No. _____

(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

PETITION FOR A WRIT OF CERTIORARI

Gretchen Sims Sween*
P.O. Box 5083
Austin, Texas 78763-5083
(214) 557.5779 (telephone)
gsweenlaw@gmail.com

** Counsel of Record, Member of Supreme Court Bar*
Counsel for Petitioner

QUESTION PRESENTED

Does the standard for assessing ineffective assistance of counsel claims, announced in *Strickland v. Washington*, fail to protect the Sixth Amendment right to a fair trial and the Fourteenth Amendment right to due process when, in death-penalty cases involving flagrantly deficient performance, courts can deny relief following a truncated "no prejudice" analysis that does not account for the evidence amassed in a habeas proceeding and relies on a trial record shaped by trial counsel's ineffective representation?

PARTIES TO THE PROCEEDINGS BELOW

Terence Tramaine Andrus, petitioner here, was the habeas applicant below.

The State of Texas, respondent here, was the respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Terence Tramaine Andrus respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (CCA).

OPINIONS BELOW

The CCA's unpublished opinion, *Ex parte Andrus*, No. WR-84,438-01 (Tex. Crim. App. Feb. 13, 2019), rejecting the trial court's favorable recommendation, is in Appendix A. The trial court's Findings of Fact and Conclusions of Law and recommendation that habeas relief be granted is in Appendix B.

JURISDICTION

The CCA's opinion issued on February 13, 2019. An extension of time to file this petition was granted on April 3, 2019 in Application No. 18A1011, extending the time to file to June 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." The U.S. Constitution's Fourteenth Amendment provides in relevant part: "No state shall … deprive any person of life, liberty, or property, without due process of law[.]" The state statute that governs quests for habeas relief in Texas death-penalty cases, Texas Code of Criminal Procedure, article 11.071, due to its length, is reproduced in Appendix C.

INTRODUCTION

This petition asks the Court to consider whether the *Strickland* standard, as applied in death-penalty cases and, particularly, to *Wiggins* claims, is inadequate when a habeas applicant established that his counsel, in a 2012 trial, failed to investigate or subject the State's case to any adversarial testing, failed to investigate or present a reasonable case in mitigation, and otherwise failed to function as an advocate for his client, and yet the habeas applicant was still denied relief. This petition demonstrates that *Strickland* itself has permitted lower courts to erect virtually insurmountable barriers to recovery even when, as with the instant case, the habeas applicant amassed substantial evidence of how the State's case in aggravation could have been attacked and of readily available mitigating evidence that the jury could and should have heard. That evidence included the following:

Terence Tramaine Andrus was born in "Jefferson Davis Hospital" in the historically African-American Third Ward neighborhood of Houston in 1988, just as the crack epidemic erupted. His mother was then seventeen; he was her second child. She eventually had five children by five different men, none of whom ever assumed the role of father. These men and others brought into the home had extensive entanglements with the criminal justice system—including convictions for family violence, injury to a child, sexual assault of a child, and numerous drug-related offenses. One of these men raped Andrus's sister when she was eight years old.

Ms. Andrus supported herself and her kids through prostitution and selling drugs. The one man who served briefly as a father figure to Andrus was a young drug-

dealer known in the neighborhood as the "Cookie Monster" because he handed out cookies to the kids in "Emancipation Park," which served as an open-air crack market after dark. He enjoyed staying in with the Andrus kids but was urged, by their mother, to get out at night and earn his keep. One day, he was killed in a drive-by shooting. He bled-out in Ms. Andrus's arms, who then lost her mind with grief, abandoning the children entirely for a time as she descended into depression and drug binges. By then, Andrus, age ten, had become the primary caregiver for his four siblings, including his special needs older brother, trying his best to see that they were fed, dressed, and attending school.

Andrus's first exposure to drugs was through the supplies his mother left lying around the house. His first disciplinary problems began after he was diagnosed with "affective psychosis" around age eleven. Instead of getting treatment, he soon became a casualty of the school-to-prison pipeline. When he was placed in detention for months, his mother did not visit—even at Christmas.

By age sixteen, he was confined to the custody of the Texas Youth Commission, known as "TYC," a veritable hell on earth as widely publicized scandals, which erupted while Andrus was awaiting trial, revealed. The systemic failures that were exposed led to unprecedented intervention at the highest levels of state government, a comprehensive, bipartisan reform bill, and a wholesale rebranding of the TYC. But massive abuses and dysfunction were what characterized the entity during the eighteen months Andrus spent in one of its worst facilities. He, like other kids struggling with untreated mental illness, spent weeks at a time in solitary

confinement in frigid cells smeared with body fluids in a ward filled with screaming. Solitary confinement in the "security unit," along with excessive and arbitrary use of psychotropic drugs, was the default approach to handling kids like Andrus, who struggled in an environment rampant with gang posturing, violent predators, and no meaningful education or rehabilitation.

Before finishing his juvenile sentence for serving as a lookout in a robbery, Andrus was punitively transferred to the adult prison system, thereby giving him a felony record—and making it difficult for him to get a job upon his release at age eighteen. He was taken in by a couple from the old Third Ward neighborhood who (unlike his mother) was willing to help him. He followed their rules, helped around the house, and diligently looked for work. But when the father of the house was sent back to prison, Andrus was turned out. Less than two years after his time in the failed TYC system, he slipped deep into drug addiction and petty crime, a circumstance that culminated in tragedy, when he, who could barely drive, became obsessed with "jacking" a car while high on PCP-laced marijuana. The failed car-jacking in a grocery store parking lot on October 15, 2008, left two people shot dead.

The jury heard none of this story—except for details of the shooting. Most of the short trial was devoted to testimony from the State's witnesses about Andrus's juvenile offenses, his commitment to TYC, and incidents that occurred in jail during the years he spent awaiting trial. Extensive time was devoted to an extraneous offense that he did not commit. The abject failure to tell any aspect of Andrus's story was the product of trial counsel's legion deficiencies that were proven during a habeas

proceeding that generated 41 volumes of testimony and documentary evidence. The trial court that received and considered that evidence found that he had proven a *Wiggins* claim and recommended relief. But relief was subsequently denied by Texas's highest criminal court in a decision that does not mention any evidence adduced during the habeas proceeding but merely cites *Strickland v. Washington*. *See* AppA.

STATEMENT OF THE CASE[1]

A. Pre-trial Proceedings

Before being indicted for the shooting deaths of two individuals outside a Fort Bend County grocery store, Andrus was apprehended in Louisiana, waived extradition, and confessed to law enforcement officers during the drive back to Texas. Without the benefit of a lawyer, he agreed to videotape his confession and helped officers in Fort Bend County find the gun and other incriminating evidence. Then, much to his confusion, he was driven to, and jailed in, neighboring Harris County.

Former Fort Bend and Harris County prosecutor James "Sid" Crowley was appointed to represent Andrus. Crowley had, by then, already been found to have provided ineffective assistance of counsel in a capital case; and a state court had removed him pre-trial for failure to do any work, threatening to hold him in contempt "for substantially interfering with the administration of justice in the case." App121. After Crowley was appointed to represent Andrus, Crowley did not meet with Andrus or even tell him that a lawyer had been appointed for nearly eight months. During the nearly four-year representation, Crowley met with Andrus six times outside of

[1] The facts in this section are supported by record citations found in AppB and/or AppD.

court and never admonished him that his behavior while incarcerated could be used against him in the punishment-phase of a capital murder trial. Crowley did not investigate what happened to his client while he was in jail and thus did not know of his suicide attempts.

Crowley did not file a single motion for over a year. He only filed one after Andrus started filing handwritten, pro se motions asking for a new lawyer.

During the representation, Crowley did not do any independent investigation of: the underlying offense, the circumstances of Andrus's confessions, or the State's extraneous offense evidence. Likewise, Crowley did not do any mitigation investigation or take steps to ensure that one was done. He did not meet with any potential lay witness before trial. The majority of Crowley's pretrial work entailed court appearances to reset the case.

