No. WR-84,438-01

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE TERENCE TREMAINE ANDRUS,
Applicant.

On Application for Writ of Habeas Corpus in
Cause 09-DCR-051034-HC1
In the 240th District Court, Fort Bend County

BRIEF OF APPLICANT TERENCE TREMAINE ANDRUS

THIS IS A CAPITAL CASE.

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Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

Applicant Terence Tremaine Andrus respectfully requests oral argument. The issue presented on remand involves one of the most fundamental and often litigated issues in death-penalty cases: the proper way to assess the prejudice element of an ineffective-assistance-of-counsel claim based on the failure to investigate and present readily available mitigating evidence in a death-penalty case. The directive on remand is that this Court undertake what the Supreme Court has described as a "weighty and record-intensive analysis." *See* Appendix 1: *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020). The Supreme Court has instructed that this analysis requires considering the State's case-in-aggravation at trial, how that case-in-aggravation was shaped by trial counsel's deficient performance, the mitigation evidence presented at trial, and the mitigation adduced in the habeas proceeding. *Id.* at n.7. Because of the importance of the issue, the size of the habeas record, and the need to compare it to the trial record shaped by trial counsel's deficient performance, Applicant submits that oral argument will promote an accurate view of dispositive facts and thus aid this Court's decisional process.

NOTE REGARDING CITATIONS

Below, "EHRR" refers to the Evidentiary Hearing Reporter's Record from the habeas proceeding; "RR" refers to the Reporter's Record from the trial; "AppX" refers to an exhibit offered by Applicant that was admitted into evidence during the

habeas evidentiary hearing and can be found in Volumes 10-41 of the EHRR. In citations, the volume number is listed first with the page number last, *e.g.*: 3EHRR38 refers to Volume 3 of the EHRR at page 38. Appendices 1-3 are attached.

ISSUE PRESENTED

The Supreme Court of the United States has already found that the "untapped body of mitigating evidence" amassed during the habeas proceeding was "simply vast"—standing in stark contrast to the virtual absence of such evidence put before the jury during the punishment phase of Terence Andrus's death-penalty trial. For this and other failures, the Supreme Court has held that trial counsel performed deficiently. The only remaining issue for this Court to decide is:

> Had the jury been privy to that "vast" "untapped body of mitigating evidence," is there a reasonable probability that at least one juror would have struck a different balance in weighing the evidence for and against a death sentence?

STATEMENT OF THE CASE

I. TRIAL

In 2008, when Terence Andrus was 20 years-old, he was charged with two counts of capital murder during a "bungled … carjacking in a grocery-store parking lot while under the influence of PCP-laced marijuana." *Andrus*, 140 S.Ct. at 1878. Soon after his arrest, before meeting with any lawyer, Terence confessed to the crime and then proceeded to assist law enforcement in recovering the gun and other evidence. In addition to his confessions, he expressed his remorse and desire to

convey his regrets to the victims' families.[1] The case was tried in Fort Bend County in 2012. Trial counsel admitted that, during the four years between his appointment and his client's death-penalty trial, he did almost nothing related to either guilt or punishment. 2EHRR186-89, 212. Counsel did not meet with his client or even inform him that a lawyer had been appointed for the first eight months Terence was held in a neighboring county's jail (near where counsel lived and worked); counsel met with his client outside of trial only six times during the entire four years of his appointment. Appendix 2 at (d)-(e).

After a year, a second-chair attorney was appointed. He started meeting with Terence, but then quit the case before trial. In his motion to withdraw, the second chair informed the court that Terence was willing to plead guilty in exchange for a sentence of life-without-parole. However, that plea offer was never acted upon. 2EHRR200-05; Appendix 2 at (ww). When the second chair withdraw, so did the mitigation specialist who had worked briefly on the case. Both attested that virtually no work had been done to prepare Terence's case for trial when they left; and the mitigation specialist was never replaced. AppX27; AppX28.

[1] As the habeas judge noted: "In addition to his statements and written confession, after returning to Fort Bend County, Applicant helped the police locate his gun, a .380 automatic, as well as a shovel Applicant used to conceal the gun." Appendix 2 at n.2; *See also* State's X1-8 admitted into evidence during a pre-trial hearing on September 5, 2012.

When trial began, counsel was virtually inert during the guilt-phase trial itself—waiving opening statement, conceding his client's guilt in closing argument, and complimenting State's counsel on proving the elements of the offense. 38RR38; 45RR15-18. He told the jury that the trial would "boil down to the punishment phase," emphasizing "that's where we are going to be fighting." 45RR18. But, as the Supreme Court has now held, that fight never came. *Andrus*, 140 S.Ct. at 1878.

During the punishment phase, the prosecution presented three days of aggravating evidence, focusing on: (1) Terence's juvenile record, including his file from the former Texas Youth Commission (TYC), and (2) his misconduct in jail while awaiting trial. Most of the jail incidents that were presented at trial had occurred during the first eight months of Terence's incarceration, over three years before trial; but the State also presented eight different witnesses to describe a single incident that had occurred in Fort Bend County several months before trial—without any objection from defense counsel to its cumulativeness. 47RR& 48RR.

Additionally, the State featured testimony from Leonard Cucolo, who was an administrator with the TYC. Cucolo testified for the State that, according to TYC, Terence had not been rehabilitated when he was in the agency's custody as a teenager following an arrest for participation in an aggravated robbery as a sixteen-year-old; therefore, TYC had transferred him to the adult prison system to complete his sentence. 48RR70-77. Defense counsel conducted no meaningful cross-

examination of this witness (or of any other punishment-phase witness). Thus, the jury did not learn of the massive scandals that had exploded into public view in 2008 exposing TYC's systemic failures and rampant mistreatment of youth while Terence was in TYC custody; nor did jurors hear that, by the time of trial, these scandals had resulted in the appointment of a special ombudsman and, ultimately, a complete overhaul of Texas's juvenile justice system.[2]

Initially, defense counsel's own punishment-phase presentation consisted of brief, largely false testimony from two witnesses: Terence's mother, Cynthia Andrus (who had to be subpoenaed to appear), and Terence's biological father, Michael Davis (who barely knew his son and was brought to court by members of the District Attorney's office). 49RR44-83; 50RR4-20. Their combined testimony, largely developed through cross-examination, suggested that, despite a largely rosy upbringing by a hard-working single mother, Terence had inexplicably turned to crime. 3EHRR98. The defense then rested. 50RR20. After the judge asked if defense counsel might have additional witnesses, the court recessed for a few days to give the defense more time. 50RR20-21.

When the trial resumed, defense counsel presented three more witnesses who largely added only to the *State's* case-in-aggravation because of defense counsel's

[2] The habeas proceeding established that defense counsel had been told about the heavily publicized TYC scandals and had been given the name of the TYC ombudsman (Will Harrell), but counsel had taken no action to investigate. 3EHRR119; 4EHRR30-33.

lack of preparation. The defense put on only one expert, Dr. John Roach, a pharmacologist whom counsel had failed to prepare and who had not been provided with Terence's social history or been put in touch with any of his family members. As the Supreme Court noted, on the stand, Dr. Roach focused only "on the general effects of drug use on developing adolescent brains" because defense counsel struggled to ask relevant questions. *Andrus*, 140 S.Ct. at 1879. Dr. Roach was then mocked on cross-examination by the State for having nothing specific or positive to say about Terence, and defense counsel "seemed to be at a loss to ask follow up questions to address the prosecution's damaging statements." AppX6; *see also* 51RR6-29.

Defense counsel then put a jail counselor on the stand whom counsel had met once briefly during the break in trial. 51RR30. This jail employee had started meeting with Terence during the 62 days he had spent confined in a padded cell in Fort Bend County. Appendix 2 at (h). Counsel never asked why his client had been confined in a padded cell; therefore, the jury did not hear about that situation or about what that may have said about Terence's mental health. 3EHRR78, 99. Instead, the jail counselor testified, unhelpfully and inaccurately, that Terence had "'started having remorse' … around the time the trial began." *Andrus*, S.Ct. at 1879. In fact, Terence had conveyed his remorse multiple times long before meeting the jail counselor, including in a videotaped confession law enforcement had made soon

after the crime. That genuine expression of remorse was never shared with the jury. Instead, the only confession, which was admitted during the guilt phase, was a written statement read into the record by a law-enforcement witness, which did not convey the sincerity evident in the video and in other recorded statements not admitted into evidence at trial. 42RR10. Defense counsel made no attempt to offer into evidence any excerpts from the many hours of recorded communications between Terence and law enforcement, which included multiple expressions of remorse and his efforts to cooperate.

Considering the ineffective defense punishment-phase presentation, Terence decided to testify to express his remorse and to provide more truthful facts about his childhood. 51RR45-56. Although he testified that he had been aware of his mother selling drugs out of the house by the time he was six years-old, that he and his siblings were often home alone, and that he first started using drugs regularly when he was about fifteen, "all told, counsel's questioning about Andrus' childhood comprised four pages of the trial transcript." *Andrus*, 140 S.Ct. at 1879. Terence's testimony essentially aided the State's punishment case because he was placed in the position of having to contradict his parents' false testimony. Most of his time on the stand involved a hostile cross-examination, during which the prosecution referred to him as a "sociopath." 51RR68.

In its initial closing argument, counsel for the State relied heavily on the contention that Terence had resisted TYC's benevolent attempts to rehabilitate him, stating, falsely, that Leonard Cucolo, a TYC bureaucrat who had never met Terence, had somehow played a personal role in his case and, quite remarkably, "crafted a tailormade program" that he had simply rejected:

> Leonard Cucolo is another representative from the Texas Youth Commission. He told you that the juvenile system is different from the adult system in that the legislature has mandated something unique to the juvenile system. First priority of TYC, the juvenile system, is protection of the community. Second is rehabilitation of the offender. Leonard met with the defendant, sat down and talk with him, what the expectations are, how to be successful, basically how to rehabilitate yourself, and then crafted a tailormade program for the defendant. He rejected it all. His rehabilitation was a failure. They already tried that.
>
> What mitigating evidence is there that could outweigh what we've already spoken up here? I submit to you there is nothing.

