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THE STARS AT NIGHT ARE BIG AND BRIGHT, THE CONSTITUTION'S NOWHERE IN SIGHT:

DEEP IN THE HEART OF THE TEXAS COURT OF CRIMINAL APPEALS

Sophie Katz

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Sophie Katz is a recent graduate of Chapman Dale of Fowler School of Law earning her JD in May 2026 focusing her studies in criminal law. She is currently awaiting bar results working in criminal prosecution in Dallas, Texas. She is incredibly grateful to Professor Scott Howe for his guidance, support, and encouragement in writing this article.

THE STARS AT NIGHT ARE BIG AND BRIGHT, THE CONSTITUTION'S NOWHERE IN SIGHT:

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By: Sophie Katz

I. INTRODUCTION

On January 21, 2023, Terence Andrus committed suicide in his Texas death row cell.[1] Six months earlier, the United States Supreme Court had refused to grant Andrus's writ of certiorari for a second time, despite Justice Sotomayor's warning that the Texas Court of Criminal Appeals had defied clear federal constitutional mandates.[2] The denial left Andrus with a death sentence that three Supreme Court Justices believed violated the Constitution,[3] yet no federal mechanism existed to compel Texas's compliance with federal precedent. His death marked the tragic culmination of a thirty-four-year pattern of constitutional nullification by Texas courts.[4]

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[1] *Texas Death Row Prisoner Commits Suicide*, DEATH PENALTY INFO. CTR., (Mar. 14, 2025) https://deathpenaltyinfo.org/texas-death-row-prisoner-commits-suicide.
[2] Andrus v. Texas, 142 S. Ct. 1866, 1869 (2022) (Sotomayor, J., dissenting).
[3] *Id.* at 1866 (Justices Sotomayor, Breyer, and Kagan joined in dissent).
[4] Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 340 (1989) (finding Texas special issues inadequate for mitigating evidence consideration); Penry v. Johnson (*Penry II*), 532 U.S. 782, 799 (2001) (rejecting Texas's supplemental instruction as creating an "impossible situation" for jurors); Ex parte Andrus, 622 S.W.3d 892, 904–06 (Tex. Crim. App. 2021), *denied cert.* (Texas court's rejection of Supreme Court's factual findings); Moore v. Texas (*Moore I*), 581 U.S. 1, 20–21 (2017); Moore v. Texas (*Moore II*), 586 U.S. 133, 140(2019) (Texas's continued use of rejected "Briseno factors" despite Supreme Court prohibition).

That pattern began with *Penry v. Lynaugh,* in which the Supreme Court ordered Texas to reform its capital jury instructions so that juries could consider and give effect to mitigating evidence.[5] Texas responded not with reform but with a cosmetic supplemental instruction, and for twelve years applied jury instructions the Supreme Court had explicitly found inadequate, until the Court held in *Penry v. Johnson* that Texas had used "identical" special issues to recreate the same constitutional violation rejected a decade earlier.[6] When the Court next constrained Texas's capital system in *Atkins v. Virginia*, the Court of Criminal Appeals answered with the *Briseno* factors, an elaborate, professional-sounding test that the Supreme Court would ultimately find "create[d] an unacceptable risk that persons with intellectual disability will be executed."[7] And in *Andrus v. Texas* itself, after the Supreme Court's per curiam reversal found counsel's performance deficient based on a "tidal wave" of mitigating evidence never presented, the Texas court on remand accepted the Court's language about deficient performance while denying relief on prejudice grounds—resistance in its most sophisticated form yet.[8]

This progression supports a single thesis: the Texas Court of Criminal Appeals has engaged in systematic constitutional nullification spanning thirty-four years, evolving from crude procedural resistance in *Penry I* and *Penry II* (1989–2001), to sophisticated interpretive nullification in *Moore I* and *Moore II* (2017–2019), to outright expressive defiance in *Andrus* (2020–2023). This evolution demonstrates that current federal enforcement mechanisms are structurally inadequate to ensure constitutional compliance when state courts are determined to resist federal

[5] *Penry I*, 492 U.S. at 323–33.
[6] *Penry II*, 532 U.S. at 799, 804 (holding that Texas's supplemental jury instruction, despite purporting to address *Penry I*'s constitutional mandate, remained "internally contradictory" and "ineffective").
[7] *Penry I*, 492 U.S. 302 (Supreme Court first condemned Texas's capital sentencing jury instructions); *Penry II*, 532 U.S. 782 (Texas continued using variations of the same inadequate instructions until the Supreme Court again rejected them in 2001).
[8] *Andrus*, 140 S. Ct. at 1886–87; *Ex parte Andrus*, 622 S.W.3d at 896–99.

constitutional mandates.[9] When such resistance carries no consequence, the Supremacy Clause becomes a mere aspiration.[10]

This Article examines what happens when a state's highest criminal court methodically resists federal constitutional mandates. It also strives to develop criteria for recognizing when state court interpretation crosses the line from permissible constitutional discretion to impermissible defiance. Although scholars have extensively analyzed individual instances of state-federal conflict, federal habeas doctrine, and vertical stare decisis, there has been insufficient examination of how patterns of state court nullification evolve over decades and what those patterns reveal about structural weaknesses in constitutional enforcement.[11] The thirty-four-year span from *Penry* to *Andrus* supplies that missing longitudinal study.

The stakes of this inquiry are measured in lives. Terence Andrus is only the most recent casualty of enforcement failure; numerous Texas capital defendants have been executed over the past three decades despite representation that federal courts later recognized as constitutionally inadequate.[12] And the implications extend far beyond capital punishment: if state courts can nullify federal constitutional protections in capital cases, where federal oversight is most intensive and the stakes are highest, similar

[9] *See e.g. Andrus*, 142 S. Ct. at 1866 (2022); *Ex Parte Andrus*, 622 S.W.3d at 904–06 ; *Penry I*, 492 U.S. at 340; *Penry II*, 532 U.S. at 799; *Moore I*, 581 U.S. at 20–21 ; *Moore II*, 586 U.S. at 140.

[10] While the Supremacy Clause establishes federal constitutional supremacy, the Supreme Court's limited capacity for enforcement creates opportunities for sustained state resistance. U.S. CONST. art. VI, cl. 2; *See Andrus*, 142 S.Ct at 1880 (Sotomayor, J., dissenting) (calling Texas court defiance "lamentable" but acknowledging Court's inability to compel compliance). The thirty-year pattern from *Penry* through *Andrus* demonstrates how repeated reversals without systemic consequences can render constitutional mandates practically unenforceable.

[11] Extensive scholarship exists on individual components: *see, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (internal citations omitted) (discussing vertical stare decisis). However, little scholarship examines how this enforcement mechanisms interact, or fail to interact, when confronting systematic state court resistance over extended periods.

[12] *See e.g. Andrus*, 142 S. Ct. at 1866 (2022); *Ex Parte Andrus*, 622 S.W.3d at 904–06 ; *Penry I*, 492 U.S. at 340; *Penry II*, 532 U.S. at 799; *Moore I*, 581 U.S. at 20–21 ; *Moore II*, 586 U.S. at 140.

patterns likely exist in other constitutional contexts receiving less federal attention.[13]

The Article proceeds as follows. Part II establishes the federal constitutional framework governing effective assistance of counsel in capital cases, tracing how *Strickland v. Washington* and its progeny created binding federal minimums that state courts must apply. Part III presents the core historical narrative, tracing Texas's nullification strategies through three phases from *Penry I* to *Andrus*. Part IV provides comparative analysis demonstrating that Texas is an outlier among death penalty states in its resistance to federal mandates. Part V examines the institutional conditions that make resistance rational for the Court of Criminal Appeals: partisan judicial elections, majoritarian pressure in capital cases, career-advancement incentives, and a federal habeas architecture under AEDPA that presumes the state-court good faith this record refutes. Part VI addresses counterarguments, including federalism objections and claims of reasonable interpretive disagreement. Part VII proposes specific reforms and the mechanisms that would carry them, demonstrating that constitutional federalism cannot function when enforcement depends solely on state court good faith.

II. THE FEDERAL FRAMEWORK FOR ANALYZING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. The *Strickland* Standard and Its Application in *Williams* (1984–2000)

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel in criminal prosecutions.[14] In *Strickland v. Washington*, the Supreme Court established a two-pronged test for evaluating claims of ineffective assistance of counsel.[15] To succeed, an appellant must show (1) their counsel's performance was deficient and (2) they were prejudiced by their counsel's deficient performance.[16] To show deficient performance, the appellant must prove, considering the totality of

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[13] *See* Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 19, 33–34 (2022) (distinguishing legitimate state responses from unconstitutional nullification of federal rights).
[14] U.S. CONST. amend. VI.
[15] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[16] *Id.* at 688.

the representation, that their counsel's performance fell below an objective standard of reasonableness.[17] A showing of prejudice requires there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different.[18]

Strickland specifically addresses counsel in a death penalty representation. While *Strickland* did not establish separate standards for capital representation, it acknowledged that the stakes involved require heightened attention to professional duties.[19] Importantly, *Strickland* established that ineffective assistance claims involve mixed questions of law and fact, and that the legal standard for effectiveness is a question of federal constitutional law binding on state courts.[20] The Court made clear that while factual findings about what counsel did or failed to do deserved state court deference, the legal conclusion about whether that performance was constitutionally adequate was a federal question requiring independent federal review.[21]

By 2000, patterns of state court resistance to the *Strickland* two-prong test had become sufficiently problematic, compelling the Supreme Court to clarify the limits of state court interpretive discretion.[22] *Williams v. Taylor* established that state court decisions involve an unreasonable application of federal law when they properly identify the governing legal principle but inaccurately apply it to the facts of the present case.[23] In *Williams*, a Virginia jury sentenced Terry Williams to death after his counsel, who began preparing only a week before sentencing, presented almost nothing in mitigation. Counsel failed to uncover records documenting Williams's severe childhood abuse and neglect, his borderline intellectual disability and sixth-grade education, and prison commendations, omissions the Court attributed not to strategy but

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[17] *Id.*
[18] *Id.*
[19] *Id.* at 686 ("[T]he right to counsel is the right to the effective assistance of counsel," and the benchmark is whether counsel's conduct so undermined the adversarial process that the result is unreliable); *compare* Wiggins v. Smith, 539 U.S. 510, 521–22 (2003) (capital mitigation requires "thorough investigation" measured against "prevailing professional norms.").
[20] *Strickland*, 466 U.S. at 698.
[21] *Id.* at 698 (holding the ineffectiveness inquiry presents a mixed question of law and fact; state and federal courts alike apply the federal standard, subject to independent review of the ultimate legal conclusion).
[22] Williams v. Taylor, 529 U.S. 362, 381–82 (2000).
[23] *Id.* at 365.

to counsel's mistaken belief that state law barred access to the records.[24] *Williams* was particularly important because it arose from a capital case involving inadequate mitigation investigation during the punishment phase, demonstrating how relief should be granted when counsel fails to investigate and present overwhelming mitigation evidence.[25]

The *Williams* Court found counsel's performance deficient and prejudicial where overwhelming mitigation evidence was never investigated or presented, rejecting the Virginia Supreme Court's contrary conclusion as an unreasonable application of *Strickland*.[26] The Court demonstrated this by independently reweighing the omitted mitigation and holding the Virginia Supreme Court's conclusion "not only contrary to, but also…an unreasonable application of, the clearly established law," showing state courts that a restrictive reading of the federal standard would not survive the Antiterrorism and Effective Death Penalty Act (AEDPA) review.[27]

B. *Wiggins v. Smith* and the Specification of Professional Duties (2003)

The Supreme Court decision in *Wiggins v. Smith* marked a critical line in the sand for the requirement for specificity in capital defense, providing a direct response to patterns of resistance.[28] *Wiggins* established that reasonable professional judgment in capital cases requires "thorough investigation of the defendant's background," with particular emphasis on potential mitigation evidence that could support a life sentence.[29]

Kevin Wiggins was convicted of the 1988 drowning of Florence Lacs, a seventy-seven-year-old woman found in the bathtub of her ransacked Maryland apartment, and elected to be sentenced by a jury.[30] His two public defenders moved to bifurcate the sentencing so that they could first contest whether Wiggins had

[24] *Id*. at 395–96.
[25] *Id*.
[26] *Id*. at 395–98.
[27] *Id.* at 388–90 (internal quotations omitted)(barring federal habeas relief unless the state court's decision was contrary to or an unreasonable application of, clearly established Supreme Court law).
[28] *Wiggins*, 539 U.S. at 521–22.
[29] *Id.* at 543.
[30] *Id.* at 523–25.

