No. 21-5226

In the Supreme Court of the United States

FARYION EDWARD WARDRIP, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Faryion Edward Wardrip pleaded guilty to capital murder. At his sentencing-phase trial, the State presented evidence that he kidnapped three, raped two, and murdered five young women and later lied about his crimes. Based on the jury's answers to special issues, the trial court sentenced him to death, and Texas courts denied him habeas relief.

Wardrip then sought federal habeas relief on the ground that his trial counsel should have investigated and presented additional mitigation evidence of his model behavior—for example, by completing an art class—during his first stint in prison for murder. The district court twice granted Wardrip habeas relief, and the Fifth Circuit reversed and remanded each time. Months after the second remand, Wardrip asked the Fifth Circuit to withdraw its mandate and allow him to file an untimely petition seeking remand on an additional issue.

The questions presented are:

> **1.** Whether the Fifth Circuit correctly reversed the district court's grant of habeas relief because Wardrip cannot overcome the relitigation bar Congress enacted in the Antiterrorism and Effective Death Penalty Act ("AEDPA").
>
> **2.** Whether the Fifth Circuit erred in refusing to withdraw its mandate and allow Wardrip to file a second petition for panel rehearing.

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INTRODUCTION

After lying about his crimes for more than a decade, Faryion Wardrip confessed to the brutal murder of five women. A jury of his peers heard for five days how his victims died in agony and terror—in some cases only to be left naked and exposed to the elements. Wardrip asks this Court to invalidate his death sentence on the ground that his trial counsel failed to provide constitutionally adequate counsel because counsel offered testimony that Wardrip behaved well on parole rather than evidence that, while Wardrip was in prison for his first murder conviction, he engaged in several positive activities, including attending classes and assisting with a fundraiser.

A state court denied relief on Wardrip's prison-record claim of ineffective assistance of trial counsel ("IATC"); this Court should do the same. The district court concluded that the

state court's adjudication was based on an unreasonable determination of the facts. Applying AEDPA's relitigation bar, the Fifth Circuit rightly reversed the district court's judgment and remanded for the court to consider whether the state court's determination was contrary to or involved an unreasonable application of clearly established federal law as determined by this Court. The Fifth Circuit also correctly declined to withdraw its mandate so that Wardrip could file a second petition for panel rehearing.

Even if the Fifth Circuit erred, this Court's review would be premature because the case has been remanded for further consideration by the district court. It is unwarranted because AEDPA would bar consideration of Wardrip's new evidence, and his prison-record IATC claim would fail even on de novo review. Wardrip has identified no circuit split to resolve, no misapplication of AEDPA to correct, and no reason to address the questions presented before the lower courts resolve additional issues. The Court should deny the petition.

STATEMENT

1. Wardrip murdered five women, raped two, and kidnapped three over the course of less than two years. In 1986, he confessed to one of these murders—the murder of Tina Kimbrew, his fifth victim, Fifth Circuit Record ("R.") 6750—and pleaded guilty to first-degree murder, R.4072. He was sentenced to 35 years in prison but was released in late 1997 after serving fewer than 12 years. R.2414-18.

Soon after his release, when faced with definitive evidence of his guilt, Wardrip confessed to murdering four other women: Terry Sims, Toni Gibbs, Ellen Blau, and Deborah Taylor. R.6748-50. The State indicted Wardrip for capital murder for intentionally killing Terry Sims by stabbing her with a knife during the commission of a felony. R.5255.

2. Wardrip pleaded guilty to the charge of capital murder, R.4198, and the trial court held a sentencing-phase trial. The State first put on evidence proving the brutality of the five murders. *See generally* R.6379-446. The forensic pathologist who performed the autopsy on Terry Sims, for example, described the terror and agony of her last minutes. R.6395-96. A police officer described the scene near an abandoned bus where Toni Gibbs's naked and lacerated body was discovered. R.6403-04. The medical examiner who autopsied Deborah Taylor explained how the killer used his bare hands to strangle her for at least five to seven minutes. R.6424. And a medical examiner testified that Ellen Blau's body was found wearing only a sock and was so decomposed that he could conclude only that she died of "undetermined homicidal violence." R.6435.

The State then proved that Wardrip committed these crimes. Two experts demonstrated that DNA and latent print evidence linked him to the murders. *See* R.6458-65. The State introduced Wardrip's detailed confession as part of the testimony of the officer who interviewed him. R.6465-84. The officer, however, made clear that even as late as 1999 Wardrip vehemently denied "knowing or having anything to do with" Ellen Blau's murder, R.6457, stated generally that he had "nothing to hide" because he was "not guilty," R.6487, and even said that his "family and church members [would] rally behind him," R.6488. Only when faced with overwhelming evidence that he killed Terry Sims and Toni Gibbs did Wardrip confess to killing both of those women, as well as Ellen Blau and Deborah Taylor. R.6748-50.

Wardrip's counsel responded by presenting testimony meant to prove that Wardrip would not be a future danger to the prison community if given a life sentence because he had shown an ability to behave well under strict supervision. The defense called Wardrip's

parole officer, who testified that Wardrip "was one of [his] best clients on the program" and that he "complied with all the rules and conditions" of parole, including that he go only to "work, counseling, [and] anything of that nature," and submit to "electronic monitoring." R.6491. The defense also called Wardrip's employer, who testified that Wardrip was an "[e]xcellent employee" because he did a good job, "never missed a day," and never caused any problems. R.6489. The defense did not need to call a corrections officer to introduce Wardrip's disciplinary record from his 11 years of incarceration because the State introduced that evidence in its case-in-chief. R.6483 (records admitted); R.6792-93 (disciplinary reports).

