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

REPLY BRIEF OF APPLICANT TERENCE TREMAINE ANDRUS

THIS IS A CAPITAL CASE.

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Oral Argument Requested

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On September 11, 2020, both parties filed briefing pursuant to this Court's Order entered on July 28, 2020. Applicant Terence Andrus presents this Reply solely to address numerous, material misrepresentations of the record found in the State's Response.

ARGUMENT IN REPLY

The State's Response, which purports to describe the trial and habeas record, is riddled with mischaracterizations and material omissions of fact. Moreover, the State's Response disregards critical findings about the record already made by the Supreme Court of the United States, findings that now bind this Court on remand. The State's mischaracterizations and omissions of material facts will not assist this Court in conducting the requisite "weighty and record-intensive analysis" necessary for adjudicating the prejudice element of the ineffective-assistance-of-counsel claim. *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020).

I. THE STATE FOCUSES ON A TRIAL RECORD SHAPED BY DEFICIENT PERFORMANCE.

Most of the State's Response, pages 3-21, is devoted to describing the State's view of the underlying offense and the trial, particularly the State's punishment-phase evidence, *as if the habeas proceeding had not happened*. All of the State's citations in this section are to the trial record—which is, in large measure, a product of the trial counsel's woefully deficient performance. As the Supreme Court has already found, counsel "performed virtually no investigation of the relevant

evidence." *Id.* at 1883. The Supreme Court described the paltry investigation as "plainly not" reasonable under prevailing profession norms and that any conclusion to the contrary is "erroneous as a matter of law." *Id.* at 1882, 1887. "On top of that, counsel 'ignored pertinent avenues for investigation of which he should have been aware,' and indeed was aware." *Id.* at 1882 (quoting *Porter v. McCollum*, 558 U.S. 30, 40 (2009)). The Supreme Court was clear that the trial record that exists does not, therefore, constitute a truthful factual history but is in part the product of a complete failure by defense counsel to provide adequate representation. The Supreme Court was explicit that counsel's failure to investigate and provide any meaningful defense was not limited to a failure to investigate and present mitigating evidence. *See, e.g., id.* at 1877, 1883 (characterizing counsel's investigation as "nonexistent," "blinked reality," "virtually no").

Additionally, the State's citations to the trial record do not, in several instances, even accurately reflect what is *in* the trial record. For instance, the State's Response misleadingly states: "A store employee saw a black male in a trench coat shoot Diaz at close range." State's Response at 3 (RR citations omitted). This characterization is misleading because this particular witness was one of the only ones whom defense counsel cross-examined. And that cross-examination arose because this witness's testimony regarding what he had allegedly seen on the night of the crime diverged considerably from his initial, recorded statement made to

police the night of the crime. To law enforcement, this employee had admitted that he had *not* seen the shooting, *not* seen the victim fall, and had *not* even seen a gun. 38RR81-92. This witness's only explanation for the noteworthy differences between his initial description to police and his trial testimony four years later was that the passage of time allowed for him to "conjure up a little bit more." 38RR91. Since this witness had lost all credibility on cross, the State had no further questions. 38RR92. For the State to now hold up this witness's testimony as supporting its hypothesis of how Diaz was shot is grossly misleading—and just one example of this disturbing tendency.

The State's Response also misleadingly implies that the entire multi-hour "recording of Applicant's conversation in the car with the detectives was admitted" into evidence at trial. Response at 6. In reality, the State had heavily edited the recording down from 6 hours to about 1 hour (without any objection from deficient defense counsel); the edited version excluded, for instance, all humanizing statements from Terence, including all expressions of remorse. Likewise, Terence's subsequent videotaped confession, expressing remorse to the victims' families, was not shown to the jury—or mentioned in the State's current recitation of "facts." *Id.*

Although it was uncontroverted that Terence worked with police to help them find his gun and other evidence against him, the State's Response seeks to discredit Terence's explanation of how the offense had occurred to make him seem more

culpable. As it did at trial, without resistance from a virtually inert defense counsel, the State's Response disparages Terence's report that he had only shot toward the Buis' car in panic because he thought the "vehicle was going to run him over." Response at 8. Mr. Bui himself testified repeatedly and consistently that shots were fired at his car only *after* he instinctively "pushed" the accelerator and thus after he was speeding toward Terence. That is, Mr. Bui's testimony supports, rather than contradicts, the explanation that Terence gave to law enforcement as to why he panicked and fired toward the Buis' car:

