No. _____

(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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case

This case returns to this Court after the remand ordered in *Andrus v. Texas*, 140 S.Ct. 1875 (2020) (per curiam).

In *Andrus*, this Court determined that the "untapped body of mitigating evidence" amassed during the state habeas proceeding was "simply vast" and that counsel's failure to investigate and present this evidence at the sentencing stage of his death penalty trial, as well as other failures, established trial counsel's deficient performance. The Court remanded to the Texas Court of Criminal Appeals (CCA) to consider whether Andrus had been prejudiced by this deficient performance.

Explicitly disagreeing with this Court about critical evidence, the CCA, in a closely divided 5-4 decision, concluded that Andrus was not prejudiced.

The Questions Presented are:

I. On remand, did the Texas court reject this Court's conclusions in *Andrus v. Texas*, 140 S.Ct. 1875 (2020), which were amply supported by the habeas and trial records, and did the Texas court disregard this Court's express guidance for conducting a prejudice analysis pursuant to *Strickland v. Washington*, 466 U.S. 688 (1984)?

II. Does the Texas court's failure to adhere to this Court's decision conflict with our constitutional system of vertical stare decisis and create widespread confusion regarding the proper legal standard that courts must use in assessing whether the Sixth Amendment right to effective assistance of counsel is violated in death-penalty cases?

PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

LIST OF RELATED PROCEEDINGS

(chronological order)

- *State of Texas v. Terence Tramaine Andrus*, No. 09-DCR-51034 in the 240th District Court, Fort Bend County, Texas (2012) (trial)
- *Andrus v. State*, No. AP-76,936, 2016 Tex. Crim. App. Unpub. LEXIS 1158 (Tex. Crim. App. Mar. 23, 2016) (not designated for publication) (direct appeal, affirming)
- *Ex parte Terence Andrus*, No. 09-DCR-051034-HC1 (Sept. 8, 2017) (initial state habeas proceeding in the trial court, recommending habeas relief)
- *Ex parte Terence Andrus*, No. WR-84,438-01, 2019 Tex. Crim. App. Unpub. LEXIS 81 (Tex. Crim. App. Feb. 13, 2019) (initial state habeas proceeding on appeal, rejecting trial court's recommendation and denying habeas relief)
- *Andrus v. Director, TDCJ-CID*, No. H-19-CV-717 (United States District Court for the Southern District of Texas) (federal habeas proceeding, stayed)
- *Andrus v. Texas*, 140 S.Ct. 1875 (2020) (per curiam) (certiorari from initial state habeas proceeding, granting petition, vacating judgment, and remanding to Court of Criminal Appeals)
- *Ex parte Terence Tramaine Andrus*, 622 S.W.3d 892 (Tex. Crim. App. May 19, 2021) (opinion on remand from grant of certiorari, denying habeas relief)

NOTE ABOUT CITATIONS

"RR" citations refer to the Reporter's Record for Andrus's trial and "EHRR" refers to the Reporter's Record for Andrus's state habeas evidentiary hearing. The first number before the abbreviation refers to the volume number; the number afterward is the page number or range within the volume. "SX" refers to an exhibit offered by the State in the habeas proceeding or at trial, and "DX" refers to an exhibit offered by Andrus in the habeas proceeding. This Court asked for and obtained the

trial and habeas records directly from the CCA when Andrus's previous petition was pending.

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In remanding for a *Strickland* prejudice assessment, this Court highlighted the "vast tranches of mitigating evidence" that counsel had failed to investigate and directed the CCA to conduct the "weighty and record-intensive analysis" that this Court's precedents require. *Andrus v. Texas*, 140 S.Ct. 1875, 1881, 1887 (2020) (per curiam). This Court cautioned that a proper prejudice assessment could not focus solely on the State's aggravating evidence at trial, could not ignore how trial counsel's deficient performance had shaped the trial record, and could not minimize the evidence adduced in the habeas proceeding that rebutted the State's punishment case and transformed the available mitigating evidence. *See id.* at 1887 & n.7. Yet that is what transpired below.

Although this Court explicitly described the mitigating evidence adduced for the first time in Andrus's state habeas proceeding as "compelling," *id* at 1881, the CCA on remand unabashedly declared that same evidence "not particularly compelling." App002. In justifying its no-prejudice determination, the CCA on remand repeatedly and directly refused to heed this Court's determination that the trial record had been distorted by counsel's deficient performance, rejected this Court's assessment of the relevant evidence, and ignored the abundant new mitigating evidence in the habeas record.

Comparing this Court's previous opinion in this case (AppB) and the CCA's opinion on remand (AppA) gives rise to two distinct concerns: (1) Did the CCA fail to evaluate the effect of counsel's abysmal performance on the trial record, reject this Court's assessment of the nature of the habeas record, and impermissibly dismiss

extensive new mitigating evidence?; and (2) Is the lower court's decision permissible in our constitutional system where all courts, state and federal, must accede to the authority of this Court? As Chief Justice Roberts recently noted in terms applicable here: "It is easy to see that the Texas Court of Criminal Appeals misapplied [this Court's previous decision in the same case]. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Moore v. Texas*, 139 S.Ct. 666, 672 (2019) (Roberts, C.J., concurring). Only this Court can remedy this conspicuous failure.

To prevent a miscarriage of justice, widespread confusion about how to undertake a *Strickland* prejudice assessment, and a defiant rejection of this Court's authority, Andrus respectfully asks that the Court grant the petition for writ of certiorari, vacate the CCA's decision below, summarily reverse, and order a new punishment trial in light of the ineffective assistance of counsel he received.

OPINIONS BELOW

The CCA's published opinion on remand, *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021), is in Appendix A. The CCA's unpublished prior opinion is in Appendix C. The habeas judge's unpublished findings of fact and conclusions of law, recommending habeas relief, are in Appendix D.

STATEMENT OF JURISDICTION

The CCA entered its judgment on May 19, 2021. At that time, this Court's Miscellaneous Order of March 19, 2020 was still in effect, extending the deadline to file this petition for a writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 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." U.S. Const. amend. VI. The Fourteenth Amendment provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. The state habeas statute in death-penalty cases, Texas Code of Criminal Procedure, article 11.071, is reproduced in Appendix H.

STATEMENT OF THE CASE

This Court is already familiar with the representation that appointed counsel, Sidney Crowley, provided to Terence Andrus from the time he was indicted for causing the deaths of two individuals during a shooting outside a grocery store in Fort Bend County, Texas in 2008, up through his death-penalty trial in 2012. *See Andrus v. Texas*, 140 S.Ct. 1875 (2020) (per curiam) (AppB).

A. State Habeas Proceeding

1. Before the State Trial Court

Andrus's state habeas application included multiple ineffective-assistance-of-counsel claims. The first was based on trial counsel's failure to investigate and present readily available mitigating evidence. Per Texas statutory law, the state habeas trial court determined that an evidentiary hearing was warranted. The subsequent eight-day presentation of evidence revealed extensive mitigating evidence that Crowley had failed to investigate, develop, or put before the jury.[1]

[1] The facts below were discussed in this Court's previous opinion and in the trial court's findings. *See* AppB & AppD.

Crowley testified at the hearing. He was asked about records showing that his client had a history of unresolved mental illness, dating back to at least age eleven, which had not been presented to the jury. Crowley dismissed those records as "a lot of psychological gobbledygook." 3EHRR235. Crowley acknowledged ignoring explicit references to psychotropic medications and hallucinations in various records in his possession. Crowley admitted that he had not asked why his client was put in a padded cell in jail while awaiting trial, including a 62-day stretch that ended just before voir dire began. Crowley also testified that he had not investigated why jail personnel had prescribed Andrus antipsychotic medications.

