No. 21-6001

(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

REPLY TO THE STATE'S BRIEF IN OPPOSITION

Clifford M. Sloan
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave NW
Washington, DC 20001
(202) 662-9387
Cliff.Sloan@georgetown.edu

Gretchen Sims Sween
Counsel of Record
P.O. Box 5083
Austin, Texas 78763-5083
(214) 557-5779
gsweenlaw@gmail.com

Kathleen Shelton
1440 New York Ave. NW
Washington, DC 20005
(202) 371-7079
kathleen.shelton@probonolaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

REPLY

Terence Tramaine Andrus's petition explains that the lower court's 5-4 decision on remand, finding no *Strickland*[1] prejudice, derives from an explicit rejection of this Court's determinations and rests on four fundamental errors, any of which warrants summary reversal. First, the Texas Court of Criminal Appeals (CCA) relied on the trial record without considering how trial counsel's deficient performance had shaped that record, as this Court explained at length in deciding that counsel's performance was constitutionally deficient. Second, the CCA mischaracterized or simply ignored the mitigating evidence that this Court had deemed "abundant," "vast," "compelling," "powerful," "myriad," "voluminous," and previously "untapped." *Andrus v. Texas*, 140 S.Ct. 1875, 1878, 1881, 1882, 1883, 1886 (2020) (per curiam). Third, the CCA relied on harmful stereotypes about mental illness and childhood trauma that are contrary to settled science and common sense. Fourth, the CCA disregarded this Court's specific guidance, tethered to established precedents, for assessing *Strickland* prejudice in this very case.

The State's Brief in Opposition (BIO) not only embraces but doubles down on the CCA's bald rejection of this Court's previous determinations. In doing so, the State relies on strawman arguments and mimics the CCA's erroneous approach by grossly mischaracterizing the habeas record. This Court should now hold that, if the State's punishment-phase evidence had been investigated and appropriately attacked, and if abundant, readily available mitigating evidence had been

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

investigated and presented, there is a reasonable probability that at least one juror would have elected a life over a death sentence.

I. The State Endorses Rejecting This Court's Prior Determinations; Relies On Strawman Arguments; And Mischaracterizes And Ignores The Habeas Record, Including Most Of Andrus's New Mitigating Evidence.

A. The State brazenly embraces the CCA's rejection of this Court's express directives and binding conclusions.

The petition demonstrates that the CCA rejected this Court's determinations about *Strickland*'s first prong (deficient performance) by disregarding, in purporting to undertake a prejudice analysis, this Court's specific explanations as to how counsel had failed to comply with prevailing professional norms in representing Andrus. In response, the State repeatedly embraces the CCA's repudiation of this Court's authority. Some conspicuous examples merit highlighting.

First, although this Court summarily reversed the CCA's first opinion and explained at length the facts and procedural history that supported this Court's decision to reverse, the State clings to the CCA's pre-remand opinion for "the factual and procedural history of the case." BIO at 3 n.1. The State, like the CCA, even invokes the discredited concurrence in the CCA that issued ***before*** this Court's summary reversal. *See* BIO at 7; App003-006. That concurrence relied on a significant misconception of the habeas record and a view of the trial record that did not account for this Court's determinations as to how the evidence had been shaped by trial counsel's deficient performance. Even the author of that concurrence later disavowed it by joining the CCA dissenters on remand. App002 & App030; *see also Andrus*, 140

S.Ct. at 1887 n.6 (expressly cautioning against the approach to *Strickland* prejudice found in the CCA concurrence).

Second, the State claims that the CCA was right to find that "this Court's characterization of both the State's aggravation case and the potential new mitigation evidence" in this Court's previous decision is "based on several incorrect or incomplete assertions of fact." BIO at 23; *see also id.* at 11 (highlighting the CCA's position that ***this Court's*** determinations were "incorrect or incomplete"). For example, in response to the glaring conflict between this Court's determination that the new mitigating evidence was "compelling" and the CCA's view that the very same mitigating evidence was "not particularly compelling," the State embraces the CCA's defiant position. BIO at 2; *see also id.* at 14 (recognizing that the CCA dismissed all of the new mitigating evidence as "relatively weak"). The State appears unbothered by the fact that the CCA's "not-particularly-compelling" assessment cannot be squared with this Court's explicit determinations that the same body of evidence had revealed "the many circumstances in Andrus' life that could have served as powerful mitigating evidence" and that "[t]he untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast." *Andrus*, 140 S.Ct. at 1883.