- "As I [Bui] turned back and I saw that, instinct – I think I have to risk it. So I pushed the gas pedal and took off." 43RR43
- "So by instinct, I push the pedal and try to take off." 43RR45
- "As I recall, as I -- as soon as I push the gas pedal, take off, then I heard the shooting, a few shots, several shots, along the car. But I just tried to take off to -- so we can escape from the -- from the robber." 43RR46
- "And I cannot think about anything else besides pushing the pedal and trying to get out." 43RR46
- "I don't remember. I just pushed the – you know, the most I can." 43RR47
- "[A]nd instantly I pushed the pedal to take off. And I heard several gunshots along my car." 43RR62

Additionally, the State's description of its own punishment-phase evidence, as with the guilt-phase evidence, ignores that the trial record was shaped by what the Supreme Court recognized as trial counsel's "fail[ure] 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 State's Response devotes, for instance, pages (8-10) to describing the juvenile offense that landed Terence in Texas Youth Commission (TYC) custody—an event that trial counsel neither investigated nor challenged at trial, even though the victim's testimony on the stand did not match the offense report. The State's Response also features an extraneous offense at a dry cleaners that trial counsel had failed to investigate and did not subject to any adversarial testing—although Terence had always denied involvement in this incident. As the Supreme Court found: "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 1885, n.3, n.4.

Similarly, the State's description of its heavy reliance at trial on Terence's misconduct while in jail awaiting trial (Response at 12-14) does not account for the Supreme Court's subsequent findings that, had trial counsel investigated Terence's long history of unaddressed mental illness and obtained "sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison." *Id.* at 1884.

Likewise, the State's claim that Terence had "received counseling and rehabilitative therapy" while in TYC custody (Response at 14-15) is not only untrue, it is also at odds with the Supreme Court's findings: "Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe." *Id*.

Further, the State's description of the defense punishment-phase evidence at trial is a portrait in misleading spin trying to make the deficient presentation seem more substantive and credible than it was. *See* Response at 16-21. As explained in Applicant's opening brief, the Supreme Court recognized that the little that counsel did in terms of "so-called" mitigation, putting on witnesses he had not interviewed or prepared, did no more than "unwittingly aided the State's case in aggravation." *Andrus*, 140 S.Ct. at 1883. The State's account is also contrary to findings the Supreme Court has now made that the defense punishment-phase presentation was based on an investigation that was "approach[ing] non-existent" and had "disregarded, rather than explored, the multiple red flags" of the "vast" available mitigating evidence. *Id.* at 1882-83.

II. THE STATE GROSSLY MISREPRESENTS THE HABEAS RECORD.

The State's Response not only misleads by puffing up the paltry defense mitigation presentation at trial; the Response radically distorts the habeas mitigation

presentation that must be compared to the trial presentation in assessing prejudice. *See* Response at 21-30. If the State's description of the habeas record were accurate, which it is not, then it would be very difficult to understand how the Supreme Court, upon reviewing that record, described the mitigation evidence presented in the habeas proceeding as "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped." *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886. The Supreme Court has also expressly found that "nearly none" of the mitigating evidence adduced in the habeas proceeding "reached the jury." *Id.* at 1877. Therefore, the State's hollow insistence that the habeas proceeding featured only "duplicative" or "double-edged" evidence cannot be squared with the Supreme Court's findings (or with the actual habeas record).

