No. 23-7577

IN THE SUPREME COURT OF THE UNITED STATES

CHUONG DUONG TONG,
Petitioner,

-v-

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

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

REPLY BRIEF OF PETITIONER TONG

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I. THE CIRCUIT COURT'S *RHINES* ANALYSIS IS WORTHY OF CERTIORARI REVIEW BECAUSE IT PROVIDES THE COURT WITH AN OPPORTUNITY TO RESOLVE A CIRCUIT SPLIT AND TO BRING THE CIRCUIT COURT'S "POTENTIALLY MERITORIOUS" TEST IN LINE WITH THIS COURT'S JURISPRUDENCE.

The parties agree that a circuit split has emerged concerning whether ineffective assistance of post-conviction counsel can constitute "good cause" to support the grant of a *Rhines*[1] stay. However, the Respondent argues that this case is "not worthy of certiorari review" primarily because the Circuit Court also found Tong's *Wiggins*[2] claim was not "potentially meritorious under *Rhines*." *See* App. at 8; Opposition Brief at 8-18.[3] According to the Respondent, "Tong's request smacks of error correction." *Id.* at 13. What the Respondent ignores is that the Fifth Circuit's opinion conflicts with this Court's opinion in *Rhines* and its own previous precedent. *See* Sup. Ct. R. 10(a).

In *Rhines*, this Court was concerned with the effects of AEDPA's 1-year

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[1] *Rhines v. Weber*, 544 U.S. 269 (2005).

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

[3] The Circuit Court's decision is cited as *Tong v. Lumpkin*, 90 F.4th 857 (5th Cir. 2024). Citations in this briefing are to the Appendix filed with Petitioner Tong's petition for writ of certiorari.

statute of limitations on the one hand and the importance of ensuring federal habeas review for certain unexhausted claims on the other.[4] The holding was grounded in the doctrines of comity and federalism, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Rhines*, 544 U.S. at 274. Balancing these various interests, the Court devised a simple test and held that "it likely would be an abuse of discretion for a district court to deny a stay and to 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 the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. The Court also noted that a district court "would abuse its discretion if it granted a stay when the unexhausted claims are plainly meritless." *Id.* at 277.

The relevant question then, is whether an unexhausted claim is "plainly

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[4] *Rhines*, 544 U.S. at 274 ("As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims."). The Respondent notes that Tong could return to the state court after federal review is complete. *See* Opposition Brief at 21. However, in light of *Shinn v. Ramirez*, 596 U.S. 366 (2022), if Tong is not permitted a stay to exhaust his current *Wiggins* claim in state court, then he runs the risk of forever losing his opportunity for any federal review of the claim.

meritless" or "potentially meritorious", phrases which appear interchangeable. The Court was clear in *Rhines* that petitioners who established good cause for failing to exhaust a claim, who had not engaged in abusive litigation tactics, and whose unexhausted claim was not plainly meritless should be permitted a stay to exhaust their claim in state court. For those petitioners who can meet the other two parts of the *Rhines* test, the plainly meritless portion is not insurmountable so long as there is a potential path to merits review at the state level and the claim is not otherwise meritless.

The Fifth Circuit has historically agreed with this analysis. Related to potential procedural bars in state court, in *Wilder v. Cockrell*, the Court 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)). But, with Tong's case, the Fifth Circuit has changed the rules for petitioners dealing with *potential* procedural bars upon return to state court.

Tong has argued that he can obtain merits review of his "serious claim that he received ineffective assistance of counsel during the punishment phase of his trial"[5] because he can satisfy the requirements of Texas Code of Criminal Procedure article 11.071 § (5)(a)(1) & (3).[6] The Fifth Circuit agreed he might be able to satisfy the requirements of article 11.071 § (5)(a)(3): "[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).'" *Tong v. Lumpkin*, 90 F.4th at 864 (*citing Balentine v. Thaler*, 626 F.3d 842, 856 (5th Cir. 2010)). In order to obtain merits review, Tong must only make a "*threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder" would have sentenced him to death. *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphasis in original).

As the Circuit Court recognized, Tong has a potential path to merits review in Texas Code of Criminal Procedure § 5(a)(3). This issue remains an open question in Texas. For this reason, his *Wiggins* claim cannot be seen as plainly meritless because it is for Texas to decide if the claim can clear the § 5(a)(3) hurdle, and the holding *Neville v. Dretke*,[7] relied upon by the

[5] App. at 20 (district court's memorandum and order).

[6] Tong has not abandoned his argument related to section 5(a)(1). *See* Opposition Brief at 11-14. Instead, counsel, at oral argument, conceded the argument was foreclosed by *Sandoval Mendoza v. Lumpkin*, 81 F.4th 461 (5th Cir. 2023).

[7] *Neville v. Dretke* held that procedurally defaulted claims are plainly meritless. 423 F.3d 474, 480 (5th Cir. 2005).

