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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 TEXAS LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF TERENCE TREMAINE ANDRUS'S APPLICATION

THIS IS A CAPITAL CASE.

Erin M. Eckhoff
Brent E. Newton
Kayna Stavast Levy
María Amelia Calaf
WITTLIFF | CUTTER, PLLC
1209 Nueces Street
Austin, Texas 78701
Telephone: (512) 213-6094
Email: mac@wittliffcutter.com

Counsel for Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are Texas law professors comprising individuals from across the political spectrum, who have been charged with educating and training future generations of Texas attorneys in criminal law. Amici, as attorneys who believe in the rule of law and deference to Constitutional precedent, file this brief in support of Terence Tremaine Andrus's claim for relief because the correct application of the Strickland prejudice standard in capital cases is not only critical to ensure due process under the law for all criminal defendants, but also necessary to encourage the public's trust in the State's criminal system—particularly in capital cases where it imposes the ultimate penalty.

Professor E. Jennifer Laurin is the Wright C. Morrow Professor of Law at the University of Texas School of Law.

Jordan Steiker is the Judge Robert M. Parker Endowed Chair in Law and Director of the Capital Punishment Center at the University of Texas School of Law.

Ana Otero is Professor of Law at Texas Southern University Thurgood Marshall School of Law.

Donna Coltharp is Assistant Professor of Law at St. Mary's University School of Law.

[1] No counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. *See* TEX. R. APP. P. 11.

Sandra Guerra Thompson is the Newell H. Blakely Chair and Director of the Criminal Justice Institute at the University of Houston Law Center.

Brian Serr is Professor of Law at Baylor University School of Law.

Meredith Duncan is the George Butler Research Professor of Law and Assistant Dean for Diversity, Inclusion, and Metropolitan Programs at the University of Houston Law Center.

Cynthia Alkon is Professor of Law and Director of the Criminal Law, Justice, and Police Program at Texas A&M University School of Law.

SUMMARY OF ARGUMENT

Strickland v. Washington, 466 U.S. 688 (1984), provides the framework for analyzing whether a criminal defendant's most essential constitutional right—namely, the Sixth Amendment right to the assistance of effective counsel in his defense—has been protected. As *Strickland* made clear, inherent in the Sixth Amendment is an obligation to ensure that every criminal defendant in the United States is afforded constitutionally effective counsel when facing charges by the State that threaten his liberty. Indeed, as in Mr. Andrus's case, a defendant's life itself often hangs in the balance when the State charges him with capital murder and chooses to pursue a death sentence. Upholding the right to counsel, and consequently effective assistance of counsel, is absolutely imperative when a defendant faces execution by the State, as Terence Tremaine Andrus does here.

The United States Supreme Court recently vacated this Court's decision to summarily deny Mr. Andrus's state habeas claim that his trial counsel had been constitutionally ineffective and remanded Mr. Andrus's claim "for further proceedings not inconsistent with [the Supreme Court's] opinion." *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020). In doing so, the Supreme Court called into serious question this Court's *Strickland* analysis in Mr. Andrus's case, noting that despite the state habeas trial court finding that hearing evidence revealed "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," this Court flatly declined to adopt that court's recommendation to grant Mr. Andrus relief. *Id.* This Court now has the opportunity to review Mr. Andrus's case with the benefit of the Supreme Court's decision and apply the *Strickland* prejudice standard in accordance with that guidance.

First, the Supreme Court rejected this Court's determination under the first prong of *Strickland* that Mr. Andrus's trial counsel's performance did not fall below an objective standard of reasonableness. *Andrus*, 140 S. Ct. at 1881 (citing *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, at *2 (Tex. Crim. App. Feb. 13, 2019) (the "Original Opinion"), *vacated and remanded*, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) and *id*. at *7 (Richardson, J., concurring, joined by Keller, P.J. & Hervey & Slaughter, JJ.) (opining that this Court "need not consider the constitutional adequacy of defense counsel' performance because [Mr. Andrus] fails to show prejudice") (the "Concurring Opinion")). This Court denied Mr. Andrus's ineffectiveness claim based, in part, on this Court's determination that he had "fail[ed] to meet his burden under *Strickland* … to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness." *Ex parte Andrus*, 2019 WL 622783, at *2 (internal citation omitted). But the Supreme Court found otherwise, holding—based on the same

evidence available to this Court in the first instance—that "[t]he evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*." *Andrus*, 140 S. Ct. at 1881. Thus, the Supreme Court expressly disagreed with the outcome of this Court's summary deficient performance analysis under *Strickland* and instead "conclude[ed] that Andrus has shown deficient performance under the first prong of *Strickland*…." *Id.* at 1887.

