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

APPENDICES A-H

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Appendix A

622 S.W.3d 892
Court of Criminal Appeals of Texas.

EX PARTE Terence Tramaine ANDRUS, Applicant

NO. WR-84,438-01
|
Delivered: May 19, 2021

Synopsis

Background: Prisoner applied for writ of habeas corpus challenging his capital murder conviction and death sentence. The 240th District Court, Fort Bend County, recommended that the petition be granted in part. On review, the Court of Criminal Appeals, 2019 WL 622783, denied relief. Prisoner petitioned for writ of certiorari, which was granted. The Supreme Court of the United States, 140 S.Ct. 1875, 207 L.Ed.2d 335, vacated and remanded.

The Court of Criminal Appeals, Keller, P.J., held that trial counsel's deficient performance in failing to investigate mitigating and aggravating evidence did not prejudice prisoner.

Relief denied.

Newell, J., filed dissenting opinion in which Hervey, Richardson, and Walker, JJ., joined.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***893 ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS, FROM CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT, FORT BEND COUNTY**

Attorneys and Law Firms

Cary Marshall Faden, Sugar Land, Gretchen Sims Sween, for Applicant.

Opinion

Keller, P.J., delivered the opinion of the Court in which Yeary, Keel, Slaughter, and McClure, JJ., Joined.

This case is on remand to us from the Supreme Court of the United States. Regarding one of Applicant's ineffective-assistance claims, the Supreme Court held that Applicant satisfied the deficient-performance prong of *Strickland v. Washington,* [1] but the Court remanded to us for further proceedings because it perceived that we might not have engaged in a prejudice inquiry. In addition, the Supreme Court criticized the concurring opinion in our Court for unduly relying upon *Wiggins v. Smith* [2] in its prejudice analysis. We now reiterate—and to the extent our holding was not clear, clarify—that we decided the issue of prejudice when the case was originally before us. In an abundance of caution, we set forth our reasoning on the issue of prejudice and do so based on an independent review of the circumstances to determine whether there is a reasonable probability that the outcome of Applicant's sentencing proceeding would have been different. [3] Although the concurrence did use *Wiggins* as a guide, that opinion nevertheless made some valid points with respect to the mitigating and aggravating evidence, and our prior order outlined some of the evidence consistent with those points. The mitigating evidence is not particularly compelling, and the aggravating evidence is extensive. Based on our independent review, we reaffirm our earlier conclusion that Applicant has failed to show prejudice, and we deny relief.

A. This Court's Prior Habeas Order

In November 2012, Applicant was convicted of capital murder and sentenced to death. On automatic appeal to this Court, his conviction was affirmed. [4] He later filed a habeas application in which he claimed, among other things, that counsel was constitutionally ineffective for failing to conduct a reasonable investigation and present available mitigating evidence. This Court rejected that claim, concluding that he "fail[ed] to meet his burden under *Strickland v. Washington* to show by a ***894** preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability

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that the result of the proceedings would have been different, but for counsel's deficient performance."[5] In a footnote to this holding, we pointed out that the trial court had "misstate[d] the *Strickland* prejudice standard by omitting the standard's 'reasonable probability' language."[6] Although the trial court had recommended granting relief on the claim, we disagreed and declined to adopt any of the trial court's findings of fact and conclusions of law regarding the claim.[7]

In our order, we explained that the current offense involved the attempted carjacking of Avelino Diaz in a Kroger parking lot.[8] Applicant shot and killed Diaz, and while fleeing the scene, shot at two occupants of another car—killing the passenger, Kim-Phuong Vu Bui, and wounding Kim's husband, Steve Bui.[9] Applicant later confessed to the killings.[10]

We further outlined Applicant's history of criminal and violent conduct.[11] Applicant was adjudicated as a juvenile for felony possession of a controlled substance in a drug-free zone and for criminal solicitation to commit aggravated robbery (involving a firearm).[12] He later had to be transferred from Texas Youth Commission (TYC) facilities to adult prison due to his general failure to make progress in TYC's rehabilitation program and his behavior problems, which included aggressive or assaultive behavior towards other youths and staff.[13] A month before the current capital offense, Applicant committed an aggravated robbery, during which he kicked and beat his victim and threatened him with a knife.[14] While awaiting trial in this case in the Harris County and Fort Bend County jails, Applicant also engaged in behavior that was significantly disruptive, violent, and threatening.[15]

We also pointed out that Applicant had numerous gang-related tattoos and that he admitted to having been a member of the "59 Bounty Hunter Bloods" street gang.[16]

We also noted that Applicant testified that he was exposed to drugs as early as age six because his mother sold them, that he rarely had adult supervision at home, and that he started using drugs regularly when he was fifteen.[17] He claimed that he ***895** had recently given his life to God and no longer acted out.[18]

B. Concurring Opinion

A four-judge concurring opinion engaged in a more extensive analysis of Applicant's claim with respect to the issue of prejudice.[19] Using the Supreme Court's case of *Wiggins v. Smith* as a guide,[20] the concurrence concluded that Applicant failed to show prejudice.[21]

In arriving at this conclusion, the concurrence observed that the additional lay witness testimony that Applicant said should have been presented was not particularly strong: it would have shown merely that "Applicant grew up primarily among street hustlers and drug dealers, that Applicant raised his siblings while his mother was dealing drugs out of the house or on the street, and that Applicant lacked a stable, supportive parental figure."[22] And much of this information "had already been introduced through the testimony of Applicant, his mother, and his father."[23] Also, much of the evidence that Applicant said should have been presented was "double-edged." As an example, the concurring opinion cited 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.[24]

The concurrence noted that Applicant had presented multiple mitigating factors to the jury: testimony about his "background and dysfunctional upbringing," testimony from an expert about "the effects that drugs, alcohol, and an unstable family environment can have on adolescent brain development," and testimony from "a professional counselor that Applicant was beginning to show remorse for the murders."[25] But Applicant had "an extensive record of violent conduct" that would offset ***896** this evidence and his proposed additional mitigating evidence.[26] The concurrence also listed much of Applicant's criminal and violent history, similar to what was outlined in this Court's order.[27]

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The concurrence noted that this evidence contrasted with the situation in *Wiggins*, in which the defendant had no prior convictions and no violent conduct the State could introduce to offset the mitigating evidence.[28] The concurrence further noted that the mitigating evidence in *Wiggins* that counsel had failed to present was "powerful and not double-edged."[29] Wiggins had suffered "severe privation and abuse in the first six years of his life while in the custody of his alcoholic absentee mother" as well as "physical torment, sexual molestation and repeated rape during his subsequent years in foster care."[30] And the concurrence noted that Wiggins was "homeless at times and had diminished mental capacities."[31]

C. The Supreme Court's Decision

The Supreme Court granted certiorari and vacated our decision.[32] In its initial summary, the Court concluded, contrary to our holding, that the record demonstrated that counsel's performance was deficient.[33] The Court further concluded that we "may have failed properly to engage with the follow-on question whether [Applicant] has shown that counsel's deficient performance prejudiced him."[34]

Noting the trial court's characterization of the new evidence proffered by Applicant as a "tidal wave of information ... with regard to mitigation,"[35] the Supreme Court went on to discuss Applicant's evidence. The Court believed that it "revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse."[36] The Court recounted that Applicant was born into a neighborhood "known for its frequent shootings, gang fights, and drug overdoses"[37] and that Applicant was one of five children, whose fathers never stayed as part of the family.[38] According to the Court, one of the fathers raped Applicant's younger half-sister, other fathers were physically abusive toward Applicant's mother, and all of the fathers were addicted to drugs and had criminal histories.[39] The Court stated that Applicant's mother engaged in prostitution and sold drugs and that the drug sales were often from home and in view of Applicant and his siblings.[40] The Court also believed that the mother habitually used drugs, being high more often than not.[41] ***897** According to the Court, the children were often left to fend for themselves, and many times, there was not enough food to eat.[42] Applicant, the Court believed, assumed responsibility as head of the household, caring for an older brother with special needs, cleaning the house, putting siblings to bed, cooking meals, getting siblings ready for school, and helping siblings with their homework.[43] Applicant was characterized by habeas witnesses as "a protective older brother" and "very caring and very loving," but he was also described as struggling with mental-health issues, and at age ten or eleven, was being diagnosed with affective psychosis.[44]

The Supreme Court said that Applicant allegedly served as a lookout while he and his friends robbed a woman of her purse.[45] The Court then recounted that Applicant was sent to TYC, where he was "prescribed high doses of psychotropic drugs carrying serious adverse side effects" and where he "spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things."[46] The Court also pointed to evidence of multiple instances of self-harm and threats of suicide, including an attempted suicide while awaiting trial in this case.[47] The Supreme Court also noted that the fatal attempted carjacking resulting in Applicant's capital murder convictions occurred when he was age eighteen, shortly after his release from incarceration.[48]

The Supreme Court found counsel to be deficient in three ways: First, counsel conducted almost no mitigation investigation, overlooking a vast amount of mitigating evidence.[49] Second, because of this failure, the evidence that counsel did present backfired by bolstering the State's aggravation case.[50] Finally, counsel did not adequately investigate the State's aggravating evidence, losing critical opportunities to rebut the case on aggravation.[51]

Because the Supreme Court has concluded that counsel's representation was deficient, we need not address in detail the Court's opinion regarding the first prong of *Strickland*. But our discussion of the second prong of *Strickland* requires us to address some of the matters the Court considered in analyzing the first prong. In the next two paragraphs, we detail certain alleged failures by counsel that we address later in our

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prejudice analysis. These involve some instances in which the Court believed that counsel lost critical opportunities to rebut the State's aggravation case.

First, the Supreme Court said that Applicant's disruptive behavior in TYC "principally comprised verbal threats, but also included instances of [Applicant's] kicking, hitting, and throwing excrement at prison officials when they tried to control him." [52] The Supreme Court concluded that a proper investigation would have shown that Applicant's "behavioral problems there were notably mild, and the harms he sustained ***898** severe." [53] Alternatively, the Court concluded that, "with sufficient understanding of the violent environments [Applicant] inhabited his entire life, counsel could have provided a counternarrative of [Applicant's] later episodes in prison." [54]

Second, the Supreme Court indicated that some research by counsel would have revealed that the evidence connecting Applicant to the robbery a month before the instant offense was questionable, with an ex-girlfriend recanting her statement and the police admitting that the belated inclusion of Applicant's photo in a photo array gave rise to "numerous reliability concerns." [55] The Supreme Court indicated that Applicant's photo was conspicuously placed in a central position in the photo array, as the "[o]nly one ... looking directly up and out." [56] The Supreme Court also suggested that the ex-girlfriend's original statements inculpating Applicant could have been impeached because the ex-girlfriend said at the habeas hearing that Applicant committing the offense was "impossible." [57]

Turning to the issue of prejudice, the Supreme Court explained that "the reviewing court must consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.' " [58] A finding of prejudice requires "a reasonable probability that at least one juror would have struck a different balance" regarding Applicant's "moral culpability." [59]

The Supreme Court found unclear whether we "considered *Strickland* prejudice at all." [60] It opined that our one-sentence denial of Applicant's claim "does not conclusively reveal whether [the Court of Criminal Appeals] determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong, that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong, or that Andrus had failed to satisfy both prongs of *Strickland*." [61] The Supreme Court noted that, unlike the concurrence, we "did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." [62] And the Supreme Court observed that the concurring opinion did not garner a majority of the judges on the Court of Criminal Appeals. [63] The Supreme Court concluded, "Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." [64]

In a footnote, the Supreme Court criticized the concurrence for relying too ***899** heavily upon *Wiggins*. [65] The Court indicated that the concurrence was wrong to "assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*." [66] The Court noted that it had "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." The Court then cited a passage in *Wiggins* that characterized the mitigating evidence in its case as "stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence." [67]

D. Analysis

1. *Our prior order decided the issue of prejudice adversely to Applicant.*

Under *Strickland*, an applicant must satisfy two prongs to show ineffective assistance of counsel: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [68] When we said that Applicant "fails to meet his burden ... to show ...

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that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different ...," we were holding that Applicant failed to make the requisite showing on both prongs of *Strickland*.

We did not set forth our reasons for denying habeas relief, but we are not aware of any constitutional requirement to do so. [69]

2. Applicant has failed to show prejudice

Nevertheless, in an abundance of caution, we now set forth our reasoning on the issue of prejudice. The Texas statutory mitigation special issue asks:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, 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. [70]

The question at this stage is whether there is a reasonable probability that at least one juror would have struck a different balance in answering the mitigation special issue. [71] To answer that question we evaluate the totality of the aggravating and mitigating evidence adduced at trial and in the habeas proceedings. [72] Doing so, we find no reasonable probability that at least one juror would have struck a different balance in answering the special issue because the ***900** mitigating evidence offered at the habeas stage was relatively weak in that it was not specific to Applicant, was contradicted by other evidence, or overlapped evidence heard by the jury, and because the aggravating evidence was strong.

For example, there 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. [73] As for physical abuse, Applicant 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. [74] But in a 2005 evaluation at TYC he denied a history of physical abuse. [75] Nevertheless, the jury heard some evidence of physical abuse because Applicant testified that he "got whoopings, you know, extensive whoopings" and "got beat," though he did not elaborate further and did not contradict the prosecutor's assertion that he had not suffered physical abuse. [76] Other evidence about family dysfunction was also presented to the jury: Applicant's mother testified at trial that he was very helpful in raising the other children and was in the position to help her the most; his father testified that his own imprisonment made him largely absent from Applicant's childhood, and Applicant testified to his exposure to drugs as early as age six, his mother's drug dealing and periodic abandonment of her children, and his own drug use beginning at age fifteen. [77]

Some habeas evidence suggested that Applicant's mother sometimes left her children without enough food to eat and that Applicant was sometimes hungry, but Applicant told Dr. Brown that his family never went without food or utilities. [78] Applicant testified twice at trial about food but not that he suffered hunger as a child. [79] His first reference to food was a volunteered comment. He testified that his mother "fed us" by selling drugs in response to the question, "Who did she sell drugs to?" [80] He 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?" [81] Given two opportunities to talk about food, ***901** 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.

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Habeas evidence also suggested that Applicant had mental health issues, possibly including schizophrenia, but this evidence, too, deserves some skepticism. 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. Furthermore, on the one hand Applicant now claims he had mental health issues, but on the other hand he decries having been treated for them while in TYC. The TYC records offered at the habeas stage documented Applicant's refusal to take psychotropic medications prescribed for him and the discontinuation of those medications and one analyst's conclusion that Applicant's lack of progress in rehabilitation was "behavioral" rather than stemming from a mental health disorder.[82] When he was on medication in TYC he had fewer violent incidents, but not zero, and one analyst theorized that the decrease in violence was a result of Applicant's effort to manipulate the system and to avoid going to adult prison.[83]

Even taking the evidence of Applicant's mental health issues at face value, it was not purely mitigating; it was also aggravating. For example, Dr. Brown's report revealed that Applicant had a disturbing history of animal cruelty.[84] Applicant told Dr. Brown that he had "accidentally" killed a puppy by holding its nose and a dog that drowned in the shower; he killed birds and "blew up frogs"; and he lit firecrackers that he had inserted into cats' anuses.[85] The report also revealed that Applicant enjoyed playing with fire and once set fire to his mother's apartment, though she was able to put out the fire.[86] Juvenile records indicated that Applicant was diagnosed with "conduct disorder" (the juvenile precursor to antisocial personality disorder)[87] and later records documented that he had antisocial personality disorder.[88]

TYC records documented 295 total instances of misconduct, including many assaults against other juveniles and staff, with authorities having to remove him from the general population 77 times.[89] His assaultive behavior in TYC, as well as his general failure to make progress on rehabilitation, ultimately led to his transfer to adult prison.[90] Although the Supreme Court described Applicant's infractions at TYC as "notably mild," we conclude that a jury would have been convinced otherwise. The habeas witness who testified to the mildness of Applicant's behavior[91] nevertheless acknowledged that Applicant had made multiple threats and assaults against ***902** other juveniles and staff.[92] The sheer number of times Applicant was removed from the general population indicates he posed a serious, ongoing problem of violence, which was considered so serious that he was transferred to adult prison. Applicant points to the bad conditions under which juveniles were often placed in TYC while he was there, but even assuming that evidence was admissible, on balance it would have been outweighed by the evidence showing that Applicant was far more dangerous and disruptive than the typical juvenile held in custody of TYC. The number of Applicant's incidents, the obvious violence of many of those incidents, and his later violent incidents during adult incarceration would lead a jury to believe that Applicant's misbehavior during TYC incarceration was a preview of, and consistent with, his behavior as an adult.

The mitigating evidence offered at the habeas stage must also be weighed against the strong and substantial aggravating evidence offered at trial. Applicant's instant capital murder arose from his effort to carjack someone at a supermarket. He first approached Diaz's car after Diaz dropped his wife off at the store. He shot and killed Diaz but abandoned the carjacking when he discovered the car was a stickshift, which he could not drive. He then found another car occupied by a married couple. As the husband tried to drive away, Applicant fired several shots at the fleeing vehicle, one of which killed the wife and another of which wounded the husband. Applicant was later arrested in New Orleans on unrelated charges.[93]

Applicant committed other crimes when he was not in custody. 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, for reasons detailed below.

Two weeks into his probation for the drug offense, he committed the offense for which he was adjudicated as a juvenile for solicitation to commit aggravated robbery. In that offense, he and two others followed a woman to her parents' home, and Applicant held the woman at gunpoint while her purse and gym bag were taken.[94] The

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Supreme Court discounted this crime, however, saying that Applicant was sentenced to TYC for "allegedly" acting as a "lookout." Although Applicant characterized his participation that way,[95] the victim's testimony was to the contrary. As our opinion on direct appeal explained, the victim identified Applicant at "the arrest scene ... stating that he was wearing the same clothes as the gunman."[96]

The Supreme Court pointed to the victim's testimony "that she did not and could not identify faces or individuals."[97] However, ***903** the victim did testify that she could identify the clothing,[98] and she testified that the gunman wore a red shirt and black shorts.[99] The Supreme Court said that she "described at least two individuals as wearing such clothing,"[100] but the victim denied that assertion. When asked, "Was there any other person there who was wearing the same type of clothing, red shirt, black shorts?" she responded, "No. I don't recall."[101] The record reference supplied by the Supreme Court to support its contrary assertion on this point does not lead to the victim's testimony but to that of Sergeant Fernando Flores,[102] and Flores did not testify that the victim described two or more assailants wearing a red shirt and black shorts. Instead, Flores testified that he encountered two men at the scene of the arrest:[103] Applicant, who was wearing a red shirt and black shorts and another person who was wearing gray pants and a different shirt over a red t-shirt and black shorts.[104] On cross-examination Flores agreed that the zipper and button of the other person's pants were open, "possibly indicating he was concealing clothing underneath."[105] The trial evidence solidly pointed to Applicant as the gunman.[106]

Just a month or two before the present double murder, Applicant committed a robbery at a dry-cleaning establishment. He chased and beat the owner and threatened him with a knife until he handed over the money Applicant demanded.[107] The victim was too afraid to identify Applicant at trial but testified that the robber was in the courtroom and said he could point in the robber's general direction.[108] He also testified that his pre-trial, photo-array identification was indeed an identification of the robber, and Applicant stipulated that he was the person shown in that photo.[109] The Supreme Court, however, 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.[110] 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.[111] 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,"[112] But the detective who responded to that question did not entirely agree with ***904** that characterization, saying that photo three (a different subject) "may be looking out."[113] Our inspection of the photo reveals that Applicant's head is tilted back slightly, but he is not looking up, and his posture and gaze are not distinctly different from those of other subjects shown in the array. Consequently, we do not judge the photo array to be unduly suggestive, and we append a copy of it to this opinion as Appendix 1.[114]

Moreover, Applicant had confessed the robbery to his sometime-girlfriend, whom the Supreme Court refers to as an "ex-girlfriend." The Supreme Court relied on the girlfriend's recantation in a habeas affidavit to question Applicant's guilt in the robbery, but the Supreme Court overlooked the fact that this recantation was later shown to be false. Before the girlfriend testified at the habeas hearing, habeas defense counsel had moved to withdraw the girlfriend's affidavit because he had "learned information that caused us to doubt [her] reliability."[115] Her subsequent testimony at the habeas hearing made clear that habeas counsel's reason to doubt her reliability was that she had perjured herself. In the habeas affidavit, the girlfriend had denied telling the police that Applicant had confessed the offense to her, but during testimony at the habeas hearing she admitted that this denial was not true, that she had given the police the information, that her statements to the police had been captured by an audio recording, and that Applicant had in fact confessed to her that he committed the offense.[116] In fact, the girlfriend was offered immunity by the State to testify about the falsity in the affidavit she had given to habeas defense counsel.[117]

The Supreme Court also relied upon the girlfriend's statement that Applicant's participation in the robbery was "impossible." When questioned further about her statements on the audio recording, the girlfriend said, "I do remember

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saying that I don't believe he was telling the truth because of that particular day it was impossible." [118] But she did not explain why it would have been impossible or when exactly she made the impossibility claim—when she told the police or when she first recanted in her affidavit—nor did she say whether she still believed the impossibility of it when she testified at the habeas hearing. There was also evidence that the girlfriend had rekindled her relationship with Applicant during the pendency of the habeas proceedings—further undermining the credibility her testimony. [119]

Applicant was also violent in county jail awaiting trial in this case. In April 2009, he assaulted another inmate. When a detention officer intervened, Applicant said, "I don't give a f—," and, "I'm getting the needle anyway." On May 9, 2009, he punched an officer in the face twice. That day, a broken razor blade and a sharpened key ring were found in his cell. On May 11, he jammed open a "panhole" used to pass food to high security inmates, and when an officer came to investigate, Applicant threw urine in the officer's face. He then did a celebratory dance and taunted the officer, "Come on in and get me. There is nothing you can do to me." [120]

***905** On July 5, he attempted to pass pills to another inmate. When the pills were intercepted, he demanded them back and threatened to throw a cup of urine on the officer. Afterwards, he broke the sprinkler head and flooded his cell. He threatened an officer on duty, saying "[I'm] going to get him, you just wait and see," and, "Once you take these handcuffs [off of] me, you are going to see how hard I hit." He told the rest of the staff that he was "going to get all of you." Two hours later, he was taken to a medical clinic because he was complaining of chest pains. When he was returned to his cell he injured the escorting officers by kicking and punching them. He yelled, "I'm going to kill y'all. I told you I'm going to kill y'all." A special response team was called, and it took five officers to subdue him. [121]

On January 4, 2010, he threw an unknown liquid at an officer. When officers sought to handcuff him, he wrapped his arms in a blanket to make them inaccessible. A special response team was called to move him to a more secure cell. On July 10, 2010, Applicant covered the window of his cell so that officers could not see inside. When a special response team went inside, it found that Applicant had stopped up the toilet and shower drain and used the shower to flood his cell. The cell wall was covered in feces and two and a half inches of water and feces covered the floor. Applicant was naked, he threw water on the officers, and he resisted attempts at handcuffing by striking at the officers. [122]

On July 27, 2011, Applicant stuck his arms through the panhole of his cell door and refused to remove them. When a special response team was called, Applicant kicked and struck at the team members. He yelled that he was "going to f— somebody up." He was moved to a padded cell, and he covered the new cell window with feces. The next day, Applicant told a guard at meal time, "Don't bring that tray over here, bitch. I'm going to throw it and hit somebody with it." While he was again being moved to a padded cell, Applicant said, "I have three caps. I have nothing to lose. This will be everyday." Once he was in the cell, he said that he "will kill an officer" if given the chance. [123]

The evidence also showed that, while awaiting trial for capital murder, he had the words "murder weapon" tattooed on his hands and a smoking gun tattooed on his forearm. [124]

In saying that the concurring opinion improperly relied on *Wiggins*, the Supreme Court mentioned that the mitigating evidence in *Wiggins* was "stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*," in which the Supreme Court also granted relief. [125] In *Williams*, mitigating evidence included the fact that Williams voluntarily turned himself in for an unsolved crime and expressed immediate ***906** remorse. [126] As a child, he had been severely and repeatedly beaten by his father, and his parents had been imprisoned for criminal neglect of their children. [127] Williams was also "borderline mentally retarded." [128] And with one significant exception noted below, Williams seems to have had an otherwise exemplary record during periods of incarceration. Prison records show he received commendations for helping crack a prison drug ring and for returning a missing guard's wallet, and prison officials described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." [129]

Aside from Williams's conviction of capital murder and robbery in the primary case, the State introduced aggravating evidence in the form of his prior criminal record. [130] As an

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adult, he committed an armed robbery, grand larceny, two auto thefts, two (possibly three) separate violent assaults on elderly victims, and an arson followed by a robbery.[131] He also had an arson conviction arising from his setting fire in jail awaiting trial in the case before the court.[132] Expert witnesses employed by the State testified that there was a high probability that he would be a future danger to society.[133] The habeas evidence Williams sought to introduce included him being committed three times to the juvenile system: for aiding a larceny, pulling a false fire alarm, and breaking and entering.[134]

We do not rely upon *Williams* as a definitive guide, but it is worth mentioning that, while the aggravating evidence in *Williams* might be roughly comparable to the aggravating evidence in Applicant's case (Williams had a more extensive criminal history, but Applicant had a far more extensive history of violent and disruptive incidents during periods of incarceration), the mitigating evidence in Applicant's case is far weaker. Williams had intellectual impairments and a history of being physically abused. He turned himself in for the primary crime that was otherwise unsolved and expressed immediate remorse. And while there was one substantial dark spot in Williams's record of behavior during incarceration, there was substantial evidence of exemplary behavior, with prison officials saying he was among the least dangerous of inmates. By contrast, Applicant has not shown that he personally suffered physical or sexual abuse nor that he has intellectual impairments.[135] Applicant's expression of remorse was belated, recent, and incomplete at best. And Applicant has not shown himself to be an exemplary prisoner —quite the opposite, his extensive record of violence while being incarcerated strongly suggests he will be a threat to other inmates and staff.

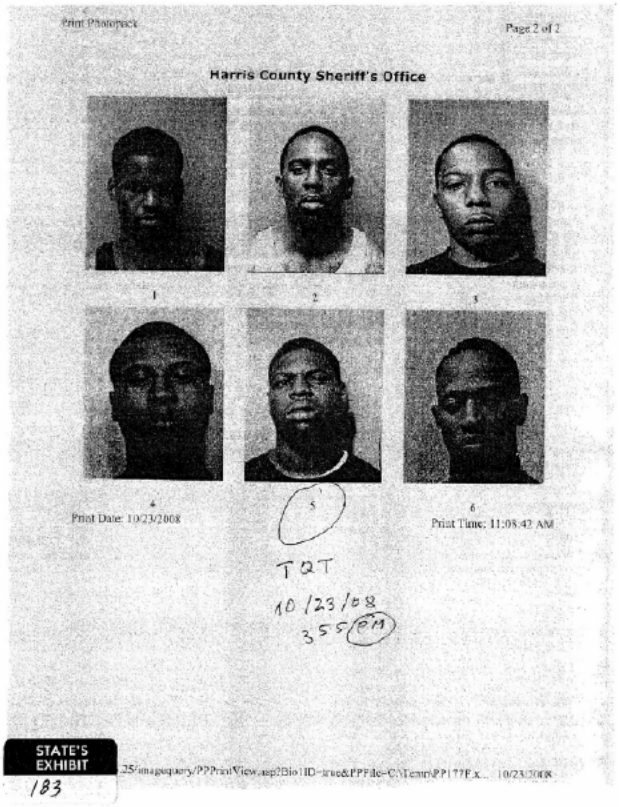
But we do not come to our conclusion because Applicant's case compares unfavorably to *Williams*. Our independent review reveals that Applicant's proposed new mitigating evidence is relatively weak and that some of that sort of evidence—about his family and background—was presented ***907** at trial. Moreover, much of Applicant's proposed new mitigating evidence could be considered aggravating in some respects. And, if his proposed mitigating evidence is admitted, it would likely be accompanied by significant additional aggravating evidence. Finally, the aggravating evidence presented at trial was strong and substantial, and notably, extensive with respect to violence during incarceration. We conclude that Applicant has not shown that the balance of aggravating and mitigating evidence would shift enough to create a reasonable probability that the outcome of Applicant's sentencing hearing would have been different.

We deny relief.

Newell, J., filed a dissenting opinion in which Hervey, Richardson, and Walker, JJ., joined.

Appendix 1

***908**



Newell, J., filed a dissenting opinion in which Hervey, Richardson and Walker, JJ., joined.

The United States Supreme Court unquestionably made mistakes regarding this Court's original order denying post-conviction relief in this case.[1] In his dissent, Justice Alito documented a number of instances in which the

Supreme Court erred in its legal analysis and its factual representations.[2] Today, the Court does a thorough job of further enhancing Justice Alito's ***909** arguments.[3]

But the United States Supreme Court does not care. At one point in his dissent, Justice Alito actually suggested that this Court was required to shout our holding by using "all caps" or bold type to prevent any misunderstanding.[4] It did not matter. If the majority members of the Supreme Court are unwilling to listen to these argument coming from their own colleagues, I am skeptical that they will listen to this Court's detailed restatement of them.

This is why I cannot join the Court's opinion in this case. The United States Supreme Court is not last because it is always right, they are only right because they are always last.[5] Whatever else can be said of the Supreme Court's opinion, its characterization of the mitigation evidence that Applicant's trial attorney failed to uncover was integral to the determination that Applicant's attorney's representation fell below prevailing professional norms. This Court is not free to "re-characterize" that evidence contrary to the United States Supreme Court's holding. We are bound by the United States Supreme Court's characterization.[6]

Further, I disagree with the Court's application of the standard for prejudice in cases involving the failure to investigate possibly mitigating evidence.[7] As we recently held in *Ex parte Garza*, 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.[8] Based upon the Supreme Court's characterization of the mitigation evidence in this case, Applicant has met that standard.[9] And, to the extent that the Supreme Court addressed the standard for prejudice we are to apply, the Supreme Court clarified that we err to regard it as a high one.[10]

***910** I share the Court's frustration with the United States Supreme Court's analysis in this case. Doubtless other courts, lower on the court structure pyramid, have experienced similar frustration regarding holdings from this Court. Nevertheless, they are still bound by this Court's holdings just as we are by the holdings of the United States Supreme Court. Because this Court does not properly apply controlling Supreme Court precedent in this case, I dissent.

All Citations

622 S.W.3d 892

Footnotes

1 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
2 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
3 *See Dewberry v. State*, 4 S.W.3d 735, 757 (Tex. Crim. App. 1999) ("He must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt and/or the sentence of death.").
4 *Andrus v. State*, No. AP-76,936, 2016 Tex. Crim. App. Unpub. LEXIS 1158 (Tex. Crim. App. March 23, 2016) (not designated for publication).
5 *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, *2, 2019 Tex. Crim. App. Unpub. LEXIS 81, *6 (Tex. Crim. App. February 13, 2019) (not designated for publication) (citation omitted).
6 *Id.* at *2 n.2, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *6 n.2, 2019 WL 622783.
7 *Id.* at *3, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *6 ("[W]e decline to adopt any of the trial court's findings of fact and conclusions of law, or its recommendation to grant relief regarding Claim 1.").
8 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *1.

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9 *Id.*
10 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *2.
11 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *3-4.
12 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *3.
13 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *3-4.
14 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *3.
15 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *4.
16 *Id.* at *1, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *3.
17 *Id.* at *2, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *4.
18 *Id.*
19 *Id.* at *3–8, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *7-23 (Richardson, J., concurring).
20 *Id.* at *7, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *18.
21 *Id.* at *8, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *23.
22 *Id.* at *9, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *20.
23 *Id.* Earlier in its opinion, the concurrence summarized the testimony from Applicant, his mother, and his father, as follows:

> Applicant, his mother, and his father testified regarding Applicant's background and upbringing. To summarize, Applicant was raised by a single mother who sold drugs. Applicant was exposed to drugs as early as six years of age, and started using drugs regularly at age fifteen. Throughout his childhood and early teenage years, Applicant and his siblings were often left unattended for extended periods of time and Applicant "practically raised his little brothers and sisters." Applicant's father was incarcerated for drug-related offenses for most of Applicant's life, although Applicant did live with his father during his freshman year of high school until his father was arrested on new drug charges. Applicant did fairly well in school, but he dropped out of school in tenth grade and started getting in trouble with the law.

Id. at *6, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *14-15. We note that the evidence that Applicant's mother sold drugs, that applicant was exposed to drugs, and that applicant used drugs came solely from Applicant. *See* 49 TRR 67-68, 78 (mother testified that Applicant did not have access to drugs in her household and that she never saw Applicant use drugs in her home), 50 TRR 16-17 (father testified that he never saw Applicant use drugs but heard about one instance of smoking "weed"). *See also infra* at n.77.
24 *Id.* at *7–8, 2019 Tex. Crim. App. Unpub. LEXIS 81, at 20-21.
25 *Id.* at *8, 2019 Tex. Crim. App. Unpub. LEXIS 81, at 21.
26 *Id.* at *8, 2019 Tex. Crim. App. Unpub. LEXIS 81, at 22.
27 *Id.*
28 *Id.* at *6–7, *7–8 2019 Tex. Crim. App. Unpub. LEXIS 81, at 17, 21.
29 *Id.* at *6, 2019 Tex. Crim. App. Unpub. LEXIS 81, at 17.
30 *Id.* at *7, 2019 Tex. Crim. App. Unpub. LEXIS 81, at 19.
31 *Id.*
32 *Andrus v. Texas*, —— U.S. ——, 140 S. Ct. 1875, 207 L.Ed.2d 335 (2020).
33 *Id.* at 1878.
34 *Id.*
35 *Id.* at 1879 (ellipsis in Supreme Court's opinion).
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 1879-80.

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42 *Id.* at 1880.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 1881.
50 *Id.*
51 *Id.* at 1881-82.
52 *Id.* at 1884.
53 *Id.*
54 *Id.*
55 *Id.* at 1885.
56 *Id.* at 1885 n.4.
57 *Id.* at 1885 n.3.
58 *Id.* at 1886 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).
59 *Id.* (quoting *Wiggins*, 539 U. S. at 537-38, 123 S.Ct. 2527).
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 1887.
65 *Id.* at 1886 n.6.
66 *Id.*
67 *Id.* (citing *Williams*, 529 U. S. at 399, 120 S.Ct. 1495).
68 *Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (internal quotation marks omitted).
69 *See Ex parte Graves*, 70 S.W.3d 103, 120 n.3 (Tex. Crim. App. 2002) (Price, J., dissenting) ("... we are not required to write an opinion explaining the reason or reasons we deny relief on applications of habeas corpus ...").
70 TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).
71 *See Andrus*, 140 S. Ct. at 1886.
72 *Ex parte Gonzales*, 204 S.W.3d 391, 398 (Tex. Crim. App. 2006).
73 *See* Applicant's trial testimony, 51 TRR 64; Report of Dr. Jerome Brown and Dr. Cassandra Smisson, dated 10-12-12, 10 HRR 174 (State's Exh. 32, p. 4); Josh Ethridge, TYC Psych. Eval., dated 2-28-05, 10 HRR 133 (State's Exh. 25, p. 1) (Applicant "denied history of physical, emotional, or sexual abuse").
74 He said that his mother used to give him "whoopings," that she paddled him with a board with tape on it, and that the "beatings" left bruises but his school never knew about them because the bruises were covered. 10 HRR 172 (State's Exh. 32, p. 2). He said that "his mother's boyfriends hit him with their fists, when his mother told them to and knocked the wind out of him." 10 HRR 174 (State's Exh. 32, p. 4).
75 10 HRR 133 (State's Exh. 25, p. 1).
76 10 TRR 64-65.
77 *See* 49 TRR 52-54 (mother's testimony), 50 TRR 13-14 (father's testimony) 51 TRR 48-50 (Applicant's testimony). *See also supra* at nn.17, 23.
78 *See* 10 HRR 173 (State's Exh. 32, p. 3).
79 *See* 51 TRR 49.

