No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Chuong Duong Tong,
Petitioner,

-v-

Bobby Lumpkin,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Attorney for Mr. Tong

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

To the Supreme Court of the United States:

Chuong Tong, a Texas death row inmate, respectfully seeks leave to proceed *in forma pauperis*. With this motion he has filed a petition for writ of certiorari.

Mr. Tong is indigent. He has been incarcerated since his arrest and always had court-appointed lawyers. Mr. Landers was appointed by the U.S. District Court under the Civil Justice Act of 1964, 18 U.S.C. § 3006A, to represent him in his federal habeas action. Mr. Landers continued as appointed counsel on appeal before the Fifth Circuit Court of Appeals. Mr. Landers has not received any funds,

or the promise of any funds, from any other source other than under the stated laws for payment of legal fees for his habeas action.

For the reasons set forth above, Petitioner respectfully prays that this Court grant leave to proceed *in forma pauperis*.

Respectfully submitted

/s/ Jonathan Landers
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CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd day of May, 2024, a true and correct copy of this motion was mailed by first-class U.S. mail to:

Ali Mustapha Nasser
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P.O. Box 12548 (MC059)
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Phone: 512-463-2134

/s/ Jonathan Landers
Jonathan Landers

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
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COURT-APPOINTED ATTORNEYS FOR
PETITIONER TONG

QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

I. Did the Court of Appeals err in holding that ineffective assistance of postconviction counsel cannot establish "good cause" under *Rhines v. Weber*? And, did the Court of Appeals misapply *Rhines'* "potentially meritorious" prong?

II. In a capital case, does a trial court's deviation from "the law of the land" during voir dire in an attempt to insulate a perceived death sentence from appellate review violate Due Process?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties. *See* Sup. Ct. R.14(1)(b)(i).

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- Mr. Tong was convicted of capital murder and sentenced to death on March 6, 1998, in Cause number 760745, previously pending in the 178th District Court of Harris County, Texas.
- Mr. Tong's death sentence was affirmed by the Texas Court of Criminal Appeals on April 12, 2000. *Tong v. State*, AP- 73058, 25 S.W.3d 707 (Tex. Crim. App. 2000). Rehearing was granted, and the original submission affirmed on September 20, 2000. *See* Appendix __.
- This Court denied certiorari from the direct appeal on May 29, 2001. *Tong v. Tex.*, No. 00-8689, 532 U.S. 1053 (2001).
- Mr. Tong's state application for a writ of habeas corpus was filed on October 10, 2000, in the 178th District Court of Harris County, Texas, cause no. 760745-A. The Court of Criminal Appeals denied the application on July 1, 2009. *Ex parte Chuong Duong Tong*, No. WR-71,377-01, 2009 WL 1900372 (Tex. Crim. App. July 1, 2009).
- Mr. Tong filed a petition for writ of habeas corpus in the Federal District Court

for the Southern District of Texas on July 1, 2007. *Tong v. Davis*, No. CV 4:10-2355. Judgement was entered against Mr. Tong on March 22, 2019.

- During the pendency of the federal proceedings, Mr. Tong filed a subsequent state application for a writ of habeas corpus on November 28, 2012, in the 178th District Court of Harris County, Texas, cause no. 760745-B. The application was dismissed as an abuse of the writ by the Texas Court of Criminal Appeals on May 22, 2013. *Ex Parte Chuong Duong Tong*, No. WR-71,377-02, 2013 WL 2285455, (Tex. Crim. App. May 22, 2013).
- The Fifth Circuit Court of Appeals remanded Mr. Tong's case to the district court on August 27, 2020. *Tong v. Lumpkin*, No. 19-70008, 825 Fed. Appx. 181 (5th Cir. 2020).
- The district court once again entered final judgment against Mr. Tong on March 4, 2023, but also granted a certificate of appealability. Southern District of Texas cause no. 4:10-CV-02355.
- The Fifth Circuit Court of Appeals affirmed the district court's ruling on January 16, 2024. *Tong v. Lumpkin*, No. 19-70008, 90 F.4th 857 (5th Cir. 2024). Rehearing was denied on February 12, 2024.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

CITATION OF OPINIONS AND ORDERS ENTERED BELOW

Tong v. Lumpkin, 90 F.4th 857 (5th Cir. 2024)

Tong v. Lumpkin, 825 Fed. Appx. 181 (5th Cir. 2020)

Tong v. Davis, No. CV 4:10-2355, 2016 WL 5661698 (S.D. Tex. Sept. 30, 2016), vacated and remanded sub nom. *Tong v. Lumpkin*, 825 Fed. Appx. 181 (5th Cir. 2020)

Ex Parte Chuong Duong Tong, No. WR-71,377-02, 2013 WL 2285455 (Tex. Crim. App. May 22, 2013)

Ex parte Chuong Duong Tong, No. WR-71,377-01, 2009 WL 1900372 (Tex. Crim. App. July 1, 2009)

Chuong Duong Tong v. Tex., 532 U.S. 1053 (2001)

Tong v. State, 25 S.W.3d 707 (Tex. Crim. App. 2000)

STATEMENT OF JURISDICTION

The Circuit Court's opinion affirming the district court was filed on January 16, 2024 and Mr. Tong's timely filed Petition for Rehearing was denied on February 12, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On May 7, 2024, this Court entered an order extending the time to file this petition until June 11, 2024.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code of Criminal Procedure article 11.071 is included as Appendix H.

STATEMENT OF THE CASE

I. THE TRIAL COURT INITIALLY EMPLOYED AN ILLEGAL VOIR-DIRE PROCEDURE IN AN ATTEMPT TO INSULATE MR. TONG'S PERCEIVED DEATH SENTENCE FROM APPEAL, ONLY TO CHANGE THAT PROCEDURE MID-VOIR-DIRE.

A. Voir dire.

Under Texas law, capital defendants are statutorily entitled to fifteen peremptory challenges. Tex. Code Crim. Proc. art. 35.15 (a). However, the judge presiding over Tong's trial promised Tong, from the beginning of voir dire, that he would have unlimited peremptory challenges. ROA.7217-7218.[1] During a discussion about how to speed up the voir dire process, the trial judge confirmed with the defense: "you got unlimited strikes right." ROA.7217-7218. The judge verified with the reporter: "you got that on the record?" *Id.*[2] Over the first eleven days of voir dire, the defense would often exercise peremptory challenges after only a few questions from the court or prosecution, making no attempt to strike most venirepersons for cause. *See*, *e.g.,* ROA.8005, 8107, 8400, 8441, 8548. The trial court would grant additional peremptory challenges without requiring the defense to challenge the juror for cause.[3]

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[1] Citations in this section are to the Record on Appeal before the Fifth Circuit Court of Appeals. If the trial record is to be cited directly, then the clerk's record will be cited as CR at (page number), and the reporter's record will be cited as (volume) RR at (page number).

