No. 18-9674

(Capital Case)

IN THE

Supreme Court of the United States

TERENCE TRAMAINE ANDRUS,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari To the Texas Court of Criminal Appeals

BRIEF OF JAMES S. BRADY, KENDALL COFFEY, MICHAEL DETTMER, W. THOMAS DILLARD, TERRY PECHOTA, DAVID SHAPIRO, AND JOHN SMIETANKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL T. BRODY
Counsel of Record
CHLOE E. HOLT
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
mbrody@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are former United States Attorneys who worked to see that the criminal defendants they prosecuted received fair trials and that the adversarial system functioned so as to ensure the verdicts obtained were just. *Amici* recognize the importance of the right to counsel to the integrity of the adversarial system and those who participate in it. *Amici* additionally recognize that allowing violations of defendants' right to counsel to go uncorrected further harms the adversarial system by allowing the State to "unconstitutionally deprive[] the defendant of his liberty"—or, as here, his life. *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

James S. Brady served as United States Attorney in the Western District of Michigan from 1977 to 1981.

Kendall Coffey served as United States Attorney in the Southern District of Florida from 1993 to 1996.

Michael Dettmer served as United States Attorney in the Western District of Michigan from 1994 to 2001.

W. Thomas Dillard served as United States Attorney in the Northern District of Florida from 1983

---

[1] Pursuant to this Court's Rule 37, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the filing of this brief was given to both parties. Petitioner and Respondent have consented to the filing of this brief.

to 1986; and as the Interim United States Attorney in the Eastern District of Tennessee in 1981.

Terry Pechota served as United States Attorney in the District of South Dakota from 1979 to 1981.

David Shapiro served as United States Attorney in the Northern District of California from 2000 to 2002.

John Smietanka served as United States Attorney in the Western District of Michigan from 1981 to 1993.

As former prosecutors, *amici* have an interest in ensuring the right to counsel is respected, and, if it is not, that the constitutional violation that occurred through ineffective assistance of counsel is remedied through appropriate review.

SUMMARY OF ARGUMENT

Respect for the right to counsel is fundamental to our criminal justice system and the rule of law. Because our criminal justice system relies on adversarial testing to produce just results, it is important to ensure the process is fair. Without effective assistance of counsel, it is not. When a conviction—or death sentence—is obtained through a deficient adversarial process, neither justice nor the rule of law are served, and confidence in our criminal justice system is lost.

In our federal system, we rely initially, if not primarily, on state courts to vindicate the right to counsel through their review of ineffective assistance of counsel claims in post-conviction proceedings. State courts are responsible for reviewing federal claims, and federal courts are required to refer to their reasonable

decisions. Without meaningful review of ineffective assistance of counsel claims by state courts, the right to counsel is demeaned, and federal courts must needlessly step in to repair the damage.

This case therefore presents important questions relating to the right to counsel and the need to protect that right within the federal system. It is essential to our criminal justice system that the right to counsel is respected, and essential to dividing responsibility between state and federal courts that state courts provide meaningful enforcement of that right on post-conviction review. Because Petitioner's right to counsel was not respected, and the constitutional violation was not remedied on state post-conviction review, the Court should grant review and reverse the judgment of the Texas Court of Criminal Appeals.

ARGUMENT

I. A Robust Right to Counsel is Necessary to Preserve the Rule of Law.

Our adversarial system of criminal justice is a fundamental element of the rule of law. Without effective representation necessary to our adversarial system of justice, the rule of law, and confidence in our legal system, suffer.

A. The Adversarial System Depends on Effective Assistance of Counsel.

Our criminal justice system rests on the assumption that "adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). *See also Penson v.*

Ohio, 488 U.S. 75, 84 (1988) ("[O]ur adversarial system of justice . . . is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the equation." (internal citations and quotation marks omitted)); *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

Meaningful adversarial testing cannot exist in a criminal case without effective defense counsel. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."); *Anders v. California*, 386 U.S. 738, 743 (1967) ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client."). For that reason, the right to effective assistance of counsel is the "foundation" of our adversarial system, and a "bedrock principle" of our criminal justice system. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). Perhaps no right is more important to guaranteeing a fair trial as "it is through counsel that all other rights of the accused are protected." *Penson*, 488 U.S. at 84.