Crowley further conceded that he did not investigate any aspect of his client's short life. Even though Crowley put Andrus's mother on the stand as one of his few punishment-phase witnesses, Crowley admitted that he had not met with her before trial or considered the significance of her reluctance to testify. Nor did Crowley investigate why Andrus had started using drugs as a child, how he had access to those drugs, why his drug use escalated after he left the custody of the now-defunct Texas Youth Commission (TYC), or the nature of the neighborhoods in which Andrus had grown up. Crowley admitted that he had not conducted any independent investigation into the circumstances that led to Andrus being placed in TYC custody as a teenager and had not consulted with any expert about TYC or its records, which showed that, instead of helping Andrus, it had placed him in solitary confinement

and dispensed a shifting array of psychotropic medications without corresponding diagnoses.[2]

The habeas proceeding, which resulted in a 41-volume record, adduced abundant mitigating evidence about Andrus's life history, which Crowley had not investigated and thus had not put before the jury. Andrus's childhood was replete with the kind of traumatic experiences that have long been recognized to adversely affect development: parental substance abuse and drug-dealing, the incarceration of caregivers, domestic violence, exposure to homicides, a single-parent household mired in poverty, his and family members' untreated mental illness, and severe emotional neglect from a mother who started having children when she herself was still a child. The specific evidence not presented at trial includes the following:[3]

- Andrus was part of the third generation of his family to live in Houston's Third Ward, a poverty-stricken, crime-ravaged neighborhood.
- Andrus's unwed, teenage mother's solution to providing for her children was drug-dealing and prostitution—among the only options for earning money then available in Third Ward.
- The five biological fathers of Andrus and his four siblings all had extensive criminal histories. Several brought rampant violence into Andrus's home. The father of Andrus's closest sister raped her when she was a young child, resulting in her removal from the home.
- Andrus lost the one father figure he briefly had—a young drug dealer known in the neighborhood as the "Cookie Monster." This man, years younger than Andrus's mother, got her kids Christmas presents and tried to protect them

[2] Because he had done no investigation, Crowley conducted no meaningful cross-examination related to TYC—or any other punishment-phase issue. The habeas proceeding established that he had been told, pre-trial, about heavily publicized scandals concerning abysmal treatment at TYC and had been given the name of the Ombudsman who had investigated TYC's massive failures. But Crowley took no action to investigate, let alone to present facts about, TYC, during Andrus's trial. 3EHRR119; 4EHRR30-33.

[3] This evidence is in Volumes 4-7 and 13-41 of the EHRR, which this Court previously reviewed.

from their mother's beatings. But he was the victim of a drive-by shooting and bled out in the streets. Thereafter, Andrus started getting into trouble in school. In eighth grade, he was caught with his mother's Xanax and punitively transferred to an alternative school instead of getting counseling or intervention at home.

- During Andrus's mother's extended absences, Andrus took on the parent role towards his siblings, including his older brother with special needs. But Andrus was too young to know what he was doing, further burdening his ability to develop skills for coping with chaotic circumstances.

- When Andrus was a teen, his mother moved the family into gang-infested housing where male "leaders" exploited vulnerable teens like Andrus. A robbery in which Andrus participated as a lookout resulted in his incarceration in juvenile detention, records of which established detention officers' concerns about his well-being and his family's failure to visit.

- While in TYC, he spent much of his time isolated in a dark, filthy cell medicated with psychotropic drugs. Andrus's extended stays in solitary confinement were generally a response to his engaging in self-mutilation, expressing suicidal feelings or panic about the siblings he had left behind, trying to get away from violence in the dorms, and committing adolescent infractions, such as eating a cookie in class or cursing at staff. Instead of treating his mental illness, TYC made his illness worse.

- After spending his last *90 days* in TYC entirely in solitary confinement, Andrus, then eighteen, was punitively transferred to the adult prison system for about a month based on his purported failure to rehabilitate. The decision rested solely on a file review by an official who had never met Andrus; that file consisted of unverified disciplinary write-ups that had been issued by untrained staff and did not account for what the TYC Ombudsman described as rampant "violence in the units" with a "brutal pecking order" and "a Lord of the Flies" environment where TYC provided no mental-health treatment or meaningful rehabilitation programs of any kind.

- At eighteen, Andrus was released from prison into the free world where he had little support for turning his life around. He strove to find gainful employment, but because TYC's transfer decision had branded him as a felon with an adult record, his efforts to find and retain legitimate employment repeatedly failed. Meanwhile, his older brother was shot and seriously wounded by gang members. Andrus became severely depressed, self-medicating with street drugs. That was his condition, at age 20, when the capital offense occurred.

- While in jail awaiting trial, Andrus became emotionally unhinged and suicidal. He was punished for his mental illness and instability with extended stays in a padded cell without any investigation by his lawyer.

- At trial, his counsel did not introduce or develop the extensive evidence of Andrus's remorse for the capital crime and his cooperation with law enforcement.

- At trial, his lawyer did nothing while State's counsel repeatedly referred to Andrus as a "sociopath." During the habeas proceeding, a clinical psychologist who had previously worked for TYC and had extensive experience assessing childhood trauma, explained that Andrus did not have the characteristics of a "sociopath," a pejorative lay term that suggests psychopathy. Instead, Andrus had an extensive history of childhood trauma, numerous symptoms of posttraumatic stress disorder, likely a complex, unaddressed bipolar disorder, and drug addiction—the latter being a common response to untreated trauma.

The habeas judge described this body of evidence as a "tidal wave of information that has come through here with regard to mitigation." 7EHRR101. After considering that "tidal wave" of evidence, the habeas judge found that Andrus had proven an ineffectiveness claim under *Wiggins v. Smith*, 539 U.S. 510 (2003) and recommended habeas relief in the form of a new punishment trial. *See* AppD.

2. The CCA's First Decision

A year and a half later, the CCA issued a short, unpublished *per curiam* opinion, rejecting the habeas judge's recommendation without discussing any of his findings. AppC. The CCA did not explain why the habeas judge's findings did not merit the deference that, under the CCA's own case law, such fact-finding is supposed to be afforded.[4] The only evidence mentioned in the CCA's opinion is from the trial

[4] *See, e.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008) (finding trial court in capital habeas proceedings "[u]niquely situated to observe the demeanor of witnesses first-hand," and thus "is in the best position to assess the credibility of witnesses"; therefore, "in most circumstances, [the CCA] will defer to and accept a trial judge's findings of fact and conclusions of law"; and "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").

record, which did not include the evidence summarized above. The only legal explanation was a one-sentence recitation of the *Strickland* standard. App029.

Four CCA judges joined a concurrence. The concurring judges focused on the aggravating evidence the State had presented at trial—evidence that trial counsel Crowley had admitted he did not investigate or contest. They also suggested that Andrus's case was not factually analogous to *Wiggins v. Smith*. The concurrence's assessment of the habeas record hinged on a letter that Crowley had received from Dr. Brown, a psychologist whom Crowley had briefly retained but who did not testify at trial. The concurrence incorrectly surmised that Dr. Brown's "report" was mitigating evidence upon which Andrus had relied in seeking habeas relief. App030 n.1. In reality, Andrus had argued that Dr. Brown's woefully inadequate and likely unethical assessment was yet more evidence of Crowley's deficient performance. Neither the concurrence nor the majority opinion discussed any of the vast mitigating evidence upon which Andrus had actually relied in seeking habeas relief. *See* AppC.

3. This Court's Reversal

Andrus filed a petition for writ of certiorari on June 12, 2019, asking this Court to review the CCA's decision rejecting his ineffectiveness claim. On June 15, 2020, this Court issued a *per curiam* decision, granting the petition and vacating the CCA's judgment. This Court made numerous determinations that Andrus's trial counsel had performed deficiently, *e.g.*:

- "First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence."

- "Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case."
- "Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation."

Andrus, 140 S.Ct. at 1881-82. This Court described with specificity counsel's abject failure to investigate readily available and "abundant," "vast," "compelling," "powerful," "myriad," "voluminous," and previously "untapped" mitigating evidence. *Id.* at 1878, 1881, 1882, 1883, 1886 (citation omitted).