Under settled legal principles dating to the earliest days of our Constitutional Republic, lower courts may not simply reject this Court's decisions and the determinations supporting them. The CCA, a lower court, had no legal right to jettison this Court's determinations under *Strickland*'s first prong (deficient performance) when analyzing *Strickland*'s second prong (prejudice). Yet the State

relies on the proposition that the CCA was entirely correct to adopt determinations contrary to this Court's previous decision. Similarly, instead of directing this Court to any aspect of the petition that gets something wrong about this Court's opinion, the State concentrates on the dissent from this Court's opinion. BIO at 8-11. But another basic cornerstone of the American legal system is that the Court's decisions, not dissents, constitute the law that lower courts are obligated to follow. *See, e.g.*, *Georgia v. Public.Resource.Org, Inc.*, 140 S.Ct. 1498, 1511 (2020) (noting the basic principle that concurrences and dissents "carry no legal force").

This Court directed the CCA on remand to assess *Strickland* prejudice "in a manner not inconsistent with this [Court's] opinion." *Andrus*, 140 S.Ct. at 1887. Yet on remand, the CCA found no prejudice by adopting determinations ***expressly inconsistent*** with both this Court's opinion and with the habeas record.

B. The State relies on a series of strawman arguments.

The State relies extensively on propositions entirely of its own imagination. Andrus did not, for instance, argue that the CCA was "not empowered" to conduct a prejudice analysis or was required "to find prejudice." BIO at 1, 20. As noted above, Andrus has argued that the CCA, in analyzing *Strickland*'s second prong, was not free to reject this Court's determinations under *Strickland*'s first prong. Nor was the CCA free to defy this Court's instructions for undertaking a proper prejudice analysis.

The State also makes a strawman of the trial record by treating it as synonymous with the entire record, ignoring most of the 41 volumes of *new* evidence developed in the habeas proceeding, which seriously undermines numerous aspects

of the trial record. As this Court's previous opinion emphasized, *Strickland* requires assessing ineffectiveness based on the *entire* record. And in *Andrus*, this Court resolved *Strickland*'s first prong and reversed after having found that the habeas record established, *inter alia*, the following: (1) that trial counsel "performed almost no mitigation investigation" and "overlook[ed] vast tranches of mitigating evidence" that would have been "compelling" and "powerful"; (2) that because of the failure to investigate, the "little evidence [trial counsel] did present backfired by bolstering the State's aggravation case"; and (3) that trial counsel's failure to investigate meant he "could not, and did not, rebut critical aggravating evidence." *Andrus*, 140 S.Ct. at 1881, 1884. This Court left no ambiguity about the severity of trial counsel's deficient performance: "Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *Id.* at 1882. A proper prejudice assessment cannot be divorced from the record evidence of deficient performance. As this Court previously told the CCA: "the reviewing court must consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Id.* at 1886 (alteration in original) (citing precedential cases). The State, like the CCA, has failed to look at the totality.

Another strawman is the State's suggestion that the CCA's approach to the remand is just like that of the Georgia Supreme Court following a remand in *Sears v. Upton*, 130 S.Ct. 3259 (2010) (per curiam). *See* BIO at 21-22, relying on *Sears v.*

Humphrey, 751 S.E.2d 365 (Ga. 2013), *cert. denied*, 572 U.S. 1118 (2014) (*Sears II*) (denying habeas relief). *Sears* was a death-penalty case involving an ineffectiveness claim that came to this Court from the state habeas proceeding and resulted in a summary reversal and remand. There the similarities end. Even a cursory look at *Sears* and *Sears II* illustrates the fundamental differences between that case and this one—with the differences strongly supporting a summary reversal here.

First and most fundamentally, the Georgia Supreme Court's remand decision in *Sears II*, quite unlike the CCA's remand decision, does not involve a rejection of this Court's determinations. As the Georgia Supreme Court correctly noted, this Court in *Sears* did not reach a conclusion as to ***either*** *Strickland*'s deficient performance ***or*** prejudice prongs. In *Sears*, this Court was primarily concerned with clarifying how courts, generally, should approach a *Strickland* prejudice assessment when the claim is that counsel had performed an inadequate investigation but had presented "a superficially reasonable mitigation theory" at trial. *Sears*, 130 S.Ct. at 3266. The resulting opinion clarified: "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented[.]" *Id.* (citation omitted). Moreover, as the Georgia Supreme Court noted, in *Sears*, "the Supreme Court did not explicitly engage with any evidence in the record regarding trial counsel's performance." *Sears II*, 751 S.E.2d at 370.

