No. 23-7577

IN THE
Supreme Court of the United States

CHUONG DUONG TONG,
Petitioner,
v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General
of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

ALI MUSTAPHA NASSER
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
ali.nasser@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. The Fifth Circuit held that Tong's *Wiggins*[1] claim would be procedurally barred under Texas's abuse-of-the-writ statute, and thus his request to return to state court to exhaust his claim was plainly meritless under *Rhines v. Weber*, 544 U.S. 269 (2005). Should this Court take up review the Fifth Circuit's interpretation of Texas's abuse-of-the-writ bar?

2. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court held that an ineffective-assistance-of-habeas-counsel (IAHC) claim could establish cause to overcome a procedural default in federal court. Should this Court take up the issue of whether, considering *Martinez*, IAHC may also establish good cause for a failure to exhaust under *Rhines*?

3. Should this Court consider whether a change in peremptory-strike procedure amounts to a due process violation, where no harm has been established, no biased or disqualified juror sat on the jury, and Tong was given *more* peremptory strikes than permitted under state law?

---

[1] *Wiggins v. Smith*, 539 U.S. 510 (2003).

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 1998, Petitioner Chuong Tong was convicted for the 1997 capital murder of Officer Tony Trinh and sentenced to death by a Texas court. After his direct appeal and initial state-habeas application were both rejected, Tong filed for federal habeas relief in district court. Over the course of more than a decade, the district court denied relief on Tong's claims and denied Tong a stay of proceedings to exhaust his *Wiggins* claim.[2] Tong appealed on the grounds that (1) the district court erred in denying his voir-dire claim and (2) the district court erred in denying his request for a stay of proceedings. In January 2024, the Fifth Circuit rejected both arguments. Tong now seeks certiorari review of the Fifth Circuit's decision.

STATEMENT OF THE CASE

I. Evidence Presented at Guilt and Punishment

A. The murder of Officer Tony Trinh

The district court below summarized the facts of the capital offense:

> On April 6, 1997, Houston police officer Tony Trinh was working at Sunny's, a Houston convenience store owned by Trinh's parents . . . Tong entered Sunny's, and approached Trinh, who was working behind the counter. Tong held a Glock 17 semi-automatic handgun . . . Tong demanded Trinh's wallet and jewelry. While Trinh was handing over his jewelry, Tong attempted to open the cash register. Trinh then identified himself as a police officer, showed Tong his badge, and told Tong that he "was not going to

2 *Wiggins v. Smith*, 539 U.S. 510 (2003).

get away with this." Tong shot Trinh once in the head at close range, took Trinh's jewelry, and fled to a waiting car. Tong took the gun apart and disposed of the components in several storm drains.

Several days later, Tong asked his roommate, Hoa Huu Than, a/k/a "Too Short," to sell some of Trinh's jewelry. After doing so, Than became suspicious that the jewelry might be Trinh's. When he asked Tong, Tong threatened him if he said anything about the jewelry.

Several months later, Tong was arrested for capital murder. He gave police a statement detailing the robbery and shooting. In the statement, Tong claimed that he accidentally shot Trinh while jumping over the counter. He later showed police where he disposed of the handgun components.

While in a jail holding tank, Tong told a fellow inmate, Stephen Mayeros, why he was in jail. Mayeros asked Tong how close he was when he shot Trinh, and Tong responded by touching his finger to Mayeros's forehead and saying "bang." When Mayeros asked Tong if he felt bad about killing Trinh, Tong replied that he felt terrible and cried himself to sleep, and then laughed. Later, when a police officer was kneeling in front of Tong preparing Tong's restraints for transport, Tong placed his fingers in the shape of a pistol, pointed them at the officer's head, and mouthed the word "bang."

At trial in 1998, Tong gave an alibi defense, testifying that he was asleep with his girlfriend at the time of the murder, and that he had never been to Sunny's. He claimed that he was induced and coerced to confess by promises of lesser charges and threats by police officers. The jury found Tong guilty of capital murder on the alternative theories that he intentionally killed Trinh, a police officer performing his official duties, and/or that he intentionally

> killed Trinh during the course of robbing or attempting to rob Sunny's.

Tong v. Davis, Civ. No. 4:10-2355, 2016 WL 5661698, at *1 (S.D. Tex. Sep. 30, 2016) (internal footnotes and record citations omitted).

B. The Punishment Evidence

The district court also summarized the evidence presented at the punishment phase of Tong's trial:

> During the penalty phase, the State presented evidence that Tong was arrested for stealing, and had numerous disciplinary problems, during high school. Efforts to counsel Tong were unsuccessful due to Tong's lack of remorse. He got in trouble for theft, destruction of property, sexual harassment, and assault. He was eventually expelled from school due to concerns that he posed a threat to the safety of other students.
>
> During the penalty phase, the State also presented evidence of other incidents. The first was that, about a month after the murder, Tong took part in a bank larceny involving $400,000. Also, two days before the Trinh incident, Tong and an accomplice broke into the home of Vincent and Hannah Lee. Mrs. Lee was at home with her sick toddler, Christina. Tong tied Mrs. Lee up, put a gun to her head, and told her he was going to take all of her money and then kill her. Mr. Lee came home during the robbery. Tong and his accomplice heard Mr. Lee enter and told Mrs. Lee that they would kill her if she made any noise. Tong approached Mr. Lee with a gun. When Mr. Lee reached for the gun, Tong shot him. Tong dragged Mr. Lee into the living room, where Mrs. Lee and Christina were held, threw him to the floor, and threatened to kill him. As he was leaving, Tong stated that he was "going to kill all of you" and began firing toward the family. He shot Christina in the leg, and hit Mr. Lee with two more shots. Tong laughed after shooting the Lees and left.
>
> Tong's father, Hoang Tong, testified that he had marital problems. Because of this, he left Vietnam with Tong when Tong