[2] The district court found the existence of this unlawful procedure: "At the beginning of jury selection, the trial judge, over prosecution objection, informed defense counsel that he would allow the defense unlimited peremptory strikes. After jury selection began, and after Tong struck twenty five jurors and there were ten seated, the trial court changed course, and announced that Tong had used all his peremptory challenges. . ." ROA.2913.

[3] Generally, to obtain an additional peremptory in Texas, a defendant would first have to request a challenge for cause, be denied, and then request an additional peremptory challenge. *See Allen v. State,* 108 S.W.3d 281, 282 (Tex. Crim. App. 2003).

Over the next nine days, while seating ten jurors, Tong's attorney exercised 25 peremptory challenges, but only struck 5 jurors for cause. 1 RR at 5-13.[4] As voir dire progressed, the prosecution became peeved with the process, and began to protest. The prosecution would note that the defense had exceeded their 15 statutorily allotted peremptory challenges. ROA.8005, 8400, 8441, 8548, 8564.

After the 23rd peremptory challenge was used by the defense, the prosecution made a more formal objection. ROA.8548-8555. The prosecution objected to the "Court continually granting additional challenges or peremptory strikes for the defense to use." *Id.* A prosecutor noted "I've never been in a case where there's been unlimited peremptories to the defense." *Id.* The judge noted an alternative to the procedure being used: to have defense counsel "zealously protect his peremptory challenges on people that he does not want . . . [and] make every effort he can to get those people challenged for cause. . ." *Id.* The judge then explained why he was employing the unlawful procedure:

> Well, I tell you, you talk to your appellate lawyers over there. I think every one of your appellate lawyers, Mr. McClellan, will tell you the last thing they want to see is an awful big fat record on voir dire where there have been a whole bunch of challenges for cause by the defense that have been overruled by the judge because every one of those is an appealable ground of error, and when the judge has failed to grant additional peremptory challenges for failure to sustain a challenge for cause that case gets reversed. This case will never get reversed for failure of this court to grant a defense challenge for cause.

Id.

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[4] Volume 1 is the master index, but it notes which jurors were challenged for cause, or excused by the trial court or the parties.

Two venire members later, when the defense requested "an extra peremptory[,]" the trial court abruptly changed course: "You want to do it the old-fashioned way? No more additional peremptory challenges will be granted unless challenge for cause is made first." ROA.8571-72. After the defense finished voir dire of the potential juror, an additional peremptory was requested and denied. ROA.8613-14. The defense made a record that they had been told "that we would never run out of peremptory challenges." *Id.* They had "relied on that from day one." *Id.* Defense counsel made a challenge for cause against the venire member, based mostly on his death-friendly answers to a juror questionnaire. ROA.8614-17. The challenge was denied, and so was a second request for an additional peremptory. *Id.* The defense explained how the court's promise of unlimited peremptories had affected their strategy. Rather than attempting to challenge a venire member for cause, the defense had simply used peremptory challenges. ROA.8617. The court granted one more peremptory. ROA.8618.

The final venire member did not subject herself to a strike for cause, but she did offer many answers that were concerning to defense counsel. ROA8690-8733. For example, she thought death was an appropriate remedy for those who sold drugs to children, was comfortable with a sentence of death even where jury members did not agree on an aggravating circumstance, was comfortable sentencing a young person to death (even her son if it was necessary), and did not believe the death penalty was used frequently enough. *Id.* After examination, the State accepted the venire member. The defense then challenged her for cause because the trial judge

"asked us to challenge for cause prior to requesting an extra peremptory." ROA.8740. The request for an additional peremptory was also denied.

Defense counsel was then sworn as a witness and explained how the promise of unlimited peremptory challenges had affected the defense strategy. ROA.8741-43. Rather than question unfavorable jurors in an attempt to strike them for cause, the defense exercised a peremptory because "we assumed we'd get as many peremptory challenges as we needed based on what the court told us." *Id.* The defense argued it did not find this particular juror acceptable because she did not consider age or drug use as potentially mitigating. *Id.* The defense requested additional peremptories so they could exercise them knowingly. *Id.* The request was denied. *Id.*[5]

B. Subsequent challenges to the voir dire procedure.

On appeal, appellate counsel challenged the trial court's unlawful voir dire procedure as violating Due Process of Law. Appendix E, at 709. But the Court of Criminal Appeals noted the "appellant fails to cite any relevant authority, from this jurisdiction or from any other, to support his constitutional claims." *Id.* As a result, "[i]n failing to provide any relevant authority suggesting how the judge's actions violated any of appellant's constitutional rights, we find the issue to be inadequately briefed." *Id.* Three justices dissented, noting that they believed counsel had adequately briefed the point of error, or, in the alternative, he that he should be

[5] Later, during trial, this juror would violate the Court's instructions and go to the public library to investigate the firearm used in the crime. *See* ROA.1857-1859.

allowed to re-brief the point pursuant to Tex. R. App. P. 38.9. *Id.* at 716.

Appellate counsel filed a motion for rehearing on this issue, but "provided no authority in support of his detrimental reliance theory or his due process . . . claims." *Id.* at 717. The state court never reached the merits of the claim.

In his initial state post-conviction proceedings, Tong raised an ineffective assistance of appellate counsel (IAAC) claim related to his appellate counsel's inadequate briefing. ROA.10529-34. The trial court, with a different judge sitting, adopted the State's proposed findings verbatim. ROA.11015-66. The court found Tong "did not rely on the trial court's alleged grant of an unlimited number of peremptory strikes. . ." and that the trial court did not err in its voir dire process. ROA.11037-38, 11058.