The State's Response creates the false impression that the habeas proceeding involved nothing new or helpful by misrepresenting the contributions of multiple lay witnesses whom trial counsel had never even interviewed. To suggest that these witnesses somehow lacked credibility or substantive knowledge, the State selectively summarizes snippets of answers, largely ignoring all but questions that *State's counsel* asked during cross-examination. These summaries of excerpts of cross-examination testimony do not represent the whole—or even fairly depict facts adduced through cross. For instance, an extended answer that Sean Gilbow gave during cross-examination about how Terence and his older brother Torad had gotten

caught up in a gang as young teenagers and how Torad had been shot in a drive-by shooting, the State describes this way: "Gilbow testified that Applicant and his brother Torad were Bloods gang members." Response at 22. The State ignores Gilbow's powerful live testimony about the drug sales, prostitution, and shootings, conducted out in the open, that characterized their lives in Third Ward when both he and then Terence were children there. *See, e.g.,* 6EHRR 12-51, 68-73. That is, the State ignored all of the context offered in the habeas proceeding to explain how Terence ended up briefly falling in with a gang; the State's Response merely emphasizes that he was in a gang.

Indeed, none of the State's descriptions of Applicant's lay witnesses in the habeas proceeding is remotely fair or accurate. The only remedy is to read the actual affidavits of Sean Gilbow, Phyllis Garner, Torad Andrus, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams, AppX9-18, as well as the live lay witness testimony at, *e.g.*, 6EHRR12-118. These witnesses' substantive, sincere, and concrete attestations stand in stark contrast to the dismissive *reductio ad absurdum* found in the Response (pages 21-24). The habeas court, who studied this testimony, found all of these lay witnesses credible and their testimony mitigating. *See* Applicant's Appendix 2 at mmmm.

The State's description of Applicant's habeas experts is, if possible, even more deceptive. *See* Response at 24-30. For instance, the State purports to describe

Professor Steptoe's testimony in one sentence, then dismisses it by asserting that she "admitted on cross examination that she knew nothing whatsoever about Applicant." Response at 25. First of all, it was clear from her hearing testimony that she was not offered as an expert to opine about Terence himself; she is a historian who was called to testify about Houston's historically African-American Third Ward neighborhood from its origins through the time during which Terence and his family lived there. *See* 4EHRR203–232. That is, Professor Steptoe was not offered to opine about Terence's personal history but about a larger cultural history that she has researched and about which she has published scholarly books and article. Her testimony showed part of what a reasonable mitigation presentation would have included—objective scholarship explaining the larger social forces of economic neglect and racial discrimination, dating back more than a century, that help explain how this neighborhood became an epicenter of the crack epidemic in the 1980s and 1990s, which were Terence's formative years. 4EHRR225–229; *see also* AppX8-18.

The State's description of the testimony of former TYC Ombudsman Will Harrell bears no resemblance to the reality of the record. Response at 25-27. Instead of describing Harrell's actual testimony, the State describes questions its counsel asked on cross examination to suggest that Harrell only offered "generalities" and knew nothing about Terence's actual experience. Response at 38. This characterization requires, not only disregarding Harrell's detailed report (AppX4) in

which he explained what he had reviewed and relied on; the mischaracterization also requires ignoring his live testimony during which he explained:

> In this case I've reviewed hundreds or thousands of pages of documents concerning Mr. Andrus' experience in the Texas Youth Commission. And also, I bring to bear what I know generally about national standards of juvenile conditions of confinement and treatment. But, also, very much what was happening in the context of the time that Mr. Andrus was in the Texas Youth Commission and where things are at now and what we know now in terms of the nature of treatment at the Texas Youth Commission at that time[.]

5EHRR115. The suggestion that Harrell offered no testimony specific to Terence Andrus is patently false.

Similarly, the State, desperately trying to bolster a false narrative that Terence was some "gang leader" in TYC, ignored Harrell's uncontroverted expert opinion that a "gang leader" was "not someone continuously sending themselves on a self-referral to security"—*i.e.*, to solitary confinement"—to get out of the violent, "chaotic" dorms, as TYC's own records show that Terence did. 5EHHR231-32. Moreover, the State's misleading description of Harrell's expert testimony is at odds with what the Supreme Court has now found with regard to his testimony and the voluminous TYC records he reviewed:

- "While in TYC custody, Andrus was prescribed high doses of psychotropic drugs carrying serious adverse side effects. He also spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things. TYC records on Andrus noted multiple instances of self-harm and threats of suicide." *Andrus*, 140 S.Ct. at 1880.