52RR31; *see also* 52RR12 (State's counsel again insisting that TYC had attempted to rehabilitate Terence and been unsuccessful). In fact, there is no support in the record for the suggestion that Cucolo ever met Terence before testifying for the State at his trial. *See* 5EHRR236 (explaining that Cucolo was an administrator who engaged in file reviews in Austin and then traveled to county courts to testify). The State's portrait of TYC at trial was, as later demonstrated in the habeas proceeding, a spectacular lie as the Supreme Court would later recognize. *See* 5EHRR143-47, 200 (TYC ombudsman testifying in habeas proceeding that: the only rehabilitation/treatment "program" at TYC when Terence was in its custody was the

"resocialization program," which was not, as the State claimed, "tailormade" for anyone but was a one-size-fits-all program; the person who developed that program "was fired shortly after the conservator was appointed by Governor Perry;" and the program was found to be an utter failure and scrapped in 2007—soon after Terence's release); *see also Andrus*, 140 S.Ct. at 1884. Yet defense counsel made no objection at trial to the false testimony and misleading argument because he had done no investigation.

Instead of challenging any aspect of the State's punishment case, in his brief closing, Terence's counsel conceded that the State had proven the future dangerousness special issue and referred specifically to the State's TYC testimony that he himself had failed to rebut: "You've heard all this evidence because what happened in the jail and TYC. There is probably a good probability that you're going to answer this question yes." 52RR36.

In its final closing, the State again invoked Terence's TYC experience as a reason to sentence him to death, along with repeatedly calling him a "sociopath." 52RR37, 50.

The jury imposed a death sentence, and this Court affirmed on appeal.

II. POST-CONVICTION

An initial habeas application, under Texas Code of Criminal Procedure, article 11.071, was filed on Terence's behalf, and the State answered. Because the judge

who had presided at trial had since retired, the administrative judge assigned the Honorable James Shoemake (hereafter "habeas judge") to preside over post-conviction proceedings in the 240th Judicial District Court. The habeas judge designated issues of fact, material to the habeas claims, that needed to be resolved by testimony during an evidentiary hearing. An eight-day evidentiary hearing was then held. 2-9EHRR.

In addition to extensive evidence of deficient performance, voluminous mitigating evidence was adduced in the habeas proceeding.

For example, sworn statements from eleven lay witnesses were admitted into evidence, all of which were found credible and to contain powerful mitigating information that could have been presented during the punishment phase of Terence's trial. *See* Appendix 2 at (mmmm) (finding affidavits of Torad Davis, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams credible and mitigating); *see also* AppX9-18; AppX139; AppX142. Some lay witnesses also provided compelling live testimony during the evidentiary hearing (Sean Gilbow and Phyllis Garner), explaining the brutal circumstances of life in the drug-infested neighborhoods in which Terence had grown up and the severe neglect he had sustained at home; his despair at having his one, short-term father figure shot dead in the streets when he was twelve; his exceptional protective actions toward his siblings; his mother's long struggle with

addiction and the criminal lifestyle that left her children to fend for themselves in a chaotic and violent environment; Terence's dogged attempts to find employment after his release from prison at eighteen. *See* 6EHRR12-118.

Instead of the one, ill-prepared trial expert, the habeas proceeding featured testimony from six experts whose opinions can briefly be summarized as follows:

- Dr. Julie Alonso-Katzowitz, psychiatrist with expertise in psychotropic medication, described TYC's misuse of psychotropic medications and the likely adverse consequences for Terence and how his medications were frequently changed in a way that could itself have had numerous adverse consequences relevant to understanding his behavior while at TYC;

- Terence Campbell, expert with extensive experience with Houston's Third Ward neighborhood, described the tremendous disadvantages black children like Terence had come up in a neighborhood where they are exposed at a very young age to "high levels of crime, HIV and AIDS, and drug availability," where the schools have been chronically low-performing, and where poverty levels are high;

- Dr. Tyina Steptoe, historian, outlined the role of racial discrimination in the development and decline of Houston's inner-city wards dating back to before the Civil War and up through the 1980s when the crack epidemic arrived there a few years before Terence was born in Third Ward;

- Will Harrell, former ombudsman for the Texas Youth Commission (TYC), who had been appointed by former Governor Rick Perry to assess the agency after it was wracked with scandals, explained the systemic failures uncovered through his investigation, the absence of any legitimate rehabilitation or mental health program when Terence was there, and its abuses that had adversely impacted Terence who had a comparatively insignificant disciplinary record in light of the practices that then characterized TYC;

- Dr. Michael Lindsey, child psychologist who reviewed extensive social history records and met with Terence for a two-day assessment, provided a scholarly overview of the adverse and well-established effects of pronounced

childhood trauma on development and offered support for his opinion that Terence's life history reflected overall deprivation in childhood, extensive trauma, the lack of adequate supervision and guidance, inadequate brain stimulation. and "unquestionably compromised" cognitive and psychological development;

- Dr. Scott Hammel, trauma specialist, social historian, and former TYC psychologist, testified about his investigation of specific instances of childhood trauma that Terence had experienced and how these experiences had adversely affected him and contextualized his adult behavior. Dr. Hammel also noted that even TYC's central administration recognized that there were problems with the mental health treatment that Terence was receiving while in TYC custody and issued a directive to do a better job of assessing, diagnosing, and treating him—but that directive was not followed. Dr. Hammel also reported that, while saddled with symptoms of posttraumatic stress disorder and untreated mental illness dating back to early childhood, Terence received the same mistreatment when in the county jails—random and potent doses of psychotropic medications and long stints in solitary confinement, which exacerbated his condition and likely explain his problems in jail. Based on his records review, Dr. Hammel also reported that, since his 2012 conviction, Terence had had virtually no misconduct write-ups and none for violent conduct while in TDCJ custody, which Dr. Hammel attributed to being taken off "many of the medications that were inappropriate" and finally being "in a structured safe environment …. such "that his neuro system appears to have dampened down and was not on such high alert and the initial overwhelming distress had diminished by that time as well."

See AppX1-5; 4EHRR200-46; 5EHRR103-247; 7EHRR5-185.

The habeas judge made no adverse credibility determinations as to any of these witnesses. *See* Appendix 2.

The habeas proceeding also featured voluminous documentary evidence admitted in support of Terence Andrus's *Wiggins* claim. For example, to support testimony about the traumatic environment in which he and his siblings had been raised, records were admitted documenting the criminal history of the five different

fathers of Cynthia Andrus's five children and of some of the other adult males she had brought into their lives. *See, e.g.*, AppX122A at 3989-4002; AppX122B at 5794-5890; AppX122C at 2808-23, 2983-3049 (Damon Sias's numerous arrests for drugs and assaults, and convictions for family violence, injury to a child, and indecency with a child); DX122B at 5856-59 (Damon Sias and Cynthia Andrus's arrests for family violence); AppX122A at 4008; AppX122B at 5892-5917, 5931-34; AppX122C at 3602-3964 (Danyel Sims' arrests for sexual assault, family violence, and various convictions for drug-related and violent offenses); AppX122A at 4139; AppX122B at 6138-45 (Norman Ray Williams' convictions for cocaine possession and multiple arrests for family violence); AppX122C at 3680-3802 (Orentherus Lee Norman's multiple convictions for drug-related offenses); AppX122A at 4153-58; AppX122B at 6174-98 (Roderick Davis's several drug-related arrests); AppX122C at 3874-3939 (Michael Davis's multiple drug-related convictions); AppX122C at 3807-3978 (Senecca Booker's multiple drug-related convictions). The habeas proceeding also established that, during Terence's childhood, most of these men either died violently or were only around briefly due to incarceration. 6EHRR209-14.

Further, during two days of testimony, Dr. Scott Hammel, walked through the specifics of multiple instances of clinically significant traumatic events in Terence's life (including untreated mental illness, murdered loved ones, sexual and physical

abuse, addicted and incarcerated caregivers), illustrating those events with a family genogram and detailed social history timeline. AppX129; AppX140. Dr. Hammel explained how the social history was supported by a wide range of records that he had reviewed and interviews he had personally conducted with multiple sources. AppX122A; AppX140; 6EHRR118-227; 7EHRR5-156.

The evidence developed for the first time in the habeas proceeding, which the habeas judge found credible, supported, *inter alia*, these reasons for considering a sentence less than death:

- Terence was part of the third generation of the Andrus family to live in Third Ward and to attend the under-resourced schools Frederick Douglass Elementary, Ryan Middle School, and Jack Yates High School that were still almost exclusively black when Terence attended them over a hundred years after Jim Crow had come to Houston. Third Ward in the 1980s and 90s was shaped by a legacy of racial segregation and urban blight; its historical African-American community was one of the first places in the nation hit by the arrival of cheap crack cocaine and illegal codeine transmogrified into a street drug known as "lean," "sizzurp," and "drank"; the epidemics associated with these drugs had already ravished Third Ward when Terence was born there in the "Jefferson Davis Hospital," an historically segregated facility for black patients. By that time, most who could afford to, including most legitimate businesses, had fled to the suburbs leaving behind a zone of unbridled vice. AppX3; AppX13; AppX118; AppX94; AppX95; AppX97; AppX98; AppX100-AppX107; AppX122A; AppX129; 3EHRR216-238; 5EHRR65-73.