> was three years old. They moved to the Philippines for approximately nine months. One day, Hoang found Tong standing in the water near the beach because he missed his mother and wanted to swim back to Vietnam to see her.
>
> The trial record revealed that Tong had a difficult childhood. Tong and his father moved to Germany. Tong lived briefly in one foster home, then in an orphanage, and eventually moved into another foster home, where he lived with Jim and Gabby Wyatt for three years. During that period, Hoang said he was going on a vacation to the United States, but never returned to Germany, apparently abandoning Tong. Eventually, after Tong became a serious discipline problem, the Wyatts determined that they could no longer handle him. The Wyatts were able to get in touch with Hoang, and Jim Wyatt brought Tong to Houston. Hoang took informal custody of Tong and they lived together with other family until Hoang left Tong again. Tong lived with extended family until he was 21 years old. His relationship with his father was very strained.
>
> Tong's uncle testified that Tong had trouble communicating when he first arrived because he spoke only German. Tong was unhappy because he missed the Wyatts and his own mother.
>
> Jim Wyatt testified that he met Tong when Tong and his father lived in a Red Cross refugee home in Germany. He testified that Hoang was not an attentive father and was a very severe disciplinarian. The Wyatts took Tong in. For some time, he did well living as part of their family. However, when Tong returned from weekend visits with his father, he was subdued. After his father went to the United States, Tong began having difficulties in the Wyatt home. Eventually, the Wyatts decided to send Tong to live with his family in the United States.

Tong, 2016 WL 5661698, at *2–3 (internal record citations omitted).

II. Appellate and Postconviction Proceedings

Tong appealed his conviction, and the Texas Court of Criminal Appeals (CCA) affirmed the trial court's judgment. *Tong v. State*, 25 S.W.3d 707, 715

(Tex. Crim. App. 2000); App 34–42.[3] He also filed a state-habeas application, which the CCA denied. *Ex parte Tong*, No. WR-71,377-01, 2009 WL 1900372 (Tex. Crim. App. Jul. 1, 2009). His case then moved to federal court, where he filed a federal habeas petition under 28 U.S.C. § 2254. ECF No. 1, *Tong v. Lumpkin*, 4:10-cv-02355 (S.D. Tex. Jul. 1, 2010).[4] In September 2012, the federal district court stayed federal proceedings so that Tong could exhaust his unexhausted claims in state court. ECF No. 31. Back in state court, Tong filed a subsequent state-habeas application. *Ex parte Tong*, No. WR-71,377-02, 2013 WL 2285455, at *1 (Tex. Crim. App. May 22, 2013). The CCA dismissed the application as an abuse of the writ without considering the merits of the claims. *Id*.

Back in federal court, Tong filed an amended habeas application. ECF No. 57. He also moved for funding to hire a mitigation expert and qualified Vietnamese interpreter, which the district court denied. ECF Nos. 49, 56. In 2016, the district court denied most of Tong's claims but held that it would conduct an evidentiary hearing on Tong's *Brady*[5] claims. *Tong*, 2016 WL

---

[3] Respondent cites to Tong's appendix as "App." followed by page number. Where Tong includes an opinion in his appendix, Respondent initially cites to both the Westlaw citation and the appendix citation but refers to only the appendix for all subsequent citations.

[4] All ECF cites are to this docket number unless indicated otherwise.

[5] *Brady v. Maryland*, 363 U.S. 83 (1963).

5661698, at *37. The district court held an evidentiary hearing and, on March 22, 2019, it denied relief on the remaining claims and entered final judgment. ECF Nos. 159, 160 (under seal). The district court granted Tong a certificate of appealability (COA) on his voir-dire claim. *Tong v. Lumpkin*, 825 F. App'x 181, 182 (5th Cir. 2020).

Tong's case then moved to the Fifth Circuit, where he sought further COAs on his *Wiggins* claim (that trial counsel failed to present mitigating evidence) and on his *Brady* claims. *Id*. at 182–83. Tong also challenged the district court's 2014 denial of funding for a mitigation expert and Vietnamese interpreter. *Id*. at 185–86. The Fifth Circuit found that the district court's denial of funding rested on the "substantial need" test that this Court struck down in *Ayestas v. Davis*, 584 U.S. 28 (2018). *Tong*, 825 F. App'x at 186. Thus, the court of appeals vacated the denial of funding and remanded the case for reconsideration of Tong's funding request in light of *Ayestas*. *Id*. The Court stayed Tong's request for a COA on his *Wiggins* claim "pending the district court's resolution of his funding request." *Id*.

On remand, the district court granted Tong investigative funding. ECF No. 182. The district court, however, noted that the Fifth Circuit remanded *only* with instructions to reconsider the funding issue but did not instruct the district court to order additional briefing on the *Wiggins* claim. ECF No. 185. The district court accordingly ordered Tong to move in the Fifth Circuit for a full remand of his *Wiggins* claim. *Id*. Tong did so, and the Fifth Circuit granted his motion, remanding for development of Tong's *Wiggins* claim. ECF No. 187.

Midstream of the second remand proceedings, this Court announced its decision in *Shinn v. Martinez Ramirez*, 596 U.S. 366 (2022). As the decision effectively barred the evidence underlying Tong's *Wiggins* claim, Respondent moved to enter judgment and terminate remand proceedings. ECF No. 206. Tong responded by seeking another stay under *Rhines v. Weber*, 544 U.S. 269 (2005). ECF No. 210. In March 2023, the district court denied the request for a stay, entered judgment denying relief on the *Wiggins* claim, but granted Tong a COA on his stay request. App. 16–22.