This Court then remanded the case because it was "unclear whether" the CCA had "considered *Strickland* prejudice at all." *Andrus*, 140 S.Ct. at 1886. This Court emphasized the CCA's failure to "engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." *Id.* This Court directed the CCA to undertake the "weighty and record-intensive analysis" that *Strickland* requires. *Id.* at 1887. This Court thoroughly described "the correct legal principles" that govern the *Strickland* prejudice inquiry in the capital-sentencing context. *Id.*

4. The CCA's Decision on Remand

On remand, the CCA granted Andrus's unopposed request to brief the prejudice issue. *See* AppE-G. Thereafter, without hearing oral argument, the CCA issued a 5-4 opinion finding that Andrus had failed to show *Strickland* prejudice. In doing so, the CCA ignored this Court's assessment that "'the scope of [trial] counsel's [mitigation] investigation' approached nonexistent." *Andrus*, 140 S.Ct. at 1883 (alterations in original) (quoting *Wiggins*, 539 U.S. at 528). Instead of engaging with the mitigating evidence that this Court had described as "compelling," *id.* at 1881,

the CCA dismissed it as "not particularly compelling." App002. The CCA almost exclusively relied on the State's case-in-aggravation from the punishment phase ***of trial***—while again ignoring trial counsel's postconviction admissions that he had not investigated any aspect of the State's case. The CCA also conspicuously ignored this Court's determination that trial counsel's failure "to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so," meant that he missed multiple opportunities to "rebut critical aggravating evidence." *Andrus*, 140 S.Ct. at 1884.

Four dissenters objected that the CCA majority had failed to apply the proper prejudice standard, echoing language this Court had used in this very case: "all an Applicant must show to establish that he was prejudiced by trial counsel's deficient performance is a showing that there is a reasonable probability that at least one juror would have struck a different balance between the aggravating and mitigating evidence and voted to spare Applicant's life." App011. The dissenters recognized that, "[b]ased upon the Supreme Court's characterization of the mitigation evidence in this case," Andrus had met that standard. *Id.* Most fundamentally, the CCA dissenters understood that, "[w]hatever else can be said of the Supreme Court's opinion, its characterization of the mitigation evidence that [Andrus's] trial attorney failed to uncover was integral to the determination that [Andrus's] attorney's representation fell below prevailing professional norms." *Id.* The dissenters emphasized that the CCA "is not free to 're-characterize' [mitigating] evidence contrary to the United

States Supreme Court's holding"; the CCA is "bound by the United States Supreme Court's characterization." App011.

REASONS TO GRANT THE WRIT

I. The CCA Found No Prejudice Only By Erroneously Dismissing The Habeas Record, This Court's Specific Determinations Based On That Record, And This Court's Precedents.

The CCA's 5-4 opinion rests on multiple fundamental errors, any one of which warrants summary reversal:

- The CCA relied primarily on ***the trial record*** without acknowledging, much less considering, this Court's determinations regarding the impact of counsel's deficient performance on the trial record, as established in the habeas proceeding.
- The CCA discounted extensive mitigating evidence, dismissing as "weak" what this Court described as "abundant," "vast," "compelling," "powerful," "myriad," "voluminous," and previously "untapped."
- The CCA relied on harmful, unfounded stereotypes about mental illness and childhood trauma contrary to settled principles about mitigation.
- The CCA ignored this Court's specific guidance for assessing *Strickland* prejudice in this very case.

Because the CCA's decision resolved an important question of federal constitutional law in conflict with decisions of this Court—including, most prominently, the Court's decision in this very case—this Court should summarily reverse and hold that Andrus's right to the effective assistance of counsel during his death-penalty trial was violated.

A. The CCA failed to acknowledge, much less consider, this Court's determinations regarding the impact of counsel's deficient performance on the trial record.

A *Strickland* prejudice inquiry "'necessarily require[s] a court to 'speculate' as to ***the effect of the new evidence' on the trial evidence***, 'regardless of how much

or little mitigation evidence was presented during the initial penalty phase.'" *Andrus*, 140 S.Ct. at 1887 (emphasis added) (quoting *Sears v. Upton*, 561 U.S. 945, 956 (2010) (*per curiam*) (emphasis added)); *see also Strickland v. Washington*, 466 U.S at 688, 695-96 (1984) (instructing courts to take "due account of the effect of" counsel's deficient performance on the trial in making the prejudice inquiry). The CCA's opinion does not even acknowledge that trial counsel's deficient performance included presenting evidence that "unwittingly aided the State's case-in-aggravation" and foregoing any opportunity to "rebut critical aggravating evidence." *Andrus*, 140 S.Ct. at 1883-84. Instead of adhering to this Court's directives, the CCA circled back repeatedly to the trial record, never once considering the distortions trial counsel's deficient performance had produced. This failure to account for counsel's deficiency when weighing the old evidence cannot be reconciled with a proper *Strickland* prejudice analysis and this Court's explicit guidance.

The CCA devoted considerable space to recounting the State's punishment-phase case at trial, grounding its analysis in evidence that this Court had concluded, based on the habeas record and in accordance with *Strickland*, could have been attacked. In doing so, the CCA mischaracterized *this Court's* assessment of Andrus's record:

> As a juvenile he committed the offense of drug possession in a drug-free zone. The jury also heard about his aggravated robbery of a woman at her parents' house and the commission of a robbery at a dry-cleaning establishment. ***The Supreme Court discounted these crimes, but we do not[.]***

App007 (emphasis added). Contrary to the CCA's characterization, this Court thoroughly assessed the State's punishment case, but did so in light of new evidence

related to these crimes that Crowley had failed to uncover. The CCA was required to do the same.

The CCA bristled at this Court's determination that Andrus's role in the juvenile offense that had led to his confinement in TYC could have been challenged at trial. Yet, as this Court recognized, the original police report showed that he had not pulled a gun on anyone, as the CCA claimed, but had "served as a lookout while his friends robbed a woman." *Andrus*, 140 S.Ct. at 1877. The CCA attempted to bolster its rejection of this Court's analysis by recourse to the very trial testimony (from the crime victim and an investigating officer) that had been undermined in the habeas proceeding by demonstrating Crowley's failure to impeach these witnesses with prior inconsistent statements. *See* AppA at n.98, n.99, n.101, n.102–n.105.

Next, the CCA rested its decision on trial evidence related to Andrus's time at the TYC by rejecting the principle that this evidence not only could have been, but as this Court found, *was* tainted by counsel's deficient performance. At trial, the State leaned heavily on the contention that Andrus had resisted TYC's "benevolent" attempts to rehabilitate him. In its punishment-phase closing, State's counsel had argued, falsely, that a TYC official, who had never met Andrus, had somehow played a personal role in Andrus's case and "crafted a tailormade program" that Andrus had simply "rejected." After extolling TYC's virtues, the prosecution had asked the jury: "What mitigating evidence is there that could outweigh what we've already spoken up [sic] here? I submit to you there is nothing." 52RR31. Instead of challenging any aspect of the State's punishment case, Andrus's trial counsel *conceded* that the State

had proven that his client would be a future danger and, in doing so, specifically referred to the State's unrebutted TYC testimony. As *this Court* put it, "counsel left all of that aggravating evidence untouched at trial—even going so far as to inform the jury that the evidence made it 'probabl[e]' that Andrus was 'a violent kind of guy.'" *Andrus*, 140 S.Ct. at 1884 (alteration in original) (emphasis added).

This Court recognized that the habeas proceeding had exposed the misleading portrait of TYC that could have been attacked by competent counsel. *See Andrus*, 140 S.Ct. at 1884; *see also* 5EHRR121-122, 143-147, 152, 158, 200 (TYC Ombudsman testifying in habeas proceeding that the only rehabilitation/treatment at TYC when Andrus was in its custody was the "resocialization program," which was not, as the State claimed, "tailormade" for anyone but was a one-size-fits-all program; that the person who developed that program "was fired shortly after the conservator was appointed by Governor Perry"; and that the failed program was scrapped soon after Andrus's release).

