No. 21-6001

(Capital Case)

IN THE

Supreme Court of the United States

TERENCE TRAMAINE ANDRUS,
Petitioner,
v.

TEXAS,
Respondent.

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

BRIEF OF REBECCA A. BETTS, JAMES S. BRADY, MICHAEL DETTMER, TERRY PECHOTA, RICHARD J. POCKER, COLONEL ROBERT F. RESNICK (RET.), AND BENITO ROMANO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are former United States Attorneys and former officers of the Judge Advocate General's Corps ("JAG Corps") who recognize the importance of the rule of law to our adversarial criminal justice system. They recognize that the vindication of the right to effective assistance of counsel is essential to maintaining the integrity of the adversarial system, and thus to upholding the rule of law. They further recognize the necessity of state court adherence to Supreme Court precedent to the rule of law, and seek to avoid the destruction of public confidence in our legal system that would result in the event a state court deviates from this Court's holdings in a way that undermines fundamental constitutional rights.

Rebecca A. Betts served as United States Attorney in the Southern District of West Virginia from 1994-2001.

James S. Brady served as United States Attorney in the Western District of Michigan from 1977 to 1981.

Terry Pechota served as United States Attorney in the District of South Dakota from 1979 to 1981.

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[1] Pursuant to the Court's Rule 37, *amici* note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the filing of this brief was given to both parties. Petitioner and Respondent have consented to the filing of this brief.

Michael Dettmer served as United States Attorney in the Western District of Michigan from 1994 to 2001.

Richard J. Pocker served as United States Attorney in the District of Nevada from 1989 to 1990.

Colonel Robert F. Resnick (Ret.) served in the United States Army JAG Corps from 1992 to 2016.

Benito Romano served as United States Attorney in the Southern District of New York in 1989.

As former prosecutors and JAG Corps officers, amici have an interest in ensuring the right to effective assistance of counsel is upheld uniformly throughout our courts, and thus that the rule of law is maintained.

SUMMARY OF THE ARGUMENT

The rule of law is a fundamental tenet of our legal system. The adversarial system of criminal justice is essential to the rule of law, and is given effect through the vindication of the Sixth Amendment right to effective assistance of counsel. Similarly, it is essential to the rule of law that lower courts—including state courts—follow this Court's precedents on federal constitutional matters.

This Court has upheld the right to effective assistance of counsel through the *Strickland* standard, which provides a claim for relief for convicted defendants who were not provided

effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner is seeking vindication of his right to effective assistance of counsel under *Strickland* from this Court for the second time. Last year, this Court "conclude[d] that the record [made] clear that Andrus [had] demonstrated counsel's deficient performance under *Strickland*," but that the Texas Court of Criminal Appeals ("CCA") "may have failed properly to engage with the . . . question [of] whether Andrus [had] shown that counsel's deficient performance prejudiced him." *Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (per curiam). This Court "grant[ed] Andrus' petition for a writ of certiorari, vacate[d] the judgment of the Texas Court of Criminal Appeals, and remand[ed] the case for further proceedings not inconsistent with this opinion." *Id.* Instead of following this Court's instructions, the CCA expressly rejected this Court's conclusions and misapplied the *Strickland* standard.

The CCA's decision undermines the rule of law by failing to respect this Court's precedent, and by failing to uphold Petitioner's right to counsel. This Court should revisit this case in order to ensure its precedents are upheld and the right to effective assistance of counsel is vindicated.

ARGUMENT

I. Effective Assistance of Counsel Is Fundamental to Our Adversary System and the Rule of Law.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The right to assistance of counsel "includes the right to the *effective* assistance of counsel." *Garza v. Idaho*, 139 S. Ct. 738, 743 (2019) (emphasis added) (internal quotation marks omitted) (quoting *Strickland*, 466 U.S. at 686); U.S. Const. amend. VI. The proper functioning of our adversarial system of criminal justice depends on the non-illusory fulfillment of this constitutional right.

