NO. 21-6001

CAPITAL CASE

In the
Supreme Court of the United States

TERENCE TRAMAINE ANDRUS,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR *AMICUS CURIAE* THE TEXAS CATHOLIC CONFERENCE OF BISHOPS IN SUPPORT OF PETITIONER

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November 17, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST[1]

This case is before the Court again to determine whether the death penalty may be imposed on a man where the jury did not hear the "vast tranches of mitigating evidence" that would have been available if his counsel had investigated. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam). In 2012, Terence Andrus was convicted of murder and sentenced to death. This Court held that his attorney was constitutionally deficient for failing to investigate extensive mitigating evidence—including that Mr. Andrus's "childhood [was] marked by extreme neglect and privation" in a "family environment filled with violence and abuse"—and remanded to the Texas Court of Criminal Appeals ("CCA") to consider whether this prejudiced him. *Id.* at 1879, 1887. Ignoring this Court's directive, the CCA found that Mr. Andrus was not prejudiced by his counsel's *total failure* to present mitigating evidence. The CCA denied relief, and Mr. Andrus now returns to this Court, once again seeking a fair penalty-phase trial.

The Texas Catholic Conference of Bishops ("TCCB")—an unincorporated association consisting of the bishops of the fifteen Catholic Dioceses in Texas and the Ordinariate of the Chair of St. Peter—is

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[1] All parties consented to the filing of this brief after receiving timely notice pursuant to Supreme Court Rule 37.2. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

interested in this case because of the Church's teachings that the death penalty "is inadmissible because it is an attack on the inviolability and dignity of the person." Pope Francis, Address of His Holiness Pope Francis to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017).[2] As Pope Francis stated in 2020, "'not even a murderer loses his personal dignity' . . . . If I do not deny that dignity to the worst of criminals, I will not deny it to anyone." Pope Francis, Encyclical Letter, Fratelli Tutti of the Holy Father Francis on Fraternity and Social Friendship ¶ 269 (2020) (quoting Saint John Paul II, Encyclical Letter, *Evangelium Vitae* (Mar. 25, 1995)).[3]

Through this association, the various bishops speak with one voice on issues facing the Catholic Church in Texas and advocate for the protection of human life from conception to natural death. The Catholic Church in Texas has a long history of ministering to the incarcerated, crime victims, and their families. The TCCB regularly advocates for both mercy and restorative justice for prisoners, especially those on death row.

TCCB is also interested in this case because it relates to Church teachings on mercy. *See, e.g.*, *Colossians* 3:13 ("[B]earing with one another and

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[2] https://www.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.html.

[3] https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html.

forgiving one another, if one has a grievance against another; as the Lord has forgiven you, so you must also do."); *James* 2:13 ("[M]ercy triumphs over judgment."). The Eighth Amendment provides a mechanism for mercy in capital crimes, through the jury's consideration of mitigating evidence at sentencing. Ensuring juries actually have the opportunity to exercise mercy—even for defendants convicted of capital crimes—is fundamental to our justice system.

SUMMARY OF THE ARGUMENT

I. Mr. Andrus is entitled to a new penalty-phase trial. His trial counsel's abject failure to present mitigating evidence unquestionably prejudiced him. Pet. 11–34. Without new sentencing, Mr. Andrus will be denied his Eighth Amendment right to a jury's "reasonable moral response" to his mitigating evidence. As this Court has repeatedly concluded when the stakes are life and death, this is unacceptable.

II. Permitting the CCA's judgment to stand risks rewriting this Court's precedent requiring only that a petitioner show a reasonable probability that at least one juror would have decided on a sentence less than death. The CCA created a never-enough-mitigation-evidence standard that no petitioner can surmount if he also has aggravating evidence. This contravenes this Court's precedent, which has found prejudice even with the most horrifying aggravating circumstances. This Court should grant review, reverse the CCA's judgment, and remand for a new penalty-phase trial.

ARGUMENT

I. The Jury Must Have A Chance To Exercise A "Reasoned Moral Response" In Death-Penalty Sentencing.

The Constitution entitles a capital defendant to present mitigating evidence at his penalty-phase trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (footnote omitted)). A "capital sentence" must be "the product of individualized and reasoned moral decisionmaking." *Sawyer v. Whitley*, 505 U.S. 333, 367 (1992) (Stevens, J., concurring).

The justification for this is two-fold. First, the death penalty "is so profoundly different from all other penalties," the Eighth Amendment compels an individualized determination. *Lockett*, 438 U.S. at 605. "[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted). "Any exclusion of the compassionate or mitigating factors stemming from the diverse frailties of humankind that are relevant to the sentencer's decision would fail to treat

all persons as uniquely individual human beings." *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (internal quotation marks omitted).

Second, the individualized determination permits the jury to "express[] its reasoned moral response." *See Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring) (internal quotation marks omitted). "[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." *Kansas v. Carr*, 577 U.S. 108, 119 (2016). This Court's case law is "designed" to allow jurors to "accord mercy if they deem it appropriate, and withhold mercy if they do not." *Id.*; *see Callins v. Collins*, 510 U.S. 1141, 1141–42 (1994) (Scalia, J., concurring) (noting "the sentencer's discretion *not* to impose death (to extend mercy) must be unlimited"); *California v. Brown*, 479 U.S. 538, 562 (1987) (Blackmun, J., dissenting) ("The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure.").