Tong raised the due process argument related to the trial court's voir dire procedure in his federal habeas petition. ROA.1651-74, 1825-30. To the extent the claim was procedurally defaulted, he argued the ineffectiveness of his appellate counsel established cause and prejudice to overcome that default. *Id.* The district court concluded the claim was procedurally defaulted. ROA.2915. The district court found that Tong could not establish cause and prejudice (based on IAAC) because he failed to "identify any due process violation[.]" ROA.2967. In other words, both the merits of the underlying voir dire claim, and the cause and prejudice issue, were denied because Tong had not proven a constitutional violation. The district court did note, however, that "the trial court's actions in changing the voir dire process midstream is quite troubling." *Id.* A certificate of appealability was granted for the

due process and IAAC issues. ROA.2981.

Tong raised the same argument before the Court of Appeals (COA). The COA also held that Tong had not established a Due Process violation, and for that reason could not establish IAAC to overcome a procedural default. Appendix A, at 866-870.

II. TONG PRESENTED THE DISTRICT COURT WITH A "SERIOUS CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PUNISHMENT PHASE OF HIS TRIAL[.]"[6]

A. Proceedings before the lower courts.

After the initial remand by the COA, Tong was permitted the necessary resources to conduct a complete mitigation investigation. ROA.12071-76. Tong filed an Amended *Wiggins*[7] Briefing and a motion to stay the federal proceedings so that he could return to state court to exhaust the newly developed claim. ROA.12288-24, 12825-38. In light of this Court's decision in *Shinn v. Ramirez*,[8] Tong argued the equitable way to proceed was to allow the state courts an opportunity to review his *Wiggins* claim. The Respondent had previously argued, also in light of *Ramirez,* that the district court should enter judgment and terminate the remand. ROA.12251-62. The district court granted the respondent's motion finding that the *Wiggins* claim was not potentially meritorious (within the meaning of *Rhines v. Webber*[9]) because, according to the district court, Texas's subsequent habeas statute would not permit

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[6] ROA.13242
[7] *Wiggins v. Smith*, 539 U.S. 510 (2003)(discussing ineffective assistance of counsel in the punishment phase of a capital trial).
[8] 596 U.S. 366 (2022).
[9] 544 U.S. 269 (2005).

merits review of the *Wiggins* claim. *See* Appendix C.[10]

The COA's opinion sufficiently details the evidence presented during both the guilt and punishment phases of trial. Appendix at 861. However, the COA apparently reviewed only the record prior to remand in discussing the underlying *Wiggins* claim. *Id.*at 865-66. The COA believed no certificate of appealability had been granted on this issue. That was true of the initial decision in the district court (prior to remand),[11] but, after remand, the district court noted "Tong presents a serious claim that he received ineffective assistance of counsel" and granted a certificate of appealability on the issue. ROA.13242-44. The COA also claimed that "Tong relies entirely on 2014 affidavits submitted by his cousins, John and Sang, describing sexual abuse." *Id.* In reality, Tong's *Wiggins* claim relied upon hundreds of pages of documents, affidavits, and other evidence establishing that his trial and post-conviction counsel failed him by ineffectively investigating the mitigation case. ROA.12378-824.

B. The mitigation case at trial.

The mitigation case spanned 85 pages of testimony. 20 RR at 18-103. No experts were called to testify on Tong's behalf. *Id.* The defense called Tong's biological father, Hoang, to testify about his son's life. 20 RR at 18-36. He testified that Tong's mother had abandoned them in Vietnam, that he fled with Tong from

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[10] The district court also granted a certificate of appealability on the *Wiggins* claim. *Id.* at 6-7. The COA appeared to believe otherwise. *See* Appendix A, at 860 ("Tong's motion for an additional COA on his *Wiggins* claim is DENIED").
[11] ROA.2980-81.

Vietnam, and that he and Tong ended up in Germany. *Id.* An uncle and grandmother testified that Tong could not speak English when arrived in Houston, and that Tong was sad because he had no immigration papers and could not attend college. *Id.* at 37-43. A pastor of a church recalled Tong had once been enrolled in CC classes and attended church. *Id.* at 50-52.

Jim Wyatt, a man who fostered Tong in Germany did provide some insightful mitigation information. Wyatt discussed Tong's childhood from the age of five to eight, the years he lived with the Wyatts. *Id.* at 54-102. Tong lived in a Red Cross home with his dad and many others when he first arrived in Germany. *Id.* at 54-62. His father never provided a stable home environment, and would just sit around watching violent movies and pornography with his friends. *Id.* at 62-70. Tong was taken in by a foster family, but was abandoned by that family. *Id.* He was sent to an orphanage. *Id.* He then moved in with the Wyatts as they were having their first child. *Id.*

Tong was a loving brother, but he seemed troubled when he returned from visits with his dad. *Id.* at 70-80. His dad was a strict disciplinarian. *Id.* Eventually, his dad left for a vacation to Houston, and never came back. Tong started having problems. He would throw fits and sometimes became uncontrollable. *Id.* A psychiatrist was consulted, but did not help. *Id.* at 80-90. Eventually, Jim Wyatt brought Tong to the United States to live with his dad. Mr. Wyatt, the defense's main mitigation witness, lacked any details about Tong's life in America after the age of eight.

C. Prior counsel failed to discover a tidal wave of mitigating evidence.[12]

1. Tong's childhood.

Tong was born into a poor Vietnamese family during the communist revolution. *Id.* at 12308-12309. His family was so poor that his mother would search food in trash, and his mother and father constantly fought. ROA.12310. Tong's mother, who was a teenager, would take her frustrations out on Tong. *Id.*

At an early age, Tong's mental health issues appeared. He had trouble talking and could not form words properly. He could not remember what his mother told him. One day, his uncle, Chanh, saw him floating down the river face down. He was pulled from the river still alive but unconscious. No one seemed to care that he almost died. ROA.12310-12311.

Meanwhile Tong's dad was hatching plans to escape from Vietnam. He wanted to take one of his children along, believing this would help him get to the United States. In 1979, Hoang successfully escaped with Chuong. However, he never told Tong's mother where he was going, instead he claimed he was taking Chuong to visit his parents in Saigon. Chuong would never see his mother again. ROA.2311-12312.

His father left with Chuong and his uncle in a small boat packed with 42 people. The boat smelled of blood, vomit, and feces. Chuong was one of the only children. The voyage was dangerous, the refugees had to constantly be aware of

[12] Citation in this section are to the Amended Wiggins Briefing, which in turn cites to documentary evidence in the record.

communists or pirates. The boat was asail a few days before being rescued by a German ship called the Cap Anamur on September 19, 1980. As the rescue boat approached, the small boat Chuong was on capsized, as captured in photos the defense team failed to discover. ROA.12312-12314.[13]

The refugees were taken to a camp in Palawan, Philippines, where Chuong and his family stayed for six months. There was little food, no formal housing, and no water supply. Refugees made shacks out of whatever supplies they could scavenge, and Choung was known for visiting other people's shacks searching for food. Eventually, Chuong was left unsupervised because his father and uncle were required to study English. ROA-12314-12315.