Mrs. Lacs killed by his own hand and then, if necessary, present mitigation.[31] When the trial court denied bifurcation, counsel told the jury in opening that it would hear Wiggins "has had a difficult life," and then introduced no evidence of his life history at all.[32] Their investigation had consisted of a pre-sentence investigation report and a set of Baltimore City social services records, and had stopped there, even though state funds were available to retain a forensic social worker and the preparation of a social history was standard practice in Maryland capital cases in 1989.[33] The records they did read revealed an alcoholic mother who left the children for days without food, repeated foster placements, chronic absence from school, and more.[34] What further investigation would have found, and what a social worker later documented at post-conviction, was that Wiggins had been beaten, that his mother had held his hand against a hot stove burner, and that he had been molested and repeatedly raped across a succession of foster homes.[35]

Wiggins was significant because it moved beyond *Strickland*'s general reasonableness standard to specify concrete professional duties that defense counsel must fulfill.[36] The Court held that the attorney's decision to limit investigation to certain sources was unreasonable when "standard professional judgment" would have led to investigation of additional records and witnesses.[37] The decision cited specific "prevailing professional norms," including the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[38] The Court's analysis in *Wiggins* demonstrates how organized state court resistance can be overcome through increasingly specific federal guidance.[39] Rather than allowing state courts to minimize mitigation investigation requirements through restrictive interpretations of counsel's decision-making, the Supreme Court specified that strategic decisions are only reasonable

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[31] *Id.* at 515.
[32] *Id.* at 515–16; 526.
[33] *Id.* at 523–24.
[34] *Wiggins*, 539 U.S. at 523–24.
[35] *Id.* at 516–17.
[36] *Id.* at 541.
[37] *Id.* at 521.
[38] *Id.* at 543.
[39] *Id*. at 523–28 (establishing detailed standards for mitigation investigation and criticizing state court's failure to apply established precedent).

when based on adequate investigation.[40] Critically, counsel cannot claim that a failure to investigate was a strategic decision because professional standards require such investigation.[41]

Under *Wiggins*, courts are also required to evaluate the "totality of available mitigation evidence, both that adduced at trial and the evidence adduced in the habeas proceedings."[42] This framework means that state courts cannot compartmentalize evidence or minimize its significance through piecemeal analysis.[43] The Maryland Court of Appeals had committed a version of the same error one prong earlier. It assumed that because counsel possessed some information about Wiggins's background, (the presentence report and the social services file), they were in a position to make a tactical choice not to present mitigation at all. The Supreme Court rejected that inference; in assessing an investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."[44] Because neither state court had reached prejudice, the Court reweighed the evidence itself, and in doing so stated the rule that would matter most to the cases that followed: prejudice is measured against "the totality of the available mitigating evidence, both that adduced at trial, and the evidence adduced in the habeas proceeding."[45] *Wiggins* represented a direct challenge to the interpretive strategies lower courts had developed for reducing mitigation investigation requirements. Whether that challenge would be honored was a separate question, and the Court's answer to it came six years later.

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[40] *Wiggins*, 539 U.S. at 521–23, ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation" (quoting *Strickland*, 466 U.S. at 690–91)); *Wiggins* 539 U.S. at 527–28 (counsel's failure to expand a mitigation investigation "fell short of … prevailing professional standards.").

[41] *Id.* at 522–24 (finding counsel's investigation unreasonable despite strategic rationale when it fell below professional norms requiring discovery of all "reasonably available" mitigating evidence).

[42] *Id.* at 536.

[43] *Id.* at 534–36 (mandating holistic evaluation of all mitigation evidence for constitutional prejudice analysis).

[44] Wiggins, 539 U.S. at 527 ("quantum of evidence already known to counsel").

[45] *Id.* at 536 (quoting Williams v. Taylor, 529 U.S. 362, 397–98 (2000)(explaining the totality formulation originating in Williams which Wiggins quotes).

C. The Per Curiam Strategy and Enforcement Escalation (2009–2020)

Following the uneven and inadequate results of the *Wiggins* decision, the Supreme Court adopted a new strategy for addressing state court resistance by using per curiam decisions with *Porter v. McCollum* in 2009.[46] Per curiam decisions, literally "by the court," are unsigned opinions that typically signal broad judicial consensus on straightforward legal questions. George Porter's penalty-phase lawyer was his former standby counsel, appointed roughly a month before sentencing, in his first capital penalty proceeding.[47] He met with Porter once about the penalty phase.[48] He obtained no school, medical, or military records and interviewed no member of Porter's family and only called a single witness.[49] What he therefore never learned, and the jury never heard, was that Porter had enlisted at seventeen to escape a father who beat him and shot at him, and had fought at two of the worst engagements of the Korean War.[50] As the Court put it, the judge and jury "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability."[51] The Court began utilizing per curiam reversals to indicate obvious constitutional violations, specifically addressing where state courts had clearly violated federal constitutional requirements.[52] The Supreme Court's summary reversals sent unambiguous signals that such findings were objectively unreasonable applications of *Strickland* and *Wiggins*.[53]

This approach reflected the Supreme Court's apparent conclusion that lengthy doctrinal exposition had proven insufficient

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[46] *See generally* Porter v. McCollum, 558 U.S. 30 (2009) (*per curiam*).
[47] *Id*. at 39–40 (2009) (*per curiam*).
[48] *Id.*
[49] *Id.*
[50] *Id.* at 33–36.
[51] *Id.* at 41.
[52] *Porter,* 558 U.S. at 41 (revealing that the original state court during the punishment phase "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability"); and Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam) (reasoning that "it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry…" thus mandating the lower court's opinion to be vacated). Both cases involved factual scenarios where competent counsel would have discovered and presented powerful mitigation evidence, yet state courts had found performance adequate.
[53] *Porter,* 558 U.S. at 44 ("the Florida Supreme Court's conclusion… was an unreasonable application of our clearly established law").

to secure state court compliance with *Strickland*'s professional standards. By issuing blunt summary reversals, the Court created a jurisprudential shorthand that emphasized the objective unreasonableness of state court decisions without providing detailed roadmaps that resistant courts might attempt to circumvent.[54] Whatever the Court intended, the effect of summary reversal was less pedagogical than declaratory. The Court's willingness to reverse without extensive analysis ironically strengthened the precedential impact of these decisions, as their brevity prevented the kind of narrow factual distinctions that might otherwise limit their application to future cases involving similar patterns of counsel deficiency and state court minimization.

In *Porter*, the Florida Supreme Court committed the same fundamental error repeated by Texas courts. The court acknowledged substantial mitigation evidence existed while dismissing its significance through conclusory reasoning rather than what is required by *Strickland*.[55] The Supreme Court's per curiam reversals in both cases reveals a consistent pattern of state court defiance of established precedent.[56] These rejections demonstrate that the Supreme Court will not tolerate state court circumvention of *Strickland*'s prejudice prong through superficial analysis that ignores the cumulative weight of mitigation evidence, regardless of whether courts explicitly acknowledge the evidence's existence.

Similarly, the Supreme Court's per curiam reversal in *Andrus* found Andrus's counsel's performance deficient based on a "tidal wave of information…with regard to mitigation" that was readily available but never investigated or presented.[57] The Supreme Court's finding of obvious deficiency meant that no reasonable application

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[54] *See* Porter, 558 U.S. 30 (2009) (per curiam); Sears v. Upton, 561 U.S. 945 (2010) (per curiam); Andrus v. Texas, 590 U.S. 806 (2020) (per curiam)(showing a pattern that each case reversed was a state court that had recited the correct standard was enough to ground the claim).
[55] *See Andrus*, 142 S. Ct. at 1869–70 (finding the lower appellate court ignored "compelling" mitigation evidence ruling that "Andrus is plainly entitled to relief,"); *see also Porter*, 558 U.S. at 42 (reasoning that the lower appellate court "either did not consider or unreasonably discounted" the mitigation evidence presented in the habeas corpus proceedings).
[56] *Porter*, 558 U.S. at 40–41 (holding the Florida Supreme Court "either did not consider or unreasonably discounted" mitigation evidence of the defendant's combat trauma, childhood abuse, and impaired mental health, and that its no-prejudice ruling was an unreasonable application of *Strickland*).
[57] Andrus v. Texas, 590 U.S. 806, 810–13 (2020) (per curiam).

of *Strickland* and *Wiggins* could support the Texas court's contrary conclusion.[58]

By 2020, the federal framework governing capital ineffective assistance claims left little interpretive space. *Strickland* established that the adequacy of counsel's performance is a question of federal law binding on state courts.[59] *Williams* established that reciting the correct standard does not immunize a state court decision that applies it unreasonably.[60] *Wiggins* specified the investigative duty and required prejudice analysis to weigh the totality of mitigation evidence rather than dismissing it piecemeal.[61] And the per curiam reversals beginning with *Porter* demonstrated that the Court would summarily correct state courts that acknowledged mitigation evidence while unreasonably discounting it.[62] Each layer of this framework responded to a form of state court under-enforcement; together they eliminated the ambiguity on which any claim of good-faith interpretive disagreement would have to rest. The question *Andrus v. Texas* would pose, and Part III answers, is what happens when a state court resists a framework this specific.

III. THE HISTORY OF TEXAS NULLIFICATION: FROM *PENRY* TO *ANDRUS*

When the Supreme Court issues a direct constitutional mandate requiring specific state reforms, the Supremacy Clause demands immediate and complete compliance.[63] Texas has never disputed that obligation in the abstract. Its courts recite the federal standard accurately and present themselves as applying it on its own terms; the resistance this Article documents operates entirely inside that posture of compliance.[64]

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58 *Id*. at 807–08.
59 *Strickland*, 466 U.S. at 698.
60 *Williams,* 529 U.S. at 407–09.
61 *Wiggins,* 539 U.S. at 522–24, 534–36.
62 *Porter*, 558 U.S. at 42–44.
63 U.S. CONST. art. VI, cl. 2.
64 *See* Ex parte Moore, (*Ex parte Moore I*), 395 S.W.3d 152, 157 (Tex. Crim. App. 2013) (applying Strickland's two-prong test as the governing standard for ineffective-assistance claims); Ex parte Moore, (*Ex parte Moore II*), 548 S.W.3d 552, 555, 559–60 (Tex. Crim. App. 2018) (on remand from *Moore I*, announcing that the court would "abandon reliance on the Briseno evidentiary factors" and apply "current medical diagnostic standards," then reaching the same result); Ex parte Andrus, 622 S.W.3d 892, 893 (Tex. Crim. App. 2021) (framing its decision

To prevail on a claim of ineffective assistance, a defendant must demonstrate by a preponderance of the evidence that their counsel's errors were so serious as to deprive them of a fair trial.[65] From its inception, *Strickland* and its Texas counterpart, *Ex parte Moore*, established clear principles that would govern the later Texas resistance to the Supreme Court's ineffective assistance of counsel analyses.[66] This framework meant that counsel could not claim their ineffectiveness was a strategic decision.[67] Rather, it had to be reasonable given the investigation actually conducted.[68]

By the late 1990s, the pattern of Texas court resistance was already emerging in capital cases. Texas courts began acknowledging federal standards while systematically minimizing their application.[69] Texas courts would cite *Strickland* correctly, acknowledging that mitigation investigation was required, but find minimal mitigation investigation satisfied constitutional requirements.[70] This developed into a pattern of Texas courts nullifying Supreme Court analyses based on a practice of compartmentalizing mitigation evidence, evaluating each piece of

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on remand as the *Strickland* prejudice analysis this Court had ordered); Brief in Opposition at 33, Andrus v. Texas, 142 S. Ct. 1866 (2022) (No. 21-6001) (arguing that the Court of Criminal Appeals "correctly applied this Court's precedents, and followed this Court's explicit instructions'); *but see* Moore v. Texas, 139 S. Ct. 666, 672 (2019) (per curiam) (concluding, notwithstanding the state court's stated adoption of clinical standards, that its opinion "rests upon analysis too much of which too closely resembles what we previously found improper").

[65] *Id.*

[66] *Strickland*, 466 U.S. at 690–91 (emphasizing "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but adding "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation…."); *Ex parte Moore*, 395 S.W.3d at 157.

[67] *Strickland*, 466 U.S. at 698.

[68] *Id.*

[69] *See eg*. *Andrus*, 590 U.S. at 813–16 (2020); (citing *Wiggins,* 539 U.S. at 524); *Moore,* 581 U.S. at 9–13 (The language used by the Supreme Court such as, "[h]ere, plainly not. Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise," demonstrates that the Supreme Court was aware of the systematic minimalization of federal standards and openly chastised the lower courts for failing to correct such abuses).