- "[T]he State emphasized that Andrus had acted aggressively in TYC facilities and in prison while awaiting trial. This evidence principally comprised verbal threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe." *Id.* at 1884

The Supreme Court's opinion also quotes extensively from Harrell's testimony—which the State's Response distorts beyond recognition. *See id.* at n.2 (quoting habeas record: "TYC ombudsman testifying that it was 'surpris[ing] how few' citations Andrus received, 'particularly in the dorms where [Andrus] was' housed;" "TYC ombudsman finding 'nothing uncommon' about Andrus' altercations because 'sometimes you . . . have to fight to get by' in the 'violent atmosphere' and 'savage environment'"; "TYC ombudsman testifying that Andrus' isolation periods in TCY 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'"; "TYC ombudsman testifying that Andrus' 'experience at TYC' 'damaged him' and 'further traumatized' him.").

Perhaps the most dishonest gesture in the State's Response is its description of Dr. Scott Hammel's two days of testimony about Terence's bio-psycho-social history that Dr. Hammel investigated and presented in the habeas proceeding. *Compare* Response at 27-29 *with* 6EHRR118-225; 7EHRR5-156. Instead of describing any of Dr. Hammel's actual testimony, the State spends several pages

discussing deficient trial counsel's consulting expert, Dr. Jerome Brown. Response at 27-28. As Applicant Terence Andrus explained in his opening brief, Dr. Brown was *not* a mitigation witness in this habeas proceeding. His hearsay draft report was admitted into evidence only as a component of trial counsel's file. The State offered defense counsel's entire file into evidence (HC-18) and then waved around Dr. Brown's draft report; but the entire file, including that report, was admitted only for the *limited* purpose of showing how very little trial counsel had done. 2EHRR145. Dr. Brown's hearsay draft report had no credibility and was not relied on by Applicant or by the habeas judge as an example of mitigating evidence. The State's suggestion that Dr. Brown's draft report somehow proves that the mitigating evidence adduced in this habeas proceeding was "potentially more harmful than helpful" is an unprincipled strawman argument. Response at 39-40 (cherry-picking hearsay-within-hearsay from Dr. Brown's draft trial report and suggesting that it constitutes "facts").

This Court should give no credence to unreliable hearsay evidence of aggravation, which is what Dr. Brown's draft report is, at best. As the habeas record demonstrates, a *qualified* mental health expert, whom the habeas judge found credible, described Dr. Brown's report as "miss[ing] the mark," reflecting "a number of problems," suggesting "limited time or limited access to records." Dr. Hammel explained at length that whatever work Brown had done did not appear "to be

sufficient in order to support the conclusions that he reached," because it was fraught with "internal consistencies," it was "not accurate," and it contained "suspect" conclusions based on "validity scales [that] call into question the accuracy of the results" which he reported "anyway and then use[d] them to support his diagnostic conclusion" despite a "lack of corroboration." In short, "not much time was dedicated to the evaluation" rather, Brown "slapped something together" that "doesn't meet the standards for what an ethical forensic assessment should involve." 7EHRR63, 65, 135-40. This testimony was from a mental-health expert in the habeas proceeding critiquing trial counsel's deficient work with Brown, a psychologist retained on the eve of trial with whom trial counsel never even spoke after receiving the draft report. Brown's draft report is relevant only as further evidence of trial counsel's deficient performance.

Accepting, without verifying, the State's characterization of the habeas record would lead this Court into error and would be contrary to the Supreme Court's own findings and directives.

CONCLUSION

For the foregoing reasons as well as those developed in his opening brief, Applicant Terence Andrus respectfully asks that this Court, upon undertaking "the weighty and record-intensive analysis" of the prejudice element, *Andrus*, 140 S.Ct.

at 1887, find that he was prejudiced by his counsel's deficient performance and grant him 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), the word count as determined by the word processing program is 3,156.

CERTIFICATE OF CONFERENCE

On September 22, 2020, counsel for Applicant Terence Andrus attempted to conferred with counsel of record for the State regarding the motion for leave to file this Reply. By the time of filing, State's counsel had not yet responded. Thus, Applicant's counsel assumes that the motion for leave to file the reply brief is opposed.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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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