After six months, the family was brought to the Philippine Refugee Processing Center (PRPC) in Bataan where they remained for three months. This camp was better organized and Hoang would spend his time taking English classes. Chuong would spend the day with other people and go from house to house asking for food. Next, Tong and his family were sent to Germany. ROA.12316.

In Germany, Tong would suffer repeated abandonment. In the winter of 1981, Chuong and Hoang arrived in Berlin and lived in a three-story government housing building along with other Vietnamese refugees. Hoang initially took classes during the day, but soon began working in a chocolate factory and moved into an apartment by himself. ROA.12317-12318.

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[13] Photo in Stern Magazine dated October 16, 1980. Hoang and Chuong can be seen on the very left, Chuong holding onto his father who is about to jump or fall into the water.

Chuong's father lost interest in him after escaping Vietnam. If authorities could not find him a foster family, then he would be sent to the orphanage "Fuchsbau." Ulrike Derfert, a social worker at the German Red Cross, met Chuong in 1981 when he was five years old. One day during Ulrike's internship, a supervisor asked if she would take Chuong in as a foster child. She had a child Chuong's age, and her family agreed. *Id.* Ulrike remembers Hoang telling her several times that it would have been better if he could have taken his younger son instead of Chuong.

Things did not go well. In preschool Chuong did not play well with other children and had problems following the rules. There were also problems at home. Chuong had episodes when he would break anything he could get his hands on. Chuong seemed to need attention all the time, and was unable to complete simple tasks. The things other children did were impossible with Chuong. There were other signs of mental illness. Choung was unable to concentrate, would wake up during the night with nightmares, and would cry for hours on end. Eventually, he was removed from preschool. After six weeks, Ulrike and her family stopped fostering Chuong. ROA.12318-19.

Psychologist Barbara Hamm explains that Chuong's actions during this time were a sign of intense psychological pressures. She opines that "we can clearly see that Chuong was in terrible distress." Unable to communicate his distress he lashed out and cried constantly. ROA.12319-20.

Chuong was sent back to the orphanage, but Ulrike would keep up with his life. She visited Hoang on the weekends, and sometimes Ulrike would visit with

Chuong and his father. Chuong would sit with his father and other young men as they drank and watched violent and pornographic movies. When Chuong cried too much for Hoang, Hoang would put a cigarette pack in his mouth and beat him. Dr. Hamm explains that "[t]his would lead to feelings of hopelessness and despair as he grew older. As a child it felt like an indelible sadness that he was such a burden to his father. Any longing for closeness would be interpreted by his father as his inadequacy and cause him to lash out or to shut down." ROA.12320-21.

In 1982, Gabriele Wyatt was working for the Red Cross and was teaching English Language classes to Vietnamese refugees including Hoang. This is how she met Chuong, and discovered that he was living in an orphanage. The Wyatt's, who were about to have their own child, applied to Youth Services and Chuong moved in in August of 1983. Chuong would still visit his father on the weekends, and when he came back from visits he was upset and screaming. After these visits, Chuong would recoil when Gabriele tried to touch him. ROA.12321-22.

The Wyatts noticed that Chuong was falling behind developmentally. He wet the bed as a six-year-old, had problems recognizing the personal space of others, and did not talk much. He was, however, inventive and loved his little brother Timmy. The Wyatts also learned of how Hoang would punish Chuong. If Chuong would talk back or did anything else his father didn't like, Hoang would put him in a corner with his arms crossed and his face to the wall. If Chuong spoke out, Hoang would put a pack of cigarettes in his mouth to keep him quiet. Hoang would tell Chuong that his younger brother, who was left in Vietnam, was much better than him. ROA.12323.

Chuong was intelligent, but didn't develop socially. During the first through third grades, there were problems at school: conflicts with children, exaggerated reactions, not participating, and not cooperating. With time, however, Chuong improved, but he lacked perseverance and the attention to detail. Chuong required much special care, and seeked attention by disrupting the class. ROA.12323-24.

Meanwhile, Hoang was attempting to move to America, but was repeatedly denied a tourist visa for Tong and himself. He decided to leave by himself. Hoang was granted a tourist visa, and in the summer of 1985, he left Germany without Chuong. He did not tell the Wyatts he was not coming back, they figured that out when he did not return after a month. *Id.* Chuong's behavior worsened. He would defy the Wyatts, he did not listen, and did not complete his homework. Often, he could not be calmed. Chuong was being bullied at school and was unable to make friends. The Wyatts sought out a counselor and social worker, but things got worse. At the same time, in November of 1985, a judge in Berlin officially terminated all parental rights because "parents are not in Berlin" and appointed the Wilmersdorf Youth Welfare Office as Chuong's guardian. ROA.12324-25. Dr. Hamm explains that Chuong's deterioration during this time was a result of, and mirrored that of, the first time he was abandoned by his father in Germany. ROA.12325.

When Chuong was 9 years old, the Wyatts decided they could no longer care for him, and gave him the option of returning to the orphanage, going to another foster family, or trying to live with his father in America. Tong picked the latter, and his father agreed to take him back. Jim Wyatt, an American citizen, brought Chuong

to America to be reunited with his father. Amazingly, Chuong arrived with no nationality, he had only a German ID-card for children. Once Chuong arrived in the US, he could not return to Germany because he had no legal status. ROA.12326-27.

At the age of ten, Chuong had lost his mother, two sets of foster parents, and been twice abandoned by his dad. He was reunited with his dad in Houston, but his dad had no plans for Chuong in his life. When Hoang moved to Houston, he moved in with his sister, Michelle. In 1986, when Chuong came to Houston, he also moved in with Michelle, but his father was rarely around. Chuong, who spoke only German, would follow his cousins around but could not communicate with them. ROA.12327.

By 1990, Chuong could speak English, and the conditions in Michelle's house became very crowded. At one point, 18 people lived in her four-bedroom house. Chuong would sleep wherever he could, sometimes he would sleep on the couch, in the corner of the living room, or in someone else's bedroom. Around 1991 or 1992, Hoang moved into his own apartment. He did not allow Chuong to come with him. Indeed, Hoang remained distant from Chuong throughout his time in Houston, he mostly stayed drunk and focused on his own social life. The family members who lived with Tong during this time remember him as a lonely outcast who didn't belong. He stayed to himself. He was, however, clever, and enjoyed figuring out how various toys or appliances worked. Chuong was also kind, and would sometimes offer emotional support to family members. ROA.1328-30.