After a round of briefing and oral argument on the stay issue, the Fifth Circuit issued its opinion. It affirmed the district court's denial of the stay and denied Tong a COA on his *Wiggins* claim. *Tong v. Lumpkin*, 90 F.4th 857, 869–70 (5th Cir. 2024); App. 12. The court of appeals also denied Tong's voir-dire claim as procedurally barred. App. 12. Tong filed a motion for rehearing en banc, which the court of appeals denied. App. 14. On May 23, 2024, Tong filed his petition for a writ of certiorari. *See generally* Pet.

REASONS FOR DENYING THE WRIT

I. The District Court's Denial of Tong's Request for a Stay Is Not Worthy of Certiorari Review.

In his first argument, Tong seeks certiorari review of the Fifth Circuit's opinion affirming the district court's denial of his stay request pursuant to *Rhines*. Pet. at 23. Under *Rhines*, a federal-habeas petitioner may obtain a stay of federal proceedings to exhaust any unexhausted federal claims so long as (1) the petitioner shows good cause for the failure to exhaust, (2) the unexhausted claim is not plainly meritless, and (3) the petitioner has not intentionally engaged in dilatory tactics. 544 U.S. at 277–79.

Tong sought a *Rhines* stay to exhaust his *Wiggins* claim, in which he alleges that his trial counsel failed to present mitigating evidence at the punishment phase of trial. App. 7. The district court denied the request. *Id*. at 16–23. The Fifth Circuit affirmed, finding that Tong failed to show good cause for his failure to exhaust and that Tong failed to show his request was not plainly meritless. *Id*. at 7–8. It reasoned first that, under circuit precedent, an IAHC claim could not be used to establish good cause under *Rhines*. *Id*. at 7. It reasoned second that the claim was plainly meritless because no CCA precedent existed that would permit Tong to obtain state-court review of his *Wiggins* claim in a subsequent application. *Id*. at 7–8. Tong now seeks review of these determinations.

A. Tong's plainly-meritless argument fails to state a compelling reason for certiorari review.

Tong contends that the Fifth Circuit erred when it found his stay request plainly meritless on the rationale that it would be procedurally defaulted if presented in state court. Pet. at 27–29. Under Texas law, a subsequent application filed by a capital applicant may only be considered if it meets one of the three exceptions to the abuse-of-the-writ bar:

- First, an applicant can prove either factual or legal unavailability of a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). A claim is legally unavailable when its legal basis "was not recognized by or could not have been reasonably formulated from a final decision of the [this Court], a court of appeals of the United States, or a court of appellate jurisdiction of this state[,]" *id.* § 5(d), and factually unavailable when its factual basis "was not ascertainable through the exercise of reasonable diligence[.]" *Id.* § 5(e);

- Second, an applicant can prove that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." *Id.* § 5(a)(2). This requires an applicant to "make a threshold, prima facie showing of innocence by a preponderance of the evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citation omitted);

- Third, an applicant can prove that, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the [S]tate's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). This subsection "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, [505 U.S. 333 (1992)]." *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

Tong argues he made a plausible showing that his *Wiggins* claim might pass through the first and third of these exceptions (respectively, the previous-unavailability exception under § 5(a)(1) and the innocence-of-the-death-penalty exception under § 5(a)(3)). He claims that the former exception applies through a theory that state-habeas counsel was ineffective and the latter exception applies through a theory that further mitigation evidence would render him innocent of the death penalty under § 5(a)(3). Pet. at 27–29.

1. Background on the Fifth Circuit's application of the plainly-meritless prong to Texas's abuse-of-the-writ bar.

Shortly after *Rhines*, the Fifth Circuit held that an unexhausted claim is "plainly meritless" if the petitioner is "procedurally barred from raising those claims in state court." *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005). This, of course, raised the question of how to make the procedural default determination prospectively.

After nearly two decades, the Fifth Circuit gave some guidance on how to apply this general rule to Texas's abuse-of-the-writ statute. In *Sandoval Mendoza*, the court of appeals considered an argument that an IAHC claim—like the one established in *Martinez*—might be used to overcome the previous-unavailability bar of § 5(a)(1).[6] *Sandoval Mendoza v. Lumpkin*, 81 F.4th 461, 482 (5th Cir. 2023). The court found that "Texas law forecloses the argument that state habeas counsel's ineffectiveness renders the factual basis

[6] *Martinez* held that a federal petitioner could overcome the procedural default of a substantial ineffective-assistance-of-trial-counsel (IATC) claim through an IAHC claim establishing that habeas counsel ineffectively failed to raise the claim in state court. 566 U.S. at 9.

unavailable at the time of the initial writ." *Id.* (citing *Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002)). Mendoza urged that the CCA should have the opportunity to revisit *Graves* in light of this Court's decision in *Martinez Ramirez*. *Id.* The Fifth Circuit rejected that argument, holding that "[t]he opportunity to reconsider state court precedent . . . is not in itself enough to grant a *Rhines* stay." *Id.* Thus, *Sandoval Mendoza* finally held what should have been obvious to everyone—that the mere *possibility* of a change in state law does not salvage a *Rhines* motion under the plainly-meritless prong.