This Court, by applying *Strickland*, recognized that the habeas testimony about Andrus's experiences in Texas's juvenile system would have cast his juvenile record in an entirely different light: "it was 'surpris[ing] how few' citations Andrus had received, 'particularly in the dorms where [Andrus] was' housed" there was "'nothing uncommon' about Andrus' altercations because 'sometimes you . . . have to fight to get by' in the 'violent atmosphere' and 'savage environment;'" and "Andrus' isolation periods in TYC custody, for 90 days at a time when Andrus was 16 or 17

years old, 'would horrify most current professionals in our justice field today.'" *Andrus*, 140 S.Ct. at 1884 n.2 (citations to habeas record omitted).

The CCA dismissed the evidence amassed in the habeas proceeding that demonstrated how TYC had failed Andrus, suggesting that that evidence would either have been inadmissible or outweighed by Andrus's TYC disciplinary record—even though the misimpression created by that disciplinary record was a central theme developed and substantiated in the habeas proceeding. Indeed, the CCA expressly *rejected* this Court's conclusion with respect to that very issue:

> ***Although the Supreme Court described [Andrus's] infractions at TYC as "notably mild,"*** we conclude that a jury would have been convinced otherwise.

App007 (emphasis added) (quoting, with disapproval, *Andrus*, 140 S.Ct. at 1884); *but see Andrus*, 140 S.Ct. at 1884 ("Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe.").[5]

Likewise, the CCA rejected the TYC-related evidence that *this Court* had highlighted as compelling, relevant, and mitigating, *e.g.*,

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[5] In rejecting this Court's assessment of the TYC-related evidence, the CCA dismissed, without discussing, the testimony of the former TYC Ombudsman. The CCA mentioned him once in passing without identifying him by name or title. *See* App007. Instead of considering the TYC Ombudsman's expert testimony, the CCA cited a fragment of the habeas record when State's counsel read excerpts from Andrus's TYC write-ups into the record while the TYC Ombudsman was on the stand. In response to the decontextualized reading, the TYC Ombudsman did not "acknowledge" that the write-ups were reliable, as the CCA suggested, but simply referred back to his previous testimony about the violence that youth in TYC units had had to endure. 5EHRR204. More critically, the TYC Ombudsman, having reviewed hundreds of pages of records, explained that the vast majority of Andrus's disciplinary write-ups were for "disruption of program," which included "talking out of turn," "throwing a paperclip or shooting a rubber band or talking while standing in line or talking in the lunch room or eating -- once I saw he got a 225 for eating a cookie in class." 5EHRR174. Andrus was also written up for expressing suicidal thoughts, and placed in solitary confinement in response. *Id.*

- During Andrus's eighteen months in TYC, "he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized Andrus all but suicidal. Those suicidal urges resurfaced later in Andrus' adult life." *Andrus*, 140 S.Ct. at 1877;

- "Andrus' experience in the custody of the TYC left him badly traumatized." *Id.* at 1882;

- "[W]ith sufficient understanding of the violent environments Andrus inhabited his entire life," including his time in TYC custody, "counsel could have provided a counternarrative of Andrus' later episodes in prison." *Id.* at 1884.

Similarly, the CCA ignored the impact the habeas evidence would have had on the State's trial argument that Andrus was guilty of an extraneous offense perpetrated at a dry-cleaning business, a crime he consistently denied committing. The CCA's contorted analysis expressly rejected *this Court*'s assessment of trial counsel's failure to expose the unreliability of the evidence linking Andrus to that offense:

> ***The Supreme Court . . . questioned the reliability of the identification due in part to police testimony on habeas about the impact of a delay between a crime and an identification.*** But the testimony was that such a delay could impact reliability in a given case, not that it did so in the robbery at issue here.

App008 (emphasis added) (footnote omitted). The CCA did not accept that the rebuttal evidence amassed in the habeas proceeding would have undercut this aspect of the State's punishment case; instead, the CCA even dismissed concessions the State's witness, a detective, had made in the habeas proceeding on cross-examination about the unreliability of the underlying investigation. The CCA suggested that those admissions were meaningless because they emerged in response to "defense counsel's

questioning."[6] App008. Indeed, the CCA criticized this Court's assessment of the very same trial evidence *because* this Court had given weight to the adversarial testing undertaken for the first time in the habeas proceeding:

> ***Citing to and quoting from defense counsel's questioning in the habeas record, the Supreme Court also criticized the photo and its placement in the array for depicting Applicant as the only subject in the array who was looking 'directly up and out[.]'*** . . . [W]e do not judge the photo array to be unduly suggestive[.]

Id. (emphasis added). The CCA thus expressly rejected this Court's record-based analysis, as well as a core feature of the adversarial process. *See* 3 Wigmore, EVIDENCE § 1367, p. 27 (2d ed. 1923) (recognizing cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth").

This Court determined that this precise extraneous offense, which the State attributed to Andrus, could likely have been vigorously attacked (if not excluded outright):

> The State's case in aggravation also highlighted Andrus' alleged commission of a knifepoint robbery at a dry-cleaning business. At the time of the offense, "all [that] the crime victim . . . told the police . . . was that he had been the victim of an assault by a black man." Although Andrus stressed to counsel his innocence of the offense, and although the State had not proceeded with charges, Andrus' counsel did not attempt to exclude or rebut the State's evidence. That, too, is because Andrus' counsel concededly had not independently investigated the incident. In fact, at the habeas hearing, counsel did not even recall Andrus' denying responsibility for the offense. Had he looked, counsel would have discovered that the only evidence originally tying Andrus to the incident was a lone witness statement, later recanted by the witness, that led to the inclusion of Andrus' photograph in a belated photo array, which the police admitted gave rise to numerous reliability concerns. ***The dissent thus reinforces Andrus' claim of deficient performance by recounting and emphasizing the details of the***

[6] To clarify: it was the habeas applicant's counsel, not "defense counsel," questioning witnesses on Andrus's behalf in the habeas proceeding.

> ***dry-cleaning offense as if Andrus were undoubtedly the perpetrator. The very problem here is that the jury indeed heard that account, but not any of the significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.***

Andrus, 140 S.Ct. at 1885 (alterations in original) (emphasis added) (footnote and citations omitted). Ignoring this, the CCA engaged in the same analytical errors that this Court had rejected.

The governing law does not permit the CCA to salvage the State's punishment case by invoking a decidedly one-sided presentation (for instance, by treating a patently unreliable witness as a reliable police informant, even though the State, at trial, had *concealed* that witness's role in the highly suspect efforts to link Andrus to this offense); *a fortiori*, citations to portions of the trial record exposed as unreliable due to counsel's deficient performance do not support the assertion that the State's trial presentation was unassailable. *Compare Andrus*, 140 S.Ct. at 1884-85, *to* App007-008.

Similarly perplexing is the CCA's repeated recourse to Andrus's own trial testimony—*see* AppA at text accompanying n.73, n.76, n.77, n.79–n.81, n.124—without acknowledging *this Court's* determination that Andrus's trial testimony was distorted by his counsel's abject failure. Likewise, the CCA dismissed Andrus's "proposed new mitigating evidence" as "relatively weak" and insisted "that some of that sort of evidence—about his family and background—was presented at trial," citing as an example his mother's trial testimony "that he was very helpful in raising the other children and was in the position to help her the most." App006 & App010.

The CCA ignored this Court's recognition that, at trial, Andrus's mother had also falsely "insisted that Andrus 'didn't have access to' 'drugs or pills in [her] household,' and that she would have 'counsel[ed] him' had she found out that he was using drugs." *Andrus*, 140 S.Ct. at 1878 (alterations in original) (citations omitted). As *this Court* observed, when Andrus opted to testify to counter the false portrait his mother had painted of his childhood, his own counsel "turn[ed] a bad situation worse." *Andrus*, 140 S.Ct. at 1884. Rather than acting as an advocate, counsel betrayed his client, making statements that the "jury could have understood . . .to insinuate that Andrus was lying." *Id.* The CCA only considered the few generalizations in his mother's trial testimony—and only as a means to dismiss the vast habeas evidence as nothing "new" of note—while disregarding the harm caused by the presentation as a whole. App010.