Chuong was subjected to both physical and sexual abuse in Michelle's house. Since the adults were working all the time, she designated her oldest son Quyen as

the disciplinarian. Chuong got the worst of it, and cousin Mike heard Quyen screaming at the young boy. Cousin John recalls Quyen beating and punishing Chuong for asking questions. Quyen would make him lay on the ground and then beat him with various objects such as a belt, a tree branch, or a broom handle. But he also got beaten with electrical cords and bamboo sticks. John remembers Quyen beating Chuong so badly that Chuong was bleeding and had welts all over his body. Even though cousins John, Sang, and Qui were also beaten by Quyen, Chuong was beaten the hardest and most often. ROA.12330-31.

Worse than the physical abuse was that Tong's family allowed one of Michelle's employees, Loi, to openly sexually abuse Chuong and others. Loi, Michelle's male employee and the one living in the garage apartment, began sexually abusing Chuong almost as soon as Chuong started living with Michelle. Loi also sexually abused Michelle's sons John and Sang. Loi would grab their penises and play with them. Loi would also often ask Chuong if he could see his penis. Loi did this in the open for everyone to see. The family just pretended they didn't know about it. Sang witnessed Loi make Chuong give him oral sex. Sang remembers that when the adults came home from work, Chuong would be defensive, brace himself, and cover his genitals like someone was about to hit him or molest him. ROA.12331-32.

Loi would take John and Chuong out fishing, and would do them favors. John now realizes this was basically bribery, or a way of luring them. The sexual abuse lasted for a couple years, until Loi moved out. Loi also kidnapped Chuong's relative

Linh at gun point in front of Chuong and the family. ROA.12332-33.[14]

It was against this backdrop of abuse and violence that Chuong fell in with the wrong crowd. Until the age of 15, he worked in the family butcher shop every day, but this changed when he met Joseph Goins at Memorial High School. He started having problems in school as he spent more time with Joseph and another boy named Joey (who was eventually murdered). During this time, Jean Baker, Joseph's mom, got to know Chuong well. She thought he was funny, caring, quiet and private. Chuong told her that his own mother was dead, and spoke of how much he missed her. She believed that Chuong's own family thought of him as nuisance, and remembered that Chuong was a very sad and lonely kid. She believed him an outcast who had no one to care for him. Around this time Chuong was living with his grandparents, but their house burned down and he moved in with friends. Within a few years he committed the murder of Officer Trinh. ROA12333-35.

2. Tong's immigration experience was truly unique.

One of the prosecution themes in closing arguments was that Tong's life was no different than other immigrants who "overcame some adversity and became productive, except for one, and he is sitting before you." 20 RR at 124. In reality, Tong's journey to Houston was truly unique.

Professor Eric Tang is the Director of the Center for Asian American Studies at the University of Texas and has "published extensively on the topic of Southeast

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[14] This was not the only criminal violence Chuong witnessed in his adolescence. When he was 15, his grandparent's house was robbed at gunpoint while he was getting a haircut. ROA.12333.

Asian refugee resettlement to the United States." He explains that "[f]ew, if any, Vietnamese refugee sojourns to the United States exhibit anomalies as remarkable as those experienced by Chuong Tong. In almost every aspect— historical, sociological, political—Chuong's resettlement ran counter to the normative patterns of other refugees who arrived to the United States in the aftermath of the Vietnam." ROA.12335.

Because Chuong was completely undocumented, he was not eligible to the "the range of support" offered to other refugees, including assistance with "housing; English instruction; educational and job programs; job placement." Chuong's status was rare because, "[t]he notion of an undocumented Vietnamese refugee simply did not exist." ROA.12336. Professor Tang believes it "remarkable that Mr. Tong has remained an undocumented immigrant in the United States since his arrival here in 1986." It is also unique that Chuong lacked any clear guardianship, and that no "responsible adult or state welfare agency took clear custodianship of him. . ." *Id.* Professor Tang explains: "I can think of no comparable case in which a Vietnamese refugee child was rendered undocumented, stateless and uncared for by a parent or guardian." *Id.*

Although the prosecution claimed that the Wyatts were part of Chuong's strong support system, in reality "the Wyatts took away Chuong's ability to seek future support and relief from Germany. In other words, once Chuong was taken outside of Germany without status, the German state was no longer obliged to recognize Chuong as its subject." The adults in Chuong's life, those the prosecution

claimed were his support system, "subjected Chuong to a life of non-recognition by the United States, Germany and Vietnam." Interestingly, the German government also failed Chuong. Instead of doing "something to establish Chuong's right to return to Germany . . . Germany moved to cut ties with Chuong." That government drew the conclusion that he was healthy and cared for in Houston, while in reality was chronically abused. ROA.12338.

Professor Tang concludes that "Chuong, an undocumented and stateless person living in the United States, was treated recklessly by the adults in his life, and neglectfully by state agencies. These parties left him vulnerable to abuse, as well as to the multiple social, economic and political dangers he faced as an undocumented and stateless subject." ROA.12339.

3. The effect of repeated trauma on Tong's life.

Barbara Hamm is a clinical psychologist who has a Harvard Medical School academic appointment in the Department of Psychiatry, worked for the Victims of Violence program, The Massachusetts Marathon Bombing Resiliency Center, and has held various other tenures related to the treatment of trauma victims. ROA.12339. She explains that children like Tong, who suffer from neglect, react poorly to situations by "rely[ing] upon poorly developed problem-solving skills that don't anticipate consequences." These children are also "targeted for abuse", "take the brunt of verbal and physical abuse in their home", and either "fall through the cracks" or are identified as "the cracks" in institutions and in society." ROA.12339-40.

Dr. Hamm notes, when discussing Chuong's abuse in Houston, that this type

of "psychological assault has the capacity to change us . . . by changing the basic systems of the self that underlie our functioning: namely our biological, emotional, and cognitive systems." *Id.* Childhood trauma, left untreated, "may lead to avoidant responses such as withdrawal and denial or active responses such as aggression and rage." The results of trauma are not "an inherent part of an individual's personality, rather than the pathological outcome of exposure to damaging life." ROA.12340-41. Tong's behavioral problems while living with Ulrike, after his father fled to America, and his gravitation toward anti-social behavior all can be explained by the severe trauma suffered in his childhood. ROA.12341-43.