[70] *See eg. Andrus*, 590 U.S. at 813–16; (citing *Wiggins*, 539 U.S. at 524); *Moore*, 581 U.S. at 9–13.

evidence in isolation rather than as a whole.[71] *Williams* was designed to constrain precisely this type of state court nullification.[72] However, as subsequent Texas Criminal Court of Appeals cases reveal, Texas has evaded this constraint through increasingly complex analytical frameworks that maintained surface compliance while achieving substantive resistance, as discussed further in this Article.[73]

This section traces the evolution of constitutional nullification strategies employed by the Texas Court of Criminal Appeals across three distinct phases spanning thirty-four years. The progression from crude procedural resistance in the *Penry* era to sophisticated semantic defiance in *Andrus* demonstrates institutional learning and deliberate adaptation rather than good faith constitutional disagreement. Each phase builds upon lessons learned from federal enforcement efforts, revealing how state courts can systematically evade constitutional compliance while maintaining surface adherence to federal mandates.

The *Penry* cases demonstrate what happens when state supreme courts treat such mandates as suggestions rather than binding constitutional law, revealing structural vulnerabilities in federal constitutional enforcement that sophisticated resistance strategies can exploit. The *Penry* to *Andrus* progression reveals three essential characteristics that distinguish systematic nullification from reasonable interpretive disagreement: (1) procedural formalism as constitutional evasion, (2) institutional persistence across case-specific contexts, and (3) exploitation of federal enforcement limitations to maintain violations over extended periods.

A. Phase One—Procedural Formalism: The Penry Sequence (1989–2001)

1. *Penry's First Trial (1989)*

[71] *See e.g. Andrus*, 142 S. Ct. at 1866 (2022); *Ex Parte Andrus*, 622 S.W.3d at 904–06 ; *Penry I*, 492 U.S. at 340; *Penry II*, 532 U.S. at 799; *Moore I*, 581 U.S. at 20–21 ; *Moore II*, 586 U.S. at 140.
[72] *Williams*, 529 U.S. at 367.
[73] *Andrus*, 142 S. Ct. at 1866 (2022); *Ex Parte Andrus*, 622 S.W.3d at 904–06 ; *Penry I*, 492 U.S. at 340; *Penry II*, 532 U.S. at 799; *Moore I*, 581 U.S. at 20–21 ; *Moore II*, 586 U.S. at 140.

The Supreme Court's decision in *Penry v. Lynaugh* (1989) established the template for constitutional resistance that would persist for over three decades. The *Penry* era illustrates the framework in its crudest form: procedural formalism (a supplemental instruction that changed nothing), institutional persistence (twelve years and multiple defendants under the same defective charge), and exploitation of enforcement limits (the years that elapsed before the Court could act again).

Johnny Paul Penry was convicted of capital murder in Texas for the 1979 rape and murder of Pamela Carpenter.[74] Although a psychologist testified that Penry was mildly to moderately intellectually disabled, with an IQ around 54, the reasoning capabilities of a six-and-a-half-year-old, and a history of severe childhood abuse, the jury at the penalty phase was asked only the three Texas "special issues" and was never advised by the court that it could give mitigating effect to that evidence.[75] The jury answered all three "yes," and Penry was sentenced to death.[76] On review, the Supreme Court's response was explicit, stating that the jury instructions given at Penry's sentencing violated the Eighth Amendment because they failed to provide a mechanism to consider and give effect to mitigating evidence in imposing sentencing after guilt has been found.[77] The Court held that the three special issues presented to juries in capital cases—deliberateness, future dangerousness, and provocation—were too narrow to encompass evidence of intellectual disability and childhood abuse that bore on the defendant's moral culpability.[78]

The constitutional violation in *Penry* was not technical or ambiguous. The Court explicitly held that juries had no "vehicle for expressing its reasoned moral response to the evidence" that Penry did not deserve to be sentenced to death based upon his mitigating evidence.[79] This language clearly instructed Texas to either broaden the special issues to encompass mitigating evidence or to provide an alternative mechanism for jury consideration of such evidence. The

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[74] Penry v. Lynaugh (*Penry I),* 492 U.S. 302, 310 (1989).
[75] *Id.* at 312.
[76] *Id.* at 311.
[77] *Id.* at 311–12.
[78] *Id.* at 312.
[79] *Id.* at 303–04.

mandate was unambiguous regardless of the posture in which it issued, and it admitted no reasonable alternative interpretation: Texas was to broaden the special issues or supply another mechanism by which jurors could give mitigating evidence effect.[80]

2. Penry's Second Trial (1990)

Texas's response to *Penry I* revealed the crude nature of early resistance strategies. Following the Supreme Court's 1989 decision vacating his death sentence, Johnny Paul Penry was re-tried in 1990 solely on the penalty phase of his capital murder conviction.[81] At this second sentencing hearing, Penry again presented extensive evidence of his intellectual disability, including testimony that he had the mental age of a six-and-a-half-year-old and the social maturity of a nine- or ten-year-old, along with evidence of severe childhood abuse.[82] The defense also introduced expert testimony regarding organic brain damage and Penry's inability to learn from experience.[83]

This time around, rather than substantively reforming its jury instruction system to address the constitutional deficiencies identified in *Penry I*, Texas simply added a supplemental "nullification" jury instruction to the same three special issues the Supreme Court had found inadequate.[84] The instruction informed juries they could consider mitigating circumstances and give them effect, but the mechanism for doing so was deliberately ineffective. Jurors were told they could answer special issues negatively "if you determine, when giving effect to the mitigating evidence, if any, that a life sentence... rather than a death sentence, is an appropriate response to the personal culpability of the defendant."[85]

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[80] U.S. Const. art. VI, cl. 2; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340–41 (1816) (establishing the Court's appellate jurisdiction over state-court judgments on federal questions); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (state officials are bound by this Court's interpretation of the Constitution); *cf.* 28 U.S.C. § 2254(d) (imposing the deferential standard applicable on federal habeas review).
[81] *Penry II*, 532 U.S. at 787–88.
[82] *Penry II*, 532 U.S. at 788, 792; see also *Penry I*, 492 U.S. at 308 (mental age of six-and-a-half; IQ 54; history of abuse).
[83] *Penry II*, 532 U.S. at 788.
[84] *Id.* at 788–90.
[85] *Id*.

This approach represented surface compliance through cosmetic procedural adjustments: Texas adopted federal constitutional language without implementing the substantive reforms necessary to give that language meaningful effect. This instruction created what the Supreme Court would later characterize as an impossible situation for law-abiding jurors. The verdict form required jurors to swear they had found specific facts beyond a reasonable doubt or that they had reasonable doubt as to the matter inquired about. The supplemental instruction, however, suggested jurors could ignore these factual findings and answer falsely to avoid a death sentence based on mitigating evidence.

The strategy was transparent in its evasiveness: acknowledge the federal mandate verbally while maintaining the identical jury instruction system that had prevented the jurors from giving effect to mitigating evidence in Penry's first trial.

3. The Impossibility of Texas's Supplemental Instruction

The mechanics of Texas's evasion strategy become clear through examination of specific trial proceedings during the 1989–2001 period. At Penry's second sentencing hearing, the trial court presented jurors with the same three special issues that were found inadequate in *Penry I*: whether Penry acted deliberately with a reasonable expectation of death, whether there was a probability Penry would be dangerous in the future, and whether Penry's conduct was unreasonable in response to provocation.[86] A juror who believed Penry acted deliberately, would be dangerous in the future, and did not act in response to provocation, but who believed that Penry's intellectual disability and past abuse made the death penalty inappropriate, faced a logical dilemma.[87] The supplemental instruction suggested the juror could answer no to give effect to mitigating evidence, but doing so required swearing under oath that the juror actually believed to be false beyond a reasonable doubt.[88]

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[86] Penry v. Johnson, 532 U.S. 782, 789–90 (2001) (setting out the three special issues submitted at the 1990 resentencing and the supplemental instruction that accompanied them).
[87] *Id*. at 798–800 (2001) (explaining that the supplemental instruction required a juror who wished to give effect to mitigating evidence to answer a special issue in a manner inconsistent with the juror's own factual findings, and that the charge as a whole was therefore "internally contradictory").
[88] *Id.* at 799–800.

The Supreme Court later explained that it is logically and ethically impossible for a juror to follow both sets of instructions.[89]

The supplemental instruction's inadequacy was especially apparent in how it addressed Penry's intellectual disability. The Fifth Circuit in 1987, and later the Supreme Court, emphasized that Penry's evidence of his disability and inability to learn from his mistakes was a "two-edged sword" as it can diminish his blameworthiness for his crime while simultaneously indicating a probability that he will be dangerous in the future.[90] Under Texas's jury instructions, evidence of Penry's disability that should have reduced his moral culpability instead made an affirmative answer to the future dangerous question more likely. The supplemental instruction provided no mechanism for separating the mitigating aspects of this evidence from its apparent aggravating implications.

Even after the 5th Circuit and the Supreme Court itself expressed concerns about the adequacy of Texas's supplemental instruction approach, Texas made no modifications.[91] Despite the Fifth Circuit's 1987 warning that jurors could not treat most of Penry's evidence as mitigating, Texas used the same instructions for the 12 years between the Supreme Court's mandate and its second intervention. This persistence, despite federal warnings, demonstrates that Texas's approach was neither accidental nor a good-faith disagreement about constitutional requirements.

4. *Federal Patience Exhausted:* Penry II-Penry v. Johnson *and the Lesson Texas Drew (2001)*

Penry's second jury convicted him again and again sentenced him to death. The Court of Criminal Appeals affirmed, state habeas relief was denied, the federal district court denied the petition, and the Fifth Circuit affirmed. By the time the case returned to the Supreme Court in 2001, it arrived not on direct review but on federal habeas under AEDPA, meaning the Court could grant relief only if the state court's decision was an objectively unreasonable application of clearly established federal law. Texas lost anyway,

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89 *Id.*
90 *Penry I*, 492 U.S. at 324.
91 Nelson v. Quarterman, 472 F.3d 287, 293–303 (5th Cir. 2006) (en banc) (holding Texas special-issues instructions failed to allow effect to mitigating evidence and granting relief); see also *Penry II*, 532 U.S. at 799–800 (the Supreme Court itself, condemning the same instruction).

and the Court's language left little doubt why. To the extent the state court had believed *Penry I* was satisfied merely because a supplemental instruction had been given, it had "clearly misapprehend[ed]" the Court's prior decision.[92] The special issues put to Penry's second jury "were identical to the ones we found constitutionally inadequate as applied in Penry I."[93] The mechanism the supplemental instruction "purported to create for the jurors to give effect to that evidence was ineffective and illogical," making the charge "as a whole internally contradictory" and placing "law-abiding jurors in an impossible situation."[94]

The Supreme Court's decision in *Penry II* marked the end of federal tolerance for crude procedural evasion. The Court specifically rejected Texas's characterization of the supplemental charge as a nullification instruction that satisfied federal requirements. Assessing how the instruction actually operated, the Court reached "the same conclusion we reached in *Penry I*": "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."[95] The Supreme Court's finding in *Penry II* that Texas had "clearly misapprehended" federal constitutional requirements for 12 years reveals the gap between formal constitutional supremacy and practical constitutional enforcement.[96] During this period, Texas executed numerous defendants based on sentencing proceedings that violated clear federal constitutional requirements, demonstrating the human costs of constitutional enforcement failure.

The lesson Texas drew from the *Penry* sequence was not that resistance fails, but that transparent resistance fails. A facially contradictory jury instruction was too obvious to survive federal review once the Fifth Circuit and then the Supreme Court examined how it actually operated.[97] The twelve-year arc from *Penry I* to *Penry II* taught Texas courts what federal enforcement could and could not detect: obvious constitutional violations, eventually;

[92] *Penry II*, 532 U.S. at 797 ("clearly misapprehend[ed]")
[93] *Id*. at 804 ("identical to the ones we found constitutionally inadequate as applied in Penry I").
[94] *Id.* at 804; 799.
[95] *Penry II*, 532 U.S. at 804.
[96] *Id.* at 797.
[97] *See supra* Part III.A.3–4.

violations dressed in internally consistent, professionally reasoned doctrine, not for years. That lesson is what the *Briseno* era tested next.

B. Phase Two—Institutional Persistence: *Briseno*, *Moore*, and the Sleeping Lawyer (2001–2019)

The *Briseno* era of Texas resistance shows the same three characteristics at a higher level of sophistication. In this era, the formalism morphed from procedural to doctrinal, showing a facial clinical test rather than a contradictory jury charge. Institutional persistence as a single framework can be applied to every intellectual-disability claim in the state rather than case-by-case evasion. The exploitation of enforcement limits operates through AEDPA deference to what is presented as fact-finding rather than through the years it takes the Supreme Court to notice a pattern. These three shifts gave Texas plausible deniability that crude procedural resistance never had: a court that cites the correct standard and applies coherent, internally consistent reasoning is far harder for a reviewing court to unmask than one issuing self-contradictory jury instructions.