Perhaps believing that some of the defense's evidence tended to show that Wardrip was a changed man, the State offered testimony that Wardrip was a liar who manipulated the system. In 1999, after he had been arrested for killing Terry Sims, Wardrip lied about his innocence. R.6492-93. He lied to his community about why he was in prison. R.6490. And he lied during a pre-parole mediation program to Tina Kimbrew's parents, telling them that "he had never hurt anybody before Tina." R.6493, 6495. Indeed, Wardrip was quite aware of his ability to lie and manipulate others, telling Kimbrew's father that he "was the greatest undercover person" because "he always held a job, and no one knew he was on drugs." R.6493.

In closing argument, the prosecutor described the anguish of the victims to prove that Wardrip acted deliberately and argued that these repeated attacks were the best possible proof that Wardrip would be a continuing threat to society. *See* R.6501.

Aware that Wardrip had knowingly and recently lied to Kimbrew's parents, the police, and his community, Wardrip's counsel told the jury that he was not arguing that Wardrip

was a changed man. *See* R.6504. Counsel instead focused his argument narrowly on convincing the jury that, despite the brutality of the murders, Wardrip would not be a continuing threat in highly regimented "prison society." *Id.* To do so, he relied on Wardrip's "disciplinary records from eleven years plus in prison," which showed only two minor disciplinary incidents. *Id.* Counsel explained, "I'm sure you can imagine what a violent place prison is, and yet that's all that they had to go on in terms of his conduct in a prison." *Id.* "Does that suggest that Faryion Wardrip would not be a threat to those around him in prison? I suggest to you that the answer to that is yes, it does." *Id.*

Counsel went on to emphasize Wardrip's compliance with the conditions of parole as evidence that he would not pose a future danger. "[T]here's more evidence of his ability to conform himself under a regimented system, and that's how he got to get out on parole. He had a strict regimen that he had to follow on parole," and he did so successfully. *Id.* Counsel argued that if monitoring was "all the motivation it took to make him conduct himself appropriately on parole, isn't that another indication that in the context of sending him to prison he can be adequately controlled? So I would submit to you that's what it comes down to." *Id.*

The jury was instructed to answer three special issues: (1) whether Wardrip's "conduct . . . that caused the death of Terry Sims [was] committed deliberately," (2) whether there is a probability that Wardrip "would commit criminal acts of violence that would constitute a continuing threat to society," and (3) whether there is "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." R.6509. The jury answered "yes" to the first two issues and "no" to the third issue. *Id.* The trial court accordingly sentenced Wardrip to death. R.6510.

3. Wardrip filed a state habeas application alleging, among other things, that he "was denied effective assistance of counsel at the trial stage when counsel failed to put on any evidence of his prison record." R.6954 (capitalization altered). Wardrip asserted that "[d]uring his term in the penitentiary [he] received only two write-up[s] for disciplinary actions," "worked as a fireman," "worked as the reporter for his unit for the prison paper," "took a college class[,] and acted as a trustee." R.6954-55. Moreover, he alleged that he was asked "to run a fund raiser to raise funds for a child that needed a kidney transplant" and that the warden told his father that he "was one of the best prisoners that had ever been in his prison." R.6955. He further alleged that "[n]one of this was investigated or presented at trial." *Id.*

The State answered the application by arguing that "[t]rial counsel made a strategic decision to rely" on evidence showing "that the applicant had spent almost 12 years in prison and had only two minor disciplinary reports." R.7011. This argument relied heavily on trial counsel's affidavit explaining—consistent with what he told the jury at closing arguments—that his strategy was not to show that Wardrip "was a different man," but to show that he would conform his behavior in prison so as not to be a future danger to the prison population. R.6997. According to trial counsel, the "best hope" he had to show this lack of future dangerousness "was to rely on some information that the State could not effectively rebut": documentation presented to the jury proving "that [Wardrip] had spent almost 12 years in prison and had only two minor disciplinary reports." R.6997-98. Trial counsel also explained that, to complement this documentation, he called Wardrip's employer and parole officer to show that Wardrip "was capable of conforming his conduct to an acceptable standard even when he had been released in the community." R.6998-99.

The affidavit also explained why, "[a]fter careful consideration," R.6997, he chose not to present the argument that Wardrip was a changed man: Wardrip "had lied" not only to his community "about why he had been to prison," but to the father of one of his victims in a videotaped mediation session. *Id.* This was strong evidence that he had *not* changed and "was just trying to impress the parole board" and "manipulate[] . . . the system." R.6999. And if "the jury questioned [Wardrip's] sincerity, any hope of saving his life because he had changed was going to be lost." R.6997. The changed-man strategy, supported with evidence of Wardrip's good works in prison, was simply "too risky." R.6997-99.

The state trial court issued findings of fact and conclusions of law recommending the denial of Wardrip's application. R.7073-106. The court found that trial counsel was aware of Wardrip's "'good' prison record" but "made a strategic decision" not to present this evidence and instead "to rely on the State's [disciplinary record] evidence to show the applicant's prison record." R.7078. It therefore concluded that the "applicant failed to show" either "that trial counsel's performance was deficient" or that "the deficient performance, *if any*, prejudiced the defense." R.7099 (emphasis altered). On the prejudice issue, the trial court noted that, "given the commission of five murders, three aggravated kidnappings, two aggravated sexual assaults, and a burglary of a habitation, the applicant failed to establish any reasonable probability that applicant would not have received the death penalty had trial counsel put on additional evidence of the applicant's good prison record." R.7099.

The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and, on its own review, denied habeas relief on the merits. R.6939-40.

4. Wardrip filed a federal habeas petition alleging, among other things, his prison-record IATC claim. R.84-87. On Wardrip's request, and over the Director's objection, *see, e.g.*,

R.2922, the magistrate judge conducted evidentiary hearings to develop evidence never presented to the state court. In July 2008, the magistrate judge issued findings of fact, conclusions of law, and a recommendation that the district court grant sentencing-phase relief on Wardrip's prison-record IATC claim. R.451-514. The district court largely adopted the magistrate's recommendation, R.670, and rendered a final judgment conditionally granting habeas relief, R.671-72.