Second, the Supreme Court likewise found lacking this Court's *Strickland* prejudice prong analysis. *Id.* at 1886–87. After noting that the Original Opinion left an open question as to whether this Court "considered *Strickland* prejudice at all" and that, though the Concurring Opinion provided at least *some* discussion of prejudice, "[w]hat little is evident from the proceeding below is that the concurring opinion's analysis of or conclusion regarding prejudice did not garner a majority of the Court Criminal Appeals," the Supreme Court expressed "uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted [the] weighty and record-intensive analysis" required when assessing the *Strickland* prejudice prong. *Id.* at 1886, 1887. These doubts are only amplified by the Supreme Court's recognition that "[t]he untapped body of mitigating evidence was, as the habeas hearing revealed, *simply vast*." *Id.* at 1883 (emphasis added).

In light of these concerns raised in the Supreme Court's *per curiam* opinion, amici herein urge the Court to consider the following arguments in reviewing Mr.

Andrus's case on remand. First, the Original Opinion's invocation of the "preponderance" standard misstates the applicable standard in a *Strickland* analysis. Second, the Concurring Opinion's assertion that Mr. Andrus must show that "the jury" would have voted for a "different sentence"—necessarily life without parole, the only other option in a Texas capital sentencing proceeding—to establish prejudice under *Strickland* likewise misstates the applicable standard. Third, this Court's analysis of prejudice under *Strickland* must be informed by the Eighth Amendment's requirement that capital sentencing juries be permitted to consider *any and all mitigating evidence*. And fourth, the mere existence of potentially aggravating or "double-edged" evidence does not foreclose a *Strickland* prejudice showing. Because consideration of these factors leads to the firm conclusion that Mr. Andrus has shown that his trial attorney's deficient performance was prejudicial under *Strickland*, amici urge this Court to grant relief.

ARGUMENT

I. PRECEDENT DICTATES THE CONTOURS OF THE STRICKLAND PREJUDICE ANALYSIS.

A Sixth Amendment claim alleging ineffective assistance of counsel has two components: (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id. at* 688. And to establish prejudice, a defendant

must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. As discussed further below, because "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," it is *less than* a showing by a preponderance of the evidence. *Id.*

A. The Only Issue Before this Court Is Whether Mr. Andrus Has Shown *Strickland* Prejudice.

Trial counsel's performance is deficient when it is "inconsistent with the standard of professional competence in capital cases that prevailed [at the time of the trial]." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). In view of the central role that mitigating evidence plays in the sentencing determination, "[i]t is unquestioned that under the prevailing professional norms[,] counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Whether Mr. Andrus's trial counsel was deficient under the first prong of *Strickland* is no longer in dispute at this juncture; the Supreme Court has determined that counsel was. *Andrus*, 140 S. Ct. at 1881; *see also id.* at 1887 ("We conclude that Andrus has shown deficient performance under the first prong of *Strickland*…."). The only question for this Court is whether Mr. Andrus was prejudiced by his counsel's deficient performance. As explained below, he was.

B. The Proper Standard of Proof to Assess *Strickland* Prejudice Is *Less Than* a Preponderance of the Evidence.

This Court, in the Original Opinion, misstated the *Strickland* prejudice standard and consequently held Mr. Andrus to an improper standard of proof. Although a habeas corpus applicant has the burden "to prove by a preponderance of the evidence his factual allegations," *Ex parte Thomas*, 906 S.W.2d 22, 25 (Tex. Crim. App. 1995), that higher burden must not be confused with the burden to prove *Strickland* prejudice. *Strickland* prejudice is a not a "factual allegation" that must be established by a preponderance of the evidence; instead, it is a "mixed question of fact and law." *Strickland*, 466 U.S. at 698. Thus, Mr. Andrus need not show by a preponderance that, but for trial counsel's deficient performance, the jury would have voted for a sentence other than death. *Id.* at 694. Rather, Mr. Andrus need only "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Andrus*, 140 S. Ct. at 1881 (quoting *Strickland*, 466 U.S. at 694). Notably, the Supreme Court has made it clear that this "reasonable probability" burden to prove prejudice is a burden *less than* by a preponderance of the evidence. *See Strickland*, 466 U.S. at 694 (holding that prejudice can be shown "even if the errors of counsel

cannot be shown by a preponderance of the evidence to have determined the outcome"); *accord Kyles v. Whitley*, 514 U.S. 419, 434 (1995).[2]