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80 *Id.* His second reference to food was an affirmation that his family was on food stamps. *Id.*
81 *Id.*
82 TYC Analyst note, dated 5-2-06, 10 HRR 150 (State's Exh. 27, p. 2).
83 Leslie Blizzard, TYC Psych. Assessment., dated 1-13-06, 10 HRR 101 (third page of the last four pages of State's Exh. 16).
84 *See* 10 HRR 174 (State's Exh. 32, p. 4).
85 *Id.*
86 *See id.*
87 *See* 10 HRR 135 (State's Exh. 25, p. 3).
88 *See* 10 HRR 175 (State's Exh. 32, p. 5).
89 *See* document titled *In the Matter of Terence Andrus* TYC # 109556a, 10 HRR 158 (within State's Exh. 28).
90 *See* 10 RR 73-76 (within State's Exh. 16) (transfer order); 10 HRR 147 (State's Exh. 26) (transfer document); 150 (State's Exh. 27, p. 2) (analyst note recommending transfer), 10 HRR 157-161 (within State's Exh. 28) (document recommending transfer).
91 *See Andrus*, 140 S. Ct. at 1884 n.2 (citing 5 HRR 189).
92 *See* 5 HRR 202-204. There appear to be two sets of overlapping volumes for the writ record: a seven volume set and a forty-one volume set, but the first seven volumes do not line up in the two sets. We refer to volumes in the forty-one volume set.
93 *See Andrus*, 2016 Tex. Crim. App. Unpub. LEXIS 1158, *2-6, for a discussion of the events in this paragraph.
94 *See id.* at *3–4, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *8-9 for a discussion of this incident.
95 *See* Affidavit of J. Sidney Crowley, 10 HRR 15, para. 38 (State's Exh. 1) (summarizing a statement Applicant made during a recording after arrest in New Orleans).
96 *Andrus*, 2016 Tex. Crim. App. Unpub. LEXIS 1158, at *9.
97 *Andrus*, 140 S. Ct. at 1880 n.1.
98 *See* 46 TRR 17.
99 *See* 46 TRR 15.
100 *Andrus*, 140 S. Ct. at 1880 n.1.
101 *See* 46 TRR 15.
102 *See* 46 TRR 21-28.
103 *See* 46 TRR 24.
104 *See* 46 TRR 25.
105 *See* 46 TRR 26.
106 Even if we were to accept at face value Applicant's claim that he was only a "lookout," which we do not, the episode could not be discounted completely because even serving as a lookout in an aggravated robbery is aggravating.
107 *See Andrus,* 2016 Tex. Crim. App. Unpub. LEXIS 1158, at *9 for a discussion of this incident.
108 46 TRR 59-60.
109 46 TRR 65-70.
110 *See Andrus*, 140 S. Ct. at 1885 n.4 (citing portions of the habeas record).
111 *See* 8 HRR 31.
112 *See Andrus*, 140 S. Ct. at 1885 n.4 (quoting defense counsel's question in the habeas record).
113 See 8 HRR 35.
114 *See* 54 TRR, State's Exhibit 183. *See also* Appendix 1.
115 *See* 8 HRR 5.
116 *See* 8 HRR 54, 56, 57, 62, 64-65.
117 *See* 8 HRR 62.
118 *See* 8 HRR 57.

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119 *See* 8 HRR 64.
120 *See id.* at *4, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *10-11 for a discussion of events in this paragraph.
121 *See id.* at *5, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *11-12 for a discussion of the events in this paragraph.
122 *See id.*at *5, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *12-13 for a discussion of the events in this paragraph.
123 *See id.* at *5, 2019 Tex. Crim. App. Unpub. LEXIS 81, at *13-14 for a discussion of the events in this paragraph.
124 *See* 51 TRR 65-68.
125 *See supra* at n.67.
126 *Williams*, 529 U.S. at 398, 120 S.Ct. 1495.
127 *Id.* at 395.
128 *Id.* at 396.
129 *Id.*
130 *Id.* at 368.
131 *Id.*
132 *Id.*
133 *Id.* at 368-69.
134 *Id.* at 396.
135 IQ testing indicated that Applicant had a full-scale score of 86 (verbal 86, performance 90), a low average score.
1 *Andrus v. Texas,* —— U.S. ——, 140 S. Ct. 1875, 1886, 207 L.Ed.2d 335 (2020).
2 *Id.* at 1887–1891 (Alito, J., dissenting).
3 Maj. Op. at 899–906.
4 *Id.* at 1888 (Alito, J., dissenting) ("Perhaps the Court thinks the CCA should have used CAPITAL LETTERS or **bold type**. Or maybe it should have added: 'And we really mean it!!!' ") (emphasis in original).
5 *See Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J. concurring) ("However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.")
6 *See, e.g., State v. Guzman*, 959 S.W.2d 631, 633 (Tex. Crim. App. 1998) ("When we decide cases involving the United States constitution, we are bound by United States Supreme Court case law interpreting it [.]") (citing generally *Samudio v. State*, 648 S.W.2d 312, 314 (Tex. Crim. App. 1983)).
7 Maj. Op. at 899–900.
8 *Ex parte Garza*, 2021 WL 1397860 at *1 (Tex. Crim. App. Apr. 14, 2021).
9 *Andrus,* 140 S. Ct. at 1876–1881.
10 *Andrus,* 140 S. Ct. at 1886 n.6 ("The concurring opinion, moreover, seemed to assume that the prejudice inquiry here turns principally on how the fact of this case compare to the facts in *Wiggins*. We note that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." (comparing *Wiggins v. Smith*, 539 U.S. 510, 537–538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[T]he mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence") with *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (finding such prejudice after applying AEDPA deference))).

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Appendix B

Andrus v. Texas

Supreme Court of the United States

June 15, 2020, Decided

No. 18-9674.

Reporter
140 S. Ct. 1875 *; 207 L. Ed. 2d 335 **; 2020 U.S. LEXIS 3250 ***; 88 U.S.L.W. 3386; 28 Fla. L. Weekly Fed. S 279

TERENCE TRAMAINE ANDRUS v. TEXAS

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte Andrus, 2019 Tex. Crim. App. Unpub. LEXIS 81 (Tex. Crim. App., Feb. 13, 2019)

Judges: Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

[*1877] [337]** PER CURIAM.

Death-sentenced petitioner Terence Andrus was six years old when his mother began selling drugs out of the apartment where Andrus and his four siblings lived. To fund a spiraling drug addiction, Andrus' mother also turned to prostitution. By the time Andrus was 12, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, Andrus took on the role of caretaker for his four siblings.

When Andrus was 16, he allegedly served as a lookout while his friends robbed a woman. He was sent to a juvenile detention facility where, for 18 months, 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' **[***2]** adult life.

During Andrus' capital trial, however, nearly none of this mitigating evidence reached the jury. That is because Andrus' defense counsel not only neglected to present it; he failed even to look for it. Indeed, counsel performed virtually no investigation of the relevant evidence. Those failures also fettered the defense's capacity to contextualize or counter the State's evidence **[*1878]** of Andrus' alleged incidences of past violence.

[338]** Only years later, during an 8-day evidentiary hearing in Andrus' state habeas proceeding, did the grim facts of Andrus' life history come to light. And when pressed at the hearing to provide his reasons for failing to investigate Andrus' history, Andrus' counsel offered none.

The Texas trial court that heard the evidence recommended that Andrus be granted habeas relief and receive a new sentencing proceeding. The court found the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial. The Texas Court of Criminal Appeals disagreed. It concluded without explanation that Andrus had failed to satisfy **[***3]** his burden of showing ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We conclude that the record makes clear that Andrus has demonstrated counsel's deficient performance under *Strickland*, but that the Court of Criminal Appeals may have failed properly to engage with the follow-on question whether Andrus has shown that counsel's deficient performance prejudiced him. We thus grant Andrus' petition for a writ of certiorari, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for further proceedings not inconsistent with this opinion.

I

A

In 2008, 20-year-old Terence Andrus unsuccessfully attempted a carjacking in a grocery-store parking lot while under the influence of PCP-laced marijuana. During the bungled attempt, Andrus fired multiple shots, killing car owner Avelino Diaz and bystander Kim-Phuong Vu Bui. The State charged Andrus with capital murder.

At the guilt phase of trial, Andrus' defense counsel declined to present an opening statement. After the State rested its case, the defense immediately rested as well. In his closing argument, defense counsel conceded Andrus' guilt and informed the jury that the trial would "boil down to the punishment phase," emphasizing that "that's **[***4]** where we are going to be fighting." 45 Tr. 18. The jury found Andrus guilty of capital murder.

Trial then turned to the punishment phase. Once again, Andrus' counsel presented no opening statement. In its 3-day case in aggravation, the State put forth evidence that Andrus had displayed aggressive and hostile behavior while confined in a juvenile detention center; that Andrus had tattoos indicating gang affiliations; and that Andrus had hit, kicked, and thrown excrement at prison officials while awaiting trial. The State also presented evidence tying Andrus to an aggravated robbery of a dry-cleaning business. Counsel raised no material objections to the State's evidence and cross-examined the State's witnesses only briefly.

When it came to the defense's case in mitigation, counsel first called Andrus' mother to testify. The direct examination focused on Andrus' basic biographical information and did not reveal any difficult circumstances in Andrus' childhood. Andrus' mother testified that Andrus had an "excellent" relationship with his siblings **[**339]** and grandparents. 49 *id.*, at 52, 71. She also insisted that Andrus "didn't have access to" "drugs or pills in [her] household," and that she would have "counsel[ed] **[***5]** him" had she found out that he was using drugs. *Id.*, at 67, 79.

[*1879] The second witness was Andrus' biological father, Michael Davis, with whom Andrus had lived for about a year when Andrus was around 15 years old. Davis had been in and out of prison for much of Andrus' life and, before he appeared to testify, had not seen Andrus in more than six years. The bulk of Davis' direct examination explored such topics as Davis' criminal history and his relationship with Andrus' mother. Toward the end of the direct examination, counsel elicited testimony that Andrus had been "good around [Davis]" during the 1-year period he had lived with Davis. 50 *id.*, at 8.

Once Davis stepped down, Andrus' counsel informed the court that the defense rested its case and did not intend to call any more witnesses. After the court questioned counsel about this choice during a sidebar discussion, however, counsel changed his mind and decided to call additional witnesses.

Following a court recess, Andrus' counsel called Dr. John Roache as the defense's only expert witness. Counsel's terse direct examination focused on the general effects of drug use on developing adolescent brains. On cross-examination, the State quizzed Dr. Roache about the **[***6]** relevance and purpose of his testimony, probing pointedly whether Dr. Roache "drove three hours from San Antonio to tell the jury . . . that people change their behavior when they use drugs." 51 *id.*, at 21.

Counsel next called James Martins, a prison counselor who had worked with Andrus. Martins testified that Andrus "started having remorse" in the past two months and was "making progress." *Id.*, at 35. On cross-examination, the State emphasized that Andrus' feelings of remorse had manifested only recently, around the time trial began.

Finally, Andrus himself testified. Contrary to his mother's depiction of his upbringing, he stated that his mother had started selling drugs when he was around six years old, and that he and his siblings were often home alone when they were growing up. He also explained that he first started using drugs regularly around the time he was 15. All told, counsel's questioning about Andrus' childhood comprised four pages of the trial transcript. The State on cross declared, "I have not heard one mitigating circumstance in your life." *Id.*, at 60.

The jury sentenced Andrus to death.

B

After an unsuccessful direct appeal, Andrus filed a state habeas application, principally alleging that his trial **[***7]** counsel was ineffective for failing to investigate or present available mitigation evidence. During an 8-day evidentiary hearing, Andrus presented what the Texas trial court characterized as a "tidal wave of information . . . with regard to mitigation." 7 Habeas Tr. 101.

The evidence revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse. Andrus was born into a neighborhood of Houston, **[**340]** Texas, known for its frequent shootings, gang fights, and drug overdoses. Andrus' mother had Andrus, her second of five children, when she was 17. The children's fathers never stayed as part of the family. One of them raped Andrus' younger half sister when she was a child. The others—some physically abusive toward Andrus' mother, all addicted to drugs and carrying criminal histories—constantly flitted in and out of the picture.

Starting when Andrus was young, his mother sold drugs and engaged in prostitution. She often made her drug sales at home, in view of Andrus and his siblings. She also habitually used drugs in front of **[*1880]** them, and was high more often than not. In her frequently disoriented state, she would leave her children to fend for themselves. **[***8]** Many times, there was not enough food to eat.

After her boyfriend was killed in a shooting, Andrus' mother became increasingly dependent on drugs and neglectful of her children. As a close family friend attested, Andrus' mother "would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it." 13 Habeas Tr., Def. Exh. 13, p. 2.

With the children often left on their own, Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs. Andrus was around 12 years old at the time. He cleaned for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner. According to his siblings, Andrus was "a protective older brother" who "kept on to [them] to stay out of trouble." *Id.*, Def. Exh. 18, p. 1. Andrus, by their account, was "very caring and very loving," "liked to make people laugh," and "never liked to see people cry." *Ibid.*; *id.*, Def. Exh. 9, p. 1. While attempting to care for his siblings, Andrus struggled with mental-health issues: When he was only 10 or 11, he was diagnosed with **[***9]** affective psychosis.

At age 16, Andrus was sentenced to a juvenile detention center run by the Texas Youth Commission (TYC), for allegedly "serv[ing] as the 'lookout'" while he and his friends robbed a woman of her purse. 10 Habeas Tr., State Exh. 16, p. 9; 13 *id.*, Def. Exh. 4, p. 4 ("[R]ecords indicate[d that] Andrus served as the lookout"); 3 *id.*, at 273-274; 5 *id.*, at 206. [1] 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. After 18 months in TYC custody, Andrus was transferred to an adult prison facility.

Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in **[**341]** his capital convictions. While incarcerated awaiting trial, Andrus tried to commit suicide. He slashed his wrist with a razor blade and used his blood to smear messages on the walls, beseeching the world to "[j]ust let [him] die." 31 *id.*, Def. Exh. 122-A, ANDRUS-SH 4522.

After considering all the evidence **[***10]** at the hearing, the Texas trial court concluded that Andrus' counsel had been ineffective for "failing to investigate and present mitigating evidence regarding [Andrus'] abusive and neglectful childhood." App. to Pet. for Cert. 36. The court observed that the reason Andrus' jury did not hear "relevant, available, and persuasive mitigating evidence" was that trial counsel had "fail[ed] to investigate and present all other mitigating evidence." *Id.*, at 36-37. The court explained that "there [is] ample mitigating evidence which could have, and should have, been presented at the punishment **[*1881]** phase of [Andrus'] trial." *Id.*, at 36. For that reason, the court concluded that counsel had been constitutionally ineffective, and that habeas relief, in the form of a new punishment trial, was warranted. *Id.*, at 37, 42.

C

The Texas Court of Criminal Appeals rejected the trial court's recommendation to grant habeas relief. In an unpublished *per curiam* order, the Court of Criminal Appeals concluded without elaboration that Andrus had "fail[ed] to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability **[***11]** that the result of the proceedings would have been different but for counsel's deficient performance." App. to Pet. for Cert. 7-8. A concurring opinion reasoned that, even if counsel had provided deficient performance under *Strickland*, Andrus could not show that counsel's deficient performance prejudiced him.

Andrus petitioned for a writ of certiorari. We grant the petition, vacate the judgment of the Texas Court of Criminal Appeals, and remand for further proceedings not inconsistent with this opinion. The evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*. But we remand so that the Court of Criminal Appeals may address the prejudice prong of *Strickland* in the first instance.

II

[1] To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland*, 466 U. S., at 688, 694. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. And to establish prejudice, a

[1] The dissent states that the victim identified Andrus as the individual holding the gun, *post*, at ___, 207 L. Ed. 2d, at 351 (opinion of Alito, J.), but in fact, the victim testified at Andrus' trial that she did not and could not identify faces or individuals, see 4 Tr. 17, 19-20. The dissent also claims that "the victim matched Andrus's clothing to the gunman's," *post*, at ___, n. 1, 207 L. Ed. 2d, at 351, but neglects to mention that the victim described at least two individuals as wearing such clothing, see 46 Tr. 25-27.

defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, **[***12]** the result of the proceeding would have been different." *Id.*, at 694.

A

"It is unquestioned that under prevailing professional norms at the time **[**342]** of [Andrus'] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter* v. *McCollum*, 558 U. S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (*per curiam*) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). [2] Counsel in a death-penalty case has "'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins* v. *Smith*, 539 U. S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Strickland*, 466 U. S., at 691). "'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Wiggins*, 539 U. S., at 521-522.

Here, the habeas record reveals that Andrus' counsel fell short of his obligation in multiple ways: 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 **[*1882]** to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. **[***13]** Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

1

[3] To assess whether counsel exercised objectively reasonable judgment under prevailing professional standards, we first ask "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Andrus'] background was itself reasonable." *Id.*, at 523 (emphasis deleted); see also *id.*, at 528 (considering whether "the *scope* of counsel's investigation into petitioner's background" was reasonable); *Porter*, 558 U. S., at 39. Here, plainly not. Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise.

To start, counsel was, by his own admissions at the habeas hearing, barely acquainted with the witnesses who testified during the case in mitigation. Counsel acknowledged that the first time he met Andrus' mother was when she was subpoenaed to testify, and the first time he met Andrus' biological father was when he showed up at the courthouse to take the stand. Counsel also admitted that he did not get in touch with the third witness **[***14]** (Dr. Roache) until just before *voir dire*, and became aware of the final witness (Martins) only partway through trial. Apart from some brief pretrial discussion with Dr. Roache, who averred that he was "struck by the extent to which [counsel] appeared unfamiliar" with pertinent issues, counsel did not prepare the witnesses or go over their testimony before calling them to the stand. 13 Habeas Tr., Def. Exh. 6, p. 3.

Over and over during the habeas hearing, counsel acknowledged that **[**343]** he did not look into or present the myriad tragic circumstances that marked Andrus' life. For instance, he did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized. Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing. As a clinical psychologist testified at the habeas hearing, Andrus suffered "very pronounced trauma" and posttraumatic stress disorder symptoms from, among other things, "severe neglect" and exposure to domestic violence, substance abuse, and death in his childhood. 6 *id.*, at 168-169, 180; 7 *id.*, at 52. Counsel uncovered none **[***15]** of that evidence. Instead, he "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U. S., at 524.

On top of that, counsel "ignored pertinent avenues for investigation of which he should have been aware," and indeed was aware. *Porter*, 558 U. S., at 40. At trial, counsel averred that his review did not reveal that Andrus had any mental-health issues. But materials prepared by a mitigation expert well before trial had pointed out that Andrus had been "diagnosed with affective psychosis," a mental-health condition marked by symptoms such as depression, mood lability, and emotional dysregulation. 3 *id.*, at 70. 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 **[*1883]** mental health issue." *Id.*, at 71. He also acknowledged that a clinical psychologist briefly retained to examine a limited sample of Andrus' files had informed him that Andrus may have schizophrenia. Clearly, "the known evidence would [have] le[d] a reasonable attorney to investigate further." *Wiggins*, 539 U. S., at 527. Yet counsel disregarded, rather than explored, the multiple red flags.

In short, **[***16]** counsel performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence. The untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast.

"[4] [C]ounsel's failure to uncover and present [the] voluminous mitigating evidence," moreover, cannot "be justified as a tactical decision." *Id.*, at 522; see also *Williams*, 529 U. S., at 396. Despite repeated questioning, counsel never offered, and no evidence supports, any tactical rationale for the pervasive oversights and lapses here. Instead, the overwhelming weight of the record shows that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U. S., at 526. That failure is all the more alarming given that counsel's purported strategy was to concede guilt and focus on mitigation. Indeed, counsel justified his decision to present "basically" "no defense" during the guilt phase by stressing that he intended to train his efforts on **[**344]** the case in mitigation. 3 Habeas Tr. 57. As the habeas hearing laid bare, that representation blinked reality. Simply put, "the scope of counsel's [mitigation] **[***17]** investigation" approached nonexistent. *Wiggins*, 539 U. S., at 528 (emphasis deleted).

2

No doubt due to counsel's failure to investigate the case in mitigation, much of the so-called mitigating evidence he offered unwittingly aided the State's case in aggravation. Counsel's introduction of seemingly *aggravating* evidence confirms the gaping distance between his performance at trial and objectively reasonable professional judgment.

The testimony elicited from Andrus' mother best illustrates this deficiency. First to testify during the case in mitigation, Andrus' mother sketched a portrait of a tranquil upbringing, during which Andrus got himself into trouble despite his family's best efforts. On her account, Andrus fell into drugs entirely on his own: Drugs were not available at home, Andrus did not use them at home, and she would have intervened had she known about Andrus' drug habits. Andrus, his mother related to the jury, "[k]ind of " "just decided he didn't want to do what [she] told him to do." 49 Tr. 83.

Even though counsel called Andrus' mother as a defense witness, he was ill-prepared for her testimony. Andrus told counsel that his mother was being untruthful on the stand, but counsel made no real attempt **[***18]** to probe the accuracy of her testimony. Later, at the habeas hearing, counsel conceded that Andrus' mother had been a "hostile" witness. 3 Habeas Tr. 94. He further admitted that he "[did not] know if [Andrus' mother] was telling the truth," *id.*, at 96, and could not even say that he had known what Andrus' mother would say on the stand, because he had not "done any independent investigation" of her, *id.*, at 95.

None of that inaction was for want of warning. During the habeas proceedings, a mitigation specialist averred that she had alerted Andrus' counsel to her concerns about Andrus' mother well before trial. In **[*1884]** a short interview with the mitigation specialist, Andrus' mother had stated that she "had too many kids," and had taken out a $10,000 life-insurance policy on Andrus on which she would be able to collect were Andrus executed. 13 *id.*, Def. Exh. 28, p. 5. Troubled by these comments, the mitigation specialist "specifically discussed with [Andrus' counsel] the fact that [Andrus' mother] was not being a cooperative witness and might not have Andrus' best interests motivating her behavior." *Id.*, at 6. But Andrus' counsel did not heed the caution.

Turning a bad situation worse, counsel's uninformed decision to **[***19]** call Andrus' mother ultimately undermined Andrus' own testimony. After Andrus testified that his mother had sold drugs from home when he was a child, counsel promptly pointed out that Andrus "heard [his] mama testify," and that she "didn't say anything about selling drugs." 51 Tr. 48. Whether counsel merely intended to provide Andrus an opportunity to explain the discrepancy (or, far worse, sought to signal that his client was being deceitful) the jury could have understood counsel's statements to **[**345]** insinuate that Andrus was lying. Counsel did nothing to dislodge that suggestion, and the damaging exchange occurred only because defense counsel had called a hostile witness in the first place. Plainly, these offerings of seemingly aggravating evidence further demonstrate counsel's constitutionally deficient performance.

3

Counsel also failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so. He thus could not, and did not, rebut critical aggravating evidence. This failure, too, reinforces counsel's deficient performance. See *Rompilla* v. *Beard*, 545 U. S. 374, 385, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) ("counsel ha[s] a duty to make all reasonable efforts to learn what they c[an] about the offense[s]" the **[***20]** prosecution intends to present as aggravating evidence).

During the case in aggravation, the State's task was to prove to the jury that Andrus presented a future danger to society. Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1) (Vernon 2006). To that end, the State emphasized that Andrus had acted aggressively in TYC facilities and in prison while awaiting trial. This evidence principally comprised verbal

threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. See App. to Pet. for Cert. 10-13. 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. [2] Or, with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison. But instead, 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." 52 Tr. 35.

[*1885] The State's case in aggravation also highlighted Andrus' alleged commission **[***21]** 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." 3 Habeas Tr. 65. 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, **[**346]** later recanted by the witness, [3] 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 dry-cleaning offense as if Andrus were undoubtedly the perpetrator. See *post*, at ___, 207 L. Ed. 2d, at 352 (opinion of Alito, J.). The very problem here is that the jury indeed **[***22]** 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. [4]

That is hardly the work of reasonable counsel. [5] In Texas, a jury cannot recommend a death sentence without unanimously finding that a defendant presents a future danger to society (*i.e.*, that the State has made a sufficient showing of aggravation). Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1). Only after a jury makes a finding of future dangerousness can it consider any mitigating evidence. *Ibid.* Thus, by failing to conduct even a marginally adequate investigation, counsel not only "seriously compromis[ed his] opportunity to respond to a case for aggravation," *Rompilla*, 545 U. S., at 385, but also relinquished the first of only two procedural pathways for opposing the State's pursuit of the death penalty. There is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment.

B

Having found deficient performance, the question remains whether counsel's deficient performance prejudiced Andrus. See *Strickland*, 466 U. S., at 692. [6] Here, prejudice exists if there is a reasonable probability that, but for his counsel's **[***23]** ineffectiveness, the jury would have made a different judgment **[*1886]** about whether Andrus deserved the death penalty as opposed to a lesser sentence. See *Wiggins*, 539 U. S., at 536; see also Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e)(1). In assessing whether Andrus has made that showing, the reviewing court must consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[h] it against the evidence

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[2] See, *e.g.*, 5 Habeas Tr. 189 (TYC ombudsman testifying that it was "surpris[ing] how few" citations Andrus received, "particularly in the dorms where [Andrus] was" housed); *ibid.* (TYC ombudsman finding "nothing uncommon" about Andrus' altercations because "sometimes you . . . have to fight to get by" in the "violent atmosphere" and "savage environment"); *id.*, at 169 (TYC ombudsman testifying that Andrus' isolation periods in TCY 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"); *id.*, at 246 (TYC ombudsman testifying that Andrus' "experience at TYC" "damaged him" and "further traumatized" him).

[3] The dissent maintains that this witness, Andrus' ex-girlfriend, "linked [Andrus] to the robbery," *post*, at ___, n. 4, 207 L. Ed. 2d, at 352, even though she testified at the habeas hearing that she thought "it was impossible" that Andrus had committed the offense, 8 Habeas Tr. 57.

[4] The dissent does not mention that Andrus' image was conspicuously placed in a central position in the photo array, as the "[o]nly one . . . looking directly up and out." 8 Habeas Tr. 35; see also *id.*, at 32. Nor does the dissent acknowledge that there was an approximately 3-month interval between the incident (after which the victim provided little identifying information about the assailant) and the police's presentation of the photo array to the victim. See *id.*, at 37; 46 Tr. 65. When asked about the delay, the detective who prepared the photo array admitted that memory can "deca[y] within a matter of days after a traumatizing incident like a crime" and that an "eyewitness identificatio[n]" "can be" "more exponentially problematic" "the greater the time interval between the incident and the identification." 8 Habeas Tr. 31; see also *ibid.* (detective confirming that there can be "real problems with reliability" if an "identification [was] made several months" after).

in aggravation." *Williams*, **[**347]** 529 U. S., at 397-398; see also *Sears* v. *Upton*, 561 U. S. 945, 956, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010) (*per curiam*) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence . . ., along with the mitigation evidence introduced during [the defendant's] penalty phase trial, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation" (citing cases)). And because Andrus' death sentence required a unanimous jury recommendation, Tex. Code Crim. Proc. Ann., Art. 37.071, prejudice here requires only "a reasonable probability that at least one juror would have struck a different balance" regarding Andrus' "moral culpability," *Wiggins*, 539 U. S., at 537-538; see also Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e)(1).

According to Andrus, effective counsel would have painted a vividly different **[***24]** tableau of aggravating and mitigating evidence than that presented at trial. See Pet. for Cert. 18. But despite powerful and readily available mitigating evidence, Andrus argues, the Texas Court of Criminal Appeals failed to engage in any meaningful prejudice inquiry. See *ibid.*

It is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all. Its one-sentence denial of Andrus' *Strickland* claim, see *supra*, at ___, 207 L. Ed. 2d, at 341, does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong, that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong, or that Andrus had failed to satisfy both prongs of *Strickland*.

Unlike the concurring opinion, however, the brief order of the Court of Criminal Appeals did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury. [5] What little is evident from the proceeding below is that the concurring opinion's analysis of or conclusion regarding prejudice did not garner a majority of the Court of Criminal Appeals. [6] Given that, the court may have **[*1887]** concluded simply that Andrus **[***25]** failed to demonstrate deficient performance under the first prong of *Strickland* (without **[**348]** even reaching the second prong). For the reasons explained above, any such conclusion is erroneous as a matter of law. See *supra*, at ___ - ___, 207 L. Ed. 2d, at 341-346.

The record before us raises a significant question whether the apparent "tidal wave," 7 Habeas Tr. 101, 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, *Wiggins*, 539 U. S., at 538 (quoting *Williams*, 529 U. S., at 398). (That is, at the very least, whether there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.) That 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." *Sears*, 561 U. S., at 956; see also *id.*, at 954 ("We have never limited the prejudice inquiry under *Strickland* to cases in which there was 'little or no mitigation evidence' presented"). [7] Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive **[***26]** analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

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[5] The Court of Criminal Appeals did briefly observe that the trial court's order recommending relief had omitted the "'reasonable probability'" language when reciting the *Strickland* prejudice standard. App. to Pet. for Cert. 8, n. 2; cf. *Strickland*, 466 U. S., at 694 (a defendant "must show that there is a reasonable probability that, but for counsel's unpro-fessional errors, the result of the proceeding would have been different"). Even were there reason to set aside that "[t]rial judges are presumed to know the law," *Lambrix* v. *Singletary*, 520 U. S. 518, 532, n. 4, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (internal quotation marks omitted), the trial court's omission of the "reasonable probability" language would at most suggest that it held Andrus to (and found that Andrus had satisfied) a stricter standard of prejudice than that set forth in *Strickland*.

[6] The concurring opinion, moreover, seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*. We note that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice. Cf. *Wiggins*, 539 U. S., at 537-538 ("[T]he mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence"); *Williams*, 529 U. S., at 399 (finding such prejudice after applying AEDPA deference).

[7] The dissent trains its attention on the aggravating evidence actually presented at trial. *Post*, at ___ - ___, 207 L. Ed. 2d, at 351-352; but see *Sears*, 561 U. S., at 956 (*Strickland* prejudice inquiry "will necessarily require a court to 'speculate' as to the effect of the new evidence" on the trial evidence); 561 U. S., at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence . . ., along with the mitigation evidence introduced during [the] penalty phase trial").

We conclude that Andrus has shown deficient performance under the first prong of *Strickland*, and that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland*. We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed *in forma pauperis*, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.

It is so ordered.

Dissent by: ALITO

Dissent

[349]** JUSTICE **ALITO**, with whom JUSTICE **THOMAS** and JUSTICE **GORSUCH** join, dissenting.

The Court clears this case off the docket, but it does so on a ground that is hard to take seriously. According to the Court, "[i]t is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all." *Ante*, at ——, 207 L. Ed. 2d, at 347; see *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But that reading is squarely contradicted by the opinion of the Court of Criminal Appeals (CCA), which said explicitly that Andrus **[***27]** failed to show prejudice:

> **[*1888]** "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness *and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance*." App. to Pet. for Cert. 7-8 (emphasis added).

Not only does the CCA opinion contain this express statement, but it adds that the trial court did not heed *Strickland*'s test for prejudice. See App. to Pet. for Cert. 8, n. 2 ("[T]hroughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's 'reasonable probability' language"). And the record clearly shows that the trial court did not apply that test to Andrus's claim. See App. to Pet. for Cert. 36-37. A majority of this Court cannot seriously think that the CCA pointed this out and then declined to reach the issue of prejudice.

How, then, can the Court get around the unmistakable evidence that the CCA decided the issue of prejudice? It begins by expressing doubt about the meaning of the critical sentence reproduced above. According to the Court, that sentence **[***28]** "does not conclusively reveal whether [the CCA] determined . . . that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong." *Ante*, at ___, 207 L. Ed. 2d, at 347. It is hard to write a more conclusive sentence than "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show by a preponderance of the evidence . . . that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." App. to Pet. for Cert. 7-8. Perhaps the Court thinks the CCA should have used CAPITAL LETTERS or **bold type**. Or maybe it should have added: "And we really mean it!!!"

Not only does the Court express doubt that the CCA reached the prejudice prong of *Strickland*, but the Court is not sure that the CCA decided even the performance prong. See *ante*, at ___, 207 L. Ed. 2d, at 347 ("Its one-sentence denial of Andrus' *Strickland* claim . . . does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong"). The Court may feel it necessary to make that statement because the CCA disposed of both prongs in the sentence quoted above. So if that sentence is not sufficient **[**350]** to show that the CCA reached the prejudice **[***29]** prong, there is no better reason for thinking that it decided the performance prong. But if the Court really thinks that the CCA did not decide the performance issue, why does it treat that issue differently from the prejudice issue? Why does it decide the performance question in the first instance? Are we now a court of "first view" and not, as we have often stressed, a "court of review"? See, *e.g.*, *McLane Co., Inc.* v. *EEOC*, 581 U. S. ___, ___, 137 S. Ct. 1159, 1170, 197 L. Ed. 2d 500 (2017)). The Court's disparate treatment of the two parts of the CCA's dispositive sentence shows that the Court is only selectively skeptical.

The Court gives two reasons for doubting that the CCA reached the issue of prejudice, but both are patent makeweights. First, the Court notes that the CCA's *per curiam* opinion, unlike the concurring opinion, did not provide reasons for finding that prejudice had not been shown. But the failure to explain is not the same as failure to decide. Today's "tutelary remand" is a misuse of our supervisory authority and a waste of our and the CCA's time. **[*1889]** *Lawrence* v. *Chater*, 516 U. S. 163, 185, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996) (Scalia, J., dissenting).

Second, the Court observes that the concurring opinion, which discussed the question of prejudice at some length, was joined

by only four of the CCA's nine judges. See App. to Pet. for **[***30]** Cert. 9-21 (opinion of Richardson, J., joined by Keller, P. J., and Hervey and Slaughter, JJ.). But that does not show that the other five declined to decide the question of prejudice. The most that one might possibly infer is that these judges might not have agreed with everything in the concurrence, but even that is by no means a certainty. So the Court's reading of the decision below is contrary to the plain language of the decision and is not supported by any reason worth mentioning.