- Terence's unwed, teenage mother's solution to providing for her children was drug-dealing and prostitution—among the only options for earning money then available in Houston's Third Ward; all of the five different men who sired the five Andrus children had extensive criminal histories and brought rampant violence into the home including the father of Terence's closest sister

who raped her when she was a young child, causing her to be removed from the home. AppX3; AppX8; AppX9; AppX18; AppX122A-AppX122C; 5EHRR37-40, 81-86, 197-98.

- Terence, as a very young child, took on the parent role towards his siblings, including his older brother with special needs. While Terence struggled to provide for his siblings, he was too young to know what he was doing, a circumstance that only further burdened his ability to develop his own coping skills in chaotic circumstances. As a mental health expert explained, children that age are just not emotionally equipped to handle these kinds of burdens without experiencing adverse consequences. AppX9-AppX11; AppX13; AppX14; AppX17; AppX18; 5EHRR24, 41-42, 168, 183.

- Terence's childhood was replete with traumatic experiences that scientific studies have long demonstrated adversely affect development, impulse control, mental and physical health. Terence had been exposed, almost continuously from birth, to parental substance abuse and drug-dealing, the incarceration of parental figures, domestic violence, homicides, a single-parent household mired in poverty, mental illness of caregivers, severe emotional neglect from a mother who started having children when she herself was still a child and had no functioning support system—circumstances that are each risk factors for self-destructive behavior and crippling dysfunction in adulthood. AppX5; AppX9-AppX11; AppX13; AppX14; AppX17; AppX18; 3EHRR235; 5EHRR22-37, 168-89, 194-95, 208; 6EHRR27, 127; AppX123-AppX129; AppX140; AppX188.

- Terence lost the one father figure he briefly had—a young drug dealer known in the neighborhood as the "Cookie Monster" due to his kindness to children. This man, years younger than Terence's mother, was the one adult who got Christmas presents for the kids and tried to protect them from their mother's beatings. He was killed in the streets at 23-years old in an unsolved drive-by shooting and bled out in Terence's mother's arms, causing her to descend further into addiction, thereafter essentially abandoning her children for extended periods. After the loss of this father figure, Terence started getting into trouble in school. In 8th grade, he was caught with his mother's Xanax and punitively transferred to an alternative school instead of being given

therapeutic treatment or intervention at home. AppX8; AppX9; AppX11-AppX13; AppX18; AppX118; AppX122A; AppX140; 5ERR44, 195-96.

- Terence's mother, trying to escape Third Ward and take advantage of Section 8 housing, unwittingly moved the family into gang-infested apartments in the Mission Bend District where the male "leaders" ran gangs and exploited vulnerable teens like Terence; at this time, a robbery in which he participated as a lookout resulted in his incarceration in Fort Bend juvenile detention, records of which established that the officer in charge of his case was concerned about him, especially since no one in his family visited him. But instead of a second chance, he was given a three-year sentence and conveyed to the custody of TYC. AppX6; AppX9; AppX13; AppX14; Appx118-Appx120; 5EHRR46, 83-84, 87; 6EHRR26-29.

- While in TYC custody for eighteen months, he spent much of his time isolated in a dark, filthy cell medicated with psychotropic drugs without a corresponding diagnosis. Terence's extended stays in solitary confinement were generally a response to his engaging in self-mutilation, expressing suicidal feelings or panic about the siblings he had left behind, trying to get away from violence on the dorms, and minor adolescent infractions, such as eating a cookie in class or cursing at staff. Instead of treating his mental illness, TYC made him worse. AppX1; AppX4; AppX9; AppX18; AppX59; AppX113; Appx119; AppX120; AppX138; 4EHRR141-212, 237-40; 5EHRR158-60; 6EHRR33-35.

- After spending his last *90 days* entirely in solitary confinement, Terence, then eighteen, was punitively transferred from TYC to the adult prison system for about a month based solely on a bureaucrat's file review; that file consisted of unverified disciplinary write-ups that had been issued by untrained staff. Those unadjudicated write-ups did not account for the rampant "violence in the units" characterized by a "brutal pecking order" and "a Lord of the Flies" environment where no mental-health treatment or meaningful rehabilitation programs of any kind were provided. 5EHRR122, 189, 204, 236-41.

- At eighteen, Terence was released from prison back into the free world where he had little support for turning his life around. He was approved to return to his mother's house, but she wouldn't take him in. Family friends allowed him

to move in with them because he was kind to their children and respectful. The head of that household helped Terence get a job—but when this man was sent back to prison for drugs, Terence lost transportation and thus the job. Thereafter, Terence strove to find gainful employment and to proactively help those who gave him shelter. But since TYC actions had branded him as a felon with an adult record, his efforts to find and retain legitimate employment repeatedly failed. He then became seriously depressed and self-medicated with street drugs, which was the condition he was in, at age 20, at the time of the capital offense. 4EHRR190, 237; AppX13-AppX15; AppX119; AppX121; AppX139; 5EHRR96.

- While in jail awaiting trial, Terence became emotionally unhinged and suicidal. He was again capriciously prescribed potent psychotropic medications by both the Harris County and Fort Bend County jails—including Lithium, Clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, Trazadone, Risperidone, Wellbutrin, Remeron, Prozac, Thorazine, and Seroquel—without accounting for his mental health history or symptoms.[3] These medications are associated with causing serious adverse side effects such as mania, aggression, and depression when mis-prescribed. In jail, Terence was punished for his mental illness and instability with extended stays in a padded cell that harkened back to the abusive treatment he had received in TYC custody. He spent a stint of 62 straight days confined in a padded cell without any interaction with a lawyer and was only released right as voir dire began in his case. He never heard what had happened to his offer to plead guilty in exchange for a sentence of life-without-parole, but the lead prosecutor claimed in the habeas proceeding that he had never heard about the offer from trial counsel although the offer is memorialized in a motion in the clerk's record filed by a lawyer who quit before Terence's case went to trial. 4EHRR170-74; 6EHRR41; AppX27; AppX68; AppX113; AppX122A; Appendix 2 at (vv)-(ww) (citing testimony from lead prosecutor that the State was not aware that, long before trial, Terence had offer to plead guilty and accept a life-without-parole sentence).

[3] The only drugs mentioned at trial were the street drugs that Terence admitted he was on the night of the crime.

- During the years of Terence's pre-trial incarceration, TYC was the subject of extensive news coverage of massive scandals reflecting years of abuse and neglect of the youth entrusted to the agency's case. Thereafter, extensive investigations exposed systemic failures that had characterized the institution during the entire time that Terence was in TYC custody. This history was described during the habeas proceeding in vivid, concrete detail by TYC's former ombudsman, Will Harrell. The abuses uncovered led to a wholesale restructuring and rebranding of Texas's juvenile justice system. Youth similarly situated to Terence were subsequently released early and the punitive transfers to the adult prison system that he had received for failing to complete the agency's disgraced "resocialization" program were scrapped. AppX4; AppX49; 4ERR128-199; Appendix 2 at (yy)-(fff) (habeas judge finding Mr. Harrell's expert testimony regarding TYC's history and Terence's treatment at TYC facilities credible and citing it extensively).

- In the punishment-phase of trial, counsel for the State had repeatedly referred to Terence as a "sociopath" without objection from trial counsel. During the habeas proceeding, Dr. Hammel, a qualified mental health expert, explained that Terence did not have the characteristics of a "sociopath," a pejorative lay term used to refer to a person with psychopathy; instead, Terence had an extensive history of childhood trauma, numerous symptoms of posttraumatic stress disorder, likely a complex, unaddressed mood disorder, and a drug addiction. Dr. Hammel also explained that identifying risk factors in Terence's background is not about making excuses or arguing for biological or cultural destiny, but explaining how exposure to certain kinds of traumatic events in childhood increases the probability that an individual will engage in destructive behaviors, including substance abuse. Dr. Hammel opined that substance abuse is a common response to untreated trauma as a means to "self-medicate" and he explained how, when substance abuse suddenly ceases, it can take up to a year for a person's neurobiology to normalize and, in the interim, can cause psychotic breaks or serious depression; with Terence, his neurochemical imbalances were likely compounded by the regime of potent, psychotropic medications he had been given while in the custody of governmental entities. These conditions had also likely affected his neurological, emotional, and social development, making it more challenging for him to modulate emotions, including the physiological "fight-or-flight" reaction naturally triggered by stress. Dr. Hammel found the approach and

> conclusions reflected in the draft report of Dr. Jerome Brown, a psychologist retained by trial counsel, to be burdened with internal inconsistencies and a lack of corroboration. Dr. Hammel concluded that Dr. Brown's hasty report did not reflect the standards for an ethical forensic assessment. 5EHRR118-178, 193; 6EHRR5-160; Appendix 2 at (yyy)-(dddd) (habeas judge summarizing Dr. Hammel's two days of testimony and finding his opinions credible).

In short, the habeas proceeding amassed considerable evidence that jurors had not heard, which the Supreme Court has now characterized as "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped." *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886; *see also* 2-41EHRR.

After the evidence was closed, the parties to the habeas proceeding each presented proposed findings of fact and conclusions of law and gave closing arguments. *See* 9EHRR. But instead of accepting the proposals of either party, the habeas judge took pains to draft his own. *See* Appendix 2. The habeas judge made numerous findings, supported by the habeas record, as to trial counsel's deficiencies. The habeas judge also identified "ample mitigating evidence which could have, and should have, been presented at the punishment phase of Applicant's trial" and found his mitigation witnesses credible. *Id.* at 14-15 (concluding that Terence Andrus was entitled to habeas relief under *Wiggins v. Smith*, 539 U.S. 510 (2003)). The habeas judge also recommended a new punishment-phase trial. *Id.* at 20.