Although Medicaid and jail records found in Crowley's file contain multiple diagnoses suggesting that his young client had unresolved mental health issues, Crowley did not investigate diagnoses of affective psychosis, schizophrenia, mood disorder, bipolar disorder, and PTSD that appear in these records. He did not confer with any mental health professional until a few weeks before trial—when he sent a psychiatrist to meet with Andrus without preparing either of them. Crowley did not even speak to the expert after his meeting with Andrus.

Co-counsel was appointed over a year after Crowley's appointment, but that lawyer, along with the mitigation specialist he retained, later withdrew in protest over Crowley's failure to do any substantive work. In the motion to withdraw, co-

counsel stated that Andrus was willing to accept a life without the possibility of parole sentence; but Crowley never shared this plea offer with the State. Although the motion is part of the docket, Crowley claimed that he never saw it.

When Crowley agreed to set Andrus's case for trial, he had no second chair, no mitigation specialist, no experts, no mitigation witnesses, and had conducted no investigation of any kind. He admitted doing virtually no work until shortly before voir dire began.

B. Trial

Voir dire began and ended in less than a month with Crowley declining to make a Batson challenge although the State had struck virtually all African-Americans and Hispanics from the qualified venire pool. In the guilt-phase trial, Crowley declined to present an opening statement. After the State rested, the defense immediately followed suit, without having presented any witnesses. Without first obtaining Andrus's consent, Crowley conceded his client's guilt in his closing argument and complimented State's counsel on proving the elements of the offense.

The jury returned a guilty verdict, and the punishment-phase trial began that same day. The defense again presented no opening statement. The State's case in aggravation took three days. The defense conducted no cross-examination or otherwise challenged the State's case.

Initially, the defense put on two witnesses, neither of whom Crowley or his new, recently appointed second chair had met before trial. One was Andrus's mother, who had to be subpoenaed to appear in court. During the one pre-trial interview,

conducted by the mitigation specialist before she withdrew, Ms. Andrus stated that she had "too many kids" and mentioned that she had taken out life insurance on her son and wondered if she could collect if he were executed. She informed counsel in advance that she would not testify about her own shortcomings as a parent because her "life was not on trial." As promised, she was not honest on the stand. She lied about her son's access to drugs growing up and feigned she had not known about his drug use. She suggested she would have counseled him about it, leaving the jury with the false impression that he came from a supportive, albeit single-parent household, but inexplicably embraced a path of drug abuse and crime. While his mother was testifying, Andrus informed Crowley that she was not telling the truth—which he would have known had he done any investigation.

The other defense witness was Andrus's biological father, who did not know him well. He acknowledged on the stand that he had been brought to the courthouse by a representative for the State.

The defense rested. The presiding judge then asked if Crowley perhaps had other witnesses and gave the defense a few days. Upon resuming, the defense put on a psycho-pharmacologist as its lone expert. This expert had been provided with very few records and only met with Andrus briefly before voir dire; he did not do a psychological assessment. He met with trial counsel the same day he met with Andrus and later attested that he was "struck by the extent to which Crowley appeared unfamiliar or naïve with issues relating to brain development, drug addiction, and other such mitigation issues relative to other capital attorneys I have

worked with." Instead of working with his expert, Crowley asked the defense expert to speak with the prosecutor about his intended testimony, which he did outside Crowley's presence. On the stand, the prosecutor openly mocked the expert during cross-examination, and Crowley took no steps to remedy the damage.

In light of the untruthful testimony about the circumstances of his childhood, Andrus elected to testify, attempting to describe how he had raised his four half-siblings during their chaotic childhood and his remorse about the crime. After his testimony, most of which involved a hostile cross-examination, the defense again rested; later that day, both sides presented closing arguments. In his closing, Crowley agreed that the jury would probably find for the State on the death-penalty-qualifying issue of future dangerousness: "You've heard all of this evidence, basically what happened in the jail and TYC. There is probably a good probability that you're going to answer this question 'yes.'" App039.

The State's final closing argument emphasized that "no mitigation exists" and "[t]here are [sic] no evidence that reduces his moral blameworthiness, not one." The prosecutor then argued that Andrus was "a sociopath," although there had been no expert testimony supporting such a diagnosis. The defense did not object or seek a mistrial. That same day, November 14, 2012, the jury returned its verdict and Andrus was formally sentenced to death. App113.

C. Post-Conviction Pleadings

New counsel was appointed to represent Andrus on direct appeal. One point of error raised was whether his confession had been voluntary—one of the few issues

preserved at trial.[2] The direct appeal also included three points of error based on the ineffective assistance of counsel (IAC) provided at trial. *Andrus v. State*, No. AP-76,936, Brief for Appellant (April 22, 2014).

The CCA ultimately rejected all points of error. With respect to the IAC claims, the CCA noted that "rarely" are such claims considered on direct appeal and would be "better left to be raised in an application for writ of habeas corpus." *Andrus v. State*, AP-76,936 (Tex. Crim. App. March 23, 2016) (unpublished op. on reh'g).

D. Habeas Proceeding

Andrus's habeas application included, *inter alia*, multiple IAC claims. The first ground focused on the failure to investigate or present readily available mitigating evidence. The presiding judge determined that an evidentiary hearing was warranted and received evidence on December 12, 13, 14, and 15, 2016, and March 20, 21, and 29, 2017. Tens of thousands of pages of documentary evidence were admitted and nine witnesses testified live, culminating in a 41-volume record.

One of the witnesses who testified at the evidentiary hearing was Crowley himself. When asked about records showing that his client had a history of unresolved mental illness dating back to age eleven, Crowley admitted that, to him, these records were only "a lot of psychological gobbledygook." He claimed he had not noted references to prescriptions for psychotropic medications or to hallucinations from Andrus's teen years up to shortly before trial. Nor had Crowley inquired why his

[2] The trial record mentions over twenty off-the-record discussions, some of which were plainly substantive because of what transpired afterwards. Crowley took no steps to create a record of what had occurred during these discussions, even when the judge asked if he wanted to do so. Therefore, any adverse rulings made during these discussions were not preserved for appeal. App116-118.

client was isolated in a padded cell for 62 days in the Fort Bend County jail or why jail personnel had prescribed the antipsychotic medications Thorazine and Seroquel. Crowley insisted that the mental health expert he had hired two weeks before voir dire "didn't find" any mental illness, an assertion contradicted by that expert's draft report, found in Crowley's files, and by that expert's affidavit submitted in support of Andrus's habeas application. App026, 029.

Andrus presented the testimony of several mental health experts through both affidavits and live testimony. One of these experts, Dr. Scott Hammel, is a clinical psychologist with experience treating youth in the now-defunct TYC, Texas's juvenile justice system. He reviewed voluminous social-history records, conducted a life-history investigation, and discussed Andrus's extensive, multi-generational history of trauma. He identified clinically significant events that likely affected Andrus's mental condition at the time of the crime, such as early exposure to homicide, long-standing substance abuse, parental drug-dealing, poverty, caregivers' involvement in the legal system, and severe emotional neglect from a mother who started having children when she herself was still a child. App034, 159-60, 217-27.

Crowley admitted that he did not investigate what problems Andrus might have experienced in his short life. Likewise, he admitted that he did not consider the significance of Ms. Andrus's reluctance to testify on her son's behalf. Crowley did not investigate why Andrus had started using drugs as a child, how he got access to those drugs, why his drug use escalated after he left TYC custody, or the nature of the neighborhood in which he grew up. He further admitted that he did not conduct any

independent investigation into the circumstances that led to Andrus being placed in TYC custody; nor did he consult with any expert about TYC itself.

Crowley did not see anything in Andrus's TYC records indicating that he had mental health problems. But during the evidentiary hearing, experts demonstrated that Andrus's TYC records were replete with red flags of unresolved mental illness—numerous references to self-injury, threats of self-harm, and suicide attempts. The TYC records include a letter Andrus wrote to the vice principal reporting that he was hearing voices and pleading for help. Those records also show that, instead of helping him, TYC sent him to solitary confinement.