A. The Right to Effective Assistance of Counsel Plays a Crucial Role in the Adversarial System of Criminal Justice.

A functional adversarial system requires able counsel on both sides. *See United States v. Cronic*, 466 U.S. 648, 655–57 (1984) ("[T]he unique strength of our system of criminal justice" is that it is premised on the belief that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." (internal quotation marks omitted)). This premise is realized through the Sixth Amendment's right to counsel, which "assure[s] fairness in the adversary criminal process," *United States v. Morrison*, 449 U.S. 361, 364 (1981), and "protect[s] the rights of the person charged,"

Martinez v. Ryan, 566 U.S. 1, 12 (2012). These functions require defense counsel to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence," *id.*, thus "playing a role that is critical to the ability of the adversarial system to produce just results," *Strickland*, 466 U.S. at 685. As such, the right to counsel has become a "bedrock principle in our justice system." *Martinez*, 566 U.S. at 12; *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting it is an "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"); Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 Widener L. Rev. 323, 327–28 (2009) (pointing to the "guaranteed right to counsel who could fully represent the accused" as a "foundation[] of the adversary system").

For these reasons, "it has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." *Cronic*, 466 U.S. at 654 (emphasis added) (internal quotation marks omitted).[2] Only *effective* assistance of counsel properly ensures that "the prosecution's case [is required] to survive the crucible of *meaningful* adversarial testing," *id.* at 656 (emphasis added)—the defining feature of an adversarial system, *see*

[2] Accordingly, claims that counsel was *ineffective* are judged by "whether counsel's conduct so undermined the proper functioning of the *adversarial process* that the trial cannot be relied on as having produced a *just result*." *Strickland*, 466 U.S. at 686 (emphasis added).

Penson v. Ohio, 488 U.S. 75, 84–85 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. . . . [C]areful advocacy [is required] to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over."). In the absence of such meaningful adversarial testing, the system fails, and "a serious risk of injustice infects" a criminal proceeding.[3] *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

B. The Proper Functioning of the Adversarial System Is Essential to the Rule of Law.

Such failures of the adversary system are detrimental not only to the individual criminal proceedings in which they occur, but also to the entire criminal justice system and thus to the rule of law. Our legal "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."). When meaningful

[3] Relevant here, the right to effective assistance of counsel also extends to capital sentencing proceedings. *See Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.").

adversarial testing does not transpire, public confidence in the system necessarily falters. The rule of law "ultimately depends" upon such "[p]ublic confidence in the fair and honorable administration of justice." *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). A lack of public confidence thus undermines the rule of law.

Because effective assistance of counsel is crucial to ensuring meaningful adversarial testing, attorney *in*effectiveness is particularly offensive to the adversarial system and the rule of law. *See Strickland*, 466 U.S. at 696 (explaining the concern with the absence of effective assistance of counsel is the resulting "breakdown in the adversarial process"); Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1628 (2020) ("[A]ttorney ineffectiveness generates disrespect for the system and undermines the legitimacy of its results."). Further, as only effective counsel can ensure a criminal defendant is able "to invoke [all additional] procedural and substantive safeguards that distinguish our system of justice," *Cuyler*, 446 U.S. at 343, ineffective assistance of counsel opens the door to the "enforcement of the law by lawless means or means that violate rationally vindicated standards of justice," *cf. Sherman*, 356 U.S. at 380. Such means cannot be tolerated in a system founded on the rule of law.

II. The Rule of Law Requires that Lower Courts Adhere to This Court's Precedents with Respect to Federal Constitutional Rights, Including the Right to Effective Assistance of Counsel.

As essential to the rule of law as the proper functioning of the adversarial system and vindication of the right to counsel is lower court adherence to this Court's precedents.

A. State Courts Must Defer to This Court on Matters of Federal Constitutional Law.

The Supremacy Clause of the U.S. Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby." U.S. Const. art. VI, § 2; *see also Claflin v. Houseman*, 93 U.S. 130, 137 (1876) ("[State courts are] subject also to the laws of the United States, and [are] just as much bound to recognize these as operative within the State as it is to recognize the State laws."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1510 (1987) ("[T]he Constitution's supremacy clause specifically charges state courts with the obligation to abide by it as the supreme law of the land.").

This Court is the ultimate authority on federal constitutional matters. *See Pennekamp v. State of Fla.*, 328 U.S. 331, 335 (1946) ("The Constitution has imposed upon this Court final authority to interpret the meaning and application

of those words of that instrument which require interpretation to resolve judicial issues."). "States may not disregard a controlling, constitutional command in their own courts," *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016), rather, "[w]hen this Court has fulfilled its duty to interpret federal law," state courts must "implement the rule so established," *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012). In other words, state courts must defer to this Court when it comes to federal constitutional claims. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 327–37 (1816); *see also Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam) ("[U]pon the state courts . . . rests the obligation to guard and enforce every right secured by th[e] Constitution."); *Ex parte Andrus*, 622 S.W. 3d 892, 909 (Tex. Crim. App. 2021) (Newell, J., dissenting) ("We are bound by the United States Supreme Court's characterization.").