If that were not enough, the Court's reading is belied by Andrus's interpretation of the CCA decision. Andrus nowhere claims that the CCA failed to decide the issue of prejudice. On the contrary, the petition faults the CCA for providing "a *truncated* 'no prejudice' analysis," not for failing to decide the prejudice issue at all. Pet. for Cert. ii (emphasis added). Indeed, the main argument in the petition is that we should modify *Strickland* because courts are too often rejecting ineffective-assistance claims for lack of prejudice. That argument would make no sense if the CCA had not decided the prejudice issue, something that is never even implied by Andrus's counsel in either the 40-page petition or **[***31]** the 11-page reply.

Not only did the CCA clearly hold that Andrus failed to show prejudice, but there was strong support for that holding in the record. To establish prejudice, Andrus must show "a substantial, not just conceivable, likelihood" that one of the jurors who unanimously agreed on his sentence would not have done so if his trial counsel had presented more mitigation evidence. *Cullen* v. *Pinholster*, 563 U. S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotation marks omitted). This inquiry focuses not just on the newly offered mitigation evidence, but on the likelihood that this evidence would have overcome the State's aggravation **[**351]** evidence. See, *e.g.*, *Sears* v. *Upton*, 561 U. S. 945, 955-956, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010) (*per curiam*). While providing a lengthy (and one-sided) discussion of Andrus's mitigation evidence, the Court never acknowledges the volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in or out of prison. Instead, the Court says as little as possible about Andrus's violent record.

For example, here is what the Court says about the crimes for which he was sentenced to death: "Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in his capital convictions." **[***32]** *Ante*, at ___, 207 L. Ed. 2d, at 340.

Here is what the record shows. According to Andrus's confession, he left his apartment one evening, "'amped up' on embalming fluid [PCP] mixed with marijuana, cocaine, and beer," and looked for a car to "go joy-riding." No. AP-76,936, p. 5 (CCA, Mar. 23, 2016) (Reh'g Op.); see also 54 Tr., Pl. Exh. 147 (Andrus's confession). In the parking lot of a supermarket, he saw Avelino Diaz drop off his wife, Patty, in front of the store. By his own admission, Andrus approached Diaz's car with a gun drawn, but he abandoned the carjacking attempt when he saw that the car had a stick shift, which he could not drive. Alerted by a store employee, Patty Diaz ran out of the store and found her husband lying by the side of the car with a bullet wound in the back of his head. He was subsequently pronounced dead.

[*1890] After killing Avelino Diaz, Andrus approached a car with two occupants, whom Andrus described as an "old man and old wom[a]n." *Id*., at 2. Andrus fired three shots into the car. The first went through the open driver's side window and hit the passenger, Kim-Phuong Vu Bui, in the head. As the car sped away, Andrus fired a second shot, which entered the back driver's side window, and a third shot, **[***33]** which "entered at an angle indicating that the shot originated from a farther distance." Reh'g Op. 3. One of these bullets hit the driver, Steve Bui, in the back. Seeing that blood was coming out of his wife's mouth, Steve drove her to a hospital and carried her inside, where she died.

These senseless murders in October 2008 were not Andrus's first crimes. In 2004, he was placed on probation for a drug offense, but just two weeks later, he committed an armed robbery. Andrus and two others followed a woman to her parents' home, where they held her at gunpoint and took her purse and gym bag. The woman identified Andrus as the perpetrator who held the gun. *Id*., at 7. [1]

For this offense, Andrus was sent to a juvenile facility where he showed such "'significant assaultive behavior' toward other youths and staff " that he was eventually transferred to an adult facility. App. to Pet. for Cert. **[**352]** 11. [2] Shortly

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[1] The Court credits Andrus's version of the event and repeats his allegation that he merely served as a "lookout." *Ante*, at ___, ___, 207 L. Ed. 2d, at 337, 340. As the CCA explained on direct review, however, the victim matched Andrus's clothing to the gunman's. See Reh'g Op. 7; see also 46 Tr. 23-25 (arresting officer explaining that only Andrus's clothing matched the suspect description).

[2] Just as the Court provides a one-sided summary of Andrus's mitigation evidence, it quibbles at every possible turn with the aggravation evidence. Thus, the Court states that Andrus's behavioral problems at this facility "were notably mild." *Ante*, at___, 207 L. Ed. 2d, at 345. But the witness on whose testimony the Court relies admitted that Andrus's record included multiple threats and assaults against staff and other youths. 4 Habeas Tr. 202-204. And

after his release, he again violated his supervisory conditions and was returned to the adult facility. *Ibid*.

When he was released again, he committed an armed robbery of a dry-cleaning establishment. Around 7 a.m. one morning, he entered the business and chased the owner, Tuan Tran, to the **[***34]** back. He beat Tran and threatened him with a knife until Tran gave him money. Reh'g Op. 7-8. Andrus's ex-girlfriend told the police that he confessed to this robbery. 8 Habeas Tr. 14. [3] In addition, Tran picked Andrus out of a photo array, 46 Tr. 66, 69-70, [4] and testified **[*1891]** at trial that the robber was in the courtroom, *id.*, at 59-60, but he was too afraid to point at Andrus, *ibid*. Less than two months after this crime, Andrus murdered Avelino Diaz and Kim-Phuong Vu Bui. App. to Pet. for Cert. 11.

While awaiting trial for those murders, Andrus carried out a reign of terror in jail. He assaulted another detainee, attacked and injured corrections officers, threw urine in an officer's face, repeatedly made explicit threats to kill officers and staff, flooded his cell and threw excrement on the walls, and engaged in other disruptive acts. *Id.*, at 11-13. Also while awaiting trial for murder, he had the words "murder weapon" tattooed on his hands and a smoking gun tattooed on his forearm. 51 Tr. 65-66, 68.

In sum, the CCA assessed the issue of prejudice in light of more than the potentially mitigating evidence that the Court marshals for Andrus. The CCA had before it strong aggravating evidence that Andrus **[***35]** wantonly killed two innocent victims and shot a third; that he committed other violent crimes; that he has a violent, dangerous, and unstable character; and that he is a threat to those he encounters.

The CCA has already held once that Andrus failed to establish prejudice. I see no good reason why it should be required to revisit the issue.

References

U.S.C.S., Constitution, Amendment 6

3 Criminal Constitutional Law § 13.08 (Matthew Bender)

L Ed Digest, Criminal Law § 46.12

L Ed Index, Capital Offenses and Punishment

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. 83 L. Ed. 2d 1112.

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the record shows that Andrus had needed to be removed from general population 77 times. 10 *id.*, Pl. Exh. 28. The responsible corrections officials obviously did not think this record was "notably mild," because it prompted them to transfer him to an adult facility.

[3] Although Andrus's ex-girlfriend later signed an affidavit contradicting herself, 41 *id.*, Def. Exh. 139, pp. 1-2, she admitted at the habeas hearing—after learning that she had been recorded—that she indeed relayed this information, 8 *id.*, at 48-49. Andrus's counsel tried to withdraw her affidavit from evidence, having "learned information that caused [them] to doubt [her] reliability." *Id.*, at 5.

[4] The Court again credits Andrus's allegation that he did not commit this robbery. See *ante*, at ___ - ___, 207 L. Ed. 2d, at 345-346. In support, the Court points to what Tran told police shortly after being beaten and to supposed problems with the photo array from which Tran first identified Andrus. But the Court cannot dispute that Andrus's ex-girlfriend linked him to the robbery or that Tran identified him twice. Nor did the detective to whom the Court refers in fact testify that "the inclusion of Andrus' photograph in a belated photo array . . . gave rise to numerous reliability concerns." *Ante*, at ___, 207 L. Ed. 2d, at 346; see 8 Habeas Tr. 31 (testifying, in response to habeas counsel's repeated questions whether delays affect the reliability of identifications, only that they "can"); *id.*, at 42-44 (affirming the bases for Andrus's inclusion).

Appendix C

Ex parte Andrus

Court of Criminal Appeals of Texas

February 13, 2019, Decided; February 13, 2019, Filed

NO. WR-84,438-01

Reporter
2019 Tex. Crim. App. Unpub. LEXIS 81 *; 2019 WL 622783

EX PARTE TERENCE TRAMAINE ANDRUS

Notice: DO NOT PUBLISH.

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Vacated by, Remanded by, Motion granted by Andrus v. Texas, 140 S. Ct. 1875, 207 L. Ed. 2d 335, 2020 U.S. LEXIS 3250 (U.S., June 15, 2020)

Affirmed by, Writ of habeas corpus denied Ex parte Andrus, 2021 Tex. Crim. App. LEXIS 522 (Tex. Crim. App., May 19, 2021)

Prior History: [*1] ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT FORT BEND COUNTY.

Ex parte Andrus, 2017 Tex. Crim. App. Unpub. LEXIS 900 (Tex. Crim. App., Mar. 29, 2017)

Judges: RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined..

Opinion

Per curiam. **RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined**.

ORDER

This is an application for a writ of habeas corpus, filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In November 2012, a jury convicted applicant of capital murder for intentionally or knowingly causing the deaths of Avelino Diaz and Kim-Phuong Vu Bui by shooting them with a firearm during the same criminal transaction. *See* TEX. PENAL CODE § 19.03(a). The trial evidence generally showed that, on October 15, 2008, a then-unidentified African American man shot Avelino Diaz to death while trying to "carjack" Diaz in a Kroger's front parking lot in Fort Bend County. While fleeing, Diaz's assailant shot at the two occupants of a car which was entering the Kroger's side lot. The man killed the passenger (Kim-Phuong Vu Bui) and wounded the driver (Kim's husband, Steve Bui).

After investigation, Texas law enforcement officers identified applicant as a suspect. These officers subsequently **[*2]** learned that applicant had been arrested in New Orleans on an unrelated charge. The officers returned applicant to Texas after he waived extradition.

Applicant initially denied any involvement in the Kroger shootings. However, applicant ultimately confessed to the officers that he had shot the complainants. In his written statement, applicant asserted he was high on a mix of "embalming fluid" mixed with marijuana (a street name for marijuana or tobacco cigarettes dipped in phencyclidene (PCP)), cocaine, and beer when the offense occurred.

Applicant also essentially contended that he had acted in self-defense. Applicant admitted that he had been trying to take Diaz's car. However, applicant asserted that he tried to abandon the attempt after he saw that the car was a stick-shift, which he could not drive. But then Diaz got out of the car, trying to pull a pistol out of a holster. While fleeing the scene of Diaz's shooting, applicant asserted, the Buis tried to run applicant over with their car. However, applicant's account of the shootings contradicted the State's physical and testimonial evidence.

The jury found applicant guilty of capital murder as alleged in the indictment. *See* TEX. PENAL CODE § 19.03(a)(7)(A). At **[*3]** the punishment phase, the State presented evidence of applicant's adjudicated and unadjudicated prior offenses. These included juvenile adjudications for felony possession of a controlled substance in a drug-free zone and criminal solicitation to commit felony aggravated robbery (involving a firearm). They also included evidence that Applicant had

committed an aggravated robbery less than a month before the capital offense. During that offense, applicant kicked, beat, and threatened his victim with a knife. The State also showed the jury photographs of applicant's numerous gang-related tattoos. In addition, when applicant testified at the punishment phase, he admitted that he had been a member of the "59 Bounty Hunter Bloods" street gang.

Besides the evidence of his criminal history, the State presented evidence that applicant was confined by the former Texas Youth Commission (TYC) as a result of his criminal-solicitation juvenile adjudication. However, due to his behavior problems, which included aggressive or assaultive behavior towards other youths and staff, and his general failure to progress in TYC's rehabilitation program, applicant was transferred to Texas's adult prison system **[*4]** to complete his sentence. The State additionally presented evidence of applicant's significantly more disruptive, violent, and threatening behavior at the Harris County and Fort Bend County jails while awaiting trial in this case.

As we summarized previously in our opinion on direct appeal, the defense presented a punishment case which emphasized evidence of: applicant's socioeconomic history; his long-standing drug abuse; the effect of drug abuse on adolescent brain development; and applicant's remorse. *See Andrus v. State*, No. AP-76,936, 2016 Tex. Crim. App. Unpub. LEXIS 1158 at *15 (Tex. Crim. App. Mar. 23, 2016) (op. on reh'g) (not designated for publication).

Applicant also testified in his own defense. Applicant asserted that: he had been exposed to drugs as early as 6 years of age, because his mother sold them; he rarely had adult supervision at home, and he started using drugs regularly when he was 15. *See* 2016 Tex. Crim. App. Unpub. LEXIS 1158 at *16. Applicant acknowledged that he does not like confined spaces and or being told what to do, and that he had previously acted out when feeling agitated. *See* 2016 Tex. Crim. App. Unpub. LEXIS 1158 at *16. However, Applicant stated that he had recently given his life to God, and he asserted that he no longer acted out. *See id.* Applicant additionally testified that he could help other inmates to **[*5]** avoid making the same mistakes that he had made. *See* 2016 Tex. Crim. App. Unpub. LEXIS 1158 at *16.

The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. 2016 Tex. Crim. App. Unpub. LEXIS 1158 at *1.

In his application, applicant presents seven challenges to the validity of his conviction and sentence. The trial court held an evidentiary hearing. The trial court thereafter entered findings of fact and conclusions of law and recommended that we grant relief as to Claim 1 of applicant's allegations. However, the trial court recommended that we deny relief as to applicant's remaining claims.

We have reviewed the record regarding applicant's allegations. In Claim 2, applicant alleges that his "due process rights were infringed when the jury was informed [that applicant] was wearing physical restraints during the punishment phase of his trial." In Claim 5, applicant alleges that his "death sentence was arbitrarily and capriciously assigned based on the jury's answer to the unconstitutionally vague [future dangerousness special issue]." Both Claim 2 and Claim 5 are procedurally barred, as they could have been raised on direct appeal. *See Ex parte Chavez*, 560 S.W.3d 191, 200 (Tex. Crim. App. 2018) **[*6]** ; *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004). We accordingly deny relief on both Claim 2 and Claim 5 without reaching the merits of either allegation.

In Claims 1, 3, 4, 6, and 7, applicant alleges that trial counsel were constitutionally ineffective for: failing to conduct a reasonable investigation and presentation of available mitigating evidence (Claim 1); failing to preserve potential *Batson*[1] error (Claim 3); conceding the future dangerousness special issue (Claim 4); failing to properly object to allegedly inadmissible victim-impact evidence at the guilt-innocence phase of trial (Claim 6); and failing to preserve the record for direct appeal (Claim 7). However, applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance.[2] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688). Therefore, we deny relief on the merits of Claims 1, 3, 4, 6, and 7.

Furthermore, we decline to adopt any of the trial court's findings of fact and conclusions of law, or its recommendation to grant relief **[*7]** regarding Claim 1. Based on our own review of the record, we deny relief on all of applicant's habeas claims.

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[2] We note that, throughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's "reasonable probability" language.

IT IS SO ORDERED THIS THE 13TH DAY OF FEBRUARY, 2019.

Do Not Publish

Concur by: RICHARDSON

Concur

CONCURRING OPINION

Applicant filed an application for a writ of habeas corpus pursuant to Texas Code of Criminal Procedure 11.071 and presented seven challenges to the validity of his conviction and sentence. The habeas judge held an evidentiary hearing and subsequently entered findings of fact and conclusions of law recommending that we deny relief on Applicant's Claims 2-7. The habeas judge, however, recommended that we grant relief on Applicant's Claim 1. In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating evidence."[1] In our written order, the Court declines to adopt the habeas judge's findings and conclusions regarding this claim and, based on our own review of the record, we deny relief on Claim 1.[2]

I agree with the Court's recitation of the facts and its decision to deny Applicant relief on all grounds. I write separately only to elaborate on why I conclude that Applicant is not entitled to relief on Claim 1. **[*8]**

BACKGROUND

In determining whether trial counsel failed to reasonably investigate and present mitigating evidence in Applicant's trial, it is necessary to review the evidence that the parties actually presented during the punishment phase. The State presented the following evidence:

• Applicant had two juvenile adjudications for crimes committed when he was about 15 or 16: (1) a May 2004 felony possession of a controlled substance in a drug-free zone; and (2) a January 2005 criminal solicitation to commit felony aggravated robbery (involving a firearm). The juvenile court put Applicant on probation for the 2004 possession offense, sent him to an alternative school, and required him to complete community service hours. But, about two weeks after the juvenile court adjudicated the possession case, police arrested Applicant for the solicitation-aggravated robbery offense.

• While confined in the Texas Youth Commission (TYC) for the solicitation-aggravated robbery case, Applicant exhibited "significant assaultive behavior" toward other youths and staff. TYC's efforts to rehabilitate Applicant were unsuccessful and thus, he was transferred to the Texas Department of Criminal Justice (TDCJ) to **[*9]** complete his sentence.

• After being transferred from TYC, Applicant served a few months in TDCJ before being released to parole. In 2007, shortly after being released, Applicant violated parole by being convicted of misdemeanor theft. He served a few more months in TDCJ before being released again.

• On August 21, 2008, Applicant committed aggravated robbery when he entered a dry cleaning business and demanded money from an employee. When the employee ran to the back of the business, Applicant cornered, beat, and kicked the employee before pulling a knife on him. Applicant committed the capital murder underlying this application less than two months after this aggravated robbery.

• Numerous photographs of Applicant's gang-related tattoos. When Applicant later took the stand in his own defense, he admitted that those tattoos included "murder weapons" tattooed on his hands, and that he had been a member of the "59 Bounty Hunter Bloods" street gang.

• Applicant's conduct while he was in the Harris and Fort Bend County jails awaiting trial in this case:

  ‣ On April 18, 2009, Applicant assaulted another inmate. When a detention officer intervened, Applicant told him, "I don't give a fuck," and **[*10]** "I'm going to get the needle anyway."

[1] Applicant seems to claim that lead counsel performed deficiently because he unreasonably failed to: (1) immediately hire a mitigation specialist, and then, after the first mitigation specialist withdrew, to hire a replacement specialist; (2) discover and present certain lay witness testimony to corroborate Applicant's punishment phase testimony about his upbringing; (3) present testimony from two expert witnesses whom counsel consulted before Applicant's trial—S.O. Woods (a prison classification expert) and Dr. Jerome Brown (a clinical psychologist); (4) consult and present testimony from experts in: (a) child and adolescent development, (b) Houston's Third Ward, and (c) scandals, conditions, and the mental health treatment Applicant received at TYC; and (5) provide their testifying expert, Dr. John Roache, with more information about Applicant and Applicant's family.

[2] As stated in the Court's order, we also decline to adopt any of the habeas judge's findings of fact and conclusions of law, and we deny relief on all of Applicant's habeas claims.

‣ On May 9, 2009, Applicant, who was housed on the "super-max" floor of the jail, claimed to be having chest pains. According to jail protocol, detention officers took Applicant to the medical clinic to be checked out. Applicant asked the nurse at the clinic for decongestants, but she told him that she could not provide those due to his other medications. Applicant told her, "Fuck you," and then screamed and yelled obscenities as detention officers tried to calm him down. The officers then escorted Applicant, who was handcuffed and shackled, back to his cell. Applicant refused to walk on his own, so the officers had to physically push him into the elevator to the super-max floor. When they arrived at Applicant's cell, the officers unshackled him. As soon as one officer unlocked the handcuffs, Applicant turned and punched the officer twice in the face before the officers regained control. That same day, officers also discovered in Applicant's cell a broken razor blade and a sharpened, bent key ring. Applicant had apparently cut himself and used his blood to draw a picture of the world on his cell wall and to write "Fuck the world. I want to die." **[*11]**

‣ On May 11, 2009, Applicant jammed open his cell door's "panhole," the opening where food, papers, and medicines can be passed to an inmate without the cell door being opened. When an officer went to investigate and looked into the panhole, [Applicant] threw urine in the officer's face. Applicant then danced around his cell in celebration saying, "I got him, bitch ass, mother fucker. I got his ass." Applicant then taunted the officer, "Come on in and get me. There is nothing you can do to me."

‣ On July 5, 2009, Applicant attempted to pass contraband pills to another inmate. When a detention officer intercepted the pills, Applicant angrily demanded the pills back. Applicant then threatened to throw urine on the officer. Afterwards, Applicant broke a sprinkler head and flooded his cell. Officers handcuffed Applicant. Applicant threatened one of the officers on duty, saying, "[I'm] going to get him, you just wait and see," and, "Once you take these handcuffs [off of] me, you are going to see how hard I hit." Applicant also told the rest of the staff that he was "going to get all of you." The mental-health unit was called to calm Applicant down.

‣ Two hours after the initial July 5, 2009 **[*12]** contraband incident, Applicant began complaining of chest pains. Applicant was taken to the medical clinic where he attempted to convince the attending officer to remove his handcuffs. When the officer refused due to Applicant's earlier threats, Applicant told him, "I haven't threatened you though." When the officer again refused, Applicant asked him, "Are you scared?" Two officers put Applicant back in his cell. They had Applicant lie down on his bed while they removed his cuffs. Once the cuffs were removed, Applicant jumped up and began kicking and punching the officers, injuring them. Applicant yelled, "I'm going to kill y'all. I told you I'm going to kill y'all." The Special Response Team (SRT) was called. It took five officers to subdue Applicant.

‣ On January 4, 2010, Applicant threw an unknown liquid on an officer as he walked past Applicant's cell. When asked to back up to the cell bars to be handcuffed, Applicant wrapped himself in a blanket so that his arms were inaccessible and the officers had to enter his cell to handcuff him. The SRT was called to handcuff Applicant and move him to a more secure cell. Applicant once again displayed obscenity-laced defiance.

‣ On July 20, **[*13]** 2010, Applicant covered the window of his cell so that officers could not see inside. He refused to remove the cover or to place his hands in the panhole so that he could be handcuffed. The SRT was called. Upon entering Applicant's cell, the officers discovered that Applicant had stopped up the toilet and the shower drain, and used the shower to flood the cell. The cell walls were covered in feces and 21/2 inches of water and feces covered the floor. Applicant was naked, standing by the toilet. Applicant threw liquid on the officers and then resisted their attempts to handcuff him by striking at them.

‣ On July 27, 2011, Applicant stuck his arms through his cell door's panhole and refused to remove them. He claimed that he was upset that he was denied recreation even though he had refused his recreation opportunity when it was offered to him. Applicant yelled at the detention officer, "You don't know me, bitch. I'm not some peon inmate. You won't find out. You'd better ask around." He continued to refuse the officer's order to put his arms back inside his cell. The SRT was called and Applicant kicked and struck at the team members who tried to subdue him. He yelled that they did not **[*14]** know him and that he was "going to fuck somebody up." The team moved him to a padded cell where Applicant covered his new cell window with feces.

‣ On July 28, 2011, Applicant told a guard at meal time, "Don't bring that tray over here, bitch. I'm going to throw it and hit somebody with it." As a result of his statements, Applicant was again moved to a padded cell. While being moved, Applicant told the officers, "I have three caps. I have nothing to lose. This will be everyday." Once in the cell, he commented that he "will kill an officer" if given the chance.

The defense then presented its punishment case. Applicant, his mother, and his father testified regarding Applicant's

background and upbringing. To summarize, Applicant was raised by a single mother who sold drugs. Applicant was exposed to drugs as early as six years of age, and started using drugs regularly at age fifteen. Throughout his childhood and early teenage years, Applicant and his siblings were often left unattended for extended periods of time and Applicant "practically raised his little brothers and sisters." Applicant's father was incarcerated for drug-related offenses for most of Applicant's life, although Applicant **[*15]** did live with his father during his freshman year of high school until his father was arrested on new drug charges. Applicant did fairly well in school, but he dropped out of school in tenth grade and started getting in trouble with the law.

Defense counsel also called Dr. John Roache, a pharmacologist and psychiatry professor specializing in the effect of alcohol and drug addiction on the human brain and behavior, to testify about Applicant's drug use and mental development. Dr. Roache testified that by age eleven, Applicant had begun using marijuana, and that his drug use increased during his teenage years. Applicant also periodically used Xanax and alcohol. By nineteen, Applicant was regularly using PCP and ecstasy and was sporadically using cocaine. Dr. Roache testified that drugs impair adolescent brain development in the areas of judgment and impulse control, and that these effects are long lasting. Dr. Roache also testified that an unstable family environment and a lack of role models can adversely affect the development of good judgment and the ability to self-regulate one's emotions.

In addition, defense counsel presented evidence of Applicant's remorse through the testimony **[*16]** of James Martin, a licensed professional counselor with the Fort Bend County Jail. Martin testified that he assisted Applicant with his behavioral issues at the jail and noted that Applicant had hallucinations and a poor history of complying with his medication schedule. Martin testified that, although Applicant "[met] every criteria of [antisocial personality] disorder," he had been making progress and was beginning to show remorse for the murders.

Based on this evidence, the jury answered "yes" to the "future dangerousness" question,[3] and "no" to the "mitigating circumstances" question.[4] The judge accordingly set Applicant's punishment at death.[5]

LEGAL STANDARD

In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating evidence." To prevail on an ineffective assistance of counsel allegation, an applicant must establish by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient **[*17]** performance.[6]

In *Wiggins v. Smith*,[7] the United States Supreme Court specifically discussed and applied *Strickland's* two-part test to a claim of ineffective assistance of counsel for failure to conduct a reasonable mitigation investigation. The Supreme Court held that counsel's investigation into Wiggins's background did not reflect reasonable professional judgment and that counsel's failures prejudiced Wiggins's defense.[8] To assess prejudice, the Court evaluated the "totality of the evidence-'both that adduced at trial, and the evidence adduced in the habeas proceedings.'"[9] The Supreme Court specifically explained how counsel's deficient performance prejudiced Wiggins's defense. First, the mitigating evidence that counsel failed to discover and present was powerful and not double-edged.[10] Second, Wiggins's jury only heard one significant mitigating factor—that Wiggins had no prior convictions.[11] Third, Wiggins did not have a record of violent conduct that

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[3] Issue No. 1 in the Court's Charge on Punishment asked: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

[4] Issue No. 2 in the Court's Charge on Punishment asked: "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

[5] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(g).

[6] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[7] 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

[8] *Id.* at 534, 536.

[9] *Id.* at 536 (citing *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

[10] *Id.* at 534-35.

[11] *Id.* at 537.

the State could have introduced to offset the undiscovered mitigating evidence.[12]

After evaluating the totality of the evidence, the Supreme Court concluded that, had the jury been confronted with the considerable undiscovered mitigating **[*18]** evidence, there was a reasonable probability that the jury would have returned a different sentence.[13] When analyzing whether Applicant has satisfied *Strickland's* prejudice requirement, it is appropriate to use *Wiggins* as a guide.

ANALYSIS

In this case, We need not consider the constitutional adequacy of defense counsel's performance because Applicant fails to show prejudice.[14] Assuming without deciding that aspects of defense counsel's performance were deficient, Applicant fails to establish that, had counsel reasonably investigated and presented a stronger mitigation defense, there is a reasonable probability that the jury would have returned a different sentence.

Proposed Additional Mitigating Evidence

From my independent review of the record, it appears that Applicant's strongest proposed mitigating evidence would have been (1) testimony from certain lay witnesses to corroborate Applicant's punishment phase testimony about his upbringing, and (2) testimony from Dr. Jerome Brown, the clinical psychologist who performed a forensic evaluation of Applicant before trial. Applicant alleges that his mother and father gave a "sanitized version" of his life history and that additional **[*19]** lay witness testimony would have provided the jury with a more complete, and therefore a more compelling, narrative of Applicant's life. In regard to Dr. Brown, the report that he created contained potentially mitigating information, including that Applicant had self-reported a history of psychological/psychiatric problems which may have begun as early as childhood, that Applicant's jail records showed that he was diagnosed with schizophrenia,[15] and that he had a high probability of substance dependence disorder. However, even if the jury heard this mitigating evidence, I cannot say that there is a reasonable probability that the jury would have returned a different sentence.

First, Applicant's proposed additional mitigating evidence is not as powerful as the evidence in *Wiggins*. In *Wiggins*, the petitioner "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic absentee mother" and "[h]e suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care."[16] Wiggins was also homeless at times and had diminished mental capacities.[17] This evidence, the Supreme Court concluded, demonstrated that Wiggins **[*20]** had the kind of troubled history that was relevant to assessing his moral culpability.[18]

Here, while not insignificant, Applicant's proposed mitigating evidence does not rise to the level of that discussed in *Wiggins*. Applicant alleges that, through additional lay witness testimony, the jury would have heard the "reality of [Applicant's] childhood"—that Applicant grew up primarily among street hustlers and drug dealers, that Applicant raised his siblings while his mother was dealing drugs out of the house or on the street, and that Applicant lacked a stable, supportive parental figure.[19] This is not the same caliber of potentially mitigating evidence that was available, but not presented, in *Wiggins*. In addition, much of this information had already been introduced through the testimony of Applicant, his mother, and his father, a fact which further dilutes the potential effect this evidence would likely have had on the jury. Lastly, unlike in *Wiggins*, much of Applicant's proposed mitigating evidence was extremely double-edged.[20] For example, Dr. Brown's report, which contained some potentially mitigating evidence, also contained evidence that was potentially extremely aggravating, **[*21]** such as Applicant's history of abusing and killing animals.

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[12] *Id.*

[13] *See id.* at 536.

[14] *Ex parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009) (holding that applicant's failure to satisfy both prongs of *Strickland's* two-pronged test defeats a claim of ineffective assistance).

[15] Although this diagnosis appears in Applicant's jail records, the professionals who had a longer opportunity to observe Applicant generally concluded that Applicant suffered instead from antisocial personality disorder.

[16] *Wiggins*, 539 U.S. at 535.

[17] *See id.*

[18] *See id.*

[19] *See* Applicant's Initial Application for Writ of Habeas Corpus at 44.

[20] *See Wiggins*, 539 U.S. at 535.

Mitigating Evidence Presented

Second, unlike in *Wiggins*, Applicant's jury actually heard multiple mitigating factors, but still did not spare Applicant from the death penalty. Wiggins's jury heard just one significant mitigating factor—that Wiggins had no prior convictions.[21] Because the jury heard only one aspect of mitigation, the Supreme Court reasoned that, had the jury "been able to place [Wiggins's] excruciating life history on the mitigating side of the scale," there was a "reasonable probability that at least one juror would have struck a different balance" on the mitigation issue.[22] Applicant's jury, however, heard the following: testimony regarding Applicant's background and dysfunctional upbringing; testimony from an expert witness who opined about the effects that drugs, alcohol, and an unstable family environment can have on adolescent brain development; and testimony from a professional counselor that Applicant was beginning to show remorse for the murders. The jury was given the opportunity to consider this evidence, to place it on the "mitigating side of the scale,"[23] but still did not resolve the mitigation **[*22]** issue in Applicant's favor.

Violent History

Third, unlike in *Wiggins*, Applicant had an extensive record of violent conduct that the State could have used to offset the proposed additional mitigating evidence.[24] The jury heard evidence about Applicant's multiple prior convictions, including a conviction for solicitation of aggravated robbery. In addition, the jury heard evidence that, just two months before the capital offense underlying this application, Applicant committed aggravated robbery when he beat, kicked, and robbed a victim while brandishing a knife. The jury also heard evidence of Applicant's assaultive behavior while in TYC. Further, the jury heard evidence that Applicant engaged in numerous instances of significant violent and disruptive behavior while he was in jail awaiting trial. In short, Applicant did not have the "powerful mitigating narrative"[25] that was available in *Wiggins*, and the State presented plenty of potentially aggravating evidence to offset the potentially mitigating evidence adduced in the habeas proceedings.

CONCLUSION

Even assuming Applicant's lead counsel was deficient,[26] Applicant fails to show how his defense was prejudiced. The State presented a **[*23]** vast amount of aggravating evidence, and the evidence Applicant now alleges counsel should have discovered and presented was largely duplicative, double-edged, and not particularly helpful. In these circumstances, even assuming that counsel could have discovered and presented Applicant's proposed additional mitigating evidence in an admissible form, I cannot say that there is a reasonable probability that the result of the proceedings would have been different. Applicant fails to show prejudice, and that failure defeats his claim of ineffective assistance.[27]

With these comments, I concur and join the majority.

FILED: February 13, 2019

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[21] *Id.* at 537.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 537.

[25] *Id.*

[26] It is worth noting that, even if lead counsel was deficient, Applicant had other counsel who arguably performed sufficiently. Normally, an applicant cannot obtain relief in this situation. *See McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996) (concluding that the defendant had not show prejudice because, even if one of his attorneys was asleep at trial, his other attorney was alert and effective).

[27] *Lane*, 303 S.W.3d at 707.

Appendix D

No. 09-DCR-051034-HC1

EX PARTE	§	IN THE 240TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
TERENCE ANDRUS	§	FORT BEND COUNTY

FINDINGS OF FACT & CONCLUSIONS OF LAW

On March 4, 2015, Applicant filed an Application for Writ of Habeas Corpus. This Court held a hearing on Applicant's application and pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court hereby enters the following Findings of Fact & Conclusions of Law:

Procedural History

(1) On February 2, 2009, Applicant was indicted for the offense of Capital Murder alleged to have been committed on October 15, 2008. *See* TEX. PENAL CODE § 19.03(a)(7)(A).

(2) Applicant pleaded not guilty to the charges alleged in the indictment and on October 1, 2012, Applicant's jury trial began in the 240th Judicial District Court of Fort Bend County, Texas.[1]

(3) On November 6, 2012, Applicant was convicted of Capital Murder as alleged in the indictment. Pursuant to the Jury's answers to the special issues submitted at the punishment phase of trial, Applicant was sentenced to death on November 14, 2012. *See* TEX. CODE CRIM. PRO. Art. 37.071 §§ 2(b), 2(e).

(4) On March 23, 2016, The Texas Court of Criminal Appeals affirmed Applicant's conviction and sentence. *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

[1] The trial was presided over by the Honorable Thomas R. Culver, III, now deceased. The undersigned was assigned to preside over the Habeas Corpus Proceedings by the Hon. Olen Underwood, Presiding Judge of the Second Administrative Judicial Region.

Applicant's Confession and Statements to Law Enforcement

(5) At trial, the jury was presented with Applicant's written confession and statements to law enforcement.[2] Applicant's trial counsel filed a motion to suppress that confession and Applicant's statements to law enforcement. The trial court denied Applicant's motion and entered findings of fact and conclusions of law with respect to the voluntariness of Applicant's statements.

(6) The Texas Court of Criminal Appeals, which will ultimately decide the present case, held that Applicant's confession and his statements to law enforcement were voluntary and were not the product of a violation of his state or federal constitutional or statutory rights; and therefore, the trial court did not err in denying Appellant's motion to suppress. *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

(7) During one conversation with law enforcement, after he was properly *Mirandized*,[3] Applicant described killing the first victim in this case by saying, "Boom, I shot him." Applicant continued:

> I shot him. He was about to pull a pistol out on me. It was life or death with him. If I'd have turned around and started running, I would have been dead --which I am now, don't get me wrong, but -so, I ran towards -out going towards, back towards my house, and people, I guess they heard the gun shots. So, as I came in front of their car, they sped up and tried to hit me with their car. They tried to run me over. So, I started shooting through their windshield, and then I just took out running. And you know that's the honest to God truth.