As Dr. Hammel explained, the TYC records also show that, after less than a year, personnel attempted to have Andrus transferred early to the adult system. But the central administration found that the TYC facility was not doing enough to treat him and directed staff to do their job by getting to the bottom of his mental health issues. Soon thereafter, Andrus was sent to an adult prison anyway. App204.

Dr. Hammel reviewed the conclusions of Dr. Julie Alonso-Katzowitz, a psychiatrist who submitted an affidavit regarding TYC's misuse of psychotropic drugs in treating Andrus as a teenager. His medications were changed frequently and haphazardly, suggesting numerous adverse consequences relevant to understanding his behavior while at TYC. As for the dysfunction of TYC, Crowley's co-counsel, appointed at the eleventh hour, had heard about the scandals surrounding TYC, sought guidance from a consultant about a potential TYC expert, and was given the name of Will Harrell—but no one on the defense team contacted him. App030.

Mr. Harrell, who submitted an affidavit and testified live in the habeas proceeding, was appointed by Governor Rick Perry to be the first independent ombudsman over TYC. In this role, Harrell had unfettered access to any TYC facility in the state. He could have told the jury that, when Andrus was in TYC custody, the agency was plagued by systemic failure and rampant abuse, such as overuse of the "security unit," which was "like a prison within a prison" where youth were locked in isolation cells in circumstances that, according to Harrell, "would horrify most current professionals in our justice field today." Reform came only after an avalanche of bad media coverage—soon after Andrus was discharged from TYC in 2006. Harrell reviewed thousands of pages of documents related specifically to Andrus's confinement and applied knowledge of national standards for juvenile justice to assess Andrus's experience in the TYC system. He opined that the time Andrus had spent in TYC custody only served to further traumatize him. App031-32.

Andrus also presented expert testimony from an historian, Dr. Tyina Steptoe, who opined about the complex history of racial discrimination underlying the vice-ridden Houston neighbor in which Andrus had been raised. Her testimony complemented the affidavits of numerous lay witnesses who had known Andrus and his family during the 1980s-90s in Houston's Third Ward. These witnesses had seen how loving Andrus was with his siblings and how hard he tried to find gainful employment after being released from TYC. App032-33, 147-217.

In short, Crowley made no effort to find any of what the trial judge presiding over the habeas proceeding referred to as "the tidal wave of information that has come through here with regard to mitigation." App155.

E. Habeas Adjudication

After considering the voluminous documentary evidence and the live testimony, on September 8, 2017, the trial court issued independently drafted findings of fact and conclusions of law. AppB. The findings are supported by ample citations to the habeas record. The court's care is particularly apparent with respect to the IAC claim based on the failure to investigate and present evidence in mitigation. App025-037 (citing and applying *Wiggins v. Smith*, 539 U.S. 510 (2003)). The trial court recommended relief in the form of a new punishment trial. App042.

The recommendation and the habeas record were then transmitted to the CCA, which, per Texas law, is the final arbiter of whether a habeas applicant will be awarded relief in a state court proceeding. AppC, sec. 11. Nearly a year and a half later, the CCA issued a 5-page, unpublished per curiam decision, rejecting the trial court's recommendation without discussing any of that court's findings. AppA. The CCA did not explain why the findings did not merit the deference that, under Texas law, such fact-finding is supposed to be afforded.[3] The only evidence mentioned in the

[3] *See Ex parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008) (explaining that trial court in capital habeas proceeding is "[u]niquely situated to observe the demeanor of witnesses first-hand," and thus "is in the best position to assess the credibility of witnesses;" recognizing that, "in most circumstances, [it] will defer to and accept a trial judge's findings of fact and conclusions of law;" and insisting "it will be under only the rarest and most extraordinary of circumstances that we will refuse to accord any deference whatsoever to the findings and conclusions as a whole.").

CCA's opinion is from the trial record.[4] App003-006. The only explanation for declining to adopt any of the findings, conclusions, or the recommendation that relief be granted is a citation to *Strickland v. Washington*. App007.

REASONS TO GRANT THE PETITION

I. THE PREVAILING UNDERSTANDING OF THE *STRICKLAND* STANDARD IS EVISCERATING VITAL SIXTH AND FOURTEENTH AMENDMENT RIGHTS OWED TO INDIVIDUALS IN DEATH-PENALTY CASES AND THUS NEEDS TO BE REEXAMINED.

The basic, two-pronged standard for assessing IAC claims is well known. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring proof that counsel's performance was objectively unreasonable and that the deficient performance prejudiced the client). But in this and numerous other death-penalty cases, where the representation the defendant received was patently deficient, the standard is not producing just results. The prejudice prong in particular is considered so onerous that few habeas applicants are able to satisfy it—or at least few courts, particularly in death-penalty cases, find it satisfied.[5] Andrus's case highlights how courts in death-

[4] Some members of the CCA signed a concurrence highlighting the State's future-dangerousness evidence, which Crowley did not investigate or contest, and a draft report of defense trial expert, Dr. Brown, who did not testify at trial and whose report Crowley claimed he did not see until after trial. App009-021. The concurrence implies that this was the primary mitigating evidence Andrus adduced during the habeas proceeding. App017. Yet during the habeas proceeding, Andrus demonstrated that Dr. Brown's drive-by psychological assessment was woefully inadequate and possibly unethical. Andrus instead relied on numerous affidavits and multiple days of testimony reflecting powerful mitigating evidence that could and should have been presented. *See* AppB & AppD.

[5] *See* Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459 (May 2009) (describing study of four circuits that demonstrated capital defendants did not achieve greater success at obtaining relief under *Strickland* even after *Wiggins v. Smith*). The study showed that, in the Fifth Circuit, which reviews numerous habeas petitions arising from capital cases where a death sentence is real, not symbolic, the success rate went from 7.3% in the 5 years before *Wiggins* to an abysmal 3.8% success rate in the 5 years after *Wiggins*. No evidence suggests that habeas applicants in death-penalty cases arising in Texas have fared any better in the CCA or the Fifth Circuit during the ten years since this study was conducted.

penalty cases often use the amorphous prejudice prong to avoid discussing the deficient performance and to otherwise short-circuit the IAC analysis, then find *Strickland* has not been satisfied. This Court's leadership is desperately needed to address how so many defendants can be convicted and sentenced to death in proceedings where the adversarial system utterly failed them and yet be unable to obtain relief in a habeas proceeding.

A. This Case Provides an Apt Vehicle for Revisiting *Strickland*'s Application in the Death-Penalty Context.

For several reasons, this case presents a worthy vehicle for revisiting *Strickland*. First, the petition arises out of a state habeas proceeding, thus the case is in a posture where the Court can consider a case involving significant Sixth and Fourteenth Amendment rights free from both the pressure of a pending execution date[6] and the overlay of the highly deferential standard of review that applies under the Antiterrorism and Effective Death Penalty Act (AEDPA).[7]

But even more importantly, this case is a worthy vehicle because the injustice of the result is facially obvious. The CCA provides few clues about the rationale for rejecting Andrus's IAC claims after the trial court, which had actually heard the evidence, recommended relief. These clues are: (1) a citation to *Strickland* and (2) a

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[6] Recently, some members of this Court have expressed concerns about significant constitutional claims, arising in death-penalty cases, being presented in end-stage litigation. *See Bucklew v. Precythe*, 587 U.S. __ (2019); *Price v. Dunn*, 587 U.S. __ (2019); *Murphy v. Collier*, 587 U.S. __ (2019). Taking up the question presented in this case permits ensuring justice before it is too late.