By contrast, in *Andrus*, this Court painstakingly engaged with the 41-volume habeas record and the trial record, and the resulting analysis cites the full record extensively and accurately to show how the "untapped" mitigation adduced for the

first time in the habeas proceeding was "compelling," "powerful," and "simply vast." *Andrus*, 140 S.Ct. at 1881, 1883. In *Andrus*, unlike *Sears*, this Court also made multiple, substantive, record-based determinations, then concluded that Andrus's trial counsel had performed deficiently. *Andrus*, 140 S.Ct. at 1875-1884 (identifying the record evidence of trial counsel's multiple deficiencies and holding that those "deficiencies effected an unconstitutional abnegation of prevailing professional norms"); *see also id.* at 1881-82 (finding trial counsel's performance unreasonable as he "fell short of his obligation in multiple ways."). Additionally, in *Andrus*, unlike *Sears*, this Court made it eminently clear that a proper prejudice assessment would require the lower court to account for the specific ways the evidence adduced at trial had been distorted by counsel's numerous failures—an analytical template that the CCA audaciously disregarded on remand.

On remand in *Sears*, the state court, unlike the CCA, engaged in a sober, detailed, respectful review of the record evidence of: (1) trial counsel's performance, (2) the mitigation adduced at trial, (3) the mitigation adduced for the first time in the habeas proceeding, and (4) the State's case-in-aggravation that no new evidence developed in the habeas proceeding had assailed. *Sears II*, 751 S.E.2d at 371-395. The Georgia Supreme Court did not brazenly flout this Court's specific, detailed analysis and directives as the CCA did in this case.

C. The State, like the CCA, mischaracterizes and ignores key evidence in the record.

Much of the State's brief is a free association about the record, unsupported by citation and often contrary to the actual record. The State offers, for instance, a

personal recollection that Andrus's mother "did not present herself" during his 2012 trial as "a drug addled prostitute," insinuating that the habeas testimony from multiple witnesses about her history should, therefore, be disregarded. BIO at 28. The State fails to note that the testimony in the habeas proceeding was about Andrus's mother's reliance on drugs and prostitution during Andrus's childhood, not in 2012. *See, e.g.*, 6EHRR26-51, 79-96. This Court, having studied the full record, determined that the jury had been grossly misled about Andrus's childhood—in part by his mother's false and unchallenged testimony at trial that she was just a hard-working single mother who had no idea how her son had been exposed to drugs. *See Andrus*, 140 S.Ct. at 1879-80 (describing in detail the habeas evidence of drugs, domestic and neighborhood violence, abuse, addiction, and unstable caregivers in Andrus's childhood and how, "[s]tarting when Andrus was young, his mother sold drugs and engaged in prostitution", "made her drug sales at home, in view of Andrus and his siblings", "habitually used drugs in front of them, and was high more often than not"). That the State and the CCA would prefer to reject the habeas record and the "tidal wave" of mitigating evidence relied on by the habeas trial court is not a cogent basis for rejecting ***this Court's*** record-based determinations as to what the habeas record established.

Equally misleading is the State's insistence that trial counsel's complete failure to investigate does not matter because most of the new evidence adduced in the habeas proceeding was "double-edged." BIO at 18, 29, 32, 36.[2] As this Court has

[2] The State does not address the CCA's failure to discuss any of the mitigating evidence Andrus adduced in the habeas proceeding. *See* Pet. at 21-25. Instead, like the CCA, the State supports its

explained, evidence that might not make a defendant "any more likable to the jury" might still be mitigating by "help[ing] the jury understand" how he could have perpetrated "horrendous acts." *Sears*, 130 S.Ct. at 3264. That is, the dismissive "double-edged" label reflects a complete misapprehension of mitigation, which is not intended to suggest that the defendant is without sin, but to humanize him and give jurors reasons to spare his life. *See Porter v. McCollum*, 558 U.S. 30, 41 (2009).

Also misleading is the State's attempted recourse to certain aggravating evidence, as presented *at trial*, as an argument for ignoring trial counsel's patent failure to uncover the means to rebut that same aggravating evidence—as demonstrated *in the habeas proceeding*. For instance, the State argues that the CCA, contrary to this Court's assessment, correctly found that Andrus, at age 16, had been "the gunman" among three boys involved in an aggravated robbery. Both the CCA and the State rely on the CCA's opinion ***in the direct appeal*** to support their insistence that this extraneous offense had been accurately presented in Andrus's capital murder trial. BIO at 24. Yet the State's portrayal of Andrus as the gunman during his capital murder trial eight years after the juvenile robbery offense was contrary to the State's own theory when it had prosecuted the robbery case. *Compare* 46RR15, 20, 25 *with* 19EHRR101. The State ignores the habeas evidence that