See HCEH RR10: State's Exhibit HC19.[4]

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[2] In addition to his statements and written confession, after returning to Fort Bend County, Applicant helped the police locate his gun, a .380 automatic, as well as a shovel Applicant used to conceal the gun. Three live rounds were still in the gun's eight-round magazine with one round in the chamber. Investigators recovered four spent bullets from the crime scene that matched the rounds recovered from the gun used to kill the victims in this case. *Andrus v. State*, No. 76,936 (Tex. Crim. App., delivered March 23, 2016).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The Reporter's Record of the Habeas Corpus Evidentiary Hearing will be referred to as "HCEH."

(8) The Texas Court of Criminal Appeals held further that the evidence in this case is legally sufficient to support Applicant's conviction because "aside from the confessions, the evidence included eyewitness testimony, video surveillance, and Andrus's flight after committing the crime." *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

Applicant's Claims

Each of Applicant's claims will be addressed in the order in which it was presented in Applicant's Petition for Writ of Habeas Corpus filed March 4, 2016. As a preliminary matter, this Court recognizes that to prevail upon a post-conviction petition for a writ of habeas corpus, an Applicant bears the burden of proving, by a preponderance of the evidence, facts that entitle him to relief. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997).

(9)Applicant's first claim is as follows:

"TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CONDUCT A REASONABLE INVESTIGATION AND IN THEIR PRESENTATION OF AVAILABLE MITIGATING EVIDENCE."

(a) In *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court held that the failure to present mitigating evidence in a death penalty case is unreasonable where the record reflects that trial counsel did not conduct a thorough investigation into the defendant's background and cited the ABA Standards for Criminal Justice. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(b) The Supreme Court emphasized in *Wiggins* that the question is not whether counsel should have presented a mitigation case. Rather, the focus is on whether the investigation supporting trial counsel's decision not to introduce mitigating evidence was itself reasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(c) Specifically, in *Wiggins*, trial counsel's assistance was found to be ineffective where they failed to investigate and present mitigating evidence regarding the defendant's abusive childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(d) At the hearing on Applicant's Petition for Habeas Corpus relief, James Sidney Crowley testified that he was appointed to represent Applicant in this case on

February 17, 2009. HCEH RR2: 172.

(e) Crowley testified that the first time he visited Applicant in jail was on October 4, 2009 and only visited him a total of six times prior to trial. HCEH RR2: 183, 185.

(f) Crowley agreed that between February 17, 2009, and October 4, 2009, he did not visit Applicant in jail to admonish him that his behavior while incarcerated could be used against him at the punishment of his capital murder trial. HCEH RR2: 186.

(g) Crowley agreed further that he was not aware that during February 17, 2009, and October 4, 2009, Applicant attempted suicide, smeared blood on the walls of the jail, and engaged in altercations with jail personnel. HCEC RR2: 188-89. Crowley stated that he did not believe he needed to investigate the foregoing issues and did not have a mitigation specialist who could have investigated those issues. HCEH RR2: 189.

(h) Crowley admitted that he did not investigate why Applicant was confined to a padded cell for sixty-two days in the Fort Bend County Jail or why he was administered the medications Thorazine and Seroquel. HCEH RR3: 78.

(i) Crowley acknowledged that the first time he had Applicant evaluated by a mental health professional, Dr. Jerome Brown, was "in 2012 sometime." HCEH RR2: 191.

(j) Crowley testified that Amy Martin, a mitigation specialist, was appointed in 2010 after second chair counsel, Jerome Godinich, recommended her. HCEC RR2: 197. However, Crowley never asked Martin to prepare a mitigation packet. HCEH RR2: 198.

(k) In fact, Crowley asked during the hearing on Applicant's Petition for Writ of Habeas Corpus, "What do you mean by a mitigation packet?" and indicated his understanding that a mitigation packet was "something that you give the district attorney's office." HCEH RR2: 199.

(l) Crowley testified that at the time Martin and Godinich withdrew from this case in January of 2012, no experts had been retained despite the fact that trial was set to begin on October 1, 2012. HCEH RR2: 212.

(m) Crowley agreed that as of January of 2012, he had only put in five hours of work on Applicant's case and that no one was attempting to define mitigation themes or determine how to advocate for a life sentence on behalf of Applicant. HCEH RR2: 212.

(n) Crowley agreed further that between January of 2012 and June of 2012, he had no second chair counsel and no mitigation expert in this case. HCEH RR3: 37-38.

(o) Crowley testified that he did not conduct any independent investigation into any of the extraneous offenses alleged by the State during the punishment phase of trial and did not test the veracity of any of the extraneous offense evidence offered by the State, despite Applicant's repeated assertion that he did not commit at least one of the extraneous offenses. HCEH RR3: 64-66.

(p) Crowley acknowledged that he received information from Martin that Applicant was diagnosed with a serious mental illness when he was ten or eleven years old, but did not retain an expert to investigate that mental illness. HCEH RR3: 71.

(q) Crowley learned that Applicant received medication for mental health issues as a child but did not consult a mental health or medical expert to investigate why Applicant received the medication or its affects. HCEH RR3: 73.

(r) Crowley stated that although records from the Texas Youth Commission indicated Applicant had problems at home, Crowley did not investigate what those problems were. HCEH RR3: 73-74.

(s) Crowley testified that he did not investigate anything traumatic in Applicant's background except to speak to Applicant and his mother. HCEH RR3: 88. However, Crowley did not speak with Applicant's mother until she was subpoenaed to come to Court. HCEH RR3: 88.

(t) Crowley testified that he did not conduct any independent investigation into Applicant's mother's version of Applicant's childhood even after Applicant informed Crowley his mother did not testify truthfully at trial. HCEH RR3: 95.

(u) Crowley testified that he did not have any extensive conversations with Appellant's father, Mike Davis, before he testified and in fact, it was the State who brought Davis to the courthouse to testify. HCEH RR3: 98.

(v) Crowley called James Martins, a Fort Bend County Jailer, to testify during the punishment phase of trial, but met with him for the first time during a break in the middle of trial. HCEH RR3: 99. Martins then testified that Applicant may suffer from Antisocial Personality Disorder which, Crowley agreed, was not mitigating. HCEH RR3: 102-03.

(w) Crowley agreed that he retained psychiatrist and pharmacologist Dr. John Roache in late August of 2012,[5] two months prior to the commencement of voir dire in this case. HCEH RR3: 103.

(x) Crowley agreed further that Dr. Roache was not given a mitigation report, memos of interviews with family members or any information from a mitigation specialist, though he regularly relies on that information to render an opinion. HCEH RR3: 103-04.

(y) Crowley acknowledged that Dr. Roache only met with Applicant once, just days before voire dire began, and Crowley took no steps to prepare Applicant for that meeting. HCEH RR3: 105.

(z) When asked if Dr. Roache did a psychological evaluation of Applicant, Crowley responded, "No." HCEH RR3: 110. Crowley responded further that although Dr. Roache was the lone expert that testified at trial, Crowley did not retain him to perform a psychological evaluation. HCEH RR3: 110.

(aa) Crowley testified that he did not investigate Applicant's neighborhood or his childhood experiences. HCEH RR3: 116.

(bb) Crowley testified that he did not investigate any of the facts of the underlying offense that resulted in Applicant's incarceration at the Texas Youth Commission. HCEH RR3: 119-20.

(cc) Crowley testified that despite the widely-known scandal concerning the Texas Youth Commission, which occurred prior to the trial of this case, Crowley did not consult an expert regarding the Texas Youth Commission. HCEH RR3: 122-23.

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[5] The record reflects "August 2002, late August." HCEH RR3: 103). This appears to be either a typo by the Court Reporter or an accidental misstatement by Applicant's attorney. The context is clear that the time period referred to was late August of 2012.

(dd) Crowley testified that he did not interview Applicant's brother, Torad Andrus; his sister, Tafarrah Andrus; his sister, NormaRaye Andrus; his stepmother, Rosalind Cummings; his stepbrother, Jamontrell Seals; his mother's live-in boyfriend, Sean Gilbow; or family friend Stephanie Garner. HCEH RR3: 135-36.

(ee) Crowley testified that he received a report from Dr. Brown, dated October 12, 2012, but claimed he did not receive that report until after trial was completed because Dr. Brown sent the report by email to an old email address. HCEH RR3: 255, 257.

(ff) Crowley agreed that Dr. Brown's report indicated that Applicant was referred for psychiatric evaluation in 2009 while in the Harris County Jail and received psychiatric treatment. HCEH RR3: 258.

(gg) Crowley agreed further that Dr. Brown's report indicated that Applicant had been prescribed psychoactive, antipsychotic, psychotropic and antidepressant medications. HCEH RR3: 258, 260.

(hh) Crowley agreed further that Dr. Brown's report indicated that Applicant had suffered auditory hallucinations since the age of fourteen years, suffers from severe mental illness and had been diagnosed with schizophrenia. HCEH RR3: 261-64.

(ii) Crowley testified that he is not a mitigation specialist and after Martin left the case, no one he spoke to about Applicant's case was a mitigation specialist. HCEH RR3: 253. Crowley testified further that he had used mitigation specialists in the past. HCEH RR3: 254.

(jj) Crowley stated that he expected to be compensated for his time testifying at the habeas corpus evidentiary hearing. HCEH RR3: 254.

(kk) The Court finds portions of Crowley's testimony credible and portions of Crowley's testimony not credible.

(ll) Diana Olvera testified that she was appointed as second chair trial counsel on June 7, 2012, four months before trial was set to begin. HCEH RR4: 12-13.

(mm) Olvera clarified that she was not a mitigation specialist and that there was no one in that role when she joined the defense team in this case or any time after. HCEH RR4: 15. However, in her affidavit, Olvera stated that she was in charge of presenting mitigating evidence at trial. HCEH RR11: State's Exhibit 2.

(nn) Olvera testified that she spoke to Cynthia Andrus, Applicant's mother, on a few occasions and decided to call her as a witness at trial, but only interviewed her in person on the day she testified. HCEH RR4: 16-17.

(oo) Olvera agreed that she had not met with any of Applicant's family members in person before this case went to trial. HCEH RR4: 25-26.

(pp) Olvera testified that she did not investigate the facts of the underlying facts of the present case and did not discuss the facts of the case with Applicant. HCEH RR4: 23-24.

(qq) Olvera testified that she contacted the Texas Defender Service prior to trial to get guidance about a potential expert on the Texas Youth Commission and its internal problems, and was given the name of John Niland who referred her to the appropriate expert. HCEH RR4: 30. However, Olvera never contacted the expert. HCEH RR4: 31.

(rr) Olvera explained that Crowley was in charge of contacting and retaining experts. HCEH RR4: 33. Olvera testified that it was not reasonable for Crowley to wait to communicate with potential experts just before voir dire began in October of 2012, especially considering he was appointed in February of 2009. HCEH RR4: 34-35.

(ss) Olvera testified that she did not investigate the extraneous offense evidence presented by the State at the punishment phase of trial. HCEH RR4: 37.

(tt) Olvera testified that Crowley was responsible for the strategic decisions in the case, including the decision to proceed without a mitigation specialist. HCEH RR4: 39.

(uu) The Court finds Olvera's testimony credible.

(vv) Fred Felcman, the Fort Bend County First Assistant District Attorney who prosecuted this case, testified that in another capital murder case, Crowley

admitted to misleading the trial court. HCEH RR5: 21-22.

(ww) Felcman testified that no one from the defense team ever approached him with an offer that Applicant would plead guilty to the offense of capital murder in exchange for a sentence of life without parole. HCEH RR5: 25.

(xx) The Court finds Felcman's testimony credible.

(yy) Will Harrell, Southern Regional Policy Counsel for the American Civil Liberties Union, testified that he was appointed by Governor Rick Perry to serve as the first Chief Independent Ombudsman over the Texas Youth Commission. HCEH RR5: 112.

(zz) Harrell reviewed Applicant's Texas Youth Commission Records and determined that Applicant was unfairly held accountable for failing to succeed in a behaviorial program that has since been discredited and "scrapped" by the State. HCEH RR5: 121. The result was that Applicant was sent to the Texas Department of Criminal Justice when he should not have been. HCEH RR5: 121-22.

(aaa) Harrell detailed the scandal which caused the Texas Youth Commission to be reformed by legislation. He explained that Applicant was incarcerated prior to the legislative reform and was incarcerated at the Texas Youth Commission while the events that were uncovered by the scandal were occurring. HCEH RR5: 140-60.

(bbb) Harrell explained that Applicant was not properly diagnosed while at the Texas Youth Commission because of undertrained staff. HCEH RR5: 158.

(ccc) Harrell detailed Applicant's time of incarceration at the Texas Youth Commission including the dangerousness of the facility he was placed in, the lack of appropriate mental health care, the fact that he was unduly placed in isolation for weeks at a time, and the fact that his prescribed medication was not appropriate or adequately distributed. HCEH RR5: 161-63, 179-81.

(ddd) Harrell testified that Applicant's time at the Texas Youth Commission damaged and traumatized him and that he got no meaningful assistance from the program. HCEH RR5: 246.

(eee) Harrell testified that he was not contacted by Applicant's trial counsel, but would have been available to testify at trial in 2012 had he been contacted. HCEH RR5: 192.

(fff) The Court finds Harrell's testimony credible.

(ggg) Sean Gilbow testified that he met Applicant when they were both living in the Third Ward because his brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 24, 29. Gilbow characterized the Third Ward as "[d]rug infested," with prostitution, shootings, crime and violence. HCEH RR6: 24-26.

(hhh) Gilbow testified that he learned how to obtain and sell drugs from Applicant's mother, Cynthia Andrus, when he was nineteen years old. HCEH RR6: 26-27, 35-36. Applicant was ten years old at this time. HCEH RR6: 37.

(iii) Gilbow testified that several other adults used and sold drugs around Applicant when he was a child. HCEH RR5: 39-40.

(jjj) Gilbow explained that when Applicant's mother was not at home, she would leave Applicant in charge of his many siblings, including his special needs brother. HCEH 6: 41-42. Specifically, Applicant cooked, cleaned, made sure his siblings did their homework and made sure they went to school. HCEH RR6: 42.

(kkk) Gilbow testified that Applicant and his family later moved to Mission Bend, but the same problems existed there as in the Third Ward. HCEH RR6: 46-47. In addition, Applicant and his siblings were exposed to gang activity. HCEH RR6: 47.

(lll) When Applicant was released from prison, he went to live with Gilbow; Gilbow's wife, Phyllis Garner; and Garner's daughter. HCEH RR6: 49.

(mmm) Gilbow testified that Applicant was respectful, cooked meals, and "cleaned up" when he lived with Gilbow. HCEH RR5: 49.

(nnn) Gilbow visited Applicant prior to the trial in this case, but was never contacted by Applicant's trial counsel. HCEH RR5: 50. Gilbow testified that he would have talked to trial counsel had they contacted him and would have

testified at trial if asked. HCEH RR5: 50-51.

(ooo) The Court finds Gilbow's testimony credible.

(ppp) Phyllis Garner testified that she is a field staff supervisor for Girling Community Care and that she and Gilbow have lived together for fourteen years. HCEH RR6: 75-76.

(qqq) Garner testified that she met Applicant when he was sixteen years old through Gilbow because Gilbow's brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 79-80.

(rrr) At the time Garner met Applicant, he and his family were living in Public Assistance Housing in Mission Bend, an area that was infested with drugs and gangs. HCEH RR6: 83.

(sss) Garner testified that Applicant's mother, Cynthia Andrus, supported herself and her children by selling drugs and prostitution. HCEH RR6: 85-86. Cynthia also used drugs in front of her children. HCEH RR6: 88-89

(ttt) Garner explained that Applicant took care of his brothers and sisters by getting them dressed and ready for school, making sure they got to bed on time, and watching out for his brother, Torad, who had special needs. HCEH RR6: 889.

(uuu) Garner explained further that on their days off, she and Gilbow would take Applicant to the movies or to get a haircut, and then Garner would cook Applicant his favorite meal, breakfast, for dinner. HCEH RR6: 90. During those visits, Applicant was "laughing, talking, smiling and just being a kid" because he did not have the responsibilities he had at home. HCEH RR6: 91.

(vvv) Garner testified that Applicant came to live with her and Gilbow when he was released from prison. HCEH RR6: 95. Applicant abided by the rules of the house and did his assigned chores. HCEH RR6: 96.

(www) Garner testified that no one from Applicant's trial team ever contacted her but she would have spoken to them if they had and she would have testified at trial if asked. HCEH RR6: 100.

(xxx) The Court finds Garner's testimony credible.

(yyy) Dr. Scott Hammel, a clinical psychologist testified that he was formerly employed at the Texas Youth Commission. HCEH RR6: 127. Dr. Hammel interviewed Applicant on three occasions, spoke to his family members and reviewed relevant records. HCEH RR6: 130.

(zzz) Dr. Hammel testified that his evaluation revealed that Applicant suffered physiological changes to his brain as a result of trauma in his childhood. HCEH RR6: 168. Specifically, Dr. Hammel testified that Applicant was exposed to violence, death, severe emotional neglect, substance abuse, domestic violence and distrust. HCEH RR6: 168-69.

(aaaa) According to Dr. Hammel, the trauma Applicant suffered stunted his emotional development. HCEH RR6: 181.

(bbbb) Dr. Hammel detailed Applicant's social history including his relationship to his relatives, the circumstances of his neighborhood, the incarceration of family members, and the violence and drug use in Applicant's family. HCEH RR6: 169-215.

(cccc) Dr. Hammel explained that his evaluation revealed that Applicant was exposed to trauma in such a way that he exhibits post-traumatic-stress-disorder symptoms and suffers from mood disorder. HCEH RR7: 52.

(dddd) The Court finds Dr. Hammel's testimony credible.

(eeee) Dr. Roache submitted an affidavit, which the Court finds credible, in which he explains:

"Based on my prior experiences consulting and testifying in capital cases, I was struck by the extent to which Mr. Crowley appeared unfamiliar or naive with issues relating to brain development, drug addiction, and other such mitigation issues relative to other capital attorneys I have worked with. During my testimony, Mr. Crowley seemed to struggle to provide direction while I was on the stand. Also, following a rather rough cross-examination by the prosecutor, who made mocking comments about my testimony, Mr. Crowley seemed to be at a loss to ask follow up questions to address the prosecution's damaging statements. Another part of my involvement in the Andrus case that stuck out to me was that Mr. Crowley asked me to speak to the prosecution prior to my testimony. Mr. Crowley told me that the prosecutor wanted to know the factual basis of my intended testimony. I found this to be an unusual request based on

my prior capital case experience. During the phone call, I was very uncomfortable with the extent to which the prosecutor wanted to go broadly into the subject of my testimony. Our conversation was certainly not limited merely to my own qualifications to testify." HCEH RR13: Applicant's Exhibit 6.

(ffff) Dr. Brown submitted an affidavit, which the Court finds credible, in which he explains he was contacted by Crowley in September of 2012 to perform a psychological evaluation of Applicant. Dr. Brown was provided only collateral information upon which to perform his evaluation. Dr. Brown visited Applicant on September 20, 2012, and submitted a report to Crowley on October 12, 2012. Dr. Brown was never asked to testify although he was available to do so. HCER RR13: Applicant's Exhibit 2.

(gggg) Dr. Michael Lindsey, a clinical psychologist, submitted an affidavit, which the Court finds credible, in which he explains that he performed a psychological evaluation on Applicant and considered Applicant's criminal history records, education records, medical records, jail records and affidavits from Applicant's family and friends. Dr. Lindsey also met with Applicant over the course of two days, February 12-13, 2015 at the Texas Department of Criminal Justice. Dr. Lindsey offered his opinion that Applicant suffered from inadequate childhood development which produced "strongly mitigating circumstances," in Applicant's case including "overall deprivation of a nurturing childhood, his parental abuse and neglect, witnessing violence and trauma, the lack of adequate supervision and guidance. Inadequate stimulation for his brain for learning. and multiple factors leading to substance abuse and misconduct, his cognitive and psychological development is unquestionably compromised and is unquestionably compromised and less that of an adult." Dr. Lindsey states he was available to testify at Applicant's trial but was not contacted by Applicant's trial counsel. HCEH RR13: Applicant's Exhibit 5.

(hhhh) Jerome Godinich submitted an affidavit, which the Court finds credible, in which he explains that he was appointed as second chair in this case but withdrew in 2012 because the case was not ready to be tried. HCEH RR13: Applicant's Exhibit 27. Specifically, he had a "lack of confidence" in Crowley's "willingness to handle the case in the manner it needed to be." HCEH RR13: Applicant's Exhibit 27.

(iiii) Amy Martin submitted an affidavit, which the Court finds credible, in which she explains she was appointed as a mitigation specialist on July 19, 2010 but

was told by Crowley that no mitigation packet was needed because he was awaiting the State's confirmation that they would accept an offer of life without parole. HCEH RR13: Applicant's Exhibit 28.

(jjjj) Martin informed Crowley he needed a juvenile development expert, a prison classification expert, a Texas Youth Commission Expert, and a medical professional. HCEH RR13: Applicant's Exhibit 28.

(kkkk) Martin also informed Crowley that he needed to interview Applicant's family, friends and teachers. HCEH RR13: Applicant's Exhibit 28.

(llll) Martin ultimately withdrew from the case because in her opinion, it was not ready to be tried. HCEH RR13: Applicant's Exhibit 28.

(mmmm) Torad Davis, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams, all submitted affidavits, each of which, the Court finds credible. HCEH RR13: Applicant's Exhibits 9-18. The affidavits provide mitigating information which could have been presented at the punishment phase of Applicant's trial. HCEH RR13: Applicant's Exhibits 9-18.

(nnnn) The Court finds and concludes that in the present case, there was ample mitigating evidence which could have, and should have, been presented at the punishment phase of Applicant's trial. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(oooo) The Court finds and concludes that relevant, available, and persuasive mitigating evidence was not presented at Applicant's trial because his lead trial counsel failed to conduct a thorough investigation into Applicant's background. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(pppp) The Court finds and concludes that lead trial counsel's decision not to introduce mitigating evidence was unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(qqqq) The Court finds and concludes that just as in *Wiggins*, Applicant's lead trial counsel was ineffective in failing to investigate and present mitigating evidence regarding the defendant's abusive and neglectful childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(rrrr) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to investigate and present all other mitigating evidence, including, but not limited to: mental health history, his incarceration at the Texas Youth Commission, the scandal at the Texas Youth Commission, educational history, the circumstances of Applicant's child development, Applicant's family history, and the diagnosis of serious mental illness, which was available at trial, as detailed above. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(ssss) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to retain the necessary experts to investigate and present all available mitigating evidence at the punishment phase of Applicant's trial. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(tttt) The Court finds and concludes that Applicant is entitled to Habeas Corpus Relief with respect to his first claim. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(10) Applicant's second claim is as follows:

"ANDRUS'S DUE PROCESS RIGHTS WERE INFRINGED WHEN THE JURY WAS INFORMED ANDRUS WAS WEARING PHYSICAL RESTRAINTS DURING THE PUNISHMENT PHASE OF TRIAL."

(a) In *Deck v. Missouri*, the United States Supreme Court held that while shackling of a defendant during trial is inherently prejudicial because it infringes upon the presumption of innocence, due process is only implicated when the jury can see the restraints. *Deck v. Missouri*, 544 U.S. 622, 628 (2005); *Bell v. State*, 415 S.W.3d 278, 281-82 (Tex. Crim. App. 2013). The *Deck* Court was clear that it is not the mere shackling alone, but rather the jury's perception of the shackles, that undermines a defendant's presumption of innocence. *Bell*, 415 S.W.3d at 281-82. If it is determined beyond a reasonable doubt that shackling the defendant did not contribute to the conviction or punishment, relief is not justified. *Id.* at 284.

(b) In the present case, virtually all of the jurors and alternates filed affidavits with respect to Applicant's second claim.

(c) All but one juror either did not remember when they realized Applicant was constrained or remembered that it was during the punishment phase when

they were apprized that Applicant was wearing restraints. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(d) Applicant concedes the bailiff did not inform the jury that Applicant was restrained until after he had been found guilty and before the punishment phase. Applicant's writ at 80.

(e) All of the jurors that submitted affidavits averred that the fact that Applicant was shackled had no effect on their verdict. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(f) As such, Applicant is not entitled to relief on his second claim for habeas corpus relief. *Deck*, 544 U.S. at 628; *Bell*, 415 S.W.3d at 284.

(11)Applicant's third claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE POTENTIAL *BATSON* ERROR."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The Texas Code of Criminal Procedure prohibits the use of peremptory challenges to exclude prospective jurors on the basis of race. TEX. CODE CRIM. PRO. Art. 35.261. Additionally, striking a prospective juror on the basis of race violates the equal protection guarantees of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986).

(c) Crowley testified that he did not make a *Batson*[6] challenge because he did not feel a prima facie case for striking minority jurors had been made. HCEH RR3: 187.

(d) Olvera testified, and included in her affidavit, her opinion that during the jury selection process, she never got the impression the State was purposely striking jurors based on race, so the defense did not lodge any *Batson* challenges. HCEH RR4: 125.

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[6] *Batson v. Kentucky*, 476 U.S. 79 (1986).

(e) Felcman testified that "not one" of the peremptory strikes against a minority venire member was racially motivated. HCEH RR5: 49.

(f) Using his notes and the answers to Juror Questionnaires, Felcman then offered race neutral reasons for the minority jurors he used peremptory strikes on. HCEH RR5: 51-78.

(g) Based on this record, Applicant is unable to show his attorney's performance was deficient or that but for counsel's allegedly deficient performance, the outcome of his trial would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(12)Applicant's fourth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING THE FIRST SPECIAL ISSUE."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The complained-of argument is as follows:

> Let's go the Question 1. It's that "future danger"' question. Remember, we talked about it. Is there's a probability --do you find from the evidence beyond a reasonable doubt that there's a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? You've heard all kinds of evidence, based upon that, to help you - - aid you in answering this question. You know, I told you all along, the guilt or innocence argument –I'm not going to try to snow the jury. You've heard evidence, even from some of our own witnesses, that Mr. Andrus was probably a violent kind of guy. Okay? That's kind of a double-edged sword to put on evidence. Hopefully, you know, our case, you have to take the good with the bad. 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.

(c) At the hearing on Applicant's Petition for Writ of Habeas Corpus, Crowley testified that his statement was not, in fact, a concession, but rather a strategy in focusing on mitigation. HCEC RR3: 83.

(d) The Court finds and concludes that Crowley's statement was the product of trial strategy to focus on mitigation and gain credibility with the jury. While not the desired strategy of all, it is still, a plausible strategy. Therefore, Applicant is unable to show his counsel's performance was deficient. Further, Applicant is unable to show the outcome of the punishment phase of his trial would have been different had Crowley not made the complained-of statement.[7] *See Strickland v. Washington*, 466 U.S. 668 (1984).

(13)Applicant's fifth claim is as follows:

"ANDRUS'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY ASSIGNED BASED ON THE JURY'S ANSWER TO THE UNCONSTITUTIONALLY VAGUE FIRST SPECIAL ISSUE."

(a) The United States Supreme Court and the Texas Court of Criminal Appeals have previously considered challenges to the constitutionality of Texas Code of Criminal Procedure Article 37.071, Section 2(b)(1) and have denied those challenges. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

(b) The United States Supreme Court and the Texas Court of Criminal Appeals have ruled contrary to Applicant's position and thus, he is not entitled to habeas corpus relief with respect to his fifth claim. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

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[7] As discussed above, the Court does find and conclude that Applicant is entitled to relief, and specifically, a new punishment trial, because his counsel was ineffective in failing to investigate and present mitigating evidence at the punishment phase of trial. Therefore, the resolution of this claim is rendered moot assuming the Court of Criminal Appeals accepts this Court's recommendation.

(14)Applicant's sixth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY OBJECT TO INADMISSIBLE VICTIM IMPACT EVIDENCE AT THE GUILT/INNOCENCE PHASE OF TRIAL."

(c) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(d) Applicant signed a written confession, made several statements to law enforcement explaining how he killed the victims in this case, and led law enforcement to the gun he used to kill the victims. In addition, there was videotape and eyewitness evidence which inculpated Applicant.

(e) Based on the overwhelming evidence of Applicant's guilt, he is unable to show that any alleged deficient performance on the part of his trial counsel affected the jury's verdict at the guilt or innocence phase of trial or that but for counsel's allegedly deficient performance, the outcome of the guilt or innocence phase of his trial would have been different. Accordingly, Applicant is not entitled to relief with respect to his sixth claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(15)Applicant's seventh claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE RECORD FOR APPEAL."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) Applicant's claim is essentially that a number of bench conferences and off-the-record discussions were not recorded by the Court Reporter and that as a result, he was prejudiced. However, Applicant does not set forth what the bench conferences or off-the-record discussions consisted of and does not demonstrate how he was prejudiced by their omission from the Reporter's

Record of his trial.

(f) Because Applicant is unable to show the importance of any bench conferences or off-the-record discussions, or how they impacted his trial, he is unable to show the outcome of his trial would have been different had they been included in the record. As such, Applicant is not entitled to relief on his seventh claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

RECOMMENDATION

This Court recommends that Applicant be granted habeas corpus relief with respect to the first claim set forth in his writ application. Specifically, the Court recommends that Applicant be granted a new punishment trial because his lead trial counsel was ineffective in failing to investigate and present mitigating evidence. This Court recommends that Applicant's remaining claims be denied.

The District Clerk shall immediately transmit to the Court of Criminal Appeals these findings and conclusions as provided by law.

The Clerk shall send a copy of this order to Applicant and the State of Texas.

Signed on this 8 day of September, 2017.

Hon. James H. Shoemake
Sitting by Assignment
240th Judicial District Court
Fort Bend County, Texas

Appendix E

WR-84,438-01
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/10/2020 7:03 PM
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DEANA WILLIAMSON
CLERK

No. WR-84,438-01

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE TERENCE TREMAINE ANDRUS,
Applicant.

On Application for Writ of Habeas Corpus in
Cause 09-DCR-051034-HC1
In the 240th District Court, Fort Bend County

BRIEF OF APPLICANT TERENCE TREMAINE ANDRUS

THIS IS A CAPITAL CASE.

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Oral Argument Requested

IDENTIFY OF PARTIES AND COUNSEL

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Respondent	State of Texas
Counsel for Respondent	District Attorney Brian Middleton ADA Charann Thompson ADA Jason Bennyhoff *Counsel of Record* jason.bennyhoff@fortbendcountytx.gov Fort Bend County District Attorney's Office 301 Jackson Street Richmond, TX 77469

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STATEMENT REGARDING ORAL ARGUMENT

Applicant Terence Tremaine Andrus respectfully requests oral argument. The issue presented on remand involves one of the most fundamental and often litigated issues in death-penalty cases: the proper way to assess the prejudice element of an ineffective-assistance-of-counsel claim based on the failure to investigate and present readily available mitigating evidence in a death-penalty case. The directive on remand is that this Court undertake what the Supreme Court has described as a "weighty and record-intensive analysis." *See* Appendix 1: *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020). The Supreme Court has instructed that this analysis requires considering the State's case-in-aggravation at trial, how that case-in-aggravation was shaped by trial counsel's deficient performance, the mitigation evidence presented at trial, and the mitigation adduced in the habeas proceeding. *Id.* at n.7. Because of the importance of the issue, the size of the habeas record, and the need to compare it to the trial record shaped by trial counsel's deficient performance, Applicant submits that oral argument will promote an accurate view of dispositive facts and thus aid this Court's decisional process.

NOTE REGARDING CITATIONS

Below, "EHRR" refers to the Evidentiary Hearing Reporter's Record from the habeas proceeding; "RR" refers to the Reporter's Record from the trial; "AppX" refers to an exhibit offered by Applicant that was admitted into evidence during the

habeas evidentiary hearing and can be found in Volumes 10-41 of the EHRR. In citations, the volume number is listed first with the page number last, *e.g.*: 3EHRR38 refers to Volume 3 of the EHRR at page 38. Appendices 1-3 are attached.

ISSUE PRESENTED

The Supreme Court of the United States has already found that the "untapped body of mitigating evidence" amassed during the habeas proceeding was "simply vast"—standing in stark contrast to the virtual absence of such evidence put before the jury during the punishment phase of Terence Andrus's death-penalty trial. For this and other failures, the Supreme Court has held that trial counsel performed deficiently. The only remaining issue for this Court to decide is:

> Had the jury been privy to that "vast" "untapped body of mitigating evidence," is there a reasonable probability that at least one juror would have struck a different balance in weighing the evidence for and against a death sentence?

STATEMENT OF THE CASE

I. TRIAL

In 2008, when Terence Andrus was 20 years-old, he was charged with two counts of capital murder during a "bungled … carjacking in a grocery-store parking lot while under the influence of PCP-laced marijuana." *Andrus*, 140 S.Ct. at 1878. Soon after his arrest, before meeting with any lawyer, Terence confessed to the crime and then proceeded to assist law enforcement in recovering the gun and other evidence. In addition to his confessions, he expressed his remorse and desire to

convey his regrets to the victims' families.[1] The case was tried in Fort Bend County in 2012. Trial counsel admitted that, during the four years between his appointment and his client's death-penalty trial, he did almost nothing related to either guilt or punishment. 2EHRR186-89, 212. Counsel did not meet with his client or even inform him that a lawyer had been appointed for the first eight months Terence was held in a neighboring county's jail (near where counsel lived and worked); counsel met with his client outside of trial only six times during the entire four years of his appointment. Appendix 2 at (d)-(e).

After a year, a second-chair attorney was appointed. He started meeting with Terence, but then quit the case before trial. In his motion to withdraw, the second chair informed the court that Terence was willing to plead guilty in exchange for a sentence of life-without-parole. However, that plea offer was never acted upon. 2EHRR200-05; Appendix 2 at (ww). When the second chair withdraw, so did the mitigation specialist who had worked briefly on the case. Both attested that virtually no work had been done to prepare Terence's case for trial when they left; and the mitigation specialist was never replaced. AppX27; AppX28.

[1] As the habeas judge noted: "In addition to his statements and written confession, after returning to Fort Bend County, Applicant helped the police locate his gun, a .380 automatic, as well as a shovel Applicant used to conceal the gun." Appendix 2 at n.2; *See also* State's X1-8 admitted into evidence during a pre-trial hearing on September 5, 2012.

When trial began, counsel was virtually inert during the guilt-phase trial itself—waiving opening statement, conceding his client's guilt in closing argument, and complimenting State's counsel on proving the elements of the offense. 38RR38; 45RR15-18. He told the jury that the trial would "boil down to the punishment phase," emphasizing "that's where we are going to be fighting." 45RR18. But, as the Supreme Court has now held, that fight never came. *Andrus*, 140 S.Ct. at 1878.

During the punishment phase, the prosecution presented three days of aggravating evidence, focusing on: (1) Terence's juvenile record, including his file from the former Texas Youth Commission (TYC), and (2) his misconduct in jail while awaiting trial. Most of the jail incidents that were presented at trial had occurred during the first eight months of Terence's incarceration, over three years before trial; but the State also presented eight different witnesses to describe a single incident that had occurred in Fort Bend County several months before trial—without any objection from defense counsel to its cumulativeness. 47RR& 48RR.