Importantly, Chuong's life of suffering "is the backdrop for Chuong's educational experience in Houston and for his gravitation to anti-social and criminal activity." His behavior in school, used against him at trial, "is a downward spiral that includes substance abuse and anti-social and often criminal activity. These are well documented patterns of behavior of traumatized children and teens." *Id.* At the time of Tong's trial, "[t]he field of psychological trauma was burgeoning, and much research focused on the role of negative experience, toxic stress, and the consequences of childhood trauma … Drug use and anti-social behaviors were recognized as, though maladaptive, coping strategies." ROA.12342-43.

In short, Dr. Hamm explained that Tong's background of severe abuse and neglect made his "segue [into drugs use and crime] sadly, predictable." Dr. Hamm's assistance showed that the prosecution's treatment of Tong's punishment case was simply wrong. He did not simply pick a life of crime at his young age, instead, the

constant neglect, abuse, and violence he lived through during his childhood all but ensured his place in the world.

4. Chuong suffers from Autism Spectrum Disorder.

Dr. Diane Mosnik is a licensed Clinical Neuropsychologist, Pediatric & Adult & Forensic Psychologist. Her clinical examination revealed a diagnosis of Autism Spectrum Disorder[15] as well as posttraumatic stress disorder. Her testing results reveal the Tong is at a higher risk of being led into criminal activity, had a high level of suggestibility, and exhibited severe social deficits. The diagnosis helps to explain Tong's behavioral problems at school, rebuts the idea that he was a leader in criminal activity, and, when combined with the facts of his childhood, greatly increased the likelihood that he would be led astray. ROA.12345-46.

Importantly, the diagnosis of Autism Spectrum Disorder not only effects the mitigation case, but also would have minimized the threat of future dangerousness if Tong were sentenced to life in prison. This is because "[r]esearch in the field of Autism has demonstrated that individuals diagnosed with an Autism Spectrum Disorder can, and do, continue to learn complex social skills throughout adulthood." This opinion has been proven by Tong's extemporary behavior for the last 20 years in prison. ROA. 12346-47.

Dr. Mosnik also explained that the body of research into "the field of Autism Spectrum Disorders was readily available to medical professionals during the time of

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[15] This same diagnosis was available at the time of Tong's trial, although it was found under "the grouping of Pervasive Developmental Disorders" in the DSM-IV published in 1994. *Id.* at 12-13.

Mr. Tong's legal proceedings discussing the diagnosis of Autism Spectrum Disorders." ROA.12347-48. She further believes that the defense team's neuropsychologist failed to diagnose Tong because he was "was not provided enough information about Mr. Tong's social and emotional behavior to make a diagnosis of an Autism Spectrum Disorder." ROA.12348.

D. Trial and state habeas counsel's mitigation investigation.

Records from the trial court show that there were two investigators working on his case. One, Sebesta, focused on guilt and innocence issues, but also attempted to contact Tong's teachers. His first attempt to contact teachers was six days prior to trial, and he provided trial counsel a "teacher list" after the trial had concluded. ROA.12349-50. Investigator Patterson was assigned to the mitigation case. She spoke with four of Tong's family members, spending a total of 7 hours interviewing them. Here entire investigation lasted 27 ½ hours. ROA.12350-52. Psychological testing was performed on Tong, but the Doctor did not have educational records or a biographical history. An education expert provided a report to defense counsel after voir dire was completed, and noted Tong's failures in school "must have come from other social or emotional issues not indicated in his school records." Dr. Leung, an expert on the "Vietnamese immigrant experience in the United States" also interviewed Tong. But Dr. Leung apparently discussed other violent crimes committed with Tong, and could not be called as a witness. Dr. Leung's work took place over two days, one of which was during voir dire, and his expense records show he spent around 20 hours in Houston. Part of that time was spent watching a movie

in his hotel room. ROA.12352-54.

Evidence provided to the district court established that state habeas counsel did not perform any mitigation investigation. ROA.12355-57.

ARGUMENT

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL CANNOT ESTABLISH "GOOD CAUSE" UNDER *RHINES V. WEBER*? AND, DID THE COURT OF APPEALS MISAPPLY *RHINES'* "POTENTIALLY MERITORIOUS" PRONG?

Three decisions of this Court have created "an important question of federal law that has not been, but should be, settled by this Court. . ." Sup. Ct. R. 10. First, in *Rhines v. Weber*, this Court provided guidance to federal courts encountering mixed petitions[16] from state habeas petitioners after the enactment of AEDPA. 544 U.S. 269 (2005). The Court held "it likely would be an abuse of discretion for a district court to deny a stay and dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that he engaged in intentionally dilatory litigation tactics." *Id.* at 270.

Next, *Martinez v. Ryan* dealt with weather a federal petitioner presenting a substantial, but procedurally defaulted, claim of ineffective assistance of trial counsel could establish cause and prejudice to overcome the procedural default. 566 U.S. 1 (2012). *Martinez* held that "[w]here, under state law, claims of ineffective assistance

[16] Those including both exhausted and unexhausted claims.

of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. In *Trevino v. Thaler*, the Court applied *Martinez* to states like Texas, where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. . ." 569 U.S. 413, 429 (2013).

Post-*Martinez*, many "*Martinez* claims" were resolved in the federal courts, but this Court's recent decision in *Shinn v. Ramirez*, likely curtailed that practice. 596 U.S. 366 (2022). There, the Court held "that, under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* at 382. For petitioners like Tong, who present federal courts with unexhausted or procedurally defaulted, yet substantial, claims of ineffective assistance of counsel, the only hope of ever having the claim reviewed in on its merits by a federal court comes by requesting a stay and abeyance under *Rhines*. For petitioners in the Fifth Circuit, a *Rhines* stay is not possible on a *Martinez* claim.

A. A circuit split has emerged concerning ineffective post-conviction counsel and "good cause."

Before the COA, Tong argued that the ineffectiveness of his post-conviction

counsel (IAHC)[17] established "good cause" under *Rhines*. The COA held that "[o]ur precedent forecloses Tong's argument." Appendix A, at 864 (*citing Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010)). In *Williams,* the circuit court first discussed whether IAHC could constitute cause to overcome a procedural default. 602 F.3d at 308-09. The Court held that "ineffective assistance of state habeas or post-conviction counsel *cannot* serve as cause for a procedural default." *Id.* Next, the Court considered whether IAHC could constitute "good cause" under *Rhines*, and simply held that "as discussed above" IAHC did not suffice. *Id.* at 309. The "good cause" *Rhines* analysis was based directly on the "cause" procedural default analysis.