By way of analogy, Mr. Andrus only need show something akin to *probable cause*. Like the "reasonable probability" standard for *Strickland* prejudice, the Supreme Court has held that the probable cause burden is less than a preponderance of the evidence.[3] Indeed, other courts have equated "probable cause" and "reasonable probability."[4] Furthermore, this Court and the Supreme Court have spoken of both probable cause and *Strickland* prejudice as relating to a degree of "confidence."[5] Significantly, the Supreme Court recently described the standard for

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[2] Although this Court noted that the "trial court misstate[d] the *Strickland* prejudice standard by omitting the standard's 'reasonable probability' language," *Ex parte Andrus*, 2019 WL 622783, at *2 n.2, this Court nevertheless coupled "preponderance" and "reasonable probability" together in denying relief.

[3] *Compare Strickland*, 466 U.S. at 694 (holding that prejudice can be shown "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"), *with Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (holding that probable cause "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands").

[4] *See, e.g.*, *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) ("Probable cause rests on a reasonable probability that a crime has been committed[.]"); *United States v. Pritchard*, 745 F.2d 1112, 1120 (7th Cir. 1984) ("Probable cause is established whenever there is a reasonable probability of finding the desired items in a particular location."); *State v. Nyce*, 137 P.3d 587, 591 (N. Mex. 2016) ("When ruling on probable cause, we deal only in the realm of reasonable probabilities, and look to the totality of the circumstances to determine if probable cause is present."), *overruled on other grounds by State v. Williamson*, 212 P.3d 376 (N. Mex. 2009); *State v. Reynolds*, 453 A.2d 1319, 1320 (N.H. 1982) ("In determining probable cause to arrest, we are dealing with only reasonable probabilities[.]"); *State v. Williams*, 310 N.W.2d 601, 606 (Wis. 1981) ("Probable cause requires a reasonable probability of guilt, which is certainly satisfied with regard to Williams.").

5 *Compare Crockett v. State*, 803 S.W.2d 308, 312 n.10 (Tex. Crim. App. 1991) (describing probable cause as a level of "confidence" required before a search or seizure can occur), with *Strickland*, 466 U.S. at 694 (describing "prejudice" as being established when a reviewing court does not have "confidence" in the verdict in view of trial counsel's deficient performance).

showing probable cause as "not a high bar."[6] Applying that standard for showing *Strickland* prejudice here, Mr. Andrus's case easily clears that bar, as explained below.

1. A Defendant Need Only Establish that There Is a Reasonable Probability that a Single Juror Would Have Answered Just One Special Issue Differently.

The Concurring Opinion likewise mischaracterized the *Strickland* prejudice standard when it stated that "even if the jury heard this mitigating evidence, [we] cannot say that there is a reasonable probability that *the jury would have returned a different sentence*." *Ex parte Andrus*, 2019 WL 622783, at *7 (emphasis added). Whether there is a reasonable probability of the jury's affirmatively returning a life sentence is not the appropriate question when assessing *Strickland* prejudice in a Texas death penalty case. Rather, as the Supreme Court itself noted, "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 Andrus' moral culpability . . ." *Andrus*, 140 S. Ct. at 1886 (emphasis added; internal quotation omitted).

The Texas sentencing statute required the jury weighing Mr. Andrus's fate to consider two special issues in its deliberation. The first special issue required that a

[6] *Kaley v. United States*, 571 U.S. 320, 338 (2014) (majority op. of Kagan, J., for six justices) ("Probable cause, we have often told litigants, is not a high bar."); *see also id.* at 354 (Roberts, C.J., dissenting, joined by Breyer & Sotomayor, JJ.) (describing probable cause as a "low bar").

jury determine beyond a reasonable doubt whether there is a probability that Mr. Andrus would commit criminal acts of violence that would constitute a continuing threat to society, including an institutional society. *See* TEX. CODE CRIM PROC. art. 37.071 § 2(b)(1) (the "future dangerousness" special issue). Because the jury answered the first special issue affirmatively, Mr. Andrus's jury was also asked to answer the second special issue:

> Whether, taking 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, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Id. at § 2(e)(1) (the "mitigation" special issue).