Instead of addressing how the evidence of trial counsel's deficient performance had affected the trial record, the CCA repeatedly cited its own previous opinion in Andrus's *direct appeal*. *See* AppA at text accompanying n.4, n.93, n.94, n.96, n.107, n.120–n.123.[7] By definition, the direct-appeal opinion was based solely on the trial record. Thus, the characterization of "facts" in the direct appeal, derived only from the trial record, cannot justify dismissing the facts developed for the first time in a habeas proceeding, which involved an evidentiary hearing that produced 41 volumes of new evidence and a Supreme Court decision highlighting numerous ways trial counsel's deficient performance had distorted the trial record. *See, e.g.*, *Andrus*, 140

[7] Footnotes 120-123 begin with a misplaced "*id.*" cite. By comparing the text associated with those footnotes to text in the CCA's 2016 direct-appeal opinion, it is clear that the CCA was referring to its own previous opinion, as it did in footnotes 4, 93, 94, 96 and 107.

S.Ct. at 1883-84 (finding trial counsel's deficient investigation meant that "much of the so-called mitigating evidence" offered at trial actually "aided the State's case in aggravation" and concluding trial counsel had "failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so").

On remand, the CCA recycled large passages from its 2016 direct-appeal opinion. An example is the CCA's description of Andrus's misconduct in jail while awaiting trial. *Compare, e.g.*, App009-010, *with Andrus v. State*, No. AP-76,936, 2016 Tex. Crim. App. Unpub. LEXIS 1158, at *8-11 (Tex. Crim. App. Mar. 23, 2016) (not designated for publication). Based on a description derived solely from trial testimony that deficient counsel had utterly failed to challenge, the CCA concluded that Andrus's "extensive record of violence while being incarcerated strongly suggests he will be a threat to other inmates and staff." App010. That statement does not account for the copious evidence adduced in the habeas proceeding that contextualized the jail misconduct. The CCA also ignored evidence that, in the years since Andrus's 2012 conviction and transfer to prison, he had had very few write-ups and none for violent conduct, which a clinical psychologist attributed to Andrus being taken off "many of the medications that were inappropriate" and finally being "in a structured safe environment" such that "his neuro system appears to have dampened down and was not on such high alert." 7EHRR51. As *this Court* noted, but-for counsel's deficient performance at trial, the jury would have heard a great deal of evidence that would have "contextualize[d] and counter[ed] the State's evidence" of Andrus's misconduct while incarcerated as a teen and while awaiting trial. *Andrus*, 140 S.Ct. at 1877-78.

The State's trial presentation of that misconduct was the State's primary basis for urging a death sentence—and the habeas proceeding demonstrated that this evidence could and should have been challenged by competent counsel.

In short, the CCA relied extensively on the very trial testimony that this Court had assessed as tainted by counsel who, "by his own admissions at the habeas hearing, [was] barely acquainted with [any of] the witnesses who testified" and who "did not prepare" the few witnesses that he called to the stand. *Andrus*, 140 S.Ct. at 1882. Ignoring the myriad ways trial counsel's failures severely distorted the trial record cannot be squared with this Court's directives.

B. The CCA erroneously rejected extensive mitigating evidence, dismissing as "weak" what this Court had described as "abundant," "vast," "compelling," "powerful," "myriad," "voluminous," and previously "untapped."

This Court explicitly directed that, in undertaking the prejudice analysis, the CCA "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.'" *Andrus*, 140 S.Ct. at 1886 (emphasis added) (quoting Supreme Court precedent) (emphasis added). Yet the CCA did not give fair consideration to the mitigating evidence adduced in the habeas proceeding or appropriately compare the new evidence to the paltry evidence before the jury. The 135 footnotes in the CCA's opinion do not contain a single citation to mitigating evidence adduced by Andrus in the habeas proceeding.

The CCA's opinion does not discuss *any* specific testimony or *any* of the more than 120 exhibits that Andrus had offered and the habeas trial court had admitted

into evidence demonstrating what trial counsel could and should have developed as mitigation.[8] This new evidence spans a 41-volume Reporter's Record and includes sworn affidavits from both lay witnesses and experts as well as voluminous documentary evidence reflecting what *this Court* characterized as "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped" mitigating evidence. *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886. For instance, instead of one ill-prepared trial expert, the habeas proceeding featured testimony from six experts whose opinions would have painted a dramatically different picture of Andrus's life up to the time when he committed the underlying capital offense while struggling with an untreated mental illness and self-medicating with street drugs.[9] The CCA did not address specific testimony presented for the first time in the habeas proceeding that *this Court* discussed at length and that had moved the habeas judge to recommend granting habeas relief. *Compare* AppA, AppB, AppD.

The voluminous documentary evidence demonstrating Andrus's traumatic upbringing—which the CCA largely ignored and none of which had been shared with the jury—includes records documenting the criminal histories of the five different

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[8] The only habeas exhibits the CCA cited are a handful introduced by State's counsel, including excerpts from a few TYC records (as if the critique of TYC and its records had not occurred). *See* AppA at n.73 (citing TYC record excerpt SX25), n.75 (same), n.82 (citing TYC record excerpt SX27), n.83 (citing TYC record excerpt SX16), n.87 (again citing TYC record excerpt SX25), n.89 (citing TDCJ record SX28 although admitted only as a demonstrative), n.90 (citing TYC record excerpts SX16, SX26, SX27, SX28). Even more concerning, the CCA cited as authoritative a postconviction affidavit signed by deficient trial counsel. *See* AppA at n.95 (citing SX2). This Court described trial counsel's representation as a submission that "blinked reality." *Andrus*, 140 S.Ct. at 1883. Moreover, the habeas proceeding demonstrated that the credibility problems with Crowley's affidavit, written for him by State's counsel, were legion. *See* 2EHRR155-167.

[9] The habeas judge who received all of the evidence made no adverse credibility determinations as to any of these experts.

biological fathers of the five Andrus children and some of the other adult males their mother brought into their lives. The record shows numerous arrests and convictions for drugs, assaults, family violence, injury to a child, indecency with a child, and sexual assault. DX122A-122C. The habeas proceeding established that, during Andrus's childhood, these men all died violently in their twenties or were around only briefly due to incarceration.

Andrus also presented testimony from one of the few men his mother had brought into their lives who survived. This family friend from the Third Ward neighborhood had described selling crack in "Emancipation Park" starting at age 18 where, on his first day on the job, he witnessed a desperate woman try to sell an infant, wrapped in a filthy blanket, for a $5 crack rock. He also described how Andrus's mother had taught him a slightly safer and more lucrative "business" involving acquiring prescription drugs illegally and selling them with mixers as a product known as "drank." He described how young Andrus would beg him to stay in on Friday nights by promising to "bake him a cake." Andrus's mother, by contrast, pushed her protégé and his younger brother to get out into the streets to earn their keep. This witness also shared how his younger brother, whom Andrus saw as a father-figure, was shot dead in the streets when Andrus was a child, causing Andrus's mother to essentially abandon her young children for extended periods while she retreated to seedy motels to binge on drugs. *See Andrus*, 140 S.Ct. at 1880 (quoting habeas record).

The CCA minimized the vast evidence of Andrus's challenging childhood developed for the first time in the habeas proceeding, dismissing it as "weak" and claiming that it was "contradicted by other evidence." But the "other evidence" to which the CCA cited was the very evidence that counsel's deficient performance had rendered unreliable. For example, the CCA relied on the prosecution's cross-examination of Andrus ***at trial*** when he was represented by deficient counsel:

> Some habeas evidence suggested that [Andrus's] mother sometimes left her children without enough food to eat and that [Andrus] was sometimes hungry, but [Andrus] told Dr. Brown that his family never went without food or utilities. [Andrus] testified twice at trial about food but not that he suffered hunger as a child. His first reference to food was a volunteered comment. He testified that his mother "fed us" by selling drugs in response to the question [from the prosecution], "Who did she sell drugs to?" [Andrus] also volunteered the comment, "I practically raised my little brothers and sisters" in response to the question, "During the day, she was working? She was working from time to time?" Given two opportunities to talk about food, and his willingness to volunteer non-responsive comments, it seems that he would have volunteered that he sometimes was hungry as a child if that had been the case.