In light of *Sandoval Mendoza*, Tong abandoned his argument under § 5(a)(1) but maintained his argument under § 5(a)(3)—that his *Wiggins* claim might show his innocence of the death penalty under Texas statute. App. 8. The Fifth Circuit rejected that argument, finding that the CCA has never found that a *Wiggins* claim meets the innocence-of-the-death-penalty exception of § 5(a)(3). *Id.* The court conducted a detailed review of the CCA's interpretation of § 5(a)(3), specifically looking to the CCA's opinion in *Blue*, 230 S.W.3d at 151. According to *Blue*, "§ 5(a)(3) 'more or less' adopted the Supreme Court's actual innocence of the death penalty rule in *Sawyer*[.]" App. 8 (citing *Blue*, 230 S.W.3d at 159–60). But, as the Fifth Circuit noted, "*Sawyer* limited this exception where alleged constitutional errors only 'affect[ed] the applicant's *eligibility* for the death penalty *under state statutory law*.'" *Id.* (quoting *Blue* 230 S.W.3d at 161). Indeed, *Sawyer* explicitly rejected the argument that the innocence-of-the-death-penalty exception could ever hinge on "the existence of additional mitigating evidence." 505 U.S. at 345.

So, the question then is to what extent § 5(a)(3)—which "more or less" adopts *Sawyer*'s definition of innocence of the death penalty—leaves more wiggle room for arguments predicated, not on categorical ineligibility for the death penalty, but rather on evidence that might have influenced the jury's determination of the Texas special issues. *See generally* Tex. Code Crim. Proc. art. 37.071 (listing special issues that must be answered by jury before imposition of a death sentence). As the Fifth Circuit noted, the CCA considered the theoretical possibility of such an argument in a footnote. *Blue*, 230 S.W.3d at 160 n.42. But the CCA's language was expressly dicta. *Id*. ("We need express no ultimate opinion on this question here."). And the Fifth Circuit held, "we cannot approve a *Rhines* stay based solely on *dicta* that 'left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3).'" App. 8. Tong seeks reversal of this interpretation of the plainly-meritless prong.

2. Tong's request amounts to error correction.

Tong seeks certiorari review of the Fifth Circuit's determination that his request was plainly meritless under Texas's abuse-of-the-writ bar. At the outset, Tong's argument that an IAHC claim might render his *Wiggins* claim previously unavailable under § 5(a)(1) should not be considered because it was abandoned below. After merits briefing had concluded, but before oral argument, the Fifth Circuit rejected Tong's § 5(a)(1) argument in another case. *See Sandoval Mendoza*, 81 F.4th at 482. When asked about *Sandoval Mendoza* at oral argument, Tong explicitly abandoned his § 5(a)(1) argument, causing the Fifth Circuit to abdicate review of the argument altogether. App. 8. Thus, this Court should decline review of whether the Fifth Circuit's interpretation of § 5(a)(1) was error. *See Schall v. Martin*, 467 U.S. 253, 293 n.18 (1984) (Marshall, J., dissenting) ("We are generally chary of deciding important constitutional questions not reached by a lower court.").

But even setting aside this prudential concern, Tong's request smacks of error correction. He doesn't take issue with the rule that a claim that would be defaulted in state court is plainly meritless under *Rhines*.[7] Rather, Tong's argument is simply a direct attack on the Fifth Circuit's *application* of the plainly meritless rule to Texas's abuse-of-the-writ bar. Such an attack on the how the Fifth Circuit interprets Texas law, by definition, involves no circuit split nor implicates any federal question for this Court to answer. *See* Sup. Ct.

---

[7] Multiple circuit courts agree that a *Rhines* request to exhaust a claim that would be procedurally barred in state court is plainly meritless. *See Neville*, 423 F.3d at 480; *Davis v. Sellers*, 940 F.3d 1175, 1191 (11th Cir. 2019) (holding that granting a *Rhines* stay would be an abuse of discretion where "a successive petition would be procedurally barred under [state] law"); *Johnson v. Raemisch*, 779 F. App'x 507, 514 n.6 (10th Cir. 2019) (explaining that petitioner was not entitled to a *Rhines* stay when the claim would be barred under state law).

R. 10. Moreover, it would be peculiar for this Court to grant review simply to correct the Fifth Circuit's interpretation of Texas law given that this Court expressly *relies on* the Fifth Circuit's interpretation of Texas law. *Cf. Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (noting that this Court generally defers to a court of appeals's interpretation of its respective states' laws); *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806, 810 n.5 (1997) (noting "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law").

Interpreting Texas law to appraise whether a Texas petitioner may obtain a *Rhines* stay is precisely the type of question that the Fifth Circuit is best equipped to answer. Indeed, this Court entrusts district and circuit courts to routinely make this very analysis in the context of procedural defaults. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). It should be no different in the *Rhines* context.

3. The Fifth Circuit's interpretation was correct.

In any event, Tong seeks a rule that is unworkable and nonsensical. First, he appears to take issue with the Fifth Circuit's interpretation that IAHC could not establish previous unavailability under § 5(a)(1) of Texas's abuse-of-the-writ statute. Pet. at 28. Despite abandoning this argument in the court of appeals, App. 8, Tong now urges that the Fifth Circuit incorrectly interpreted *Graves*, 70 S.W.3d at 117, and points to CCA judges that have suggested overturning *Graves* after this Court's opinion in *Martinez*. Pet. at 27–28.