The right to counsel is even more imperative in a capital sentencing proceeding, in which a defendant's life, not merely his liberty, is at stake. Such proceedings are "sufficiently like [] trial[s] in [their] adversarial format," *Strickland*, 466 U.S. at 686, such

that vigorous representation is needed to ensure only "those offenders . . . whose extreme culpability makes them most deserving of execution" are sentenced to death, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations and quotation marks omitted). *See also Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.").

The denial of effective assistance of counsel thus leads to a "breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696. Without effective assistance of counsel, a criminal defendant is unable "to invoke the procedural and substantive safeguards that distinguish our system of justice" and a "serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

B. The Adversarial System Broke Down at Petitioner's Capital Trial and Sentencing.

There was not even a pretense of meaningful adversarial testing at Petitioner's criminal trial and sentencing. During Petitioner's trial, counsel failed to make an opening statement or present any witnesses, and "conceded his client's guilt . . . and complimented State's counsel on proving the elements of the offense" during his closing statement. Pet. 7. At sentencing, counsel again failed to make an opening statement and failed to cross-examine the witnesses offered by the

State to prove future dangerousness. *Id.* Counsel presented only two mitigation witnesses, one of whom barely knew Petitioner, and one of whom lied on the stand. Pet. 7-8. Counsel was informed that the witness was lying, but made no effort to establish the truth. Pet. 8. Counsel then presented an expert witness, but only after being prompted to do so by the court, and without providing the expert with the information necessary or opportunity to conduct a meaningful assessment. Pet. 8. Counsel further allowed the State to speak with the expert about his testimony outside of his presence, and, without objection, to "openly mock[]" the expert during cross-examination. Pet. 9. Counsel failed to conduct any re-direct examination to repair the damage. *Id.* Counsel then conceded the State had established future dangerousness in his closing argument, and failed to object when the State argued that "no mitigation exists" and that there was no evidence to reduce his client's moral blameworthiness. *Id.* Petitioner was then sentenced to death. *Id.*

The evidence presented by Petitioner during his post-conviction proceedings—described by the state habeas judge as a "tidal wave" of mitigation evidence, Pet. 14—demonstrates that, had there been "partisan advocacy on both sides of [the] case," *Herring*, 422 U.S. at 862, there is a reasonable probability that Petitioner would have been sentenced to life without the possibility of parole instead of to death. While it is possible that Petitioner is one of those offenders "most worthy of execution," it is also likely that he is not. Because his sentence was not the result of meaningful adversarial testing, we cannot know.

II. Full and Fair Consideration of Ineffective Assistance of Counsel Claims on State Post-Conviction Review is Needed to Protect the Right to Counsel and Preserve the Role Given to State Courts.

Without meaningful enforcement, the right to counsel is only an "unfulfilled, illusory promise." Justin F. Marceau, *Gideon's Shadow*, 122 Yale L.J. 2482, 2485 (2013). If state post-conviction courts are unwilling to provide full and fair consideration to constitutional claims, the right to counsel and the federal system are undermined.

A. State Post-Conviction Courts are the Guardians of the Right to Counsel.

Individual ineffective assistance of counsel claims are the "primary mechanism" through which the right to effective assistance of counsel is enforced, Erwin Chemerinsky, *Lessons from Gideon*, 122 Yale L.J. 2676, 2688 (2013), and state post-conviction courts are the "principal forum" in which such claims are brought, *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Thus, if the right to counsel is to be respected, it is vital that state post-conviction courts give meaningful consideration to ineffective assistance of counsel claims.

This allocation of responsibility is a hallmark of our federal system, in which we depend on state courts to vindicate our federal rights. This Court has frequently acknowledged that state courts serve as the primary guardians of federal constitutional rights, both during criminal trials and on post-conviction review. *See, e.g.*, *Harrington*, 562 U.S. at 103; *Engle v. Isaac*, 456 U.S.

107, 128 (1982) ("The States . . . hold the initial responsibility for vindicating constitutional rights."); *Testa v. Katt*, 330 U.S. 386, 392-94 (1947) (holding that since federal law stands as the supreme law of the land, the State's courts are obligated to enforce it).