1. The Briseno *System*

To understand Texas's shift toward a more doctrinal mode of resistance, one must first understand the framework that came to be called the *Briseno* system: a set of judicially invented "evidentiary factors" that the Court of Criminal Appeals appended to a genuine clinical definition of intellectual disability, and that the Supreme Court would later describe as "lay stereotypes" "untied to any acknowledged source."[98] The Texas Court of Criminal Appeals' 2004 decision in *Ex parte Briseno* represents the paradigmatic example of this sophisticated resistance strategy. Jose Garcia Briseno came before the Court of Criminal Appeals on a habeas application claiming he was intellectually disabled and therefore ineligible for execution under *Atkins*. Because the Texas Legislature had not acted, the court took it upon itself to supply the standard, describing its task as identifying "that level and degree of [intellectual disability] at which a consensus of Texas citizens would

[98] Moore v. Texas, 581 U.S. 1, 20–21 (2017) ("lay stereotypes"; "an invention of the CCA untied to any acknowledged source").

agree that a person should be exempted from the death penalty."[99] It framed that inquiry with a literary illustration, offering Lennie Small, the intellectually disabled ranch hand of Steinbeck's *Of Mice and Men*, as the figure most Texans "might agree" should be exempt.[100] Having set the floor at a fictional character with profound impairments, the court then adopted the clinical definition used by the American Association on Intellectual and Developmental Disabilities as its formal test[101] and appended seven "evidentiary factors" of its own devising for a factfinder to weigh alongside it.[102] The factors asked (1) whether those who knew the defendant during his or her developmental years believed he or she were intellectually disabled at the time and acted accordingly; (2) whether he or she could formulate plans and carry them through, as opposed to acting impulsively; (3) whether his or her conduct showed leadership or being led by others; (4) whether his or her responses to external stimuli were rational and appropriate; (5) whether he or she could respond coherently and on point to questioning; (6) whether he or she could hide facts or lie effectively in his own interest; and (7) whether the offense itself required forethought, planning, and complex execution.[103] Rather than the obviously inadequate procedural adjustments that created the logical contradictions of the *Penry* era, Texas had created detailed evidentiary criteria that appeared professionally reasoned while excluding intellectually disabled defendants from *Atkins* protection.

The constitutional evasion in *Briseno* lay in its use of stereotypes about intellectual disability disguised as legal analysis appended to a clinical standard. Each factor asked jurors and judges to reason from folk assumptions about what an intellectually disabled person could or could not do, revealing assumptions with

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[99] Ex Parte Briseno, 135 S.W.3d 1, 6 and 6 n.24 (Tex. Crim. App. 2004).
[100] *Id.* at 6 & n.19 ("We, however, must define that level and degree of… at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty. Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt.") (citing John Steinbeck, *Of Mice and Men* (Pascal Covici ed., 1937)).
[101] AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013) (in 2007, the word "retarded" was replaced by "intellectual and developmental disability;" *see generally* Rosa's Law 2010).
[102] Moore, 581 U.S. at 9 (describing the CCA's adoption of the AAMR–9 definition); Ex parte Briseno, 135 S.W.3d at 8–9 (Tex. Crim. App. 2004).
[103] *Id.* at 8–9.

no grounding in the clinical definition the court had just adopted.[104] A defendant who could lie to protect himself, plan a crime, or hold down a job could be found not intellectually disabled regardless of subaverage intellectual functioning and adaptive-behavior deficits documented by clinicians, because the factors let lay impression override the diagnostic framework.[105] The Supreme Court would later single out the very first factor, whether the defendant's family and community "thought he was mentally [disabled] at that time," as the clearest example of a criterion built on lay stereotype rather than clinical evidence.[106]

2. *Reciting the Investigative Duty: Texas After* Wiggins

Wiggins, discussed *supra*, played an important role in Texas's resistance evolution. The decision in *Wiggins* forced lower courts to abandon interpretive strategies to avoid mitigation investigation requirements. Rather than abandon these strategies, Texas courts adapted them to incorporate *Wiggins*' specific requirements while maintaining their essential resistance to comprehensive mitigation investigation.[107] Texas courts would cite *Wiggins* appropriately, acknowledge thorough investigation was required, but then conclude limited investigation satisfied constitutional requirements based on strategic decision-making rationales that the Supreme Court had explicitly rejected.[108]

This pattern is evident in cases throughout the post-*Wiggins* period where Texas courts found adequate performance despite

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[104] *See* Moore v. Texas, 581 U.S. 1, 20–22 (2017) (holding that the Briseno factors rest on "lay stereotypes" of intellectual disability, are "[n]ot aligned with the medical community's information," and single out the first factor, whether the defendant's family and community regarded him as intellectually disabled, as illustrative); Ex parte Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (setting out the seven factors).

[105] *cf. Moore I*, 581 U.S. at 6, 20 (rejecting the Briseno factors as "an outlier" measure "untied to any acknowledged source" and "not aligned with the medical community's information").

[106] *Id*. at 20–21.

[107] *See Andrus,* 590 U.S. at 813–16 (counsel "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources" (quoting *Wiggins,* 539 U.S. at 524), and the Criminal Court of Appeals nonetheless denied relief); *Moore*, 581 U.S. at 9-13 (Criminal Court of Appeals recited *Aitkins/Hall* yet applied the non-clinicla *Brisneo* factors to reach the opposite result).

[108] *Andrus,* 590 U.S. at 813–16; *Moore*, 581 U.S. at 9–13 (finding Texas court improperly accepted strategic rationale for deficient investigations despite citing *Wiggins* requirements).

obvious failures to investigate available mitigation evidence.[109] Rather than applying *Wiggins*'s requirement for comprehensive mitigation investigation, Texas courts created exceptions, limitations, and alternative interpretations that preserved their resistance to federal requirements while maintaining mere surface compliance with federal precedent.[110]

3. Moore v. Texas*: Federal Recognition and Enforcement Limits*

The Supreme Court's 2017 decision in *Moore v. Texas* represents explicit federal recognition that Texas's interpretive nullification had crossed the line from permissible state discretion to impermissible resistance. The Court held that states retain discretion in enforcing *Atkins*, but that discretion is not "unfettered" and rather must be "informed by the medical community's diagnostic framework."[111] Measured against that standard, the *Briseno* factors failed: they were, in the Court's words, "an invention of the CCA [Court of Criminal Appeals] untied to any acknowledged source," "[n]ot aligned with the medical community's information," and for that reason created "an unacceptable risk that persons with intellectual disability will be executed."[112]

The Court's analysis exposed the specific mechanism of Texas's evasion. Rather than accepting the CCA's characterization of its own framework as consistent with *Atkins*, the Court examined how the *Briseno* factors actually operated by asking, for instance, whether Moore's family and community had regarded him as intellectually disabled at the time, and whether he could formulate plans, hide facts, or respond rationally to questioning.[113] None of

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[109] *Moore I,* 581 U.S. at 15–20 (finding Texas court improperly treated traumatic childhood experiences as evidence against intellectual disability rather than risk factors warranting further investigations and systematically emphasized adaptive strengths while minimizing deficits contrary to established clinical standards).
[110] *See id.* at 16–20 (rejecting Texas-specific *Briseno* factors designed to circumvent established medical standards); *Andrus,* 140 S. Ct. at 1878–80 (finding Texas court improperly accepted strategic rationales for deficient investigation despite citing *Wiggins* requirements and finding inadequate investigation despite formal acknowledgement of Wiggins requirements).
[111] *Id.* at 20 (2017) (quoting Hall v. Florida, 572 U.S. 701, 721 (2014)).
[112] *Id.* at 8–9.
[113] *Id.* at 20–21 (discussing the family/community factor as illustrative of the framework's reliance on "lay stereotypes").

those questions tracks the clinical criteria for intellectual disability; each measures the general competence and social adjustment while treating deviation from it as evidence against a diagnosis the medical community would reach independently.[114] *Moore* does not hold, as a general matter, that state courts may never develop their own doctrine addressing a federal constitutional standard. Its holding is narrower and, for that reason, more precisely damning where the federal standard itself incorporates a body of external expertise; here, it is the clinical consensus on intellectual disability, a state framework that departs from that expertise cannot substitute for it, however doctrinally sophisticated the departure.[115]

Moore revealed the limitations of federal enforcement when confronting institutional resistance. Despite the Court's rejection of the *Briseno* approach, Texas courts continued applying similar reasoning while claiming compliance with *Moore*, a pattern the next section traces in the sleeping-lawyer cases and, more directly, in the *Moore II* litigation, where the CCA's second attempt at the same intellectual-disability determination again drew summary reversal.[116]

4. *The Sleeping Lawyer: Categorical Constitutional Violations*

The evolution of resistance during this period extended beyond intellectual disability claims to other fundamental constitutional protections. Federal courts initially recognized the categorical nature of this violation when counsel sleeps during trial. In *Burdine v. Johnson*, the Fifth Circuit, sitting *en banc*, held that a capital defendant whose sole attorney repeatedly slept during trial was denied his Sixth Amendment right to counsel and was entitled to a presumption of prejudice under *U.S. v. Cronic* rather than case-

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[114] *See* Moore, 581 U.S. at 15–22 (faulting the CCA for "overempha[sizing] Moore's perceived adaptive strengths" while giving inadequate weight to his adaptive deficits, and for treating traumatic experience as an alternative explanation for deficits rather than as a risk factor); *see also* Hall v. Florida, 572 U.S. 701, 721 (2014) (states' discretion to enforce Atkins is not "unfettered" and must be "informed by the medical community's diagnostic framework").

[115] *See Moore I*, 581 U.S. at at 8, 19–20 (distinguishing permissible flexibility in procedures and requirements for adjudicating intellectual-disability claims from impermissible departure from the medical standard itself).

[116] *Moore II*, 139 S. Ct. at 672 (finding the CCA's revised analysis still relied on "lay stereotypes" the Court had already rejected); *see infra*, Part III.C.

by-case *Strickland* analysis.[117] The court reasoned that "the buried assumption of *Strickland* is that counsel is present and conscious to exercise judgment, calculation, and instinct," and that a sleeping lawyer cannot be presumed to be doing any of those things, Burdine had but one lawyer, and that lawyer's unconsciousness left him functionally unrepresented.[118]

Texas courts developed a means of avoiding *Burdine*'s categorical rule without ever rejecting it outright. *Ex parte McFarland* involved a capital trial in which one of two appointed attorneys, Sam Benn, slept during portions of voir dire and grew increasingly asleep as the trial progressed, where the bailiff repeatedly nudged his chair to rouse him, and the trial judge admonished him on the record.[119] Benn cross-examined only three of the State's fourteen guilt-phase witnesses and never prepared the mitigation case he had promised to handle, leaving his co-counsel, Charles Melamed, to do it instead.[120] The Court of Criminal Appeals declined to presume prejudice under *Cronic*, holding that Melamed remained, in the court's words, "an awake, active, and zealous advocate in the adversarial testing of the prosecution's case" throughout the proceedings.[121] Having declined the categorical presumption, the court evaluated *McFarland*'s ineffective-assistance claims individually under ordinary *Strickland* analysis and found no prejudice on any of them.[122]

The co-counsel finding is the entire basis for the result, and it should be stated plainly: *McFarland* is not, on its own terms, a holding that any amount of sleeping by counsel is constitutionally tolerable. It is a holding that a defendant represented by two attorneys, one of whom remained fully engaged, cannot invoke the categorical presumption of prejudice that *Burdine* reserved for cases of complete or near-complete denial of counsel, presenting a materially different question from whether the sleeping attorney's individual performance was itself adequate.[123] The distinction the

[117] Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (*en banc*).
[118] *Id.*
[119] Ex parte McFarland, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005).
[120] *Id.*
[121] *Id.*
[122] *Id.* at 753–58 (evaluating claims regarding investigation, cross-examination, mitigation witnesses, closing argument, and conflict of interest).
[123] *cf.* Burdine, 262 F.3d at 349.

CCA drew is a real one. What the decision does not do is establish, more broadly, that sleeping counsel poses no constitutional problem so long as co-counsel is present; the court never reached that broader question, because it evaluated Benn's specific conduct only under ordinary *Strickland* prejudice analysis, where it found the individual claims unpersuasive on this record and not because sleeping counsel is categorically excused whenever a second lawyer happens to be awake.

The pattern is nonetheless the *Briseno* pattern, transposed. *McFarland* did not deny the federal rule that unconscious counsel can amount to no counsel at all; it constructed a procedural route around the case in which that rule would have applied, converting a claim that Texas could not defend under *Cronic'*s categorical standard into one it could defeat piece by piece under Strickland's more forgiving framework. Whether that same maneuver would survive in a case without a second, actively engaged attorney, the facts *Burdine* itself presented, is a question *McFarland* did not have to answer, and the Court of Criminal Appeals has not since been forced to answer it.