First, Tong feebly argues that *Graves* does not hold that IAHC cannot be used to show an underlying constitutional claim was unavailable under § 5(a)(1). Pet. at 28. He contends that is so because, in *Graves*, the applicant did not tie his IAHC claim to any underlying constitutional claim. *Id*. That's a distinction without a difference. The upshot of *Graves* is that IAHC can never show previous unavailability under § 5(a)(1), even when used as a procedural vehicle to support an underlying constitutional claim. The CCA itself cites to *Graves* for that very proposition: "If an applicant's habeas counsel fails to raise a potentially meritorious IA[T]C claim in an initial writ application, under our holding in *Graves*, that claim cannot be revived in a subsequent writ application by asserting ineffective assistance of habeas counsel." *Ex parte Ruiz*, 543 S.W.3d 805, 825 (Tex. Crim. App. 2016). Moreover, Tong's suggestion that the CCA might overrule *Graves* is unavailing. Tong's hope that the law might change to his benefit is, by definition, not the law. *See Leal Garcia v. Texas*, 564 U.S. 940, 941 (2011) ("Our task is to rule on what the law is, not what it might eventually be.").[8]

---

[8] Tong's argument—a hodgepodge of various CCA concurrences and dissents—is that "at least six [judges] have . . . *suggested* that the [CCA] should revisit its subsequent application jurisprudence in light of *Trevino*." Pet. at 27–28 (emphasis

Tong makes a similar argument that his *Wiggins* claim is not plainly meritless because it may show innocence of the death penalty under § 5(a)(3) of Texas's abuse-of-the-writ statute. Pet. at 28–29. The Fifth Circuit noted that § 5(a)(3) was meant to codify the categorical ineligibility of the death penalty as promulgated by this Court in *Sawyer*. App. 8 (citing *Blue*, 230 S.W.3d at 159–60). The court also noted, however, that the opinion in *Blue* "left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3)." *Id.* (quoting *Balentine v. Thaler*, 626 F.3d 842, 856 (5th Cir. 2010)). Indeed, in a footnote that was expressly dicta, the CCA in *Blue* stated,

> . . . 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). But it would also permit a subsequent state habeas applicant to proceed under circumstances that would not excuse a

---

added). Even indulging in this specious judge-counting exercise, only two of the six judges he references are still on the court. *Compare* Pet. at 28 n.21, *with About the Court: Judges*, Court of Criminal Appeals of Texas, https://www.txcourts.gov/cca/about-the-court/judges/ (last visited July 29, 2024). And one of the two remaining judges in that list showed skepticism of Tong's argument in light of the Supreme Court's reaffirmance in *Davila v. Davis*, 582 U.S. 521 (2017), that there is no constitutional right to state-postconviction counsel. *Compare* Appellant's Br. at 28 n.21, *with Ex parte Preyor*, 537 S.W.3d 1, 2 (Tex. Crim. App. 2017) (Newell, J., concurring) ("The [Supreme] Court may, at some future date, constitutionalize the holdings of *Martinez* and *Trevino* and proclaim that the Sixth Amendment requires the appointment of counsel in a post-conviction habeas proceeding . . . But it is up to the United States Supreme Court to overrule its precedent, not this Court."). Two other judges joined that concurring opinion. Moreover, there has been no renewed push to overturn *Graves* post-*Davila*. Thus, Tong's argument is stale.

> federal petitioner under *Sawyer v. Whitley*. *We need express no ultimate opinion on this question here.*

Blue, 230 S.W.3d at 160 n.42 (emphasis added).

The Fifth Circuit held that the CCA's "hesitance on this point, as expressed in the *Blue* footnote, does not make Tong's *Wiggins* claim potentially meritorious under *Rhines*." App. 8. The court determined that, because the *Blue* footnote was dicta, any recognition that *Wiggins* could be applied to § 5(a)(3) would require the CCA "to revisit its procedural default precedent." *Id*. Looking to *Sandoval Mendoza*, the Fifth Circuit "noted that '[t]he opportunity to reconsider state court precedent . . . is not in itself enough to grant a *Rhines* stay.'" *Id*. (quoting *Sandoval Mendoza*, 81 F.4th at 865). It therefore held, "we cannot approve a *Rhines* stay based solely on *dicta* that 'left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3).'" *Id*. (quoting *Balentine*, 626 F.3d at 856).

The Fifth Circuit's reasoning was consistent with the principles espoused in *Rhines*. The fact that the CCA, in nearly thirty years since the enactment of § 5(a)(3),[9] has *never* held Tong's argument to be a viable one under § 5(a)(3) seems to fit the definition of "plainly meritless." *Rhines*, 544 U.S. at 277. Moreover, the Fifth Circuit's rationale finds support from this Court's prior ruling in *Leal Garcia*, in which this Court declined a stay of execution upon

[9] Article 11.071 was enacted in 1995. *See Blue*, 230 S.W.3d at 155.

unenacted legislation that *might be* forthcoming. *Leal Garcia*, 564 U.S. at 941 ("Our task is to rule on what the law is, not what it might eventually be."). And finally, the Fifth Circuit's reasoning finds support in *Rhines*'s caution that a "stay and abeyance should be available only in limited circumstances." 544 U.S. at 277. Permitting stays upon yet-to-be-recognized legal theories has no limiting principle, and would permit the grant of a *Rhines* stay, not upon potential merit, but rather upon the self-serving and fanciful hopes of federal petitioners. The Fifth Circuit's thorough, detailed, and sensical analysis appropriately balances the interests of petitioners with the desirability of staying habeas proceedings sparingly. Thus, it requires no revisitation here.

B. This case is a poor vehicle for resolving the question of whether IAHC can serve as good cause under *Rhines*.

1. Good cause in the context of *Martinez* and the emergence of a circuit split

In *Rhines*, this Court held that a petitioner proceeding under § 2254 could obtain a stay of federal proceedings to exhaust his unexhausted claims only if he could show good cause for failing to exhaust the claim in state court. 544 U.S. at 277. But this Court had already held in *Coleman* that, under agency principles, a state prisoner bears the cost of his state-postconviction counsel's "ignorance or inadvertence." 501 U.S. at 753. The Fifth Circuit applied the same logic in *Williams v. Thaler*, holding that, because an IAHC claim could not show cause to overcome a procedural default, it also could not serve as "good cause for [Williams's] failure to exhaust his IAC claim in state court[.]" *Williams v. Thaler*, 602 F.3d 291, 308–09 (5th Cir. 2010), *abrogated on other grounds by Thomas v. Lumpkin*, 995 F.3d 432, 440 (5th Cir. 2021).