---

baseless "double-edged" mantra by recourse yet again to its favorite strawman, Dr. Brown. *See* BIO at 15, 28-31. The State falsely asserts that trial counsel "ultimately chose not to call Dr. Brown as a witness because his report was problematic for the defense"; trial counsel himself testified that he did not even see Dr. Brown's "report" until ***after*** Andrus's trial and he and Dr. Brown agreed that they never spoke again after the latter's one short meeting with Andrus. 3EHRR131-32; DX2; App042. Dr. Brown's brief role as a consulting expert ***at trial*** resulted in a draft report of dubious provenance, which was only relevant as yet more evidence of trial counsel's woefully deficient performance. *See* Pet. at 25-28. As this Court already recognized, Dr. Brown's unreliable assessment was ***not*** part of the "vast" mitigating evidence that Andrus relied on to prove prejudice. *Andrus*, 140 S.Ct. at 1882-83.

undermined this aspect of the State's case-in-aggravation by showing how trial counsel had failed to impeach the false testimony by using, for instance, police and court records that plainly showed that Andrus could *not* have been the gunman.

Similarly, the State endorses the CCA's inaccurate interpretation of the record regarding an alleged assault at a dry-cleaning establishment that the State attributed to Andrus. The State falsely suggests that a police informant was found to have "perjured" herself in her post-conviction declaration when she denied knowing whether Andrus had perpetrated that offense. *Compare* BIO at 13 *with* 8EHRR5-8. In truth, what was established during the habeas proceeding was the unchallenged impropriety of law enforcement's use of an unreliable informant's speculation to justify including Andrus in a suggestive photo array, *see* 8EHRR5-8, which was then used to obtain a highly suspect identification months after-the-fact from the traumatized assault victim who, at the time, could only say that he had been assaulted by "a black man," 3EHRR65.

Ultimately, the State's contra-factual dive into the weeds misses the mark. This Court has already considered the record as a whole. And this Court recognized that the uncontroverted evidence—including the admissions of trial counsel—established that trial counsel had conducted *no* independent investigation of *any* aspect of the State's case, including any investigation of the facts underlying the extraneous offenses the State relied on at trial. And this Court already determined, based on the habeas record, that, had counsel discharged his duty to conduct a reasonable investigation, ample opportunities to rebut the State's punishment-phase

case would have been discovered. *Andrus*, 140 S.Ct. at 1882, 1883 (quoting *Rompilla v. Beard*, 545 U.S. 374, 385 (2005)).

Further indicating the weakness of the State's position is its contention that powerful evidence amassed in the habeas proceeding—such as the testimony of the former Ombudsman for Texas's failed juvenile justice system—might not "have been admitted [at trial] under Texas state evidentiary rules." BIO at 24 (citing Texas Rule of Evidence 401, which, like its federal counterpart, defines relevance very broadly). The simple fact is: there has been no finding that Andrus's mitigating evidence would have been inadmissible at trial on relevance (or any other) grounds.[3] Contrary to the State's desire to avoid addressing this evidence by speculating that the Ombudsman's testimony might have been excluded, ***this Court*** specifically recognized both its relevance and mitigating power. *See Andrus*, 140 S.Ct. at 1884 n.2.

Similarly, the State's reliance on mental health records from Andrus's time in the Texas juvenile system ignores that these records showed how that system had failed Andrus and cannot, in good faith, be treated as accurate mental health assessments. Indeed, the habeas proceeding established, as the State admits, that Texas's failed juvenile justice system had a history of labeling almost everyone in its custody as having "the juvenile precursor to antisocial personality disorder" instead of accurately assessing and treating its charges. BIO at 15; 7EHRR76. However, the State, like the CCA, utterly ignores the evidence amassed in the habeas proceeding

[3] This Court has long recognized that, under the U.S. Constitution, "relevance," already a broad concept, is to be understood even more expansively in a sentencing proceeding involving the death penalty with regard to mitigating evidence. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Green v. Georgia*, 442 U.S. 95, 97 (1979).

that the Ombudsman, appointed by Governor Rick Perry when massive scandals led to the Texas Youth Commission (TYC) being placed into receivership, testified specifically about how Andrus had been adversely affected by TYC. The Ombudsman testified, *inter alia*, that Andrus was incarcerated in TYC while the events that were uncovered by the scandal were occurring; before legislative reforms were implemented; was unfairly held accountable for failing in a program that the State subsequently "scrapped"; was not properly diagnosed while in TYC because of undertrained staff; was held in one of the most dangerous TYC facilities were he was unduly placed in isolation for weeks at a time; and was wantonly prescribed psychotropic medication. 5EHRR103-242. Nor does the State recognize that the habeas trial court specifically found the Ombudsman's testimony both relevant and credible. App044-045. Yet Andrus's jury heard nothing about TYC's sordid history and the role it had played in further traumatizing him and making his mental-health issues worse. *Andrus*, 140 S.Ct. at 1882.