5. The Director appealed and, while the appeal was pending, this Court issued *Cullen v. Pinholster*, which held that, "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." 563 U.S. 170, 185 (2011). The Fifth Circuit accordingly vacated the district court's judgment and remanded for reconsideration in the light of *Pinholster*. R.2218-19; *Wardrip v. Thaler*, 428 F. App'x 352 (5th Cir. 2011) (per curiam) ("*Wardrip I*").

While the case was on remand, this Court issued *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Wardrip filed a supplemental brief asking the district court to "consider evidence first presented to [the district court] in support of his claim of ineffective assistance of trial counsel for failing to present evidence of his prior prison record" and to "'remand this cause to the state court,' which [the district court] interpret[ed] to mean to stay these proceedings to allow him to present these claims [and new evidence] to the state court." R.2506.

In April 2014, the district court stayed all proceedings "while Wardrip pursue[d] his state habeas remedies." R.2561. Wardrip filed a subsequent habeas application in state court that again raised his prison-record IATC claim and the newly presented supporting

evidence from his federal-court hearing. R.3503-04. In December 2014, the Court of Criminal Appeals "dismiss[ed] the application as an abuse of the writ without considering the merits of the claims." R.3478.

After the state court denied Wardrip's claims, the district court reopened proceedings and directed Wardrip to file an amended petition. R.2582. In his amended petition, filed in June 2015, Wardrip once more asserted multiple claims for relief, including his prison-record IATC claim. R.2594-650. And he relied on evidence never considered by the state court in its merits adjudication. R.2594-651. Respondent filed an answer to the amended petition, R.2663-725, arguing that *Pinholster* barred consideration of any evidence previously developed on federal review, R.2678-79.

In November 2017, the magistrate judge issued his report and recommendation that the district court again grant conditional habeas relief on Wardrip's prison-record IATC claim. R.2761. The magistrate judge recognized that *Pinholster* precludes federal courts from "consider[ing] evidence that was not before the state court in making the determination of reasonableness under" 28 U.S.C. § 2254(d). R.2763. Then, although Wardrip did not address the issue in his amended petition, the magistrate judge concluded that the state court's factual findings were not reasonable on the record presented to it. R.2771-78. According to the magistrate judge, the state court's finding that trial counsel acted "strategically" was unreasonable, as was its "determination that no disputed, previously unresolved fact issues existed." R.2777-78. Believing *Pinholster*'s bar on new evidence to be cleared, R.2778, the magistrate judge reinstated the analysis and conclusion from his 2008 report and recommendation, R.2782-83. The district court adopted the magistrate judge's recommendation, elaborated on part of the magistrate judge's analysis, and granted conditional

habeas relief. R.2844-52. The court denied a certificate of appealability on Wardrip's additional claims, which included judicial bias and defense-investigator conflict of interest. R.2851.

6. The Director and Wardrip each appealed. R.2855, 2857. The Fifth Circuit concluded that "it was not an 'unreasonable determination of the facts' for the state *habeas* court to find that [Wardrip's trial counsel] had conducted a reasonable investigation that made him aware of Wardrip's good conduct while in prison" and that counsel "made a reasonable strategic decision regarding what evidence to present." *Wardrip v. Lumpkin*, 976 F.3d 467, 477 (5th Cir. 2020) ("*Wardrip II*"); Pet. App'x ("A.") 21. The court further concluded that "it was reasonable for the state court to conclude that whatever else [trial counsel] might have done, the failure to take those steps had not prejudiced Wardrip." A.21. The court therefore reversed the district court's grant of habeas relief. A.23.

Wardrip filed a petition for panel rehearing, which the Fifth Circuit granted. *Wardrip v. Lumpkin*, 838 F. App'x 99, 100 (5th Cir. 2021) (per curiam) ("*Wardrip III*"); A.5. The court explained that it had not addressed Wardrip's argument that he was entitled to habeas relief under 28 U.S.C. § 2254(d)(1) because the state court's denial of relief on his prison-record IATC claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). A.4. Because it recognized that the district court also had not considered that claim, the court remanded the case to the district court for consideration of the claim. A.5. The Fifth Circuit's mandate issued in March 2021. Judgment as Mandate, *Wardrip v. Lumpkin*, No. 18-70016 (5th Cir. Mar. 22, 2021), Doc. No. 00515789219.

In June, Wardrip asked the Fifth Circuit to recall its mandate and grant him leave to file an out-of-time petition for panel rehearing. Corrected Motion to Recall and Amend

Mandate or to Recall Mandate and Grant Leave to File Out-of-Time Petition for Panel Rehearing, *Wardrip v. Lumpkin*, No. 18-70016 (5th Cir. June 30, 2021), Doc. No. 00515921001. He argued that the court should also have remanded the case for consideration of his argument that he is entitled to habeas relief on his prison-record IATC claim under *Martinez* and *Trevino*. *Id.* at 2. The court denied his motion. Order, *Wardrip v. Lumpkin*, No. 18-70016 (5th Cir. July 1, 2021), Doc. No. 00515922517.

Not content to pursue relief in the district court, Wardrip petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Multiple Vehicle Problems Render Review Inappropriate.

Even if the Fifth Circuit erred in holding that Wardrip failed to overcome AEDPA's relitigation bar under section 2254(d)(2)—and it did not, *infra* Part II—this case does not merit certiorari review. Such review would be premature, because the Fifth Circuit remanded for the district court to consider whether Wardrip can overcome the relitigation bar under section 2254(d)(1). *Wardrip III*, A.5. In addition, Wardrip's prison-record IATC claim is doomed because it relies on evidence introduced for the first time in federal habeas court in violation of section 2254(e)(2). And, even if Wardrip were to receive de novo review and consideration of his new evidence, he would not be entitled to habeas relief on his prison-record IATC claim. The Court should therefore deny Wardrip's petition.

