No. 21-6001

(Capital Case)

In The

Supreme Court of the United States

Terence Tramaine Andrus,

Petitioner,

vs.

Texas,

Respondent

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

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Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

(Capital Case)

Petitioner presents the following questions for review:

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

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

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Introduction

Petitioner previously filed a petition for certiorari with this Court arguing that the Texas Court of Criminal Appeals erroneously denied relief on his state habeas application on the grounds that his trial counsel was ineffective in his investigation and presentation of mitigating evidence. This Court granted that petition for writ of certiorari, holding that Petitioner's trial counsel was ineffective, and ordered the Texas Court of Criminal Appeals to engage in a prejudice analysis.

The Texas Court of Criminal Appeals has now conducted the prejudice analysis ordered by this Court and denied Petitioner relief. Petitioner now brings the instant petition for a writ of certiorari, and argues that the Texas Court of Criminal Appeals erred in conducting an independent review of the facts and conducting a prejudice analysis at all, and this Court's order was in fact a summary order to find prejudice rather than an order to engage in a prejudice analysis. Petitioner also argues that the Texas Court of Criminal Appeals erred both legally and factually in its prejudice analysis even presuming it were empowered to conduct such an analysis.

Respondent argues that this Court's order explicitly required the Texas Court of Criminal Appeals to conduct a prejudice analysis and therefore the Texas Court of Criminal Appeals was necessarily empowered to conduct a record intensive analysis of the facts, and indeed was required to do so by this Court's order. Respondent argues that the Texas Court of Criminal Appeals not only was required to perform a record intensive factual analysis by this Court's order, but that this fact finding function should be granted deference by this Court.

The Texas Court of Criminal Appeals held that Petitioner was not prejudiced by his trial counsel's ineffectiveness because the aggravating evidence was strong and the proposed mitigation evidence was not particularly compelling. Petitioner argues that the Texas Court of Criminal Appeals erred factually by considering the trial record in aggravation and by finding that many of his proposed assertions of fact were incorrect or incomplete. Petitioner likewise argues that the Texas Court of Criminal Appeals erred in its application of this Court's precedents to the facts.

Respondent argues that the Texas Court of Criminal Appeals' factual findings are supported by the record and that Petitioner's proposed facts in mitigation are indeed incorrect or incomplete in many respects. Respondent argues that the Texas Court of Criminal Appeals properly applied this Court's precedents in holding that the proposed mitigation evidence did not rise to the level of establishing prejudice under this Court's precedents.

Respondent requests that this Court deny Petitioner's petition for a writ of certiorari.

Factual and Procedural History

The Underlying Offense and Trial Proceedings

In November of 2012, a jury convicted Petitioner of capital murder for the murders of Avelino Diaz and Kim-Phuong Vu Bui by shooting them with a firearm during the same criminal transaction.[1] *See* Tex. Pen. Code §19.03(a).

The trial evidence generally showed that, on October 15, 2008, a then-unidentified African American man shot Avelino Diaz while trying to "carjack" Diaz in a grocery store parking lot. The assailant then shot at two occupants of a car which was entering the grocery store parking lot. The passenger, Kim-Phuong Vu Bui was killed and her husband, Steve Bui, was wounded.

Petitioner was identified as the suspect through surveillance videos and Crime Stoppers tips, and the police went to New Orleans to interview Petitioner, where he had been arrested on an unrelated charge. The officers then drove Petitioner back to Texas after he waived extradition on an outstanding charge.

Petitioner initially denied involvement in the killings, but ultimately confessed to the officers that he had shot the victims in a recorded statement on his way back to Texas from Louisiana. Petitioner also gave a written statement in which he asserted that he was high on various drugs and alcohol at the time of the commission of the offense.

[1] The recitation of the factual and procedural history of the case prior to this Court's first opinion is drawn from the Texas Court of Criminal Appeals opinion (and concurring opinion) on Petitioner's state application for writ of habeas corpus, a copy of which is attached to the Petition as Appendix C.

Petitioner also essentially contended that he killed the victims in self-defense. Petitioner admitted trying to steal Diaz's car, but asserted that he tried to abandon that attempt after realizing the car was a stick-shift, which he could not drive. Petitioner claimed that Diaz got out of the car, trying to pull a pistol, at which time Petitioner shot Diaz. Petitioner also claimed that as he was trying to flee the scene of Diaz's murder, the Buis tried to run him over with their car, and so Petitioner shot them to protect himself. Petitioner's claims of the defensive nature of the shooting were contradicted by the physical and testimonial evidence.

The jury found Petitioner guilty.

During the punishment phase, the State presented evidence of Petitioner's significant history of criminality and violence. This included juvenile adjudications for felony possession of a controlled substance in a drug-free zone and criminal solicitation to commit felony aggravated robbery with a firearm. This also included testimony that Petitioner committed an aggravated robbery less than a month before the commission of these murders wherein he kicked, beat and threatened his victim with a knife before robbing him. The State also presented evidence of Petitioner's many gang tattoos, which Petitioner, when he later testified, admitted was accurate in that he was a member of the "59 Bounty Hunter Bloods" criminal street gang.

The State also presented evidence that Petitioner, while he was confined in the Texas Youth Commission facility as a result of his juvenile adjudication for criminal solicitation of aggravated robbery, had numerous behavior problems including aggressive and assaultive behavior towards youth and staff. The State also presented

evidence that Petitioner was eventually transferred to the adult prison system to complete his sentence because he did not progress in rehabilitation and because he was so violent and disruptive.

The State also presented significant evidence of Petitioner's disruptive, violent and threatening behavior in the Harris County and Fort Bend County jails while awaiting trial for this offense.

The defense's punishment case presentation included evidence of Petitioner's difficult socioeconomic history, his long standing substance abuse problem and the effect this had on his brain development, and Petitioner's remorse for his crime.

Petitioner's mother, father and Petitioner testified in the punishment phase. The testimony showed that Petitioner was raised by a single mother who sold drugs. Petitioner was left unattended for extended periods of time and left to raise his little brothers and sisters. Petitioner's father was incarcerated through most of his childhood.

