CAPITAL CASE

No. 21-6001

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

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

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INTEREST OF AMICUS CURIAE[1]

The Roderick & Solange MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights, and for a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning habeas corpus, unlawful confinement, and the treatment of incarcerated people. MJC has an interest in the sound

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

and fair administration of the criminal justice system. MJC submits this brief to address the important interests at stake given the Texas Court of Criminal Appeals' antipathy toward this Court's early decision in this case.

INTRODUCTION

Lower courts do not get to decide whether to respect this Court's decisions. In the unusual instance in which a lower court gives only lip service to this Court's analysis in a case, this Court has recognized the importance of summary intervention to preserve its supremacy. *See Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (summarily reversing the Texas Court of Criminal Appeals' remand decision where "the similarity of language and content between" its reversed analysis and its new analysis indicated it had not taken this Court's opinion seriously).

That importance goes well beyond the merits of any particular case. It is a basic precept of our judicial system that "[f]ederal and state courts are absolutely bound by vertical precedents." Bryan A. Garner, et al., THE LAW OF JUDICIAL PRECEDENT 27 (2016). That command is "absolute and requires lower courts to follow applicable Supreme Court rulings in every case." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc). And that command is at its zenith when the vertical stare decisis originates from a mandate in the very case at issue. *See Copart, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 495 F.3d 1197, 1200 (10th Cir. 2007) (Gorsuch, J.). Indeed, as the Chief Justice recognized on the last occasion in which the Texas Court of Criminal Appeals (TCCA) openly transgressed one of this Court's decisions, the need for

intervention in these circumstances exists even irrespective of one's agreement with the Court's initial decision to remand the case. *Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring). The fact that the TCCA "repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance" justified summary reversal. *Id.*

The TCCA majority's opinion in this case requires the same response. Applying *Strickland*'s first prong to this very record, this Court reasoned that:

> (i) petitioner's trial counsel "performed almost no mitigation investigation" and "overlook[ed] vast tranches of mitigating evidence" that would have been "compelling" and "powerful";
>
> (ii) due to counsel's failure to investigate, the "little evidence [he] did present backfired by bolstering the State's aggravation case"; and
>
> (iii) counsel's failure to investigate meant he "could not, and did not, rebut critical aggravating evidence."

Andrus v. Texas, 140 S. Ct. 1875, 1881-82, 1884 (2020) (per curiam). On these bases, the Court found constitutional deficiency and remanded for consideration of *Strickland*'s prejudice prong "in a manner not inconsistent with [its] opinion." *Id.* at 1887.

On remand, the TCCA found no prejudice by adhering to its earlier view that:

> (i) counsel presented "much of" the mitigating evidence and any overlooked evidence was "not particularly compelling" or "relatively weak";

(ii) any failure to investigate was beside the point because new evidence would be "double-edged";

(iii) counsel's inability to rebut critical evidence was apparently not pertinent, and therefore not even addressed.

See Pet. App. 2-3, 5.

It is worth a pause to contrast those (i)'s, (ii)'s and (iii)'s. As four dissenting TCCA judges put it—and the TCCA majority did not even contest—the decision below openly flouts reasoning "integral to" this Court's opinion and assumes the liberty "to 're-characterize' that evidence contrary to" this Court's decision. Pet. App. 11 (Newell, J., dissenting). In other words, their colleagues apparently did not consider themselves "bound by" this Court. *Id.*

The TCCA majority has all but challenged this Court to summarily reverse it. Its antipathy toward this Court's prior decision, and the resulting institutional concerns that go well beyond this case, demand summary intervention.

ARGUMENT

I. The TCCA Majority's Indifference To This Court Requires Summary Reversal.

The last time this Court was forced to summarily intervene in this manner was strikingly similar to this case. In *Moore v. Texas*, 137 S. Ct. 1039 (2017), this Court likewise reversed the TCCA after it denied relief to a petitioner. This Court's bottom-line holding was that the TCCA erred in its "adherence to superseded medical standards and its reliance" on certain considerations, known as the *Briseno* factors, when

evaluating intellectual disability. *Id*. at 1048. In arriving at that conclusion, the Court departed from the TCCA's evaluation of the record in several ways. In the Court's view, for instance, the TCCA "overemphasized [the petitioner's] perceived adaptive strengths"; mistakenly relied on adaptive strengths the petitioner had developed while in prison; improperly discounted the petitioner's "childhood abuse" and "traumatic experiences"; and incorrectly relied on certain lay misconceptions about intellectual disability. *Moore v. Texas*, 139 S. Ct. 666, 668-69 (2019). This Court "remanded the case 'for further proceedings not inconsistent with [its] opinion.'" *Id* at 670 (quoting *Moore*, 137 S. Ct. at 1053).