A. Certiorari review is premature.

Certriori review of whether the Fifth Circuit correctly applied the relitigation bar is inappropriate at this time because the Fifth Circuit remanded the case for the district court to determine whether Wardrip is entitled to relief under section 2254(d)(1). *Wardrip III*,

A.4-5. If Wardrip is dissatisfied with the district court's ruling, he can seek an appeal to the Fifth Circuit and, if unsuccessful there, he can then ask this Court to review the entire case. And, if Wardrip prevails under section 2254(d)(1), he will receive all the relief he has requested in this proceeding. The Court should therefore reject Wardrip's invitation to grant review before the lower courts have decided all his issues. *See Halprin v. Davis*, 140 S. Ct. 1200, 1201-02 (2020) (Sotomayor, J., statement respecting the denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., statement respecting the denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., statement respecting the denial of the petitions for writs of certiorari).

B. Section 2254(e)(2) bars Wardrip's new evidence.

Review would also be futile because Wardrip's prison-record IATC claim relies on evidence presented for the first time at evidentiary hearings in federal district court, *see* Cert. Pet. 15-16, and Wardrip failed to meet the requirements of section 2254(e)(2), *see, e.g.*, R.2922. Because section 2254(e)(2) bars consideration of Wardrip's new evidence in a federal habeas proceeding, his prison-record IATC claim cannot succeed even if this Court were to grant review on the issue presented.

1. Wardrip's new evidence is barred from consideration unless he can meet the conditions of section 2254(e)(2).

State prisoners are not categorically forbidden to introduce new evidence to support federal habeas claims, but "AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2) applies to Wardrip's new evidence because he failed to develop the factual basis of his claim in state court. The basis of Wardrip's prison-record IATC claim is that his trial counsel could have, but did not, uncover and present to the jury the information about his prison record that Wardrip later presented to the federal district court. R.2606-07, 2617, 2621. And Wardrip blames his state habeas counsel for failing to develop the factual record to support his prison-record IATC claim in state habeas proceedings. R.2621-22 (asserting that state habeas counsel "committed the same critical mistake" as trial counsel, did not act as "[r]easonably competent habeas counsel," and produced "failures [that] caused Wardrip to suffer prejudice").

Those concessions doom his claim. AEDPA bars federal courts from considering evidence not diligently developed in state court by the habeas petitioner. 28 U.S.C. § 2254(e)(2). And for purposes of section 2254(e)(2), the action or inaction of state habeas counsel "is chargeable to the client." *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam); *see also Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's*

counsel.") (emphasis added). Accordingly, this Court has instructed that state habeas counsel's failure to develop the record in state court bars the introduction of new evidence in federal court. *See Holland*, 542 U.S. at 650, 652-53. Because neither Wardrip, nor his trial counsel, nor his state habeas counsel diligently developed the state-court factual record to reflect the evidence he now wishes considered, AEDPA bars consideration of that evidence unless Wardrip can meet section 2254(e)(2)'s requirements. He cannot.

2. Wardrip does not meet the conditions set by section 2254(e)(2).

Wardrip cannot avoid this bar on new evidence because his claim does not rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2254(e)(2)(A)(i), or "a factual predicate that could not have been previously discovered through the exercise of due diligence," *Id.* § 2254(e)(2)(A)(ii). The factual predicate of his claim did not need to be discovered: they relate to Wardrip's own behavior in prison. And his IATC claim relies on the assertion that his trial counsel *could* have discovered the additional evidence. *See Wardrip II*, A.17 (noting that a federal evidentiary hearing was not appropriate under section 2254(e)(2)(A)(ii) "because the factual question the district court explored is whether [counsel] failed to offer evidence he could have obtained by any measure of diligence"). Furthermore, even if he could satisfy one of those two conditions, he could not demonstrate that his new evidence "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). He is not claiming to be innocent, nor is he challenging his conviction.

Wardrip's inability to meet those conditions means that section 2254(e)(2) precludes the use of any new evidence to support his ineffective-assistance claim. While section 2254(e)(2) provides that a federal court "shall not hold an evidentiary hearing," it applies to any evidence that the petitioner failed to develop in state court. This Court has held that section 2254(e)(2)'s restrictions on evidentiary hearings in federal habeas cases "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." *Holland*, 542 U.S. at 653. Because Wardrip's prison-record IATC claim is based on new evidence developed and presented for the first time in federal court, section 2254(e)(2)'s bar on that evidence necessarily defeats his claim. Certiorari review is unwarranted.

C. Wardrip's claim would fail even de novo review.

As discussed in the next part, the Fifth Circuit correctly denied habeas under the standards established in AEDPA. But even if Wardrip could overcome AEDPA's relitigation bar and ban on newly introduced evidence, certiorari review would not aid him as his prison-record IATC claim would fail de novo review.