Petitioner testified that he had been exposed to drugs as early as age six because his mother sold drugs from their home. Petitioner testified that he rarely had any supervision at home and never had a stable male role model. Petitioner testified that he began using drugs regularly when he was 15. Petitioner testified that he did not like confined spaces or being told what to do, and that he previously acted out when feeling agitated. Petitioner testified that he had recently given his life to God and would no longer act out. Petitioner also testified that he wanted to

use his life as an example to help other inmates avoid making the mistakes he had made.

Dr. John Roache, a pharmacologist and professor of psychiatry who specialized in the effect of alcohol and drug addiction on the human brain and behavior testified about the effect of Petitioner's drug use on his mental development. Dr. Roache testified that by age eleven, Petitioner had begun using marijuana, and that his drug use increased in his teenage years. By nineteen, Petitioner was regularly using PCP and ecstasy and was sporadically using cocaine. Dr. Roache testified that drugs impair the 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.

The defense also presented the testimony of James Martin, a licensed professional counselor at the Fort Bend County Jail who testified that he assisted Petitioner with his behavioral issues at the jail and noted that Petitioner had hallucinations and a poor history of complying with his medication schedule. Martin testified that, although Petitioner met all the criteria of antisocial personality disorder, he had been making progress and showing remorse for the murders.

The special issues enshrined in article 37.071 of the Texas Code of Criminal Procedure were submitted to the jury, and the jury accordingly set punishment at death. Petitioner filed a direct appeal and his conviction and sentence were affirmed on direct appeal.

The State Habeas Proceedings

Petitioner then filed an application for writ of habeas corpus on which the trial court held a hearing. Petitioner raised seven grounds in that application. The trial court entered findings of fact and conclusions of law in which it recommended that the Texas Court of Criminal Appeals grant relief on Petitioner's first ground (namely that his trial counsel was ineffective in their investigation and presentation of mitigating evidence), and deny relief on all other grounds.

The Court of Criminal Appeals denied relief on all grounds, and declined to adopt any of the trial court's findings of fact and conclusions of law as to Petitioner's first ground for relief as they were not supported by the record.

Petitioner argued in the postconviction proceedings that trial counsel was ineffective in its investigation and presentation of mitigating evidence because they could have presented further lay witness testimony which would have painted Petitioner's childhood in a less "sanitized" version and because they could have presented more evidence of the psychological problems Petitioner reported. In this vein, the concurring opinion at the Texas Court of Criminal Appeals noted that although there were records of various psychological diagnoses over the years, "the professionals who had a longer opportunity to observe [Petitioner] generally concluded that [Petitioner] suffered instead from antisocial personality disorder." *Ex parte Andrus*, No. WR-84, 438-01, 2019 WL 622783 at *7, fn. 15 (Tex. Crim. App. Feb. 13, 2019) (mem. op., not designated for publication).

The United States Supreme Court's First Decision on Habeas

Petitioner filed a petition for certiorari with this Court arguing that the *Strickland v. Washington* standard for evaluating ineffective assistance of counsel claims in capital cases was unworkable and should be retooled. This Court's majority (per curiam) opinion did not address that argument, but held that Petitioner's trial counsel was ineffective and remanded the case to the Texas Court of Criminal Appeals with instructions that the Texas Court of Criminal Appeals undertake a prejudice analysis under *Strickland* and detail that analysis in its subsequent opinion. *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020) (per curiam).

The dissent, in which three Justices of this Court joined, argued that although the Texas Court of Criminal Appeals majority opinion had not engaged in a recitation of its reasons for not finding prejudice, it must have concluded that Petitioner was not prejudiced by any ineffectiveness of his counsel because it stated that Petitioner had not shown that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's performance. *Id.*, at 1888 (internal quotation omitted). The dissent also noted that neither Petitioner nor the State of Texas argued that the Court of Criminal Appeals did not consider the prejudice prong, but rather Petitioner argued that the *Strickland* analysis should be modified because too many courts were rejecting *Strickland* claims on the ground that the defendant had suffered no prejudice. *Id.* at 1889.

The dissent also noted that the majority opinion's finding that trial counsel was ineffective relied on a selective reading, or perhaps misreading of the facts as detailed below:

The majority credited Petitioner's version of events that he was only a lookout in an armed robbery, but ignored the fact that Petitioner was identified as the gunman by his clothing by the victim of the robbery, *id.* at 1890, fn. 1;

The majority credited the testimony of a witness for Petitioner and stated that Petitioner's behavior in the juvenile detention facility[2] was "notably mild," but the dissent noted that the majority ignored that this same witness acknowledged that Petitioner engaged in numerous threats and assaults against both other youths and staff, and that the record showed he had to be removed from the general population 77 times, *id.*, fn. 2;

The majority also credited Petitioner's contention that he did not commit the aggravated robbery of a dry cleaner, despite the fact that the owner picked Petitioner out of a photo lineup, and that the dry cleaner testified that the perpetrator of the crime was in the courtroom at trial, though he was too scared to point at Petitioner, and that Petitioner's girlfriend told the police that Petitioner told her he committed this offense, *id.*, fn. 4;

The dissent also pointed out that the majority's crediting Petitioner's claim that he did not rob the dry cleaner is problematic because the basis for this claim –

[2] The juvenile detention facility referenced herein is routinely referred to by Petitioner as "TYC," an acronym for the then Texas Youth Commission, which was charged with housing and rehabilitating youths determined to have engaged in serious delinquent conduct.

that the detective who testified at habeas said there were problems with the photo lineup, is erroneous in that the detective (who did not prepare the photo lineup) only testified that there "can" be reliability problems with such photo lineups, *id.*;

The dissent also noted that the majority's crediting of Petitioner's claim that he did not rob the dry cleaner was problematic because Petitioner's girlfriend told the police Petitioner admitted committing this offense – she later submitted an affidavit stating this was untrue, but when confronted with a recording of her saying exactly that at the habeas hearing, she admitted making this statement and Petitioner's counsel sought to withdraw her affidavit from evidence because they "learned information that caused [them] to doubt [her] reliability," *id.*, fn. 3;