The case was then submitted to this Court. On February 13, 2019, in an unpublished per curiam decision, this Court refused to adopt the habeas judge's

findings of fact and rejected his conclusions of law and his recommendation that habeas relief be granted. *See Ex parte Andrus*, 2019 Tex. Crim. App. Unpub. LEXIS 81 (Tex. Crim. App. Feb. 13, 2019). Most of the six-page majority opinion is devoted to summarizing the State's trial presentation. The opinion does not discuss the prejudice element of the *Wiggins* claim or any evidence adduced during the habeas proceeding. *See id.*

Four of the nine judges of this Court signed a separate, more detailed concurring opinion. *Id.* at **7-17 (Richardson, J., concurring, in which Keller, P.J., and Hervey and Slaughter, J.J., joined) (unpublished) (hereafter "Concurring Opinion"). The Concurring Opinion contains the conclusion that Terence Andrus was not prejudiced by counsel—but without discussing any of the mitigating evidence presented in the habeas proceeding and without explaining why the habeas judge's prejudice finding had been rejected. *Andrus*, 140 S.Ct. at 1887, n.6.

Terence appealed to the Supreme Court in a petition for writ of certiorari.[4] On June 15, 2020, the Supreme Court granted the petition in a per curiam opinion that includes extensive findings regarding the "grim facts of Andrus' life history" that had been presented for the first time during the state habeas proceeding and thus had not been before the jury. *Id.* at 1878. The Supreme Court further found that "[t]he

[4] The docket is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-9674.html.

untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast." *Id.* at 1883. The Supreme Court found that that trial counsel had performed deficiently, vacated the judgment of this Court, and remanded the case for this Court to address the prejudice prong of *Strickland v. Washington* in a manner consistent with the Supreme Court's per curiam opinion. The Supreme Court's opinion also cautions that the Concurring Opinion previously signed by members of this Court had misapplied *Wiggins* and did not account for the record amassed during the habeas proceeding. *Id.* at 1887, n.6.

On July 17, 2020, the Supreme Court issued its mandate in this case. Thereafter, an unopposed motion was filed on Terence Andrus's behalf seeking a right to submit briefing to this Court. That unopposed motion was granted, and this brief follows.

SUMMARY OF ARGUMENT

The Supreme Court has now found that the habeas record amassed on Terence Andrus's behalf includes "abundant," "vast," "compelling," "powerful," "myriad," "untapped" evidence mitigating against a death sentence—none of which his jury heard because of his appointed counsel's deficient performance. Because the abundant evidence adduced for the first time in the habeas proceeding materially reduces the aggravating value of the State's punishment-phase case and utterly changes the mitigation profile presented at trial, the weight of the evidence has shifted entirely away from any presumption that a death sentence was somehow inevitable. In the wake of the Supreme Court's findings in this case and in light of governing precedent, the only reasonable resolution to this case is to find that Terence Andrus was prejudiced by his counsel's deficient performance and grant him a new punishment-phase trial, as mandated by the Constitution's Sixth Amendment.

ARGUMENT

The Supreme Court opinion in this case focuses on the claim that Terence's trial counsel was ineffective for failing to investigate and present mitigating evidence, thus necessitating a new punishment-phase trial. *See* Appendix 1. As this Court well knows, succeeding on such a claim requires showing that trial counsel's performance was deficient in light of prevailing professional norms and that the

deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 688, 694 (1984). This particular kind of ineffective-assistance claim is commonly referred to as a "*Wiggins* claim," because its contours were discussed at length in *Wiggins v. Smith*, 539 U.S. 510 (2003). The Supreme Court remanded Terence's claim after finding in no uncertain terms that he had proven deficient performance. *Andrus*, 140 S.Ct. at 1881-82. Specifically, the Supreme Court has held that trial counsel performed deficiently in several categorical ways:

- "First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence."
- "Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case."
- "Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation."

Id. The Supreme Court refrained, however, from deciding the issue of *Strickland* prejudice, leaving it to this Court to decide the matter "in light of the correct legal principles articulated" in its opinion. *Id.* at 1887 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) (explaining decision not to take up an issue presented because it is "a court of review, not of first view")). Those legal principles only support one outcome: a finding of prejudice and a remand for a new punishment-phase trial.

I. ADOPTING THIS COURT'S PREVIOUS CONCURRING OPINION'S REASONING OR CONCLUSION WOULD BE ERROR.

In this case, the Supreme Court found it "unclear whether [this Court] considered *Strickland* prejudice at all." *Id.* at 1886. The Supreme Court expressed doubt because this Court's majority "did not … engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." *Id*. Given this uncertainty, the Supreme Court remanded the case for this Court to conduct the "weighty and record-intensive analysis" required for a prejudice analysis. *Id.* at 1887.

The Supreme Court considered the entire record—the trial record as well as the eight full court days of testimony and the hundreds of thousands of pages of documentary evidence admitted into evidence during the habeas proceeding. *See* 1-41EHRR; *see also* Appendix 1 (citing the habeas record extensively). Because the Supreme Court has demanded a "weighty and record-intensive analysis," this Court must now account for the full habeas record. *Id*. As explained at length below, the previous Concurring Opinion signed by four members of this Court does not present a viable approach to resolving this case. The Concurring Opinion is mistaken because it: (A) was based on an incomplete and inaccurate view of the record; (B) is

at odds with findings the Supreme Court has now made; and (C) relies, as the Supreme Court has explained, on a misapprehension of *Wiggins v. Smith*.[5]

A. The Concurring Opinion Was Based on an Incomplete and Inaccurate View of the Record.

The face of the Concurring Opinion indicates that the signatories may not have seen the 41-volume habeas record that the Supreme Court reviewed and discussed in great detail in holding that Terence Andrus's counsel performed deficiently. Perhaps this oversight arises from a clerical error. The Court's portal for this case includes only the Clerk's Record from the trial court and the non-final volumes 1-7 of the 41-volume Reporter's Record of the habeas evidentiary hearing. The portal does not include the Master Index, which became Volume 1. *See* Appendix 3. Nor

[5] Aside from its dicta about prejudice, the Concurring Opinion suggests that, even if lead counsel was deficient, that would not matter because he had a belatedly appointed second chair counsel at trial. *See* Concurring Opinion at n.26. To support this view, the opinion cites *McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996). This Court's *McFarland* decision is currently the subject of a federal habeas proceeding, and the Fifth Circuit Court of Appeals recently granted McFarland a Certificate of Appealability on all of his claims, including the claim that "his trial counsel's persistent sleeping during trial meant he was constructively deprived of counsel, in violation of *United States v. Cronic*, a deprivation ***not*** cured by the presence of secondary counsel appointed against McFarland's wishes." *McFarland v. Davis*, 812 F. App'x 249 (5th Cir. 2020) (finding all four claims, including claim that his trial counsel was deficient under *Strickland v. Washington* "for their failure to investigate and prepare for trial and for their failure to test the credibility of the State's key witnesses," "warrant encouragement to proceed" because McFarland had "made a sufficient showing that jurists of reason could debate the district court's conclusions"). That is, the Fifth Circuit is presently considering whether this Court made unreasonable applications of clearly established federal constitutional law in deciding McFarland's case back in 1996. In any event, this Court is now bound by the Supreme Court's clear finding in *this* case that Andrus more than carried his burden of showing deficient performance. *See, e.g.*, *Andrus*, 140 S.Ct. at 1882 (finding counsel's performance "plainly not" reasonable under prevailing profession norms) and *id.* at 1887 (instructing that any conclusion to the contrary is "erroneous as a matter of law").

does the portal include the final versions of the transcripts from the eight days of testimony found in Volumes 2-9 or any of the exhibits in Volumes 10-41.[6]

This circumstance may explain the Concurring Opinion's characterization of the habeas record in a way that cannot be squared with the actual record or with the Supreme Court's assessment of that record. *Compare* Concurring Opinion at *18 (stating "it appears that Applicant's strongest proposed mitigating evidence would have been (1) testimony from certain lay witnesses to corroborate Applicant's punishment phase testimony about his upbringing, and (2) testimony from Dr. Jerome Brown")[7] *with* Appendix 1. The Concurring Opinion's assessment is wrong in light of four different tranches of evidence in the habeas record, as highlighted by the Supreme Court.

1. The Concurring Opinion did not consider the mitigating evidence adduced in the habeas proceeding.

The Concurring Opinion does not compare trial counsel's mitigation investigation and presentation that, per the Supreme Court, "approached nonexistent," to the "vast" mitigating evidence adduced during the habeas proceeding. The latter includes evidence of: Terence's exposure to illegal narcotics

[6] An unopposed motion to supplement the record stored in the portal was denied on October 28, 2019.

[7] As explained further below, "Dr. Brown" was retrained by trial counsel; he did not testify in the habeas evidentiary hearing and was not idenitifed as someone who should have testified at trial.

and violence at a young age through his mother; the multiple instances of clinically significant childhood trauma in his social history; the long-standing mental-health issues diagnosed first in early childhood that were then made far worse by abuse, bordering on torture, inflicted on him while in the "care" of Texas's juvenile justice system; and the massive misuse of psychotropic medications administered to him while at TYC and then in jail that could well explain his suicide attempts and much of his misconduct while awaiting trial. *Andrus*, 140 S.Ct. at 1883.

There is both a qualitative and quantitative difference between both the lay and expert testimony presented on Terence's behalf at trial and in the habeas proceeding.

