No. 18-9674

(CAPITAL CASE)

In the
Supreme Court of the United States

TERENCE TRAMAINE ANDRUS,
Petitioner,

vs.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

REPLY TO STATE'S BRIEF IN OPPOSITION

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REPLY

For those committed to the rule of law and a robust adversarial system, the State's opposition should engender dismay. Both the substance and style demonstrate a lack of respect for the serious stakes here. The State grossly mischaracterizes the habeas record and even the question presented; it then stoops to puerile scare tactics, insisting that, were the Court to grant review to ensure that *Strickland*[1] is sufficiently protecting indigents' rights to counsel in death-penalty cases, that act would "result in multitudinous litigation" and even "untold chaos." Opp. at 11, 17.

Ultimately, the opposition demonstrates the very problem that Petitioner urges this Court to address: the failure to safeguard indigent defendants' right to counsel in jurisdictions where death is zealously pursued as a state-sanctioned punishment. *See* Stephen Bright and Sia Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE LAW JOURNAL 2150 (2013). Aside from failing to ensure competent counsel, in the wake of convictions and sentences that are inevitable absent a true adversarial process, state courts, such as the Texas Court of Criminal Appeals (CCA), are refusing to undertake a good-faith review of meritorious claims alleging that the constitutional right to counsel was violated.

The State's cavalier opposition shows that, under the status quo, prosecutors "need not worry about whether their convictions are obtained through a fair adversarial proceeding" because they can assume that flagrant violations of the right to counsel will go unchecked, even in death-penalty cases. *See* Brief of James S.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Brady, et al. as *Amici Curiae*, former United States Attorneys and career prosecutors, in support of Petitioner (Brief of *Amici*) at 13. As prosecutors of integrity, *amici* have recognized that, when a death sentence "is obtained through a deficient adversarial process neither justice nor the rule of law [is] served, and confidence in our criminal justice system is lost." *Id.* at 2. This case affords an opportunity to reaffirm indigent defendants' rights to adequate representation in death-penalty cases and state courts' obligation to engage with the habeas record when adjudicating ineffective-assistance-of-counsel (IAC) claims.

I. Petitioner's Question Presented Addresses a Concerning Trend of Truncated *Strickland* Analyses in Death-Penalty Cases; Instead of Joining Issue with Petitioner, the State Defends the Indefensible.

The State's opposition starts with a strawman argument: that Petitioner wants *Strickland* prejudice to be presumed "any time trial counsel is ineffective." Opp. at 1. The State then argues that the quest for certiorari arises only from Petitioner's "view" that "not enough convictions and sentences are being reversed on ineffective assistance grounds." *Id.* Simply reading the petition should clarify that Petitioner does not argue that prejudice should be presumed whenever deficient performance is proven. Instead, the petition highlights trial counsel's flagrantly deficient performance to show why a truncated *Strickland* analysis, that looks only at the trial record created as a result of a non-adversarial proceeding, inadequately protects the fundamental right to counsel guaranteed by the Sixth Amendment.

Indisputably, *Strickland* requires a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance[,] that … the

challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. But evidence adduced in this habeas proceeding established that trial counsel functioned as little more than an adjunct to the district attorney's office. *See* Brief of *Amici* at 5 (observing "[t]here was not even a pretense of meaningful adversarial testing at Petitioner's criminal trial and sentencing.").

The CCA's opinion does not mention any of the habeas trial court's specific findings of deficient performance,[2] including trial counsel's numerous damning admissions. App025-029. The State's opposition obliquely concedes this fact. Opp. at 11-12 ("it is true that the *per curiam* opinion does not expound in any great detail on its rationale for denying relief"). The CCA's silence suggests the court found no credible way to defend trial counsel's performance. Yet in the State's opposition, it elected to defend the indefensible. The State, for example, defends trial counsel's unilateral decision to concede his client's guilt in closing argument as a "strategic" effort to "preserve" an issue for appeal. Opp. at 2. Yet in the habeas proceeding, this pretext was exposed as baseless because a decision cannot be "strategic" that has no

[2] The CCA's per curiam opinion mentions the habeas trial court's findings only to decline to adopt them. App008. As for the concurrence, it drops a footnote to one of the CCA's previous decisions, stating that, even assuming lead counsel's performance was deficient, one cannot assume that Petitioner was deprived of effective assistance because he had second-chair counsel. App0021 (citing *McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996) (concluding that "defendant had not shown prejudice because, even if one of his attorneys was asleep at trial, his other attorney was alert and effective")). This infamous "sleeping lawyer" case is currently being appealed to the Fifth Circuit. Moreover, the concurrence does not account for the findings regarding the limited duties assumed by the second chair, appointed just before trial. App029-030. Additionally, the concurrence does not address the evidence adduced in the habeas proceeding as to why trial counsel had no second chair until the eve of trial and the relevance of that evidence to Petitioner's IAC claim. App084-096.

basis in law. App106-07, 146-48. Likewise, the State disingenuously suggests that trial counsel did not actually "concede" the death-qualifying issue of future dangerousness in his punishment-phase closing argument but merely "conceded the State's future dangerousness case was strong[.]" Opp. at n.1. Equally untoward is the State's attempt to justify trial counsel's admitted failure to investigate any aspect of the State's case by suggesting that *the State's unchallenged case* did not support Petitioner's trial testimony about the defensive nature of the shootings. *Id.* at n.2, 7. These arguments are facially unsound.