The dissent also pointed out that the majority opinion did not mention that the jury heard that Petitioner, while awaiting trial, had "carried out a reign of terror in jail." *Id.* at 1891. In particular, the dissent pointed out that the majority did not mention that Petitioner had assaulted another prisoner, attacked and injured officers, threw urine in an officer's face, threatened to kill officers and staff, flooded his cell and threw excrement on the walls, and engaged in numerous other disruptive acts. *Id.* The dissent also pointed out that the majority did not mention that while awaiting trial, Petitioner had the words "murder weapon" tattoed on his hands and a smoking gun tattooed on his forearm. *Id.*

In sum, the dissent argued that the Texas Court of Criminal Appeals had weighed the aggravating and mitigating factors and decided that Petitioner was not

prejudiced by any ineffectiveness of his counsel, and the case should not be remanded for further prejudice analysis. *Id.*

The Texas Court of Criminal Appeals' Decision on Habeas on Remand

On remand, the Texas Court of Criminal Appeals, in its five Judge majority opinion, stated that it had in fact engaged in a prejudice analysis in its first review of the habeas petition, and stated that it was reiterating its prior holding that Petitioner had not shown prejudice, and included its reasoning on that issue in this opinion on remand. *Ex parte Andrus*, 622 S.W.3d 892, 893 (Tex. Crim. App. 2021). In so holding, the Texas Court of Criminal Appeals held that the "mitigating evidence is not particularly compelling, and the aggravating evidence is extensive." *Id.* Based on its review of the record, the Texas Court of Criminal Appeals again denied relief on Petitioner's application for writ of habeas corpus and held that Petitioner did not show prejudice from his trial counsel's ineffectiveness. *Id.*

The Texas Court of Criminal Appeals in its opinion on remand also pointed out numerous instances where this Court's majority opinion had relied on factual assertions which were incorrect or incomplete:

The Texas Court of Criminal Appeals held though this Court characterized Petitioner's behavior in the juvenile facility as "notably mild," the jury would have been convinced otherwise as Petitioner made numerous threats and assaults against staff and had to be removed from the general population 77 times, *id.* at 901-02;

The Texas Court of Criminal Appeals also pointed out that this Court's majority opinion credited Petitioner's contention that he had been a "lookout," rather

than the gunman, in an aggravated robbery, but that contention was not supported by the record as the victim identified Petitioner by his clothing as the gunman and the citation to the record this Court's opinion relied on to discount the victim's testimony was actually a citation to testimony of a police officer rather than the victim, *id.* at 903;

Likewise the Texas Court of Criminal Appeals took issue with this Court's crediting Petitioner's contention that he did not rob the dry cleaner and in particular this Court's reliance on testimony of a police officer, that delay in presenting a photo lineup can present reliability problems, because this officer did not testify that the lineup in this case was problematic, only that such lineups can be problematic in general, *id.* at 903-04;

The Texas Court of Criminal Appeals also pointed out that this Court's crediting Petitioner's claim that he had not robbed the dry cleaner was in error because:

> the "Supreme Court relied on the girlfriend's recantation [of her prior statement that Petitioner had confessed to committing this robbery to her] in a habeas affidavit to question [Petitioner'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.' 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 [Petitioner] 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 [Petitioner] had in fact confessed to her that he committed the

> offense. In fact, the girlfriend was offered immunity by the State to testify about the falsity in the affidavit she had given defense counsel.

Id. at 904;

The Texas Court of Criminal Appeals also noted that this Court's majority opinion credited the girlfriend's statement that it was "impossible" that Petitioner robbed the dry cleaner, despite the girlfriend having been found to have perjured her affidavit and the fact that she did not explain how this was "impossible." *Id.*

The Texas Court of Criminal Appeals also pointed out numerous aggravating facts which this Court's majority opinion did not consider, including:

While in jail awaiting trial, Petitioner assaulted another inmate and when an officer intervened, Petitioner said that he did not "give a f----," because he was "getting the needle anyway," *id.*;

While in jail awaiting trial, Petitioner punched a guard twice in the face, *id.*;

While in jail awaiting trial, a broken razor blade and a sharpened key ring were found in Petitioner's cell, *id.*;

While in jail awaiting trial, Petitioner threw urine in an officer's face and did a celebratory dance and taunted the officer, *id.*;

While in jail awaiting trial, Petitioner broke a sprinkler head and flooded his cell and assaulted and threatened to kill officers, *id.* at 905;

While in jail awaiting trial, Petitioner again flooded his cell and covered his cell wall with feces and he fought with and struck officers when they entered his cell, *id.*;

While in jail awaiting trial, Petitioner kicked and struck team members attempting to remove his arms from the panhole in his cell and after being placed in a padded cell, covered the window with feces and threatened to kill officers, *id.*;

While in jail awaiting trial, Petitioner had the words "murder weapon" tattooed on his hands and a smoking gun tattooed on his forearm, *id.*

The Texas Court of Criminal Appeals likewise considered the mitigation presented at the habeas proceeding and concluded that it was "relatively weak in that it was not specific to [Petitioner], was contradicted by other evidence, or overlapped evidence heard by the jury…." *Id.* at 900.