1. Trial counsel's performance was not deficient.

In his habeas petition, Wardrip asserts that his death sentence was imposed in violation of his Sixth Amendment right to effective assistance of counsel because his trial attorney failed to present evidence of Wardrip's prior prison record. R.2615. But, as discussed below in Part II.A.1, counsel made a reasoned decision not to pursue a "changed-man" strategy and determined that additional evidence about Wardrip's good prison record would be irrelevant to his argument that Wardrip would not pose a future danger in prison society. What mattered for counsel's argument was that Wardrip had not been violent in prison—whether he went to a class or wrote newsletter articles was immaterial. *See* R.6999. And

evidence of his prison activities was double-edged because it "was susceptible to rebuttal by the State by arguing that he was just trying to impress the parole board and that it was just more manipulation of the system on his part." *Id.* That strategic decision is entitled to "highly deferential" review that avoids "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

In holding that trial counsel's performance was deficient, the district court focused on trial counsel's 2006 testimony in federal court, which the district court characterized as counsel admitting that he never made a strategic decision to limit his investigation. R.2779. In fact, however, that testimony established only that trial counsel had limited memory of his decision-making process in 1999. The fact that counsel could not *recall* years later why he made his decisions does not mean that he lacked a reason to limit his investigation or that he lied in his 2001 affidavit. The district court failed to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

2. Any deficient performance did not prejudice Wardrip.

Even if trial counsel did perform deficiently, Wardrip cannot show prejudice. The State presented extensive evidence that Wardrip committed a string of horrific crimes that left five women dead. *See infra* Part II.B.2. The State also presented evidence that, after being released on parole from a prison sentence for one of the murders, Wardrip lied to an officer, his community, and his victim's parents. *Id.*

Weighed against these facts, Wardrip's new mitigation evidence does not move the needle. Wardrip relies on evidence that, while in prison, he attended classes, passed the GED, wrote newsletter articles, and participated in a fundraiser. Cert. Pet. 15-16. That evidence

adds little to the evidence presented to the jury, which indicated that Wardrip had committed only two minor infractions while in prison, R.6997-98, that he complied with his parole requirements, R.6491, 6998, and that he was a valued employee after leaving prison, R.6489. Wardrip's new evidence does not show that he would not be a future danger, but only that he engaged in a few positive activities while incarcerated. And those handful of activities gave the jury no reason to believe that Wardrip did not deserve the death penalty for his repeated rapes and murders. Wardrip cannot show prejudice, and he is not entitled to habeas relief.

II. The Fifth Circuit Correctly Reversed the Grant of Habeas Relief.

Apart from these vehicle problems, the Fifth Circuit correctly held that "it was not an 'unreasonable determination of the facts' for the state *habeas* court to find that [Wardrip's trial counsel] had conducted a reasonable investigation that made him aware of Wardrip's good conduct while in prison" and that counsel "made a reasonable strategic decision regarding what evidence to present, thus satisfying *Strickland*'s standard for effective assistance of counsel." *Wardrip II*, A.21. The court also correctly held that "it was reasonable for the state court to conclude that whatever else [trial counsel] might have done, the failure to take those steps had not prejudiced Wardrip." *Id.*

The state habeas court adjudicated Wardrip's prison-record IATC claim on the merits. R.7098-99. Therefore, AEDPA's relitigation bar prevents a federal court from granting habeas relief on that claim unless the state court's adjudication "resulted 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" or "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." 28 U.S.C. § 2254(d)(1), (2). Wardrip can show neither, so the Fifth Circuit correctly determined that AEDPA bars relief.

A. Wardrip cannot overcome AEDPA's relitigation bar under section 2254(d)(2).

Wardrip argues in this Court that he can overcome AEDPA's relitigation bar under section 2254(d)(2) because the state court's conclusion that trial counsel's performance was not deficient was based on an unreasonable factual determination. Cert. Pet. 19-22. But the record shows that Wardrip's trial counsel pursued a consistent, reasonable strategy, and the state court's factual determinations were not unreasonable. And, in any event, Wardrip does not argue in his certiorari petition that the state court's prejudice determination was based on an unreasonable determination of the facts.

1. The state court's deficient-performance holding was not based on an unreasonable determination of the facts.

To be entitled to federal habeas relief, Wardrip must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "In the capital sentencing context, the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Shinn v. Kayer*, 141 S. Ct. 517, 522-23 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id.* at 523 (quoting *Pinholster*, 563 U.S. at 189) (cleaned up).

Moreover, because Wardrip presents his IATC claim in a federal habeas petition, he "faces additional burdens" imposed by AEDPA. *Id.* To overcome AEDPA's relitigation bar

under section 2254(d)(2), he must show that the state court's adjudication of his claim "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." 28 U.S.C. § 2254(d)(2). "This 'standard is difficult to meet.'" *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). "The term 'unreasonable' refers not to 'ordinary error' or even to circumstances where the petitioner offers 'a strong case for relief,' but rather to 'extreme malfunctions in the state criminal justice syste[m].'" *Id.* (alteration in original) (quoting *Richter*, 562 U.S. at 102) (cleaned up). Under this "doubly deferential" review, *Burt v. Titlow*, 571 U.S. 12, 15 (2013), Wardrip is not entitled to habeas relief.

The state habeas court determined that Wardrip failed to show that his trial counsel's performance was deficient. R.7098. That holding was not based on an unreasonable determination of the facts. In his affidavit, which the state court accepted as true, R.7075, Wardrip's trial counsel explained that he originally considered trying to persuade the jury that Wardrip was "a changed man," R.6996; *accord* R.6991 ("Initially, it appeared that [Wardrip] had changed his life during the 12 years he had spent in prison . . . ."). Counsel rejected that strategy after investigating multiple witnesses, carefully considering the available evidence, and consulting with another attorney in his office. R.6996-97. Trial counsel had difficulty finding witnesses who would testify on Wardrip's behalf. R.6997. Their reluctance was the result of Wardrip's lies—he lied about why he had been in prison, and he lied to a victim's father. *Id.* Wardrip's counsel knew that the State had a video recording of Wardrip lying to the father, and he was concerned that the State would present the recording to the jury in response to a changed-man argument. *Id.* Counsel reasonably determined that Wardrip's post-prison lies were inconsistent with the argument that he had reformed during his

prior incarceration. In counsel's view, the changed-man theory "was too risky," because, "[i]f the jury questioned [Wardrip's] sincerity, any hope of saving his life because he had changed was going to be lost." *Id.*