[7] The AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 88 (2011). If state courts can deny facially valid habeas claims with impunity, then the highly deferential approach in federal habeas is difficult to justify.

recitation of evidence from the trial record about the crime, the State's future-dangerousness evidence, and the scant mitigation that got before the jury despite an unreasonable investigation. App003-006. This approach reflects a broader problem—in Texas, the Fifth Circuit, and other death-penalty jurisdictions. *Strickland* is seen as permitting a truncated, ham-fisted analysis, whereby all the adjudicator has to do is point to evidence adduced by the State at trial, or to some mitigating evidence in the trial record, or to the perceived "double-edged" nature of the new mitigation and then conclude that the death-sentenced individual was not prejudiced by counsel's deficient performance no matter how deficient it was. If this Court does not disavow this approach, then IAC claims are a dead letter in the most consequential cases and review of these claims is just creating a veneer of process where none really exists.

Andrus alleged and proved deficient performance throughout every phase of the representation. There was no adversarial process of any kind with respect to the State's case in aggravation. Andrus's lawyer gave no opening statement in the punishment-phase trial (just as he gave no opening in the guilt-phase trial). Counsel did not test the State's case in aggravation (because he had not done any investigation) even though Andrus, who had confessed to capital murder, repeatedly explained that he did not commit one of the extraneous offenses given considerable attention at trial. Trial counsel stood up in closing arguments and *conceded* that the State had probably carried its burden with respect to future dangerousness. Then trial counsel made no meaningful argument regarding mitigation because he had adduced no evidence to support sparing his client's life—even though abundant

mitigating evidence existed. That failure was seized upon by counsel for the State as a basis for sentencing Andrus to death: "no mitigation exists;" "[t]here are [sic] no evidence that reduces his moral blameworthiness, not one." App116.

The CCA did not engage with any of the evidence of deficient performance or of the mitigation the defense could and should have presented—including any of the evidence specifically highlighted in the habeas court's findings and conclusions. *Compare* AppA *with* AppB. But without a close comparison of the trial narrative to the new narrative suggested by evidence adduced during the habeas proceeding, a court cannot step into the shoes of a hypothetical new jury and then fairly ascertain whether the defendant was prejudiced.

This Court's guidance is needed to explain why an abbreviated *Strickland* analysis in death-penalty cases is not just unjust but unconstitutional, especially where a palpable contrast exists between the trial and habeas records. By granting the petition, this Court can explain that, when trial counsel's performance was deficient in subjecting the State's case in aggravation to adversarial testing and in investigating mitigation, and when the death-sentenced individual amassed significant evidence of powerful, readily available mitigation during a habeas proceeding, then prejudice should be ***presumed***. Otherwise, a "truncated approach is in direct contravention of this Court's precedent[.]" *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting from denial of certiorari) (criticizing Fifth Circuit for concluding that "new evidence in aggravation cancels out new evidence in

mitigation" without considering "how the jury would have considered that evidence in light of what it already knew.").

B. The Court Should Grant the Petition Because *Strickland* Is the Root Cause of the Problem.

Most of the blame for the truncated approaches to IAC claims in death-penalty cases can be laid at *Strickland*'s feet. *Strickland* expressly invites courts to cut-to-the-chase by stating that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. Indeed, *Strickland* encourages courts to go this route "[i]f it is *easier* to dispose of an ineffectiveness claim" and notes that it "*expect[s] that will often be so*," and thus "that course should be followed." *Id.* (emphasis added). Lower courts have long embraced this message about what will make their jobs easier. *See, e.g.*, *United States ex rel Cross v. DeRobertis*, 811 F.2d 1008, 1014 (7th Cir. 1987) (deciding that, because performance prong required "a particularly subtle assessment," it would "heed the Supreme Court's advice and to address first the 'prejudice' component of the *Strickland* test," potentially precluding the need to rule "on the difficult 'performance' question"); *Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012) (affirming finding that IAC claimant had failed to show prejudice and thus holding it "need not address" conclusions about counsel's performance).

This Court's suggestion that disposing of IAC claims by simply assessing prejudice "will often" be the appropriate course was made in 1987, well before so much was known about just how badly indigent individuals were being represented in death-penalty cases. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death*

Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1836-37 (1994).[8] But from the outset, Justice Marshall voiced concern that the prejudice prong is so vague that it would virtually guarantee arbitrary results. *See Strickland*, 466 U.S. at 706-19 (Marshall, J., dissenting) (predicting that the two-prong test for IAC would prove to be unhelpful because it was "so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.").

Even more than permitting arbitrary results, the *Strickland* standard has permitted, as a default rule, rejecting IAC claims involving flagrantly deficient performance. *See, e.g., Ex parte McFarland*, 163 S.W.3d 743, 748-49) (Tex. Crim. App. 2005) (finding no IAC even though retained lead counsel slept through most of trial and second appointed counsel—who had no capital trial experience—failed to interview any state witnesses, visited defendant only once in person before trial, failed to locate any of the potential witnesses his client had identified, and, at punishment stage, failed to call any family or character witnesses); *McFarland v. Davis*, H-05-3916 (S.D. Tex. April 2, 2019) (finding CCA had not "unreasonably applied federal constitutional law" because, even though lead counsel's "sleeping was obvious to the entire courtroom" throughout trial, "McFarland was never completely without counsel" because his inexperienced second chair counsel had stayed awake).

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[8] *See also* Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care* (April 9, 2001) ("I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial."), *available at* https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a.

The focus on prejudice has rendered guilt-phase IAC claims a virtual nullity. When courts assume that "prejudice" is a proxy for the guilt-determination and that any evidence in the trial record that ties the defendant to the crime is sufficient to support a "no prejudice" finding, that analytical model guarantees a loss even when evidence is adduced in a habeas proceeding raising serious doubts about the defendant's guilt. *See, e.g.*, *Conner v. Quarterman*, 477 F.3d 287, 293-94 (5th Cir. 2007). *Conner* involved an IAC claim that hinged, in part, on trial counsel's failure to investigate his client's medical history, which showed that Conner had a condition that prevented him from running without an awkward, noticeable gait and thus he was not likely the person the eyewitnesses had observed sprinting freely from the crime scene. Yet the Fifth Circuit concluded that the defendant was not prejudiced by his counsel's failure to identify this significant defensive point because Conner had "done nothing to lessen the impact of the other evidence against him." *Id.* at 294. This result should have been intolerable. Yet Mr. Conner was executed.

This kind of unjust result is intolerable (although routinely tolerated) for additional reasons. For instance, the focus on whether the trial record includes *some* evidence of the defendant's guilt, notwithstanding counsel's abysmal performance, means that courts have permission to disregard the degree to which the trial record was a product *of* the deficient performance. Additionally, this focus elevates the cold trial record over the extra-record evidence of what trial counsel could and should have done that would have altered the jury's experience. Further, the assumption that there is no prejudice from guilt-phase deficient performance where there is evidence

of the defendant's guilt undermines the very compendium of constitutional rights that the writ of habeas corpus is supposed to safeguard. This pinched conception of prejudice devalues some of our most foundational values when the rights to a fair trial and to due process can be excused by the facile conclusion that "he was guilty anyway." That simplistic approach also ignores the integrated nature of the guilt- and sentencing-phases in a death-penalty trial, which generally focuses less on the issue of guilt than on moral culpability.

This Court, nearly twenty years ago, embarked on a mission to correct some of the seemingly insurmountable barriers to obtaining relief under *Strickland* in the narrow, but important context of death-penalty punishment-phase claims. In a series of cases, this Court clarified that assessing IAC claims with respect to punishment-phase prejudice required a more nuanced approach than courts had been undertaking because of counsel's duty to investigate and present any available evidence to rebut the State's case and to affirmatively present mitigation. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (explaining "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); *Wiggins*, 539 U.S. 510 (holding petitioner's attorneys were ineffective for failing to properly investigate their client's background and social history to prepare for the sentencing phase of his death-penalty trial); *Rompilla v . Beard*, 545 U.S. 374 (2005) (finding counsel had been ineffective for failing to conduct a thorough pre-trial investigation to uncover

mitigating evidence and to rebut the prosecution's case for death—even if the client and his family were unhelpful).