The Texas Court of Criminal Appeals considered the habeas evidence that Petitioner grew up in a bad neighborhood and that several of his family members suffered physical and sexual abuse, that his mother was addicted to drugs and sometimes abandoned her children, and that the various fathers of the children were addicted to drugs and not present. *Id.*

The Texas Court of Criminal Appeals noted that Petitioner testified at trial that he was beaten by his mother and her boyfriends, but in a prior evaluation at the youth detention facility which was admitted during the habeas proceedings, he denied having been physically abused. *Id.* The Texas Court of Criminal Appeals also noted that there was testimony at the trial that Petitioner had helped raise his siblings, that his father was in prison for most of Petitioner's childhood, that he was exposed to drugs by age six, that his mother used drugs and abandoned her children at times, and that Petitioner himself began using drugs at age 15. *Id.*

With regard to his mental health, the Texas Court of Criminal Appeals noted that although there was some evidence in the habeas record that Petitioner suffered from mental health issues, "this evidence, too, deserves some skepticism." *Id.* at 901. The Texas Court of Criminal Appeals pointed out that the record indicated that Petitioner still managed to care for his siblings despite any purported mental health problems, and the habeas record indicated that the juvenile system staff theorized that Petitioner's acting out was "behavioral" rather than stemming from a mental health disorder. *Id.*

The Texas Court of Criminal Appeals also noted that the mental health records were not purely mitigating in that Dr. Brown's report indicated a "disturbing history of animal cruelty" and the juvenile records indicated that Petitioner was diagnosed with the juvenile precursor to antisocial personality disorder. *Id.*

The Texas Court of Criminal Appeals likewise noted the absence of certain mitigating factors, including that Petitioner never alleged that he was sexually abused and in fact consistently denied having been sexually abused. *Id.*

The Texas Court of Criminal Appeals majority opinion concluded that "[Petitioner] has not shown that the balance of aggravating and mitigating evidence would shift enough to create a reasonable probability that the outcome of [Petitioner's] sentencing hearing would have been different. *Id.* at 907.

The Texas Court of Criminal Appeals also issued a dissenting opinion, in which four Judges joined, wherein the dissenters argued that the majority erred because, in the dissenters' reading of this Court's majority opinion, this Court had already

decided that Petitioner was prejudiced. *Id.* at 909. Specifically, the dissenters stated that they were "not free to 're-characterize' [the mitigation] evidence contrary to the United States Supreme Court's holding … [and] [b]ased upon the Supreme Court's characterization of the mitigation evidence in this case, [Petitioner] has met [his burden to establish prejudice]." *Id.*

Petitioner now brings the instant Petition for certiorari to this Court arguing that this Court should overrule the Texas Court of Criminal Appeals' holding that Petitioner was not prejudiced by his trial counsel's ineffectiveness in finding and presenting mitigating evidence.

Summary of the Argument

The Texas Court of Criminal Appeals was ordered to conduct a record intensive prejudice analysis under the *Strickland* standard by this Court's order. This order, by its terms, required the Texas Court of Criminal Appeals to make factual determinations, which it did. Those factual determinations are supported by the record and not erroneous purely because they are not favorable to Petitioner. They should be accepted and given deference by this Court. The Texas Court of Criminal Appeals' application of the law to the facts is likewise supported by the record and in keeping with this Court's precedents. The Texas Court of Criminal Appeals' holding that Petitioner has not shown prejudice should be undisturbed and this Court should deny Petitioner's petition for a writ of certiorari to the Texas Court of Criminal Appeals.

Argument

The Court of Criminal Appeals' holding that Petitioner was not prejudiced by his trial counsel's ineffectiveness is supported by the trial and habeas record and in keeping with this Court's precedent and should be affirmed by this Court

The Texas Court of Criminal Appeals, per this Court's remand order, reviewed the evidence in mitigation and aggravation in this case and held that Petitioner had not met his burden to show that he had been prejudiced by his trial counsel's ineffectiveness, and detailed its reasoning for this holding. *Andrus*, 622 S.W.3d at 893.

Petitioner now argues that the Texas Court of Criminal Appeals erred by: (1) engaging in any review of the facts at all because this Court's per curiam opinion precluded any such review; (2) "re-characterizing" the mitigation evidence as weak and the aggravating evidence as compelling; and (3) misapplying the law to the facts in its application of this Court's *Wiggins* and *Williams* precedents to the facts. Pet. at pp. 10-11, 38.

The Law of Ineffective Assistance of Counsel with Regard to Mitigation Evidence Generally

This Court established the now well-known principle for examining claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to obtain relief on such a claim, the petitioner must show that his counsel's performance was deficient and that deficiency prejudiced his defense. *Id.* at 687. Deficient performance is that which falls below an objective standard of reasonableness. *Id.* at 688.

This 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, 123 S.Ct. 2527 (2003). In *Wiggins*, on which the Texas Court of Criminal Appeals relied in part, and which this Court's prior per curiam opinion cited, this 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, this 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, this Court held that the totality of the evidence should be considered including that adduced at trial and during the habeas proceedings. *Id.* at 536. This 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. This 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.

The Question of whether Petitioner was prejudiced by his trial counsel's ineffectiveness is live, and the Texas Court of Criminal Appeals was not precluded from considering that question as Petitioner implies, but was instead expressly required by this Court's order to consider that question

Before delving into a fact intensive analysis of the mitigating and aggravating evidence in this case, Petitioner's contention that this Court has already decided the issue of prejudice must be considered.

This Court, in its prior per curiam opinion in this case, held that Petitioner's trial counsel was ineffective under *Strickland*, but held that "the question remains whether counsel's deficient performance prejudiced [Petitioner]." *Andrus*, 140 S.Ct., at 1885, citing *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052. This Court reiterated the *Wiggins* standard for making that determination, namely that "prejudice exists if there is a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether [Petitioner] deserved the death penalty as opposed to a lesser sentence." *Id.* at 1885-86, citing *Wiggins*, 539 U.S. at 536, 123 S.Ct. 2527. Specifically with regard to the Texas death penalty scheme at issue here, this Court held that because the Texas death penalty statute requires a unanimous verdict that there is not sufficient mitigating evidence which would merit a lesser sentence than death in order to impose a death sentence, prejudice requires only "a reasonable probability that at least one juror would have struck a different balance" regarding [Petitioner's] "'moral culpability.'" *Id.* at 1886, citing *Wiggins*, 539 U.S. at 537-38, 123 S.Ct. 2527, and Tex. Code Crim. Proc., art. 37.071, §2(e)(1).