App006 (footnotes omitted). As described above in Section I.A, Andrus's trial testimony was the result of—and was tainted by—trial counsel's deficient performance. As detailed below, reliance on "Dr. Brown" was likewise erroneous.

Had the CCA considered the "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped" mitigating evidence presented during the habeas proceeding—evidence that trial counsel had never even looked for—the CCA could not reasonably have described it as "weak." *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886. At the very least, as the CCA dissenters noted, "the mitigation evidence that [Andrus's] trial attorney failed to uncover was integral to [this Court's]

determination that [Andrus's] attorney's' representation fell below prevailing professional norms." App011. The CCA was not free to reach a contrary conclusion by rejecting and mischaracterizing all evidence helpful to Andrus.

A particularly disconcerting mischaracterization of the habeas record involves recourse to a straw man. The CCA's opinion is replete with references to "Dr. Brown."[10] *See* AppA at text accompanying n.73, n.74, n.78, n.84, n.85, n.86, n.88 (all citing SX32, letter from Dr. Brown to trial counsel). Brown, a psychologist whom Crowley retained at the last minute and then never spoke to again, did not testify at trial or in the habeas proceeding. Yet the CCA seized on a letter from Brown, found in Crowley's file, characterizing that letter as somehow indicative of the mitigation that Andrus believed should have been before the jury. App003 (declaring "much of the evidence that Applicant said should have been presented" to be "double-edged" and citing "Applicant's expert witness's report, which included potentially mitigating evidence but also included potentially extremely aggravating evidence such as Applicant's history of abusing and killing animals"). But Andrus never—at trial or in the habeas proceeding—presented Dr. Brown's letter as mitigating evidence; instead, Andrus argued it was further evidence of Crowley's ***deficient performance***.

The CCA's reliance on Brown's letter to trial counsel, which the CCA refers to as a "report," hinges on several misconceptions. First, Brown was not "Applicant's

[10] The misapprehension of the role played by Dr. Brown, a non-testifying psychologist retained by Crowley, was briefed to the CCA on remand. It was not then clear if, due to a clerical error, the CCA had ever seen the full habeas record and thus had mistakenly conflated Brown's unreliable draft report to trial counsel as the mitigation evidence that Andrus had developed in the habeas proceeding. *See* App086-088. Considering that post-remand briefing, the CCA's reliance on Dr. Brown's letter to Crowley in its subsequent opinion, which this Court is now being asked to review, is difficult to fathom.

expert witness"; he was a non-testifying fact witness who submitted an affidavit during the habeas proceeding relevant only to trial counsel's grossly deficient performance. Second, Andrus never argued that Brown or his letter should have been "presented" to the jury. Quite the contrary. Third, there was absolutely no competent evidence adduced at trial that Andrus had a "history of abusing and killing animals." App003. This fallacious suggestion, made by the State in the habeas proceeding, was thoroughly debunked.[11]

The CCA treated unsubstantiated comments in Brown's letter (obtained by deficient trial counsel) as somehow reflecting an accurate assessment of Andrus. Yet the letter was admitted during the habeas proceeding only as a demonstrative exhibit after the State asked to be able to question Crowley about the contents of his case file; as a matter of convenience, a thumb drive (SX18) containing Crowley's entire file (and thus Brown's letter) was admitted pursuant to a stipulation that the thumb drive represented the entire contents of trial counsel's file. 3EHRR145, 244. That is, Brown's letter was admitted only as a component of trial counsel's file reflecting the *absence* of any meaningful investigation. Even if Brown's letter had been admitted in the habeas proceeding for any other purpose, no one argued that it was mitigating evidence that should have been before the jury.

[11] Dr. Hammel, a mental-health expert in the habeas proceeding who, *inter alia*, critiqued Dr. Brown's methodology, testified during questioning by the State about statements in Brown's letter suggesting that Andrus had hurt animals; Dr. Hammel explained that he had investigated that suggestion and learned of an incident where Andrus felt he had killed his uncle's puppy by "holding the puppy's nose" while playing with it. "[L]ater on, hours later, the puppy died. And so he assumed that it was his actions that caused that[.]" 7EHRR67-68. In short, there was no competent evidence of any history of sadism toward animals, as the CCA asserted.

Based on Crowley's own testimony and other evidence adduced during the habeas proceeding, it was clear that, consistent with Crowley's deficient performance, Brown's letter was written after he had reviewed little more than jail records, spent about an hour with Andrus at the jail, and then given him a questionnaire of some kind to take back to his padded cell. DX2; DX38; SX32. There is no record of who filled out the questionnaire since Andrus was not allowed pen or pencil in the padded cell; there is also no record of how the questionnaire got back to Brown before he prepared his letter to Crowley. No one ever suggested that Brown's letter reflected a reliable mental-health assessment—except for the State, and only to the extent it was useful for maligning Andrus, an attempt that the habeas judge had flatly rejected. *See* AppD.

A clinical psychologist in the habeas proceeding, who had spent significant time postconviction reviewing Andrus's social history records, interviewing collateral witnesses, and meeting multiple times with Andrus, found that Brown's letter was based on insufficient data, was burdened with internal inconsistencies, lacked corroboration, did not "look valid," and did not "reflect the standards for what an ethical forensic assessment should entail." 7EHRR63-65, 135, 140-45.

The CCA's inappropriate reliance on Brown's letter and mischaracterization of its role in Andrus's ineffectiveness claim grossly distorts the habeas record. Brown's letter, evidencing trial counsel's ***deficient performance***, was pointedly *not* any part of the "untapped body of mitigating evidence" amassed during the state habeas proceeding that established ***prejudice***, *i.e.*, "'a reasonable probability that at least

one juror would have struck a different balance' regarding Andrus' 'moral culpability'" had the jury heard, for instance, a mental health assessment from someone (unlike Brown) who was actually prepared and qualified. *Andrus*, 140 S.Ct. at 1886 (quoting *Wiggins*, 539 U.S. at 537-38). Nor did Brown's letter represent aggravating evidence available to the State that would have precluded the reasonable probability that at least one juror would have been moved by the "tidal wave" of new mitigating evidence that could and should have been presented at Andrus's trial.

C. The CCA erroneously relied on harmful, unfounded stereotypes about mental illness and childhood trauma contrary to settled principles about mitigation.

This Court's decision highlighted the importance of Andrus's struggles with mental illness as powerful mitigating evidence that his deficient trial counsel had failed to investigate or present. Indeed, all of this Court's seminal ineffectiveness cases on the failure to investigate and present mitigation have stressed the importance of developing a thorough social history that will shed light on the defendant's mental health at the time of the capital offense. *See Sears*, 561 U.S. at 956; *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 382 (2005); *Wiggins*, 539 U.S. at 534-35; *Williams v. Taylor*, 529 U.S. 362, 370-71 (2000). In *Andrus*, this Court cited each of these precedents underscoring this core requirement for effective representation in death-penalty cases. *See Andrus*, 140 S.Ct. at 1881-87.