The death penalty is imposed only if the jury answers "no" to this second special issue. Notably, the statute requires the court instruct the jury that it "may not answer the issue 'no' unless it *agrees unanimously* and may not answer the issue 'yes' unless 10 or more jurors agree." *Id.* at § 2(f)(2) (emphasis added). If *just one* juror answers "yes" to the second special issue, the defendant is sentenced to life in prison without parole. *See id.* at § 2(g) ("If the jury returns . . . an affirmative finding on an issue submitted under Subsection (e)(1) *or is unable to answer any issue submitted under Subsection . . . (e)*, the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.") (emphasis added). Therefore, in assessing prejudice, the question

is not whether *ten jurors* would have answered the mitigation special issue affirmatively; rather, it is whether even a *single juror* would have answered the mitigation special issue differently if he or she had heard the mitigating evidence first presented by Mr. Andrus's habeas counsel.

That is, in deciding whether there is a "reasonable probability" of a different "outcome," *Strickland*, 466 U.S. at 694, this Court counterfactually must assess whether, *at the very least*, a single juror would have been persuaded to answer the mitigation special issue differently had all the mitigating evidence been offered at trial, which would have resulted in a hung jury and automatic imposition of a life without parole sentence under Section 2(g). *Cf. Turner v. United States*, 137 S. Ct. 1885, 1898 (2017) (Kagan, J., dissenting) (stating that all members of the Court, including the majority and the dissent, "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—*i.e*., an acquittal or *hung jury* rather than a conviction") (emphasis added).[7] Thus, the proper inquiry

[7] Although stated in a dissenting opinion, Justice Kagan's comment reflected the position of the Supreme Court. *See McCray v. Capra*, No. 9:15-CV-01129-JKS, 2018 WL 3559077, at *4 (N.D.N.Y. July 24, 2018) ("Notably, the Supreme Court has recently suggested that, in considering materiality under *Brady* [*v. Maryland*, 373 U.S. 83 (1963)], courts should consider whether the undisclosed evidence would lead to a different result, *including a hung jury*."). Justice Kagan's comment concerning *Brady* "materiality" is equally applicable to *Strickland* prejudice. *See Kyles*, 514 U.S. at 434 (noting that the standard for *Strickland* "prejudice" and *Brady* "materiality" are identical).

here for the Court is to determine whether the *vast* mitigation evidence omitted at trial would have led to a different outcome for at least one juror. That showing alone is sufficient to establish prejudice under *Strickland*.

2. A Defendant May Be Prejudiced by Trial Counsel's Failure to Present Compelling Mitigation Evidence Even if Aggravating Evidence Exists.

The Concurring Opinion also erred in its suggestion that the existence of aggravating evidence in a case forecloses a showing of *Strickland* prejudice. *See Ex parte Andrus*, 2019 WL 622783, at *8 ("[T]he State presented plenty of potentially aggravating evidence to offset the potentially mitigating evidence adduced in the habeas proceedings."). This position is contradicted both by Supreme Court precedent[8] and the reality that countless actual juries—including Texas juries—have declined to impose death sentences on defendants, even in the face of compelling aggravating facts.[9]

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[8] *See, e.g.*, *Williams*, 529 U.S. at 396–99 (plurality); *id.* at 413–16 (O'Connor, J., concurring in the judgment); *see also Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) ("The government asserts that the evidence against Hendricks was so overwhelming that the presentation of mitigating evidence could not have had an impact on the sentence. The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place. In light of the whole record, and despite the substantial evidence of aggravation, we conclude that the failure of Berman to present mitigating evidence rendered the sentencing hearing neither fair nor reliable.").

[9] *See, e.g.*, Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, 1229–56 (2018) (collecting several capital cases involving strong aggravating factors, including several Texas cases, in which juries imposed life sentences rather than death sentences);

For example, one Texas case—from Fort Bend County, the same county in which Mr. Andrus was sentenced to death—involved a multiple-victim murder where the defendant was convicted of fatally shooting his cousin and then fatally stabbing his cousin's girlfriend, who was eight months pregnant. It was not the defendant's first criminal activity: prosecutors presented evidence in the punishment phase of his trial that the defendant had "committed an aggravated robbery in Abilene as a juvenile in 2003 and was certified to stand trial as an adult," "shot at both police officers and a police K-9" while fleeing that aggravated robbery, and had served ten years in prison for that crime before being paroled.[10] Nevertheless, the jury imposed a life without parole sentence instead of death.

In another case, the defendant committed a two-state crime spree involving two different multiple-victim murders, the second of which involved a pregnant woman.[11] As described by *Texas Monthly*:

> In the fall of 2005, a young Missouri man, 23-year-old Levi King, went on a vicious and inexplicable 24-hour killing spree, first shooting an elderly man and his daughter-in-law in the rural community of Pineville, Missouri, then stealing their truck and driving to Texas,

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Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 300, 302 (1983) (describing a Texas capital case "involving three killings, two maimings, and twelve robberies," in which "the jury showed mercy" based on compelling mitigating evidence).