B. A State Court's Failure to Adhere to This Court's Precedent Destabilizes the Rule of Law.

When state courts fail to adhere to U.S. Supreme Court precedent, the rule of law is undermined for three primary reasons.

First, it upsets the balance of vertical federalism, including because it suggests the state court at issue does not respect the supremacy of the U.S. Supreme Court. It is essential to vertical federalism that state courts properly apply Supreme Court precedent to federal constitutional claims. *See United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a

lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court opinions."); *Ex parte Andrus*, 622 S.W.3d at 909 (Newell, J., dissenting) ("The United States Supreme Court is . . . right because they are always last."). "[U]nless we wish anarchy to prevail within the . . . judicial system, a precedent of this Court *must* be followed by the lower . . . courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (emphasis added).

Second, it risks a lack of uniformity and predictability in constitutional outcomes from state to state. Such unpredictability is problematic because "predictability ranks fairly high among the legal virtues. It is part of what people mean by the Rule of Law." *See* Maimon Schwarzschild, *Keeping It Private*, 44 San Diego L. Rev. 677, 686 (2007); *see also* Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 Baylor L. Rev. 48, 51 (2015) ("Predictability is a defining feature of the rule of law."). Uniformity of judicial outcomes across state lines "helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes." *Id.*; *see also Cohens v. Virginia*, 19 U.S. 264, 415–16 (1821) (noting that "[t]hirteen independent Courts . . . of final jurisdiction over the same causes, arising upon the same laws, [would be] a hydra in government, from which nothing but contradiction and confusion c[ould] proceed" (internal quotation marks omitted)); *Martin*, 14 U.S. at 348–49 (noting "the importance, and even necessity of *uniformity* of decisions

throughout the whole United States, upon all subjects within the purview of the constitution").

Third, it represents diminished state court protection of federal constitutional rights. "States . . . hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). When a state court fails to properly apply Supreme Court precedent to a constitutional claim, it does not vindicate the right at issue—it cheapens it.

The rule of law "protect[s] against anarchy . . . , allow[s] people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions, . . . [and] guarantee[s] against at least some types of official arbitrariness." *See* Richard H. Fallon, Jr., *"The Rule of Law" As A Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 7–8 (1997). A state court's failure to properly apply this Court's precedents undermines these functions.

III. The CCA's Failure to Adhere to Supreme Court Precedent in This Case Undermines the Rule of Law and the Federal Constitutional Right to Effective Assistance of Counsel.

This Court previously remanded this case to the CCA "for th[at] court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion." *Andrus*, 140 S. Ct. at 1887. This Court found that "[t]he evidence ma[de] clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*," including because

Andrus' counsel failed to investigate or present a "vast" "body of mitigating evidence" and "did not[] rebut critical aggravating evidence" presented by the State at Petitioner's sentencing. *Id.* at 1881, 1883, 1884 ("[C]ounsel left all of that aggravating evidence untouched at trial."). In other words, the Court concluded Andrus' capital sentencing proceeding lacked any meaningful adversarial testing of the State's case. *See, e.g.*, *id.* at 1884 (explaining that trial counsel "offer[ed] [] seemingly aggravating evidence" that "undermined Andrus' own testimony"); *id.* (noting trial counsel "failed to conduct any independent investigation of the State's case in aggravation"); *id.* (noting trial counsel "inform[ed] the jury that the [State's aggravating] evidence made it 'probabl[e]' that Andrus was 'a violent kind of guy'"); *id.* at 1878 (noting trial counsel "conceded Andrus' guilt").

On remand, the CCA concluded Andrus "failed to show prejudice" and that "[t]he mitigating evidence [was] not particularly compelling." *Ex parte Andrus*, 622 S.W.3d at 893. It found there was "no reasonable probability that at least one juror would have struck a different balance in answering the [mitigation] special issue because the mitigating evidence offered at the habeas stage was relatively weak in that it was not specific to [Andrus], was contradicted by other evidence, or overlapped evidence heard by the jury, and because the aggravating evidence was strong." *Id.* at 899–900.