Additionally, these cases reemphasized that the "reasonableness" of trial counsel's purported strategic decisions had to be assessed pursuant to prevailing professional norms, a national, not local, standard. Lower courts were urged to refer, for instance, to the American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) as evidence of an appropriate baseline. *See, e.g.*, *Wiggins*, 539 U.S. at 533, 524.

This more nuanced approach required engaging with the *substance* of the new mitigating evidence in deciding whether trial counsel was deficient in the duty to pursue any available sources that might lead, if not to an affirmative defense, to mitigating and rebuttal evidence. But even after the robust analysis this Court modeled in *Wiggins*—comparing the trial record to the mitigation unearthed in post-conviction, and comparing trial counsel's actions to national standards—courts continued to short-circuit the analysis. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (explaining that the only logical way to assess the probability of a different outcome, is for courts to "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding[.]").

Today, this Court's efforts are in desperate need of a reboot. As some members of this Court have already recognized, a widespread problem exists with death-sentenced individuals being denied punishment-phase relief under *Strickland* based on an inadequate analysis. *See, e.g.*, *Hodge v. Kentucky*, 568 U.S. __ (2012)

(Sotomayor, J., dissenting) (critiquing erroneous, truncated approach to prejudice analysis in death-penalty case); *Trevino v. Davis*, 584 U.S. __ (2018) (Sotomayor, J., with Ginsburg, J., dissenting) (same); *Peede v. Jones*, 585 U.S. __ (2018) (Sotomayor, J., with Ginsburg, J., dissenting) (same).

In the Fifth Circuit, death-sentenced individuals have prevailed on IAC claims in only a handful of cases—ever. One of these, involving allegations of both guilt- and punishment-phase ineffectiveness, is noteworthy for how anomalous it is. *See Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005) (affirming recommendation that habeas petitioner receive, not just punishment-phase relief, but a whole new trial). In *Draughon*, the Fifth Circuit panel took pains to consider how new expert forensic evidence would have altered the prism through which the jury received the State's guilt-phase presentation at trial and lent credence to the theory that the defendant had not intended to kill anyone. The court not only assessed the habeas expert's testimony, but also explained that the only support the jury had heard for the defendant's position (that he had not intended to shoot the victim but had instead aimed at the pavement) came from the defendant himself—and not until the punishment phase. The *Draughon* panel analyzed how the defendant's testimony had, in context, only set him up to be openly mocked by the prosecution, thereby hurting, not helping his cause. *Draughon* was *not* decided based on the facile assumption that, because there was some other evidence of his guilt before the jury, the new evidence could be summarily discounted or disregarded and counsel's deficient performance ignored. Instead, the panel in this one case acknowledged a

need to look closely at "what might have been," as a necessary requisite to determining whether decisions that trial counsel had made—to act or not to act—were reasonable when made. *Id.* at 296. But engaging in a substantive consideration of "what might have been" is not what most courts are doing—as illustrated by the CCA's opinion in this case and a host of Fifth Circuit decisions routinely rejecting IAC claims in death-penalty cases.[9]

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[9] Here is a ***sample*** of Fifth Circuit cases rejecting IAC claims (or even a Certificate of Appealability) in death-penalty cases post *Wiggins*: *Young v. Davis*, 860 F.3d 318 (5th Cir. 2017); *Bible v. Stephens*, 640 F. App'x 350 (5th Cir. 2016); *Garza v. Thaler*, 487 F. App'x 907 (5th Cir. 2012); *Woods v. Thaler*, 399 F. App'x 884 (5th Cir. 2010); *Crawford v. Epps*, 353 F. App'x 977 (5th Cir. 2009); *Moore v. Quarterman*, 534 F.3d 454 (5th Cir. 2008); *Villegas v. Quarterman*, 274 F. App'x 378 (5th Cir. 2008); *Hudson v. Quarterman*, 273 F. App'x 331 (5th Cir. 2008); *Ries v. Quarterman*, 522 F.3d 517 (5th Cir. 2008); *Martinez v. Quarterman*, 270 F. App'x 277 (5th Cir. 2008); *Bishop v. Epps*, 265 F. App'x 285 (5th Cir. 2008); *Smith v. Quarterman*, 515 F.3d 392 (5th Cir. 2008); *Perkins v. Quarterman*, 254 F. App'x 366 (5th Cir. 2007); *Wood v. Quarterman*, 503 F.3d 408 (5th Cir. 2007); *Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007); *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007); *Diaz v. Quarterman*, 239 F. App'x 886 (5th Cir. 2007); *Manns v. Quarterman*, 236 F. App'x 908 (5th Cir. 2007); *Berry v. Epps*, 230 F. App'x 386 (5th Cir. 2007); *Scheanette v. Quarterman*, 482 F.3d 815 (5th Cir. 2007); *Smith v. Quarterman*, 222 F. App'x 406 (5th Cir. 2007); *Turner v. Quarterman*, 481 F.3d 292 (5th Cir. 2007); *Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007); *Sonnier v. Quarterman*, 476 F.3d 349 (5th Cir. 2007); *Conner v. Quarterman*, 477 F.3d 287 (5th Cir. 2007); *Parr v. Quarterman*, 472 F.3d 245 (5th Cir. 2006); *Smith v. Quarterman*, 471 F.3d 565 (5th Cir. 2006); *St. Aubin v. Quarterman*, 470 F.3d 1096 (5th Cir. 2006); *Wright v. Quarterman*, 470 F.3d 581 (5th Cir. 2006); *Rodriguez v. Quarterman*, 204 F. App'x 489 (5th Cir. 2006); *Anderson v. Quarterman*, 204 F. App'x 402 (5th Cir. 2006); *Gutierrez v. Quarterman*, 201 F. App'x 196 (5th Cir. 2006); *Whitaker v. Quarterman*, 200 F. App'x 351 (5th Cir. 2006); *Reyes v. Quarterman*, 195 F. App'x 272 (5th Cir. 2006); *Henderson v. Quarterman*, 460 F.3d 654 (5th Cir. 2006); *Amador v. Quarterman*, 458 F.3d 397 (5th Cir. 2006); *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006); *Granados v. Quarterman*, 455 F.3d 529 (5th Cir. 2006); *United States v. Hall*, 455 F.3d 508 (5th Cir. 2006); *Knight v. Quarterman*, 186 F. App'x 518 (5th Cir. 2006); *Garcia v. Quarterman*, 454 F.3d 441 (5th Cir. 2006); *Moore v. Dretke*, 182 F. App'x 329 (5th Cir. 2006); *Moreno v. Dretke*, 450 F.3d 158 (5th Cir. 2006); *Mosley v. Dretke*, 370 F.3d 467 (5th Cir. 2006); *Martinez v. Dretke*, 173 F. App'x 347 (5th Cir. 2006); *Cannady v. Dretke*, 173 F. App'x 321 (5th Cir. 2006); *Pippin v. Dretke*, 434 F.3d 782 (5th Cir. 2005); *O'Brien v. Dretke*, 156 F. App'x 724 (5th Cir. 2005); *Leal v. Dretke*, 428 F.3d 543 (5th Cir. 2005); *Neville v. Dretke*, 423 F.3d 474 (5th Cir. 2005); *Frazier v. Dretke*, 145 F. App'x 866 (5th Cir. 2005); *Brown v. Dretke*, 419 F.3d 365 (5th Cir. 2005); *Ford v. Dretke*, 135 F. App'x 769 (5th Cir. 2005); *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005); *Howard v. Dretke*, 125 F. App'x 560 (5th Cir. 2005); *Shields v. Dretke*, 122 F. App'x 133 (5th Cir. 2005); *Martinez v. Dretke*, 404 F.3d 878 (5th Cir. 2005); *Ramirez v. Dretke*, 398 F.3d 691 (5th Cir. 2005); *United States v. Webster*, 392 F.3d 787 (5th Cir. 2004); *Sterling v. Dretke*, 117 F. App'x 328 (5th Cir. 2004); *Wolfe v. Dretke*, 116 F. App'x 487 (5th Cir. 2004); *Roberts v. Dretke*, 381 F.3d 491 (5th Cir. 2004); *Cartwright v. Dretke*, 103 F. App'x 545 (5th Cir. 2004); *Martinez v. Dretke*, 99 F. App'x 538 (5th Cir. 2004); *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004); *Cole v. Dretke*, 99 F. App'x 523 (5th Cir. 2004); *Morrow v. Dretke*, 99 F. App'x 505 (5th Cir. 2004); *Hood v. Dretke*, 93 F. App'x 665 (5th Cir. 2004); *Riley v. Dretke*, 362 F.3d 302 (5th Cir. 2004); *Kincy v. Dretke*, 92 F. App'x 87 (5th Cir. 2004); *Cockrell v. Dretke*, 88 F. App'x 34 (5th Cir.