On remand, the TCCA acknowledged this Court's bottom-line holding, stating that it would follow suit and "abandon reliance on the *Briseno* evidentiary factors." *Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018). Upon saying so, however, the TCCA reverted to its earlier view, reasoning that "a vast array of evidence in this record is inconsistent with a finding of intellectual disability." *Id.* at 555. Returning to the characterization of the evidence in its earlier decision, the TCCA again detailed the petitioner's "apparent adaptive *strengths*"; relied "heavily upon adaptive improvements made in prison"; and resorted to lay misconceptions rather than clinical standards. *Moore*, 139 S. Ct. at 670-71 (emphasis in original). On that rationale, the TCCA concluded that it had complied with this Court's mandate and denied relief.

This Court summarily reversed. It observed that the TCCA's analysis of the record not only disregarded "the evidence relied upon by the trial court," but was "difficult to square with" the reasoning provided in

this Court's prior opinion. *Id.* Although the TCCA's opinion contained "sentences here and there suggesting other modes of analysis consistent with" this Court's guidance, "when taken as a whole and when read in the light both of [this Court's] prior opinion and the trial court record," the TCCA's opinion "rest[ed] upon analysis too much of which too closely resemble[d] what [this Court] previously found improper." *Id.* at 672. Moreover, "extricating that analysis from the opinion [left] too little that might warrant reaching a different conclusion than did the trial court." *Id.*

So too here. The TCCA openly rejected virtually all of the analysis upon which this Court held that trial counsel was deficient. According to this Court, petitioner's trial counsel "performed almost no mitigation investigation" and "overlook[ed] vast tranches of mitigating evidence" that would have been "compelling" and "powerful." *Andrus*, 140 S. Ct. at 1881. But as the TCCA majority told it, counsel presented "much of" the evidence and anything overlooked was "not particularly compelling" or "relatively weak." Pet. App. 2-3, 6. According to this Court, counsel's failure to investigate caused the "little evidence [he] did present" to "backfire[] by bolstering the State's aggravation case." 140 S. Ct. at 1881. But as the TCCA majority reasoned, counsel's failure to investigate was beside the point because new evidence would be "double-edged." Pet. App. 3.

Other analysis critical to this Court's conclusion was completely ignored. For instance, this Court devoted a full section of its opinion to the ways in which counsel's failure to investigate meant he "could not, and did not, rebut critical aggravating evidence." 140

S. Ct. at 1884. Yet—despite resolving a prejudice inquiry that directly asks about the impact of counsel's deficiency—the TCCA majority did not discuss counsel's failure to rebut the aggravating evidence at all. In fact, paradoxically, the TCCA relied upon much of that same unrebutted aggravating evidence for its holding that petitioner was not prejudiced by counsel's deficient performance. *Compare, e.g.*, *id.* ("[W]ith sufficient understanding of the violent environments [petitioner] inhabited his entire life, counsel could have provided a counternarrative of [his] later episodes in prison."), *with, e.g.*, Pet. App. at 8-9 (devoting five paragraphs of analysis to the allegedly aggravating nature of [petitioner's] misconduct record in custody).

In fact, the degree to which the TCCA rebuffed this Court's analysis of the record is quite striking. It made a point of disagreeing with this Court's analysis on virtually every point, big and small. Consider these examples:

- Food Access: This Court found that, "[m]any times, there was not enough food [for petitioner] to eat" as a child. 140 S. Ct. at 1880. The TCCA majority rejected that and replaced it with the court's own postulation that petitioner "would have volunteered that he sometimes was hungry as a child if that had been the case." Pet. App. 6.
- Mental Health: This Court described the ample evidence in the record that petitioner "struggled with mental-health issues" as a child. 140 S. Ct. at 1880. The TCCA rejected that, instead asserting that petitioner's claim of mental-

health issues "deserves some skepticism." Pet. App. 7.