This Court's per curiam opinion held that the record "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 [Petitioner's] 'moral culpability' as to establish *Strickland* prejudice." *Id.* at 1887, citing *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 1515 (2000)) (emphasis added). This Court's order to the Texas Court of Criminal Appeals stated that "there is significant question as to whether the Court of Criminal Appeals properly considered the prejudice prong under *Strickland*. We thus … remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion." *Id.* at 1887.

Petitioner argues that this Court's prior per curiam opinion decided the issue of prejudice in Petitioner's favor and the Texas Court of Criminal Appeals was bound to simply reiterate that holding as an exercise in "vertical stare decisis." Pet. at pp. 10-11, 38. Petitioner argues that this Court's per curiam opinion "enjoined the CCA to follow the law. Because the CCA did not do so, Andrus respectfully submits that this Court should summarily reverse upon determining that Andrus was prejudiced by trial counsel's deficient performance." Pet. at p. 38.

The dissenters at the Texas Court of Criminal Appeals apparently also believed that the Texas Court of Criminal Appeals was not empowered to evaluate the facts and make an independent prejudice determination: "[w]e are bound by the United States Supreme Court's characterization [of the mitigation evidence] … [b]ased upon the Supreme Court's characterization of the mitigation evidence in this case, [Petitioner] has met [his burden to establish prejudice]. *Andrus*, 622 S.W.3d at 909.

Respondent contends that this Court's per curiam opinion means exactly what it says; that there is a "question" as to whether Petitioner was prejudiced, and that the Texas Court of Criminal Appeals was ordered to engage in an explicit prejudice analysis to answer that question. *Andrus*, 140 S.Ct., at 1887.

This conclusion is buttressed by the fact that this Court has previously held, in a case where it found *Strickland* ineffectiveness, but that the question of prejudice from the lack of presentation of available mitigating evidence had not been properly addressed by the state court, that:

> A proper prejudice analysis under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. It is for the state court – and not for … this Court … to undertake this reweighing in the first instance.

Sears v. Upton, 561 U.S. 945, 956, 130 S.Ct. 3259, 3267 (2010).

Following this Court's remand in *Sears*, the state court then did in fact reexamine and reweigh the evidence, despite the petitioner's claim in that case (as in this case) that it was not empowered to do so. *Sears v. Humphrey*, 751 S.E.2d 365, 370-71 (Ga. 2013) cert. denied 572 U.S. 1118, 134 S.Ct. 2292 (2014). The state court in *Sears* held on remand that its review of the record established both that trial counsel was effective in his examination and presentation of mitigating evidence, and even assuming *arguendo* that this was incorrect, that its review of the record did not establish prejudice. *Id.* at 377. This Court denied the subsequent petition for writ of

certiorari from the state court's decision on remand. *Sears*, 572 U.S. 1118, 134 S.Ct. 2292 (2014).

The Texas Court of Criminal Appeals (or at least a majority of it) has now engaged in the explicit prejudice analysis ordered by this Court and rendered an opinion answering the question of whether Petitioner was prejudiced and expounding upon its reasoning for its holding. This Court is now in a position to review that ruling, which it ordered the Texas Court of Criminal Appeals to conduct. Respondent argues that this Court should now conduct that review in keeping with its prior opinion's dictates and its precedent in such proceedings.

The Texas Court of Criminal Appeals conducted a fact intensive balancing of the aggravating and mitigating factors in this case, as ordered by this Court and determined that Petitioner was not prejudiced. This holding was supported by the record and should be affirmed by this Court

The Texas Court of Criminal Appeals majority opinion engaged in a record intensive analysis of Petitioner's claim of prejudice and held that Petitioner was not prejudiced by his counsel's ineffectiveness because the aggravating evidence was extensive, whereas the proposed mitigating evidence was "not particularly compelling." *Andrus*, 622 S.W.3d at 893.

Petitioner argues that the Texas Court of Criminal Appeals' majority opinion incorrectly analyzed and weighed the factors in aggravation and mitigation and should be reversed on that basis. Pet. at pp. 11-33.

Respondent argues that the Texas Court of Criminal Appeals did properly weigh these facts and Petitioner's recitation of the facts is incorrect in some respects and incomplete in others. This Court's previous per curiam opinion in this case, on

which Petitioner relies for the characterization of his proposed mitigation evidence, likewise relies on several factual assertions Petitioner made which are inaccurate, and further, that opinion was written with an eye toward reviewing trial counsel's seeking out and presenting potential mitigating evidence (ineffectiveness) rather than the potential impact of that potential mitigating evidence on the jury (prejudice).

Petitioner argues that the Texas Court of Criminal Appeals erred factually because it did not give what he considers due consideration to the potential to challenge the State's aggravating evidence and did not give enough weight to his new potentially mitigating evidence. Pet. at pp. 12-13. Petitioner's contention, and indeed this Court's characterization of both the State's aggravation case and the potential new mitigation evidence, are based on several incorrect or incomplete assertions of fact.

This Court's precedent makes clear that the evaluation of whether Petitioner was prejudiced should take into account the entirety of the record. Petitioner's claim, and this Court's prior per curiam opinion on which he relies, do not take account of the entirety of the record, but rather leave out both significant aggravating factors that the jury heard, and that they did not hear, but would hear were Petitioner's new evidence presented to them. Further, they leave out significant facts which would call into question the value of Petitioner's new mitigation evidence.

Petitioner relies firstly on the claim that the jury would have heard that the victim in the aggravated robbery he went to juvenile detention for did not identify him as the gunman. Pet. at p. 13. This is untrue as is detailed above – she identified

the gunman as wearing clothing matching Petitioner's and Petitioner was the only person found amongst the perpetrators wearing that clothing. *Andrus*, 622 S.W.3d at 902-03.

Petitioner next argues that he was prejudiced because the jury heard a "misleading portrait" of the juvenile detention facility. Pet. at p. 14. While it is true that trial counsel did not contest the "portrait" of TYC presented by the prosecution, this also resulted in the jury not seeing all of the records of Petitioner's time at TYC. The jury did not see the records showing that Petitioner was removed from the general population 77 times. *Andrus*, 622 S.W.3d at 901. The jury did not hear that Petitioner engaged in numerous assaults on staff and other youths. (5WRR201-04). The jury did not see records showing that Petitioner was a gang leader in TYC. (5WRR201-04).