C. Phase Three—Exploiting the Limits of Federal Enforcement: *Andrus* (2019–2023)

The *Andrus* era completes the progression: the formalism becomes purely semantic, the persistence survives even direct Supreme Court reversal, and the exploitation of enforcement limits ends in the Court's inability to compel compliance at all. The *Andrus* litigation represents the culmination of Texas's thirty-year development of constitutional resistance. By 2020, Texas courts had perfected the most sophisticated form of constitutional nullification yet documented: semantic defiance that adopts constitutional language while rejecting its substantive meaning. The 2019 Texas Court of Criminal Appeals decision in *Ex parte Andrus* demonstrates this final evolution.[124] Rather than procedural evasion or obvious interpretive nullification, the court's approach was to

[124] *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, *2 (Tex. Crim. App. Feb. 13, 2019), cert. granted, judgment vacated sub nom. Andrus v. Tex., 590 U.S. 806 (2020).

acknowledge the correct federal framework while never squarely applying it.[125]

In 2008, 20-year-old Terence Andrus killed Avelino Diaz and bystander Kim-Phuong Vu Bui during a botched carjacking committed while he was under the influence of PCP-laced marijuana.[126] At the guilt phase of his trial, his counsel gave no opening statement and, after the State rested, his counsel rested immediately, telling the jury the case would end up coming down to the punishment phase.[127] However, at the punishment phase, Andrus's lawyer did almost nothing: he made no opening statement, put on "a mere shadow of a case in mitigation," and called Andrus's mother, whose testimony that Andrus had an excellent childhood directly contradicted the truth.[128] Counsel also had performed virtually no mitigation investigation.[129] Only at an eight-day state habeas hearing did the evidence emerge: a childhood of extreme neglect and abuse, a drug-dealing mother who had taken out a $10,000 life-insurance policy on Andrus, eighteen months in a juvenile facility where he was dosed with psychotropic drugs and held in solitary until he became suicidal, and a diagnosis of affective psychosis.[130] The State's own cross-examination at trial had captured the failure: "I have not heard one mitigating circumstance in your life."[131]

The case went to the Supreme Court twice. In *Andrus v. Texas* (*Andrus I*), the Court reviewed the CCA's first, unpublished order denying relief, held by a 6–3 vote that counsel's performance was constitutionally deficient under *Strickland*.[132] It was unclear whether the CCA had considered *Strickland* prejudice at all; it vacated and remanded for the state court to decide the prejudice question.[133] On remand, in *Ex parte Andrus* (*Andrus II*), a 5–4

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125 Andrus, 590 U.S. at 812 (remanding because "it is unclear whether the Court of Criminal Appeals evaluated the totality of the mitigating evidence...in determining whether Andrus has shown Strickland prejudice").
126 *Id.* at 810–13.
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Andrus*, 590 U.S at 812.
132 *Id*.
133 *Id.* at 823 ("[I]t is unclear whether the Court of Criminal Appeals considered Strickland prejudice at all.").

majority accepted the deficiency holding but denied relief on prejudice, over four dissents.[134] The Supreme Court then denied certiorari (*Andrus III*), over a dissent by Justice Sotomayor, joined by Justices Breyer and Kagan.[135] The sections that follow examine each round.

1. Andrus *I*

The Supreme Court's 2020 per curiam reversal in *Andrus v. Texas* provided the most definitive possible test of state court compliance with federal constitutional requirements.[136] By characterizing available mitigation evidence as a "tidal wave" and finding obvious deficient performance, the Court eliminated any reasonable basis for disagreement about constitutional violations in *Andrus*'s case.[137] The per curiam format is significant because it indicates that the constitutional violation was so clear that extended analysis was unnecessary. The Court's reversal sent an unmistakable signal that Texas's analytical sophistication could not disguise obvious constitutional violations.

The Court's specific findings removed all ambiguity about constitutional requirements in *Andrus*'s case. The Court characterized the mitigation evidence as "compelling" and "powerful," directly contradicting the findings of the CCA.[138] The finding of deficient performance based on failure to investigate readily available evidence eliminated any reasonable basis for concluding that counsel's performance was constitutionally adequate under *Strickland*.[139] The *Andrus I* decision demonstrates that the federal system can operate to remedy constitutional violations by triggering swift correction without extended analysis.

2. Andrus *II*

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[134] *Ex parte Andrus,* 622 S.W.3d at 893, 899.
[135] *Andrus,* 142 S. Ct. at 1866 (Sotomayor, J., dissenting from denial of certiorari).
[136] *Id.* at 1877.
[137] *Id.*
[138] *Id*. at 1881, 1883 (finding counsel "performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence" that would have been "compelling" and "powerful").
[139] *Id.* at 1878, 1886 (holding that counsel's failure to investigate readily available mitigating evidence, standing alone, established deficient performance under *Strickland v. Washington,* 466 U.S. 668 (1984), such that "no competent attorney would have made" the same choice).

The Texas Court of Criminal Appeals' response on remand in 2021 demonstrated that even explicit Supreme Court correction could not overcome institutionalized resistance.[140] In a 5–4 decision, the majority accepted the Supreme Court's finding of deficient performance while denying relief on prejudice grounds.[141] Rather than rejecting federal constitutional language or findings, the court accepted the Supreme Court's characterization of counsel's performance as deficient but conducted its own independent reweighing of the mitigation evidence against the State's aggravating evidence, concluding in a single sentence that "[t]he mitigating evidence is not particularly compelling, and the aggravating evidence is extensive."[142] That conclusion directly inverted the Supreme Court's own characterization of the identical evidentiary record as an "apparent 'tidal wave'" of mitigation.[143] The four dissenting judges recognized that the majority's opinion was "irreconcilable with the Supreme Court's prior decision," specifically invoking vertical stare decisis and the law-of-the-case doctrine to argue that the CCA was bound by the Supreme Court's characterizations of the same record.[144] When nearly half the Texas court explicitly recognized that the majority's analysis contradicts the Supreme Court's findings, the resistance cannot masquerade as good faith disagreement about ambiguous legal standards.

Judge Richardson's separate opinion illustrates how that acknowledgment-without-application worked in practice. Comparing Andrus's case to *Wiggins v. Smith*, Judge Richardson wrote, "Here, while not insignificant, [a]pplicant's proposed mitigating evidence does not rise to the level of that discussed in *Wiggins*....[t]his is not the same caliber of potentially mitigating evidence that was available, but not presented, in Wiggins."[145] That comparison is doing real work, and it should be described accurately rather than folded into a broader claim the record doesn't support. Richardson did not conclude that counsel's performance was adequate; the panel's order did not reach that question on the merits

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[140] *Ex parte Andrus*, 622 S.W.3d at 893.
[141] *Id.* at 899–908.
[142] *Id*. at 899.
[143] *Andrus*, 140 S. Ct. at 1881, 1883.
[144] *Ex parte Andrus*, 622 S.W.3d at 909 (Newell, J., dissenting); *see also Andrus*, 142 S. Ct. at 1875 (Sotomayor, J., dissenting from denial of certiorari) (describing the CCA's decision as irreconcilable with the Court's prior holding).
[145] *Ex parte Andrus*, 2019 WL 622783, at *7 (Richardson, J., concurring).

at all. What Richardson did was use the *Wiggins* comparison to suggest the withheld mitigation evidence was less compelling than *Wiggins*'s by a characterization of the evidence's weight, offered without the benefit of full prejudice analysis, that the Supreme Court would later reject when it independently reviewed the same evidence and vacated on the ground that the Court of Criminal Appeals had failed to conduct the prejudice inquiry *Strickland* requires.[146]

3. Andrus *III*

The Supreme Court's denial of certiorari in 2022 represents the complete failure of constitutional enforcement mechanisms when confronted with semantic resistance.[147] Justice Sotomayor's dissent, joined by Justices Breyer and Kagan, recognizes that Texas's approach was irreconcilable with the Supreme Court's prior decisions and raised significant federalism concerns about state court defiance of federal mandates.[148] The Court's refusal to grant certiorari despite clear evidence of continued constitutional defiance demonstrates the structural limitations of current enforcement mechanisms.

Andrus's suicide in 2023, six months after the denial of certiorari, is a tragic example of constitutional enforcement failure. The human cost of continued constitutional resistance is measured not only in Andrus's death but in the pattern of constitutional violations across multiple cases and contexts. *Andrus* represents the culmination of three decades of constitutional resistance that current enforcement mechanisms have been unable to address effectively, revealing fundamental structural inadequacies in federal constitutional enforcement.

IV: TEXAS AS A CONSTITUTIONAL OUTLIER

This Part demonstrates that Texas's struggle against federal mandates is an aberration among death penalty jurisdictions. Through statistical analysis, comparative case studies, and

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[146] *Andrus*, 590 U.S. at 821–24 (finding the mitigating evidence "considerable" and characterizing it, quoting the record, as a "tidal wave" of available information).
[147] Andrus, 142 S. Ct at 1875–76.
[148] *Id.* at 1875.

examination of institutional responses to identical federal requirements, this analysis establishes that constitutional compliance is both feasible and normal, making Texas's three-decade pattern of resistance particularly stark. The evidence refutes claims that Texas's approach reflects reasonable interpretive disagreement or practical constraints inherent in capital punishment administration, claims the State itself has advanced in *Andrus v. Texas*, arguing in its own briefing that the CCA "correctly applied this Court's precedents" in denying relief on remand.[149] Part V examines the question of why Texas alone represents a constitutional outlier among death penalty states.

A. Statistical Evidence of Habeas Denial

A statistical analysis of ineffective assistance claims across death penalty jurisdictions reveals that Texas is a dramatic outlier in rates of habeas corpus relief for constitutional violations.[150] While comprehensive state-by-state data remains limited due to inconsistent reporting practices, available evidence from federal habeas corpus proceedings, Death Penalty Information Center records, and academic studies demonstrates systematic patterns.

Federal habeas corpus reversal rates provide the clearest evidence of methodical state court constitutional violations. During the period from 1989–2023, federal courts reversed Texas capital cases for constitutional violations at rates significantly exceeding other death penalty jurisdictions.[151] Fifth Circuit data reveals that Texas cases comprise a disproportionate percentage of federal habeas reversals for ineffective assistance of counsel, despite Texas representing only one of several death penalty states within the circuit.[152] The pattern is particularly stark for mitigation investigation failures. Federal district courts in Texas granted habeas relief for inadequate mitigation investigation in dozens of cases during the study period, indicating institutionalized state court

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[149] Brief in Opposition at 33, Andrus v. Texas, 142 S. Ct. 1866 (2022) (No. 21-6001)(filed on behalf of the State by the Fort Bend County District Attorney's Office).
[150] *See A State of Denial: Texas Justice and the Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 2021), https://deathpenaltyinfo.org/stories/a-state-of-denial-texas-justice-and-the-death-penalty.
[151] *See* David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000–2020*, 68 UCLA L. REV. DISC 2, 9 (2020).
[152] *Id.*

failures to apply federal constitutional requirements.[153] These federal reversals occurred despite the AEDPA's restrictive standards for overturning state court decisions, suggesting that Texas's violations were so clear that they met even highly deferential federal review standards.[154]

A note on what reversal rates can and cannot show: aggregate capital reversal data measures the error reviewing courts find, not the error trial courts commit, and the two diverge precisely where a reviewing court is disinclined to look. James Liebman's national study flagged this ambiguity without resolving it, observing that Virginia's anomalously low reversal rate left open the question of whether its judgments were less error-prone or its courts "more tolerant of serious error."[155] For Texas, the ambiguity can be resolved because the record supplies the missing variable: on the occasions when a federal court did look closely at what the Court of Criminal Appeals had approved, it found error the state court had not, in *Penry II*, in *Moore*, in *Smith v. Texas* twice, and in *Andrus*. A low state reversal rate is evidence for the thesis of this Article, not against it.[156]

The frequency of Supreme Court intervention in Texas capital cases provides additional evidence of systematic constitutional resistance. The *Penry* sequence alone involved two Supreme Court reversals spanning twelve years, demonstrating sustained resistance to clear federal mandates.[157] The *Moore* litigation required Supreme Court intervention to address Texas's evasion of the *Atkins* requirements.[158] Finally, the *Andrus* case involved two Supreme Court reviews within three years,

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[153] Jolie McCullough, *Texas Death Row Prisoners Spend Decades in Solitary Confinement. A Lawsuit Wants to End that "Cruel" Treatment*, TEX. TRIB. (Jan. 26, 2023), https://www.texastribune.org/2023/01/26/texas-death-row-solitary-lawsuit/.
[154] 28 U.S.C. § 2254(d).
[155] James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, 1973–1995, at 15 (Columbia Law Sch. Pub. Law Rsch. Paper No. 15, 2000), (Virginia anomaly and the "more tolerant of serious error" question); McCullough*, supra* note 153 at 4–5 (states where state post-conviction review is an important source of review, listing Florida and North Carolina).
[156] *See generally* Liebman, *supra* note 155, *at* at tbl. 30 & app. C.
[157] *See* Penry v. Lynaugh (*Penry I*), 492 U.S. 302 (1989); Penry v. Johnson (*Penry II*), 532 U.S. 782 (2001).
[158] Moore v. Texas (*Moore I*), 581 U.S. 1, 20 (2017).

culminating in a rare dissent from denial of certiorari citing federalism concerns about state court defiance.[159]

B. Other States' Responses to Identical Federal Mandates

Texas's claim that resistance reflects inherent difficulty in complying with federal capital-sentencing mandates can be tested directly: other states received functionally identical mandates during the same period, and they complied. The comparison also answers a question Part III raises but cannot resolve on Texas evidence alone: whether compliance with a federal capital-sentencing mandate is fundamentally a judicial act or a legislative one. The three comparison states answer it differently from one another. Florida's high court corrected itself. North Carolina's did too, and its legislature later rebuilt the defense system underneath. Virginia never had the problem, because its statute was drafted so as not to create it, and when its system did fail, the legislature repaired it. What distinguishes all three from Texas is not which branch acted but that some branch acted in good faith, and what distinguishes Texas is that its Legislature acted while its high criminal court continued to resist.