Additionally, the State featured testimony from Leonard Cucolo, who was an administrator with the TYC. Cucolo testified for the State that, according to TYC, Terence had not been rehabilitated when he was in the agency's custody as a teenager following an arrest for participation in an aggravated robbery as a sixteen-year-old; therefore, TYC had transferred him to the adult prison system to complete his sentence. 48RR70-77. Defense counsel conducted no meaningful cross-

examination of this witness (or of any other punishment-phase witness). Thus, the jury did not learn of the massive scandals that had exploded into public view in 2008 exposing TYC's systemic failures and rampant mistreatment of youth while Terence was in TYC custody; nor did jurors hear that, by the time of trial, these scandals had resulted in the appointment of a special ombudsman and, ultimately, a complete overhaul of Texas's juvenile justice system.[2]

Initially, defense counsel's own punishment-phase presentation consisted of brief, largely false testimony from two witnesses: Terence's mother, Cynthia Andrus (who had to be subpoenaed to appear), and Terence's biological father, Michael Davis (who barely knew his son and was brought to court by members of the District Attorney's office). 49RR44-83; 50RR4-20. Their combined testimony, largely developed through cross-examination, suggested that, despite a largely rosy upbringing by a hard-working single mother, Terence had inexplicably turned to crime. 3EHRR98. The defense then rested. 50RR20. After the judge asked if defense counsel might have additional witnesses, the court recessed for a few days to give the defense more time. 50RR20-21.

When the trial resumed, defense counsel presented three more witnesses who largely added only to the *State's* case-in-aggravation because of defense counsel's

[2] The habeas proceeding established that defense counsel had been told about the heavily publicized TYC scandals and had been given the name of the TYC ombudsman (Will Harrell), but counsel had taken no action to investigate. 3EHRR119; 4EHRR30-33.

lack of preparation. The defense put on only one expert, Dr. John Roach, a pharmacologist whom counsel had failed to prepare and who had not been provided with Terence's social history or been put in touch with any of his family members. As the Supreme Court noted, on the stand, Dr. Roach focused only "on the general effects of drug use on developing adolescent brains" because defense counsel struggled to ask relevant questions. *Andrus*, 140 S.Ct. at 1879. Dr. Roach was then mocked on cross-examination by the State for having nothing specific or positive to say about Terence, and defense counsel "seemed to be at a loss to ask follow up questions to address the prosecution's damaging statements." AppX6; *see also* 51RR6-29.

Defense counsel then put a jail counselor on the stand whom counsel had met once briefly during the break in trial. 51RR30. This jail employee had started meeting with Terence during the 62 days he had spent confined in a padded cell in Fort Bend County. Appendix 2 at (h). Counsel never asked why his client had been confined in a padded cell; therefore, the jury did not hear about that situation or about what that may have said about Terence's mental health. 3EHRR78, 99. Instead, the jail counselor testified, unhelpfully and inaccurately, that Terence had "'started having remorse' … around the time the trial began." *Andrus*, S.Ct. at 1879. In fact, Terence had conveyed his remorse multiple times long before meeting the jail counselor, including in a videotaped confession law enforcement had made soon

after the crime. That genuine expression of remorse was never shared with the jury. Instead, the only confession, which was admitted during the guilt phase, was a written statement read into the record by a law-enforcement witness, which did not convey the sincerity evident in the video and in other recorded statements not admitted into evidence at trial. 42RR10. Defense counsel made no attempt to offer into evidence any excerpts from the many hours of recorded communications between Terence and law enforcement, which included multiple expressions of remorse and his efforts to cooperate.

Considering the ineffective defense punishment-phase presentation, Terence decided to testify to express his remorse and to provide more truthful facts about his childhood. 51RR45-56. Although he testified that he had been aware of his mother selling drugs out of the house by the time he was six years-old, that he and his siblings were often home alone, and that he first started using drugs regularly when he was about fifteen, "all told, counsel's questioning about Andrus' childhood comprised four pages of the trial transcript." *Andrus*, 140 S.Ct. at 1879. Terence's testimony essentially aided the State's punishment case because he was placed in the position of having to contradict his parents' false testimony. Most of his time on the stand involved a hostile cross-examination, during which the prosecution referred to him as a "sociopath." 51RR68.

In its initial closing argument, counsel for the State relied heavily on the contention that Terence had resisted TYC's benevolent attempts to rehabilitate him, stating, falsely, that Leonard Cucolo, a TYC bureaucrat who had never met Terence, had somehow played a personal role in his case and, quite remarkably, "crafted a tailormade program" that he had simply rejected:

> Leonard Cucolo is another representative from the Texas Youth Commission. He told you that the juvenile system is different from the adult system in that the legislature has mandated something unique to the juvenile system. First priority of TYC, the juvenile system, is protection of the community. Second is rehabilitation of the offender. Leonard met with the defendant, sat down and talk with him, what the expectations are, how to be successful, basically how to rehabilitate yourself, and then crafted a tailormade program for the defendant. He rejected it all. His rehabilitation was a failure. They already tried that.
>
> What mitigating evidence is there that could outweigh what we've already spoken up here? I submit to you there is nothing.

52RR31; *see also* 52RR12 (State's counsel again insisting that TYC had attempted to rehabilitate Terence and been unsuccessful). In fact, there is no support in the record for the suggestion that Cucolo ever met Terence before testifying for the State at his trial. *See* 5EHRR236 (explaining that Cucolo was an administrator who engaged in file reviews in Austin and then traveled to county courts to testify). The State's portrait of TYC at trial was, as later demonstrated in the habeas proceeding, a spectacular lie as the Supreme Court would later recognize. *See* 5EHRR143-47, 200 (TYC ombudsman testifying in habeas proceeding that: the only rehabilitation/treatment "program" at TYC when Terence 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; the person who developed that program "was fired shortly after the conservator was appointed by Governor Perry;" and the program was found to be an utter failure and scrapped in 2007—soon after Terence's release); *see also Andrus*, 140 S.Ct. at 1884. Yet defense counsel made no objection at trial to the false testimony and misleading argument because he had done no investigation.

Instead of challenging any aspect of the State's punishment case, in his brief closing, Terence's counsel conceded that the State had proven the future dangerousness special issue and referred specifically to the State's TYC testimony that he himself had failed to rebut: "You've heard all this evidence because what happened in the jail and TYC. There is probably a good probability that you're going to answer this question yes." 52RR36.

In its final closing, the State again invoked Terence's TYC experience as a reason to sentence him to death, along with repeatedly calling him a "sociopath." 52RR37, 50.

The jury imposed a death sentence, and this Court affirmed on appeal.

II. POST-CONVICTION

An initial habeas application, under Texas Code of Criminal Procedure, article 11.071, was filed on Terence's behalf, and the State answered. Because the judge

who had presided at trial had since retired, the administrative judge assigned the Honorable James Shoemake (hereafter "habeas judge") to preside over post-conviction proceedings in the 240th Judicial District Court. The habeas judge designated issues of fact, material to the habeas claims, that needed to be resolved by testimony during an evidentiary hearing. An eight-day evidentiary hearing was then held. 2-9EHRR.

In addition to extensive evidence of deficient performance, voluminous mitigating evidence was adduced in the habeas proceeding.

For example, sworn statements from eleven lay witnesses were admitted into evidence, all of which were found credible and to contain powerful mitigating information that could have been presented during the punishment phase of Terence's trial. *See* Appendix 2 at (mmmm) (finding affidavits of Torad Davis, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams credible and mitigating); *see also* AppX9-18; AppX139; AppX142. Some lay witnesses also provided compelling live testimony during the evidentiary hearing (Sean Gilbow and Phyllis Garner), explaining the brutal circumstances of life in the drug-infested neighborhoods in which Terence had grown up and the severe neglect he had sustained at home; his despair at having his one, short-term father figure shot dead in the streets when he was twelve; his exceptional protective actions toward his siblings; his mother's long struggle with

addiction and the criminal lifestyle that left her children to fend for themselves in a chaotic and violent environment; Terence's dogged attempts to find employment after his release from prison at eighteen. *See* 6EHRR12-118.

Instead of the one, ill-prepared trial expert, the habeas proceeding featured testimony from six experts whose opinions can briefly be summarized as follows:

- Dr. Julie Alonso-Katzowitz, psychiatrist with expertise in psychotropic medication, described TYC's misuse of psychotropic medications and the likely adverse consequences for Terence and how his medications were frequently changed in a way that could itself have had numerous adverse consequences relevant to understanding his behavior while at TYC;

- Terence Campbell, expert with extensive experience with Houston's Third Ward neighborhood, described the tremendous disadvantages black children like Terence had come up in a neighborhood where they are exposed at a very young age to "high levels of crime, HIV and AIDS, and drug availability," where the schools have been chronically low-performing, and where poverty levels are high;

- Dr. Tyina Steptoe, historian, outlined the role of racial discrimination in the development and decline of Houston's inner-city wards dating back to before the Civil War and up through the 1980s when the crack epidemic arrived there a few years before Terence was born in Third Ward;

- Will Harrell, former ombudsman for the Texas Youth Commission (TYC), who had been appointed by former Governor Rick Perry to assess the agency after it was wracked with scandals, explained the systemic failures uncovered through his investigation, the absence of any legitimate rehabilitation or mental health program when Terence was there, and its abuses that had adversely impacted Terence who had a comparatively insignificant disciplinary record in light of the practices that then characterized TYC;

- Dr. Michael Lindsey, child psychologist who reviewed extensive social history records and met with Terence for a two-day assessment, provided a scholarly overview of the adverse and well-established effects of pronounced

childhood trauma on development and offered support for his opinion that Terence's life history reflected overall deprivation in childhood, extensive trauma, the lack of adequate supervision and guidance, inadequate brain stimulation. and "unquestionably compromised" cognitive and psychological development;

- Dr. Scott Hammel, trauma specialist, social historian, and former TYC psychologist, testified about his investigation of specific instances of childhood trauma that Terence had experienced and how these experiences had adversely affected him and contextualized his adult behavior. Dr. Hammel also noted that even TYC's central administration recognized that there were problems with the mental health treatment that Terence was receiving while in TYC custody and issued a directive to do a better job of assessing, diagnosing, and treating him—but that directive was not followed. Dr. Hammel also reported that, while saddled with symptoms of posttraumatic stress disorder and untreated mental illness dating back to early childhood, Terence received the same mistreatment when in the county jails—random and potent doses of psychotropic medications and long stints in solitary confinement, which exacerbated his condition and likely explain his problems in jail. Based on his records review, Dr. Hammel also reported that, since his 2012 conviction, Terence had had virtually no misconduct write-ups and none for violent conduct while in TDCJ custody, which Dr. Hammel attributed to 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 and the initial overwhelming distress had diminished by that time as well."

See AppX1-5; 4EHRR200-46; 5EHRR103-247; 7EHRR5-185.

The habeas judge made no adverse credibility determinations as to any of these witnesses. *See* Appendix 2.

The habeas proceeding also featured voluminous documentary evidence admitted in support of Terence Andrus's *Wiggins* claim. For example, to support testimony about the traumatic environment in which he and his siblings had been raised, records were admitted documenting the criminal history of the five different

fathers of Cynthia Andrus's five children and of some of the other adult males she had brought into their lives. *See, e.g.*, AppX122A at 3989-4002; AppX122B at 5794-5890; AppX122C at 2808-23, 2983-3049 (Damon Sias's numerous arrests for drugs and assaults, and convictions for family violence, injury to a child, and indecency with a child); DX122B at 5856-59 (Damon Sias and Cynthia Andrus's arrests for family violence); AppX122A at 4008; AppX122B at 5892-5917, 5931-34; AppX122C at 3602-3964 (Danyel Sims' arrests for sexual assault, family violence, and various convictions for drug-related and violent offenses); AppX122A at 4139; AppX122B at 6138-45 (Norman Ray Williams' convictions for cocaine possession and multiple arrests for family violence); AppX122C at 3680-3802 (Orentherus Lee Norman's multiple convictions for drug-related offenses); AppX122A at 4153-58; AppX122B at 6174-98 (Roderick Davis's several drug-related arrests); AppX122C at 3874-3939 (Michael Davis's multiple drug-related convictions); AppX122C at 3807-3978 (Senecca Booker's multiple drug-related convictions). The habeas proceeding also established that, during Terence's childhood, most of these men either died violently or were only around briefly due to incarceration. 6EHRR209-14.

Further, during two days of testimony, Dr. Scott Hammel, walked through the specifics of multiple instances of clinically significant traumatic events in Terence's life (including untreated mental illness, murdered loved ones, sexual and physical

abuse, addicted and incarcerated caregivers), illustrating those events with a family genogram and detailed social history timeline. AppX129; AppX140. Dr. Hammel explained how the social history was supported by a wide range of records that he had reviewed and interviews he had personally conducted with multiple sources. AppX122A; AppX140; 6EHRR118-227; 7EHRR5-156.

The evidence developed for the first time in the habeas proceeding, which the habeas judge found credible, supported, *inter alia*, these reasons for considering a sentence less than death:

- Terence was part of the third generation of the Andrus family to live in Third Ward and to attend the under-resourced schools Frederick Douglass Elementary, Ryan Middle School, and Jack Yates High School that were still almost exclusively black when Terence attended them over a hundred years after Jim Crow had come to Houston. Third Ward in the 1980s and 90s was shaped by a legacy of racial segregation and urban blight; its historical African-American community was one of the first places in the nation hit by the arrival of cheap crack cocaine and illegal codeine transmogrified into a street drug known as "lean," "sizzurp," and "drank"; the epidemics associated with these drugs had already ravished Third Ward when Terence was born there in the "Jefferson Davis Hospital," an historically segregated facility for black patients. By that time, most who could afford to, including most legitimate businesses, had fled to the suburbs leaving behind a zone of unbridled vice. AppX3; AppX13; AppX118; AppX94; AppX95; AppX97; AppX98; AppX100-AppX107; AppX122A; AppX129; 3EHRR216-238; 5EHRR65-73.

- Terence'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 Houston's Third Ward; all of the five different men who sired the five Andrus children had extensive criminal histories and brought rampant violence into the home including the father of Terence's closest sister

who raped her when she was a young child, causing her to be removed from the home. AppX3; AppX8; AppX9; AppX18; AppX122A-AppX122C; 5EHRR37-40, 81-86, 197-98.

- Terence, as a very young child, took on the parent role towards his siblings, including his older brother with special needs. While Terence struggled to provide for his siblings, he was too young to know what he was doing, a circumstance that only further burdened his ability to develop his own coping skills in chaotic circumstances. As a mental health expert explained, children that age are just not emotionally equipped to handle these kinds of burdens without experiencing adverse consequences. AppX9-AppX11; AppX13; AppX14; AppX17; AppX18; 5EHRR24, 41-42, 168, 183.

- Terence's childhood was replete with traumatic experiences that scientific studies have long demonstrated adversely affect development, impulse control, mental and physical health. Terence had been exposed, almost continuously from birth, to parental substance abuse and drug-dealing, the incarceration of parental figures, domestic violence, homicides, a single-parent household mired in poverty, mental illness of caregivers, severe emotional neglect from a mother who started having children when she herself was still a child and had no functioning support system—circumstances that are each risk factors for self-destructive behavior and crippling dysfunction in adulthood. AppX5; AppX9-AppX11; AppX13; AppX14; AppX17; AppX18; 3EHRR235; 5EHRR22-37, 168-89, 194-95, 208; 6EHRR27, 127; AppX123-AppX129; AppX140; AppX188.

- Terence lost the one father figure he briefly had—a young drug dealer known in the neighborhood as the "Cookie Monster" due to his kindness to children. This man, years younger than Terence's mother, was the one adult who got Christmas presents for the kids and tried to protect them from their mother's beatings. He was killed in the streets at 23-years old in an unsolved drive-by shooting and bled out in Terence's mother's arms, causing her to descend further into addiction, thereafter essentially abandoning her children for extended periods. After the loss of this father figure, Terence started getting into trouble in school. In 8th grade, he was caught with his mother's Xanax and punitively transferred to an alternative school instead of being given

therapeutic treatment or intervention at home. AppX8; AppX9; AppX11-AppX13; AppX18; AppX118; AppX122A; AppX140; 5ERR44, 195-96.

- Terence's mother, trying to escape Third Ward and take advantage of Section 8 housing, unwittingly moved the family into gang-infested apartments in the Mission Bend District where the male "leaders" ran gangs and exploited vulnerable teens like Terence; at this time, a robbery in which he participated as a lookout resulted in his incarceration in Fort Bend juvenile detention, records of which established that the officer in charge of his case was concerned about him, especially since no one in his family visited him. But instead of a second chance, he was given a three-year sentence and conveyed to the custody of TYC. AppX6; AppX9; AppX13; AppX14; Appx118-Appx120; 5EHRR46, 83-84, 87; 6EHRR26-29.

- While in TYC custody for eighteen months, he spent much of his time isolated in a dark, filthy cell medicated with psychotropic drugs without a corresponding diagnosis. Terence'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 on the dorms, and minor adolescent infractions, such as eating a cookie in class or cursing at staff. Instead of treating his mental illness, TYC made him worse. AppX1; AppX4; AppX9; AppX18; AppX59; AppX113; Appx119; AppX120; AppX138; 4EHRR141-212, 237-40; 5EHRR158-60; 6EHRR33-35.

- After spending his last *90 days* entirely in solitary confinement, Terence, then eighteen, was punitively transferred from TYC to the adult prison system for about a month based solely on a bureaucrat's file review; that file consisted of unverified disciplinary write-ups that had been issued by untrained staff. Those unadjudicated write-ups did not account for the rampant "violence in the units" characterized by a "brutal pecking order" and "a Lord of the Flies" environment where no mental-health treatment or meaningful rehabilitation programs of any kind were provided. 5EHRR122, 189, 204, 236-41.

- At eighteen, Terence was released from prison back into the free world where he had little support for turning his life around. He was approved to return to his mother's house, but she wouldn't take him in. Family friends allowed him

to move in with them because he was kind to their children and respectful. The head of that household helped Terence get a job—but when this man was sent back to prison for drugs, Terence lost transportation and thus the job. Thereafter, Terence strove to find gainful employment and to proactively help those who gave him shelter. But since TYC actions had branded him as a felon with an adult record, his efforts to find and retain legitimate employment repeatedly failed. He then became seriously depressed and self-medicated with street drugs, which was the condition he was in, at age 20, at the time of the capital offense. 4EHRR190, 237; AppX13-AppX15; AppX119; AppX121; AppX139; 5EHRR96.

- While in jail awaiting trial, Terence became emotionally unhinged and suicidal. He was again capriciously prescribed potent psychotropic medications by both the Harris County and Fort Bend County jails—including Lithium, Clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, Trazadone, Risperidone, Wellbutrin, Remeron, Prozac, Thorazine, and Seroquel—without accounting for his mental health history or symptoms.[3] These medications are associated with causing serious adverse side effects such as mania, aggression, and depression when mis-prescribed. In jail, Terence was punished for his mental illness and instability with extended stays in a padded cell that harkened back to the abusive treatment he had received in TYC custody. He spent a stint of 62 straight days confined in a padded cell without any interaction with a lawyer and was only released right as voir dire began in his case. He never heard what had happened to his offer to plead guilty in exchange for a sentence of life-without-parole, but the lead prosecutor claimed in the habeas proceeding that he had never heard about the offer from trial counsel although the offer is memorialized in a motion in the clerk's record filed by a lawyer who quit before Terence's case went to trial. 4EHRR170-74; 6EHRR41; AppX27; AppX68; AppX113; AppX122A; Appendix 2 at (vv)-(ww) (citing testimony from lead prosecutor that the State was not aware that, long before trial, Terence had offer to plead guilty and accept a life-without-parole sentence).

[3] The only drugs mentioned at trial were the street drugs that Terence admitted he was on the night of the crime.

- During the years of Terence's pre-trial incarceration, TYC was the subject of extensive news coverage of massive scandals reflecting years of abuse and neglect of the youth entrusted to the agency's case. Thereafter, extensive investigations exposed systemic failures that had characterized the institution during the entire time that Terence was in TYC custody. This history was described during the habeas proceeding in vivid, concrete detail by TYC's former ombudsman, Will Harrell. The abuses uncovered led to a wholesale restructuring and rebranding of Texas's juvenile justice system. Youth similarly situated to Terence were subsequently released early and the punitive transfers to the adult prison system that he had received for failing to complete the agency's disgraced "resocialization" program were scrapped. AppX4; AppX49; 4ERR128-199; Appendix 2 at (yy)-(fff) (habeas judge finding Mr. Harrell's expert testimony regarding TYC's history and Terence's treatment at TYC facilities credible and citing it extensively).

- In the punishment-phase of trial, counsel for the State had repeatedly referred to Terence as a "sociopath" without objection from trial counsel. During the habeas proceeding, Dr. Hammel, a qualified mental health expert, explained that Terence did not have the characteristics of a "sociopath," a pejorative lay term used to refer to a person with psychopathy; instead, Terence had an extensive history of childhood trauma, numerous symptoms of posttraumatic stress disorder, likely a complex, unaddressed mood disorder, and a drug addiction. Dr. Hammel also explained that identifying risk factors in Terence's background is not about making excuses or arguing for biological or cultural destiny, but explaining how exposure to certain kinds of traumatic events in childhood increases the probability that an individual will engage in destructive behaviors, including substance abuse. Dr. Hammel opined that substance abuse is a common response to untreated trauma as a means to "self-medicate" and he explained how, when substance abuse suddenly ceases, it can take up to a year for a person's neurobiology to normalize and, in the interim, can cause psychotic breaks or serious depression; with Terence, his neurochemical imbalances were likely compounded by the regime of potent, psychotropic medications he had been given while in the custody of governmental entities. These conditions had also likely affected his neurological, emotional, and social development, making it more challenging for him to modulate emotions, including the physiological "fight-or-flight" reaction naturally triggered by stress. Dr. Hammel found the approach and

conclusions reflected in the draft report of Dr. Jerome Brown, a psychologist retained by trial counsel, to be burdened with internal inconsistencies and a lack of corroboration. Dr. Hammel concluded that Dr. Brown's hasty report did not reflect the standards for an ethical forensic assessment. 5EHRR118-178, 193; 6EHRR5-160; Appendix 2 at (yyy)-(dddd) (habeas judge summarizing Dr. Hammel's two days of testimony and finding his opinions credible).

In short, the habeas proceeding amassed considerable evidence that jurors had not heard, which the Supreme Court has now characterized as "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped." *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886; *see also* 2-41EHRR.

After the evidence was closed, the parties to the habeas proceeding each presented proposed findings of fact and conclusions of law and gave closing arguments. *See* 9EHRR. But instead of accepting the proposals of either party, the habeas judge took pains to draft his own. *See* Appendix 2. The habeas judge made numerous findings, supported by the habeas record, as to trial counsel's deficiencies. The habeas judge also identified "ample mitigating evidence which could have, and should have, been presented at the punishment phase of Applicant's trial" and found his mitigation witnesses credible. *Id.* at 14-15 (concluding that Terence Andrus was entitled to habeas relief under *Wiggins v. Smith*, 539 U.S. 510 (2003)). The habeas judge also recommended a new punishment-phase trial. *Id.* at 20.

The case was then submitted to this Court. On February 13, 2019, in an unpublished per curiam decision, this Court refused to adopt the habeas judge's

findings of fact and rejected his conclusions of law and his recommendation that habeas relief be granted. *See Ex parte Andrus*, 2019 Tex. Crim. App. Unpub. LEXIS 81 (Tex. Crim. App. Feb. 13, 2019). Most of the six-page majority opinion is devoted to summarizing the State's trial presentation. The opinion does not discuss the prejudice element of the *Wiggins* claim or any evidence adduced during the habeas proceeding. *See id.*

Four of the nine judges of this Court signed a separate, more detailed concurring opinion. *Id.* at **7-17 (Richardson, J., concurring, in which Keller, P.J., and Hervey and Slaughter, J.J., joined) (unpublished) (hereafter "Concurring Opinion"). The Concurring Opinion contains the conclusion that Terence Andrus was not prejudiced by counsel—but without discussing any of the mitigating evidence presented in the habeas proceeding and without explaining why the habeas judge's prejudice finding had been rejected. *Andrus*, 140 S.Ct. at 1887, n.6.

Terence appealed to the Supreme Court in a petition for writ of certiorari.[4] On June 15, 2020, the Supreme Court granted the petition in a per curiam opinion that includes extensive findings regarding the "grim facts of Andrus' life history" that had been presented for the first time during the state habeas proceeding and thus had not been before the jury. *Id.* at 1878. The Supreme Court further found that "[t]he

[4] The docket is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-9674.html.

untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast." *Id.* at 1883. The Supreme Court found that that trial counsel had performed deficiently, vacated the judgment of this Court, and remanded the case for this Court to address the prejudice prong of *Strickland v. Washington* in a manner consistent with the Supreme Court's per curiam opinion. The Supreme Court's opinion also cautions that the Concurring Opinion previously signed by members of this Court had misapplied *Wiggins* and did not account for the record amassed during the habeas proceeding. *Id.* at 1887, n.6.

On July 17, 2020, the Supreme Court issued its mandate in this case. Thereafter, an unopposed motion was filed on Terence Andrus's behalf seeking a right to submit briefing to this Court. That unopposed motion was granted, and this brief follows.

SUMMARY OF ARGUMENT

The Supreme Court has now found that the habeas record amassed on Terence Andrus's behalf includes "abundant," "vast," "compelling," "powerful," "myriad," "untapped" evidence mitigating against a death sentence—none of which his jury heard because of his appointed counsel's deficient performance. Because the abundant evidence adduced for the first time in the habeas proceeding materially reduces the aggravating value of the State's punishment-phase case and utterly changes the mitigation profile presented at trial, the weight of the evidence has shifted entirely away from any presumption that a death sentence was somehow inevitable. In the wake of the Supreme Court's findings in this case and in light of governing precedent, the only reasonable resolution to this case is to find that Terence Andrus was prejudiced by his counsel's deficient performance and grant him a new punishment-phase trial, as mandated by the Constitution's Sixth Amendment.

ARGUMENT

The Supreme Court opinion in this case focuses on the claim that Terence's trial counsel was ineffective for failing to investigate and present mitigating evidence, thus necessitating a new punishment-phase trial. *See* Appendix 1. As this Court well knows, succeeding on such a claim requires showing that trial counsel's performance was deficient in light of prevailing professional norms and that the

deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 688, 694 (1984). This particular kind of ineffective-assistance claim is commonly referred to as a "*Wiggins* claim," because its contours were discussed at length in *Wiggins v. Smith*, 539 U.S. 510 (2003). The Supreme Court remanded Terence's claim after finding in no uncertain terms that he had proven deficient performance. *Andrus*, 140 S.Ct. at 1881-82. Specifically, the Supreme Court has held that trial counsel performed deficiently in several categorical ways:

- "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."

Id. The Supreme Court refrained, however, from deciding the issue of *Strickland* prejudice, leaving it to this Court to decide the matter "in light of the correct legal principles articulated" in its opinion. *Id.* at 1887 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) (explaining decision not to take up an issue presented because it is "a court of review, not of first view")). Those legal principles only support one outcome: a finding of prejudice and a remand for a new punishment-phase trial.

I. ADOPTING THIS COURT'S PREVIOUS CONCURRING OPINION'S REASONING OR CONCLUSION WOULD BE ERROR.

In this case, the Supreme Court found it "unclear whether [this Court] considered *Strickland* prejudice at all." *Id.* at 1886. The Supreme Court expressed doubt because this Court's majority "did not … engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." *Id*. Given this uncertainty, the Supreme Court remanded the case for this Court to conduct the "weighty and record-intensive analysis" required for a prejudice analysis. *Id.* at 1887.

The Supreme Court considered the entire record—the trial record as well as the eight full court days of testimony and the hundreds of thousands of pages of documentary evidence admitted into evidence during the habeas proceeding. *See* 1-41EHRR; *see also* Appendix 1 (citing the habeas record extensively). Because the Supreme Court has demanded a "weighty and record-intensive analysis," this Court must now account for the full habeas record. *Id*. As explained at length below, the previous Concurring Opinion signed by four members of this Court does not present a viable approach to resolving this case. The Concurring Opinion is mistaken because it: (A) was based on an incomplete and inaccurate view of the record; (B) is

at odds with findings the Supreme Court has now made; and (C) relies, as the Supreme Court has explained, on a misapprehension of *Wiggins v. Smith*.[5]

A. The Concurring Opinion Was Based on an Incomplete and Inaccurate View of the Record.

The face of the Concurring Opinion indicates that the signatories may not have seen the 41-volume habeas record that the Supreme Court reviewed and discussed in great detail in holding that Terence Andrus's counsel performed deficiently. Perhaps this oversight arises from a clerical error. The Court's portal for this case includes only the Clerk's Record from the trial court and the non-final volumes 1-7 of the 41-volume Reporter's Record of the habeas evidentiary hearing. The portal does not include the Master Index, which became Volume 1. *See* Appendix 3. Nor

[5] Aside from its dicta about prejudice, the Concurring Opinion suggests that, even if lead counsel was deficient, that would not matter because he had a belatedly appointed second chair counsel at trial. *See* Concurring Opinion at n.26. To support this view, the opinion cites *McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996). This Court's *McFarland* decision is currently the subject of a federal habeas proceeding, and the Fifth Circuit Court of Appeals recently granted McFarland a Certificate of Appealability on all of his claims, including the claim that "his trial counsel's persistent sleeping during trial meant he was constructively deprived of counsel, in violation of *United States v. Cronic*, a deprivation ***not*** cured by the presence of secondary counsel appointed against McFarland's wishes." *McFarland v. Davis*, 812 F. App'x 249 (5th Cir. 2020) (finding all four claims, including claim that his trial counsel was deficient under *Strickland v. Washington* "for their failure to investigate and prepare for trial and for their failure to test the credibility of the State's key witnesses," "warrant encouragement to proceed" because McFarland had "made a sufficient showing that jurists of reason could debate the district court's conclusions"). That is, the Fifth Circuit is presently considering whether this Court made unreasonable applications of clearly established federal constitutional law in deciding McFarland's case back in 1996. In any event, this Court is now bound by the Supreme Court's clear finding in *this* case that Andrus more than carried his burden of showing deficient performance. *See, e.g.*, *Andrus*, 140 S.Ct. at 1882 (finding counsel's performance "plainly not" reasonable under prevailing profession norms) and *id.* at 1887 (instructing that any conclusion to the contrary is "erroneous as a matter of law").

does the portal include the final versions of the transcripts from the eight days of testimony found in Volumes 2-9 or any of the exhibits in Volumes 10-41.[6]

This circumstance may explain the Concurring Opinion's characterization of the habeas record in a way that cannot be squared with the actual record or with the Supreme Court's assessment of that record. *Compare* Concurring Opinion at *18 (stating "it appears that Applicant's strongest proposed mitigating evidence would have been (1) testimony from certain lay witnesses to corroborate Applicant's punishment phase testimony about his upbringing, and (2) testimony from Dr. Jerome Brown")[7] *with* Appendix 1. The Concurring Opinion's assessment is wrong in light of four different tranches of evidence in the habeas record, as highlighted by the Supreme Court.

1. The Concurring Opinion did not consider the mitigating evidence adduced in the habeas proceeding.

The Concurring Opinion does not compare trial counsel's mitigation investigation and presentation that, per the Supreme Court, "approached nonexistent," to the "vast" mitigating evidence adduced during the habeas proceeding. The latter includes evidence of: Terence's exposure to illegal narcotics

[6] An unopposed motion to supplement the record stored in the portal was denied on October 28, 2019.

[7] As explained further below, "Dr. Brown" was retrained by trial counsel; he did not testify in the habeas evidentiary hearing and was not idenitifed as someone who should have testified at trial.

and violence at a young age through his mother; the multiple instances of clinically significant childhood trauma in his social history; the long-standing mental-health issues diagnosed first in early childhood that were then made far worse by abuse, bordering on torture, inflicted on him while in the "care" of Texas's juvenile justice system; and the massive misuse of psychotropic medications administered to him while at TYC and then in jail that could well explain his suicide attempts and much of his misconduct while awaiting trial. *Andrus*, 140 S.Ct. at 1883.

There is both a qualitative and quantitative difference between both the lay and expert testimony presented on Terence's behalf at trial and in the habeas proceeding.

For instance, because trial counsel had never interviewed Terence's biological father Michael Davis before putting him on the stand, Davis's trial testimony established only that he had been in prison most of Terence's life; then, on cross-examination, the State brought out that Terence had lived for a time with his grandmother, Davis's mother, whom Davis said was "a good mom." 50RR4-11. While it is true that Terence, his older brother, and his teenage, unwed mother had lived for a time with Davis's mother, the conclusory statement that she was "a good mom" was misleading. By actually interviewing Davis and researching his history, an expert who testified in the habeas proceeding was able to explain that Davis's mother had been "a bad crack addict," had not been able to care for her own sons,

and had "a history of trauma herself" as "her father [had] murdered her mother," an event which sent her and her siblings into abusive foster care from which she never fully recovered and which drove her to substance abuse and bouts of sustained hysteria. 6EHRR198-199.

Likewise, there is a significant difference between testimony from the defendant himself stating, without explanation, that his mother sold drugs out of the house when he was a child compared to testimony from multiple witnesses describing the Andruses' "nasty" childhood home in graphic detail, supported by testimony from a family friend explaining precisely how Terence's mother taught him to obtain illegal prescriptions to make and sell "drank," and describing the toll the crack trade had taken on their old Third Ward neighborhood in which Terence was born and raised. For instance, one witness in the habeas proceeding described his first day "on the job" as a teenage crack dealer, encountering an emaciated addict trying to trade her newborn baby for $5 worth of street drugs. *See, e.g.*, 6EHRR12-118.

The jury did not even learn that Terence's mother was seventeen when he, her second child, was born, or that her five children had five different fathers none of whom had lived in Terence's home; nor had the jury learned that she had supported these children through prostitution and drug hustling. *See* 6EHRR37-38, 82-86, 104, 184, 196-97, 206-08. The habeas judge, not the jury, heard about the prostitution,

shootings, and drug-dealing occurring openly in the streets when Terence was a child. And it was the habeas judge who learned how virtually everyone Terence's mother brought into their lives was selling drugs—including in their house—whose windows had to be boarded up after crack addicts tried to break in to steal the little they had. *Id.*; AppX9-AppX18.

As the Supreme Court noted, the habeas proceeding also featured evidence about how, "[b]efore he reached adolescence, Andrus took on the role of caretaker for his four siblings," including his intellectually disabled older brother—evidence supported by multiple affiants and live testimony from lay witnesses, none of whom had even been interviewed before trial. *See, e.g.*, AppX9-AppX18; 6EHRR12-118. The Supreme Court also recognized that the habeas judge had heard details, not just conclusory statements, about: Terence's mother's drug dealing and addiction; the binges that would precipitate her regularly spending "entire weekends, at times weeks, away from her five children;" and "a revolving door of drug-addicted, sometimes physically violent, boyfriends." *Andrus*, 140 S.Ct. at 1877. The habeas judge, not the jury, learned that one of these "boyfriends," who had sired one of Terence's sisters, raped her when she was still a young child, leading her to be temporarily removed from the home and to be permanently traumatized. 6EHRR187-88.

