). And under § 2254(d), "assurances that [Stringer] would consider imposing the death penalty and follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired[.]" *Uttecht*, 551 U.S. at 18; *Varga v. Quarterman*, 321 F. App'x 390, 395 (5th Cir. 2009) ("The Supreme Court has specifically indicated that an expressed willingness to follow the law does not necessarily overcome other indications of bias."). Statements that Stringer supported the death penalty in general would not overcome the single layer of deference afforded a trial judge's decision on direct

review, let alone the two demanded by AEDPA when reviewing state-court decisions.

Ultimately, "[t]his is not a case where 'the record discloses no basis for a finding of substantial impairment.'" *Wheeler*, 135 S. Ct. at 462 (quoting *Uttecht*, 551 U.S. at 20). Stringer's affirmative answer to the appropriate-case question, his death-bothers-me answers, and his statement in his questionnaire that he could not serve as a juror in a murder case all demonstrate substantial impairment, and the trial judge's observation of Stringer's demeanor and defense counsel's declination of questioning support it too. At the very least, these factors provide fairminded disagreement on the matter. "The [district] judge[] . . . below might have reached a different conclusion had [she] been presiding over voir dire. But simple disagreement does not overcome the two layers of deference owed by a federal habeas court in this context." *Id*. The CCA's affirmance of Stringer's for-cause dismissal was not objectively unreasonable, nor was the finding of substantial impairment clearly and convincingly rebutted by Smith. His complaint to this Court amounts to nothing more than a request to recanvas the same facts and legal arguments addressed by multiple courts in

numerous proceedings and to engage in simple error correction. He has not furnished any compelling reason to grant certiorari review in this case. Thus, the Court should deny his request as to his second question presented.

CONCLUSION

Smith fails to identify any compelling reasons for this Court to expend its limited judicial resources on further review. Consequently, his petition should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TRAVIS G. BRAGG
Assistant Attorney General
State Bar No. 24076286
Counsel of Record

Post Office Box 12548,
Capitol Station
Austin, Texas 78711
512.936.1400
Travis.Bragg@oag.texas.gov

Attorneys for Respondent