[10] *Man Sentenced to Life in Prison for 2010 Murder of Young Couple, Unborn Baby in Missouri City*, Houston Chronicle, July 3, 2014, https://www.chron.com/neighborhood/fortbend/news/article/Man-sentenced-to-life-in-prison-for-2010-murder-9691625.php.

[11] Katie Bauer, *Family of Levi King Victims Speaks Out After Verdict*, Oct. 7, 2009, https://www.kcbd.com/story/11270442/family-of-levi-king-victims-speaks-out-after-verdict/.

> where he randomly stopped at a darkened farm house on the outskirts of the small Panhandle town of Pampa. Dressed completely in black and toting an AK-47, King broke through the back door and immediately went to the master bedroom. He first put three bullets into the body of the home's owner, 31-year-old Brian Conrad. He next fired two shots into Molly, the family's dog. Then he turned his gun on Conrad's 35-year-old pregnant wife, Michell, who was screaming. He [fatally] shot her five times.[12]

Despite those horrific facts, the jury imposed a life sentence.

As these two cases—and many more in the modern era—have shown, death sentences are not inexorable merely because the prosecution offers a strong case in aggravation during the punishment phase. As instructed by the trial court, juries consider mitigating evidence that is presented to them and, in doing so, often impose life without parole sentences, even in extremely aggravated cases.

3. Any "Double-Edged" Nature of New Mitigation Evidence Cannot be Used to Undermine a Prejudice Analysis.

Lastly, the Concurring Opinion also erroneously suggested that the additional mitigation evidence Mr. Andrus identified in habeas proceedings could be discounted in a *Strickland* analysis based on this Court's opinion that such evidence was "double-edged"—*i.e.*, a juror may view the mitigating evidence as potentially aggravating as well.[13] *See Ex parte Andrus*, 2019 WL 622783, at *8 ("[T]he

[12] Daren Braun, *The Girl Who Saw Too Much*, Texas Monthly, Mar. 12, 2014, https://www.texasmonthly.com/articles/the-girl-who-saw-too-much/.

[13] In thus characterizing the additional mitigation evidence, the Concurring Opinion focused on a sliver of that evidence rather than the "tidal wave" described by the habeas trial court and the Supreme Court. *See Andrus*, 140 S. Ct. at 1887 (noting the Supreme Court's "uncertainty" as to whether this Court "adequately conducted" a "record-intensive analysis in the first instance").

evidence Applicant now alleges counsel should have discovered and presented was … double-edged."). But a finding that evidence may be "double-edged" primarily relates to a determination of whether trial counsel was deficient under *Strickland*. Here, because the Supreme Court has already determined that trial counsel's performance was deficient for failing to present mitigating evidence for the jury's consideration in Mr. Andrus's case, any contention that such evidence was "double-edged" has no place in the Court's consideration of whether Mr. Andrus was prejudiced by his trial counsel's failures under *Strickland*'s second prong.[14] This conclusion is only reinforced by how the relevant Texas statute structures jury deliberations in the punishment phase of a capital trial. *See, e.g.*, Section I.B.1, *supra* (describing Texas's capital sentencing statute).

Pursuant to that statute, the State is permitted wide latitude to present aggravating evidence—including, for example, evidence relating to criminal charges for which the defendant was never convicted, or even alleged criminal conduct for

[14] *See Strickland*, 466 U.S. at 694–95 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination."); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (holding that sentencing jurors are required to "give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, *notwithstanding the severity of his crime or his potential to commit similar offenses in the future*") (emphasis added).

which the defendant was never even charged—for the jury's consideration regarding the future dangerousness special issue. A jury must answer with a unanimous "yes" on this special issue before it can move on to deliberating the mitigation special issue. *See* TEX. CODE CRIM PROC. art. 37.071 § 2(e)(1). Thus, mitigating evidence becomes an issue for the jury to consider *only if* it has *already* assessed and weighed the State's case in aggravation and affirmatively found beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See Trevino v. Davis*, 138 S. Ct. 1793, 1799 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari) (noting lower court's "legal error" for failing to "consider the value of the newly discovered evidence in the context of the whole record" was "particularly evidence given Texas' capital sentencing scheme" because the jury "necessarily already has concluded beyond a reasonable doubt that the defendant poses a continuing threat to society" and "whether the defendant poses a risk of future dangerousness is not the only inquiry a jury considering death must undertake").