It should also be noted that the testimony regarding TYC which Petitioner relied on at the habeas hearing came from a former ombudsman for TYC, who by his own admission, had never met Petitioner and had absolutely no idea if any of the complaints he made regarding TYC had any effect on Petitioner. (5WRR199, 231). Considering that this witness had nothing to contribute regarding Petitioner's circumstances, it is questionable at best whether his testimony would have been admitted under Texas state evidentiary rules.[3] The potential mitigating impact of such testimony is questionable, even were it admitted.

[3] Evidence must be relevant to be relevant to be admitted under Texas evidentiary rules, and the definition of relevance requires that the evidence must have a tendency to make a fact more or less probable and that fact must be of consequence in determining the action. Tex. R. Evid. 401.

Petitioner, and this Court's per curiam opinion, also relied on an incorrect and incomplete recitation of the facts regarding Petitioner's committing a robbery of a dry cleaners. Pet. at pp. 16-17. Petitioner argues that the claim that Petitioner committed this aggravated robbery "could have been vigorously attacked (if not excluded outright)." Pet. at p. 17. This Court's per curiam opinion likewise treated Petitioner's guilt of this offense as questionable. *Andrus*, 140 S.Ct. at 1885.

This claim does not stand up to scrutiny because the owner picked Petitioner out of a photo lineup, the owner testified that the perpetrator of the crime was in the courtroom at trial, though he was too scared to point at Petitioner, and Petitioner's girlfriend told the police that Petitioner told her he committed this offense. *Andrus*, 622 S.W.3d at 903.

Petitioner's only basis for "vigorously attack[ing]" this evidence was that Petitioner's girlfriend disavowed telling the police that Petitioner admitted committing this offense, and that a detective who did not prepare the photo lineup said that delays in photo lineup preparation and presentation "can" cause reliability problems. This is, even taking these items at face value, a highly dubious basis on which to argue that this aggravating evidence could have been "vigorously attacked," much less "excluded outright."

Of course, as the dissent at this Court and the Texas Court of Criminal Appeals both noted, these claims cannot be taken at face value. This is firstly because the girlfriend's disavowal of the statement that she told the police Petitioner admitted committing this robbery was false. (8WRR57; State's Rebuttal Ex. 1).

The girlfriend was confronted with a recording wherein she told the police that Petitioner admitted committing this offense, and admitted on the stand that her affidavit denying making that statement was perjured. (8WRR57; State's Rebuttal Ex. 1). Necessarily, the primary basis on which Petitioner relied to contest his guilt of this offense was a case of perjury and cannot be relied upon by this Court, and certainly would not have been credited by a jury.

Had Petitioner's trial counsel presented this same witness to give this same testimony at trial, he would have found himself in the same position as habeas counsel – disavowing that testimony, except that he would have been doing so in front of the jury rather than the habeas judge. It stands to reason that presenting perjured testimony and getting caught red handed in front of the jury would have done nothing to undermine the prosecution's evidence that Petitioner committed this offense. No doubt it would not only have failed to convince the jury of Petitioner's innocence of this offense, it would have convinced them both of Petitioner's guilt and destroyed any credibility he might have had in front of the jury.

Petitioner's second basis for contesting his guilt of this offense was purported reliability problems with the photo lineup shown the owner of the dry cleaner. Pet. at pp. 17-18. Petitioner's only evidence that there was in fact a reliability issue with this photo lineup is the testimony of a detective who did not prepare it, and did not present it to the victim, who only testified that there "can" be reliability issues with delays in presentation of photo lineups. (8WRR31). That detective, who had no personal knowledge of how this photo lineup was prepared, nor how it was presented,

spoke only in general terms and never testified that there actually were any reliability problems with the photo lineup in this case.[4] (8WRR24). In sum, Petitioner had no evidence that the photo lineup in this case could have or would have been excluded at trial.[5]

It bears mentioning that the Texas Court of Criminal Appeals was so unmoved by Petitioner's claim that the photo lineup was unduly suggestive that the Court of Criminal Appeals included a photo copy of that lineup in its published opinion. *Andrus*, 622 S.W.3d Appx. 1. Any state law evidentiary complaint regarding the admission of the photo lineup would have been decided by the Texas Court of Criminal Appeals. Because the Texas Court of Criminal Appeals obviously felt that this photo lineup was properly admitted, Petitioner's claim that he could have excluded this piece of evidence is simply incorrect.

Petitioner also contends that the Texas Court of Criminal Appeals did not credit his proposed mitigation evidence which would have painted his mother in a far more negative light than that which appeared at trial. Pet. at pp. 18-19, 23. Petitioner did present habeas evidence to this effect, but as the Texas Court of Criminal Appeals noted, it was largely the same as Petitioner's testimony, but more

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[4] This testimony also likely would not have been presented to a jury being subject to a relevance objection under state evidentiary rules because the witness had no personal knowledge. Tex. R. Evid. 401.

[5] Petitioner makes reference to the prosecution "conceal[ing]" a witness's unreliability at trial – presumably Petitioner's girlfriend's. Pet. at p. 18. Needless to say, this claim is false – Petitioner's girlfriend did not execute a perjured affidavit until years after the trial, and this was in support of Petitioner's habeas application. 10WRR Ex. 139. The prosecution could not possibly have possessed the clairvoyance to know that Petitioner's girlfriend would perjure herself to benefit Petitioner years after the trial, and the prosecution certainly had no hand in any such event, as is clear enough by virtue of Petitioner presenting no evidence of any such wrongdoing.

in depth. *Id.* at 906-07. As the Texas Court of Criminal Appeals noted, it was in this sense duplicative. As such, it could have been subject to state evidentiary rules objections. Further, were we to presume that Petitioner's mother would not concede that she was a drug addled prostitute, as indeed she did not present herself at trial, evidence that she was addicted to drugs and engaged in prostitution would have been contested and there is no guarantee that the jury would have believed the testimony of others that she was engaged in such activities and disbelieved her denials. Thus, while the failure of trial counsel to uncover and present these witnesses goes to trial counsel's ineffectiveness, the question of whether Petitioner was prejudiced by his trial counsel's failure to do so is a closer question – is it not just as plausible that the jury would be offended by these attacks on Petitioner's mother as that they would be convinced she was a drug addict and a prostitute and consider that fact mitigating?