Two years after *Williams*, this Court held in *Martinez* that state-habeas counsel's failure to raise a substantial IATC claim in state court could serve as cause to overcome the default of that claim. 566 U.S. at 9. As Tong points out, the Ninth Circuit first addressed the argument that IAHC could establish good cause under *Rhines* in *Blake v. Baker*, 745 F.3d 977, 979–84 (9th Cir. 2014). Unlike the Fifth Circuit, the Ninth Circuit had no prior precedent on the matter. *Id.* at 981 (noting that prior Ninth Circuit cases on good cause did not address "whether IAC by post-conviction counsel could amount to good cause under *Rhines*"). The Ninth Circuit held that IAHC could establish good cause under *Rhines*, in part explaining that the holding was "consistent with and supported by the Supreme Court's recent opinion in *Martinez*[.]" *Id.* at 983.

Unlike, the Ninth Circuit though, the Fifth Circuit *did* have pre-*Martinez* precedent holding that IAHC could not establish good cause under *Rhines*, namely, *Williams*, 602 F.3d at 308–09. Thus, when Tong raised his good cause argument in the Fifth Circuit, the panel found itself bound by *Williams* under the circuit's "rule of orderliness [,]" which holds that a Fifth Circuit panel is bound by prior precedent held by a prior Fifth Circuit panel.

App. 7 (citing *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)). The Fifth Circuit declined to revisit *Williams* on en banc reconsideration. *Id.* at 14.

2. This case is a poor vehicle to decide this question.

Because the lower court of appeals rejected Tong's *Rhines* request on the plainly meritless prong, this Court would have to find error on *both* the plainly meritless and good cause prongs to grant Tong relief. As explained above, Tong's request is plainly meritless, and Tong has presented no split in authority or federal question to be resolved. *See supra* Argument I(A). As this claim is easily disposed of on the plainly meritless prong, it is a poor vehicle to address the circuit split on the good cause prong.

Moreover, the lack of authority on the issue presented makes this case a poor candidate for certiorari review. "[T]here is additional value to letting important legal issues 'percolate' throughout the judicial system, so [this Court] can have the benefit of different circuit court opinions on the same subject." *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). This Court has no such benefit here. Tong cites to only the Ninth Circuit's discussion of how *Martinez* impacted good cause under *Rhines*. *Blake*, 745 F.3d at 783–84. The Fifth Circuit, however, found itself unable to address the argument under the Circuit's rule of orderliness. App. 7.[10] This Court should decline to take up an issue that has been so sparsely discussed by the courts of appeals.

3. Good cause under *Rhines* is not the same as good cause under *Martinez*.

In any event, this Court should decline review because the good-cause analysis under *Rhines* is unchanged by the holding in *Martinez*. Tong counters with the argument that *Martinez Ramirez*, by barring evidence underlying defaulted IATC claims under § 2254(e)(2), forecloses federal review of defaulted IATC claims. Pet. at 26. Thus, Tong contends, if IAHC cannot establish good cause under *Rhines*, "no Court will ever review the merits of potentially meritorious claims." *Id.*

But Tong's analysis is incomplete. If he truly has a pathway to merits review in a subsequent state-court proceeding, he can always pursue that remedy *after* his federal habeas proceedings. If his post-federal-habeas state application is dismissed procedurally, Tong will know that a *Rhines* stay would have accomplished nothing. If the post-federal-habeas state application is

---

10 Tong moved for en banc reconsideration to overturn the panel opinion in *Williams*, and Fifth Circuit denied the motion. App. 14. But, for all we know, the Fifth Circuit declined to revisit this precedent because Tong's request fails under the "plainly meritless" prong. Indeed, the proper case to address this type of argument would likely involve a scenario in which state-habeas counsel failed to exhaust a claim in state court but the claim would also not be barred under state procedural rules. That is not the case here.

considered on the merits, Tong will obtain review on the merits of his *Wiggins* claim, thus satisfying the equitable concerns of *Martinez*. *See Martinez*, 566 U.S. at 10–11 ("And 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."). Permitting a petitioner to instead play this scenario out midstream of habeas proceedings would "prolong federal habeas proceedings with no purpose"—an outcome this Court has expressly forbidden. *Shoop v. Twyford*, 596 U.S. 811, 820 (2022) (quoting *Martinez Ramirez*, 596 U.S. at 390); *see also Martinez*, 566 U.S. at 15 (finding that permitting IAHC to establish cause in federal court "ought not to put a significant strain on state resources"). Thus, *Rhines* is an inappropriate life-raft to rescue defaulted IATC claims from the jaws of *Martinez Ramirez*, and it therefore makes little sense to equate good cause under *Rhines* with good cause under *Martinez*.

II. Tong's Voir Dire Claim Does Not Merit Certiorari Review.

In his second argument, Tong challenges the Fifth Circuit's rejection of his voir-dire claim. The Fifth Circuit summarized the voir dire proceedings, including the trial court's process of giving the parties additional peremptory strikes, as follows:

> At the beginning of jury selection, the trial judge informed defense counsel that Tong was allowed unlimited peremptory strikes. This decision contravened Texas law, which permits only 15

> peremptory strikes. . . . After Tong used 25 peremptory strikes and 10 jurors were seated, the State objected and the judge changed course. It announced that Tong had used all available peremptory challenges and, going forward, would have to challenge potential jurors for cause. The judge overruled defense counsel's objection to this change in procedure. Tong wanted to use a peremptory strike on the eleventh juror—Venireperson Sullivan—but the judge ruled Tong was out of peremptory strikes. Tong admits there were no grounds to strike Sullivan for cause.