Based on this statutory scheme, then, a jury's potential finding of sufficient mitigation is effectively the defendant's last chance to avoid a death sentence in a Texas capital trial. Unless the jury determines that there are sufficient mitigating circumstances, the defendant is facing a death sentence based largely on the aggravating evidence the State presented in its effort to secure a "yes" answer to the

first special issue. Assessment of the evidence in answering the second special issue focuses on mitigating factors, not aggravating factors.[15]

Because this Court has correctly recognized that "the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror" and also that "the amount of weight that the factfinder might give any particular piece of mitigating evidence is left to the range of judgment and discretion exercised by each juror," *see Colella v. State*, 915 S.W.2d 834, 844–45 (Tex. Crim. App. 1995) (internal quotations omitted), this Court cannot simply assume that Mr. Andrus's jury—had they heard his additional mitigating evidence offered for the first time during the habeas corpus proceedings—would have focused solely on any potentially aggravating elements. *See Trevino*, 138 S. Ct. at 1798 (noting the Court in *Williams v. Taylor*, 529 U.S. 362 (2000), "did not isolate [the] new evidence, which included both mitigating and potentially aggravating aspects, and decide that it canceled itself out" but instead properly "considered all the evidence and evaluated how the new evidence would have affected the jury's evaluation of future dangerousness and moral culpability in light of what the jury already knew"). Even mitigating evidence that had a "double-edged" quality still could have caused at least one juror to answer the mitigation special issue differently. *See, e.g.*, *Penry v.*

[15] Significantly, "mitigating evidence" is "evidence that a juror *might* regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM PROC. art. 37.071 § 2(f)(4) (emphasis added).

Lynaugh, 492 U.S. 302, 323–24 (1989) (invalidating former Texas capital sentencing statute that did not allow jury to give meaningful effect to potentially mitigating "two-edged" evidence like the defendant's mental disability and recognizing that, despite being potentially double-edged, such evidence can mitigate against a death sentence, leading a rational jury to return a life verdict instead).[16]

For this reason, the Court must "view the prejudice inquiry holistically," and "the requisite inquiry demands that courts consider the entirety of the evidence and reweigh it as if the jury had considered it all together in the first instance." *Trevino*, 138 S. Ct. at 1797 (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Wong v. Belmontes*, 558 U.S. 15 (2009) (*per curiam*)). In doing so, this Court should find that, even if Mr. Andrus's new mitigation evidence "may not have overcome a finding of future dangerousness," it "might well have influenced the jury's appraisal of his moral culpability." *See Williams*, 529 U.S. at 398.

[16] *Penry* was decided before the mitigation special issue was added. Indeed, it was because of the Court's decision in *Penry* that the Texas legislature added the mitigation special issue. *Ex parte Hood*, 211 S.W.3d 767, 770 & n.2 (Tex. Crim. App. 2007) (citing Acts 1991, 72nd Leg., ch. 652, sec. 9), *remanded on rehearing on other grounds*, 304 S.W.3d 397 (Tex. Crim. App. 2010). Because evidence may have aggravating *and* mitigating aspects, it does not mean that trial counsel's failure to introduce such evidence cannot contribute to a showing of *Strickland* prejudice when that evidence supports an affirmative answer to the mitigation special issue—which, after all, is decided only if the jury first finds against a capital defendant on the future dangerousness special issue. Therefore, the Concurring Opinion's argument is plainly inconsistent with the Supreme Court's (and Texas legislature's) recognition that "double-edged" evidence can lead a rational jury to return a life sentence by answering the mitigation special issue affirmatively.

C. Both Eighth Amendment Mitigation Jurisprudence and this Court's Recognition of the "Moral Discretion" Exercised by Capital Sentencing Jurors Support Mr. Andrus's *Strickland* Prejudice Arguments.

Neither the Original Opinion nor the Concurring Opinion indicate any deference to long-standing precedent that juries must have the opportunity to consider *any* potentially relevant mitigating evidence, particularly when the State is seeking the death penalty. Since 1976, the Supreme Court repeatedly has held that the Eighth Amendment requires the admission and meaningful consideration of any mitigating evidence related to the offense or offender, including in many Texas capital cases. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (finding Eighth Amendment violation related to mitigating evidence in Texas death penalty case); *Brewer v. Quarterman*, 550 U.S. 286 (2007) (same); *Smith v. Texas*, 550 U.S. 297 (2007) (same); *Tennard v. Dretke*, 542 U.S. 274 (2004) (same); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (same). As Justice O'Connor stated nearly 40 years ago:

> This Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not

> imposed out of whim, passion, prejudice, or mistake. . . . [In that regard,] the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (emphasis added).