1. *Florida: Judicial Compliance After* Hitchcock

Florida received its *Penry*-style correction two years before Texas received *Penry.* In *Hitchcock v. Dugger,* a unanimous Supreme Court held that Florida's capital sentencing proceeding was unconstitutional because the advisory jury was instructed not to consider, and the sentencing judge refused to consider, mitigating evidence not enumerated in the Florida statute.[160] The mandate was the same one Texas would receive in *Penry*: the sentencer must be permitted to consider and give effect to all relevant mitigation.[161]

[159] *Andrus*, 142 S. Ct. at 1880).
[160] Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987).
[161] *Hitchcock*, 481 U.S. at 398–99 (holding that Florida's advisory jury and sentencing judge could not be precluded from considering non-statutory mitigating evidence); *see also Penry I*, 492 U.S. at 319 (requiring that the jury be able to "consider and give effect to" mitigating evidence in imposing sentence).

Florida's judicial response supplies the "workable solutions" this comparison requires. First, the Florida Supreme Court treated *Hitchcock* as a genuine change in law and applied it retroactively, granting new sentencing hearings in a substantial line of cases where juries had been instructed under the old scheme rather than constructing procedural barriers to review.[162] Second, in *Campbell v. State*, the Florida Supreme Court went beyond the federal minimum, requiring trial courts to expressly evaluate each proposed mitigating circumstance in the sentencing order, to determine whether it was established by the evidence and what weight it carried, precisely so that mitigation could not be silently discounted and so that appellate review of that weighing would be possible.[163] The contrast with Texas is structural: within three years of its mandate, Florida's high court had built a compliance-forcing doctrine; twelve years after its mandate, Texas's high court was still defending the identical instructions in *Penry II*. Florida later adjusted Campbell's weighting rule, permitting a sentencer to assign no weight to an established circumstance for reasons unique to a case. What it did not disturb was the requirement that every proposed circumstance be found, addressed, and weighed on the record, the procedural discipline that made silent discounting impossible. The refinement operated above the federal floor, not beneath it.

2. *North Carolina: Immediate Compliance After* McKoy

North Carolina's analog arrived in *McKoy v. North Carolina*, in which the Supreme Court struck down the state's requirement that jurors unanimously agree on a mitigating circumstance before any juror could weigh it.[164] North Carolina's response was immediate and total. The North Carolina Supreme Court applied *McKoy* on remand and in pending cases, ordering new sentencing hearings rather than salvaging the old verdicts[165] and the pattern jury

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[162] *See generally* Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).
[163] Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from on other grounds* by Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (permitting a sentencer to assign no weight to an established mitigating circumstance in circumstances unique to a case, while leaving intact Campbell's requirement that each proposed circumstance be expressly evaluated and weighed on the record).
[164] McKoy v. North Carolina, 494 U.S. 433, 435, 444 (1990).
[165] State v. McKoy, 394 S.E.2d 426, 427 (N.C. 1990) (on remand).

instructions were revised to eliminate the unanimity requirement statewide. There was no second *McKoy*. The mandate issued once, then compliance followed revealing the null hypothesis against which the *Penry* sequence must be measured.

North Carolina's later reforms were legislative, and they illustrate the second route to compliance. The Indigent Defense Services Act of 2000 created a statewide Office of Indigent Defense Services with a capital defender division, replacing ad hoc county-by-county appointment with centralized qualification standards, training requirements, and funding for capital defense.[166] North Carolina thus legislated the infrastructure that removes Strickland from the discretion of the courts and puts it in the hands of the legislation.[167]

3. *Virginia: Statutory Design and Legislative Repair*

Virginia's capital statute largely avoided the *Penry* problem by design: it directed the jury to consider all the evidence in mitigation, without enumerating an exclusive list and without the special-issue structure that made Texas's scheme incapable of giving mitigation effect.[168] Where Virginia's system did produce systemic failures, the fix came from the legislature: the 2004 creation of regional capital defender offices under the Virginia Indigent Defense Commission established salaried, specialized capital trial counsel with mandatory qualification standards.[169]

4. *The Texas Anomaly*

The comparative record would be incomplete without acknowledging that the Texas Legislature did eventually act. In 1991, the Legislature amended Article 37.071 of the Code of Criminal Procedure to add what practitioners call the mitigation special issue: capital juries are now asked directly whether, taking into account all the evidence including the circumstances of the offense and the defendant's character, background, and personal moral culpability, sufficient mitigating circumstances exist to

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[166] Act of July 13, 2000, 2000 N.C. Sess. Laws 144 (codified at N.C. Gen. Stat. §§ 7A–498 to 7A–498.9).
[167] *Id.*
[168] Va. Code Ann. § 19.2–264.4.
[169] 2004 Va. Acts ch. 884.

warrant a life sentence rather than death.[170] The 1991 amendment is, on its face, exactly what *Penry I* required.

This legislative fix sharpens rather than softens the indictment of the Court of Criminal Appeals for two reasons. First, the amendment applied only to offenses committed on or after its effective date.[171] For the large population of defendants whose crimes predated it, including Penry, whose 1979 offense meant that his 1990 resentencing and every subsequent proceeding ran under the superseded scheme, the legislature's fix supplied nothing. The Court of Criminal Appeals spent the next decade defending, in those cases, a charge its own legislature had abandoned in new ones, and the Supreme Court was still correcting rulings under the old scheme sixteen years after the amendment passed.[172] Second, the pattern documented in Part III postdates the fix: *Briseno* (2004), *McFarland* (2005), and *Ex parte Andrus* (2019–2021) all arise under the reformed statute. The 1991 amendment closed the specific *Penry* gap, and the CCA's resistance simply migrated to the doctrines the legislature had not addressed. The comparative lesson, and the answer to the question of where Texas falls short is follows: in Florida and North Carolina, judicial compliance made legislative rescue unnecessary; in Virginia, legislative design made judicial correction unnecessary; in Texas, legislative repair was met with judicial workarounds.[173]

C. Judicial Merit Selection Systems and Compliance

If the failure is located in the Court of Criminal Appeals, the question becomes what distinguishes that institution from the courts that complied. The most conspicuous difference is how its judges keep their jobs. Comparison of different types of judicial selection systems reveals significant correlations between judicial independence and constitutional compliance in capital cases. States with merit selection systems or appointment processes show significantly better records of constitutional compliance compared to states with partisan judicial elections, particularly in capital

[170] Act of June 16, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898 (codified at Tex. Code Crim. Proc. art. 37.071, § 2(e)(1)).
[171] *Id*.
[172] *See generally* Smith v. Texas, 550 U.S. 297 (2007); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); Brewer v. Quarterman, 550 U.S. 286 (2007).
[173] *See supra* Part III.

punishment contexts where constitutional compliance may conflict with electoral incentives.[174]

Virginia's merit selection system for trial judges and life tenure for appellate judges contributes to judicial independence that enables constitutional compliance even when such compliance may be politically unpopular.[175] Virginia judges can apply federal constitutional requirements without concern for electoral consequences, leading to more consistent compliance compared to jurisdictions with partisan judicial elections.[176] North Carolina's move from partisan to nonpartisan judicial elections, combined with public financing of judicial campaigns, has corresponded with improved constitutional compliance in capital cases.[177] While not as protective as full merit selection, North Carolina's reforms demonstrate that institutional changes can improve constitutional compliance by reducing political pressures on judges reviewing capital cases.[178] Florida's own judiciary supplies a natural experiment within a single state: its appellate judges, including the Supreme Court and the District Courts of Appeal, which decide the capital ineffective-assistance and mitigation claims most comparable to those the CCA hears, are chosen through merit selection and stand only for uncontested retention votes, while its trial judges face ordinary contested nonpartisan elections.[179]

D. Fifth Circuit Tolerance for Texas Resistance

The Fifth Circuit's historical deference to Texas capital decisions has enabled systematic constitutional resistance by reducing the likelihood of federal intervention in clear constitutional violations. As compared with other federal circuits, the Fifth Circuit significantly differs in its approach to reviewing state court

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[174] Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171–72 (2009) (finding that judges facing reelection are less likely to vote for criminal defendants).
[175] Va. Const. art. VI, § 7.
[176] *See id.*
[177] Robert N. Hunter Jr., *Do Non-Partisan, Publicly Financed Judicial Elections Enhance Relative Judicial Independence?* 93 NORTH CAROLINA LAW REVIEW 6, 1830–35 (2015).
[178] *Id* at 1868.
[179] FLA. CONST. art. V, § 10(a)–(b); *see also Merit Retention Info for Florida Voters*, FLA. BAR (July 2025 update), https://www.ansbacher.net/blog/learn-floridas-merit-retention-vote/; Judicial Selection in Florida, Ballotpedia, https://ballotpedia.org/Judicial_selection_in_Florida.

constitutional determinations, demonstrating unusual tolerance for questionable state court constitutional analysis.[180] Fifth Circuit habeas review of Texas capital cases has required Supreme Court correction with unusual frequency.[181]

The pattern is not merely one of deference to the CCA; the Fifth Circuit developed doctrine of its own that screened Texas violations from correction, and the Supreme Court repeatedly reversed it for doing so. In *Tennard v. Dretke*, the Court rejected the Fifth Circuit's self-invented "constitutional relevance" test, which had required capital defendants to show a "uniquely severe" condition causally connected to the crime before their mitigation evidence even qualified for *Penry* analysis, a screening mechanism the Court noted had "no foundation in the decisions of this Court."[182] In *Miller-El v. Cockrell* and again in *Miller-El v. Dretke*, the Court twice reversed the Fifth Circuit's refusal to grant relief on overwhelming evidence of racial discrimination in Dallas County jury selection, the second reversal necessary because the Fifth Circuit had effectively re-denied the claim after the first.[183] And in *Smith v. Texas*, the Court twice reversed the CCA in the same case over the adequacy of *Penry* nullification instructions, with the Fifth Circuit's permissive framework in the background.[184] A circuit that must itself be summarily corrected for narrowing federal protections cannot function as the enforcement backstop AEDPA assumes.

The contrast with other circuits need not rest on impressionistic claims about judicial culture. It is enough to observe

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180 *See* Tennard v. Dretke, 542 U.S. 274, 284 (2004) (rejecting the Fifth Circuit's "constitutional relevance" screening test for mitigating evidence as having "no foundation in the decisions of this Court"); Abdul-Kabir v. Quarterman, 550 U.S. 233, 246–58 (2007) (reversing the Fifth Circuit for denying relief on a Penry claim); Brewer v. Quarterman, 550 U.S. 286, 289–96 (2007) (same, decided the same day).

181 *See infra* notes [191]–[193] and accompanying text (discussing *Tennard*, *Miller-El*, and Smith v. Texas).

182 Tennard, 542 U.S. at 284-87.

183 *Miller-El* (*Miller-El I*), 537 U.S. at 341 (reversing the Fifth Circuit's refusal to permit appeal of the denial of habeas relief on a claim of racial discrimination in jury selection); *Miller-El* (*Miller-El II*), 545 U.S. at 265–66 (granting relief after Texas courts again rejected the same claim on remand).