Indeed, the federal system places considerable confidence in state courts' willingness and ability to vindicate constitutional rights. This Court has often cautioned against federal review of state court judgments on the basis that such review would only discourage states from enforcing federal rights. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) ("Federal habeas review of state convictions frustrates ' . . . [states'] good-faith attempts to honor constitutional rights.'" (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986))); *Engle*, 456 U.S. at 128 n.33 ("Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own.").

This deference to state court determinations of whether a defendant received adequate representation of counsel is reflected in statute. Under the Anti-Terrorism and Effective Death Penalty Act, federal habeas courts must defer to a state court decision unless it "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). *See, e.g.*, *Harrington*, 562 U.S. at 105 ("When § 2254(d) applies [to an ineffective assistance of counsel claim], the question is not whether

counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (holding the federal habeas court could grant relief under § 2254 because the state court's application of *Strickland* was "objectively unreasonable").

The structure of federal habeas review is premised on the assumption that state courts will give full and fair consideration to constitutional claims. *See, e.g.*, Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 Wash. & Lee L. Rev. 1, 10 (1997). *See also Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."). This statutory regime reflects an explicit allocation of responsibilities between federal and state courts. As long as state courts fulfill their responsibility to review state convictions and issue decisions that are reasonable in fact and law, federal courts will defer to those decisions. Yet where the state courts fail to do so, federal courts must step into the void left by the state courts to protect the Constitutional rights of the accused, and the convicted.

This case shows that the system's confidence in state court adjudication of ineffective assistance of counsel claims may be misplaced, as "in many jurisdictions, state post-conviction proceedings are simply a sham, with state trial judges refusing to

engage in any meaningful fact-finding." Jordan M. Steiker et al., *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous. L. Rev. 889, 893 (2018); *see also* Eve Brensike Primus, *The Illusory Right to Counsel*, 37 Ohio N.U. L. Rev. 597, 598 (2011) ("In reality . . . there is no meaningful review of trial counsels' performance at the state post-conviction stage.").

Thus, although state post-conviction courts are charged with reviewing ineffective assistance of counsel claims and thus enforcing the right to counsel, they do so with little oversight, and, as Petitioner demonstrates, little incentive, to give full and fair consideration to such claims. *See* Pet. 19-38 (arguing that the *Strickland* standard allows courts to "short-circuit" their consideration of ineffective assistance of counsel claims and that *Strickland* is not adequately protecting the right to counsel). Absent incentives to enforce the right to counsel, state post-conviction courts simply do not.

This pattern needlessly shifts the burden of enforcing constitutional rights to federal courts. Where state courts decline to protect federal rights in the first instance, those decisions not only demean those rights, but also upset the balance between federal and state court review.

B. The CCA Failed to Enforce Petitioner's Right to Counsel.

In the case below, the Texas Court of Criminal Appeals ("CCA")[2] failed to engage with the evidence adduced in the habeas proceeding and denied Petitioner's claim through nothing more than a recitation of the *Strickland* standard. Pet. App. 7-8.[3] In contrast, the state habeas trial court heard multiple days of testimony from lay and expert witnesses and received "tens of thousands of pages of documentary evidence" demonstrating that Petitioner's trial counsel failed to conduct a reasonable mitigation investigation and that this professional failure prejudiced Petitioner. Pet. 10. The habeas trial court then independently drafted its Findings of Fact and Conclusions of Law, *see* Pet. App. B, finding Petitioner's "trial counsel was ineffective in failing to investigate and present . . . mitigating evidence," and recommended that Petitioner be granted a new punishment phase. Pet. App. 37; Pet. App. 42.

---

[2] The CCA is the "ultimate factfinder" in post-conviction proceedings. *See Moore v. Texas*, 137 S. Ct. 1039, 1044 n.2 (2017).

[3] The CCA wrote: "[A]pplicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." Pet. App. 7-8. Although it also claimed to have "reviewed the record regarding applicant's allegations," Pet. App. 6, neither the majority nor the concurrence referenced any evidence adduced during the habeas proceedings in their opinions.