- Texas Youth Center (TYC) Behavior: This Court described the record as revealing that petitioner's "behavioral problems [at TYC] were notably mild." 140 S. Ct. at 1884. The TCCA openly rejected that, saying that "[a]lthough the Supreme Court described [petitioner's] infractions at TYC as 'notably mild,' we conclude that a jury would have been convinced otherwise." Pet. App. 7. It instead evaluated prejudice on the reasoning that petitioner "posed a serious, ongoing problem of violence" while at TYC and that petitioner "was far more dangerous and disruptive than the typical juvenile held in custody of TYC." *Id.* The TCCA then drew a direct connection between that inconsistent view of the record and its conclusion on prejudice: "The number of [petitioner'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 [petitioner's] misbehavior during TYC incarceration was a preview of, and consistent with, his behavior as an adult." Pet. App. 7.

- Trauma During Time at TYC: This Court found that at TYC, petitioner "was prescribed high doses of psychotropic drugs carrying serious adverse side effects" and that this experience "left him badly traumatized." 140 S. Ct. at 1880, 1882. The TCCA rejected that view of the record, opining instead that petitioner had "refus[ed] to take psychotropic medications prescribed for him" and that his "lack of progress

in rehabilitation was 'behavioral' rather than stemming from a mental health disorder." Pet. App. 7.

- Alleged Juvenile Robbery: This Court explained that evidence in the record showed petitioner was originally sentenced to TYC custody for "allegedly serving as the lookout while he and his friends robbed a woman of her purse." 140 S. Ct. at 1880 (internal quotation marks and alteration omitted). The TCCA openly rejected that possibility, presuming instead that the "trial evidence solidly pointed to [petitioner] as the gunman," not the lookout. Pet. App. 8.
- Alleged Adult Robbery: This Court found there was "significant evidence that would have cast doubt" on petitioner's involvement in a later alleged robbery, including a photo array in which petitioner's "image was conspicuously placed in a central position" and "as the only one looking directly up and out." 140 S. Ct. at 1885 & n.4 (internal quotation marks and alteration omitted). The TCCA rebuffed that view of the evidence, preferring its own contrary "inspection of the photo," in which petitioner'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." Pet. App. 8. This Court also found, regarding the same photo array, that it "gave rise to numerous reliability concerns." 140 S. Ct. at 1885. The TCCA rejected that, too, opining that it did "not judge the photo array to be unduly suggestive." Pet. App. 8. And finally, regarding

> that same robbery, this Court found that the "only evidence originally tying [petitioner] to the incident was a lone witness statement, later recanted by the witness." 140 S. Ct. at 1885. The TCCA rejected that as well, proposing that this Court must have "overlooked the fact that this recantation was later shown to be false." Pet. App. 8.

The TCCA was not shy about its repeated rejection of this Court's analysis. As it stated openly and defiantly in the context of discussing evidence related to petitioner's allegedly aggravating criminal history: "The Supreme Court discounted these crimes, but we do not." Pet. App. 7. And such resistance is evident throughout the TCCA majority's analysis. *See also id.* at 8-9 (devoting a paragraph to refutation of this Court's reliance on a line of victim testimony); *id.* at 8 (devoting two paragraphs to refutation of this Court's reliance on the testimony of petitioner's "sometime-girlfriend, whom the Supreme Court refers to as an 'ex-girlfriend'"); *id.* at 4-5 (characterizing what this Court squarely held to be counsel's deficient performance as his "*alleged* failures" and "instances in which [this] Court *believed* that counsel erred" (emphasis added)).

It was, of course, prudent and ordinary practice for this Court to remand upon finding it "unclear whether the Court of Criminal Appeals considered *Strickland* prejudice" and to allow the TCCA to "address the prejudice prong of *Strickland* in the first instance." 140 S. Ct. at 1886-87. But that remand did not mean the TCCA was free to evaluate prejudice in a way that is inconsistent with—and, indeed, repeatedly snubs—this Court's analysis under *Strickland*'s first prong.