This Court needs to instruct that the IAC analysis does not allow for "plac[ing] the events of trial into two separate airtight containers of the first and second prongs of *Strickland*." *Id.* at 293. Indeed, doing just that has rendered most IAC claims dead on arrival. What is needed is a holistic, nuanced approach that considers how deficient performance at any stage of trial may have affected the fundamental fairness of the proceeding. Instead of encouraging courts to do what is "easier" on the road to denying relief, the Court should harness its experience to note that a new trial is a cost that death-penalty jurisdictions must shoulder when they elect to seek death against an indigent individual and then saddle that individual with appointed counsel, like Mr. Crowley, who had no business handling any case where someone's life was on the line.[10] *Strickland*, 466 U.S. at 697.

The rampant failure of death-sentenced individuals to obtain habeas relief on what have come to be known as "*Wiggins* claims" suggests that *Strickland* itself requires significant clarification or needs to be scrapped altogether—at least in death-penalty cases where the requirement of heightened reliability is supposed to operate. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining why heightened reliability is required in death-penalty cases). This Court should grant the petition to examine whether *Strickland* is doing an adequate job of

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2004); *Busby v. Dretke,* 359 F.3d 708 (5th Cir. 2004); *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003); *Flores v. Dretke*, 82 F. App'x 92 (5th Cir. 2003); *Green v. Dretke*, 82 F. App'x 333 (5th Cir. 2003); *Moody v. Dretke*, 77 F. App'x 722 (5th Cir. 2003); *Cotton v. Cockrell*, 343 F.3d 746 (5th Cir. 2003); *Bruce v. Cockrell*, 74 F. App'x 326 (5th Cir. 2003); *Perez v. Cockrell*, 77 F. App'x 201 (5th Cir. 2003); *Miniel v. Cockrell*, 339 F.3d 331 (5th Cir. 2003); *Allridge v. Quarterman*, 92 F. App'x 60 (5th Cir. 2003).

[10] *See* App086-90, 120-22 (discussing some of Crowley's history of providing ineffective assistance to clients in other death-penalty cases).

protecting the fundamental rights to a fair trial and to due process ensconced in the Constitution's Sixth and Fourteenth Amendments.

C. This Court Should at Least Clarify That IAC Analyses in Death-Penalty Cases Should Not Entail Formulaic Shortcuts.

In granting certiorari to cure the problem that *Strickland* has inadvertently created—of condoning flagrantly deficient representation in death-penalty cases—this Court can also address recurrent shortcuts that courts are taking in IAC analyses in death-penalty cases. Further, this Court can explain why a cogent IAC analysis requires accounting for the specific jurisdiction's capital sentencing scheme.

1. This Court needs to clarify that a truncated IAC analysis is never appropriate in death-penalty cases.

a. A holistic analysis requires considering the cumulative effect of counsel's deficient performance.

This Court recently noted in the non-death-penalty context that, in assessing prejudice, courts need to adopt a context-specific, non-mechanistic approach in deciding if particular errors and omissions rendered the proceeding as a whole fundamentally unfair. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (emphasizing that "the concept of prejudice is defined in different ways depending on the context in which it appears" and "caution[ing] that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion."). "[T]he ultimate inquiry should concentrate on 'the fundamental fairness of the proceeding.'" *Id.; see also Lafler v. Cooper*, 132 S. Ct. 1376, 1388-89 (2012) (emphasizing that "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation'").

Courts—including the CCA and the Fifth Circuit—are not, however, tailoring their IAC analyses to suit the death-penalty context. Even after years of litigation rejecting the concept that the potential impact of mitigating evidence can be discounted based on the blithe conclusion that it might be "double-edged," that concept is still being wielded as a shortcut for rejecting *Wiggins* claims. *See, e.g., Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (dismissing evidence developed in habeas proceeding of Fetal Alcohol Syndrome, aka FAS, as "double-edged" because "although it might permit an inference that [a defendant] is not as morally culpable for his behavior, it also might suggest that he, as a product of his environment, is likely to continue to be dangerous in the future."). *See, by contrast, Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019) (finding state court had unreasonably denied IAC claim where trial counsel had done substantial investigation but had missed signs that client suffered from FAS because that diagnosis would "have been substantively different from the defense team's investigation into other mental illnesses and behavioral issues").

Rarely does a single error or omission on trial counsel's part support a finding of ineffectiveness—although this Court has identified at least one example. *See Buck v. Davis*, 580 U.S. __ (2017) (explaining impact of a defense expert's two references to race in discussing the issue of future dangerousness "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record."). As the Court aptly noted, "[s]ome toxins can be deadly in small doses." *Id.* To determine whether one really terrible decision or, as in the instant case, counsel's

failures at every stage of the representation, prejudiced the defendant, courts need to assess how the alleged deficient performance may have impacted the proceeding's overall fairness.

In other words, prejudice cannot be assessed fairly without assessing the totality of counsel's performance and the cumulative effect of any deficient performance—notwithstanding *Strickland*'s language stating that courts "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697.

The ABA Guidelines for defense counsel in death-penalty cases have long emphasized the importance of developing, well in advance of trial, an "integrated" defensive theory that is consistent in both the guilt- and punishment-phases of trial. *See* ABA Guidelines, Guideline 10.10.1 ("Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."). Therefore, in the specific context of assessing an IAC claim raised in a death-penalty case, prejudice cannot be fairly assessed without looking at the entire trial. That is, if capital defense counsel have a basic duty to think about their trial presentation holistically so as to minimize inconsistencies and thus avoid credibility problems, then counsel's work must be assessed in terms of how errors or omission may have prejudiced their client by undermining the overall fairness of his trial. Conducting that analysis requires looking at both the trial that was and the trial that should-have-been holistically.

b. That some mitigation was before the jury should not be dispositive.

This Court should also clarify that being able to point to *some* mitigation in the trial record does not end the IAC inquiry. The objective must be to engage the *substance* of the evidence adduced both at trial and in the habeas proceeding. For instance, in *Williams v. Taylor* this Court noted that trial counsel had presented some mitigating evidence in the sentencing phase consisting of "the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist." 529 U.S. at 369. The lay witnesses testified to Williams' non-violent nature, while the psychiatrist related that "in the course of one of his earlier robberies, [Williams] had removed the bullets from a gun so as not to injure anyone." *Id.* The Court then looked at the quantum and quality of mitigation amassed to support the IAC claim, implying that a finding that *some* mitigating evidence was before the jury did not end the inquiry. Similarly, in *Wiggins*, this Court acknowledged that trial counsel had obtained *some* mitigating evidence in the form of records describing Wiggins' difficult childhood and his time in foster care; but the Court then looked carefully at where those records could and should have led counsel in determining that the representation had been ineffective. *Wiggins*, 539 U.S. at 524.

Likewise, in *Rompilla*, this Court recognized that the jury had heard *some* mitigating evidence at trial—for instance, testimony from family members who "argued in effect for residual doubt, and beseeched the jury for mercy" and from Rompilla's 14-year-old-son, who testified to his love for his father. 545 U.S. at 378. In rejecting the state court's conclusion that defense counsel had been effective, this Court emphasized that the IAC analysis needed to address reasonably available leads

that trial counsel had failed to pursue. *Id.* at 389-90. *Rompilla*'s holding built logically on *Wiggins*, which had made clear that a lawyer charged with defending someone in a death-penalty case may not simply "abandon[] their investigation of [the client's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524.