The Supreme Court's recognition that *any and all* mitigation evidence must be admitted and given meaningful consideration under the Eighth Amendment clearly informs the Sixth Amendment *Strickland* prejudice standard in capital cases. Necessarily implicit in the Supreme Court's Eighth Amendment precedent is the proposition that even a single piece of mitigating evidence could sway a capital sentencing jury, especially because the standard only requires that a single juror be swayed to answer just one of the special issues differently. Indeed, because of the immense power relevant mitigating evidence can have on a Texas capital sentencing jury, the Fifth Circuit has concluded that Eighth Amendment *Penry* violations related to the former Texas capital sentencing statute were "structural" errors and not subject to harmless-error review. *See Nelson v. Quarterman*, 472 F.3d 287, 317 (5th Cir. 2006) (en banc) ("Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate

for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases."), *cert. denied*, 551 U.S. 1141 (2007).

This logic extends to this Court's assessment of prejudice under *Strickland.* Indeed, this Court recognized that "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror." *Banda v. State*, 890 S.W.2d 42, 54 (Tex. Crim. App. 1994). In view of its recognition that the weighing of mitigating evidence involves a "subjective determination undertaken by each individual juror," this Court has declined to engage in sufficiency review of a capital sentencing jury's negative answer to the mitigation special issue. *Colella*, 915 S.W.2d at 844–45; *id*. at 841 (describing the jury's answer to the mitigation special issue as an exercise of "moral discretion").

Because a capital sentencing jury responds to mitigating evidence from a subjective, moral (and not an objective, legal) perspective, this Court cannot assume that jurors would have given little weight to Mr. Andrus's mitigating evidence in the face of the potentially aggravating facts of the case.[17] Rather, this Court should err on the side of finding prejudice when the deficient performance of defense counsel

[17] Amici are not contending that a defense attorney's deficient performance related to a structural error is *per se* prejudicial under the Sixth Amendment. The Supreme Court rejected that argument in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Instead, and as expanded above, amici contend that because the specific nature of mitigating evidence in capital cases is so bound up in individual jurors' moral judgments, this Court should not assume that *even* strong aggravating facts typically will outweigh mitigating evidence.

resulted in the omission of mitigating evidence being presented for jurors' "moral" consideration. This is particularly true considering that a single hold-out juror would have resulted in a life sentence.

Because trial counsel's deficient performance resulted in a "tidal wave" of mitigating evidence (*Andrus*, 140 S. Ct. at 1887) being omitted from the jury's consideration in Mr. Andrus's case, he has shown prejudice under *Strickland.*

II. MR. ANDRUS HAS DEMONSTRATED *STRICKLAND* PREJUDICE.

The Supreme Court noted the "vast" body of mitigating evidence not offered by Mr. Andrus's trial counsel and agreed with the state habeas trial court's description of it as a veritable "tidal wave." *Andrus*, 140 S. Ct. at 1883, 1887. Had the jury heard all of this evidence, there is at least a "reasonable probability" that at least one juror would have reached a different conclusion. Neither the potentially aggravating facts of Mr. Andrus's underlying crime and record—particularly the unreliable and inadmissible evidence urged by the State—nor any "double-edged" new mitigating evidence compels the opposite result.

Again, this Court must review the new mitigating evidence as the jury would have in the first instance. *See Williams*, 529 U.S. at 398; *Rompilla*, 545 U.S. at 393. "The true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew," *i.e.*, the Court must evaluate "how the new evidence would

have affected the jury's evaluation of future dangerousness and moral culpability in light of what the jury already knew." *Trevino*, 138 S. Ct. at 1794, 1798. And, as the Supreme Court stated, it is not appropriate to compare the facts of this case to those in *Wiggins*: the Supreme Court has "*never before* equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S. Ct. at 1886 n.6 (emphasis added). This Court should not do so here.