If the State is correct about trial counsel's performance, then the deficient-performance element of an IAC claim has no meaning.

II. The State Mischaracterizes the Habeas Record, Directing the Court Only to the Trial Record to Support Its Argument.

The opposition insists that Petitioner "had little in the way of mitigation evidence that his trial counsel did not present." Opp. at 1, 2. That contention is belied by comparing the defense's punishment-phase presentation at trial, which consisted of a handful of ill-prepared witnesses, to the habeas record that spans 41 volumes.

Moreover, the State is contradicting its position at trial. At trial, the State argued in closing that "no mitigation exists" and "[t]here are [sic] no evidence that reduces his moral blameworthiness, not one." App116. Now, the State insists that the cursory testimony by: Petitioner's mother who lied about his childhood, by his biological father who was not present for his childhood, by an expert who submitted a post-conviction affidavit admitting that he had been unprepared to testify, and by a jailhouse counselor with whom counsel only spoke briefly during a recess from trial

amounts to a "presentation [that] included evidence of Petitioner's difficult socioeconomic history, his longstanding substance abuse problem and the effect this had on his brain development, and Petitioner's remorse for his crime." Opp. at 8.

The State dismisses the "tidal wave" of mitigating evidence put before the habeas trial court, App155, as "largely duplicative, double-edged, and not particularly helpful." Opp. at 5. But the State, like the CCA, does not mention any of the mitigating evidence adduced in the habeas proceeding—through numerous lay witnesses, who were never interviewed by trial counsel and did not testify at trial, or the array of experts only consulted in the habeas proceeding. AppC. Likewise, there is no mention of the voluminous documentary evidence admitted into evidence to support Petitioner's IAC claim. *Id.*

The trial habeas court that received this evidence found the testimony of Petitioner's witnesses credible and mitigating. AppB. Yet the State directs this Court only to (1) excerpts from the trial record that was a product of an unfair proceeding and (2) a few additional materials found in *trial counsel*'s scant file. With the latter, the State seems to be following the lead of the concurrence—written in the first-person singular, but endorsed by several members of the CCA. The face of that concurrence suggests a lack of awareness of the 41-volume habeas record.[3] Instead, the concurrence brings up "Dr. Brown," a trial expert retained at the eleventh hour—implying that Petitioner had relied on Brown's draft report as evidence that

[3] Similarly, the CCA's opinion states that the court "reviewed the record regarding applicant's allegations," App006, but the opinion does not mention anything in the voluminous habeas record.

Petitioner was prejudiced by trial counsel's failure to put Brown on the stand. App017-018.

Petitioner did not argue that the jury should have heard from Dr. Brown, trial counsel's woefully ill-prepared expert. Petitioner established during the habeas proceeding that Dr. Brown was retained shortly before voir dire then only conducted a one-hour "drive by" assessment of Petitioner without the benefit of the most basic collateral source information; additionally, Petitioner established that Dr. Brown threw together an ethically suspect draft report in which Dr. Brown himself expressed concerns about the validity of the testing he had undertaken. The State's bizarre insistence that Dr. Brown found that Petitioner had "a penchant for torturing animals" is a dishonest non sequitur. Opp. at 3, 14. No such finding was made by anybody; and Petitioner did not argue that he was prejudiced by trial counsel's failure to follow up with the ill-prepared Dr. Brown.

For the State to dig up a hastily drafted report, which trial counsel admitted he never read, and suggest that this work-product somehow captured the truth about Petitioner (and thus trial counsel made a reasonable strategic decision not to put on this expert) reflects alarming cynicism. A qualified and adequately prepared clinical psychologist testified for two days about Petitioner's traumatic history and complex, unresolved mental health issues during the habeas proceeding. Yet both the CCA's opinion and the State's opposition ignore that evidence—and all other evidence that convinced the trial habeas court that Petitioner deserved relief.[4]

[4] In addition to Dr. Brown, the opposition spends pages discussing trial expert Dr. John Roach, whose testimony was a disaster—and further proof of trial counsel's deficient performance. Likewise,

Mitigating evidence, "the empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases," requires more than testimony from a few ill-prepared witnesses uttering generalities; it requires translating a robust investigation into a compelling trial presentation. Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Responses in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237 (2008). There is a qualitative and quantitative difference between the lay and expert testimony presented on Terence Andrus's behalf at trial and in this habeas proceeding. For instance, testimony from the defendant himself stating, without explanation, that his mother sold drugs out of the house when he was a child is quite different from testimony from multiple witnesses describing Petitioner's childhood home in graphic detail, supported by testimony from a family friend explaining how Petitioner's mother taught him the drug trade in their old Third Ward neighborhood where, on his first day "on the job," he encountered an emaciated crack addict trying to trade her newborn baby for $5-worth of street drugs. App190.