The CCA's decision below suggests that the mere presence of some evidence that can be characterized as mitigating permits rejecting a *Wiggins* claim—without considering the effect of the deficient performance on the trial record or comparing that record to the alternative suggested by the habeas record. App005-006. That approach constitutes a more egregious analytical failure than found, for instance, in *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017) (acknowledging habeas proceeding had adduced expert and lay testimony about the petitioner's FAS, which had not been developed at trial, but discounting the significance of the new mitigating evidence). The Fifth Circuit's prejudice analysis in *Trevino* does not account for the qualitative difference between the trial and habeas mitigating evidence, how the latter would have changed the narrative presented to the jury, or how trial counsel's performance deviated from prevailing professional norms operative at the time of Trevino's trial. But no comparative analysis (*e.g.,* below) and a superficial one (*e.g.*, in *Trevino*) lead generally to the same result: relief denied—even when, as here, counsel's performance was so deficient to be contrary to the basic concept of advocacy.

This Court needs to explicitly disavow *Strickland's* statement that, more often than not, "it is easier to dispose of an ineffectiveness claim" by first "examining

[whether] the prejudice" prong is satisfied first. *Strickland*, 466 U.S. at 697. That statement, notwithstanding *Williams*/*Wiggins*/*Rompilla*, has given habeas courts a license to ignore how deficient performance affects the fundamental fairness of a trial.

c. That a case was highly aggravated should not be dispositive.

The CCA failed to conduct an analysis that looked beyond particulars about the crime and the State's future dangerousness presentation found in the trial record. App003-006. However, that error will not likely be corrected in federal habeas because of fundamental, recurrent errors in the Fifth Circuit's Sixth Amendment jurisprudence along these same lines. Repeatedly, Fifth Circuit panels have rejected IAC claims, despite significant new evidence adduced in a habeas proceeding, by merely pointing to the state's "future dangerousness" evidence at trial and/or the aggravated nature of the crime itself. *See, e.g.*, *Santellan v. Cockrell*, 271 F.3d 190, 198 (5th Cir. 2001) (concluding, in light of defendant's perceived dangerousness and the "horrific nature" of the offense, there was "no substantial likelihood that the outcome of the punishment phase would have been altered by evidence that [the defendant] suffered organic brain damage"); *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002) (insisting significant mitigating evidence adduced in post-conviction is irrelevant when evidence of future dangerousness is "overwhelming"); *Vasquez v. Thaler*, 389 Fed. App'x 419, 429 (5th Cir. 2010) (finding no prejudice where trial counsel failed to develop and present evidence of PTSD, FAS, and a borderline IQ given "overwhelming evidence of guilt" and the "brutality" of the offense); *Clark v. Thaler*, 673 F.3d 410, 421-25 (5th Cir. 2012) (finding aggravating evidence was

overwhelming, making it "virtually impossible to establish prejudice," even when substantial evidence of childhood abuse and trauma was amassed in post-conviction).

The CCA, the Fifth Circuit, and other courts[11] have failed to appreciate what is implicit in this Court's core death-penalty IAC jurisprudence: that even an exceptionally aggravated crime does not preclude a finding that a habeas applicant was prejudiced by ineffective counsel. The facts of *Williams* are illuminating. Williams had been sentenced to death after being convicted of killing his victim with a mattock when the victim refused to lend Williams a few dollars. In addition to the senseless and violent nature of the crime, at trial the State had presented considerable evidence of extraneous offenses—such as Williams having "brutally assaulted" an elderly woman and leaving her in a vegetative state, stolen cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail while awaiting trial for capital murder, and confessed to strong urges to choke other inmates and to break a fellow prisoner's jaw. *Id.* at 368, 418. But this Court found that the IAC claim merited relief *despite* the highly aggravated crime and the "simply overwhelming" evidence of future dangerousness. *Id.* at 374. *See also Wiggins*, 539 U.S. 510 (granting

[11] Courts in some jurisdictions have understood that an aggravated crime does not foreclose a prejudice finding (or permit short-circuiting the analysis). *See, e.g.*, *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003) (granting IAC relief to petitioner who had sexually assaulted a nineteen-year-old, beaten her to death with a piece of wood with nails sticking out of it, then left her half-naked in an abandoned building); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (granting IAC relief to petitioner who had beaten his pregnant girlfriend to death in front of their one-year-old daughter, rupturing the fetus's liver and causing severe injuries to its head and chest in utero). Other jurisdictions have been inconsistent. *Compare Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (granting IAC relief to petitioner who had kidnapped, raped, tortured, and mutilated two victims and left human remains in a trash can) *to Apelt v. Ryan*, 878 F.3d 800 (9th Cir. 2017) (holding state court's no-prejudice finding reasonable because murder of petitioner's wife was premeditated thus new mitigating evidence of childhood trauma was not relevant). This discrepancy among the Circuits is another indication that this Court's guidance is needed to explain that the state's future-dangerousness evidence and/or a highly aggravated crime is not dispositive of the IAC inquiry.

IAC relief to petitioner where crime involved 77-year-old woman found drowned in her bathtub, missing her underwear, and sprayed with insecticide); *Rompilla*, 545 U.S. at 391 (granting IAC relief after finding "beyond any doubt that counsel's lapse was prejudicial" although crime victim had been stabbed 16 times, beaten with a blunt object, gashed in the face with beer bottle shards, and set on fire); *Sears v. Upton*, 561 U.S. 945 (2010) (summarily reversing a no-prejudice finding in case where defendant had kidnapped, raped, and murdered 59-year-old victim after punching her in the face with brass knuckles and handcuffing her to the backseat of a car).

This Court's help is needed to clarify that, even when the State's case in aggravation withstood defense counsel's adversarial testing (not the circumstance presented here), that circumstance does not justify short-circuiting the IAC analysis.

2. This Court needs to clarify that a Strickland analysis must be nuanced and context-specific.

In a habeas proceeding, the court is supposed to decide whether different evidence would have produced a different result by asking what a reasonable jury would likely have done with that evidence before it. That assessment has to account for how jurors are actually instructed to reach a verdict in a particular case in accordance with a particular jurisdiction's law.

For instance, in Texas, juries in capital-sentencing trials are *not* asked to weigh aggravating factors against mitigating factors as they are in other jurisdictions. Instead, jurors, after convicting the defendant of a capital crime and then sitting through a separate punishment-phase trial, are, in every Texas death-penalty case, required to respond to two stand-alone "special issues."

The first special issue requires that the jury answer: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]" TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1) (the "future dangerousness" special issue). The State bears the burden of obtaining an affirmative answer to this special issue "beyond a reasonable doubt." *Id.*, sec. 2(c). Because proving this special issue is part of the State's burden, in principle, the special issue is supposed to narrow who among those convicted of capital murder will be sentenced to death.

Only if the jury unanimously answers the future dangerousness special issue affirmatively does the jury then consider the issue of mitigation. The second special issue requires jurors to decide whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CODE CRIM. PROC. art. 37.071, sec. 2(e). As long as one juror answers this question affirmatively, the defendant is sentenced to life-without-the-possibility-of-parole. *Id.* sec. 2(g).