Williams was decided prior to *Martinez* and *Trevino.* As the COA recognized, "*Martinez* and *Trevino I* overruled our procedural default holding in *Williams* by permitting IAHC to serve as 'cause.'" Appendix A, at 863. However, despite the fact that the "good cause" holding in *Williams* was based entirely on the "cause" holding (now overruled by *Trevino*), the COA held that the "good cause" holding remained binding precedent because *Martinez* and *Trevino* "said nothing about what constitutes 'good cause' for failure to exhaust under *Rhines*." Appendix at 8-9.[18]

After *Martinez* and *Trevino*, it makes sense that IAHC would establish good cause for IATC claims that are potentially meritorious. This Court has suggested that the "good cause" standard from *Rhines* is more forgiving than the "cause"

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[17] IAHC stands for ineffective assistance of habeas counsel.

[18] The *Williams* holding seemingly conflicts with the Fifth Circuit's own precedent in *Ruiz v. Quarterman*, 504 F.3d 523, 529 n.17 (5th Cir. 2007) (recognizing that the "failures" of Texas' state habeas system in affording competent state habeas representation establishes equitable good cause for a *Rhines* stay).

standard associated with procedural default. In dicta, the Court opined that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). More importantly, the only other circuit court to consider the issue has decided that "the *Rhines* standard for IAC-based cause is not any more demanding than the cause standard articulated in *Martinez." Blake v. Baker*, 745 F.3d 977, 984 (9th Cir. 2014). For that reason, the petitioner's "showing of state post-conviction IAC satisfies the *Rhines* good cause standard." *Id.*[19]

Finally, the equitable underpinnings of *Martinez* support Tong's argument. *Martinez's* holding was based upon the idea that at least one court should pass upon a prisoner's IATC claims. *Martinez*, 566 U.S. at 10-11 ("if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims."). And, in light of *Ramirez*, if IAHC does not establish "good cause," then no Court will ever review the merits of potentially meritorious IAC claims. The equitable underpinnings of *Martinez* can only be satisfied if petitioners with substantial, but unexhausted, IATC claims are permitted to return to state court to exhaust their claims.

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[19] *Blake*, 745 F.3d. at 983 ("Our holding. . . is consistent with and supported by the Supreme Court's recent opinion in *Martinez v. Ryan*[.]"; *See also Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017)(holding the same and noting "[t]he caselaw concerning what constitutes 'good cause' under *Rhines* has not been developed in great detail.").

B. The Court of Appeals is applying an unnecessarily burdensome "potentially meritorious" test, in contradiction of its own and this Court's precedent.

The *Rhines* Court explained that claims are not potentially meritorious when the "claims are plainly meritless." *Rhines*, 544 U.S. at 277. In *Wilder v. Cockrell*, the Fifth Circuit considered the application of this *Rhines* factor and explained "because it is not entirely clear that Texas' subsequent-application bar would prohibit consideration of the [relevant] claim, Texas courts should make that determination." 274 F.3d 255, 262-53 (5th Cir. 2001)).[20] The relevant test in the Fifth Circuit was, previously, whether it was "entirely clear" that a state court would consider an otherwise potentially meritorious claim procedurally defaulted.

The cognizability of claims in subsequent habeas applications in Texas is governed by Texas Code of Criminal Procedure art. 11.071 § 5. Appendix H. Although Tong recognized that Texas has yet to decide that *Martinez* and *Trevino* might affect the application of this statute, specifically section 5 (a)(1), he argued that Texas might be willing to review his IATC claim in light of recent Supreme Court case law. However, recent Fifth Circuit precedent foreclosed his argument. *See* Appendix A, at 864, n. 4. (*citing Sandoval Mendoza v. Lumpkin*, 81 F.4th 461 (5th Cir. 2023) (per curiam).

Sandoval Mendoza, discussing Texas law, held that "Texas law forecloses the

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[20] The Ninth Circuit has a similar interpretation: "In determining whether a claim is 'plainly meritless,' principles of comity and federalism demand that the federal court refrain from ruling on the merits of the claim unless 'it is perfectly clear that the petitioner has no hope of prevailing.'" *Dixon v. Baker*, 847 F.3d 714, 722 (9th Cir. 2017) (*citing Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005)).

argument that state habeas counsel's ineffectiveness renders the factual basis unavailable at the time of the initial writ." 81 F.4th at 482 (*citing Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002). Interestingly, *Graves* did not hold what the COA believed it did. Graves did not raise a claim attacking the validity of his conviction. Instead, the claim at issue there was "based solely upon an alleged violation of the habeas statute itself. It [was] not a constitutional claim." *Id.* at 116. Of course, "[s]tatutory violations simply are *not* cognizable claims on a writ of habeas corpus." *Id.* at 116-17. More importantly, Tong has argued that at least six Judges have, at one point or another, suggested that the Court of Criminal Appeals should revisit its subsequent application jurisprudence in light of *Trevino*.[21] Indeed, four current Judges of the Court assumed *Martinez* and *Trevino* could have changed their past decisions, and addressed the merits of a state applicant's claims in a concurring opinion. *Ex Parte Medina*, No. WR-41,274-05, 2017 WL 690960, at 9 (Tex. Crim. App. 2017).

Tong also argued that Section 5(a)(3) of Article 11.071 permits review of his substantial *Wiggins* claim. "Under this provision, a subsequent capital habeas applicant is entitled to a merits-review of a claim if he can show by clear and convincing evidence that, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special

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[21] *Ex parte Alvarez*, 468 S.W.3d 543 (Tex. Crim. App. 2015) (concurrence by Yeary, J., in which Johnson and Newell, JJ., joined.); *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013) (dissent by Price and Johnson, JJ., joined); *Ex parte McCarthy*, WR-50,360-04, 2013 WL 3283148 (Tex. Crim. App. June 24, 2013) (concurrence by Price, J., and Meyers, J., joined) (dissent by Alcala, J., in which Johnson, J., joins.).

issues that were submitted to the jury in the applicant's trial under Article 37.071[.]" *Ex parte Blue*, 230 S.W.3d 151, 153 (Tex. Crim. App. 2007) (internal quotation marks omitted). The COA recognized, "[i]t is true, though, that the TCCA has left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3)." Appendix A, at 864.[22] Despite that it was not "entirely clear" that the Texas courts would apply a procedural bar to Tong's *Wiggins* claim, and the claim was not therefore "plainly meritless," the COA decided Tong could not establish that his claim was potentially meritorious within the meaning of *Rhines*.