For instance, because trial counsel had never interviewed Terence's biological father Michael Davis before putting him on the stand, Davis's trial testimony established only that he had been in prison most of Terence's life; then, on cross-examination, the State brought out that Terence had lived for a time with his grandmother, Davis's mother, whom Davis said was "a good mom." 50RR4-11. While it is true that Terence, his older brother, and his teenage, unwed mother had lived for a time with Davis's mother, the conclusory statement that she was "a good mom" was misleading. By actually interviewing Davis and researching his history, an expert who testified in the habeas proceeding was able to explain that Davis's mother had been "a bad crack addict," had not been able to care for her own sons,

and had "a history of trauma herself" as "her father [had] murdered her mother," an event which sent her and her siblings into abusive foster care from which she never fully recovered and which drove her to substance abuse and bouts of sustained hysteria. 6EHRR198-199.

Likewise, there is a significant difference between testimony from the defendant himself stating, without explanation, that his mother sold drugs out of the house when he was a child compared to testimony from multiple witnesses describing the Andruses' "nasty" childhood home in graphic detail, supported by testimony from a family friend explaining precisely how Terence's mother taught him to obtain illegal prescriptions to make and sell "drank," and describing the toll the crack trade had taken on their old Third Ward neighborhood in which Terence was born and raised. For instance, one witness in the habeas proceeding described his first day "on the job" as a teenage crack dealer, encountering an emaciated addict trying to trade her newborn baby for $5 worth of street drugs. *See, e.g.*, 6EHRR12-118.

The jury did not even learn that Terence's mother was seventeen when he, her second child, was born, or that her five children had five different fathers none of whom had lived in Terence's home; nor had the jury learned that she had supported these children through prostitution and drug hustling. *See* 6EHRR37-38, 82-86, 104, 184, 196-97, 206-08. The habeas judge, not the jury, heard about the prostitution,

shootings, and drug-dealing occurring openly in the streets when Terence was a child. And it was the habeas judge who learned how virtually everyone Terence's mother brought into their lives was selling drugs—including in their house—whose windows had to be boarded up after crack addicts tried to break in to steal the little they had. *Id.*; AppX9-AppX18.

As the Supreme Court noted, the habeas proceeding also featured evidence about how, "[b]efore he reached adolescence, Andrus took on the role of caretaker for his four siblings," including his intellectually disabled older brother—evidence supported by multiple affiants and live testimony from lay witnesses, none of whom had even been interviewed before trial. *See, e.g.*, AppX9-AppX18; 6EHRR12-118. The Supreme Court also recognized that the habeas judge had heard details, not just conclusory statements, about: Terence's mother's drug dealing and addiction; the binges that would precipitate her regularly spending "entire weekends, at times weeks, away from her five children;" and "a revolving door of drug-addicted, sometimes physically violent, boyfriends." *Andrus*, 140 S.Ct. at 1877. The habeas judge, not the jury, learned that one of these "boyfriends," who had sired one of Terence's sisters, raped her when she was still a young child, leading her to be temporarily removed from the home and to be permanently traumatized. 6EHRR187-88.

The Supreme Court emphasized Terence's complex, long-standing mental-health issues, including a diagnosis of "affective psychosis" around age ten, possible schizophrenia, and a history of suicidal ideation—records of which trial counsel had entirely ignored. *Andrus*, 140 S.Ct. at 1877, 1880. As the Supreme Court noted, counsel "did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized." *Id.* at 1882. Indeed, in the habeas proceeding, trial counsel dismissed all of the records showing Terence's history of unresolved mental-health issues as "a lot of psychological gobbledygook." 2EHRR240; *see also Andrus*, 140 S.Ct. at 1882 (finding "counsel 'ignored pertinent avenues for investigation of which he should have been aware,' and indeed was aware.") (quoting *Porter v. McCollum*, 558 U.S. 30, 40 (2009)).

2. The Concurring Opinion did not consider the affirmative damage done by trial counsel's terrible mitigation presentation.

The habeas proceeding also included evidence from two of the handful of witnesses who had testified for the defense at trial—Cynthia Andrus (AppX8) and Dr. John Roach (AppX6). They attested to facts showing how, due to trial counsel's deficient performance, their involvement at trial had done more to harm than help.

As the Supreme Court recognized, Terence's mother had not simply provided a "sanitized" description of his childhood at trial, Concurring Opinion at *18, the habeas proceeding established that she had flagrantly *lied*—and put her son in the untenable position of having to take the stand to contradict her. The habeas

proceeding established that his mother had told a mitigation specialist, who quit before trial, that she was uninterested in being helpful. Cynthia Andrus had only agreed to meet briefly one morning before work if the mitigation specialist agreed to buy her breakfast, and then she had commented during this meeting, in front of one of her daughters, that she had "too many kids" but might at least be able to collect on a $10,000 life insurance policy if her son Terence were executed. AppX8; AppX28.

The Supreme Court found that the defense-sponsored testimony from Terence's mother, who falsely portrayed "a tranquil upbringing" and suggested that her son "got himself into trouble despite his family's best efforts," was an example of how counsel's abject failure to investigate meant that "much of the so-called mitigating evidence" offered at trial actually "aided the State's case in aggravation." *Andrus*, 140 S.Ct. at 1883. The Supreme Court also observed that, when Terence opted to testify at trial, counsel turned "a bad situation worse" because counsel's "uninformed decision" to call his mother "undermined Andrus' own testimony[.]" *Id.* at 1884. Before trial, she had told counsel her "life was not on trial" and she "was not about to tell any stories about [her]self." AppX8. Therefore, as the Supreme Court made clear, calling her only served to bolster the State's case-in-aggravation—a circumstance that must be considered in assessing prejudice. *Andrus*, 140 S.Ct. at 1882-84. If called at all, Ms. Andrus should have been called as a hostile witness

and impeached about her callous notion that she could collect on a life insurance policy if her own child were executed as a means to deal with her other four neglected kids.

Another example of a defense punishment-phase performance that only served to bolster the State's case was the botched use of trial expert Dr. John Roach. This lone defense testifying expert was called only after the defense initially rested and only after the trial judge suggested a recess so that the defense could consider putting on more witnesses. 2ERHR91-94. Dr. Roach was undermined at the outset by the lawyer who was sponsoring him (defense counsel: "Are you a psychiatrist or what?" and "You're not a practicing MD, in other words?"). 51RR7. Presenting this expert without having provided him with a social history meant that the expert had nothing much to say about Terence himself. That expert spent most of his brief time on the stand being mocked during cross-examination as the defense sat idly by (prosecution: "So you drove three hours from San Antonio to tell the jury panel that, that people change their behavior when they use drugs?"). 51RR21. The Supreme Court found it significant that the habeas proceeding had shown that trial counsel had utterly failed to prepare Dr. Roach, whose post-conviction affidavit averred that he was "struck by the extent to which [counsel] 'appeared unfamiliar' with pertinent issues[.]" *Andrus*, 140 S.Ct. at 1882 (quoting AppX6).

Prejudice to Terence from counsel's deficient performance is clear given the vast difference between an unprepared expert offering generalities about how illicit drugs can affect the developing brain, and the multiple experts attesting in the habeas proceeding about the wanton way psychotropic drugs were prescribed to Andrus, how those drugs likely exacerbated his long-standing and unresolved mental-health issues while he was incarcerated, and the relationship between the clinically significant trauma in his background and the street drugs he had used to self-medicate after emerging from an eighteen-month hell in a juvenile system that the State of Texas itself has, since that time, disavowed as a colossal failure. *See, e.g.*, AppX1; 5EHRR103-247; 6EHRR118-227; 7EHRR5-160.

3. The Concurring Opinion mistakenly interpreted evidence of trial counsel's deficient performance as an example of mitigating evidence adduced in post-conviction.

The Concurring Opinion, like this Court's majority opinion, made no mention of the voluminous mitigating evidence unearthed and presented in the habeas proceeding. Instead, the Concurring Opinion references "Dr. Jerome Brown." Concurring Opinion at **19-20. Dr. Brown was a defense *trial* expert, retained at the eleventh hour whom trial counsel did not even contact after Dr. Brown conducted a brief interview with Terence. AppX2. The Concurring Opinion mistakenly implies that Dr. Brown's draft report was the primary mitigating evidence adduced during the habeas proceeding. Everything about trial counsel's approach to experts,

including his failure vis-à-vis Dr. Brown, was exposed as objectively unreasonable during the habeas proceeding. The critique of Dr. Brown is mentioned in Andrus's initial application, supported by an affidavit from Dr. Brown himself. *See id*. But the legion problems with Dr. Brown's unreliable draft report were developed more fully during the evidentiary hearing through an eminently more qualified and better prepared expert, Dr. Scott Hammel. *See* 6EHRR118-226; 7EHRR5-160.

Dr. Hammel opined that Dr. Brown's draft report was based on inadequate sources and a seemingly unethical and definitely unreliable methodology.[8] 7EHRR63-65, 135-37. The unhelpful and unreliable nature of Dr. Brown's draft report and the few generalities elicited from Dr. Roach (the only defense expert who testified) were relevant in the habeas proceeding only as further proof of trial

[8] Moreover, there was no finding of any kind that Terence had a "history of abusing and killing animals" as the Concurring Opinion states in reliance on Dr. Brown's draft report. Concurring Opinion at *21. There is no record of the basis for most of Dr. Brown's draft report, which played only an ancillary role in the habeas proceeding when the State endeavored to seize on its contents as something more than hearsay-within-hearsay, found in trial counsel's paltry file. A thumb drive containing trial counsel's file, which included the draft report, was offered and admitted into evidence for the *limited* purpose of establishing the contents of counsel's file. *See* 2EHRR145 (admitting HC-18). Dr. Hammel, a mental-health expert in the habeas proceeding who, *inter alia*, critiqued Dr. Brown's methodology, testified during questioning by the State about having asked about statements in Brown's report that Terence had hurt animals; Dr. Hammel described an incident where Terence felt he had killed his uncle's puppy by "holding its nose" while playing with it. "[L]ater on, hours later, the puppy died. And so he assumed that it was his actions that caused that in that instance[.]" 7EHRR67-68. For the State to treat hearsay-within-hearsay in Dr. Brown's unreliable report as representing "facts" about Terence was improper. It is unclear why the author of the Concurring Opinion came to believe that Terence had been found to "abuse animals" or why it felt Dr. Brown's report represented competent evidence, let alone something that represented mitigating evidence that should have been presented at trial. No such argument was made on Terence's behalf, and the habeas court made no such finding. *See* Appendix 2.

counsel's *deficient performance*; the trial work product of these experts was *not* among the "tidal wave" of mitigating evidence adduced in the habeas proceeding. *Andrus*, 140 S.Ct. at 1887. Now that the Supreme Court has already concluded that trial counsel's performance was deficient, prejudice is clear, as Dr. Brown's and Dr. Roach's trial involvement stand in stark contrast to the "the abundant mitigating evidence so compelling, and so readily available" that could and should have been presented through qualified experts at trial. *Id.* at 1878; *see also* Appendix 2 (w)-(z), (ee)-(hh); Appendix 3.