One thing is plain about the Texas capital-sentencing scheme: it requires that the two special issues be addressed in a set sequence and as *separate* considerations. Jurors are *not* instructed to decide whether the mitigation "outweighs" the aggravating evidence before answering the mitigation special issue affirmatively. By contrast, most "weighing" states *do* require that process. For instance, *Wiggins*, which arose in Maryland, and *Strickland*, which arose in Florida, both required sentencing juries to do just that. Thus, the "weighing" language found in *Strickland* and *Wiggins*

was appropriate, as it accounted for the state-specific sentencing schemes at issue in each case. But the more fundamental holding is that the prejudice analysis for any IAC claim should turn on how the *new* evidence may have affected the jury's verdict. For instance, in Wiggins' case, as with all against whom the state seeks death in Texas, juror unanimity was required; therefore, this Court noted that prejudice was established by "a reasonable probability that at least one juror would have struck a different balance" in light of the new mitigating evidence because "balancing" and "weighing" is what Kevin Wiggins' jury was asked to do. *Id.* at 537. In short, this Court has suggested, but not plainly held, that a prejudice analysis for a *Wiggins* claim must account for how the law in the given jurisdiction governs the precise sentencing determination.[12]

In the past, both the CCA[13] and the Fifth Circuit[14] recognized that Texas jurors are not asked to weigh aggravating against mitigating evidence in death-penalty cases. But the understanding of how jurors are charged with reaching a verdict has gotten lost in applying *Strickland* to *Wiggins* claims in both the CCA, as Andrus's case demonstrates, and in the Fifth Circuit: *see, e.g.*, *Busby v. Davis*, 892 F. 3d 735,

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[12] Arguably, the *Strickland* approach, which invites appellate courts to speculate about how new evidence may or may not have affected jurors' sentencing calculus, is in tension with this Court's holdings in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. (2016).

[13] *See Ex parte Gonzales*, 204 S.W.3d 391, 393-94 (Tex. Crim. App. 2006) ("capital sentencing scheme . . . does not involve the direct balancing of aggravating and mitigating circumstances. Rather, the Texas statute asks the jury to answer a [distinct] mitigation issue."). "The issue of future dangerousness is [supposed to be] completely independent of the [mitigation] special issue[.]" *Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996).

[14] *Hughes v. Johnson*, 191 F.3d 607, 623 (5th Cir. 1999) ("Texas is a 'non-weighing state' in that its capital-sentencing scheme does not direct the jury to "weigh" aggravating factors against mitigating ones.").

761 (5th Cir. 2018) (finding that mitigation evidence "did not outweigh the State's aggravation evidence …. therefore [he was] not prejudiced by his trial counsel's allegedly deficient mitigation investigation, and his IATC claim fails.").

The CCA disposed of Andrus's *Wiggins* claim by referring back to the State's case in aggravation at trial, suggesting that ended the inquiry. That process meant indulging in an exercise that the jurors themselves were not supposed to have done. Jurors, under current Texas law, are free to extend mercy even in highly aggravated cases and even where the State's "future dangerousness" evidence is overwhelming.

That significant mitigating evidence may change at least one juror's answer to specific jury instructions, even in cases involving highly aggravated crimes, is borne out by experience. The worst crimes do not invariably yield death sentences when trial lawyers find and present persuasive mitigating evidence. For instance, a Texas jury in Dallas County recently deadlocked on whether to sentence Erbie Bowser to death after convicting him of a violent rampage that unfolded at multiple crime scenes, left four women dead, and four children seriously injured.[15] Similarly, a Nueces County jury elected to sentence Arturo Garza to life for beating his pregnant girlfriend to death over the course of hours—because of the strength of the mitigating evidence presented by effective trial counsel.[16] More widely known is the life verdict obtained for James Holmes, responsible for the Aurora, Colorado, movie theater

[15] T. Tsiaperas, *Jurors deadlocked on death penalty*, DALLAS MORNING NEWS (May 12, 2017).

[16] E. Dearman, *Arturo Garza sentenced to life in prison without parole*, CORPUS CHRISTI CALLER TIMES (March 14, 2019).

massacre that killed twelve and injured seventy others. His life was spared because at least one juror was moved by the mitigating mental health evidence.[17] These results are attributable to the effective representation that these defendants received pursuant to prevailing professional norms, which Andrus's trial counsel did not seem to know exist. *See, e.g.*, App156 (trial counsel referring to client's mental health records as "a lot of psychological gobbledygook.").

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This Court should grant this petition to mend the plague of inadequate IAC analyses in death-penalty cases by revisiting *Strickland* and reinvigorating the Sixth Amendment. Although this Court tried to rectify some of the problem in *Williams/Wiggins/Rompilla*, courts plainly need more specific guidance about their obligation to conduct a nuanced, case-specific, comparative analysis that accounts for the new evidence adduced in the habeas proceeding, examines the deficient performance cumulatively in light of professional norms at the time of trial, resists facile shortcuts, and assesses the fundamental fairness of the trial holistically.

This Court spent decades trying to ensure enforcement of the basic right to have mitigating evidence put before juries in Texas death-penalty cases and for those juries then to have some legitimate means to give effect to that evidence. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) (finding Texas's death-penalty sentencing scheme, which failed to give jurors a vehicle to consider or give effect to mitigating evidence, unconstitutional). After *Penry I,* the resistance in both state and federal

[17] N. Phillips & J. Steffen, *Juror Says One Said No to Death*, DENVER POST (Aug. 8, 2015).

courts in Texas was so entrenched that this Court granted certiorari in an unprecedented number of cases, all involving death sentences imposed in Texas, simply to try to force compliance with the same constitutional mandate.[18] Andrus's case illustrates that the long-standing resistance to the unique role mitigation plays in death-penalty cases is still operative.

Under prevailing professional norms at the time of Kevin Wiggins' trial (1989), an attorney defending a client in a death-penalty case had a duty to "discover *all* reasonably available mitigating evidence and evidence to rebut *any* aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (emphasis added). When Andrus went to trial in 2012, those professional norms had not been abandoned. That such norms could be so dishonored and yet not warrant habeas relief shows that something remains quite rotten in the state harboring this

[18] *See Penry v. Johnson*, 532 U.S. 782, 797 (2001) *(Penry II*) (finding, in Johnny Paul Penry's second trip to the Supreme Court, that requiring jurors to answer the special issues dishonestly to give effect to Penry's mitigation had "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation" and again insisting that constitutional error occurs whenever a sentencer is precluded from giving "full consideration and full effect to mitigating circumstances.'"); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (emphasizing the "low threshold for relevance" generally and the even broader standard that must apply to mitigating evidence in the punishment phase of a capital case and holding that sentencer must be able to consider *any* evidence that might serve as a basis for a sentence less than death, regardless of whether the defendant was able to establish a nexus between the mitigating evidence and the commission of the crime); *Smith v. Texas*, 543 U.S. 37, 46 (2004) (reminding the CCA that *Penry II* had "identified a broad and intractable problem" that the CCA had "ignored" that was "inherent" in the Texas capital verdict form, which did not allow Texas jurors in capital cases a means to give full and fair consideration and effect to whatever mitigating evidence had been presented to them); *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004) (vacating denial of Certificate of Appealability in light of *Tennard* and remanding for further proceedings), *rev'g denial of relief after remand sub nom. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (finding that Texas was still not allowing for sentencing procedures required by *Penry I*); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (chiding the CCA for a holding that "again" "was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'"); *Smith v. Texas*, 127 S. Ct. 1686, 1698 (2007) (*Smith II*) (reversing the CCA again on finding it had "misunderstood the interplay of *Penry I* and *Penry II*, and it mistook which of Smith's claims furnished the basis for this Court's opinion in *Smith I*.").

nation's most prodigious executioner.[19] In short, if *Strickland* supports denying IAC claims under the circumstances presented here, then *Strickland* is plainly untenable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, this Could should summarily vacate the judgment below and remand for an analysis of Andrus's *Wiggins* claim in light of *Wiggins*.

Respectfully submitted,

/s/ Gretchen Sims Sween
Gretchen Sims Sween,
Counsel of Record
P.O. Box 5083
Austin, Texas 78763-5083
TEL: (214) 557.5779
gsweenlaw@gmail.com

Counsel for Petitioner

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[19] *See* Death Penalty Information Center, demonstrating that Texas has executed far more than most other jurisdictions combined: 561 people (as of June 2019), with Virginia a distant second at 113. *Available at* https://deathpenaltyinfo.org/number-executions-state-and-region-1976.