As in *Moore*, the "length and detail of the [TCCA's] discussion of these points is hard to square," 139 S. Ct. at 671, with this Court's instruction to conduct a "weighty and record-intensive analysis" of how the "tidal wave of available mitigating evidence" affected the *Strickland* prejudice inquiry, *Andrus*, 140 S. Ct. at 1887 (citation and quotation marks omitted). And it would be quite an understatement to say that the TCCA "repeated the same errors that this Court previously condemned—if not quite in *haec verba*, certainly in substance." *Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring).

Indeed, viewed alongside the dissent, the TCCA majority appears to all but challenge this Court to summarily reverse. The dissenting TCCA judges—all of whom joined the TCCA's original opinion denying relief—explicitly recognized the majority's blatant and impermissible departure from this Court's analysis:

> Whatever else can be said of the Supreme Court's opinion, its characterization of the mitigation evidence that [petitioner's] trial attorney failed to uncover was integral to the determination that [petitioner'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.

Pet. App. 11 (Newell, J., dissenting). The TCCA majority did not even dispute that account of its opinion.

II. The TCCA Majority's Opinion Challenges Bedrock Principles Of Vertical Stare Decisis.

The TCCA majority's defensiveness regarding its earlier opinion is apparent. Before analyzing the only question before it, the majority focused great energy on rebutting this Court's conclusion that it failed to answer the prejudice question in its first opinion. Apparently speaking to this Court, the majority said: "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." Pet. App. 2. The majority then went on for pages discussing its earlier ruling and the accompanying concurrence. Pet. App. 2-6. Indeed, according to the TCCA, its earlier analysis remained sufficient and it therefore "set forth [its] reasoning on the issue of prejudice" only "in an abundance of caution." Pet. App. 6. Perhaps that defensiveness explains the TCCA majority's resistance to this Court's analysis of the case.

In the alternative, perhaps the TCCA majority truly just thought this Court's analysis was wrong. As set forth in Part I, the TCCA made no secret of its disagreement with this Court's view and rebuffed it in virtually every way. As the dissenting TCCA judges put it, the majority appeared to believe it was free to disregard this Court's analysis and, instead, focus on "further enhancing Justice Alito's arguments" in dissent. Pet. App. 11 (Newell, J., dissenting).

But whatever the reason for the majority's indifference, a lower court is not free to dismiss this Court's analysis out of hand. And in the unusual instance where a lower court digs in its heels on remand—preferring its view of a case over this Court's—doing so

implicates serious concerns that go well beyond the particular case. Again, as the dissenting TCCA judges observed, our judicial hierarchy depends on lower courts affording respect to this Court's decisions irrespective of their "frustration with" being reversed or their view that this Court "made mistakes" in analyzing the record. Pet. App. 11 (Newell, J., dissenting).

The TCCA's blatant defiance threatens bedrock notions of vertical stare decisis, under which "[f]ederal and state courts are absolutely bound by" this Court's decisions. Bryan A. Garner, et al., THE LAW OF JUDICIAL PRECEDENT 27 (2016). That mandate is "absolute and requires lower courts to follow applicable Supreme Court rulings in every case." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc); *see also* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) ("Vertical stare decisis is an inflexible rule that admits of no exception.").

And that command is at its apex when this Court has spoken in the context of a particular case. It has "long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit." *Clark v. Keith*, 106 U.S. 464, 465 (1883). In this context, vertical stare decisis is combined with "the mandate rule." *Copart, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 495 F.3d 1197, 1200 (10th Cir. 2007) (Gorsuch, J.). That rule requires a lower court to "comply strictly" with a reviewing court's decision when revisiting a prior ruling on remand. *Id.* (citation omitted).

Conversely, when a lower court betrays vertical stare decisis upon remand, the threat and cost to judicial norms is at its highest. Accordingly, as the Chief Justice explained in his concurring opinion in *Moore*, the case for summary reversal in such instances extends beyond any particular Justice's view of the merits. *Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring). When a lower court adheres to its view of a case even though that view "did not pass muster under this Court's analysis," summary intervention is necessary to preserve order. *Id.*

The TCCA has all but dared this Court to summarily reverse, and it would undermine our judicial system to do anything less.

CONCLUSION

The certiorari petition should be granted and the decision below should be summarily reversed.

Respectfully submitted,

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