App. 10 (citing Tex. Code Crim. Proc. art. 35.15(a)). The Fifth Circuit found the voir-dire claim meritless, as Tong failed to show any biased or disqualified juror sat on his jury. *Id*. at 11–12. Tong seeks certiorari review of this decision.

Such review is unwarranted. First, Tong fails to show any error, as the Fifth Circuit correctly interpreted this Court's precedent. And even if Tong could show error, he fails to point to any split in authority or important question that would be answered by granting his petition. Second, even if this Court created the new rule Tong seeks, this case is a poor vehicle to do so because his voir-dire claim will remain barred under the doctrines of procedural default and nonretroactivity.

A. Procedural history of the claim

Tong raised this claim in the CCA on direct appeal, arguing that the change in procedure regarding peremptory strikes violated his right to due process. App. 35. The CCA held the claim was inadequately briefed, as Tong only cited a single case that "neither deals with the same issue presented in the instant case, nor provides any relevant constitutional or statutory framework for evaluating his claim." *Id.*

During state-habeas proceedings, Tong raised the same argument, but couched it as an ineffective-assistance-of-appellate-counsel (IAAC) claim. 1.SHCR-01 46–50. He alleged that the voir-dire claim was a "dead bang winner" that appellate counsel had failed to adequately brief. *Id.* at 48–50. The CCA rejected the IAAC-voir-dire claim as well, finding that the trial court did not err and that Tong could not show that "an unqualified juror served." App. 44–50.

Tong raised both the standalone voir-dire claim and the IAAC-voir-dire claim in federal district court. App. 25–32. The district court found the voir-dire claim procedurally defaulted due to CCA's dismissal on inadequate-briefing grounds but found that Tong could show cause and prejudice through his exhausted IAAC claim if it were meritorious. *Id.* at 25–30. The district court held that Tong failed to show any prejudice arising from the peremptory-strike procedure, thus the voir-dire claim and the IAAC-voir-dire claim failed. *Id.* at 25–32. Because the IAAC version of the claim failed, the voir-dire claim was also procedurally defaulted. *Id.* at 29–30. The district court, however, granted

Tong a certificate of appealability on the voir-dire claim. *Tong*, 2016 WL 5661698, at *37.[11]

On appeal, the Fifth Circuit agreed with the district court's rationale. It found that, under this Court's precedents, Tong cannot win on his claim without showing that any biased juror was seated. App. 12. It therefore held that appellate counsel was not ineffective and Tong could not show cause to overcome the procedural default of the voir-dire claim. *Id.*

B. Tong seeks error correction of an already-correct decision.

The Fifth Circuit rejected Tong's voir-dire argument finding that, "Tong fails to identify any biased juror seated as a result of the change in procedure." App. 12 (citing *Skilling v. United States*, 561 U.S. 358, 398 (2010)). Tong alleges that the Fifth Circuit's "opinion conflicts with this Court's prior opinions concerning procedural due process and misapplies this Court's prior precedent." Pet. at 33.

Contrary to Tong's overstatement, the Fifth Circuit's analysis was on point. This Court has indeed held that "peremptory [strikes] are not of

---

[11] There was some confusion regarding whether the district court's granting a COA on the voir-dire claim was also a COA grant on the corresponding IAAC claim. On remand, the district court made clear that it only granted a COA on the voir-dire claim, and not the corresponding IAAC claim. ECF No. 181. Thus, the IAAC aspect of the claim discussed on appeal only addresses IAAC as a procedural mechanism to show cause for the default of the underlying voir-dire claim. App. 11 ("Tong does not, however, independently appeal the denial of his IAAC claim. He instead addresses IAAC simply as a means to address the merits of his underlying *voir dire* claim. We therefore do not address the TCCA's ruling on his independent IAAC claim.").

constitutional dimension." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (citing *Gray v. Mississippi*, 481 U.S. 648, 663 (1987); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919)). "[R]ather, they are one means to achieve the constitutionally required end of an impartial jury." *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000)). And it is for the "State to determine the number of peremptory challenges allowed and to define their purpose and manner of their exercise." *Ross*, 487 U.S. at 89 (citing *Stilson*, 250 U.S. at 587; *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948)).

Leaving such procedural decisions to the states, this Court held that the "Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but the 'fundamental elements of fairness in a criminal trial.'" *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (quoting *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967)). In *Rivera*, this Court addressed a situation in which a defendant was improperly denied a statutorily required peremptory strike, thus resulting in the seating of a juror against the defendant's preference. *Id.* at 159. This Court held that the "trial judge's refusal to excuse" the undesired juror "did not deprive Rivera of his constitutional right to a fair trial before an impartial jury" because "no member of his jury was removeable for cause." *Id.* Similarly, where a defendant loses a peremptory strike by using one on a venireperson that should have been struck for cause, this Court has found no error of constitutional dimension so long as no biased or disqualified juror sat on the jury. *Ross*, 487 U.S. at 89–91; *Martinez-Salazar*, 528 U.S. at 315–17.