Respondent, is inapplicable. *See* Opposition Brief at 10. The Fifth Circuit's conclusion, that "[t]he mere possibility that [Texas might review the merits of the unexhausted claim] does not make Tong's claim potentially meritorious under *Rhines*[,]" conflicts with this Court's holding in *Rhines* and is yet another reason this Court should grant certiorari. *See* Sup. Ct. R. 10(c). Indeed, the Circuit Court has converted this Court's potentially meritorious test into a plainly meritorious requirement.

Recently, at least two district courts granted *Rhines* stays in similar circumstances, and both courts agreed that State courts should be permitted to apply their own procedural default rules in the first instance. The Nevada District Court addressed the propriety of a post-*Ramirez* stay in *Moncada v. Perry*, 2022 WL 3636467 (D. Nev. Aug. 23, 2022). The petitioner argued that staying his petition "would not be futile" because he could raise various "arguments in state court to excuse the procedural default of his unexhausted claims." *Id.* at 2. The district court found that Moncada had established good cause for his procedural default because his state post-conviction counsel had

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However, there is an open question in Texas concerning whether the *Wiggins* claim at issue is procedurally defaulted.

been ineffective. *Id.* at 3. The stay was granted *in spite* of the fact that he "would face several procedural bars if he returned to state court to raise his unexhausted claims." *Id.* at 4. Although Nevada precluded ineffective assistance of state post-conviction counsel as a reason to forgive a procedural bar, a stay was appropriate because there were other potential avenues for relief and because "the state courts should generally have the first opportunity to consider the application of conclusive procedural bars." *Id.*

The Western District of Louisiana recently made a similar ruling relying on the Fifth Circuit's previous "potentially meritorious" test established in *Wilder*, discussed *supra*. *See Irish v. Cain*, 2023 WL 2564397 (W.D. La. Mar. 16, 2023). There, the court noted that the *Ramirez* heightened the need for a stay. *Id.* at 2.[8] The court explained that the principles of comity and federalism favor the granting of a stay "unless it is 'entirely clear' that state procedural bars 'would prohibit consideration' of a petitioner's claim. . ." *Id.* at 4 (*citing Wilder*, 274 F.3d 255, 262-53). For that reason, the court granted the stay

[8] The court also discussed that some state courts are revisiting the adequacy of post-conviction procedures post-*Ramirez*. *Irish,* 2023 WL 2564397, at *4 (W.D. La. Mar. 16, 2023) (*citing Frost v. State*, 514 P.3d 1182, 1188 (Or. Ct. App. 2022) (granting relief in part because the recent *Ramirez* decision indicates that state review of the errors of petitioner's state post-conviction counsel is "likely the end of the line"); *Commonwealth v. Debois*, 281 A.3d 1062, 1062 n.6 (Pa. Super. Ct. 2022) (reversing a dismissal, in part, because "[a]n affirmance in this instance would effectively close off any avenue for additional state post-conviction collateral review. That result would forever cut off any opportunity for Appellant to create an evidentiary record for his ineffective claims in light of ...*Shinn v. Ramirez*")).

despite "concerns about the procedural issues that Irish may face" and because "state courts are in a better position to determine if those prohibitions apply to Irish's petition." *Id.*

Although these decisions don't come from courts of appeals, likely because the grant of a *Rhines* stay is not an appealable order, they do show the importance of the proper application of the "potentially meritorious" portion of the *Rhines* framework. This Court should grant certiorari to settle the circuit split related to whether or not ineffective assistance of post-conviction counsel can constitute good-cause under *Rhines*, and to bring the Fifth Circuit's "potentially meritorious" jurisprudence back in line with this Court's decision in *Rhines*.

II. THE 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 VIOLATED DUE PROCESS.

The Respondent does not dispute that the trial judge deviated from Texas's statutorily required voir dire procedure in an attempt to insulate a perceived death sentence from appellate review, or that the trial judge changed the voir dire procedure mid-voir dire because of his dissatisfaction with the prosecution's objections. Instead, the Respondent urges that Tong's case is a poor vehicle to address whether the trial court's actions violated Due Process for three reasons: (1) Tong was not harmed by the trial court's actions, (2) appellate counsel was not ineffective because Tong currently seeks a new constitutional rule, and (3) the argument is barred by the non-retroactivity principles of *Teague*. *See* Opposition Brief at 29-31.

Related to a showing of harm, the Respondent is correct that Tong has argued, and continues to argue, that the type of Due Process error occurring here should be considered structural error. This Court has deemed certain errors structural because of the difficulty in assessing the effect of the error. *See United States v. Gonzalez-Lopez,* 548 U.S. at 149 n.4 (2006) (discussing three criteria for finding structural error: (1) fundamental unfairness, (2) difficulty of assessing effect of the error, or (3) irrelevance of harmlessness). Such difficulty often stems from the fact that the nature of the error renders its impact "necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana,* 508 U.S. 275, 282 (1993); *Estes v. Texas,* 381 U.S. 532, 542-44 (1965).