Likewise, there is a vast difference between an unprepared expert testifying in generalities about how illicit drugs can affect the developing brain, and multiple experts describing the wanton way psychotropic drugs were prescribed to Petitioner, how those drugs likely exacerbated his unresolved mental health issues, and the relationship between evidence of clinically significant trauma in his background and

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the State's reliance on James Martins, a jailhouse counselor rounded up during a break from trial, is stunning in its audacity. As the trial habeas court recognized, Martins' trial testimony was relevant only as more evidence of trial counsel's deficient performance. App028.

street drugs used to self-medicate after he emerged from a eighteen-month hell in a juvenile system that the State of Texas itself has disavowed as a colossal failure. App199-205.

The only evidence surveyed in the opposition (and the CCA concurrence) is evidence that was adduced during the habeas proceeding to demonstrate trial counsel's objectively unreasonable preparation, not the mitigation evidence that was actually available. The absence of any reasonable adversarial testing before and during trial created a trial record that does not tell any part of the story as to why Terence Andrus merited mercy.

III. The State's Insistence That the Challenged Opinion Represents a "Straightforward" Application of *Strickland* Only Underscores the Problem with *Strickland*.

The State's attempt to defend the indefensible also involves insisting that the CCA's opinion below reflects a "straightforward" application of *Strickland*. Opp. at 6, 11, 12, 17. In fact, the CCA's adjudication of Petitioner's meritorious *Wiggins* claim is part of a broader problem of truncated, analytically unsound applications of a standard that this Court needs to shore up. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

This case and many others arising out of Texas and proceeding to federal habeas review in the Fifth Circuit show that meritorious claims are rejected *pro forma*, *see* Pet. at n.9, without a fair comparison of the case that the jury heard to the case that could and should have been presented had counsel conducted a reasonable investigation into both guilt- and punishment-phase issues. By contrast, courts in other jurisdictions have concluded that *Strickland* ***requires*** looking at "[t]he

difference between the case that was and the case that should have been[.]" *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006). *See also Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (holding *Strickland* requires evaluating "whether the difference between what was presented and what could have been presented is sufficient to 'undermine confidence in the outcome' of the proceeding."). *Wiggins* emphasizes the need to evaluate the "the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*'" 539 U.S. at 536 (citing *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000)) (emphasis retained). Yet this case demonstrates that habeas courts are foregoing this comparative analysis when reviewing IAC claims in death-penalty cases.

The CCA made no attempt to compare the case presented at trial by ineffective counsel to what could and should have been presented at trial as demonstrated in the habeas proceeding. If the CCA's assessment of Petitioner's IAC claim can be deemed a "straightforward application of *Strickland*," then a circuit split plainly exists over whether habeas courts are obligated to engage with the evidence adduced in the habeas proceeding before making a prejudice determination. *See Lee v. Kirk*, 922 F.3d 772, 775 (7th Cir. 2019) (finding failure to engage with "vital evidence" can render a state court's habeas decision unreasonable). The Court's guidance is needed.

Empirical research has revealed that, "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*, 55 HOUS. L. REV. 889, 893 (2018).

Here the habeas trial court allowed for a full and fair evidentiary hearing then undertook meaningful fact-finding, only to have those findings summarily rejected without explanation. Permitting the CCA's decision in this case to stand would further eviscerate any incentive courts have to engage in meaningful review of habeas claims in stressful, time-consuming, and costly death-penalty cases. While doing the right thing may be a reward in and of itself, when doing so results in one's efforts being summarily disregarded with no more than a citation to *Strickland v. Washington*, most courts might, as a practical matter, opt for the easy exit ramp. *See* Brief of *Amici* at 12-14 (bemoaning CCA's failure to make a "good-faith attempt" to enforce Petitioner's right to counsel after "rebuff[ing]" the trial habeas court's efforts "in favor of an abbreviated *Strickland* analysis").

Sending a message is critical because, as the *amici* aptly note, "[w]ithout meaningful review of ineffective assistance of counsel claims by state courts, the right to counsel is demeaned"—an injury to us all. Brief of *Amici* at 3.

Because state courts are supposed to be the "principle forum" for adjudicating habeas claims, including IAC claims, the failure of state courts to accept this responsibility undermines the delicate balance of power between the state and federal judiciaries. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This Court should grant certiorari to ensure that this balance is restored—especially in jurisdictions that elect to seek death sentences, with all of the attendant costs such cases impose far beyond the actual forum in which death is sought.[5] By allowing this case to proceed to federal

[5] *See* Conservatives Concerned About the Death Penalty, "Wasteful and Inefficient: The alarming cost of the death penalty," *available at* https://conservativesconcerned.org/why-were-

habeas when it should have been fully and fairly reviewed by a state court will only further defer justice. The very least that should be mandated where a life and the integrity of our criminal justice system hang in the balance is that courts examine the IAC claimant's evidence showing how the trial could and should have been different from the trial he received as a result of counsel's deficient performance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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concerned/cost/ ("Even states with the fewest protections and a faster process face exorbitant death penalty costs. In Texas, for example, the death penalty still costs an average of three times more than 40 years in prison at maximum security.").