In short, the habeas trial court attempted to meaningfully enforce Petitioner's right to counsel. Yet its efforts were rebuffed—and the evidence it heard was ignored—by the CCA in favor of an abbreviated *Strickland* analysis. This outcome is detrimental not only to the right to counsel and the adversarial system, but also to federalism. Even though the state habeas court already held a seven-day evidentiary hearing, and accumulated a 41-volume record, Pet. 10, because the CCA refused to engage with that evidence, a federal habeas court must now step in to vindicate Petitioner's rights.[4] The federal court will be charged with doing no more than what the CCA should have done in the first instance. This duplication of efforts is exactly what this Court and Congress have sought to avoid.

III. This Court's Review is Needed to Ensure the Right to Effective Assistance of Counsel is Enforced by State Post-Conviction Courts in the First Instance.

"No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel." Stephen B. Bright, *Turning Celebrated Principles into Reality*, Champion, at 6 (2003). Petitioner is just one example of a defendant who was denied effective assistance of counsel during his trial and sentencing and was then unable to vindicate that

---

[4] State courts may not "insulate their decisions from federal review by refusing to entertain vital evidence." *Lee v. Kink*, 922 F.3d 772, 775 (7th Cir. 2019) ("[A] state court's refusal to consider evidence can render its decision unreasonable under § 2254(d)(2) even when its legal analysis satisfies § 2254(d)(1).").

right on state post-conviction review. This outcome eviscerates the right to counsel, harms federalism, and allows unnecessary delays in death penalty cases.

The CCA's failure to vindicate Petitioner's right to effective assistance of counsel, like other state courts' failures to vindicate this right, suggests that right to counsel violations will continue to go unenforced. The CCA's opinion tells post-conviction trial courts that they should not waste their time engaging with evidence of ineffective counsel, and it tells the remaining players in the adversarial system—including and especially prosecutors—that they need not worry about whether their convictions are obtained through a fair adversarial proceeding. This outcome is simply not acceptable in a criminal justice system that relies on "the proper functioning of the adversarial process" to "produce . . . just result[s]." *Strickland*, 466 U.S. at 686.

This Court's intervention is needed to ensure that violations of the right to effective assistance of counsel, especially those as flagrant as the one in this case, do not go unchecked in state criminal justice systems. Absent intervention, the adversarial system will continue to exist for many indigent defendants only in name, and prosecutors who value their integrity will have little cause to celebrate their wins. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("[T]he United States Attorney['s] . . . interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

This Court's review would not only strengthen the right to counsel, but it would also serve the interests of

federalism. Although this Court's jurisprudence has cautioned against federal review of state court judgments based on the belief that states are making "good-faith attempts to honor constitutional rights," *Calderon*, 523 U.S. at 556, state courts cannot be left with the last word on the meaning of the United States Constitution where, as here, they have made no such good-faith attempt.

Petitioner may well ultimately obtain relief on federal habeas, after years more of proceedings. But he should not have to. This Court should act so that state courts meaningfully enforce the right to counsel in the first instance, and so that federal habeas courts are not left responsible for repairing the damage caused by unreasonable state court decisions.

Finally, requiring this case to proceed to federal habeas, when it could and should have been thoroughly reviewed by the CCA, serves only to needlessly delay justice—regardless of the outcome. Several members of this Court have lamented the delays in resolving capital cases that result from procedural protections, including federal habeas review. *See*, *e.g.*, *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring) (arguing that "enabling the delay" of an execution "work[s] a 'miscarriage of justice'") (internal citations omitted); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019) (Gorsuch, J.) (criticizing delays in execution resulting from the litigation of constitutional claims); *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) (discussing the "problem of increasingly lengthy delays in capital cases"). If state

courts gave full and fair consideration to federal claims in the first instance, such delays would be minimized.

* * *

"[T]his Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate." *Schnecklove v. Bustamonte*, 412 U.S. 218, 265 (1973) (Powell, J., concurring). Such mutual respect necessarily entails robust enforcement of federal rights by state courts. This Court's review would signal to state courts that the right to counsel must be respected and that they cannot leave the burden of enforcing constitutional rights to federal courts and unnecessarily delay capital cases. Because this case presents this Court with the opportunity to remind state post-conviction courts of the importance of upholding the right to counsel, it merits this Court's review.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, *amici* respectfully urge this Court to grant the petition or summarily reverse the judgment.

July 12, 2019

Respectfully submitted,

MICHAEL T. BRODY
Counsel of Record
CHLOE E. HOLT
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7366
mbrody@jenner.com

Counsel for Amici Curiae