184 Smith v. Texas (*Smith I*), 543 U.S. 37, 46–48 (2004) (per curiam) (summarily reversing the Criminal Court of Appeals for upholding a nullification instruction under the rationale rejected in Penry II); Smith v. Texas (*Smith II*), 550 U.S. 297, 315–16 (2007) (reversing again after the Criminal Court of Appeals denied relief on remand by applying a state-law "egregious harm" standard).

that the enforcement failures documented above are circuit-specific: the screening doctrines the Supreme Court struck down in *Tennard* and *Miller-El* were Fifth Circuit inventions, applied to Texas cases, with no analog in the Fourth Circuit's review of Virginia capital cases.[185]

V: INSTITUTIONAL CONDITIONS ENABLING SYSTEMATIC RESISTANCE

This Part examines the structural elements within Texas's legal and political system that enables and incentivizes constitutional nullification. Rather than treating systematic resistance as an aberration requiring explanation, this analysis identifies specific institutional mechanisms that make constitutional resistance a rational strategy for state court judges operating within Texas's unique political and professional environment. Understanding these enabling factors is essential for developing effective reforms that address root causes rather than symptoms of constitutional nullification.

A. Electoral Politics

Texas uses a system of partisan judicial elections that creates a conflict between upholding constitutional mandates and popular sentiment about capital punishment.[186] Unlike federal judges with life tenure or state judges selected through merit systems, Texas judges face regular electoral review by constituents that may support aggressive capital punishment policies.[187] It is possible that these voters may view constitutional protections for capital defendants as obstacles to swift executions, thus influencing judges to support this position to remain in favor of their constituents.

The electoral dynamic creates systematic bias against constitutional compliance in capital cases because constitutional protections often delay executions or result in sentence reductions

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[185] Lovitt v. True, 403 F.3d 171, 178–79 (4th Cir. 2005); McKinney v. Ryan, 813 F.3d 798, 822–23 (9th Cir. 2015) (*en banc*)(*McKinney* actually shows the Ninth Circuit correcting Arizona's own decades-long resistance to *Eddings*, showing circuits can and do end state resistance patterns when they choose to).

[186] *See Texas Judicial Elections,* BALLOTPEDIA, https://ballotpedia.org/Texas_judicial_elections (explaining Texas's use of partisan judicial elections and their implications).

[187] *Despite Committee's Recommendation, Ending Texas' Partisan Judicial Elections Looks Unlikely,* THE TEX. TRIB. (Dec. 31, 2020), https://www.texastribune.org/2020/12/31/texas-judicial-elections-partisan/.

that are politically unpopular.[188] Judges who grant relief in high-profile capital cases could face electoral consequences from voters who view adhering to the constitution as judicial activism or sympathy for murderers.[189]

Statistical evidence supports the correlation between judicial elections and constitutional resistance in capital cases.[190] Studies of judicial behavior in capital cases show that judges facing competitive elections are significantly less likely to grant constitutional relief compared to judges with secure tenure or merit selection.[191] Texas judicial elections consistently feature campaign rhetoric criticizing judges who grant constitutional relief in capital cases, creating electoral consequences for constitutional compliance. Campaign finance dynamics further distort constitutional decision-making by creating financial incentives for constitutional resistance.[192] Judicial candidates who establish reputations for denying constitutional claims in capital cases may receive substantial campaign funding while judges who grant constitutional relief face potential opposition funding from these same sources in subsequent elections.[193]

The partisan structure of Texas judicial elections links judicial retention to party primaries in which criminal-justice positioning is salient, compounding the electoral dynamics documented above.[194] Republican judicial candidates routinely campaign on platforms of aggressive capital punishment enforcement and resistance to federal constitutional constraints.[195]

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[188] Joanna M. Shepherd, *Are Appointed Judges Strategic Too?,* 58 DUKE L.J. 1589, 1592–94 (2009) (finding elected judges are less likely to grant relief in capital cases due to electoral pressures).
[189] Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections,* 114 MICH. L. REV. 929, 940 (2016) (discussing how campaign dynamics influence judicial behavior in criminal cases).
[190] Michael S. Kang, *Campaign Cash and Judicial Outcomes*, STATE CT. REP. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/campaign-cash-and-judicial-outcomes.
[191] Kang & Shepherd, *supra* note 189, at 940 (discussing how campaign dynamics influence judicial behavior in criminal cases).
[192] Kang, *supra* note 190.
[193] *See Id.*
[194] *Tex. Comm'n on Judicial Selection Final Report*, Public Policy Research Institute – Texas A&M University, at 12–14 (December 2020).
[195] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75

Empirical studies confirm that judges facing partisan reelection are significantly less likely to rule in favor of capital defendants, and Texas death sentences are concentrated in a small number of counties where prosecutorial and judicial elections reward aggressive capital enforcement.[196] This electoral structure places Texas's court of last resort in capital cases—the elected, partisan Court of Criminal Appeals—directly atop the political pressures documented above, whereas the states that achieved compliance with identical federal mandates, most notably North Carolina, routed reform through legislative action insulated from judicial electoral incentives, a distinction examined in Part IV, *supra*.[197]

B. Public Opinion and the Counter-Majoritarian Problem in Capital Cases

Texas's political culture strongly supports capital punishment. It often views constitutional protections for capital defendants as federal interference with state sovereignty and local values. This creates public pressure that judges must navigate when making constitutional determinations that may be legally required but are politically unpopular. Historically, Texas voters have supported capital punishment at rates among the highest in the nation, and although recent polling shows Texas support declining alongside national trends,[198] the relevant electorate for judicial elections remains substantially more supportive than the general population.[199] When constitutional compliance conflicts with public

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B.U. L. Rev. 759, 760–65 (1995) (documenting judicial candidates, including in Texas, campaigning on records of imposing and upholding death sentences); Kang & Shepherd, *supra* note 189, at 940; *see also* Tex. Comm'n on Jud. Selection, Final Report, *supra* note 203.

[196] Shepherd, *supra* note 174, at 171–72; Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 74–76 (2011); Death Penalty Info. Ctr., *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All* (2013); *see also Fair Punishment Project*, Too Broken to Fix: Part I (2016) (profiling outlier counties, including Harris County, that produce disproportionate shares of death sentences).

[197] *See infra* Part IV.

[198] *NEWS BRIEF — Poll Shows Decreasing Support for Death Penalty in Texas*, Death Penalty Information Center, https://deathpenaltyinfo.org/news-brief/news-brief-poll-shows-decreasing-support-for-death-penalty-in-texas (last accessed August 6, 2026).

[199] *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2021),

preference for swift executions, elected judges face the choice between electoral survival or enforcing constitutional requirements.

Victims' rights advocacy has become organized and politically consequential in criminal justice policymaking generally, and victims' families and advocacy organizations frequently characterize post-conviction litigation as an obstacle to justice and closure.[200] Further, the constitutional counter-majoritarian difficulty becomes particularly acute in capital cases because constitutional protections specifically protect unpopular defendants from majoritarian preferences for severe punishment. The Sixth Amendment's guarantee of effective assistance of counsel and the Eighth Amendment's prohibition against cruel and unusual punishment operate as constitutional constraints on democratic preferences for punitive criminal justice policies.[201]

C. AEDPA Restrictions and State Court Resistance

The institutional incentives described above would matter less if federal review reliably corrected their products. The AEDPA ensures that it does not.[202] AEDPA's architecture rests on an assumption of state-court good faith: its deference provisions were designed to prevent federal relitigation of reasonable state decisions, not to shield unreasonable ones. But each of its mechanisms operates differently against a court engaged in the patterns of constitutional resistance Part III documents.

Section 2254(d)(1)'s "unreasonable application" standard requires more than federal disagreement; the state decision must be objectively unreasonable.[203] Against interpretive nullification, this standard is nearly self-defeating: the entire design of the *Briseno* factors and the *Andrus* remand analysis was to produce opinions that recite the correct standard and reach the forbidden result through facially plausible reasoning, precisely the form of decision

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https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/.

200 *See generally* Susan Bandes, *Victims, "Closure," and the Sociology of Emotion,* 72 LAW & CONTEMP. PROBS. 1, 9–12 (2009) (discussing the political influence of victims' rights movements in shaping criminal justice policy).

201 U.S. CONST. AMEND. VI, VIII.

202 28 U.S.C. § 2254(d); *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 445–47 (2007).

203 Williams v. Taylor, 529 U.S. 362, 409–10 (2000) (defining "unreasonable application" under § 2254(d)(1)).

deference protects.[204] The statute of limitations forecloses claims discovered through the very post-conviction investigation that trial counsel's deficiency made necessary; the *Andrus* pattern, in which the mitigation case emerged only at the habeas stage, is the norm, not the exception, in inadequate-investigation claims.[205] Procedural default doctrine permits state courts to insulate violations from federal review through state procedural rulings[206] and § 2254(e)(1)'s presumption of correctness extends deference to the factual findings on which resistant legal conclusions are built.[207]

VI: ADDRESSING COUNTERARGUMENTS

This Part anticipates and responds to the primary objections likely to be raised against claims that Texas has engaged in systematic constitutional nullification. These counterarguments generally fall into three categories: (1) federalism and state sovereignty concerns, (2) claims of reasonable interpretive disagreement, and (3) traditional principles of federal-state comity and habeas deference. The historical evidence from three decades of Texas resistance provides empirical data for evaluating these objections and demonstrating why they fail to justify constitutional resistance.

A. Federalism and State Sovereignty Objections

The strongest counterargument to claims of constitutional nullification invokes federalism principles and traditional state sovereignty in criminal justice administration.[208] This argument contends that criminal justice has historically been a state rather than federal responsibility, and that federal constitutional enforcement interferes with legitimate state authority to design and to implement criminal punishment systems according to local values and preferences.

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[204] *See supra* Part III.
[205] 28 U.S.C. § 2254(d)(1); Holland v. Florida, 560 U.S. 631, 645–46 (2010) (discussing equitable tolling under AEDPA and the challenges of timely filing).
[206] Coleman v. Thompson, 501 U.S. 722, 750 (1991).
[207] Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (discussing the presumption of correctness for state court factual findings under AEDPA).
[208] Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment,* 45 U. KAN. L. REV. 1219, 1220–22 (1997) (discussing federalism as a structural principle in criminal justice).

The federalism objection argues that states should retain primary authority over criminal justice administration and should receive substantial deference in implementing capital punishment systems.[209] This argument suggests that federal constitutional requirements should be interpreted to accommodate state preferences and traditional state authority rather than imposing uniform national standards that conflict with local values.[210]

However, the federalism objection fundamentally misunderstands the relationship between state sovereignty and federal constitutional requirements.[211] The Supremacy Clause establishes that federal constitutional law is "the supreme Law of the Land," binding on all state judges who are "bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[212] This constitutional text makes clear that state sovereignty cannot justify violation of federal constitutional requirements, regardless of traditional state authority in particular policy areas.[213]

B. The Claim of Reasonable Interpretive Disagreement and Why the Record Refutes It

The second major counterargument claims that Texas courts have engaged in reasonable interpretive disagreement about ambiguous constitutional standards rather than systematic constitutional nullification. This is not a hypothetical objection; it is Texas's own account of its conduct.[214] In opposing certiorari after the *Andrus* remand, the State argued that the CCA had faithfully performed the prejudice reweighing the Supreme Court ordered and had simply reached a permissible conclusion on a mixed question.[215] The CCA majority itself framed its remand decision as ordinary

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[209] Andrus, 590 U.S. at 824 (Alito, J., dissenting)(faulting the majority for intervening in a fact-bound state case); *Penry I*, 492 U.S. at 350 (Scalia, J., concurring in part and dissenting in part)(objecting to federal micromanagement of state sentencing procedure).
[210] Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting); Younger v. Harris, 401 U.S. 37, 44–45 (1971).
[211] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340–41 (1816) (affirming federal supremacy over state courts in constitutional interpretation).
[212] U.S. Const. art. VI, cl. 2.
[213] Cooper v. Aaron, 358 U.S. 1, 18–19 (1958) (holding that state officials cannot defy federal constitutional mandates under the guise of state sovereignty).
[214] Brief in Opposition at 33–37, Andrus v. Texas, 142 S. Ct. 1866 (No. 21-6001) (2022).
[215] *Id.*

application of *Strickland* prejudice doctrine,[216] and Judge Richardson's earlier concurrence presented the denial of relief as a routine, fact-bound distinction of *Wiggins*.[217] The question is whether that self-description survives contact with the record.

The *Strickland* standard's emphasis on "objective reasonableness" and the Eighth Amendment's prohibition of punishments that violate "evolving standards of decency" seem on their face to invite judgment calls on which reasonable courts might disagree.[218] However, the interpretive disagreement argument fails when confronted with the systematic nature of Texas resistance across different constitutional contexts, factual scenarios, and time periods. Reasonable interpretive disagreement should produce varied results across different cases and should diminish as federal guidance becomes clearer and more specific. Texas's consistent pattern of constitutional minimization suggests systematic resistance rather than random interpretive uncertainty.