The Supreme Court emphasized Terence's complex, long-standing mental-health issues, including a diagnosis of "affective psychosis" around age ten, possible schizophrenia, and a history of suicidal ideation—records of which trial counsel had entirely ignored. *Andrus*, 140 S.Ct. at 1877, 1880. As the Supreme Court noted, counsel "did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized." *Id.* at 1882. Indeed, in the habeas proceeding, trial counsel dismissed all of the records showing Terence's history of unresolved mental-health issues as "a lot of psychological gobbledygook." 2EHRR240; *see also Andrus*, 140 S.Ct. at 1882 (finding "counsel 'ignored pertinent avenues for investigation of which he should have been aware,' and indeed was aware.") (quoting *Porter v. McCollum*, 558 U.S. 30, 40 (2009)).

2. The Concurring Opinion did not consider the affirmative damage done by trial counsel's terrible mitigation presentation.

The habeas proceeding also included evidence from two of the handful of witnesses who had testified for the defense at trial—Cynthia Andrus (AppX8) and Dr. John Roach (AppX6). They attested to facts showing how, due to trial counsel's deficient performance, their involvement at trial had done more to harm than help.

As the Supreme Court recognized, Terence's mother had not simply provided a "sanitized" description of his childhood at trial, Concurring Opinion at *18, the habeas proceeding established that she had flagrantly *lied*—and put her son in the untenable position of having to take the stand to contradict her. The habeas

proceeding established that his mother had told a mitigation specialist, who quit before trial, that she was uninterested in being helpful. Cynthia Andrus had only agreed to meet briefly one morning before work if the mitigation specialist agreed to buy her breakfast, and then she had commented during this meeting, in front of one of her daughters, that she had "too many kids" but might at least be able to collect on a $10,000 life insurance policy if her son Terence were executed. AppX8; AppX28.

The Supreme Court found that the defense-sponsored testimony from Terence's mother, who falsely portrayed "a tranquil upbringing" and suggested that her son "got himself into trouble despite his family's best efforts," was an example of how counsel's abject failure to investigate meant that "much of the so-called mitigating evidence" offered at trial actually "aided the State's case in aggravation." *Andrus*, 140 S.Ct. at 1883. The Supreme Court also observed that, when Terence opted to testify at trial, counsel turned "a bad situation worse" because counsel's "uninformed decision" to call his mother "undermined Andrus' own testimony[.]" *Id.* at 1884. Before trial, she had told counsel her "life was not on trial" and she "was not about to tell any stories about [her]self." AppX8. Therefore, as the Supreme Court made clear, calling her only served to bolster the State's case-in-aggravation—a circumstance that must be considered in assessing prejudice. *Andrus*, 140 S.Ct. at 1882-84. If called at all, Ms. Andrus should have been called as a hostile witness

and impeached about her callous notion that she could collect on a life insurance policy if her own child were executed as a means to deal with her other four neglected kids.

Another example of a defense punishment-phase performance that only served to bolster the State's case was the botched use of trial expert Dr. John Roach. This lone defense testifying expert was called only after the defense initially rested and only after the trial judge suggested a recess so that the defense could consider putting on more witnesses. 2ERHR91-94. Dr. Roach was undermined at the outset by the lawyer who was sponsoring him (defense counsel: "Are you a psychiatrist or what?" and "You're not a practicing MD, in other words?"). 51RR7. Presenting this expert without having provided him with a social history meant that the expert had nothing much to say about Terence himself. That expert spent most of his brief time on the stand being mocked during cross-examination as the defense sat idly by (prosecution: "So you drove three hours from San Antonio to tell the jury panel that, that people change their behavior when they use drugs?"). 51RR21. The Supreme Court found it significant that the habeas proceeding had shown that trial counsel had utterly failed to prepare Dr. Roach, whose post-conviction affidavit averred that he was "struck by the extent to which [counsel] 'appeared unfamiliar' with pertinent issues[.]" *Andrus*, 140 S.Ct. at 1882 (quoting AppX6).

Prejudice to Terence from counsel's deficient performance is clear given the vast difference between an unprepared expert offering generalities about how illicit drugs can affect the developing brain, and the multiple experts attesting in the habeas proceeding about the wanton way psychotropic drugs were prescribed to Andrus, how those drugs likely exacerbated his long-standing and unresolved mental-health issues while he was incarcerated, and the relationship between the clinically significant trauma in his background and the street drugs he had used to self-medicate after emerging from an eighteen-month hell in a juvenile system that the State of Texas itself has, since that time, disavowed as a colossal failure. *See, e.g.*, AppX1; 5EHRR103-247; 6EHRR118-227; 7EHRR5-160.

3. The Concurring Opinion mistakenly interpreted evidence of trial counsel's deficient performance as an example of mitigating evidence adduced in post-conviction.

The Concurring Opinion, like this Court's majority opinion, made no mention of the voluminous mitigating evidence unearthed and presented in the habeas proceeding. Instead, the Concurring Opinion references "Dr. Jerome Brown." Concurring Opinion at **19-20. Dr. Brown was a defense *trial* expert, retained at the eleventh hour whom trial counsel did not even contact after Dr. Brown conducted a brief interview with Terence. AppX2. The Concurring Opinion mistakenly implies that Dr. Brown's draft report was the primary mitigating evidence adduced during the habeas proceeding. Everything about trial counsel's approach to experts,

including his failure vis-à-vis Dr. Brown, was exposed as objectively unreasonable during the habeas proceeding. The critique of Dr. Brown is mentioned in Andrus's initial application, supported by an affidavit from Dr. Brown himself. *See id*. But the legion problems with Dr. Brown's unreliable draft report were developed more fully during the evidentiary hearing through an eminently more qualified and better prepared expert, Dr. Scott Hammel. *See* 6EHRR118-226; 7EHRR5-160.

Dr. Hammel opined that Dr. Brown's draft report was based on inadequate sources and a seemingly unethical and definitely unreliable methodology.[8] 7EHRR63-65, 135-37. The unhelpful and unreliable nature of Dr. Brown's draft report and the few generalities elicited from Dr. Roach (the only defense expert who testified) were relevant in the habeas proceeding only as further proof of trial

[8] Moreover, there was no finding of any kind that Terence had a "history of abusing and killing animals" as the Concurring Opinion states in reliance on Dr. Brown's draft report. Concurring Opinion at *21. There is no record of the basis for most of Dr. Brown's draft report, which played only an ancillary role in the habeas proceeding when the State endeavored to seize on its contents as something more than hearsay-within-hearsay, found in trial counsel's paltry file. A thumb drive containing trial counsel's file, which included the draft report, was offered and admitted into evidence for the *limited* purpose of establishing the contents of counsel's file. *See* 2EHRR145 (admitting HC-18). 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 having asked about statements in Brown's report that Terence had hurt animals; Dr. Hammel described an incident where Terence felt he had killed his uncle's puppy by "holding its 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 in that instance[.]" 7EHRR67-68. For the State to treat hearsay-within-hearsay in Dr. Brown's unreliable report as representing "facts" about Terence was improper. It is unclear why the author of the Concurring Opinion came to believe that Terence had been found to "abuse animals" or why it felt Dr. Brown's report represented competent evidence, let alone something that represented mitigating evidence that should have been presented at trial. No such argument was made on Terence's behalf, and the habeas court made no such finding. *See* Appendix 2.

counsel's *deficient performance*; the trial work product of these experts was *not* among the "tidal wave" of mitigating evidence adduced in the habeas proceeding. *Andrus*, 140 S.Ct. at 1887. Now that the Supreme Court has already concluded that trial counsel's performance was deficient, prejudice is clear, as Dr. Brown's and Dr. Roach's trial involvement stand in stark contrast to the "the abundant mitigating evidence so compelling, and so readily available" that could and should have been presented through qualified experts at trial. *Id.* at 1878; *see also* Appendix 2 (w)-(z), (ee)-(hh); Appendix 3.

4. The Concurring Opinion did not account for how the State's case-in-aggravation could and should have been rebutted, as demonstrated in the habeas proceeding.

The Concurring Opinion devotes several pages to describing the State's punishment-phase presentation—without acknowledging that it was shaped in large part by trial counsel's deficient performance. As the Supreme Court has found, trial counsel "failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so." *Andrus*, 140 S.Ct. at 1884.

The Supreme Court cites some of the extensive evidence developed during the habeas proceeding that could have been presented to undercut the State's case-in-aggravation. For instance, the Supreme Court highlights Terence's experiences when, at age sixteen, he was sent to juvenile facilities run by the TYC for having "allegedly served as a lookout while his friends robbed a woman." *Id.* at 1877. The

habeas proceeding established, as the Supreme Court recognized, that, during Terence's eighteen-month TYC incarceration, "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." *Id*.

The Supreme Court identifies the "severe" harm Terence sustained as a result of his time in TYC custody as a teenager and again while incarcerated awaiting trial as significantly countering the State's evidence at trial. *Id.* at 1884. Contrary to the State's version of events, if counsel had "genuinely investigated Andrus' experiences in TYC custody," as the Supreme Court recognized, "counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe." *Id.* "Or," as the Supreme Court added, "with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison." *Id.*

The portrait presented at trial of TYC and Terence's time in its custody was diametrically different from the testimony provided from three experts during the habeas proceeding: TYC Ombudsman Will Harrell, appointed by former Governor Rick Perry in 2010 to address the system's massive failure and unconstitutionality; clinical psychologist Dr. Scott Hammel, who had worked for the TYC system and was aware of its abuses and inadequate mental-health treatment and who, after

conducting a preliminary investigation of Terence's social history, found multiple instances of clinically significant childhood trauma; and psychiatrist Dr. Alonso-Katzowitz, who described the physiological consequences of the improper "medical restraints" used on Terence while he was in TYC custody. *Compare* 48RR60-77, 52RR5-32 *with* AppX1; AppX4; 5EHRR103-247; 6EHRR118-226; 7EHRR5-160.

The State's narrative that Terence's TYC and jail records showed that he was incorrigible and inexplicably volatile, but also somehow an unfeeling "sociopath," could and should have been attacked. The habeas record not only contains evidence of significant, unresolved mental-health issues that shed a different light on Terence's conduct, but also evidence that he was wantonly given potent psychotropic medications while in TYC and in jail—Lithium, Clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, Trazadone, Risperidone, Wellbutrin, Remeron, Prozac, Thorazine, and Seroquel—drugs that can *induce* mania, depression, and aggression when mis-prescribed and randomly changed, as they were with Terence *for years*. 6EHRR160-65; AppX1; AppX122A.

The habeas record also includes evidence that Terence was quite receptive to advice when he briefly got some. After his arrest for the capital offenses, he spent his first eight months locked up in a neighboring jail, without legitimate explanation and without visits or guidance from a lawyer (or anyone else). But once a second-chair lawyer was finally appointed a year after Terence's arrest, and that lawyer

started meeting with Terence in Fort Bend County, Terence agreed to plead guilty and to accept a life-without-parole sentence. Yet that second lawyer quit the case over lead counsel's failure to do any work; and thereafter, no one acted on the plea offer on Terence's behalf or informed him what was going on. Instead, terrified and alone, his suicidal tendencies resurfaced—to which the jail responded by confining him to a padded cell for 62 days. *See* AppX27; AppX40-43; AppX68; *see also* Appendix 2 at (ww), (hhhh); 2EHRR203-05. The jury heard none of these facts.

The Supreme Court also found that the habeas proceeding had exposed counsel's prejudicial deficiencies in failing to challenge the State's contention that Terence had committed "a knifepoint robbery at a dry-cleaning business." *Andrus*, 140 S.Ct. at 1885. Terence had told counsel he was not the perpetrator, but counsel neither investigated nor challenged the State's evidence presuming Terence guilty of this unadjudicated offense. As the Supreme Court explained: "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 [at the habeas hearing] gave rise to numerous reliability concerns." *Id.*; *see also id.* at n.3 (critiquing the dissent for "maintain[ing] that this witness, Andrus' ex-girlfriend, 'linked [Andrus] to the robbery,' …, even though she testified at the habeas hearing that she thought 'it was impossible' that Andrus had committed the

offense") & n.4 (critiquing the dissent for inadequate attention to the habeas record that shows "significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.").

Instead of attacking misrepresentations and inaccuracies in the State's punishment-phase case, trial counsel, as the Supreme Court found, left the aggravating evidence "untouched," going so far as to concede that the State had proven that Andrus "was 'a violent kind of guy.'" *Id.* at 1884 (quoting defense counsel's closing argument). According to the Supreme Court, "[t]here is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment." *Id.* at 1885.

During the habeas proceeding, extensive evidence was adduced that dismantled the State's portrayal of Terence as someone who had engaged in "significant assaultive behavior" in TYC and then resisted "rehabilitation" and was then continuously uncontrollable in jail. *Compare* Concurring Opinion at **8-14 *with*, *e.g.*, 5EHRR137-57. Terence, like other kids struggling in TYC custody with untreated mental illness, was given no meaningful treatment. Instead, he spent weeks at a time in solitary confinement in a frigid cell smeared with body fluids in a ward filled with screaming occupants banging on steel doors. 5EHRR154, 167. Had the

jury learned this, there is a reasonable probability that at least one juror would have voted to spare his life.

In addition to the vast mitigating evidence, prejudice to Terence has also been established by counsel's admitted failure to investigate any aspect of the State's case-in-aggravation, much of which the post-conviction investigation demonstrated was eminently rebuttable, as the Supreme Court has now recognized.

B. The Concurring Opinion Relied on a Misapprehension of *Wiggins v. Smith*, as the Supreme Court Has Now Clarified.

The Supreme Court expressly cautioned against the Concurring Opinion's reasoning, noting that it incorrectly "seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts of *Wiggins*," although the Supreme 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. That is, while the Concurring Opinion is correct that [w]hen analyzing whether Applicant has satisfied *Strickland*'s prejudice requirement, it is appropriate to use *Wiggins* as a guide," Concurring Opinion at *18, the Supreme Court has now made clear that the Concurring Opinion misconstrued *Wiggins* by using it as a factual litmus test.

The Concurring Opinion purported to compare the mitigating evidence adduced on *Wiggins*'s behalf to that adduced for Terence Andrus—but, as explained above, that comparison was based on a misperception of the habeas record. The

Concurring Opinion also suggested a no-prejudice finding was warranted because Andrus, unlike Wiggins, had a record of violent conduct. But as the Supreme Court has now explained at length, this Court must account for how the State's portrayal of Terence would not have withstood scrutiny if contextualized by the evidence adduced in the habeas proceeding regarding: the truth about his juvenile offenses; his experience in TYC; and his long-standing, untreated mental-health issues, beginning with an "affective psychosis" diagnosis at ten, issues exacerbated by his protracted time in jail awaiting trial. *Andrus*, 140 S.Ct. at 1881, 1882.

Further, *Wiggins* itself notes that the mitigation in *Wiggins* was stronger, and the aggravating evidence weaker, than in *Williams v. Taylor*, 529 U.S. 362 (2000); 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 finding "no prejudice" simply because the habeas applicant did not adduce evidence analogous to the facts of *Wiggins* itself.

II. THE SUPREME COURT, IN APPLYING *WIGGINS* TO THE FACTS OF THIS CASE, HAS CLARIFIED HOW TO UNDERTAKE A *STRICKLAND* PREJUDICE ANALYSIS AND STRONGLY IMPLIES WHAT THE RESULT SHOULD BE.

In multiple ways, the Supreme Court's decision in this case strongly implies that Terence Andrus was prejudiced.

First, the Supreme Court strongly implies that Andrus was prejudiced by a patently deficient investigation by highlighting "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, 1883, 1886, 1877. The Supreme Court notes "the multiple red flags" that should have alerted counsel to the "vast" mitigating evidence developed during the post-conviction investigation. *Id.* at 1883; *see also Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005) (finding prejudice arising from failure to pursue "red flags" that would have led to undiscovered mitigation that "might well have influenced the jury's appraisal," a failure that undermined confidence in the outcome reached at sentencing).

As the Supreme Court found, "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. The habeas proceeding included testimony from multiple experts about specific instances of childhood trauma, including adverse events experienced growing up in Houston's drug- and violence-infested Third Ward neighborhood, then in gang-infested Section 8 housing in Fort Bend County, then in TYC facilities that were eventually exposed as horrific failures. *See, e.g.*, 4EHRR203-37; 5EHRR103-246; 6EHRR118-227; 7EHRR5-160.

Second, the Supreme Court strongly implies that Terence Andrus was prejudiced by his trial counsel's deficient mitigation presentation. The Supreme Court notes how bad the presentation was—and points to numerous witnesses, whose testimony was adduced in the habeas proceeding, who could have provided compelling and specific information about Terence's childhood about which the jury heard only a few vague and contradictory generalities. For instance, the Supreme Court notes the habeas testimony about his childhood in a crack-ridden neighborhood, where his mother's boyfriend was shot and killed in the streets, prompting her to become "increasingly dependent on drugs and neglectful of her children;" the Supreme Court cites as an example testimony from "a close family friend" who testified that "Andrus' mother 'would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it.'" *Andrus*, 140 S.Ct. at 1880 (quoting 13EHRR, AppX13). The Supreme Court also highlights the habeas testimony about how "Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs." *Id.* The Supreme Court further cites the habeas evidence that, even though Terence was already struggling with his own mental-health issues, he was the one who, while still a child, "cleaned for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner." *Id.* The Supreme Court quotes some of the

habeas testimony from his siblings, describing Terence as "'a protective older brother" who "kept on to [them] to stay out of trouble," someone who "was 'very caring and very loving,' 'liked to make people laugh,' and 'never liked to see people cry.'" *Id.* (quoting AppX18, AppX9).

Third, the Supreme Court strongly implies that Andrus was prejudiced by his trial counsel's failure to investigate and then rebut the State's case-in-aggravation. The Supreme Court, with recourse to the habeas record, was able to identify examples of how the State's punishment-phase case could and should have been attacked—thereby showing how Terence was prejudiced. For example, the habeas proceeding established that much of Terence's misconduct while in custody was while he was seriously mentally ill—a circumstance to which his jailors responded by giving him potent psychotropic medications without corresponding diagnoses and locking him in solitary confinement for extended periods, thereby exacerbating his illness. *See, e.g.*, 5EHRR103-193; AppX1. The Supreme Court highlighted examples in the habeas record of new mitigating evidence that would have "contextualize[d] and counter[ed] the State's evidence of Andrus' alleged incidences of past violence." *Andrus*, 140 S.Ct. at 1877-78. One example was the testimony of the TYC Ombudsman: opining "that it was 'surpris[ing] how few' citations Andrus received, "'particularly in the dorms where [Andrus] was' housed;" "finding 'nothing uncommon' about Andrus' altercations because 'sometimes you … have to

fight to get by' in the 'violent atmosphere' and 'savage environment;'" "testifying that 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.'" *Id.* at 1885 n.2 (quoting testimony from habeas record at 5EHRR189, 169, 246).

The Supreme Court characterizes the habeas record—which is now again before this Court—as raising "a significant question 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." *Id.* at 1887 (quoting habeas record). The Supreme Court then emphasizes: "We have never limited the prejudice inquiry under *Strickland* to cases in which there was 'little or no mitigation evidence' presented'"—although there was little or no mitigation evidence presented at Terence's trial. *Id.*; *see also id.* at n.7. What must now occur is a "weighty and record-intensive analysis" that does ***not***, as the Supreme Court dissent did, "train[] its attention" solely on the trial case-in-aggravation, while ignoring the rebuttal evidence and mitigation evidence adduced in the habeas proceeding. *Id.* at 1887 & n.7. The dissent, as the Supreme Court majority recognized, did not acknowledge that a significant part of counsel's deficient performance was the failure to investigate the State's extraneous-offense evidence (and failure to investigate the circumstances of the capital crime itself). *Id.*

Evidence was presented at the habeas evidentiary hearing that would have exposed how prior aggravating incidents were misrepresented and, in some cases, flatly untrue.[9] 3EHRR65-68.

Ultimately, the Supreme Court suggested that the bar for showing prejudice in the circumstances presented here is low and Terence Andrus more than surmounted it: "because Andrus' death sentence required a unanimous jury recommendation, prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding [his] 'moral culpability.'" *Andrus*, 140 S.Ct. at 1885 (quoting *Wiggins*, 539 U.S. at 537–38).

Each of the Supreme Court's teachings in *this* case indicate that a prejudice finding is required.

III. THE SUPREME COURT'S OTHER MITIGATION JURISPRUDENCE PROVIDES ROBUST GUIDANCE FOR UNDERTAKING THE *STRICKLAND* PREJUDICE ANALYSIS FOR A *WIGGINS* CLAIM.

A. The Prejudice Analysis Requires Contemplating What a Reasonable Juror Might Have Done in Light of the New Evidence.

[9] After this Court rejected Terence's habeas claims, and before the Supreme Court issued its opinion on his *Wiggins* claim, a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 was filed on his behalf. *See Andrus v. Davis*, Case No. 4:19-cv-00717 (S.D. Tex.). This federal habeas petition raised additional claims challenging the constitutionality of Terence's conviction and sentence. *See id.* at No. 11. Those claims include new allegations that the State elicited false testimony during the punishment phase of trial regarding at least *three* extraneous offenses (none of which trial counsel had investigated but simply conceded).

To assess prejudice, the Court must "weigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U. S. at 534; *see also Sears v. Upton*, 561 U.S. 945 (2010); *Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 393. Next, the Court must determine whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against a death sentence. *Wiggins*, 539 U. S. at 537.

Undertaking this analysis, as the Supreme Court reminds, "'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 (quoting *Sears*, 561 U.S. at 956). This reasoned speculation requires the adjudicator to keep in mind how jurors reach a decision about punishment in a constitutional manner. The Supreme Court has long instructed that "the fundamental respect for humanity underlying the Eighth Amendment" requires jurors to make an *individualized* assessment of whether death is warranted. *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). That individualized assessment must reflect "'a reasoned moral response to the defendant's background, character, and crime.'" *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (citation omitted).

Under Texas law at the time of Terence's 2012 trial, *after* a jury has found a person guilty of capital murder, and *after* a separate punishment-phase trial, the

death penalty may be imposed only if the jurors unanimously answer at least two "special issues" in a certain way. First, the jury must find unanimously and beyond a reasonable doubt that the State proved that "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). Next, the jury must find unanimously the *absence* of "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* sec. 1(e)(1), (f). In so doing, the jury must "tak[e] into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." *Id.* sec. 1(e)(1). Terence's jury had no means to do that.

B. The Supreme Court's Core Cases about Ineffective Assistance in the Punishment Phase of Death-Penalty Cases Provide Further Guidance.

The instant case represents the first time in ten years that the Supreme Court has offered guidance about how to assess an ineffective-assistance claim based on counsel's failure to investigate and present readily available and compelling mitigation evidence in a death-penalty case. The Supreme Court's past jurisprudence regarding this discrete issue should provide further guidance—and that guidance, requiring a necessarily "fact-specific" inquiry, further supports the conclusion that Terence was prejudiced. *Sears*, 561 U.S. at 955 ("[W]e have consistently explained that the *Strickland* inquiry requires … probing and fact-specific analysis").

For instance, in *Williams v. Taylor*, the Supreme Court found that the state court had unreasonably applied clearly established federal constitutional law by failing to grant Williams relief on his ineffective-assistance claim. In reaching that conclusion, the Supreme Court acknowledged that, while the *original* mitigation case may have been insufficient to overcome the death penalty, Williams's "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. The Supreme Court also emphasized 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.

Williams had been convicted of bludgeoning a man to death with a mattock after he refused to lend Williams "a couple of dollars;" the State had shown that he had also committed armed robberies, "two separate violent assaults on elderly victims," and had "set[] a fire in the jail while awaiting trial." *Id.* at 367-69. Nevertheless, the Supreme Court observed that a "graphic description" of his "childhood[] filled with abuse and privation" might have changed the jury's mind about his "moral culpability." *Id.* at 368, 398. Indeed, *Williams* stands for the proposition that, although some mitigating evidence was presented at trial, even a

subset of new mitigating evidence that counsel failed to find can satisfy the prejudice prong. *Id.* at 398 (also noting Williams's confession, remorse, and cooperation). Although all murders are tragic, the evidence against Terence Andrus was far less aggravated than that amassed against Williams. Moreover, Terence, like Williams, had confessed, assisted law enforcement, and expressed remorse on multiple occasions. Moreover, significant mitigating evidence was amassed on Terence's behalf that was quite different from what the jury had heard, including evidence that rebutted much of the State's "future dangerousness" case—which Williams did not have. A no-prejudice finding here could not be reconciled with the Supreme Court's holding in *Williams*.

In *Wiggins*, the Supreme Court found prejudice even though the defendant had been convicted of a "bizarre crime—in which a 77-year-old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer." *Wiggins*, 539 U.S. at 514. The Supreme Court found the evidence of "severe physical and sexual abuse" that Wiggins had suffered sufficiently "powerful" that "[h]ad the jury been able to place [Wiggins'] excruciating life history on the mitigating side of the scale, there [was] a reasonable probability that at least one juror would have struck a different balance." *Id.* at 516, 534, 537. But neither the holding nor the rationale in *Wiggins* requires

that the identical kind of mitigating evidence in that case be amassed in an habeas proceeding for prejudice to be found.

Courts should not be weighing whether the abuse one defendant sustained was "less bad" than what a defendant in some other case experienced. The comparison that matters is the difference between the mitigation case put before the jury and what the habeas proceeding shows could have been presented. For instance, in *Sears*, the Supreme Court found prejudice where trial counsel had presented a mitigation case through "[s]even witnesses" who "offered testimony along the following lines: Sears came from a middle-class background; his actions shocked and dismayed his relatives; and a death sentence, the jury was told, would devastate the family"—whereas the habeas proceeding had shown that "Sears' home life, while filled with material comfort, was anything but tranquil." *Sears*, 561 U.S. at 947-48.

The Supreme Court has also taught that prejudice cannot be ruled out due to the circumstances of the crime and other aggravating factors to the exclusion of "the other side of the ledger." *Porter*, 558 U.S. at 41. Every case is different because every defendant is a unique human being whose life will invite considering a different set of variables. *Porter* involved a middle-aged man whose military service and childhood abuse, which could and should have been before the jury, had to be factored into the analysis. The Supreme Court found the state court's "no prejudice" finding objectively unreasonable even though the murder was "premeditated in a

heightened degree." *Id.* at 42; *see also Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009) (unpublished) (finding prejudice where defendant had invaded a young woman's home, laid in wait for her, bludgeoned her to death, then repeatedly stabbed her corpse with a butcher knife and barbecue fork).

Additionally, a prejudice analysis cannot be short-circuited by simply concluding that aggravating evidence somehow would have cancelled out all mitigating evidence whatever it may have been. The only time the Supreme Court has authorized a truncated prejudice analysis was in the habeas applicant's favor. *See Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Supreme Court made clear that a single bad decision by counsel can be sufficiently unreasonable and prejudicial to support a finding of ineffective assistance of counsel. *See id.* at 777 (explaining that the impact of defense expert's two references to the defendant's race in discussing the future-dangerousness issue "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.").

The Supreme Court's body of cases in this discrete area teaches that Terence Andrus only needed to show a reasonable probability that, had the new evidence been considered, "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 513. If one digs into the habeas record, as the Supreme Court majority did, it is clear that this burden was carried and thus prejudice was proven.

IV. THE HABEAS JUDGE'S PREJUDICE FINDING AND LEGAL CONCLUSIONS, AMPLY SUPPORTED BY THE HABEAS RECORD, SHOULD BE ADOPTED.

The Supreme Court observed that the Texas habeas judge who "heard the evidence recommended that Andrus be granted habeas relief" upon finding "the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial." *Andrus*, 140 S.Ct. at 1878. The habeas judge—who already labored to receive the evidence, to assess the credibility of the witnesses, to compare the new evidence to the trial record, to make independent findings, and to review the relevant constitutional law—merits deference with regard to his prejudice finding.

Of course, *this* Court is the final arbiter under Texas law. But as this Court has previously explained, the role of the habeas judge in the habeas proceeding is, nevertheless, central; the habeas judge "is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed fact issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief." *Ex parte Rodney Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (quoting *Ex parte Simpson*, 136 S.W.3d 136 S.W.3d 660, 668 (Tex. Crim. App. 2004)). Moreover, the habeas judge is "[u]niquely situated to observe the demeanor of witnesses first-hand" and "is in the

best position to assess the credibility of witnesses." *Id.* (citing *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007)). Unlike an appellate court, which must rely on a cold record, the habeas judge "is tuned in to how something is being said as much as to what is being said. The judge is acutely aware of a witness's tone of voice or inflection, facial expressions, mannerisms, and body language." *Id.* at 728. Because of these advantages, "in most circumstances," this Court has said it "will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record." *Id.* at 727.

Although this Court "afford[s] no deference to findings and conclusions that are not supported by the record," *id.*, the habeas judge who presided in this cause issued findings and conclusions amply supported by the record. *Compare* Appendix 2 *to* 1-41EHRR. The habeas judge made twelve pages of findings relevant to the prejudice analysis, applying *Wiggins v. Smith*. *See* Appendix 2 at 3-15. Among those findings are summaries of the testimony of numerous mitigation witnesses, all of whom he found credible. *See* Appendix 2 (zz)-(fff); (ggg)-(ooo); (ppp)-(xxx); (yyy)-(dddd); (gggg); (mmmm).

As the Supreme Court's review in this case shows, this case does *not* constitute one of those "rarest and most extraordinary of circumstances" when this Court should have refused, as it did, "to accord any deference whatsoever to the [habeas judge's] findings and conclusions as a whole." *Ex parte Rodney Reed*, 271

S.W.3d at 728. Instead, the habeas judge was entitled to the conventional deference that similarly situated decisionmakers are supposed to be afforded under Texas case law and under the Constitution's Due Process Clause.[10]

Because the habeas judge's factfinding is amply supported by the record and his legal conclusions align with clearly established federal constitutional law, his recommendation to grant habeas relief should be adopted. As the Supreme Court noted, the only critique this Court made of the habeas judge's work was that the order recommending relief "had omitted the 'reasonable probability' language when reciting the *Strickland* prejudice standard." *Andrus*, 140 S.Ct. at 1886, n.5 (citing *Strickland*, 466 U.S. at 694). But, as the Supreme Court explained, that omission "would at most suggest that [the habeas judge] held Andrus to (and found that Andrus had satisfied) a ***stricter*** standard of prejudice than that set forth in *Strickland*." *Id.* (emphasis added).

Both the habeas judge below and the Supreme Court above have now described the basis for a prejudice finding as a "tidal wave" of mitigating evidence,

[10] Decades ago, the Supreme Court noted in dicta that, in a criminal case, where a higher court rejects a lower court's favorable factfinding on credibility and substitutes its own factfinding based on a cold record to deny relief, as this Court did, that act "give[s] rise to serious [constitutional] questions[.]" *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980); *see also Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) ("Like the Supreme Court …, we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself.").

reflecting a traumatic "childhood marked by extreme neglect and privation," as well as "a family environment filled with violence and abuse." *Id.* at 1879.

In light of the facts the Supreme Court has now found, Terence has proven he was prejudiced in multiple, categorical ways. Terence was prejudiced by his attorney's failure to investigate and then contest the State's punishment case regarding the truth about his juvenile record, the unadjudicated robbery-assault at a dry cleaners that Terence did not commit, and the mistreatment he experienced in TYC custody and in jail, including the rampant misuse of psychotropic drugs and solitary confinement that further traumatized and ultimately unhinged him. Terence was prejudiced by his attorney's failure to investigate and present readily available and compelling mitigation evidence of the deprivation and abuse he sustained as a child and his long-standing, untreated mental illness, instead presenting a false portrait of his family background that stands in stark contrast to the tragic history of neglect and abuse he actually endured. Terence was prejudiced by has attorney's failure to investigate and present any positive evidence of Terence's character from anyone other than Terence himself, in pronounced contrast to the many witnesses who relayed in the habeas proceeding their personal experiences of how, even as a very young child living in wretched circumstances, Terence had found creative ways to keep his siblings fed and entertained when their mother disappeared, leaving them without food or money, and how he tried to protect them when his mother came

home high with strange men in tow. *See, e.g.,* 4EHRR209-38; AppX9-AppX11; AppX13; AppX14; AppX17. AppX93; AppX118; AppX122A-C; AppX129; AppX132.

After undertaking the prejudice analysis mandated by the Supreme Court, this Court should find that the jury heard very little in the punishment phase that was mitigating and, by contrast, the readily available mitigating evidence adduced during the habeas proceeding would have painted a "vastly different picture" of Terence Andrus's life and humanity. *Cooper v. Secretary*, 646 F.3d 1328, 1355 (11th Cir. 2011) ("During the penalty phase, the jury heard very little that would humanize Cooper … and the mitigation evidence presented in post-conviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial.") (citation omitted); *see also Andrus*, 140 S.Ct. at 1881, 1883 (describing as "vast" mitigating evidence adduced in the habeas proceeding that the jury did not hear); *see also* 7EHRR101 (habeas judge noting "the tidal wave of information that has come through here with regard to mitigation"). Had the jury been exposed to that "vastly different picture," there is a reasonable probability that at least one juror would have voted against a death sentence.

PRAYER

Having satisfied both elements of *Strickland v. Washington*, Terence Andrus prays for habeas relief in the form of a new punishment-phase trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), that the word count as determined by the word processing program is 8,072, excluding those parts as permitted by rule 9.4(i)(1)—assuming that Rule 9.4(i)(2)(F) applies to this sui generis circumstance.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2020, a true and correct copy of the above and foregoing motion was forwarded to all counsel of record by the Electronic Service Provider, if registered, otherwise by email, as follows:

Via E-Filing
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/s/ Gretchen S. Sween
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Appendix F

WR-84,438-01
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/11/2020 3:22 AM
Accepted 9/11/2020 10:08 AM
DEANA WILLIAMSON
CLERK

WR-84,438-01
Trial Court Cause No. 09-DCR-051034HC1

EX PARTE	'	**IN THE**
	'	**COURT OF CRIMINAL APPEALS**
TERENCE TRAMAINE ANDRUS	'	**OF TEXAS**

STATE'S RESPONSE TO APPLICANT'S APPLICATION FOR WRIT OF HABEAS CORPUS (FILED PURSUANT TO TEX. CODE CRIM. PROC. ART. 11.071) SUBSEQUENT TO REMAND FROM THE UNITED STATES SUPREME COURT

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ORAL NOT ARGUMENT REQUESTED

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IDENTIFICATION OF PARTIES

Pursuant to Tex. R. App. P. 38.1, a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

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TERENCE TRAMAINE ANDRUS

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THE STATE OF TEXAS

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240th Judicial District Court
Fort Bend County, Texas

Habeas Judge:
The Hon. James Shoemake
434th Judicial District Court
Fort Bend County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

This Court has thus far granted the parties only the right to submit briefs. Pursuant to Tex. R. App. P. 39, the State does not request oral argument unless granted to Appellant because the Court has previously been confronted with this case and the legal issues have been previously briefed and no new facts have occurred which would materially change the parties' presentation.