The CCA's analysis directly contravenes this Court's analysis of Petitioner's case, and this Court's *Strickland* line of cases generally. First, the CCA improperly "'re-characterize[d]' [the mitigation

evidence that Applicant's trial attorney failed to uncover in a way that was] contrary to the United States Supreme Court's holding." *Id.* at 909 (Newell, J., dissenting). The CCA rejected this Court's conclusion that "[trial] counsel lost critical opportunities to rebut the State's aggravation case," *id.* at 897—even going so far as to *explicitly reject* this Court's assessment of the evidence, *see, e.g.*, *id.* at 901 ("Although the Supreme Court described Applicant's infractions at TYC as 'notably mild,' we conclude that a jury would have been convinced otherwise."); *id.* at 902 ("The Supreme Court discounted these crimes, but we do not."); *see also* Pet. at 11–28 (describing ways in which "the CCA mischaracterized *this Court's* assessment of Andrus'[] record").

Second, the CCA's analysis "conflict[ed] with settled principles as to how the *Strickland*-prejudice analysis is to be undertaken." Pet. at 37. *Strickland* "'require[s] a court to speculate as to the effect of the new evidence' on the trial evidence, 'regardless of how much or little mitigation evidence was presented during the initial penalty phase.'" *Andrus*, 140 S. Ct. at 1887 (quoting *Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam)). The CCA, however, improperly discredited the mitigation evidence presented during the habeas proceeding and improperly elevated the aggravation evidence presented by the State at trial, despite the fact that such evidence was not subject to any meaningful adversarial testing and was in fact "rendered unreliable" by "counsel's deficient performance." Pet. at 24; *see also id.* at 12 ("Instead of adhering to this Court's directives, the CCA circled back repeatedly to the trial record, never once considering

the distortions trial counsel's deficient performance had produced.").[4] The impact of these errors was high; the CCA dissenters concluded that Petitioner *had* met the *Strickland* prejudice standard "[b]ased upon the Supreme Court's characterization of the mitigation evidence in this case." *Ex parte Andrus*, 622 S.W.3d at 909 (Newell, J., dissenting).[5]

The CCA's disregard for this Court's precedents is concerning. Not only does the CCA's express disagreement with this Court threaten vertical federalism and the rule of law, but its failure to recognize the significance of this Court's observation that "[trial] counsel lost critical opportunities to rebut the State's aggravation case," *id.* at 897, evinces a lack of appreciation of the importance of the adversarial process to maintaining the rule of law, and of the central role effective trial counsel plays in that process. The CCA thus failed to vindicate the constitutional right to effective assistance of counsel as defined by this Court. That outcome is detrimental to the integrity of the adversarial system and to the rule of law.

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[4] As noted by Petitioner, the CCA failed to include a single citation to the mitigation evidence adduced at the habeas proceeding throughout the 135 footnotes to its opinion. Pet. at 21.

[5] Although the dissenters expressed disagreement with this Court's analysis, they nevertheless recognized their obligation to follow it. *Ex parte Andrus*, 622 S.W.3d at 910 (Newell, J., dissenting) ("[W]e are [bound] by the holdings of the United States Supreme Court.").

IV. This Court Must Revisit This Case in Order to Uphold the Rule of Law and Protect the Federal Right to Counsel at Issue in This Case.

As Petitioner made clear, the CCA "disregarded this Court's clear constitutional holdings" on remand and "has now failed *twice* to discharge its obligation to enforce Andrus'[] Sixth Amendment right to effective assistance of counsel." Pet. at 38. The right to effective assistance of counsel and state court adherence to Supreme Court precedent on federal constitutional claims are essential to the rule of law. "Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity." Fallon, 97 Colum. L. Rev. at 3. Thus, allowing the CCA's decision—which fails on both issues—to stand will have implications that extend far beyond Petitioner's case. The criminal justice system will lack certainty in constitutional outcomes and protection of constitutional rights. This Court should revisit this case to protect Petitioner's—and all criminal defendants'—right to effective assistance of counsel and to maintain the integrity of the adversarial system and the rule of law.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, *amici* respectfully urge this Court to grant the Petition.

November 18, 2021

Respectfully submitted,

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