In Mr. Andrus's case, there were substantial differences between the mitigating evidence that was presented and should have been presented to his jury. The qualitative difference unquestionably would have changed the narrative presented to the jury in a manner favoring a life sentence, even taking into account the potentially aggravating aspects of that evidence.[18] Here, as described in *Rompilla*, the new evidence "adds up to a mitigation case that bears no relation" to the one "actually put before the jury at sentencing." *Rompilla*, 545 U.S. at 393. "[T]he undiscovered mitigating evidence, taken as a whole, might well have

[18] However, this Court should not give credence to unreliable hearsay evidence of aggravation like that which the State urged in its Brief in Opposition to the Supreme Court. The State cannot rebut Mr. Andrus's demonstration of *Strickland* prejudice by sneaking in inflammatory yet unreliable hearsay evidence that would never have been allowed before the jury at trial. *See* TEX. R. EVID. 801; 805. Likewise, it is not enough for the State to marshal juror affidavits in an effort to undermine Mr. Andrus's demonstration of *Strickland* prejudice. As this Court is well aware, it is improper to consider such evidence. TEX. R. EVID. 606(b); *see also Ex parte Knight*, 401 S.W.3d 60, 64 (Tex. Crim. App. 2013) ("[T]he rules of evidence prohibit evidence from jurors about their deliberative process."); *Thomas v. State*, No. AP-75,218, 2008 WL 4531976 at *20 (Tex. Crim. App. Oct. 8, 2008) (not designated for publication) (noting Rule 606(b) "prohibits juror testimony on matters concerning jury deliberations or affecting a juror's decision making.").

influenced the jury's appraisal" of Mr. Andrus's culpability.[19] *See id.* (alterations and internal quotations omitted). At the very least, it might have caused a single juror to change his or her answer to at least one of the special issue questions. That is all that is required to establish *Strickland* prejudice, and that is the standard to which this Court must hold Mr. Andrus.

CONCLUSION

For the foregoing reasons, amici respectfully submit that analysis of the *Strickland* prejudice issue—when properly informed by the four factors discussed above—can lead only to the conclusion that trial counsel's deficient performance prejudiced Mr. Andrus. He is entitled to a new sentencing hearing with competent counsel.

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Respectfully submitted,

/s/ María Amelia Calaf

María Amelia Calaf
Texas Bar No. 24081915
mac@wittliffcutter.com
Erin M. Eckhoff
Texas Bar No. 24090910
erin@wittliffcutter.com

[19] In some cases, of course, an assessment of all the mitigating and aggravating evidence available will not compel the conclusion that trial counsel's deficient mitigation presentation was prejudicial. For example, in concluding that the petitioner in *Wong* was not prejudiced by trial counsel's deficient mitigation presentation, the Supreme Court determined that the newly available "humanizing evidence" was generally cumulative of the previously presented mitigating evidence, but the marginal aggravating evidence was "potentially devastating." *Wong*, 558 U.S. at 22. Mr. Andrus's case presents a very different situation from that in *Wong*.

Brent E. Newton
Texas Bar No. 00788115
brent@wittliffcutter.com
Kayna Stavast Levy
Texas Bar No. 24079388
kayna@wittliffcutter.com

WITTLIFF | CUTTER, PLLC
1209 Nueces Street
Austin, Texas 78701
Telephone: (512) 213-6094

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and correct copy of the foregoing Brief of Amici Curiae Texas Law Professors was electronically delivered to the following individuals on this 11th day of September, 2020:

Via E-Filing
Texas Court of Criminal Appeals

Via E-mail
District Attorney Brian Middleton
ADA Charann Thompson
ADA Jason Bennyhoff, Counsel of Record
Fort Bend County District Attorney's Office
301 Jackson Street
Richmond, Texas 77469
jason.bennyhoff@fortbendcountytx.gov

Via E-mail
Gretchen S. Sween
P.O. Box 5083
Austin, Texas 78763-5083
gsweenlaw@gmail.com

/s/ María Amelia Calaf
María Amelia Calaf

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. Pro. 73.1, undersigned counsel certifies that this document complies with:

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/s/ María Amelia Calaf
María Amelia Calaf

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Maria Calaf
Bar No. 24081915
mac@wittliffcutter.com
Envelope ID: 46158622
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Gretchen Sims Sween	24041996	gsweenlaw@gmail.com	9/11/2020 1:02:36 PM	SENT
Jason Bennyhoff		Jason.Bennyhoff@fortbendcountytx.gov	9/11/2020 1:02:36 PM	SENT
Nicole LeFave		nlefave@littler.com	9/11/2020 1:02:36 PM	SENT
Sandra Mendoza		smendoza@littler.com	9/11/2020 1:02:36 PM	SENT
Kelli Fuqua		kfuqua@littler.com	9/11/2020 1:02:36 PM	SENT
Kayna StavastLevy		kayna@wittliffcutter.com	9/11/2020 1:02:36 PM	SENT
Brent E.Newton		brent@wittliffcutter.com	9/11/2020 1:02:36 PM	SENT
Erin M.Eckhoff		erin@wittliffcutter.com	9/11/2020 1:02:36 PM	SENT