WR-84,438-01
Trial Court Cause No. 09-DCR-051034HC1

EX PARTE	'	**IN THE**
	'	**COURT OF CRIMINAL APPEALS**
TERENCE TRAMAINE ANDRUS	'	**OF TEXAS**

STATE'S RESPONSE TO APPLICANT'S APPLICATION FOR WRIT OF HABEAS CORPUS (FILED PURSUANT TO TEX. CODE CRIM. PROC. ART. 11.071) SUBSEQUENT TO REMAND FROM THE UNITED STATES SUPREME COURT

RESPONDENT, the State of Texas, by and through its District Attorney, 268th Judicial District, Fort Bend County, Texas, files this, its answer to Applicant's application for writ of habeas corpus subsequent to remand, in the above-captioned cause, and would show this Honorable Court the following:

Statement of the Case

Applicant was charged in cause number 09-DCR-051034 with the offense of capital murder of multiple persons, alleged to have occurred on October 15, 2008. (1CR12).[1] The jury found Applicant guilty as charged in the indictment. (1CR301). On November 14, 2012, the jury answered the special issues such that

[1] References to "CR" and "RR" refer to the Clerk's and Reporter's Records from the original trial proceedings respectively.

Applicant was sentenced to death by law following the punishment phase of the trial. (1CR304-13).

Applicant made a direct appeal of his conviction and death sentence as a matter of right to this Honorable Court, and this Court overruled Applicant's points of error on direct appeal in an unpublished opinion. *Andrus v. State*, No. AP-76, 936, 2015 WL 9486133 (Tex. Crim. App. Dec. 9, 2015) (mem. op., not designated for publication).

Applicant then filed a postconviction application for writ of habeas corpus, pursuant to article 11.071 of the Texas Code of Criminal Procedure, and this Court denied relief on Applicant's claims. *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783 (Tex. Crim. App. Feb. 13, 2019) (mem. op., not designated for publication) cert. granted, jdgm't vacated by 140 S.Ct. 1875 (Jun. 15, 2020).

The United States Supreme Court then granted Applicant's petition for writ of certiorari and vacated this Court's judgment, finding that Applicant's trial counsel was ineffective under *Strickland*, and remanded the case to this Court for an explicit consideration of the prejudice prong of Applicant's claim of ineffective assistance by the entirety of this Court. *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020).

This Court has now granted Applicant's motion to brief this issue and the

State of Texas hereby presents the instant brief on the issue of whether Applicant has proven prejudice under the *Strickland v. Washington* standard.

Relevant Factual History

Respondent denies the factual allegations made in the instant application and subsequent briefing, except those supported by official court records and admissions in support of the judgment, and offers the following facts:

State's Evidence of Applicant's Guilt

On the night of October 15, 2008, Norma Diaz came out of the Kroger grocery store on Highway Six in Fort Bend County, Texas to find her husband Avelino Diaz, who had been waiting for her in their car, sitting in a pool of his own blood choking for breath. (38RR38-48). Diaz's gun, which he carried in his vehicle for protection, was laying by his feet, still in its holster. (38RR55, 117; 40RR23). Diaz was taken by ambulance to the hospital. (38RR56). The next day, Diaz was declared brain dead. (38RR60). Three days later he was declared dead. (38RR61).

A store employee saw a black male in a trench coat shoot Diaz at close range. (38RR71-72). The store employee did not see Diaz raising a gun. (38RR73).

Within minutes of Diaz's murder, a black male shot Kim Bui to death in the same Kroger parking lot, and also shot her husband in the back. (43RR42, 46, 48).

Bui and her husband had gone to the Kroger that evening after having dinner with their children so that Bui could get materials to teach a nutrition class to impoverished mothers the next morning. (43RR35-36). As they drove into the parking lot, a black male, holding a small, shiny handgun said something about them getting out of the car. (43RR41-47). As Bui's husband tried to speed away from this person, he fired several shots into the vehicle, striking Bui's husband in the back and fatally wounding her. (43RR41-47). Bui's husband sped away, blood gushing from his wife's mouth. (43RR48). Bui's husband rushed his mortally wounded wife to a nearby hospital where he was told the doctors could do nothing for her and that he and his children had nothing left to do but to say goodbye to her. (43RR49-54).

Following a canvass of the area near the murders, a video tape was recovered from a nearby home which showed a person matching the description of the suspect, later identified as Applicant, walking in the direction of the Kroger. (40RR33-35). That video shows the same person walking away from the Kroger approximately sixteen minutes later. (40RR36-37). This video also showed the person matching Applicant's description walking toward the home where the murder weapon was ultimately recovered. (40RR37). The video shows the person matching Applicant's description going into the yard where the murder weapon was found, disappearing behind a wall and then reappearing approximately 90

second later. (40RR38). The person matching Applicant's description then walks off in the direction of the apartments where Applicant lived. (40RR38).

The police also recovered a videotape from a Valero station closer to where Applicant lived. (40RR41-42). This video showed Applicant coming into the station at about 11:00 p.m. on the day of the murders. (40RR44-45).

Applicant and a female (later identified as Applicant's girlfriend) were seen together, both on the Valero video and the homeowner's video at the scene where the murder weapon was recovered, and at the Valero store the day after the murders. (40RR47-48; 41RR15).

The detectives made stills from these videos and released them to the media to try to get a tip as to the suspect's identity. (40RR48-49). Following the release of these images, tips came in to Crime Stoppers implicating Applicant. (41RR18). The detectives ultimately learned that Applicant was in the New Orleans jail and went to interview him there on Friday, November 7, 2008. (41RR24-26). Applicant waived his *Miranda* rights and spoke to the detectives, who audiorecorded the interview. (41RR26). Applicant denied committing any criminal offense, but stated something to the effect that "something might have happened with somebody he was with." (41RR27). Applicant then stated he was done talking and the detectives terminated the interview. (41RR28).

While in New Orleans, the detectives interviewed Applicant's girlfriend. (41RR29-30). On Monday, November 10, 2008, the detectives went back to the Orleans Parish jail and learned Applicant had waived extradition. (41RR30). The detectives then picked Applicant up to drive him back to Texas. (41RR30). The detectives placed a recording device in the car, and read Applicant his *Miranda* rights again before beginning the drive back to Texas. (41RR31). During the drive, Applicant reinitiated conversation with the officers and confessed to committing these murders. (41RR60-61). A recording of Applicant's conversation in the car with the detectives was admitted as State's Exhibit 146. (41RR62-63).

Applicant also gave a written statement which contained his *Miranda* warnings. (41RR35). A copy of Applicant's written statement was admitted as State's Exhibit 147. (42RR10). Applicant confessed to the murders in his written statement. (42RR16-17). Applicant also confessed to owning the handgun used to commit the murders. (42RR14). Applicant also told the detectives the location of the murder weapon in his written statement. (42RR17).

Applicant also admitted corroborating details in his written statement, including that he had gone to the Valero station before the murders and that he came back to the neighborhood the next day to try to retrieve the gun. (42RR15, 18).

Other than the interview at the Orleans Parish jail, Applicant never tried to terminate any of the other interviews with police. (41RR36).

The murder weapon was recovered where Applicant said it would be found. (39RR49-50; 42RR101-02). It was a .380 semi-automatic pistol, consistent with the shell casings and projectiles recovered at the scene of the murders. (39RR53; 54RR Ex. 81-99). The weapon could not, however, be conclusively included nor excluded as the weapon that fired the fatal shots by a firearms examiner. (42RR20-26). The shovel Applicant used to bury the murder weapon was also recovered where he described it. (39RR55; 54RR Ex. 105-108).

The medical examiner testified that the deceased Avelino Diaz was an otherwise healthy man who was killed by a single gunshot wound to the head. (42RR68). The bullet entered the back left side of Diaz's head and lodged in his brain. (42RR70-72). The bullet traveled from the back to the front of the body, from the left to the right, and slightly downward. (42RR74).

The medical examiner testified that the deceased Kim Bui was a healthy woman, killed by a gunshot to the face, which exited through the back of her neck. (42RR36-37). The bullet entered through her face above the left side of her lip, and traveled through her mouth dislodging teeth and fracturing her jaw before severing major arteries in her neck. (42RR37). The bullet also broke her neck before exiting. (42RR37).

Applicant said in his statements that he killed the victims in self-defense. (54RR Ex. 146, 147). Applicant's statement that he killed Diaz was not consistent with the wound to Diaz being to the top of Diaz's head and traveling downward. (54RR Ex. 157). Applicant's statement that he shot Bui because the Buis' vehicle was going to run him over was also not consistent with the fact that Bui was shot in the left side of her face through a side window of the vehicle, rather than through the windshield as she would have been had the car been traveling at Applicant. (54RR Ex. 54-61, 162-167).

Applicant was ultimately found guilty of the offense of capital murder by the jury. (45RR28).

State's Evidence at Punishment

The punishment phase began with Applicant's stipulations that he had been previously convicted of felony possession of a controlled substance in a drug-free zone, and that he had been committed to the Texas Youth Commission as a juvenile for solicitation of aggravated robbery. (46RR7-8).

There was then testimony of Applicant's commission of an aggravated robbery with a deadly weapon. (46RR8). The victim, Alison Koenig, described how she had been held up at gunpoint by two black males who demanded her purse and her gym bag. (46RR14). Koenig testified that she handed over her belongings, and then got back in her car as they had told her to. (46RR14-15).

She then wrote down the license plate of the vehicle these black males were in. (46RR15). Koenig described the person with the gun as wearing a red shirt with black gym shorts. (46RR15). Koenig then had her parents call the police within minutes of the robbery. (46RR16).

When the police arrived, they told Koenig that they had found the suspects and asked if she would come to the scene where the suspects were located to identify them. (46RR16). Koenig was not able to identify their faces, but did know the clothing, and also identified some of her property which was in the suspects' possession. (46RR17).

Sergeant Fernando Flores with the Fort Bend County Sheriff's Office testified that he responded to the call of the aggravated robbery perpetrated against Koenig. (46RR23). Flores testified that he was given a description of the suspect vehicle including its license plate number. (46RR23).

Flores testified he went to the residence where the license plate was registered and saw two black males, one of whom matched the description given by Koenig within ten minutes of getting the call. (46RR24). Applicant was the black male whose description fit the description given by Koenig. (46RR24-25). Applicant was ultimately apprehended for the aggravated robbery of Koenig. (46RR24-25).

Applicant pled "true" to the allegation that he had solicited the aggravated robbery of Koenig in juvenile court. (54RR Ex. 213, 213A). Applicant also stipulated to the admissibility of the judgment from the juvenile court that he had engaged in delinquent conduct by soliciting the aggravated robbery of Koenig (though it refers to her by her maiden name). (46RR7, 9-10; 54RR Ex. 213, 213A). Applicant also admitted to taking part in this robbery as what he termed a "lookout" during his statement in the car from New Orleans to Fort Bend County. (54RR Ex. 212 at 1:07-1:45).

Farida Faheem then testified that a black male stole her purse as she left the Sharpstown mall in order to care for her special-needs child. (46RR29-32). Applicant stipulated that he was the person who committed that theft, and that he was convicted of that offense. (46RR7; 54RR Ex. 175-175B).

Detective White of the Fort Bend County Sheriff's Office then testified as a gang expert. (46RR37). Applicant stipulated that the photographs introduced by the State were in fact true and correct representations of his tattoos. (46RR39-40; 54RR Ex. 203-210).

Detective White testified that the Bloods were a criminal street gang involved in various criminal activities including home invasions, aggravated robberies and the like. (46RR40-41). White testified that the Bloods use certain identifiers to mark members of the gang, including both clothing items and tattoos.

(46RR40-41). Specifically, the Bloods use five pointed crowns and five pointed stars to identify their members. (46RR41).

Applicant has tattoos consistent with Blood identifiers. (46RR43-44; 54RR Ex 203-210). Specifically, Applicant has tattoos of a five pointed star, the initials "BHB" which White testified stand for "Bounty Hunter Blood," a tattoo of the initials "MOB" which is a term used in gang parlance to mean either "money over bitches" or "member of bloods." (46RR43-44; 54RR Ex. 204-206). The Bounty Hunter Bloods are a specific subset within the larger Bloods gang. (46RR43).

Applicant also has tattoos of a gun and the word "murder" surrounded by five pointed stars. (46RR44-45; 54RR Ex. 207-210). The five pointed star is, again, a Blood gang identifier. (46RR41).

Detective White conceded he was speaking only as to the meaning of these tattoos that he has seen in the past, rather than whether Applicant specifically was a gang member. (46RR46).

The jury then heard from Tuan Tran, the owner of a dry cleaner, who testified that Applicant had robbed him at knife point. (46RR47-67). Applicant struggled with the victim, struck and kicked him numerous times, threatened and cut him with a knife and stole all of the money in his store. (46RR53-58). Applicant stipulated that he was the same person the victim had previously picked out of a photo lineup after this robbery. (46RR66).

The jury then heard from Harris County Sheriff's Deputy Shane Ramsour, who testified that Applicant had assaulted him while Applicant was an inmate in the Harris County Jail. (46RR90). Applicant struck the Deputy twice in the face, shifting his nose and curling his lip. (46RR90-91; 54RR Ex. 185, 186). This attack was entirely unprovoked. (46RR91). This attack occurred after Applicant had verbally abused one of the nurses in the jail's clinic. (46RR 88; 100).

The Deputy Applicant attacked also testified that he later found an improvised weapon in Applicant's cell made of a broken razor and a key ring. (46RR102). Applicant had also written "Fuck the world, I want to die" and drawn a penis on his cell wall in his own blood. (46RR107).

Another Harris County Sheriff's Deputy testified that Applicant tried to pass pills to another inmate. (47RR10). When the Deputy confiscated the pills, Applicant held a cup full of urine near the door in preparation to throw it on the Deputy. (47RR10). Applicant then broke the sprinkler head in his cell, causing the cell to begin flooding with water, which was then running into the other cells on that floor. (47RR11-12). While Applicant was being removed from his cell and placed in another cell so the sprinkler head could be fixed, he threatened that he would "get" the Sergeant on duty. (47RR14).

Later, when the detention officers tried to take handcuffs off of Applicant in his cell, Applicant attacked them. (47RR19; 47). Applicant struck the Sergeant

hard enough that the Sergeant's eye was swollen shut. (47RR20; 50; 54RR Ex. 187-190). Applicant also injured two other Deputies in his attack. (47RR21). The Deputy described Applicant as a "very violent" inmate. (47RR26). The Sergeant Applicant attacked described Applicant as "one of the worst that I've come across since I've been there almost 22 years." (47RR52-53).

The jury then heard of an instance where Applicant threw urine in a Sergeant's face while in the Harris County Jail. (47RR57; 67). After throwing urine in the Sergeant's face, Applicant celebrated as though his team had scored a touchdown. (47RR59; 67). Applicant said "come on in and get me. There is nothing you can do to me." (47RR69). The Sergeant described Applicant as "violent and uncooperative." (47RR74).

The jury then heard of an assault Applicant committed against another inmate. (47RR77-78). Applicant laughed about assaulting the other inmate. (47RR79). Applicant would routinely respond to the officers' attempts to calm him down by saying things like, "Fuck it. I don't – I'm going to get the needle anyway. I don't give a fuck." (47RR81).

The jury then heard of an incident where Applicant threw liquid on a jailer in the Fort Bend County Jail. (47RR86; 93). Applicant then had to be forcibly removed from his cell. (47RR95-104).

The jury then heard of another instance in which Applicant, while in the Fort Bend County Jail, covered his cell window, refused to come out of his cell and had to be again forcibly extracted from the cell. (48RR8-16). When the officers entered Applicant's cell to remove him from it, they discovered that Applicant had smeared feces all over the walls. (48RR16). Applicant then threw an object at the officers when they approached him and struck at them. (48RR18-19). Applicant had flooded his cell and tied his sandals to his feet to give him more traction in the assault he planned to perpetrate on the officers. (48RR18, 20). The Deputy who testified about this incident described Applicant as "violent." (48RR23).

The jury then heard of another incident where Applicant was violent and kicking and screaming at the Deputies as they attempted to remove him from his cell for another incident of misconduct. (48RR30-33). After being removed to a padded cell, Applicant covered the window of the padded cell with feces. (48RR34).

The jury then heard of an incident where Applicant struck a Deputy in the head with Applicant's elbow. (48RR40-41).

The jury then heard that Applicant threatened to kill an officer if given the chance while in the Fort Bend County Jail. (48RR49).

Applicant was incarcerated as a juvenile for solicitation to commit aggravated robbery. (48RR62). While in TYC, Applicant received counseling and

rehabilitative therapy. (48RR66). Applicant was not receptive to therapy and was ultimately transferred to adult prison. (48RR74).

Portions of Applicant's interviews which had not previously been played for the jury were then introduced. (54RR Ex. 201, 212). In these interviews, Applicant admitted that he had two pistols with him after the murders and was waiting for the police to come to his door so he could shoot it out with them. (48RR82). Two pistols were recovered from Applicant's residence as he described. (48RR83).

Diaz's wife described how her children came to the hospital to see their father for the last time. (49RR16-20). The hospital personnel had a doll that they used to explain to the children what all of the tubes coming out of their father did to help keep him alive. (49RR18).

Bui's husband described how his children saw the blood on his shirt and how he had to tell them that their mother had blood flowing out of her mouth that got on his shirt. (49RR33). Bui's husband testified that no one spoke in the hospital room with his wife because they knew that if they spoke, they would burst out in tears. (49RR33).

Diaz was buried the same day and in the same cemetery as Bui. (49RR21; 35).

Defense Evidence at Punishment

The defense began its punishment case by calling Applicant's mother. (49RR44). Applicant's mother testified that she was 17 years old when Applicant was born and his father was only 16 years old. (49RR45). Applicant's mother testified that she already had a child when Applicant was born. (49RR44). Applicant's mother testified that she and Applicant's father did not marry. (49RR45). Applicant's mother testified that she lived with her parents with her two children until she was 19 years old, then she moved out. (49RR47). By the time Applicant was in middle school, Applicant's mother had two more children and had moved the family into an apartment in Fifth Ward with the help of a government housing voucher. (49RR49-50).

Applicant's mother described him as a good student with limited behavior problems. (49RR52). Applicant's mother described Applicant as being responsible for taking care of the younger children while she was at work. (49RR53). Applicant's mother testified that she got no help from the fathers of her children for several years. (49RR54). From the ages of seven to 11 or 12, Applicant's mother lived with a man who helped raise the children, but he was murdered in a robbery. (49RR71).

In high school, Applicant went to live with his father because he had begun to have behavioral problems. (49RR54). Applicant's father was out of his life for

several years because Applicant's father was in prison. (49RR55). Applicant ultimately came back to live with his mother again because his father was reincarcerated. (49RR56).

Applicant dropped out of school in the tenth grade. (49RR57). At that point, Applicant began getting in trouble with the law. (49RR57). Applicant received probation as a juvenile for having pills at school. (49RR57-58). Applicant was then sent to alternative school. (49RR59). Applicant was arrested on the aggravated robbery case only weeks after the pill case. (49RR59-60). Applicant's mother did not see him while he was in TYC because she did not have transportation. (49RR62).

Applicant's mother was able to see Applicant before he was sent off to adult prison. (49RR63). Applicant came back to live with his mother after he got out of prison. (49RR63). Applicant worked some temporary jobs after getting out of prison, but was back in trouble again before long. (49RR65). Applicant's parole was revoked and he went back to prison. (49RR65). When Applicant got out, he lived part time with his mother and part time with a girlfriend. (49RR65-66).

Applicant did not experience physical or sexual abuse as a child. (49RR74). Applicant's mother testified that Applicant was not mentally retarded. (49RR78). Applicant did not do drugs around his mother. (49RR78). Applicant's mother tried to remedy his behavioral problems, but Applicant "kind of" did what he wanted to

do. (49RR76-77). Applicant had a good relationship with his grandparents as a child and could go to them with any problems. (49RR80). Applicant could behave and get good grades, but he chose not to do as his mother told him. (49RR83).

Applicant's father testified that he did not know that Applicant was his son until Applicant was about three years old. (50RR6). Applicant's father had little involvement in Applicant's early years because Applicant's father spent most of that time in prison. (50RR6-7). Applicant's father testified that he wanted to get involved in Applicant's life after Applicant's father got out of prison, so he took Applicant in, and Applicant did well. (50RR8-9). This did not last long, however, because Applicant's father went back to prison. (50RR9). By the time Applicant's father got out of prison, Applicant was incarcerated on this capital murder charge. (50RR9).

Applicant's father testified that though he was not around, Applicant was raised by good people; Applicant's grandmother on his father's side, Applicant's mother, and Applicant's mother's parents. (50RR14-15). When Applicant's father was present, he told Applicant to stay away from drugs and stay away from the wrong people. (50RR16). Applicant's father testified that Applicant got good grades and behaved himself while Applicant was living with his father. (50RR17). Applicant's father denied any history of mental retardation in Applicant. (50RR17).

Dr. John Roache, an experimental pharmacologist and professor of psychiatry testified Applicant had a history of drug abuse. (51RR7, 10). Dr. Roache testified that Applicant had poor impulse control, probably due to his adolescent drug use and because he was intoxicated on the night of the murders. (51RR18).

Dr. Roache testified that Applicant was aggressive, hostile, and exhibited antisocial behavior before his drug use, and his drug use exacerbated those traits. (51RR20).

James Martin then testified on Applicant's behalf. (51RR30). Martin is a licensed professional counselor for the Fort Bend County Jail. (51RR30). Martin met with Applicant on more than 50 occasions during Applicant's time in the Fort Bend County Jail. (51RR33). Martin testified Applicant suffered from "manifestations of hallucination" and had problems with medication compliance. (51RR33). Martin testified Applicant was prescribed Wellbutrin and Remeron. (51RR34). Martin testified Applicant suffered from "antisocial personality disorder." (51RR34). Martin testified that in the two months prior to the trial, Applicant had shown progress in that he began to show remorse. (51RR35). However, Martin also testified Applicant was manipulative. (51RR37).

Applicant then testified. (51RR45). Applicant testified that his first memory of his father was visiting him in the penitentiary. (51RR47). Applicant testified he

never had a stable male role model. (51RR48). Applicant testified that he first came into contact with drugs between the ages of six and eight and started using drugs when he was 11 years old. (51RR48). Applicant testified that his mother sold drugs from their home. (51RR48).

Applicant testified that he took responsibility for the crimes he had committed, but that he had found God and would reform his behavior in prison. (51RR52-53). Applicant expressed remorse for the murders. (51RR54-55). Applicant testified that he wanted to use his story as an example for other prisoners to encourage them to change their ways. (51RR55).

Applicant testified that he attacked law enforcement officers because they provoked him. (51RR62-63). Applicant testified he beat an inmate in Fort Bend County Jail because that inmate "shanked" a friend of his. (51RR63-64). Applicant confirmed that he was not sexually abused, nor physically abused, nor was he mentally retarded. (51RR65). Applicant testified he got the "murder weapons" tattoos on his hands during his time in Fort Bend County Jail. (51RR66). Applicant also got a tattoo of a smoking gun on his arm while in Fort Bend County Jail awaiting trial. (51RR68).

Applicant admitted that he knowingly and intentionally committed the murders in this case. (51RR72-73). Applicant also confessed that he was a member of the 59 Bounty Hunter Bloods criminal street gang. (51RR74).

Applicant admitted that Detective White's testimony about Applicant's gang tattoos was correct. (51RR74).

Applicant admitted that when he was informed in open court that the State would seek the death penalty, he laughed. (51RR75).

The 11.071 writ hearing[2]

Applicant presented numerous witnesses and exhibits which he claimed should have been introduced in evidence and, had they been, would have changed the outcome of the punishment proceedings.

Applicant presented proposed lay witnesses who had known him in various capacities at different times and who would, had they been called, have testified that they were available and willing to testify in some mitigating capacity. (6WRR12-117[3]).

Sean Gilbow, who appeared in court in jail garb because he was then incarcerated for assaulting a public servant, testified that after he began selling crack in Applicant's neighborhood, Applicant's mother told him how to go to a doctor and get a prescription for codeine cough syrup he could sell. (6WRR12-26). Gilbow testified that Applicant's mother was a drug dealer. (6WRR37).

[2] Because the United States Supreme Court's remand order required only that this Court consider the prejudice prong of Applicant's ineffective assistance claim, which was premised on trial counsel's presentation of mitigating evidence, the recitation of facts from the writ hearing will concentrate on that aspect of the evidence presented and will not recite testimony or exhibits not relevant to that issue.

[3] References to "WRR" refer to the Reporter's Record from the 11.071 writ hearing.

Gilbow testified that although Applicant's brother Torad was older than Applicant, Applicant was in charge of the household while Applicant's mother was away because he was "more advanced" and "fun-loving, good kid, responsible." (6WRR41-42).

Gilbow had been to prison five times and when he was out of prison saw Applicant only a couple of times a month. (6WRR51-55). Gilbow testified that he tried to keep illegal things away from Applicant, and he never saw anyone engaged in prostitution around Applicant. (6WRR56).

Gilbow testified that Applicant and his brother Torad were Bloods gang members. (6WRR61).

Phyllis Garner testified that she knew Applicant for perhaps two or three years all told outside of his incarceration. (6WRR101). Garner testified that she saw Applicant's mother deal drugs in front of Applicant and she knew Applicant's mother to be involved in prostitution. (6WR103-04). Garner, however, seemed unable to explain her partner, Gilbow's never having seen Applicant's mother deal drugs in front of Applicant, and her only knowledge of Applicant's mother being involved in prostitution was that they would go to the club and she would leave with different men. (6WRR103-04).

Garner conceded there was a great deal going on in Applicant's life that she knew nothing about. (6WRR111).

Garner testified she grew up in the same rough neighborhood as Applicant but never dealt drugs and never killed anyone. (6WRR105).

Applicant also presented lay witness testimony by affidavit, including an affidavit from Applicant's brother Torad, who, while he states Applicant's upbringing was difficult, also admits that he sold cocaine, and was a member of the Bloods criminal street gang with Applicant. App. at Ex. 9 at pp. 3-4. Torad also states in his affidavit that on the night of the offense, he and Applicant were snorting cocaine and Applicant left to go steal a car when they ran out of cocaine. App. at Ex. 9 at p. 4. Torad does go on to say that Applicant was a "fun guy." App. at Ex. 9, at pp. 4-5.

Applicant also presents the affidavit of Senecca Booker's mother, who in essence seems to remember that Applicant existed, but little else. App. at Ex. 10.

Applicant also presents the affidavit of Senecca Booker's sister, who thought Applicant was a nice boy, but apparently saw little of him, in particular after Senecca Booker was killed. App. at Ex. 11.

Applicant also presents the affidavit of his father's ex-wife, who states in her affidavit that Applicant behaved well during the period that he lived with them before his father went back to prison. App. at Ex. 12. Applicant's father testified to this. 50RR9-17.

Applicant also presents the affidavit of Sade Scroggins, who is daughter to Phyllis Garner and knows Gilbow and Booker through that relationship. App. at Ex. 15. Scroggins states that Applicant was nice and well-behaved when he lived in her and her parents' home for six months and that she was surprised when she heard about the murders. App. at Ex. 15.

Applicant's next lay witness affidavit is from Jamontrell Seals. App. at Ex. 16. Seals states that Applicant lived with his family for two years when Seals was eight years old. App. at Ex. 16. Seals's affidavit can be boiled down to a statement that Applicant was nice.

Applicant's next lay witness affidavit is from Kailynn Williams, who states that she met Applicant when she was four or five years old. App. at Ex. 17. Williams states that she went to visit Applicant at his apartment, and Applicant's mother was rarely home and did not provide a good living environment. App. at Ex. 17. Nevertheless, she states that she never told anyone about this because "we were afraid that [my mother] would not let us visit [Applicant's] house anymore." App. at Ex. 17 at p. 2. Williams also concedes being associated with numerous criminal elements and viewing such things as normal. *Id*.

Applicant presented the testimony of various expert witnesses, who could theoretically have been called to offer mitigating evidence, or reduce the

aggravating impact of the evidence otherwise produced. (4WRR194-239; 5WRR103-247; 6WRR118-227; 7WRR5-160).

Applicant's first expert witness was Tyina Steptoe, an Assistant Professor of History who testified that the neighborhood where Applicant grew up was a rough one. (4WRR194-240). Steptoe admitted on cross examination that she knew nothing whatsoever about Applicant. (4WRR234).

Applicant next called Will Harrell, a lawyer with the American Civil Liberties Union (ACLU). (5WRR103). Harrell testified that he was the chief independent ombudsman for the Texas Youth Commission for two years. (5RR112). Harrell testified that based on his review of Applicant's TYC records, "it was unfair that he was held accountable for his inability to succeed in a behavior program that has since been discredited and scrapped by the state." (5WRR121). Harrell then related a litany of (in his view) shortcomings and various problems with TYC at the time Applicant was in TYC. (5WRR122).

Harrell testified that although he had previously testified that incidents of sexual misconduct had taken place at TYC, he had no knowledge that any such thing had happened to Applicant. (5WRR199). Harrell testified that although he had testified that there were numerous incidents of assaults by staff on youth at TYC, he had no indication that any such thing had ever happened to Applicant. (5WRR199).

Harrell clarified that he did not dispute any of the factual bases for sending Applicant to TDCJ, only that he disagreed that these facts should have resulted in Applicant being sent to TDCJ. (5WRR200).

Harrell then acknowledged (only after having it pointed out on cross examination) that Applicant was not sent to TDCJ solely because he was not successful in the resocialization program, but rather because Applicant was routinely violent and assaultive both to staff and other youth and also because Applicant "is a gang leader on the dorm and across campus. [Applicant] is associated with the Bloods." ((5WRR201-04) (reciting TYC disciplinary reports where Applicant punched other youth, punched staff member in the face, told staff that he would "beat [their] motherfucking ass," banging another youth's face on his bunk, and being a gang leader in TYC).

Harrell also conceded on cross examination that although he had said that youth being extorted by other youth for their food and hence being effectively starved was common in TYC, Applicant weighed 210 pounds at the time of his transfer to TDCJ and this belied any claim such a circumstance could apply to Applicant. (5WRR205).

Harrell also conceded that Applicant had denied having suicidal ideations in TYC and also denied having heard voices. (5WRR210 referencing WR. Ex. 46). Harrell then conceded Applicant had engaged in a further series of violent and

disruptive behavior in TYC. ((5WRR215-26) (throwing gang signs, showing his penis to staff members, masturbating in front of staff, urinating through the door slot, cursing at staff members, calling staff members racial slurs ("cracker ass bitch")).

Although Harrell testified that he did not know what percentage of youth were transferred to TDCJ from TYC. (5WRR231). Harrell testified he never had any personal experience with Applicant when Applicant was at TYC, nor had he ever spoken with anyone who had. (5WRR231).

The final expert Applicant called was Scott Hammel, a psychologist. (6WRR118). Hammel testified that portion of the report by Dr. Brown, the psychiatric expert retained by Applicant's trial counsel, which indicated Applicant might have schizophrenia, "is not accurate." (7WRR64) ("[Dr. Brown] says the data or the results seem to be suggestive of a diagnosis of schizophrenia, which I think is not accurate"). Hammel testified that he was concerned that this potential diagnosis was invalid because Dr. Brown indicated that the validity scales of his testing indicated that Applicant was over-reporting his psychiatric problems. (7WRR65).

Hammel testified that where Applicant had told Dr. Brown how he had killed a puppy and had tortured other animals, (i.e. putting firecrackers in cats' anuses) Applicant admitted some of those acts to him but minimized them and denied

others. (7WRR67-68). Hammel testified that although Applicant told Dr. Brown he had set fire to his mother's apartment, he denied doing so in his interview with Hammel. (7WRR68).

Hammel testified that the potential diagnosis of "mood disorder" might legitimately apply to Applicant – that being a general diagnosis that could include "clinically significant levels of depression or clinically significant levels of anxiety…." (7WRR72). Hammel testified that the diagnosis of "conduct disorder" might also legitimately apply to Applicant – conduct disorder being a diagnosis "given on the basis of behaviors a person exhibits … breaking the law, skipping school, problems with authority, et cetera." (7WRR74-75). Hammel testified that "the presumption is anybody who's sent to TYC probably has conduct disorder." (7WRR76).

Hammel testified that "I don't think he has a primary psychotic disorder." (7WRR88). Hammel further clarified his diagnosis to say, "I do think [Applicant] had some experiences that were outside of reality. But, again, I don't believe they represent a primary psychotic disorder, such as schizophrenia." (7WRR90).

Hammel testified that a diagnosis of antisocial personality disorder could apply to Applicant, but could not say for certain if the diagnosis was appropriate. (7WRR94).

Hammel testified that when the TYC psychologists concluded that Applicant was faking psychological issues to avoid transfer to TDCJ, this was a "possible conclusion." (7WRR79).

Hammel testified that Applicant "has some acute anxiety at times and some dysphoric and depressed moods at times … and mood dysregulation …." (7WRR107).

Applicant attempted to attack the State's proof of his having committed an extraneous robbery of a dry cleaner (owned by Tuan Tran, referred to at the original trial in volume 46) by presenting the affidavit of Charaya Williams, Applicant's then girlfriend, wherein she asserted that she had not told the police that Applicant admitted committing this offense. Ex. 139. Applicant then attempted to withdraw this affidavit after learning that there was in fact an audio recording of Williams telling the detective that Applicant had admitted committing this offense. (8WRR5-9; State's Rebuttal Ex. 1).

On rebuttal, the Detective with whom Williams spoke testified that she had in fact told him that Applicant admitted committing this offense, and introduced the recording of that conversation. (8WRR14, 20-21; State's Rebuttal Ex. 1). Williams admitted that she had told the detective that Applicant admitted committing this offense. (8WRR57).

The trial court recommended that this Court grant Applicant relief on his first writ claim, that being ineffective assistance of counsel, and recommended a denial of relief on his other claims.

Applicant also presented proposed expert witness testimony by way of affidavit, including the affidavit of one Dr. Alonso-Katzowitz, a psychiatrist, who indicated that in her opinion, "it is not entirely clear that [Applicant's] behaviors and symptoms warranted a major health diagnosis, as opposed to being a strictly behavioral issue." App. at Ex. 1.

Applicant also included the affidavit of a Dr. Lindsey, whose affidavit can be boiled down to having read only the selected background materials provided to him by Applicant's writ counsel, Dr. Lindsey is of the opinion that Applicant had a rough childhood and this made him a less friendly and responsible adult. App. at Ex. 5.

The Subsequent Appellate Proceedings

This Court, in a per curiam opinion, denied relief and rejected the trial court's findings of fact and conclusions of law. *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783 (Tex. Crim. App. Feb. 13, 2019) (mem. op., not designated for publication) cert. granted, jdgm't vacated by 140 S.Ct. 1875 (Jun. 15, 2020).