Petitioner also argues that the Texas Court of Criminal Appeals erred in its consideration of the purported facts regarding Petitioner's mental health. Pet. at pp. 24-33. Firstly, Petitioner takes issue with the Texas Court of Criminal Appeals' citation to and reliance on an evaluation conducted by a Dr. Brown. Pet. at pp. 24-26.

Dr. Brown was a psychologist who was retained by trial counsel to evaluate and potentially testify on Petitioner's behalf. (10WRR174, State's Ex. 32 at p. 4). Trial counsel ultimately chose not to call Dr. Brown as a witness because his report was problematic for the defense both in terms of his methodology/conclusions and the fact that he related that Petitioner had engaged in numerous acts of sadism on

animals. (10WRR174, State's Ex. 32 at p. 4). The Texas Court of Criminal Appeals cited Dr. Brown's report as an example of how the potential psychological evidence which Petitioner now argues would have been entirely mitigating was in fact far from clearly mitigating, but rather double-edged and sometimes even entirely aggravating. *Andrus*, 622 S.W.3d at 901.

Petitioner argues that Dr. Brown's report should not be considered for any reason because it was not mitigating and Dr. Brown did not testify – even were this contention credited, we must certainly consider the testimony of the expert Petitioner did call.

The expert Petitioner called at the habeas hearing, and presumably is to be held as an example of the psychological testimony Petitioner wants this Court to consider the potential impact of in front of a jury, Dr. Hammel, testified that portion of the report by Dr. Brown, the psychiatric expert retained by Petitioner's trial counsel, which indicated Petitioner might have schizophrenia, "is not accurate." (7WRR64). 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 Petitioner was over-reporting his psychiatric problems. (7WRR65).

Hammel testified that where Petitioner had told Dr. Brown how he had killed a puppy and had tortured other animals, (i.e. putting firecrackers in cats' anuses) Petitioner admitted some of those acts to him but minimized them and denied others.[6]

[6] Petitioner argues that the claim that Petitioner tortured animals was "thoroughly debunked" (Pet. at p. 26) by Hammel's testimony, but in fact Hammel did no such thing – he detailed that Petitioner reported killing two dogs though both purportedly now by accident (though how one accidentally

(7WRR67-68). Hammel testified that although Petitioner 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 Petitioner – 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 Petitioner – 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 [Petitioner] has a primary psychotic disorder." (7WRR88). Hammel further clarified his diagnosis to say, "I do think [Petitioner] 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 Petitioner, but could not say for certain if the diagnosis was appropriate. (7WRR94).

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drowns a dog, he did not explain), and killing birds, but Petitioner denied putting firecrackers in cats' anuses during their interview. (7WRR67-68). This hardly qualifies as a thorough debunking.

In sum, the psychological expert Petitioner called at the habeas hearing took the position that Petitioner does not have a serious psychiatric disorder, but he might have antisocial personality disorder. The expert that was not called, Dr. Brown, would have testified Petitioner had schizophrenia. Petitioner's habeas expert would have testified Petitioner "accidentally" killed two dogs, including "accidentally" drowning one of them, and killed birds. Dr. Brown would have testified that Petitioner killed various animals and put firecrackers in cats' anuses and tried to burn down his mother's house.

Are either of these experts particularly mitigating in their testimony? Are they not both at least as aggravating as mitigating? At least Dr. Brown would have testified Petitioner might be schizophrenic. Hammel's testimony that Petitioner is not schizophrenic but might have antisocial personality disorder is hardly more helpful – in fact, this proposed testimony is plainly aggravating, rather than mitigating.

Petitioner nonetheless takes issue with the Texas Court of Criminal Appeals' skepticism that Petitioner had a serious mental illness[7] – but this conclusion was firmly grounded in the record – as we have just seen, his own habeas expert testified Petitioner did not have a serious mental illness. (7WRR90, 94).

In this vein, Petitioner again relies on an incomplete recitation of the facts when he states that his jail records indicate he was given all manner of medications

[7] Pet. at pp. 30-33.

in relation to mental health. Pet. at p. 32. While it is true that Petitioner was given numerous such medications, a complete reading of the record shows numerous notations that Petitioner was engaged in drug seeking behavior and he himself stated that he tried to "sleep his time away" in TYC. (7WRR95-97). Therefore, the claim that inappropriate medication is the root of Petitioner's misdeeds, and that presenting this claim to the jury would have been uniformly mitigating is inaccurate and not supported by a full reading of the record.

Petitioner's claim that the Texas Court of Criminal Appeals incorrectly characterized his proposed mitigation evidence is based on incomplete and inaccurate recitations of the facts. The Texas Court of Criminal Appeals' opinion simply takes account of the entirety of the aggravating factors which Petitioner would choose to ignore and also considers the double-edged nature of much of his proposed mitigation evidence. The Texas Court of Criminal Appeals was empowered to make factual findings and consider the entirety of the facts. Its factual findings are supported by the record and should be undisturbed.

Further, the juries and their verdicts are sacred to our principles of ordered government and to the principle of the citizenry providing checks on government. An actual jury considered a real set of facts presented to it and rendered a verdict in this case. That verdict should be granted great deference and not be disturbed lightly. More to the point, it should not be disturbed based on speculation about what effect a set of contested (not to mention incomplete and inaccurate) purported facts could

have had on a hypothetical juror. The Texas Court of Criminal Appeals' findings of fact are supported by the record and should remain undisturbed.