Consistent with settled principles about counsel's duties with respect to mitigation, this Court expressly noted Andrus's struggles with mental illness and concluded that counsel had performed deficiently by failing to pursue "the multiple

red flags" that should have alerted counsel to the "vast" mitigating evidence developed post-conviction. *Andrus*, 140 S.Ct. at 1883. *This Court's opinion*, supported by the habeas record, is replete with references to a mitigating history of mental illness and trauma that should have been investigated and presented to Andrus's jury, *e.g.*,

- "While attempting to care for his siblings, Andrus struggled with mental-health issues: When he was only 10 or 11, he was diagnosed with affective psychosis."
- "While in TYC custody, Andrus was prescribed high doses of psychotropic drugs carrying serious adverse side effects. He also spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things. TYC records on Andrus noted multiple instances of self-harm and threats of suicide."
- "At the habeas hearing, counsel admitted that he 'recall[ed] noting,' based on the mitigation expert's materials, that Andrus had been 'diagnosed with this seemingly serious mental health issue.'"

Andrus, 140 S.Ct. at 1880, 1882-84 (citations omitted).

Additionally, this Court noted that "a clinical psychologist testified at the habeas hearing" that "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. Counsel uncovered none of that evidence." *Andrus*, 140 S.Ct. at 1882 (citation omitted).

The CCA, however, ignored this Court's determinations on this topic. The CCA also disregarded two days of testimony in the habeas proceeding during which a clinical psychologist walked through multiple instances of significant trauma in Andrus's history—including his untreated mental illness, murdered loved ones,

physical abuse, and addicted and incarcerated caregivers—supported by a wide range of records that the expert had reviewed and interviews he had personally conducted.

The CCA expressed "skepticism" as to whether Andrus even had "mental health issues" as opposed to "behavioral issues." App007. The reasons for CCA's "skepticism" starkly conflict with well-established principles for understanding mental-health issues and childhood trauma:

- "[T]here is habeas evidence that Applicant lived in a bad neighborhood, that some of his family members suffered physical and sexual abuse, that his mother was a drug addict who sometimes abandoned her children, and that the various fathers of those children were drug-addicted criminals who never stayed with the family. *But there was no evidence that Applicant suffered sexual abuse himself, and he consistently denied it*." App006 (emphasis added).

- "As for physical abuse, [Andrus] told Dr. Brown that his mother would beat him with a board that left bruises on him and that her boyfriends would beat him with their fists at her behest. *But in a 2005 evaluation at TYC he denied a history of physical abuse*." *Id.* (emphasis added).

- "Whatever his mental health issues were, those issues were *not so severe or persistent as to keep him from—according to his own testimony—taking care of his siblings*." App007 (emphasis added).

The CCA supported its avowed "skepticism" about the prospect that Andrus struggled with mental illness by positing "on the one hand [Andrus] ***now*** claims he had mental health issues, but on the other hand he decries having been treated for them while in TYC." App007 (emphasis added). This perspective, however, conflicts with a fundamental clinical principle: denying mental illness is hardly proof that a person does not have a mental illness.[12] The CCA's erroneous perspective also

[12] In fact, being unaware of, or unable to acknowledge, one's own mental health condition is a common symptom of mental illness. *See Anosognosia*, Nat'l All. on Mental Illness, https://www.nami.org/About-Mental-Illness/Common-with-Mental-Illness/Anosognosia (last visited Oct. 12, 2021). *See also* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition ("DSM-5") at 101 (2013).

assumes that objecting to medications or other forms of treatment reflects whether a person has a mental illness. This is not supported by science or common sense.[13] Additionally, this Court recognized, Andrus's evidence detailed TYC's gross mistreatment that had made his mental illness *worse*. *Andrus*, 140 S.Ct. at 1880, 1884 & n.2; *see also* App044.

The CCA propounded other fundamental misunderstandings of mental illness. The CCA wrongly implied that abuse perpetrated in a household is irrelevant unless a person directly experiences a given instance of violence. The CCA did not seem to appreciate why a teenager might hesitate to share with strangers in a youth prison shameful details about his traumatic childhood at the hands of his mother, whom he nevertheless loved. The CCA suggested, erroneously, that someone with mental illness is incapable of functioning in any way or of serving in a nurturing capacity at any time in his life. The CCA's comment about Andrus's resistance to attempts to medicate him ignored: the post-conviction testimony of a psychiatrist regarding the wanton misuse of psychotropic medications to which Andrus was subjected as a teenager while in TYC; all testimony from the former TYC Ombudsman about this same issue; testimony from multiple experts about how TYC did not provide Andrus with any meaningful mental health treatment but instead confined him for days and then weeks in a filthy, cold, loud cell in solitary confinement; and testimony from the

[13] As the DSM-5 explains, anosognosia is "typically a symptom of schizophrenia itself" "comparable to the lack of awareness of neurological deficits following brain damage"; and anosognosia is "the most common predictor of nonadherence to treatment," including resistance to medication. DSM-5, *supra* note 12, at 101.

TYC Ombudsman that the TYC units where Andrus was confined were "among the worst" and had no qualified staff, including no qualified mental health professionals.

The CCA failed to appreciate the strong likelihood that at least one juror, hearing testimony from a qualified mental health expert, would view Andrus differently—even if perceiving his mental health struggles as "double-edged." *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2 (requiring jurors to make a unanimous finding of future dangerousness as a threshold requirement for the death penalty and then directing jurors to consider whether *any* mitigating evidence warrants a life-without-parole sentence instead, with one "yes" vote being sufficient to result in a life sentence).

Even Andrus's jail records—upon which the State and the CCA relied heavily—posit the prospect of schizophrenia, mood disorder, schizophrenia affective disorder, bipolar disorder, and post-traumatic stress disorder. And those same jail records show that jail staff, like the TYC staff, had randomly dispensed all manner of psychotropic medications to Andrus, including Lithium, Clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, Trazodone, Risperidone, Wellbutrin, Remeron, Thorazine, Prozac, Celexa, and Seroquel, but without determining whether the various drug cocktails amounted to an appropriate treatment. The jail records also show that, while awaiting trial, Andrus spent extended stays in a padded cell, including one 62-day stint ending right before trial. The practice of confining someone to a padded cell, if it has any efficacy, would indicate that even his jailers believed that Andrus had a serious mental illness. DX122A.

Moreover, as *this Court* recognized, what the CCA dismissed as a recently manufactured claim of mental illness is supported by historical records, dating back to childhood when Andrus was diagnosed with, but not treated for, "affective psychosis," "a mental-health condition marked by symptoms such as depression, mood lability, and emotional dysregulation." *Andrus*, 140 S.Ct. at 1880, 1882 (quoting habeas record).

The CCA did not engage with any of the extensive mental-health evidence adduced in the habeas proceeding on Andrus's behalf. The CCA also ignored the reasonable probability that at least one juror would have seen him as a human being, worthy of mercy.[14] The CCA's conclusions conflict with this Court's specific determination that trial counsel failed to investigate and present relevant evidence of Andrus's mental health history that would have been mitigating.

Allowing the CCA's misguided dismissal of mental-health evidence to stand will not only have dire consequences for Andrus. It will undermine what prevailing professional norms for capital defense have long required: following the "red flags" in a person's history to develop mitigating evidence that explains, without excusing, the client's darkest moments. *Rompilla*, 545 U.S. at 392-93 (finding prejudice from failure to pursue "red flags" indicating a history of mental illness that "might well have influenced the jury's appraisal" (quoting Wiggins, 539 U.S. 538)).

[14] Numerous individuals have received life sentences from juries in heavily aggravated cases where the defendant's mental illness was explained to the jury. *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161 app. 1-4 (2018) (summarizing data from multiple jurisdictions identifying scores of highly aggravated cases in which jurors rejected the death penalty).

D. The CCA erroneously ignored this Court's specific guidance for assessing *Strickland* prejudice in this very case.

This Court's opinion gave the CCA clear guidance for assessing *Strickland* prejudice.

First, this Court highlighted "the vast tranches" of "powerful and readily available mitigating evidence" that trial counsel "not only neglected to present" but "failed even to look for[.]" *Andrus*, 140 S.Ct. at 1881, 1886, 1877.

Second, this Court emphasized the harm caused by trial counsel's deficient mitigation presentation—observing how bad the presentation was and pointing to numerous witnesses, identified in the habeas proceeding, who could have provided compelling and specific information about Andrus's life about which the jury heard only a few vague and contradictory generalities. *See, e.g., Andrus*, 140 S.Ct. at 1880.