Four members of this Court wrote separately in a concurrence to explain why Applicant was not entitled to relief on the basis that he had not shown prejudice under *Strickland* and its progeny. *Id*. at *3 Richardson, J., concurring.

The United States Supreme Court subsequently granted Applicant's petition for certiorari, holding that Applicant's trial counsel was ineffective, and remanded the case to this Court for an explicit consideration of the prejudice prong of the *Strickland* analysis by the entirety of this Court. *Andrus v. Texas*, 140 S.Ct. 1875 (Jun. 15, 2020).

SUMMARY OF THE ARGUMENT

Applicant has not shown prejudice under the *Strickland* and *Wiggins* standard because the potential mitigating evidence was double-edged and its potential mitigating impact was outweighed by Applicant's history of violence and the increased history of violence which his proposed mitigation evidence would open the door to.

Burden of Proof

In a habeas proceeding, the applicant bears the burden of proof and must prove by a preponderance of the evidence that any alleged error contributed to his conviction or punishment. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1977); *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

THIS COURT SHOULD ADOPT THE RATIONALE OF JUDGE RICHARDSON'S CONCURRENCE AND HOLD THAT APPLICANT HAS NOT ESTABLISHED PREJUDICE

Applicant claims in his application for writ of habeas corpus that his trial counsel was ineffective in "failing to conduct a reasonable investigation and in their presentation of available mitigating evidence" and that he was prejudiced thereby. App. at p. 18. Applicant supports this claim by pointing out evidence he claims could have and should have been presented in mitigation, but which were not produced by trial counsel.

This Court should adopt the holding of the concurrence by Judge Richardson and hold that Applicant was not prejudiced by these items not being introduced because Applicant's counsel did put on a mitigation case, and the mitigation evidence that was not introduced was not nearly so impactful as was the evidence in *Wiggins*, on which Applicant relies, and Applicant's history of violence outweighed the impact of any potentially mitigating evidence that could have been introduced.

Argument and Authorities

a. The Law of Ineffective Assistance Claims Generally

To succeed on a claim of ineffective assistance of trial counsel, the applicant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) that trial

counsel's deficient performance prejudiced the applicant's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In order to show prejudice, the applicant must prove that there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Id*. This stringent burden requires that the applicant point to objective facts in the record that indicate the result of the proceeding would have been different but for trial counsel's ineffectiveness; mere assertions of prejudice without factual support are insufficient to obtain relief. *Bone*, 77 S.W.3d at 836-37 & n.29; *Ladd v. State*, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999). "Unless [an applicant] can prove both [Strickland] prongs, an appellate court must not find counsel's representation to be ineffective." *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

"Counsel's decision not to present cumulative testimony does not constitute ineffective assistance." *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007) *citing Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984). Complaints regarding the strategy employed by trial counsel do not establish ineffective assistance. *Coble*, 496 F.3d at 437 citing *Yarbrough v. Gentry*, 540 U.S. 1, 5-6 (2003). Even where an omission is inadvertent, relief is not automatic. *Yarbrough*, 540 U.S. at 6. "[C]ounsel is not required to 'investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at

sentencing.'" *Coble*, 496 F.3d at 442 quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

"[T]he existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel." *Phillips v. Bradshaw*, 607 F.3d 199, 207 (6th Cir. 2010). "Not every failure to present, or even fully to investigate mitigating evidence constitutes a deficiency in representation." *Rosales v. State*, 841 S.W.2d 368, 376 (Tex. Crim. App. 1992).

"To find prejudice, there must be a reasonable probability that, absent the error, the sentence would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sonnier v. Quarterman*, 476 F.3d 349, 356-57 (5th Cir. 2007) citing *Strickland*, 466 U.S. at 695; *Ex parte Gonzales*, 204 S.W.3d 391, 393-94 (Tex. Crim. App. 2006) (applying this standard in state proceedings).

b. Prejudice Under Wiggins

The United States Supreme Court has since applied the *Strickland* standard to claims of ineffective assistance based on alleged deficiencies of counsel in the investigation and presentation of mitigating evidence, most notably in *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, on which Judge Richardson's concurrence relied, the United States Supreme Court held that trial counsel's lack of awareness of and subsequent failure to present evidence of the petitioner's "severe privation

… physical torment, sexual molestation, and repeated rape" as a child, constituted deficient performance which prejudiced the defense under the *Strickland* standard. *Id*. at 535-38. In so holding, the United States Supreme Court noted the marked lack of any meaningful mitigation evidence uncovered or presented to the jury by trial counsel (trial counsel presented only the fact that the petitioner had no prior criminal history). *Id*. at 537.

In considering this claim, the United States Supreme Court held that the totality of the evidence should be considered including that adduced at trial and during the habeas proceedings. *Id*. at 536. The United States Supreme Court noted that in evaluating the utility of mitigating evidence which was not introduced, its nature as potentially "double edged" should also be taken into consideration. *Id*. at 535. The United States Supreme Court also, in that vein, held that a "record of violent conduct … could have been introduced by the State to offset" a mitigating narrative would also have been relevant (and was lacking in that case). *Id*. at 537.

c. Applying Wiggins to this Case

Applicant claims that trial counsel conducted insufficient investigation and ineffectively presented lay witness testimony and that this prejudiced him. App. at pp. 24-28. Applicant likewise complains that his trial counsel was ineffective for failing to present more expert testimony regarding various themes and that he was prejudiced thereby. App. at p. 57.

Applicant's proposed lay witness testimony is flawed in that the lay witnesses' testimonies are either duplicative, subject to significant cross examination, or both. Further, they would have done nothing to dispel the significant aggravating evidence admitted, including Applicant's long and continuing course of violence, which these witnesses apparently ignored or know nothing of. Applicant's argument that his trial counsel was ineffective for not calling these witnesses, and that Applicant was prejudiced by this ineffectiveness is in unavailing in light of the case law which has considered such complaints. *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 792 (1987) ("an experienced trial lawyer could properly have decided not to put either petitioner or the psychologist who had thus evaluated him in a position where he would be subjected to cross examination that might literally be fatal," and trial counsel's decision not to more thoroughly investigate petitioner's background not deficient in light of what he had already discovered being overwhelmingly negative); *Durr v. Mitchell*, 487 F.3d 423, 436 (6th Cir. 2007) ("failure to present additional mitigating evidence that is merely cumulative of that already presented does not establish prejudice") (internal quotations omitted); *Ex parte Martinez*, 195 S.W.3d 713, 727 (Tex. Crim. App. 2006) (trial counsel not deficient, and no prejudice was shown where trial counsel did not present evidence of applicant's sexual abuse as a child where witnesses were uncooperative until after the trial and applicant denied such abuse); *Ex parte*

McFarland, 163 S.W.3d 743, 758 (Tex. Crim. App. 2005) (counsel not ineffective for not calling a witness who would have been subject to damaging cross examination); *Rosales*, 841 S.W.2d at 378 (no prejudice where additional mitigation evidence would have "render[ed] a more textured portrait of appellant, [but was] ultimately no different in outline than the picture that was presented at trial").

The facts here are reflective of the Fifth Circuit's decision in *Coble v. Quarterman*, wherein the Fifth Circuit Court of Appeals upheld the state courts' determination that trial counsel was not ineffective because the trial counsel investigated mitigation and presented a mitigation case. *Coble*, 496 F.3d at 442. In *Coble*, the court distinguished *Wiggins*, wherein the defendant's background was "appalling," and the trial lawyers did no mitigation investigation whatsoever. *Id.* fn. 6. Here, the trial lawyers did investigate and did put on a mitigation case. Ex. 1, 2, 49RR-51RR. Applicant was not prejudiced as the witnesses he complains of not being called were either duplicative in their testimony, justifiably not called due to their potential for impeachment, or both.

Applicant's complaint regarding the lack of expert testimony about his childhood neighborhood (embodied at the 11.071 writ hearing by Tyina Steptoe) was merely a generalization and not reflective of Applicant's actual circumstances. Such testimony would thus have been subject to a relevancy objection. Tex. R.

Evid. 402. Further, it has also been held that failure to call a "cultural expert" of this kind is not cognizable in a writ of habeas corpus. *Fears v. Bagley*, 462 Fed. Appx. 565, 576 (6th Cir. 2012) (unpublished).

There was testimony at trial that Applicant was brought up in difficult circumstances. See Applicant's father's testimony at 50RR5-7; Applicant's testimony about his childhood at 51RR47-49. Therefore, the substance of this testimony is duplicative and Applicant was not prejudiced by its not being included. Even additional evidence of a difficult upbringing adduced post-conviction does not automatically equate to prejudice in the *Strickland* context. *See Loving v. United States*, 68 M.J. 1, 17-18 (U.S. Armed Forces 2009) (no reasonable probability that at least one juror would have reached a different conclusion as to mitigating evidence had additional evidence of the defendant's difficult upbringing been introduced); *Durr*, 487 F.3d at 438 (opinion of expert that introduction of cross cultural evidence could have had some conceivable impact on the verdict insufficient to establish prejudice).

Applicant's claim regarding deficiencies at TYC is again generalities with no relation to Applicant. Applicant was not prejudiced by trial counsel's decision not to introduce further expert testimony regarding Applicant's time in TYC because it would have been more damaging than not. Applicant's TYC records, as is laid out in painstaking detail in the writ hearing record, indicate that Applicant

was repeatedly violent and a gang leader in TYC – the full scope of Applicant's violence and gang membership in TYC were not introduced at trial.[4] Had Applicant introduced the testimony of Harrell at trial, necessarily the full scope of that aggravating history would have been delved into – hence Harrell's testimony would have been "double-edged" at best.

Further, Applicant's TYC records also indicate that he was attempting to manipulate the mental health system to avoid a transfer to TDCJ. (7WRR79). Applicant's psychological expert at the writ hearing buttressed the conclusion that Applicant merely feigned serious mental illness when he testified that Applicant did not have any sort of psychotic disorder. As such, introducing Applicant's TYC records and expert testimony based on them, would have exposed at least as much damaging material as helpful material. This would have been a "double-edged" presentation at best.

Introducing the psychological testimony would likewise have been double-edged. Calling the psychological expert trial counsel retained to examine Applicant (Dr. Brown) would have been potentially more harmful than helpful because although he would have testified to Applicant's potential mental health problems, he would also have testified to numerous inflammatory facts, including

[4] The State began to question its witness on Applicant's time at TYC (at the time of trial referred to as TJJD) as to specific instances of conduct, but relented after Applicant's trial counsel objected on hearsay and confrontation grounds. The records themselves were not introduced in evidence at trial. (48RR70).

Applicant's penchant for torturing animals. It should be noted that the primary potential positive impact of Dr. Brown's testimony was that he would have testified that Applicant had some indications of schizophrenia, but Applicant's psychological expert at the 11.071 hearing disputed this and testified that he believed that diagnosis to be erroneous, and in fact denied that Applicant had any sort of psychotic disorder, as did the psychological expert who submitted an affidavit in support of Applicant's application. (7WRR64, 90; App. at Ex. 1). The psychological expert who testified at the 11.071 hearing likewise referred to Applicant having tortured animals, although to a lesser extent than that referenced in Dr. Brown's report. This testimony was contradictory and therefore not even uniformly helpful. Adding in the fact that in order to bring out the helpful portions of the testimony, the negative portions of that testimony would also come out militates in favor of a find that Applicant was not prejudiced by the lack of introduction of this evidence.

The aggravating evidence both introduced and with the potential to be introduced was extremely egregious. Aside from the aggravated nature of the underlying offense, Applicant had a lengthy history of violence and criminal offenses of the type lacking in *Wiggins*. Judge Richardson noted that fact in his concurrence in contrasting this case against the facts in *Wiggins*. *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783 at *8 (Tex. Crim. App. Feb. 13, 2019) (mem.

op., not designated for publication), Richardson, J. concurring, cert. granted, jdgm't vacated by 140 S.Ct. 1875 (Jun. 15, 2020).

Also in contrast to *Wiggins*, Applicant's trial counsel did put on a mitigation case – they put on testimony of Applicant's difficult childhood through his mother, father and himself. They further put on testimony of the harmful effects of narcotics on him and on his brain development having been exposed to narcotics from a young age. They also put on the testimony of a jail counselor who testified to Applicant's expressions of remorse for his crime.

Trial counsel also consulted with a prison classification expert whom they again made a strategic decision not to call because he told them that he would describe Applicant as "one of the worst" prisoners he had ever seen. This testimony would have been "double edged" at best and likely more harmful than helpful.

A decision by this Court denying relief based on a holding that Applicant has not established prejudice under *Wiggins* and *Strickland* would be in keeping with precedent from the United States Supreme Court and the Fifth Circuit. *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 11-12 (2009) (rejecting claim that trial counsel who presented mitigation evidence of defendant's troubled childhood were ineffective for not presenting more evidence of defendant's troubled childhood); *Wong v. Belmontes*, 558 U.S. 15, 26-28 (2009) (holding defendant could not

establish prejudice (assuming without deciding trial counsel was ineffective) where trial counsel put on mitigation case but limited it to attempt to avoid introduction of extraneous murder defendant committed); *Trevino v. Davis*, 861 F.3d 545, 550-51 (5th Cir. 2017) (denying claim of ineffective assistance on grounds defendant did not show prejudice from lack of expert testimony on defendant's fetal alcohol syndrome); *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (denying claim of ineffective assistance where trial counsel presented only one witness and school records in punishment phase); *Santellan v. Cockrell*, 271 F.3d 190, 198 (5th Cir. 2001) (rejecting ineffective assistance claim based on trial counsel's not introducing evidence defendant had brain damage because evidence in aggravation was so overwhelming of any potential mitigating effects of potential brain damage claim); see also *Harrison v. Richter*, 562 U.S. 86, 110 (2011) (rejecting claim of ineffective assistance where trial counsel did not consult forensic blood experts in developing defensive strategy because rationale for this forensic evidence became apparent only in hindsight and its admission could have been double edged).

Applicant has not established prejudice under the *Strickland* and *Wiggins* standards. There is no realistic prospect that had the testimony Applicant now suggest should have been presented, that had it been presented, the outcome of the punishment proceedings would have been different. This Court should hold that Applicant has not proven prejudice and deny his request for relief.

Prayer

Wherefore, premises considered, Respondent, The State of Texas, respectfully prays this Court deny the relief requested in this application for a writ of habeas corpus.

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CERTIFICATE OF SERVICE

The State has served Applicant's writ counsel, the Gretchen Sween, via electronic mail, on the date of the filing of the original document by agreement.

/s/ Jason Bennyhoff

Jason Bennyhoff

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In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Jason Bennyhoff, hereby certify that the foregoing electronically created document has been reviewed by the word count function of the creating computer program, and has been found to be in compliance with the requisite word count requirement in that its word count (excluding those items not required to be included in the word count) is 8,925words.

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Appendix G

WR-84,438-01
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/23/2020 12:09 PM
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DEANA WILLIAMSON
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No. WR-84,438-01

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE TERENCE TREMAINE ANDRUS,
Applicant.

On Application for Writ of Habeas Corpus in
Cause 09-DCR-051034-HC1
In the 240th District Court, Fort Bend County

REPLY BRIEF OF APPLICANT TERENCE TREMAINE ANDRUS

THIS IS A CAPITAL CASE.

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Counsel for Applicant

Oral Argument Requested

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Cases **Page(s)**

Other

On September 11, 2020, both parties filed briefing pursuant to this Court's Order entered on July 28, 2020. Applicant Terence Andrus presents this Reply solely to address numerous, material misrepresentations of the record found in the State's Response.

ARGUMENT IN REPLY

The State's Response, which purports to describe the trial and habeas record, is riddled with mischaracterizations and material omissions of fact. Moreover, the State's Response disregards critical findings about the record already made by the Supreme Court of the United States, findings that now bind this Court on remand. The State's mischaracterizations and omissions of material facts will not assist this Court in conducting the requisite "weighty and record-intensive analysis" necessary for adjudicating the prejudice element of the ineffective-assistance-of-counsel claim. *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020).

I. THE STATE FOCUSES ON A TRIAL RECORD SHAPED BY DEFICIENT PERFORMANCE.

Most of the State's Response, pages 3-21, is devoted to describing the State's view of the underlying offense and the trial, particularly the State's punishment-phase evidence, *as if the habeas proceeding had not happened*. All of the State's citations in this section are to the trial record—which is, in large measure, a product of the trial counsel's woefully deficient performance. As the Supreme Court has already found, counsel "performed virtually no investigation of the relevant

evidence." *Id.* at 1883. The Supreme Court described the paltry investigation as "plainly not" reasonable under prevailing profession norms and that any conclusion to the contrary is "erroneous as a matter of law." *Id.* at 1882, 1887. "On top of that, counsel 'ignored pertinent avenues for investigation of which he should have been aware,' and indeed was aware." *Id.* at 1882 (quoting *Porter v. McCollum*, 558 U.S. 30, 40 (2009)). The Supreme Court was clear that the trial record that exists does not, therefore, constitute a truthful factual history but is in part the product of a complete failure by defense counsel to provide adequate representation. The Supreme Court was explicit that counsel's failure to investigate and provide any meaningful defense was not limited to a failure to investigate and present mitigating evidence. *See, e.g., id.* at 1877, 1883 (characterizing counsel's investigation as "nonexistent," "blinked reality," "virtually no").

Additionally, the State's citations to the trial record do not, in several instances, even accurately reflect what is *in* the trial record. For instance, the State's Response misleadingly states: "A store employee saw a black male in a trench coat shoot Diaz at close range." State's Response at 3 (RR citations omitted). This characterization is misleading because this particular witness was one of the only ones whom defense counsel cross-examined. And that cross-examination arose because this witness's testimony regarding what he had allegedly seen on the night of the crime diverged considerably from his initial, recorded statement made to

police the night of the crime. To law enforcement, this employee had admitted that he had *not* seen the shooting, *not* seen the victim fall, and had *not* even seen a gun. 38RR81-92. This witness's only explanation for the noteworthy differences between his initial description to police and his trial testimony four years later was that the passage of time allowed for him to "conjure up a little bit more." 38RR91. Since this witness had lost all credibility on cross, the State had no further questions. 38RR92. For the State to now hold up this witness's testimony as supporting its hypothesis of how Diaz was shot is grossly misleading—and just one example of this disturbing tendency.

The State's Response also misleadingly implies that the entire multi-hour "recording of Applicant's conversation in the car with the detectives was admitted" into evidence at trial. Response at 6. In reality, the State had heavily edited the recording down from 6 hours to about 1 hour (without any objection from deficient defense counsel); the edited version excluded, for instance, all humanizing statements from Terence, including all expressions of remorse. Likewise, Terence's subsequent videotaped confession, expressing remorse to the victims' families, was not shown to the jury—or mentioned in the State's current recitation of "facts." *Id.*

Although it was uncontroverted that Terence worked with police to help them find his gun and other evidence against him, the State's Response seeks to discredit Terence's explanation of how the offense had occurred to make him seem more

culpable. As it did at trial, without resistance from a virtually inert defense counsel, the State's Response disparages Terence's report that he had only shot toward the Buis' car in panic because he thought the "vehicle was going to run him over." Response at 8. Mr. Bui himself testified repeatedly and consistently that shots were fired at his car only *after* he instinctively "pushed" the accelerator and thus after he was speeding toward Terence. That is, Mr. Bui's testimony supports, rather than contradicts, the explanation that Terence gave to law enforcement as to why he panicked and fired toward the Buis' car:

- "As I [Bui] turned back and I saw that, instinct – I think I have to risk it. So I pushed the gas pedal and took off." 43RR43
- "So by instinct, I push the pedal and try to take off." 43RR45
- "As I recall, as I -- as soon as I push the gas pedal, take off, then I heard the shooting, a few shots, several shots, along the car. But I just tried to take off to -- so we can escape from the -- from the robber." 43RR46
- "And I cannot think about anything else besides pushing the pedal and trying to get out." 43RR46
- "I don't remember. I just pushed the – you know, the most I can." 43RR47
- "[A]nd instantly I pushed the pedal to take off. And I heard several gunshots along my car." 43RR62

Additionally, the State's description of its own punishment-phase evidence, as with the guilt-phase evidence, ignores that the trial record was shaped by what the Supreme Court recognized as trial counsel's "fail[ure] to conduct any independent

investigation of the State's case in aggravation, despite ample opportunity to do so." *Andrus*, 140 S.Ct. at 1884. The State's Response devotes, for instance, pages (8-10) to describing the juvenile offense that landed Terence in Texas Youth Commission (TYC) custody—an event that trial counsel neither investigated nor challenged at trial, even though the victim's testimony on the stand did not match the offense report. The State's Response also features an extraneous offense at a dry cleaners that trial counsel had failed to investigate and did not subject to any adversarial testing—although Terence had always denied involvement in this incident. As the Supreme Court found: "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 [at the habeas hearing] gave rise to numerous reliability concerns." *Id*.; *see also id.* at 1885, n.3, n.4.

Similarly, the State's description of its heavy reliance at trial on Terence's misconduct while in jail awaiting trial (Response at 12-14) does not account for the Supreme Court's subsequent findings that, had trial counsel investigated Terence's long history of unaddressed mental illness and obtained "sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison." *Id.* at 1884.

Likewise, the State's claim that Terence had "received counseling and rehabilitative therapy" while in TYC custody (Response at 14-15) is not only untrue, it is also at odds with the Supreme Court's findings: "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." *Id*.

Further, the State's description of the defense punishment-phase evidence at trial is a portrait in misleading spin trying to make the deficient presentation seem more substantive and credible than it was. *See* Response at 16-21. As explained in Applicant's opening brief, the Supreme Court recognized that the little that counsel did in terms of "so-called" mitigation, putting on witnesses he had not interviewed or prepared, did no more than "unwittingly aided the State's case in aggravation." *Andrus*, 140 S.Ct. at 1883. The State's account is also contrary to findings the Supreme Court has now made that the defense punishment-phase presentation was based on an investigation that was "approach[ing] non-existent" and had "disregarded, rather than explored, the multiple red flags" of the "vast" available mitigating evidence. *Id.* at 1882-83.

II. THE STATE GROSSLY MISREPRESENTS THE HABEAS RECORD.

The State's Response not only misleads by puffing up the paltry defense mitigation presentation at trial; the Response radically distorts the habeas mitigation

presentation that must be compared to the trial presentation in assessing prejudice. *See* Response at 21-30. If the State's description of the habeas record were accurate, which it is not, then it would be very difficult to understand how the Supreme Court, upon reviewing that record, described the mitigation evidence presented in the habeas proceeding as "abundant," "vast," "compelling," "powerful," "myriad," and previously "untapped." *Andrus*, 140 S.Ct. at 1878, 1881, 1882, 1883, 1886. The Supreme Court has also expressly found that "nearly none" of the mitigating evidence adduced in the habeas proceeding "reached the jury." *Id.* at 1877. Therefore, the State's hollow insistence that the habeas proceeding featured only "duplicative" or "double-edged" evidence cannot be squared with the Supreme Court's findings (or with the actual habeas record).

The State's Response creates the false impression that the habeas proceeding involved nothing new or helpful by misrepresenting the contributions of multiple lay witnesses whom trial counsel had never even interviewed. To suggest that these witnesses somehow lacked credibility or substantive knowledge, the State selectively summarizes snippets of answers, largely ignoring all but questions that *State's counsel* asked during cross-examination. These summaries of excerpts of cross-examination testimony do not represent the whole—or even fairly depict facts adduced through cross. For instance, an extended answer that Sean Gilbow gave during cross-examination about how Terence and his older brother Torad had gotten

caught up in a gang as young teenagers and how Torad had been shot in a drive-by shooting, the State describes this way: "Gilbow testified that Applicant and his brother Torad were Bloods gang members." Response at 22. The State ignores Gilbow's powerful live testimony about the drug sales, prostitution, and shootings, conducted out in the open, that characterized their lives in Third Ward when both he and then Terence were children there. *See, e.g.,* 6EHRR 12-51, 68-73. That is, the State ignored all of the context offered in the habeas proceeding to explain how Terence ended up briefly falling in with a gang; the State's Response merely emphasizes that he was in a gang.

Indeed, none of the State's descriptions of Applicant's lay witnesses in the habeas proceeding is remotely fair or accurate. The only remedy is to read the actual affidavits of Sean Gilbow, Phyllis Garner, Torad Andrus, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams, AppX9-18, as well as the live lay witness testimony at, *e.g.*, 6EHRR12-118. These witnesses' substantive, sincere, and concrete attestations stand in stark contrast to the dismissive *reductio ad absurdum* found in the Response (pages 21-24). The habeas court, who studied this testimony, found all of these lay witnesses credible and their testimony mitigating. *See* Applicant's Appendix 2 at mmmm.

The State's description of Applicant's habeas experts is, if possible, even more deceptive. *See* Response at 24-30. For instance, the State purports to describe

Professor Steptoe's testimony in one sentence, then dismisses it by asserting that she "admitted on cross examination that she knew nothing whatsoever about Applicant." Response at 25. First of all, it was clear from her hearing testimony that she was not offered as an expert to opine about Terence himself; she is a historian who was called to testify about Houston's historically African-American Third Ward neighborhood from its origins through the time during which Terence and his family lived there. *See* 4EHRR203–232. That is, Professor Steptoe was not offered to opine about Terence's personal history but about a larger cultural history that she has researched and about which she has published scholarly books and article. Her testimony showed part of what a reasonable mitigation presentation would have included—objective scholarship explaining the larger social forces of economic neglect and racial discrimination, dating back more than a century, that help explain how this neighborhood became an epicenter of the crack epidemic in the 1980s and 1990s, which were Terence's formative years. 4EHRR225–229; *see also* AppX8-18.

The State's description of the testimony of former TYC Ombudsman Will Harrell bears no resemblance to the reality of the record. Response at 25-27. Instead of describing Harrell's actual testimony, the State describes questions its counsel asked on cross examination to suggest that Harrell only offered "generalities" and knew nothing about Terence's actual experience. Response at 38. This characterization requires, not only disregarding Harrell's detailed report (AppX4) in

which he explained what he had reviewed and relied on; the mischaracterization also requires ignoring his live testimony during which he explained:

> In this case I've reviewed hundreds or thousands of pages of documents concerning Mr. Andrus' experience in the Texas Youth Commission. And also, I bring to bear what I know generally about national standards of juvenile conditions of confinement and treatment. But, also, very much what was happening in the context of the time that Mr. Andrus was in the Texas Youth Commission and where things are at now and what we know now in terms of the nature of treatment at the Texas Youth Commission at that time[.]

5EHRR115. The suggestion that Harrell offered no testimony specific to Terence Andrus is patently false.

Similarly, the State, desperately trying to bolster a false narrative that Terence was some "gang leader" in TYC, ignored Harrell's uncontroverted expert opinion that a "gang leader" was "not someone continuously sending themselves on a self-referral to security"—*i.e.*, to solitary confinement"—to get out of the violent, "chaotic" dorms, as TYC's own records show that Terence did. 5EHHR231-32. Moreover, the State's misleading description of Harrell's expert testimony is at odds with what the Supreme Court has now found with regard to his testimony and the voluminous TYC records he reviewed:

- "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." *Andrus*, 140 S.Ct. at 1880.

- "[T]he State emphasized that Andrus had acted aggressively in TYC facilities and in prison while awaiting trial. This evidence principally comprised verbal threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. 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." *Id.* at 1884

The Supreme Court's opinion also quotes extensively from Harrell's testimony—which the State's Response distorts beyond recognition. *See id.* at n.2 (quoting habeas record: "TYC ombudsman testifying that it was 'surpris[ing] how few' citations Andrus received, 'particularly in the dorms where [Andrus] was' housed;" "TYC ombudsman finding 'nothing uncommon' about Andrus' altercations because 'sometimes you . . . have to fight to get by' in the 'violent atmosphere' and 'savage environment'"; "TYC ombudsman testifying that Andrus' isolation periods in TCY 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'"; "TYC ombudsman testifying that Andrus' 'experience at TYC' 'damaged him' and 'further traumatized' him.").

Perhaps the most dishonest gesture in the State's Response is its description of Dr. Scott Hammel's two days of testimony about Terence's bio-psycho-social history that Dr. Hammel investigated and presented in the habeas proceeding. *Compare* Response at 27-29 *with* 6EHRR118-225; 7EHRR5-156. Instead of describing any of Dr. Hammel's actual testimony, the State spends several pages

discussing deficient trial counsel's consulting expert, Dr. Jerome Brown. Response at 27-28. As Applicant Terence Andrus explained in his opening brief, Dr. Brown was *not* a mitigation witness in this habeas proceeding. His hearsay draft report was admitted into evidence only as a component of trial counsel's file. The State offered defense counsel's entire file into evidence (HC-18) and then waved around Dr. Brown's draft report; but the entire file, including that report, was admitted only for the *limited* purpose of showing how very little trial counsel had done. 2EHRR145. Dr. Brown's hearsay draft report had no credibility and was not relied on by Applicant or by the habeas judge as an example of mitigating evidence. The State's suggestion that Dr. Brown's draft report somehow proves that the mitigating evidence adduced in this habeas proceeding was "potentially more harmful than helpful" is an unprincipled strawman argument. Response at 39-40 (cherry-picking hearsay-within-hearsay from Dr. Brown's draft trial report and suggesting that it constitutes "facts").

This Court should give no credence to unreliable hearsay evidence of aggravation, which is what Dr. Brown's draft report is, at best. As the habeas record demonstrates, a *qualified* mental health expert, whom the habeas judge found credible, described Dr. Brown's report as "miss[ing] the mark," reflecting "a number of problems," suggesting "limited time or limited access to records." Dr. Hammel explained at length that whatever work Brown had done did not appear "to be

sufficient in order to support the conclusions that he reached," because it was fraught with "internal consistencies," it was "not accurate," and it contained "suspect" conclusions based on "validity scales [that] call into question the accuracy of the results" which he reported "anyway and then use[d] them to support his diagnostic conclusion" despite a "lack of corroboration." In short, "not much time was dedicated to the evaluation" rather, Brown "slapped something together" that "doesn't meet the standards for what an ethical forensic assessment should involve." 7EHRR63, 65, 135-40. This testimony was from a mental-health expert in the habeas proceeding critiquing trial counsel's deficient work with Brown, a psychologist retained on the eve of trial with whom trial counsel never even spoke after receiving the draft report. Brown's draft report is relevant only as further evidence of trial counsel's deficient performance.

Accepting, without verifying, the State's characterization of the habeas record would lead this Court into error and would be contrary to the Supreme Court's own findings and directives.

CONCLUSION

For the foregoing reasons as well as those developed in his opening brief, Applicant Terence Andrus respectfully asks that this Court, upon undertaking "the weighty and record-intensive analysis" of the prejudice element, *Andrus*, 140 S.Ct.

at 1887, find that he was prejudiced by his counsel's deficient performance and grant him relief in the form of a new punishment-phase trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the word count as determined by the word processing program is 3,156.

CERTIFICATE OF CONFERENCE

On September 22, 2020, counsel for Applicant Terence Andrus attempted to conferred with counsel of record for the State regarding the motion for leave to file this Reply. By the time of filing, State's counsel had not yet responded. Thus, Applicant's counsel assumes that the motion for leave to file the reply brief is opposed.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, a true and correct copy of the above and foregoing motion was forwarded to all counsel of record by the Electronic Service Provider, if registered, otherwise by email, as follows:

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Appendix H

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 11. HABEAS CORPUS

. . . .

Art. 11.071. PROCEDURE IN DEATH PENALTY CASE

Sec. 1. APPLICATION TO DEATH PENALTY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section,

the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., R.S., Ch. 781, Sec. 11, eff. January 1, 2010.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

Sec. 2A. STATE REIMBURSEMENT; COUNTY OBLIGATION. (a) The state shall reimburse a county for compensation of counsel

under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. INVESTIGATION OF GROUNDS FOR APPLICATION. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. FILING OF APPLICATION. (a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b)

constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. UNTIMELY APPLICATION; APPLICATION NOT FILED. (a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. SUBSEQUENT APPLICATION. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. ISSUANCE OF WRIT. (a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. ANSWER TO APPLICATION. (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT EVIDENTIARY HEARING. (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues

material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. RULES OF EVIDENCE. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Added by Acts 1995, 74th Leg., ch. 319, Sec. 1, eff. Sept. 1, 1995. Sec. 4(a), (h) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 1, eff. Sept. 1, 1997; Sec. 5(a), (b) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 2, eff. Sept. 1, 1997; Sec. 7(a) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 3, eff. Sept. 1, 1997; Sec. 8 amended by Acts 1997, 75th Leg., ch. 1336, Sec. 4, eff. Sept. 1, 1997; Sec. 9(a), (e) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 5, eff. Sept. 1, 1997; Sec. 2 amended by Acts 1999, 76th Leg., ch. 803, Sec. 1, eff. Sept. 1, 1999; Sec. 2A added by Acts 1999, 76th Leg., ch. 803, Sec. 2, eff. Sept. 1, 1999; Sec. 3(b), (d) amended by Acts 1999, 76th Leg., ch. 803, Sec. 3, eff. Sept. 1, 1999; Sec. 4

amended by Acts 1999, 76th Leg., ch. 803, Sec. 4, eff. Sept. 1, 1999; Sec. 4A added by Acts 1999, 76th Leg., ch. 803, Sec. 5, eff. Sept. 1, 1999; Sec. 5 heading amended by Acts 1999, 76th Leg., ch. 803, Sec. 7, eff. Sept. 1, 1999; Sec. 5(a), (b) amended by and Sec. 5(f) added by Acts 1999, 76th Leg., ch. 803, Sec. 6, eff. Sept. 1, 1999; Sec. 6(b) amended by Acts 1999, 76th Leg., ch. 803, Sec. 8, eff. Sept. 1, 1999; Sec. 7(a) amended by Acts 1999, 76th Leg., ch. 803, Sec. 9, eff. Sept. 1, 1999; Sec. 9(b) amended by Acts 1999, 76th Leg., ch. 803, Sec. 10, eff. Sept. 1, 1999; Sec. 2(f) amended by Acts 2003, 78th Leg., ch. 315, Sec. 1, eff. Sept. 1, 2003; Sec. 2A(d) added by Acts 2003, 78th Leg., ch. 315, Sec. 2, eff. Sept. 1, 2003; Sec. 3(d) amended by Acts 2003, 78th Leg., ch. 315, Sec. 3, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 787 (S.B. 60), Sec. 13, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 965 (H.B. 1701), Sec. 5, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 593 (H.B. 8), Sec. 3.06, eff. September 1, 2007.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 2, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 3, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 4, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 5, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 11, eff. January 1, 2010.

Acts 2011, 82nd Leg., R.S., Ch. 1139 (H.B. 1646), Sec. 1, eff. September 1, 2011.

Acts 2013, 83rd Leg., R.S., Ch. 78 (S.B. 354), Sec. 2, eff. May 18, 2013.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 1, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 2, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 3, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 4, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 5, eff. September 1, 2015.