4. The Concurring Opinion did not account for how the State's case-in-aggravation could and should have been rebutted, as demonstrated in the habeas proceeding.

The Concurring Opinion devotes several pages to describing the State's punishment-phase presentation—without acknowledging that it was shaped in large part by trial counsel's deficient performance. As the Supreme Court has found, trial counsel "failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so." *Andrus*, 140 S.Ct. at 1884.

The Supreme Court cites some of the extensive evidence developed during the habeas proceeding that could have been presented to undercut the State's case-in-aggravation. For instance, the Supreme Court highlights Terence's experiences when, at age sixteen, he was sent to juvenile facilities run by the TYC for having "allegedly served as a lookout while his friends robbed a woman." *Id.* at 1877. The

habeas proceeding established, as the Supreme Court recognized, that, during Terence's eighteen-month TYC incarceration, "he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized Andrus all but suicidal. Those suicidal urges resurfaced later in Andrus' adult life." *Id*.

The Supreme Court identifies the "severe" harm Terence sustained as a result of his time in TYC custody as a teenager and again while incarcerated awaiting trial as significantly countering the State's evidence at trial. *Id.* at 1884. Contrary to the State's version of events, if counsel had "genuinely investigated Andrus' experiences in TYC custody," as the Supreme Court recognized, "counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe." *Id.* "Or," as the Supreme Court added, "with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison." *Id.*

The portrait presented at trial of TYC and Terence's time in its custody was diametrically different from the testimony provided from three experts during the habeas proceeding: TYC Ombudsman Will Harrell, appointed by former Governor Rick Perry in 2010 to address the system's massive failure and unconstitutionality; clinical psychologist Dr. Scott Hammel, who had worked for the TYC system and was aware of its abuses and inadequate mental-health treatment and who, after

conducting a preliminary investigation of Terence's social history, found multiple instances of clinically significant childhood trauma; and psychiatrist Dr. Alonso-Katzowitz, who described the physiological consequences of the improper "medical restraints" used on Terence while he was in TYC custody. *Compare* 48RR60-77, 52RR5-32 *with* AppX1; AppX4; 5EHRR103-247; 6EHRR118-226; 7EHRR5-160.

The State's narrative that Terence's TYC and jail records showed that he was incorrigible and inexplicably volatile, but also somehow an unfeeling "sociopath," could and should have been attacked. The habeas record not only contains evidence of significant, unresolved mental-health issues that shed a different light on Terence's conduct, but also evidence that he was wantonly given potent psychotropic medications while in TYC and in jail—Lithium, Clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, Trazadone, Risperidone, Wellbutrin, Remeron, Prozac, Thorazine, and Seroquel—drugs that can *induce* mania, depression, and aggression when mis-prescribed and randomly changed, as they were with Terence *for years*. 6EHRR160-65; AppX1; AppX122A.

The habeas record also includes evidence that Terence was quite receptive to advice when he briefly got some. After his arrest for the capital offenses, he spent his first eight months locked up in a neighboring jail, without legitimate explanation and without visits or guidance from a lawyer (or anyone else). But once a second-chair lawyer was finally appointed a year after Terence's arrest, and that lawyer

started meeting with Terence in Fort Bend County, Terence agreed to plead guilty and to accept a life-without-parole sentence. Yet that second lawyer quit the case over lead counsel's failure to do any work; and thereafter, no one acted on the plea offer on Terence's behalf or informed him what was going on. Instead, terrified and alone, his suicidal tendencies resurfaced—to which the jail responded by confining him to a padded cell for 62 days. *See* AppX27; AppX40-43; AppX68; *see also* Appendix 2 at (ww), (hhhh); 2EHRR203-05. The jury heard none of these facts.

The Supreme Court also found that the habeas proceeding had exposed counsel's prejudicial deficiencies in failing to challenge the State's contention that Terence had committed "a knifepoint robbery at a dry-cleaning business." *Andrus*, 140 S.Ct. at 1885. Terence had told counsel he was not the perpetrator, but counsel neither investigated nor challenged the State's evidence presuming Terence guilty of this unadjudicated offense. As the Supreme Court explained: "Had he looked, counsel would have discovered that the only evidence originally tying Andrus to the incident was a lone witness statement, later recanted by the witness, that led to the inclusion of Andrus' photograph in a belated photo array, which the police admitted [at the habeas hearing] gave rise to numerous reliability concerns." *Id.*; *see also id.* at n.3 (critiquing the dissent for "maintain[ing] that this witness, Andrus' ex-girlfriend, 'linked [Andrus] to the robbery,' …, even though she testified at the habeas hearing that she thought 'it was impossible' that Andrus had committed the

offense") & n.4 (critiquing the dissent for inadequate attention to the habeas record that shows "significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.").

Instead of attacking misrepresentations and inaccuracies in the State's punishment-phase case, trial counsel, as the Supreme Court found, left the aggravating evidence "untouched," going so far as to concede that the State had proven that Andrus "was 'a violent kind of guy.'" *Id.* at 1884 (quoting defense counsel's closing argument). According to the Supreme Court, "[t]here is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment." *Id.* at 1885.

During the habeas proceeding, extensive evidence was adduced that dismantled the State's portrayal of Terence as someone who had engaged in "significant assaultive behavior" in TYC and then resisted "rehabilitation" and was then continuously uncontrollable in jail. *Compare* Concurring Opinion at **8-14 *with*, *e.g.*, 5EHRR137-57. Terence, like other kids struggling in TYC custody with untreated mental illness, was given no meaningful treatment. Instead, he spent weeks at a time in solitary confinement in a frigid cell smeared with body fluids in a ward filled with screaming occupants banging on steel doors. 5EHRR154, 167. Had the

jury learned this, there is a reasonable probability that at least one juror would have voted to spare his life.

In addition to the vast mitigating evidence, prejudice to Terence has also been established by counsel's admitted failure to investigate any aspect of the State's case-in-aggravation, much of which the post-conviction investigation demonstrated was eminently rebuttable, as the Supreme Court has now recognized.

B. The Concurring Opinion Relied on a Misapprehension of *Wiggins v. Smith*, as the Supreme Court Has Now Clarified.

The Supreme Court expressly cautioned against the Concurring Opinion's reasoning, noting that it incorrectly "seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts of *Wiggins*," although the Supreme Court has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S.Ct. at 1887, n.6. That is, while the Concurring Opinion is correct that [w]hen analyzing whether Applicant has satisfied *Strickland*'s prejudice requirement, it is appropriate to use *Wiggins* as a guide," Concurring Opinion at *18, the Supreme Court has now made clear that the Concurring Opinion misconstrued *Wiggins* by using it as a factual litmus test.

The Concurring Opinion purported to compare the mitigating evidence adduced on *Wiggins*'s behalf to that adduced for Terence Andrus—but, as explained above, that comparison was based on a misperception of the habeas record. The

Concurring Opinion also suggested a no-prejudice finding was warranted because Andrus, unlike Wiggins, had a record of violent conduct. But as the Supreme Court has now explained at length, this Court must account for how the State's portrayal of Terence would not have withstood scrutiny if contextualized by the evidence adduced in the habeas proceeding regarding: the truth about his juvenile offenses; his experience in TYC; and his long-standing, untreated mental-health issues, beginning with an "affective psychosis" diagnosis at ten, issues exacerbated by his protracted time in jail awaiting trial. *Andrus*, 140 S.Ct. at 1881, 1882.

Further, *Wiggins* itself notes that the mitigation in *Wiggins* was stronger, and the aggravating evidence weaker, than in *Williams v. Taylor*, 529 U.S. 362 (2000); yet prejudice was nevertheless found in *Williams*—even though that case was decided under the highly deferential standard imposed by the Antiterrorism and Effective Death Penalty Act. Therefore, *Wiggins* does not permit finding "no prejudice" simply because the habeas applicant did not adduce evidence analogous to the facts of *Wiggins* itself.

II. THE SUPREME COURT, IN APPLYING *WIGGINS* TO THE FACTS OF THIS CASE, HAS CLARIFIED HOW TO UNDERTAKE A *STRICKLAND* PREJUDICE ANALYSIS AND STRONGLY IMPLIES WHAT THE RESULT SHOULD BE.

In multiple ways, the Supreme Court's decision in this case strongly implies that Terence Andrus was prejudiced.

First, the Supreme Court strongly implies that Andrus was prejudiced by a patently deficient investigation by highlighting "the vast tranches" of "powerful and readily available mitigating evidence" that trial counsel "not only neglected to present" but "failed even to look for[.]" *Andrus*, 140 S.Ct. at 1881, 1883, 1886, 1877. The Supreme Court notes "the multiple red flags" that should have alerted counsel to the "vast" mitigating evidence developed during the post-conviction investigation. *Id.* at 1883; *see also Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005) (finding prejudice arising from failure to pursue "red flags" that would have led to undiscovered mitigation that "might well have influenced the jury's appraisal," a failure that undermined confidence in the outcome reached at sentencing).