Trial counsel also knew that evidence concerning Wardrip's prison record was double-edged. On the one hand, Wardrip's prison record was relatively clean. R.6998. On the other hand, focusing on Wardrip's prison record would highlight "the fact that [Wardrip] had been sentenced to 35 years in prison for the murder of Ms. Kimbrew and had been released after only doing about a third of it." *Id.* A rational jury might resent the fact that a serial killer had served such a small portion of a lengthy prison sentence. Moreover, at the time, Texas law did not provide that a life sentence for capital murder was without the possibility of parole. Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 12.31, 1993 Tex. Gen. Laws 3586, 3602 (amended 2005) (current version at Tex. Penal Code § 12.31(a), (b)); *see White v. State*, 629 S.W.2d 701, 707-08 (Tex. Crim. App. 1981) (noting the possibility of parole for one convicted of capital murder). Wardrip's counsel was concerned that, given how quickly Wardrip was paroled before, "the jury was going to be confronted with the existence of parole in a very real way." R.6998. The existence of parole may have encouraged the jury to find that Wardrip would be a future danger to society.

In addition, counsel noted that the State had characterized Wardrip as cunning—someone who knew how to "manipulat[e] . . . the system." R.6999. As trial counsel explained, evidence that Wardrip "contributed to prison society" was "susceptible to rebuttal by the State by arguing that he was just trying to impress the parole board." *Id.* "[C]ounsel is

afforded particular leeway where a potential strategy carries 'double-edged' consequences." *Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018) (quoting *St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006)).

Faced with these competing considerations, Wardrip's trial counsel tried to chart the best strategic course the landscape permitted: persuading the jury that Wardrip would not be a future danger to the prison community if given a life sentence. R.6999. He "attempted to make something positive out of [the prison record] by showing the jury that [Wardrip] could conform his conduct to the rules and regulations of prison and not be a threat to other inmates or the staff in the prison." R.6998. To that end, counsel relied on evidence the State had already introduced—which "the State could not effectively rebut"—that Wardrip "had spent almost 12 years in prison and had only two minor disciplinary reports." R.6997-98. Neither of these incidents involved significant violence, and they led only to minor disciplinary action against Wardrip. R.6998.

Counsel also presented two witnesses. Wardrip's parole officer testified that Wardrip "was a model parolee." *Id.*; *see* R.6491. And the owner of the business where Wardrip worked after being released from prison testified "about the good work that [Wardrip] had done and the confidence he had placed in [Wardrip] as an employee." R.6998; *see* R.6489. Counsel hoped to convince the jury that Wardrip was capable of "conforming his conduct to an acceptable standard" and would pose no danger in prison. R.6998-99. That is, counsel "wanted the jury to know one thing: that society would be more than adequately protected by sentencing [Wardrip] to life in prison." R.6999. Therefore, "whatever good things [Wardrip] might have accomplished in prison were not really relevant to the argument [counsel] was trying to make." *Id.*

Trial counsel's closing argument was also consistent with his overall strategy. He explained to the jury that, rather than asserting that Wardrip was "a changed man," counsel was arguing that Wardrip would not be a continuing threat to prison society, and he pointed the jury to Wardrip's disciplinary records to support his argument. R.6504. Counsel also argued that Wardrip's ability to fulfill his parole requirements indicated that he could "conform himself under a regimented system." *Id.* The fact that trial counsel's strategy was unsuccessful does not mean that it was unreasonable or that his representation was constitutionally deficient. Given this coherent and reasonable strategy, the state court's conclusion that Wardrip failed to establish that his trial counsel's performance was deficient was not "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

In attacking the state court's determinations, Wardrip homes in on trial counsel's statement that he was "'fortunate' that the State introduced Wardrip's prison disciplinary record." Cert. Pet. 20 (quoting R.6998). When read in the broader context of trial counsel's decision-making, that statement shows only that counsel was pleased that, after he had settled on the strategy of persuading the jury that Wardrip would not pose a risk of future dangerousness in prison society, the State introduced the prison records showing only two disciplinary reports. Because it was the State that introduced the records, it "could not effectively rebut" them. R.6997-98. Any further investigation or presentation of evidence concerning "whatever good things [Wardrip] might have accomplished in prison were not really relevant to the argument [counsel] was trying to make" and would have invited "rebuttal by the State." R.6999.

2. Wardrip has not shown, or even argued here, that the state court's prejudice analysis was based on an unreasonable determination of the facts.

Even if this Court concludes that the state court made unreasonable factual determinations regarding the sufficiency of trial counsel's performance, the Court should still deny review. That is because Wardrip must also show that the state court's prejudice analysis was based on an unreasonable determination of the facts to overcome the relitigation bar under section 2254(d)(2). He has not attempted to make that showing, much less succeeded.

To establish ineffective assistance of counsel, a petitioner must show first that his trial counsel's performance was deficient and, second, "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Because the petitioner must show *both* elements to prevail, and the state court affirmatively held that Wardrip "failed to show that the deficient performance, *if any*, prejudiced the defense," R.7098 (emphasis altered), this no-prejudice holding was an independent basis for the state court's adjudication on the merits.

Section 2254(d)(2) therefore does not apply unless the purportedly unreasonable determinations of the facts identified by the district court underlay not only the state court's no-deficiency holding but its no-prejudice holding as well. But that is not the case here—the state court's no-prejudice holding was not based on any purportedly unreasonable determination of the facts.

Indeed, Wardrip has not made that argument in his petition for a writ of certiorari. He has not identified any unreasonable factual determination on which the state court's prejudice analysis was allegedly based. Instead, he argues only that the state court's prejudice

determination involved an unreasonable application of federal law. Cert. Pet. 22-24. (As discussed below in Part II.B.1, the Fifth Circuit never reached that issue. *See Wardrip III*, A.4.) Accordingly, Wardrip cannot overcome AEDPA's relitigation bar under section 2254(d)(2).