In Mr. Andrus's case, because the mitigating evidence was never presented, the jury never had a "vehicle for expressing its reasoned moral response." *See Franklin*, 487 U.S. at 185 (O'Connor, J., concurring) (internal quotation marks omitted). The jury never heard that his "childhood [was] marked by extreme neglect and privation," in a "family environment filled with violence and abuse." *Andrus*, 140 S. Ct. at 1879. Or that his mother often left him and his siblings to fend for themselves, with little food to eat, while she engaged in drugs and prostitution.

Id. at 1879–80. They did not hear that his mother's boyfriend raped his sister as a child. *Id.* at 1879. Nor did they hear that Andrus was diagnosed with affective psychosis, or, that, during his time in a juvenile detention center, he was prescribed "psychotropic drugs carrying serious adverse side effects" and "spent extended periods in isolation" because he reported hearing voices in his head. *Id.* at 1880.

Compounding the original constitutional violation, the effect of the CCA's judgment is to ensure that a jury *never* has an opportunity to express its reasoned moral response to Mr. Andrus's case. For him, "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *See Lockett*, 438 U.S. at 605. And "[w]hen the choice is between life and death, that . . . is unacceptable." *Id.* The only remedy is a new penalty-phase trial for Mr. Andrus.

As this Court has stated, "capital punishment [should] be imposed fairly . . . or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). To be clear, the Catholic Church abhors the death penalty. Pope Francis and the Texas Bishops have called all Catholics to work toward abolishing it. Fratelli Tutti ¶ 268; Pastoral Statement, TCCB, *Capital Punishment: The death penalty does not fulfill justice* (Oct. 10, 2016).[4] But, if it continues to exist, courts must honor the constitutional requirement that jurors

[4] https://txcatholic.org/capital-punishment-the-death-penalty-does-not-fulfill-justice/.

have the opportunity to weigh mitigation evidence when sentencing a capital defendant.

II. The CCA's Judgment Strips The "At Least One Juror" Standard Of Any Meaning.

Not only was Mr. Andrus denied his right to have the jury hear mitigating evidence, but the CCA has also rewritten this Court's precedent on what is required to show prejudice. Mr. Andrus simply had to show a reasonable probability that his mitigating evidence would have caused at least one juror to choose a lesser sentence. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" actually reached at sentencing. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Though it may be "possible that a jury could have heard [all of Mr. Andrus's mitigation evidence] and still have decided on the death penalty, *that is not the test*." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (emphasis added). If Mr. Andrus's evidence was "sufficient to undermine confidence" in his death sentence, that is enough to invalidate it. *See id.* (internal quotation marks omitted); *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (per curiam) ("We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome." (internal quotation marks and brackets omitted)).

There is no question that the mitigating evidence the jury never heard was sufficient to undermine confidence in the sentence. Mr. Andrus presented overwhelming mitigation evidence in his habeas case. *Andrus*, 140 S. Ct. at 1881. But the CCA held that it was insufficient to show a "reasonable probability that at least one juror would have struck a different balance," as required by *Wiggins*. *See* 539 U.S. at 537. Many of the circumstances here—abuse, neglect, privation, and a degree of mental disability—were present in *Williams v. Taylor* and *Wiggins*, two cases where this Court *did* find prejudice. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000) (evidence of abuse, privation, and borderline mental disability "might well have influenced the jury's appraisal of . . . moral culpability"); *Wiggins*, 539 U.S. at 516–17, 538 (failure to present evidence that neglect, physical and sexual abuse by parents and foster families, and mental disorder prejudiced petitioner).

The CCA relied heavily on aggravating evidence to find that Mr. Andrus was not prejudiced. But aggravating evidence does not automatically negate the effect of unpresented mitigating evidence. A petitioner can satisfy the "at least one juror" standard despite extensive aggravating evidence. *See Williams*, 529 U.S. at 398 ("Mitigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."). In fact, this is often the case. *See id.* at 368 (majority), 418 (Rehnquist, C.J., concurring in part, dissenting in part) (petitioner had stolen two vehicles, set fire to someone's home, "brutally assaulted an elderly woman," set fire to the jail while awaiting trial, stabbed a man, choked two fellow inmates and broke

another inmate's jaw); *Porter*, 558 U.S. at 32 (petitioner committed the murder during a burglary, in a "cold, calculated and premeditated manner" and the "murder was especially heinous, atrocious, or cruel"). As this Court stated in *Rompilla*, the question is not whether it is possible that the jury could have heard everything and still decided on the death penalty. 545 U.S. at 393. The question is whether at least one juror could have heard everything and decided on a lesser sentence. Here, there is more than enough evidence to support that conclusion.

If this Court denies review, or affirms the CCA, then it will be sanctioning the CCA's never-enough-mitigation-evidence approach to death penalty cases, contrary to its own precedent. As noted above, the result will be that, in cases where mitigating evidence is not presented at the original trial, defendants never receive an opportunity for mercy. This is an untenable result when a person faces the death penalty.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, TCCB respectfully asks this Court to grant the petition, summarily reverse, and remand for a new penalty-phase trial.

Respectfully submitted,

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