According to the COA, the "mere possibility" that Texas might consider the merits of his claim "does not make Tong's claim potentially meritorious under *Rhines*." Appendix A, at 865. This Court should grant this petition because the COA's opinion conflicts with this Court's decision in *Rhines* and its own previous opinions. Further, this Court has not provided any guidance on the interplay between potential state procedural defaults, a question of state law, and the *Rhines* "potentially meritorious" analysis. Sup. Ct. R. 10.

II. IN A CAPITAL CASE, DOES A TRIAL COURT'S DEVIATION FROM "THE LAW OF THE LAND" DURING VOIR DIRE IN AN ATTEMPT TO INSULATE A PERCEIVED DEATH SENTENCE FROM APPELLATE REVIEW VIOLATE DUE PROCESS?

Discussing the contours of Due Process, this Court has explained "[o]ur system of law has always endeavored to prevent even the probability of unfairness." *In re*

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[22] *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) ("Therefore it is arguable that, in theory at least, a subsequent habeas applicant could demonstrate by clear and convincing evidence that, but for some constitutional error, no rational juror would have answered the mitigation special issue in the State's favor. On its face this would seem to meet the criteria of Article 11.071, Section 5(a)(3).").

Murchison, 349 U.S. 133, 136 (1955). And, more on point here, this Court explained almost 150 years ago, that, at a minimum, "[d]ue process of law is process according to the law of the land." *Hurtado v. People of State of Cal.*, 110 U.S. 516, 533 (1884).[23] The question here does not involve the erroneous denial of peremptory challenges, but whether a trial court's deviation from state law in an attempt to insulate a perceived sentence of death from appellate reversal violates Due Process.

The cause and prejudice analysis and underlying merits of this claim rise or fall with the merits of the claim. Restated, if Tong's conviction would have been reversed had appellant counsel sufficiently briefed the merits of this claim, then Tong has established cause and prejudice to overcome any procedural default[24] while at the same time establishing a constitutional violation calling for a new trial.[25]

This Court has recognized that a trial court's violation of state law can implicate procedural due process concerns. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980). In *Hicks,* state law required the jury assess the defendant's punishment, but the trial judge instructed the jury that it must return a verdict of 40 years. *Id.* at 345-46. The State, in *Hicks*, like the State and lower court here, argued that the error was merely "the denial of a procedural right of exclusively state concern." *Id.* at 346. This Court disagreed, replying that the "[t]he defendant in such a case has a

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[23] *Walker v. Sauvinet*, 92 U.S. 90, 93, 23 L. Ed. 678 (1875) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State").

[24] The Appellate Court agrees. *See* Appendix A, at 867-70 (finding no IAAC based on denying the merits of the Due process claim). The Respondent also agreed before the Appellate Court. *See* Appellee's Brief at 15-17.

[25] *Murray v. Carrier*, 477 U.S 478, 488 (1986). ("'[i]neffective assistance of counsel…is cause for a procedural default.'").

substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.*

Hicks provides the constitutional framework for the claim: (1) the Fourteenth Amendment preserves against arbitrary deprivations of statutory protections so long as (2) the petitioner has a substantial and legitimate expectation that the statutory protection will be followed. Tong had a substantial and legitimate expectation that he would be able to intelligently exercise his peremptory challenges in accordance with state law, or, in accordance with the trial court's promise of unlimited strikes, but neither happened. Further, this Court has historically been concerned with constitutional errors involving the jury selection process. In *Peters v. Kiff*, the Court explained "due process imposes limitations on the composition of that jury." 407 U.S. 493, 501 (1972).[26] Constitutional principles "compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." *Id.* at 502.[27]

The lower court relied upon *Ross*, *Rivera,* and *Skilling* in denying this issue,

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[26] Holding that, regardless of a defendant's race, a conviction cannot stand when African-American's were arbitrarily excluded from the grand jury.

[27] In *Morgan v. Illinois*, the Court held that due process mandates a "petitioner's ability to exercise intelligently his complementary challenge for cause" against those biased against his case or pro-death penalty jurors who would always impose a sentence of death. 504 U.S. 719 (1992). The trial court's actions deprived Tong of that ability, because trial counsel relied on the promise of unlimited peremptories rather than challenging biased jurors for cause. 13 RR at 80.

but none are controlling. *Skilling v. United States* is inapplicable. 561 U.S. 358 (2010). That case involved two questions: "First, did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling's jury?" *Id.* at 377. Both questions involved a question of whether pretrial publicity rendered Skilling's trial unfair, and neither involved the trial court's deviation from, or violation of, statutory voir dire procedures.

Ross and *Rivera* are also not controlling because both of those cases included a good faith error on the part of the trial judge, not a trial judge repeatedly and deliberately misapplying State law. In *Ross,* this Court held that the failure to remove a juror for cause did not deprive defendant of his right to an impartial jury when that juror did not sit on the jury. *Ross v. Oklahoma*, 487 U.S. 81 (1988). However, this Court also explained that "[n]o claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force petitioner to use his peremptory challenges to correct these errors." *Id.* at 91, n. 5. In *Ravera*, where the Court found no constitutional error in the erroneous denial of a peremptory challenge, it was noted "[a]s in *Ross* and *Martinez–Salazar,* there is no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner." *Rivera v. Illinois*, 556 U.S. 148, 160 (2009).[28]

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[28] "In conclusion, we note what this case does not involve. It is not asserted that the trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error." *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

The error of the lower courts was the failure to recognize that Tong's case does not involve a good faith error on the part of the trial court. Rather, this case involves an arbitrary deviation from State law orchestrated by the trial judge in an attempt to insulate the case from appellate review. The lower court's opinion conflicts with this Court's prior opinions concerning procedural due process, and misapplies this Court's prior precedent. This Court should grant the petition and permit full briefing on the Due Process issue. Sup. Ct. R. 10.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the page limitation of Rule 33.2. The relevant portions of the brief include 33 pages.

/s/ Jonathan Landers

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