* * *

Wardrip has not established that the state court's deficient-performance or prejudice analysis was based on an unreasonable determination of the facts. His attack on the state court's deficient-performance analysis falls far short of the "doubly deferential" standard, *Titlow*, 571 U.S. at 15, he must meet to overcome AEDPA's relitigation bar—much less to justify the exercise of this Court's supervisory power, U.S. Sup. Ct. R. 10(a). And he makes no effort to challenge the state court's prejudice analysis under section 2254(d)(2). AEDPA bars habeas relief, and this Court should deny Wardrip's petition.

B. Wardrip cannot overcome AEDPA's relitigation bar under section 2254(d)(1).

Wardrip argues that the Fifth Circuit "departed from the accepted and usual course of judicial proceedings" in failing to hold that the state court's conclusion that trial counsel's deficient performance was not prejudicial was an unreasonable application of clearly established federal law. Cert. Pet. 22. But the Fifth Circuit never reached that issue. And, even if it had rejected Wardrip's argument under section 2254(d)(1), that holding would have been correct.

1. The Fifth Circuit did not reach Wardrip's arguments under section 2254(d)(1).

Contrary to Wardrip's arguments, the Fifth Circuit did not consider whether he could overcome the relitigation bar under section 2254(d)(1). Rather, the court's statement that

"it was reasonable for the state court to conclude that whatever else [trial counsel] might have done, the failure to take those steps had not prejudiced Wardrip" was part of its analysis under section 2254(d)(2). *Wardrip II*, A.21. This is evident from the Fifth Circuit's explanation that all the Director's arguments the court would consider "focus[ed] on applying the requirements of Section 2254(d)(2) to the state court's rejection of relief on Wardrip's *habeas* application," A.14, and by the heading: "I. An unreasonable determination of the facts under Section 2254(d)(2)[,]" A.15 (cleaned up). Any doubt was removed by the court's express statement: "The magistrate judge did not address Section 2254(d)(1), and neither will we." A.14.

After Wardrip filed his petition for rehearing, the Fifth Circuit explained that neither it nor the district court had addressed Wardrip's argument under section 2254(d)(1). *Wardrip III*, A.4-5. That is why the Fifth Circuit remanded the case to the district court. A.5; *accord* Cert. Pet. 19. Because neither the district court nor the Fifth Circuit has ruled on Wardrip's claim under section 2254(d)(1), that issue is not yet ripe for this Court's review. *See supra* Part I.A.

2. The state court's determination that Wardrip suffered no prejudice was not unreasonable.

Even if the Fifth Circuit had rejected Wardrip's argument that the state habeas court's prejudice determination was contrary to, or involved an unreasonable application of, clearly established law, that ruling would have been correct. To establish prejudice in this context, Wardrip had to show that there was "a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether [he] deserved the death penalty as opposed to a lesser sentence." *Andrus v. Texas*, 140 S. Ct. 1875,

1885-86 (2020) (per curiam). This standard requires a court to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). And, when that analysis is conducted under section 2254(d)(1), the reviewing court must rely solely on the evidence before the state habeas court, *Pinholster*, 563 U.S. at 181, and apply a "doubly deferential" review, *id.* at 202.

The state court determined that, even if trial counsel's performance had been deficient, it would have caused Wardrip no prejudice. R.7098. The court found that, given the evidence that Wardrip committed "five murders, three aggravated kidnappings, two aggravated sexual assaults, and a burglary of a habitation," Wardrip "failed to establish any reasonable probability that applicant would not have received the death penalty had trial counsel put on additional evidence of the applicant's good prison record." R.7099. This was not an unreasonable application of *Strickland*, because the jury heard overwhelming aggravating evidence, and nothing before the state court effectively countered it.

The State presented extensive, graphic evidence of Wardrip's sexual assaults and quintuple murders. For example, the jury heard evidence that Terry Sims had eight stab wounds on the front of her chest, three stab wounds on the side of her back, and an additional stab wound on her arm. R.6395. Sims also had "defense wounds" indicating that "she actually had gripped the knife" trying to protect herself. *Id.* In addition, her hands had been tied behind her back with an extension cord, and she had received lesser "tease wounds." *Id.* Sims died both from hemorrhaging and "from the fact that her lungs had collapsed and she could not breathe." R.6396.

The jury also heard evidence about Toni Gibbs's murder. A retired Texas Ranger told the jury that he investigated the crime scene where Gibbs's body was found nude and with

severe chest wounds. R.6404. The officer testified that blood spatters indicated "[t]here was a lot -- a lot of violence." *Id.* Like Sims, Gibbs had "a defensive wound" on her hand. R.6407. The medical examiner who autopsied Deborah Taylor explained how the killer used his bare hands to strangle her for at least five to seven minutes. R.6424. And a medical examiner testified that Ellen Blau's body was found wearing only a sock and was so decomposed that he could conclude only that she died of "undetermined homicidal violence." R.6435.

This evidence—and other evidence detailing Wardrip's spree of sexual assault and killing—was extraordinarily aggravating. And it was compounded by the fact that the jury was aware that Wardrip served fewer than 12 years of his original 35-year sentence. R.2414-18. This evidence was aggravating because it may have led the jurors to believe that Wardrip had escaped a just punishment. Furthermore, the jury also heard evidence that Wardrip lied about his innocence in 1999, R.6492-93, lied to his community about why he had been in prison, R.6490, and lied during a pre-parole mediation program to Kimbrew's parents, R.6493-95. Indeed, Wardrip told Kimbrew's father that Wardrip "was the greatest undercover person, he always held a job, and no one knew he was on drugs[.]" R.6493.