As the Supreme Court found, "a clinical psychologist testified at the habeas hearing" that "Andrus suffered 'very pronounced trauma' and posttraumatic stress disorder symptoms from, among other things, 'severe neglect' and exposure to domestic violence, substance abuse, and death in his childhood. Counsel uncovered none of that evidence." *Andrus*, 140 S.Ct. at 1882. The habeas proceeding included testimony from multiple experts about specific instances of childhood trauma, including adverse events experienced growing up in Houston's drug- and violence-infested Third Ward neighborhood, then in gang-infested Section 8 housing in Fort Bend County, then in TYC facilities that were eventually exposed as horrific failures. *See, e.g.*, 4EHRR203-37; 5EHRR103-246; 6EHRR118-227; 7EHRR5-160.

Second, the Supreme Court strongly implies that Terence Andrus was prejudiced by his trial counsel's deficient mitigation presentation. The Supreme Court notes how bad the presentation was—and points to numerous witnesses, whose testimony was adduced in the habeas proceeding, who could have provided compelling and specific information about Terence's childhood about which the jury heard only a few vague and contradictory generalities. For instance, the Supreme Court notes the habeas testimony about his childhood in a crack-ridden neighborhood, where his mother's boyfriend was shot and killed in the streets, prompting her to become "increasingly dependent on drugs and neglectful of her children;" the Supreme Court cites as an example testimony from "a close family friend" who testified that "Andrus' mother 'would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it.'" *Andrus*, 140 S.Ct. at 1880 (quoting 13EHRR, AppX13). The Supreme Court also highlights the habeas testimony about how "Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs." *Id.* The Supreme Court further cites the habeas evidence that, even though Terence was already struggling with his own mental-health issues, he was the one who, while still a child, "cleaned for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner." *Id.* The Supreme Court quotes some of the

habeas testimony from his siblings, describing Terence as "'a protective older brother" who "kept on to [them] to stay out of trouble," someone who "was 'very caring and very loving,' 'liked to make people laugh,' and 'never liked to see people cry.'" *Id.* (quoting AppX18, AppX9).

Third, the Supreme Court strongly implies that Andrus was prejudiced by his trial counsel's failure to investigate and then rebut the State's case-in-aggravation. The Supreme Court, with recourse to the habeas record, was able to identify examples of how the State's punishment-phase case could and should have been attacked—thereby showing how Terence was prejudiced. For example, the habeas proceeding established that much of Terence's misconduct while in custody was while he was seriously mentally ill—a circumstance to which his jailors responded by giving him potent psychotropic medications without corresponding diagnoses and locking him in solitary confinement for extended periods, thereby exacerbating his illness. *See, e.g.*, 5EHRR103-193; AppX1. The Supreme Court highlighted examples in the habeas record of new mitigating evidence that would have "contextualize[d] and counter[ed] the State's evidence of Andrus' alleged incidences of past violence." *Andrus*, 140 S.Ct. at 1877-78. One example was the testimony of the TYC Ombudsman: opining "that it was 'surpris[ing] how few' citations Andrus received, "'particularly in the dorms where [Andrus] was' housed;" "finding 'nothing uncommon' about Andrus' altercations because 'sometimes you … have to

fight to get by' in the 'violent atmosphere' and 'savage environment;'" "testifying that Andrus' isolation periods in TYC custody, for 90 days at a time when Andrus was 16 or 17 years old, 'would horrify most current professionals in our justice field today.'" *Id.* at 1885 n.2 (quoting testimony from habeas record at 5EHRR189, 169, 246).

The Supreme Court characterizes the habeas record—which is now again before this Court—as raising "a significant question whether the apparent 'tidal wave' of 'available mitigating evidence taken as a whole' might have sufficiently 'influenced the jury's appraisal' of [Andrus'] moral culpability' as to establish *Strickland* prejudice." *Id.* at 1887 (quoting habeas record). The Supreme Court then emphasizes: "We have never limited the prejudice inquiry under *Strickland* to cases in which there was 'little or no mitigation evidence' presented'"—although there was little or no mitigation evidence presented at Terence's trial. *Id.*; *see also id.* at n.7. What must now occur is a "weighty and record-intensive analysis" that does ***not***, as the Supreme Court dissent did, "train[] its attention" solely on the trial case-in-aggravation, while ignoring the rebuttal evidence and mitigation evidence adduced in the habeas proceeding. *Id.* at 1887 & n.7. The dissent, as the Supreme Court majority recognized, did not acknowledge that a significant part of counsel's deficient performance was the failure to investigate the State's extraneous-offense evidence (and failure to investigate the circumstances of the capital crime itself). *Id.*

Evidence was presented at the habeas evidentiary hearing that would have exposed how prior aggravating incidents were misrepresented and, in some cases, flatly untrue.[9] 3EHRR65-68.

Ultimately, the Supreme Court suggested that the bar for showing prejudice in the circumstances presented here is low and Terence Andrus more than surmounted it: "because Andrus' death sentence required a unanimous jury recommendation, prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding [his] 'moral culpability.'" *Andrus*, 140 S.Ct. at 1885 (quoting *Wiggins*, 539 U.S. at 537–38).

Each of the Supreme Court's teachings in *this* case indicate that a prejudice finding is required.

III. THE SUPREME COURT'S OTHER MITIGATION JURISPRUDENCE PROVIDES ROBUST GUIDANCE FOR UNDERTAKING THE *STRICKLAND* PREJUDICE ANALYSIS FOR A *WIGGINS* CLAIM.

A. The Prejudice Analysis Requires Contemplating What a Reasonable Juror Might Have Done in Light of the New Evidence.

[9] After this Court rejected Terence's habeas claims, and before the Supreme Court issued its opinion on his *Wiggins* claim, a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 was filed on his behalf. *See Andrus v. Davis*, Case No. 4:19-cv-00717 (S.D. Tex.). This federal habeas petition raised additional claims challenging the constitutionality of Terence's conviction and sentence. *See id.* at No. 11. Those claims include new allegations that the State elicited false testimony during the punishment phase of trial regarding at least *three* extraneous offenses (none of which trial counsel had investigated but simply conceded).

To assess prejudice, the Court must "weigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U. S. at 534; *see also Sears v. Upton*, 561 U.S. 945 (2010); *Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 393. Next, the Court must determine whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against a death sentence. *Wiggins*, 539 U. S. at 537.

Undertaking this analysis, as the Supreme Court reminds, "'necessarily require[s] a court to "speculate" as to the effect of the new evidence' on the trial evidence, 'regardless of how much or little mitigation evidence was presented during the initial penalty phase.'" *Andrus*, 140 S.Ct. at 1887 (quoting *Sears*, 561 U.S. at 956). This reasoned speculation requires the adjudicator to keep in mind how jurors reach a decision about punishment in a constitutional manner. The Supreme Court has long instructed that "the fundamental respect for humanity underlying the Eighth Amendment" requires jurors to make an *individualized* assessment of whether death is warranted. *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). That individualized assessment must reflect "'a reasoned moral response to the defendant's background, character, and crime.'" *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (citation omitted).

Under Texas law at the time of Terence's 2012 trial, *after* a jury has found a person guilty of capital murder, and *after* a separate punishment-phase trial, the

death penalty may be imposed only if the jurors unanimously answer at least two "special issues" in a certain way. First, the jury must find unanimously and beyond a reasonable doubt that the State proved that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. Art. 37.071, sec. 2(b)(1). Next, the jury must find unanimously the *absence* of "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* sec. 1(e)(1), (f). In so doing, the jury must "tak[e] into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." *Id.* sec. 1(e)(1). Terence's jury had no means to do that.

B. The Supreme Court's Core Cases about Ineffective Assistance in the Punishment Phase of Death-Penalty Cases Provide Further Guidance.

The instant case represents the first time in ten years that the Supreme Court has offered guidance about how to assess an ineffective-assistance claim based on counsel's failure to investigate and present readily available and compelling mitigation evidence in a death-penalty case. The Supreme Court's past jurisprudence regarding this discrete issue should provide further guidance—and that guidance, requiring a necessarily "fact-specific" inquiry, further supports the conclusion that Terence was prejudiced. *Sears*, 561 U.S. at 955 ("[W]e have consistently explained that the *Strickland* inquiry requires … probing and fact-specific analysis").

For instance, in *Williams v. Taylor*, the Supreme Court found that the state court had unreasonably applied clearly established federal constitutional law by failing to grant Williams relief on his ineffective-assistance claim. In reaching that conclusion, the Supreme Court acknowledged that, while the *original* mitigation case may have been insufficient to overcome the death penalty, Williams's "entire postconviction record, viewed as a whole and cumulative of mitigating evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." *Williams*, 529 U.S. at 399. The Supreme Court also emphasized that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398.

Williams had been convicted of bludgeoning a man to death with a mattock after he refused to lend Williams "a couple of dollars;" the State had shown that he had also committed armed robberies, "two separate violent assaults on elderly victims," and had "set[] a fire in the jail while awaiting trial." *Id.* at 367-69. Nevertheless, the Supreme Court observed that a "graphic description" of his "childhood[] filled with abuse and privation" might have changed the jury's mind about his "moral culpability." *Id.* at 368, 398. Indeed, *Williams* stands for the proposition that, although some mitigating evidence was presented at trial, even a

subset of new mitigating evidence that counsel failed to find can satisfy the prejudice prong. *Id.* at 398 (also noting Williams's confession, remorse, and cooperation). Although all murders are tragic, the evidence against Terence Andrus was far less aggravated than that amassed against Williams. Moreover, Terence, like Williams, had confessed, assisted law enforcement, and expressed remorse on multiple occasions. Moreover, significant mitigating evidence was amassed on Terence's behalf that was quite different from what the jury had heard, including evidence that rebutted much of the State's "future dangerousness" case—which Williams did not have. A no-prejudice finding here could not be reconciled with the Supreme Court's holding in *Williams*.