The Fifth Circuit's analysis therefore correctly identified that the touchstone of peremptory-strike claims is whether a biased or disqualified juror sat on the jury. App. 11–12. Tong attempts to distinguish his case from *Rivera* and *Ross* by focusing on the fact there was no suggestion in those cases that the trial court "repeatedly and deliberately misapplied the law or acted in an arbitrary or irrational manner." Pet. at 32 (quoting *Ross*, 487 U.S. at 91 n.5 and *Rivera*, 556 U.S. at 160). But the quotes pulled from those cases are dicta. Both *Ross* and *Rivera* hinged their analyses on the fact that the defendant's right to an impartial jury was not violated. *See Ross*, 487 U.S. at 87 (holding that a defendant's use of a peremptory strike to cure an improper denial for cause did not "mandate[] reversal" because no biased juror was seated); *Rivera*, 556 U.S. at 158–59 (holding that improper denial of peremptory strike did not violate the Due Process Clause where "Rivera's jury was impartial for Sixth Amendment Purposes"). The Fifth Circuit's adherence to precedent can hardly be called error.

And even assuming the Fifth Circuit should have given more weight to the dicta in these cases, that is not reason to grant certiorari review. Certiorari is generally reserved for resolving splits in authority or novel and undecided questions of federal law. Sup. Ct. R. 10; *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals"). As such, "[a] Petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Tong has not cited to any split in authority or compelling question that needs to be resolved here. He only seeks error correction of the Fifth Circuit's (already correct) holding that the trial court's decision on peremptory strikes did not fall within the ambit of this Court's precedent. Such an uncompelling question is not worthy of certiorari review. *See Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting) (noting that "this Court is not usually in the business of error correction"). Moreover, this case illustrates a one-off departure of state procedure that is better left to the state-court corrective process. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 610 (1996) (Ginsburg, J., dissenting) (contending that an "idiosyncratic" situation that is "unlikely to recur . . . does not call for error correction by this Court"); *see also Rivera*, 556 U.S. at 158 (holding that the Due Process Clause does not safeguard "the meticulous observance of state procedural prescriptions").

C. This case is a poor vehicle to address Tong's question presented.

As explained above, Tong's citation to dicta in *Rivera* and *Ross* doesn't so much demonstrate error in the lower courts; rather, it suggests a new rule: That, where the deprivation of peremptory strikes "does not involve good faith error on the part of the trial court", some different rubric applies. Pet. at 33. Tong's case is a poor vehicle to entertain such a new rule because (1) Tong benefitted from the trial court's decision to deviate from statutory procedure, (2) Tong's claim is procedurally defaulted, and (3) Tong's proposed new rule is barred under nonretroactivity principles.

First, Tong's argument ignores that the Fifth Circuit entertained his argument that he might have been harmed by his reliance on the trial court's change in procedure. App. 12. The Fifth Circuit held that Tong's argument was purely speculative and that Tong in fact benefitted from the trial court's decision to deviate from statutory procedure:

> [Tong] feebly argues that he was prejudiced because one cannot know how *voir dire* would have played out had the judge followed Texas's rules on peremptory strikes. That is pure speculation. Tong, moreover, ignores that the judge's error *benefited* him by giving him 10 extra peremptory strikes.

Id. This makes Tong's situation an exceptionally poor vehicle to explore the dicta in *Rivera* and *Ross*. While the complained-of error those cases did not rise to the level of constitutional dimension, at least the complained-of harm was apparent—the defendants in those cases *lost* statutorily afforded peremptory strikes due to the trial court's erroneous rulings. Conversely, Tong *benefitted* from the trial court's decision to give him more peremptory strikes than the statutory maximum.[12] App. 12. Whatever door was left open in *Rivera* to constitutionalize the use peremptory strikes (if it was left open at all), it was surely left open to address those who lost peremptory strikes, not gained them.

Second, this claim is procedurally defaulted, and it can only be revived upon a showing that appellate counsel was ineffective. App. 10–12. But, as explained above, Tong in truth seeks a newly created exception to *Rivera* and *Ross*. Even if this Court created such an exception, appellate counsel certainly could not have been ineffective for failing to anticipate a novel rewrite of this Court's jurisprudence on peremptory strikes. *See Smith v. Robbins*, 528 U.S. 259, 285–88 (2000) (adopting the *Strickland*[13] framework for analyzing IAAC claims); *see also United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009) (holding that "counsel need not anticipate changes in the law or raise meritless objections"); *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997) ("[T]here is

---

[12] Tellingly, Tong doesn't explain what harm analysis he envisions under his proposed rule, nor does he argue harm at all. To the extent Tong claims that the decision amounted to structural error, that is foreclosed by precedent. *See Rivera*, 556 U.S. at 161–62. And, as the Fifth Circuit noted, the claim of structural error is also procedurally defaulted. App. 12. To the extent Tong urges this Court to adopt a new rule of structural error, his argument is foreclosed by the same default and nonretroactivity obstacles listed in this section.

[13] *Strickland v. Washington*, 466 U.S. 668 (1984).

no general duty on the part of defense counsel to anticipate changes in the law[.]"). Thus, even if this Court announced a new rule, Tong could not avail himself of it; he would not be able to show appellate counsel was ineffective and he therefore could not overcome the procedural default of his claim.

And third, because Tong proposes a new rule, this claim is barred by the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288, 310 (1989). "New procedural rules" that "alter 'only the manner of determining the defendant's culpability' . . . do not apply retroactively on federal collateral review." *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Tong effectively asks this Court to impose such a new rule of procedure constitutionalizing the process of granting peremptory strikes to state-court litigants based on the conduct of the trial court. *See Teague,* 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."). But he is precluded from doing so here—on federal collateral review. *See Edwards*, 593 U.S. at 276.

CONCLUSION

For these reasons, this Court should deny Tong's petition for certiorari.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Ali Mustapha Nasser
ALI MUSTAPHA NASSER
Assistant Attorney General
State Bar No. 24098169
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
ali.nasser@oag.texas.gov

Attorneys for Respondent–Appellee