Petitioner's complaints about the Texas Court of Criminal Appeals' application of the law to the facts should likewise be rejected because the Texas Court of Criminal Appeals properly applied this Court's precedents to the facts at bar in denying Petitioner habeas relief.

The Texas Court of Criminal Appeals correctly applied this Court's precedents, and followed this Court's explicit instructions in denying Petitioner habeas relief and that holding should not be disturbed

This Court ordered the Texas Court of Criminal Appeals to "address *Strickland* prejudice in light of the correct legal principles articulated above." *Andrus*, 140 S.Ct. at 1887. The principles this Court referred to were citations to *Wiggins*, *Williams* and *Sears*. *Id.*, citing *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527; *Williams*, 529 U.S. at 398, 120 S.Ct. 1495 and *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259 (2010).

The Texas Court of Criminal Appeals undertook this review, and relied principally on this Court's opinion in *Williams* as a guide. *Andrus*, 622 S.W.3d at 905-07. The Texas Court of Criminal Appeals noted that it relied principally on *Williams* (as opposed to *Wiggins*) because this Court's per curiam opinion criticized the previous prejudice analysis conducted by a minority of the Texas Court of

Criminal Appeals for relying too closely on *Wiggins*. *Andrus*, 622 S.W.3d at 905, fn. 125, citing *Andrus*, 140 S.Ct. 1886, fn. 6[8].

In undertaking that review, the Texas Court of Criminal Appeals noted that although the evidence in this case compared unfavorably to that in *Williams*, the Texas Court of Criminal Appeals was careful to note that it had not relied on a mechanical application or comparison of the facts between this case and *Williams*. The Texas Court of Criminal Appeals explained its analysis thusly:

> [W]e do not come to our conclusion [that Petitioner has not shown prejudice] because [Petitioner's] case compares unfavorably to *Williams*. Our independent review reveals that [Petitioner's] proposed new mitigating evidence is relatively weak and that some of that sort of evidence – about his family and background – was presented at trial. Moreover, much of [Petitioner'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 [Petitioner] has not shown that the balance of aggravating and mitigating evidence would shift enough to create a reasonable probability that the outcome of Petitioner's sentencing hearing would have been different.

Andrus, 622 S.W.3d at 906-07.

Respondent argues that the Texas Court of Criminal Appeals properly applied this Court's precedents in analyzing Petitioner's claim of prejudice. The Texas Court

[8] The footnote referenced in this Court's per curiam opinion criticized the Texas Court of Criminal Appeals' concurring opinion's reliance on *Wiggins* by saying, "The concurring opinion seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins* … we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S.Ct. 1886, fn. 6.

of Criminal Appeals' holding that Petitioner did not show prejudice should be affirmed.

While this Court cautioned that mechanically comparing Petitioner's circumstances to that of those in *Wiggins* is not the proper way to evaluate Petitioner's claim of prejudice, it is nonetheless proper for the Texas Court of Criminal Appeals and other state courts to look to this Court's precedent to aid them in determining whether a Petitioner has shown prejudice in a given case.

As is to be expected in an individualized, record-intensive analysis, this Court's precedents are not uniformly in favor of a finding that a petitioner has not shown prejudice, nor that a petitioner has shown prejudice. However, there is precedent from this Court which closely mirrors the proceedings here, and which supports Respondent's argument that the Texas Court of Criminal Appeals did not err in holding that Petitioner had not shown prejudice. *See, e.g.*, *Sears*, 561 U.S. 945, 956, 130 S.Ct. 3259, 3267 (2010) (remanding case to state court for examination of petitioner's claim of ineffectiveness and prejudice in investigation and presentation of mitigating evidence, which the state court conducted and found no ineffectiveness nor prejudice after examining the record and this Court denied the subsequent petition for writ of certiorari to review that decision); *Sears*, 751 S.E.2d 365, 370-71 (Ga. 2013) cert. denied 572 U.S. 1118, 134 S.Ct. 2292 (2014); *Wong v. Belmontes*, 558 U.S. 15, 26-28, 130 S.Ct. 383, 389-91 (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); *but see Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447 (2009) (reversing death sentence where counsel did not interview witnesses or review documents and presented no mitigation though defendant was a war hero with history of mental health issues); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005) (reversing a death sentence on ineffective assistance grounds where defendant and his family were unhelpful in finding mitigating evidence and counsel did not review prior convictions before trial).

There is also precedent from the lower federal courts considering federal habeas proceedings addressing an evaluation of prejudice which likewise support the conclusion that the Texas Court of Criminal Appeals did not err in holding that Petitioner did not show prejudice. *See, .e.g.*, *Floyd v. Filson*, 949 F.3d 1128, 1140-42 (9th Cir. 2020) cert. denied 141 S.Ct. 660 (2020) (holding petitioner was not prejudiced where evidence of fetal alcohol syndrome and other mental health issues where this evidence was cumulative and the aggravating evidence weighty); *Trevino v. Davis*, 861 F.3d 545, 549-51 (5th Cir. 2017) cert. denied 138 S.Ct. 1793 (2018) (holding that petitioner was not prejudiced by failure to introduce evidence he suffered from fetal alcohol syndrome where the introduction of such evidence would have been "double edged" in that it would also have introduced acts of violence to the jury which they had not previously heard).

The Texas Court of Criminal Appeals undertook a record intensive review of Petitioner's case as it was ordered to by this Court. It came to the conclusion that Petitioner was not prejudiced because his proposed mitigating evidence was not

uniformly mitigating, but in many places actually aggravating, and was duplicative of evidence already introduced in other respects. The Texas Court of Criminal Appeals' legal conclusion that Petitioner has not shown prejudice is supported by the trial and habeas record and in keeping with precedent from this Court and the lower federal courts. This Court should conclude that the Texas Court of Criminal Appeals did not err in holding that Petitioner has not shown prejudice and deny Petitioner's petition for a writ of certiorari to the Texas Court of Criminal Appeals.

Conclusion

It is respectfully submitted that Petitioner's petition for certiorari should be denied.

Respectfully submitted,

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