Wiggins's specific requirements provided detailed guidance about mitigation investigation obligations, citing specific professional standards and establishing concrete benchmarks for constitutional compliance.[219] By 2003, claims about interpretive ambiguity became less plausible because federal requirements had become significantly more specific and constraining.[220] *Williams*'s enforcement standards and subsequent per curiam decisions provided explicit federal guidance about the limits of reasonable state court interpretation, establishing that state courts must apply federal constitutional standards in objectively reasonable ways rather than systematically minimizing constitutional requirements.[221] By the time the Court characterized the withheld evidence in Andrus as a "tidal wave," no interpretive ambiguity remained to disagree within.[222]

C. Federal-State Comity and Habeas Corpus Limitations

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[216] *Ex parte Andrus*, 622 S.W.3d at 899.
[217] *Ex parte Andrus*, 2019 WL 622783, at *7 (Richardson, J., concurring).
[218] *Strickland,* 466 U.S. at 687–88; *Trop*, 356 U.S. at 100–01.
[219] *Wiggins*, 539 U.S. at 521–23.
[220] *See id.*
[221] *See Williams*, 529 U.S. at 410–13.
[222] *Andrus*, 140 S. Ct. at 1886–87; *Ex parte Andrus*, 622 S.W.3d at 896–99.

The third and last category of counterarguments invokes traditional principles of federal-state comity and deference that suggest federal courts should avoid interfering with state criminal justice administration except in extraordinary circumstances.[223] Comity arguments emphasize historical respect for state sovereignty in criminal justice administration and suggest that federal constitutional enforcement should be limited to clear violations that cannot be addressed through state institutional mechanisms.[224] These arguments invoke the principle of judicial restraint and suggest that aggressive constitutional enforcement represents federal judicial activism that undermines appropriate federal-state balance.[225]

AEDPA deference requirements provide statutory support for comity arguments by establishing that federal habeas courts must defer to state court constitutional determinations unless they represent objectively unreasonable applications of clearly established federal law.[226] These statutory requirements suggest that Congress intended to limit federal constitutional enforcement and preserve substantial state court authority over constitutional interpretation.[227] Institutional capacity arguments suggest that federal courts lack adequate information and expertise to effectively monitor state criminal justice administration and that federal constitutional enforcement should be limited to circumstances where federal judicial intervention is clearly necessary and likely to be effective.[228]

However, deference arguments fail when confronted with systematic constitutional violations that persist despite clear federal guidance and explicit federal correction.[229] Traditional deference

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[223] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453–54 (1963) (discussing comity and finality in federal habeas review).
[224] *Id.*
[225] *Id.*
[226] 28 U.S.C. § 2254(d)(1); *see also Williams*, 529 U.S. at 410.
[227] Harrington v. Richter, 562 U.S. 86, 103 (2011) ("State courts are the principal forum for asserting constitutional challenges to state convictions."); Shoop v. Twyford, 596 U.S. 811, 819 (2022) (AEDPA reflects "the principles of comity, finality, and federalism").
[228] Bator, *supra* note 223, at 451–53.
[229] For the paradigm case, *see Ex parte Andrus*, 622 S.W.3d at 899–906 (denying relief on prejudice through the compartmentalized weighing *Wiggins* forbids,

principles assume state court good faith that is absent when state courts systematically resist binding federal constitutional requirements over extended time periods.[230] The Supreme Court's decision in *Williams v. Taylor* established explicit limits on federal deference to state court constitutional determinations, requiring federal courts to independently evaluate whether state constitutional interpretations represent objectively reasonable applications of federal constitutional law.[231] The "unreasonable application" standard was designed for exactly this circumstance, and it marks the point at which deference stops protecting reasonable state judgment and starts insulating violations from correction.[232]

VII: PROPOSED REFORMS AND THEIR IMPLEMENTATION

The reforms proposed here follow from the diagnosis. Part V located the conditions that make systematic resistance sustainable in three places: an electoral structure that penalizes judges for granting relief in capital cases, a career path that rewards them for denying it, and a federal review architecture that presumes the state-court good faith Part III refutes. Part IV showed that each condition has a working alternative already operating in a comparable death-penalty state. What follows is therefore not a wish list. Each proposal is a mechanism functioning somewhere today, redirected at the failure this record documents: one for the electoral condition, one for the federal detection problem, and one for the institutional infrastructure that the compliant states built and Texas did not.

A. Judicial Selection: Removing the Electoral Incentive

Insulating constitutional decision-making from direct electoral pressure requires changing how judges keep their jobs. Merit selection is the most complete answer: Missouri's system combines professional screening with limited retention accountability, preserving democratic input while removing the incentive to campaign on capital outcomes.

Extended tenure systems can reduce electoral pressure even within elective systems by lengthening judicial terms and limiting

notwithstanding this Court's intervening characterization of the same record); *cf. Wiggins*, 539 U.S. at 534–36.

[230] *See supra* Parts III–IV.

[231] *Williams*, 529 U.S. at 363–67.

[232] *Wiggins,* 539 U.S. at 520–21.

the frequency of electoral review.[233] Twelve-year terms for trial judges and life tenure for appellate judges would reduce electoral pressure while maintaining democratic accountability at reasonable intervals.

The compliant courts in Part IV operate under selection systems that insulate constitutional decisions from retention pressure to varying degrees; the CCA operates under partisan election, the arrangement most strongly associated in the retention election literature discussed in Part V with rulings against capital defendants.[234] Reform of the CCA's selection method does not offer a guarantee of compliance, as no selection system produces one, but rather removes the specific incentive structure under which three decades of resistance proved electorally costless and, plausibly, electorally advantageous.

B. Federal Detection: Monitoring Institutional Patterns Rather Than Individual Errors

Federal enforcement should be equipped to detect institutional patterns, not merely to correct individual errors. Statistical monitoring of state constitutional-claim denial rates, federal habeas reversal rates, and Supreme Court intervention frequency would identify a jurisdiction in the posture Texas occupied by the mid-1990s—before three decades had elapsed. The reason such a mechanism is necessary is structural: case-by-case Supreme Court review and ordinary AEDPA habeas proceedings are designed to correct discrete errors, and they cannot by their nature detect or interrupt a pattern sustained across decades and multiple doctrinal areas. Where such a pattern is documented, federal review of capital constitutional claims should be expedited, so that violations cannot persist through state appellate processes long enough to outlast the prisoner.[235]

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[233] Layne S. Keele, *Why the Judicial Elections Debate Matters Less Than You Think: Retention As the Cornerstone of Independence and Accountability*, 47 AKRON L. REV. 375, 421 (2014).

[234] *See* supra Parts IV.C, V.A; Shepherd, *supra* note 174 at 171–72.

[235] *See generally* supra Part III (documenting the *Penry*, *Briseno*, and *Andrus* sequences as three phases of institutional resistance); Part IV.A (documenting comparative reversal-rate and Supreme Court intervention data); *see generally* Penry v. Johnson, 532 U.S. 782 (2001); Moore v. Texas, 581 U.S. 1 (2017); Ex parte Andrus, 622 S.W.3d 892 (Tex. Crim. App. 2021).

C. Congressional Enforcement: Conditioning Funds on Capital Defense Infrastructure

The Fourteenth Amendment provides the constitutional basis for Congress to authorize legislative enforcement of federal constitutional requirements when judicial enforcement proves inadequate.[236] Legislation should address constitutional resistance through comprehensive reform requirements. For example, legislation should establish specific requirements for state capital punishment systems that ensure constitutional compliance through adequate defense representation, professional training requirements, and institutional support systems.[237]

Enforcement legislation could provide federal agencies with authority to monitor state constitutional compliance and require institutional reforms when violations are identified. For instance, this could include statistical monitoring requirements, institutional assessment authority, and comprehensive reform mechanisms for addressing systematic constitutional violations. Legislation could condition federal criminal justice funding on demonstrated constitutional compliance through institutional defense systems, by which this Article means a statewide or regional office with salaried capital-qualified counsel, mandatory qualification and training standards, workload limits, and dedicated investigative and mitigation funding, of the kind North Carolina's Indigent Defense Services Act and Virginia's regional capital defender commission created, rather than the ad hoc judicial appointment systems that empirical research has linked to representation failures in Texas capital cases.[238]

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[236] U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (affirming Congress's enforcement authority under Section 5 of the Fourteenth Amendment), superseded by statute, Holt v. Hobbs, 574 U.S. 352 (2015).

[237] *See generally* Justice for All Act of 2004, *supra* note 237 (establishing, through Title IV, federal grant programs conditioning funding on state capital defense counsel qualification standards, caseload limits, and performance oversight).

[238] Act of July 13, 2000, 2000 N.C. Sess. Laws 144 (codified at N.C. Gen. Stat. §§ 7A–498 to 7A–498.9); 2004 Va. Acts ch. 884; Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel*, 70 DUKE L.J. 775 (2021).

That approach has a working precedent. Rather than mandating capital defense reforms nationally, Title IV of the Justice for All Act of 2004 created grant programs conditioning funds on states' voluntary adoption of counsel qualification standards, caseload limits, and performance oversight.[239]

That such a template can spread from willing states to reluctant ones is the premise behind Justice Brandeis's description of states as "laboratories" for "novel social and economic experiments": early adopters generate the evidence and political cover later adopters rely on.[240] North Carolina's Indigent Defense Services Act and Virginia's regional capital defender system, discussed in Part IV, are themselves products of this kind of diffusion: neither state was under a specific federal mandate to adopt them, and each developed a model that a state with fewer institutional obstacles than Texas could adapt.[241] States that wanted the funding adopted the standards; states that did not were left as they were, but the program supplied both a template and a financial incentive without displacing state authority to decline.

VIII: THE CRISIS OF CONSTITUTIONAL FEDERALISM AND THE PATH FORWARD

The progression from *Penry v. Lynaugh* in 1989 to Terence Andrus's suicide in 2023 traces a single institutional failure across thirty-four years and three distinct forms. Part III documented that progression in detail: crude procedural formalism in the *Penry* sequence, sophisticated interpretive nullification in *Briseno* and its progeny, and semantic defiance in the *Andrus* remand—each phase building on lessons the last had taught about which forms of resistance federal review could detect and which it could not.[242] Part IV demonstrated, through the comparative record, that none of this was inevitable: Florida, Virginia, and North Carolina faced functionally identical federal mandates and complied, some through judicial correction, some through statutory design, some through legislative reform of defense infrastructure.[243]

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[239] Justice for All Act of 2004, *supra* note 237.
[240] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[241] *See supra* Part IV.B.2–3.
[242] See *supra* Part III.
[243] See *supra* Part IV.B.

The comparative record forecloses one otherwise natural defense of the Texas Court of Criminal Appeals: that its resistance reflects some structural feature of Texas government rather than institutional choice. It does not. The Texas Legislature amended Article 37.071 to add the mitigation special issue within two years of *Penry I*, faster than Florida's judicial correction of *Hitchcock*, and on the same timeline as North Carolina's judicial response to *McKoy.*[244] Yet the CCA spent the next decade defending jury instructions its own legislature had already replaced, and when that resistance was finally corrected in *Penry II*, the pattern simply migrated to the doctrines the 1991 amendment had not reached—intellectual disability determinations under *Briseno,* sleeping-counsel claims under *McFarland*, and mitigation-prejudice analysis under *Andrus*. The failure this Article documents belongs to one institution, identifiable and specific, not to the state as a whole.

Part V located that institution's incentives—electoral pressure, career advancement structures tied to a prosecutorial pipeline, and a federal habeas architecture that presumes the good faith this record refutes—and Part VII proposed reforms addressing each: judicial selection reform, federal monitoring of institutional patterns, and congressional legislation conditioning funds on the capital defense infrastructure North Carolina and Virginia already built.[245] None of these reforms is self-executing, and all depend on institutions choosing to act in a way the Court of Criminal Appeals, across three decades, has not.

Terence Andrus's death did not follow from an unclear legal question. Every element of his case had already been resolved by the time the Court of Criminal Appeals denied him relief a second time: the governing standard, the facts, and the Supreme Court's own characterization of the evidence as compelling and powerful. Told plainly what the law required, the court found a way not to require it of itself, and four of its own members said so in dissent.[246]

Constitutional governance depends on institutions treating federal constitutional minimums as binding rather than negotiable in cases that will never make headlines as often as they make

[244] see *supra* Part IV.B.4.
[245] See *supra* Part VII.
[246] See *supra* Part III.C.

demands. The Texas experience shows what happens when that treatment breaks down, and what does not automatically follow from its breakdown: neither swift correction, nor structural inevitability, nor an absence of alternatives already working in states with no greater claim to exceptionalism than Texas has to resistance. When a court can defy the Supremacy Clause for three decades and answer to no one but its own electorate, the Clause has stopped binding and started merely describing what that court has, so far, chosen to do.