Furthermore, the State fails to address the CCA's extensive reliance on unsupported and indefensible stereotypes about mental illness and its complete disregard of the scientific evidence (adduced in the habeas proceeding) of how clinically significant trauma and adverse childhood experiences affect adult functioning. *See* BIO at 15 (listing uncritically the CCA's litany of unfounded assumptions about mental illness that it used to justify viewing Andrus's long history of unresolved mental illness with "skepticism"). But there is certainly a reasonable probability that at least one juror would disagree with the CCA's serious

misconceptions about mental illness and the effects of childhood trauma. *See*, *e.g.*, Brief of *Amici Curiae* of the National Alliance on Mental Illness and the National Association of Social Workers at 3 ("For instance, people with mental illness may still be able to care for family members at certain points in time, or they may deny their mental illness or refuse treatment for it."); Brief of *Amici Curiae* of Advocates for Child Victims of Domestic Violence at 23-24 ("[T]his Court's intervention is necessary to ensure that lower courts do not blithely disregard evidence of childhood trauma or established psychology when assessing the moral culpability of defendants whose traumatic childhoods jeopardized their opportunity to develop into healthy adults.").

In striking contrast to both the CCA's and the State's rejection of the mental illness and trauma evidence adduced for the first time in the habeas proceeding, this Court's previous decision in this very case relied in part on express determinations about trial counsel's failure to investigate Andrus's history of mental illness. *See, e.g.*, *Andrus*, 140 S.Ct. at 1882 ("[Counsel] did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized. Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing. As a clinical psychologist testified at the habeas hearing, Andrus suffered 'very pronounced trauma' and posttraumatic stress disorder symptoms from, among other things, 'severe neglect' and exposure to domestic violence, substance abuse, and death in his childhood.") (citations to habeas record omitted).

The State's brief reinforces the need for this Court to summarily reverse and clarify that, when this Court has provided explicit, extensive determinations for finding deficient performance under *Strickland*, a lower court cannot reject or ignore those determinations in deciding *Strickland* prejudice.

II. The State Fails To Engage With The Important Issue Presented Regarding The Destabilizing Effect On The Rule Of Law When A Lower Court Disregards This Court's Binding Decisions.

This Court made ***binding*** conclusions regarding Andrus's habeas evidence—including conclusions as to how the State's punishment-phase case could and should have been attacked and how the mitigation case could and should have been significantly more compelling than the profoundly unhelpful trial presentation based on virtually no investigation. Yet the CCA 5-member majority, contrary to the rule of law, rejected those conclusions. As a lower court in the vertical judicial hierarchy, the CCA had no right to do so. *See*, *e.g.*, *NAACP v. Alabama*, 360 U.S. 240, 244-45 (1959) ("Whatever was before the Court, and is disposed of, is considered as finally settled.") (quoting *Sibbald v. United States*, 37 U.S. 488, 492 (1838) and citing *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816)); *Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) (holding that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court"); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by th[e Supreme C]ourt on appeal, and remanded to [a lower c]ourt, whatever was before th[e Supreme C]ourt, and disposed of by its decree, is considered as finally settled.").

The CCA's patent disregard for how the judiciary must operate in our constitutional system requires this Court to proceed, as it did in *Wiggins*, with a determination regarding *Strickland* prejudice based on the record as a whole. Moreover, a prejudice finding here, unlike in *Wiggins*, would accord with the decision made by the habeas trial court that received the evidence in a courtroom and was thus in the best position to make credibility determinations. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (finding prejudice where "neither of the state courts below reached this prong of the *Strickland* analysis"); *see also* App038-050. A summary reversal in this case is not just warranted but required to reaffirm the rule of law.

CONCLUSION

For these reasons and those stated in his petition, Terence Tramaine Andrus respectfully asks that this Court grant the petition for writ of certiorari, summarily reverse, and find that he was prejudiced by his trial counsel's deficient performance.

Respectfully submitted,

/s/ Gretchen Sims Sween

Gretchen Sims Sween
Counsel of Record
P.O. Box 5083
Austin, Texas 78763-5083
(214) 557-5779
gsweenlaw@gmail.com

Clifford M. Sloan
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave NW
Washington, DC 20001
(202) 662-9387
Cliff.Sloan@georgetown.edu

Kathleen Shelton
1440 New York Ave. NW
Washington, DC 20005
(202) 371-7079
kathleen.shelton@probonolaw.com

Date submitted: December 1, 2021