Such is the case here, although the record identifies one juror who would most likely have been struck by the defense if they still held any peremptory challenges,[9] we will never know how many peremptory challenges would have been available had the trial judge simply followed the law as established by the Texas Code of Criminal Procedure. Although the Circuit Court claims Tong benefited from the trial court's unlawful procedure,[10] in reality Tong's trial counsel were unable to intelligently use their peremptory challenges because they had "used [their] peremptories from the beginning without even attempting to challenge for cause" any objectionable jurors. 13 RR at 80-82. The reality is that it is impossible to know how trial counsel would have used their peremptory challenges had they not been promised unlimited challenges at the beginning of voir dire, and for this reason structural error analysis should apply.

Further, errors affecting the composition of the jury have consistently been held to require automatic reversal. *Gray v. Mississippi,* 481 U.S. 648, 660-68 (1987) (improper exclusion of juror with scruples regarding the death penalty from capital case); *Batson v. Kentucky,* 476 U.S. 79, 100 (1986) (unlawful exclusion of jurors based on race); *Vasquez v. Hillery,* 474 U.S. 254,

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[9] *See* App. at 10 (discussing Juror Sullivan).

[10] *See* App. at 10 (claiming Tong actually benefited by receiving extra peremptory strikes).

263-64 (1985) (unlawful exclusion of grand jurors based on race); *Peters v. Kiff,* 407 U.S. 493, 505 (1972) (systematic exclusion from grand jury on basis of race requires automatic reversal regardless of race of defendant); *Irvin v. Dowd,* 366 U.S. 717, 728 (1961) (pretrial publicity calling into question jury's impartiality); *Thiel v.* S. *Pac. Co.,* 328 U.S. 217, 224-25 (1946) (exclusion from jury venire of hourly wage earners).

Hicks v. Oklahoma,[11] the case providing the legal framework for this claim, also suggests structural error applies when Due Process has been violated. In *Hicks*, where the trial court unlawfully instructed the jury to return a 40-year sentence after conviction, the Court noted that the "possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is, therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence." *Id.* In much the same way, the possibility of harm in Tong's case is substantial, although we can never know how the case would have turned out had the trial judge simply followed Texas's statutory law. It is therefore wholly incorrect to speculate that the initial unlawful jury selection

[11] 447 U.S. 343 (1980).

procedure, followed up by the mid-stream change in procedure, did not affect the makeup of Tong's jury.

In *Peters v. Kiff,* the Court stated that "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." 407 U.S. at 502. And what could create a greater likelihood of bias than a trial court willing to violate the statutory law to protect the state on appellate review, only to change his course out of spite when the prosecution challenges his unlawful process?

The Respondent continues to frame this claim as an attempt to create a constitutional right to peremptory challenges, and claims that appellate counsel could not have been ineffective "for failing to anticipate a novel rewrite of this Court's jurisprudence on peremptory strikes." Opposition Brief at 30. But this issue is about trial courts not arbitrarily changing the law in a perceived attempt to benefit the state, and the cases Tong has relied upon throughout these proceedings were all decided years before his conviction became final on May 29, 2011.[12] Tong's arguments involve mere interpretation

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[12] *See Tong v. Texas*, 532 U.S. 1053 (2001) (the end of direct review); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Duncan v. Louisiana*, 391 U.S. 145

and application of well-settled concepts. Accordingly, the Respondent is incorrect that appellate counsel could not have been ineffective by failing to sufficiently brief this issue on direct appeal.

This is also why *Teague* does not prohibit relief. The non-retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989) prohibits the retroactive application of new constitutional rules of criminal procedure on collateral review. Under *Teagu*e, a new rule is one which either breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent existing at the time the defendant's conviction became final. *See Graham v. Collins*, 506 U.S. 461, 467, (1993). "Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering [Tong's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Tong] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Tong argues that this Court's prior precedent dictated the rule that a trial judge, in a capital case, cannot employ an unlawful jury selection procedure designed to insulate a perceived death sentence from

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(1968); *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Neder v. U.S.*, 527 U.S. 1 (1999); *Gray v. Mississippi*, 481 U.S. 648 (1987); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Spencer v. Texas*, 385 U.S. 554 (1967).

appellate review, only to change the procedure mid-voir dire.

Tong relies upon cases published before his case became final in making this argument, and each case was also available to appellate counsel. If this Court were to decide Due Process was violated by the trial judge's action, Tong necessarily has proven appellate counsel was ineffective and therefore established cause and prejudice to overcome any procedural default. Tong prays that the Court grant certiorari on this issue.

CONCLUSION

Tong prays that the Court 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 13 pages.

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