Third, this Court described the harm from trial counsel's failure to investigate, and corresponding failure to rebut, the State's case-in-aggravation in light of Texas's capital sentencing scheme, which requires a unanimous finding of future dangerousness for death-eligibility and then requires jurors to consider retreating from a death sentence if at least one juror finds sufficient mitigating circumstances. *Andrus*, 140 S.Ct. at 1884-85 (considering Tex. Code. Crim. Proc. Ann. art. 37.071).

Furthermore, this Court expressly cautioned the CCA *against* the prejudice-assessment employed in a concurrence to the CCA's first opinion. Yet several pages of the CCA's opinion on remand are devoted to defending the concurrence and its interpretation of *Wiggins* (although the concurrence's author joined the dissenters on remand). *See* App003-004 & App009-010. As this Court previously noted, the CCA

concurrence "seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*" although this Court "has never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S.Ct. at 1887 n.6. *Wiggins* itself notes that the mitigation in *Wiggins* was stronger, and the aggravating evidence weaker, than in *Williams*; yet prejudice was nevertheless found in *Williams*—even though that case was decided under the highly deferential standard imposed by the Antiterrorism and Effective Death Penalty Act. Therefore, *Wiggins* does not permit a "no prejudice" finding simply because the habeas applicant's evidence is not analogous to *Wiggins*.

The CCA's response to this Court's determination that the concurrence had misconstrued *Wiggins* was to misconstrue *Williams*. *See* AppA009-010.[15]

In *Williams*, this Court held that the state court had unreasonably applied clearly established federal constitutional law by denying Williams habeas relief on his ineffectiveness claim after noting that the "***entire*** postconviction record, viewed ***as a whole*** and cumulative of mitigating evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." *Williams*, 529 U.S. at 399 (emphasis added) (citations omitted).

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[15] The CCA's entire approach to this Court's specific directives for applying the *Williams-Wiggins* line of cases evokes the CCA's protracted resistance to this Court's *Penry v. Lynaugh*, 492 U.S. 302 (1989) jurisprudence. *See, e.g.*, *Brewer v. Quarterman*, 550 U.S. 286, 293 (2007) ("It may well be true that Brewer's mitigating evidence was less compelling than Penry's, but, contrary to the view of the CCA, that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case."). This kind of resistance to this Court's decisions undermines the rule of law. *See* Section II below.

The CCA did not follow *Williams* because the CCA ignored most of Andrus's habeas record and certainly did not consider the postconviction record "as a whole." *Id.*

Instead, the CCA speculated that *Williams* is distinguishable because Williams's remorse was somehow more worthy of consideration than Andrus's. The CCA argued that Williams had "turned himself in for an unsolved crime and expressed immediate remorse," App010, whereas Andrus expressed remorse only after being arrested. (The CCA ignored the uncontroverted evidence that Andrus repeatedly professed remorse to law enforcement and then helped them find incriminating evidence, including the lost murder weapon. Pretrial Hearing 1RR; SX147; 41RR35-36; 42RR8-10; 51RR46, 58, 60, 62, 69-72.

The CCA's comparison of the facts in *Williams* to this case is, moreover, untethered to the actual records for either case.[16] The CCA insisted that Williams' extraneous offenses and capital crime were not as bad as Andrus's (based on the CCA's own pre-habeas characterization of the trial record). But Williams had been sentenced to death for beating his victim to death 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 Williams' trial the State had presented evidence of significant extraneous offenses—that Williams had "brutally assaulted" an elderly woman and left her in a vegetative state, stolen cars, set fire to a home, stabbed a man during a

[16] For instance, in describing Andrus's crime, the CCA revised the facts developed at trial to enhance Andrus's callousness. Yet the trial record established that the first shot occurred after the victim pulled out his own gun. SX1; SX8; SX38. Additionally, Mr. Bui, the second car's driver, testified that he pushed on the gas pedal and sped toward Andrus after seeing him in the parking lot with a gun; the second and third shots were only fired thereafter. App182-183.

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. *Williams*, 529 U.S. at 368, 418. Yet *despite* Williams' highly aggravated crime and the "simply overwhelming" evidence of his future dangerousness, evidence of which was not challenged in his habeas proceeding as it was in Andrus's, this Court held that Williams had been prejudiced by counsel's deficient performance. *Id.* at 374. Indeed, *Williams* stands for the proposition that "[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." *Id.* at 398. But the CCA concluded that *Williams* somehow supports denying Andrus relief—although the evidence in *Williams* of counsel's deficiency and of the mitigation that could have been, but was not, presented at trial pales in comparison to Andrus's habeas record.

The CCA's misapplication of *Williams* conflicts with settled principles as to how the *Strickland*-prejudice analysis is to be undertaken. *See Williams*, 529 U.S. at 391 (explaining that "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence'" (citation omitted)); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (describing *Strickland*'s "circumstance-specific reasonableness inquiry"). A court cannot comply with this Court's directives by flouting the requirements necessary to apply the relevant standard.

II. The Rule Of Law Requires Fidelity To This Court's Decisions.

The CCA's opinion below reflects astonishing disrespect for the basic premise that *this Court* is the final arbiter of how federal constitutional text is to be interpreted. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803); *Cohens v.*

Virginia, 19 U.S. (6 Wheat.) 264, 413-23 (1821). This Court's previous decision in Andrus's case did not announce new federal constitutional law whose retroactivity is uncertain. This Court, in pellucid fashion, applied settled federal constitutional law and held that (1) Andrus's trial counsel had performed deficiently and (2) the CCA needed to apply this Court's precedents in assessing *Strickland* prejudice.

As this Court has long recognized, "on state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam); *see also Robb v. Connolly*, 111 U.S. 624, 637 (1884). The CCA has now failed twice to discharge its obligation to enforce Andrus's Sixth Amendment right to effective assistance of counsel, even after this Court concluded that he had brought a "significant question" to this Court as to "whether the apparent 'tidal wave' . . . of available mitigating evidence taken as a whole might have sufficiently 'influenced the jury's appraisal' of [Andrus'] moral culpability' as to establish *Strickland* prejudice." *Andrus*, 140 S.Ct. at 1887 (alteration in original) (citations omitted). This Court enjoined the CCA to *follow* the law. Because the CCA did not do so, Andrus respectfully submits that this Court should summarily reverse upon determining that Andrus was prejudiced by trial counsel's deficient performance. In similar circumstances, where the CCA disregarded this Court's clear constitutional holdings in a previous decision in the same case, this Court reached the ultimate issue. *See, e.g., Moore v. Texas*, 139 S.Ct. 666, 672 (2019) (per curiam) (granting the writ, summarily reversing, and determining that petitioner had shown he is a person with intellectual disability after

the CCA had failed to follow this Court's directives in a previous decision in the same case).

The CCA may not disregard this Court's determinations and legal precedents to strain for a result that it prefers. *See, e.g.*, *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court decisions."); *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (Kavanaugh, J.) ("Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" (quoting U.S. CONST. art. III, § 1)). Reversal of the CCA is necessary to ensure adherence to this Court's constitutional holdings, consistent application of a bedrock legal standard, and fidelity to the rule of law. *See, e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) (granting summary reversal and emphasizing that lower courts are "bound by this Court's interpretation of federal law"); *Wearry v. Cain*, 577 U.S. 385, 395 (2016) (per curiam) (noting that this Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law"); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (granting summary reversal where lower court's interpretation of federal law "was both incorrect and inconsistent with clear instruction in the precedents of this Court").

CONCLUSION

The CCA's opinion below cannot be squared with this Court's precedents, including the Court's decision in this very case. Accordingly, Terence Tramaine

Andrus respectfully asks that this Court grant the petition for writ of certiorari, summarily reverse, find that he was denied his Sixth Amendment right to effective assistance of counsel, and remand for an order granting habeas relief in the form of a new punishment trial. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

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