Weighed against this aggravating evidence, the mitigating evidence was minimal. Wardrip had only two disciplinary infractions while serving his previous prison sentence. R.6997-98. His parole officer testified that he complied with his requirements. R.6491. And his employer valued his work. R.6489. State habeas counsel argued that further investigation would have uncovered additional evidence that Wardrip did well in prison. R.6955. But indications that Wardrip took an art class or wrote a newsletter while incarcerated could do little to sway a jury presented with harrowing details of Wardrip's spree of kidnappings, rapes, murders, and lies. Even on de novo review, such meager evidence could not establish

"a reasonable probability," *Andrus*, 140 S. Ct. at 1885, that a juror would have answered the special issues differently. Much less does Wardrip's evidence show that the state court's prejudice determination was an unreasonable application of *Strickland* and its progeny. 28 U.S.C. § 2254(d)(1).

Wardrip's reliance on *Buck v. Davis*, 137 S. Ct. 759 (2017), is misplaced. *See* Cert. Pet. 22-24. According to Wardrip, this Court concluded that the petitioner established prejudice in *Buck* despite his crimes because those crimes took place in the context of relationships with women rather than in prison. *Id.* at 23 (citing *Buck*, 137 S. Ct. at 776). But Wardrip's discussion omits the central factor in the Court's prejudice analysis in *Buck*—a court-appointed medical expert's testimony that the defendant had an increased risk of future violence because his "race" was "Black." *See Buck*, 137 S. Ct. at 768. The Court concluded that this testimony "was potent evidence" that "appealed to a powerful racial stereotype." *Id.* at 776. Because this "particularly noxious strain of racial prejudice" coincided with the question of future dangerousness, which was "the central question at sentencing," the expert's testimony "created something of a perfect storm." *Id.* It was this "unusual confluence of factors," *id.*, that led the Court to hold that the petitioner had demonstrated prejudice, *id.* at 777.

There is no such unusual confluence here. The jury heard evidence regarding Wardrip's violent crimes and balanced that against evidence that Wardrip committed no violent acts in prison. Learning that Wardrip attended classes or helped with a fundraiser would not have materially affected the jury's analysis.

The jury note does not prove otherwise. The jury asked: "[D]efine threat to society. Public or prison?" R.6507. Wardrip argues that this note shows that the issue of future

dangerousness was central to the jury's deliberations. Cert. Pet. 23. But that is unsurprising, given that his trial counsel's strategy was to show that Wardrip would not be a future danger to prison society. *See* R.6504, 6998. And the jury had before it evidence that Wardrip had spent time in prison, as well as out on parole, without committing further acts of violence. Again, Wardrip's additional evidence of prison activities would have done little to aid the jury in its consideration of the public-dangerousness special issue. Because Wardrip cannot show prejudice, review is unwarranted because the Fifth Circuit correctly held that he cannot overcome AEDPA's relitigation bar.

III. The Fifth Circuit Did Not Err in Denying Wardrip's Motion to Recall the Mandate or to File an Out-of-Time Petition for Rehearing.

Finally, review is unwarranted for his additional claims of ineffective assistance of counsel because Wardrip failed to timely present them to the Fifth Circuit. As Wardrip concedes, the petition for panel rehearing he filed in the Fifth Circuit argued only that the court should also have addressed his IATC arguments under section 2254(d)(1). Cert. Pet. 19. The Fifth Circuit granted his petition and remanded the case for consideration of those arguments. *Wardrip III*, A.5. Wardrip now argues that the Fifth Circuit should also have remanded for consideration of his arguments under *Trevino*. Cert. Pet. 24-25.

But Wardrip did not ask the Fifth Circuit for an expanded remand until about three months after the court's mandate issued, four months after the court issued its opinion on rehearing, and nine months after the court reversed the district court's judgment. *Id.* at 19 (noting that the mandate had issued); *see* Judgment as Mandate, *supra*; *see also* Corrected Motion to Recall and Amend Mandate or to Recall Mandate and Grant Leave to File Out-of-Time Petition for Panel Rehearing, *supra*. That distinguishes this case from *Corcoran v.*

Levenhagen, 558 U.S. 1 (2009) (per curiam), on which Wardrip relies, Cert. Pet. 24-25. Here, the issue is not merely whether the Fifth Circuit should have remanded for consideration of an additional issue but whether the court's decision to deny Wardrip's post-mandate motion was error meriting certiorari review. It was not.

Both this Court and the Fifth Circuit have emphasized that a court of appeals should use the power to recall its mandate sparingly. That power "is one of last resort, to be held in reserve against grave, unforeseen contingencies" and to be "exercised only in extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *accord United States v. Emeary*, 794 F.3d 526, 528 (5th Cir. 2015) (Dennis, J., in chambers). The Fifth Circuit will not recall its mandate except "to prevent injustice." 5th Cir. R. 41.2. Moreover, Wardrip asked the Fifth Circuit to recall its mandate so that he could file a second petition for rehearing. That court has noted that "[t]he occasions when second rehearings are appropriate are *exceedingly* rare." *Sanchez v. R.G.L.*, 761 F.3d 495, 499 n.1 (5th Cir. 2014).

Far from demonstrating exceedingly rare, extraordinary circumstances, Wardrip provides no explanation at all for his failure to request in his first petition for rehearing the expanded remand he now seeks. Nor has he explained why he did not file a timely second petition for rehearing after the court decided *Wardrip III*. Wardrip has not demonstrated that recalling the mandate is necessary to prevent a disparity between his treatment and the treatment of other litigants. *Cf. United States v. Davila*, 890 F.3d 583, 588 (5th Cir. 2018), *reh'g granted and op. vacated*, 738 F. App'x 257 (5th Cir. 2018); *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997). Nor has he demonstrated that he exercised "sufficient diligence." *Cf. Davila*, 890 F.3d at 588. The intervening months remain unexplained.

Because Wardrip has failed to demonstrate extraordinary circumstances that would justify—much less require—a recall of the Fifth Circuit's mandate allowing him to file a *second* petition for rehearing, he has not demonstrated that the court "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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