In *Wiggins*, the Supreme Court found prejudice even though the defendant had been convicted of a "bizarre crime—in which a 77-year-old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer." *Wiggins*, 539 U.S. at 514. The Supreme Court found the evidence of "severe physical and sexual abuse" that Wiggins had suffered sufficiently "powerful" that "[h]ad the jury been able to place [Wiggins'] excruciating life history on the mitigating side of the scale, there [was] a reasonable probability that at least one juror would have struck a different balance." *Id.* at 516, 534, 537. But neither the holding nor the rationale in *Wiggins* requires

that the identical kind of mitigating evidence in that case be amassed in an habeas proceeding for prejudice to be found.

Courts should not be weighing whether the abuse one defendant sustained was "less bad" than what a defendant in some other case experienced. The comparison that matters is the difference between the mitigation case put before the jury and what the habeas proceeding shows could have been presented. For instance, in *Sears*, the Supreme Court found prejudice where trial counsel had presented a mitigation case through "[s]even witnesses" who "offered testimony along the following lines: Sears came from a middle-class background; his actions shocked and dismayed his relatives; and a death sentence, the jury was told, would devastate the family"—whereas the habeas proceeding had shown that "Sears' home life, while filled with material comfort, was anything but tranquil." *Sears*, 561 U.S. at 947-48.

The Supreme Court has also taught that prejudice cannot be ruled out due to the circumstances of the crime and other aggravating factors to the exclusion of "the other side of the ledger." *Porter*, 558 U.S. at 41. Every case is different because every defendant is a unique human being whose life will invite considering a different set of variables. *Porter* involved a middle-aged man whose military service and childhood abuse, which could and should have been before the jury, had to be factored into the analysis. The Supreme Court found the state court's "no prejudice" finding objectively unreasonable even though the murder was "premeditated in a

heightened degree." *Id.* at 42; *see also Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009) (unpublished) (finding prejudice where defendant had invaded a young woman's home, laid in wait for her, bludgeoned her to death, then repeatedly stabbed her corpse with a butcher knife and barbecue fork).

Additionally, a prejudice analysis cannot be short-circuited by simply concluding that aggravating evidence somehow would have cancelled out all mitigating evidence whatever it may have been. The only time the Supreme Court has authorized a truncated prejudice analysis was in the habeas applicant's favor. *See Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Supreme Court made clear that a single bad decision by counsel can be sufficiently unreasonable and prejudicial to support a finding of ineffective assistance of counsel. *See id.* at 777 (explaining that the impact of defense expert's two references to the defendant's race in discussing the future-dangerousness issue "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.").

The Supreme Court's body of cases in this discrete area teaches that Terence Andrus only needed to show a reasonable probability that, had the new evidence been considered, "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 513. If one digs into the habeas record, as the Supreme Court majority did, it is clear that this burden was carried and thus prejudice was proven.

IV. THE HABEAS JUDGE'S PREJUDICE FINDING AND LEGAL CONCLUSIONS, AMPLY SUPPORTED BY THE HABEAS RECORD, SHOULD BE ADOPTED.

The Supreme Court observed that the Texas habeas judge who "heard the evidence recommended that Andrus be granted habeas relief" upon finding "the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial." *Andrus*, 140 S.Ct. at 1878. The habeas judge—who already labored to receive the evidence, to assess the credibility of the witnesses, to compare the new evidence to the trial record, to make independent findings, and to review the relevant constitutional law—merits deference with regard to his prejudice finding.

Of course, *this* Court is the final arbiter under Texas law. But as this Court has previously explained, the role of the habeas judge in the habeas proceeding is, nevertheless, central; the habeas judge "is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed fact issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief." *Ex parte Rodney Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (quoting *Ex parte Simpson*, 136 S.W.3d 136 S.W.3d 660, 668 (Tex. Crim. App. 2004)). Moreover, the habeas judge is "[u]niquely situated to observe the demeanor of witnesses first-hand" and "is in the

best position to assess the credibility of witnesses." *Id.* (citing *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007)). Unlike an appellate court, which must rely on a cold record, the habeas judge "is tuned in to how something is being said as much as to what is being said. The judge is acutely aware of a witness's tone of voice or inflection, facial expressions, mannerisms, and body language." *Id.* at 728. Because of these advantages, "in most circumstances," this Court has said it "will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record." *Id.* at 727.

Although this Court "afford[s] no deference to findings and conclusions that are not supported by the record," *id.*, the habeas judge who presided in this cause issued findings and conclusions amply supported by the record. *Compare* Appendix 2 *to* 1-41EHRR. The habeas judge made twelve pages of findings relevant to the prejudice analysis, applying *Wiggins v. Smith*. *See* Appendix 2 at 3-15. Among those findings are summaries of the testimony of numerous mitigation witnesses, all of whom he found credible. *See* Appendix 2 (zz)-(fff); (ggg)-(ooo); (ppp)-(xxx); (yyy)-(dddd); (gggg); (mmmm).

As the Supreme Court's review in this case shows, this case does *not* constitute one of those "rarest and most extraordinary of circumstances" when this Court should have refused, as it did, "to accord any deference whatsoever to the [habeas judge's] findings and conclusions as a whole." *Ex parte Rodney Reed*, 271

S.W.3d at 728. Instead, the habeas judge was entitled to the conventional deference that similarly situated decisionmakers are supposed to be afforded under Texas case law and under the Constitution's Due Process Clause.[10]

Because the habeas judge's factfinding is amply supported by the record and his legal conclusions align with clearly established federal constitutional law, his recommendation to grant habeas relief should be adopted. As the Supreme Court noted, the only critique this Court made of the habeas judge's work was that the order recommending relief "had omitted the 'reasonable probability' language when reciting the *Strickland* prejudice standard." *Andrus*, 140 S.Ct. at 1886, n.5 (citing *Strickland*, 466 U.S. at 694). But, as the Supreme Court explained, that omission "would at most suggest that [the habeas judge] held Andrus to (and found that Andrus had satisfied) a ***stricter*** standard of prejudice than that set forth in *Strickland*." *Id.* (emphasis added).

Both the habeas judge below and the Supreme Court above have now described the basis for a prejudice finding as a "tidal wave" of mitigating evidence,

[10] Decades ago, the Supreme Court noted in dicta that, in a criminal case, where a higher court rejects a lower court's favorable factfinding on credibility and substitutes its own factfinding based on a cold record to deny relief, as this Court did, that act "give[s] rise to serious [constitutional] questions[.]" *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980); *see also Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) ("Like the Supreme Court …, we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself.").

reflecting a traumatic "childhood marked by extreme neglect and privation," as well as "a family environment filled with violence and abuse." *Id.* at 1879.

In light of the facts the Supreme Court has now found, Terence has proven he was prejudiced in multiple, categorical ways. Terence was prejudiced by his attorney's failure to investigate and then contest the State's punishment case regarding the truth about his juvenile record, the unadjudicated robbery-assault at a dry cleaners that Terence did not commit, and the mistreatment he experienced in TYC custody and in jail, including the rampant misuse of psychotropic drugs and solitary confinement that further traumatized and ultimately unhinged him. Terence was prejudiced by his attorney's failure to investigate and present readily available and compelling mitigation evidence of the deprivation and abuse he sustained as a child and his long-standing, untreated mental illness, instead presenting a false portrait of his family background that stands in stark contrast to the tragic history of neglect and abuse he actually endured. Terence was prejudiced by has attorney's failure to investigate and present any positive evidence of Terence's character from anyone other than Terence himself, in pronounced contrast to the many witnesses who relayed in the habeas proceeding their personal experiences of how, even as a very young child living in wretched circumstances, Terence had found creative ways to keep his siblings fed and entertained when their mother disappeared, leaving them without food or money, and how he tried to protect them when his mother came

home high with strange men in tow. *See, e.g.,* 4EHRR209-38; AppX9-AppX11; AppX13; AppX14; AppX17. AppX93; AppX118; AppX122A-C; AppX129; AppX132.

After undertaking the prejudice analysis mandated by the Supreme Court, this Court should find that the jury heard very little in the punishment phase that was mitigating and, by contrast, the readily available mitigating evidence adduced during the habeas proceeding would have painted a "vastly different picture" of Terence Andrus's life and humanity. *Cooper v. Secretary*, 646 F.3d 1328, 1355 (11th Cir. 2011) ("During the penalty phase, the jury heard very little that would humanize Cooper … and the mitigation evidence presented in post-conviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial.") (citation omitted); *see also Andrus*, 140 S.Ct. at 1881, 1883 (describing as "vast" mitigating evidence adduced in the habeas proceeding that the jury did not hear); *see also* 7EHRR101 (habeas judge noting "the tidal wave of information that has come through here with regard to mitigation"). Had the jury been exposed to that "vastly different picture," there is a reasonable probability that at least one juror would have voted against a death sentence.

PRAYER

Having satisfied both elements of *Strickland v. Washington*, Terence Andrus prays for habeas relief in the form of a new punishment-phase trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), that the word count as determined by the word processing program is 8,072, excluding those parts as permitted by rule 9.4(i)(1)—assuming that Rule 9.4(i)(2)(F) applies to this sui generis circumstance.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2020, a true and correct copy of the above and foregoing motion was forwarded to all counsel of record by the Electronic Service Provider, if registered, otherwise by email, as follows:

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