No. 19-6482

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

REPLY TO BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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Introduction

Petitioner filed his Petition for a Writ of Certiorari ("Pet.") on October 31, 2019. Respondent filed her Brief in Opposition ("BIO") on February 4, 2020. Respondent now files this Reply to Respondent's Brief in Opposition.[1]

I. Respondent's assertion that 2253(c)(2) cannot apply to the government is incorrect.

Respondent argues that section 2253(c)(2), by its terms, cannot apply to the government because the government does not hold constitutional rights. BIO at 12-

[1] In this Reply, Petitioner responds only to those assertions made by Respondent he deems merit a Reply.

13. The premise of Respondent's argument – that it holds no right – is correct, but the conclusion Respondent infers does not follow from the premise.

The jurisdictional requirement – i.e., that the court of appeals lacks jurisdiction over an appeal from the district court in the absence of the issuance of a COA – is contained in section 2253(c)(1). *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012). That section does not distinguish between the government and the habeas applicant, and the language of that section is absolute and unambiguous: "[A]n appeal may not be taken" absent the issuance of a COA. 28 U.S.C. § 2253(c)(1).

Section 2253(c)(2) then governs the standard for the issuance of a COA; and this Court has, of course, addressed this standard in numerous cases. *E.g.*, *Buck v. Davis*, 137 S. Ct. 759, 773-75 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003); *Slack v. McDaniel*, 529 U.S. 473, 485 (2000). The language of the statute specifies that a COA may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Insofar as it is necessarily the prisoner, and not the government, who will be arguing that habeas relief is warranted in view of the denial of a constitutional right, the word "applicant" in 2253(c)(2) applies to the inmate, not the government.

To be sure, whenever the inmate has obtained habeas relief in the district court, the predicate for obtaining a COA identified in section 2253(c)(2) will perforce have been satisfied; the inmate will have made a substantial showing of the denial of a constitutional right, and will therefore have secured habeas relief. However, this showing by the inmate in the district court does not create automatic

jurisdiction in the court of appeals over an appeal from that grant of relief, for two reasons.

First, the statute says otherwise. And in a wide variety of contexts, this Court has stressed that where statutory language is plain and unambiguous, it will apply the statute as written, and not rewrite it to conform what it (or the litigants) believes Congress meant. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Second, this Court's interpretation of the "substantial showing" language in section 2253(c)(2) forecloses Respondent's argument. The Court has read "substantial showing" to mean debatable among jurists of reason, and that the issues warrant further proceedings. *Buck*, 137 S. Ct. at 777; *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El*, 537 U.S. at 330; *Slack*, 529 U.S. at 484 (2000). But as Petitioner argues in his Petition, not every case where the inmate prevails in the district court will meet this standard, because in some cases where the inmate prevails, it is the *government's* argument that is not debatable among jurists of reason – the government's argument that does not merit further federal proceedings. Pet. at 12. For that reason, and in such cases, the government must obtain the COA. *See Gonzalez*, 565 U.S. at 145 ("[t]he COA process screens out issues unworthy of judicial time and attention"). In this case, the government was required to persuade either the district court or the court of appeals that, although

the Petitioner prevailed on his claim, the merits of that claim were debatable among jurists of reason and therefore justified further proceedings. But the government made no attempt to do so, and as a result, under the unambiguous statutory language, the court of appeals lacked jurisdiction.

II. Smith's argument is not that Rule 22(b)(3) does not apply to federal habeas proceedings but that it is impermissible because it conveys jurisdiction to the courts of appeals beyond that granted by the statute.

Respondent misconstrues Petitioner's argument related to Federal Rule of Appellate Procedure 22(b)(3) as being that the rule does not apply to federal habeas proceedings. BIO at 16. In his Petition, Smith clearly agrees the rule pertains to federal habeas proceedings. Pet. at 16-17. Petitioner's argument is that the Rule is impermissible to the extent it confers jurisdiction beyond that conferred by section 2253(c) because the Rules Enabling Act provides it is impermissible for this Court to prescribe rules of practice that "enlarge any substantive right." 28 U.S.C. § 2072(b); *see* Pet. at 16-17.

III. Petitioner's second question does not ask this Court to engage in error correction. Rather, it asks this Court address how much deference a trial court's decision removing a juror for cause is due when all available record-based evidence categorically demonstrates a venireperson is not disqualified.

In *Uttecht v. Brown*, 551 U.S. 1 (2007), this Court explained that a trial court's decision removing a potential juror for cause is due deference. *Brown*, 551 U.S. at 9 ("[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire"). In cases where the potential juror's answers to questions during voir dire are ambiguous with respect to whether he is qualified to

serve, a trial court's decision excluding him is entitled to deference. *Id.* at 7. In *Brown*, however, this Court cautioned that a trial court's decision is not due unfettered discretion in all cases: the "need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for finding substantial impairment." *Id.* at 20. Petitioner's second question does not merely ask this Court to engage in error correction, as Respondent has suggested. BIO at 36-37. Rather, Smith's Petition asks this Court to grant certiorari to explain when a trial court's decision is not due deference notwithstanding its opinion in *Brown*.

Smith's case is the ideal case through which the Court can address the limit of *Brown*. According to Respondent, the court of appeals, and the Texas Court of Criminal Appeals ("CCA"), there are three reasons to find the trial court did not abuse its discretion in removing veniremember Stringer for cause: 1) he stated he had moral and conscientious objections to the death penalty; 2) he stated he was bothered by death; and 3) the trial court carefully observed him.

First, that one is not excludable from death penalty jury for cause simply because he objects to the death penalty is the square holding of this Court's opinion in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon*, 391 U.S. at 522-23. That Stringer answered he had those objections "in an appropriate capital murder case" does not negate that merely voicing those objections cannot render him excludable for cause. Stringer did not state his objections were so strong that he would be unable to vote to sentence Petitioner to death without violating them. For

that reason, the question asked of him is not comparable to the one addressed by this Court in *Darden v. Wainwright*, 477 U.S. 168 (1986). *See* BIO at 22-23 (arguing the question asked of Stringer was comparable to the question at issue in *Darden*).

Second, merely being uncomfortable with death is not a reason for finding a juror is unqualified to serve on a death penalty jury. Respondent believes that a veniremember's saying that "[d]eath bothers [him] a little bit [and] makes [him] uncomfortable" demonstrates he is "substantial[ly] impair[ed]." BIO at 25 (quoting ROA.3798). Thoughts of death and dying make most people uncomfortable. This Court should view Respondent's assertion that this renders a person unfit for jury service as evidence that the record is devoid of any evidence whatsoever that Stringer was not qualified to serve as a juror.

Accordingly, the district court's finding that the CCA's decision denying Smith relief was an unreasonable application of *Witherspoon* and its progeny was incorrect only if the trial court's decision is due deference when the record is devoid of any evidence the juror is excludable. This Court's opinion in *Brown* makes clear that the trial court's decision is due a great amount of deference but does not foreclose the possibility of relief in a scenario such as the one presented by this case. Granting certiorari in this case would give the Court the opportunity to explain under what circumstances *Brown* does not foreclose the possibility of relief.

Conclusion and Prayer for Relief

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

DATE: February 17, 2020

Respectfully submitted,

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