No. 20-8462
CAPITAL CASE

IN THE
Supreme Court of the United States

RODERICK NAPOLEON HARRIS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

A Texas jury found Roderick Napoleon Harris guilty of capital murder and answered the statutory special issues in a manner requiring the trial court to sentence him to death. The Texas Court of Criminal Appeals (TCCA) denied relief on state habeas review. Harris's petition now presents three questions for this Court's consideration:

> (1) In a state court's analysis of the deficient-performance prong of *Strickland v. Washington,* 466 U.S. 668 (1984), is the court required to enter explicit findings of fact articulating the prevailing professional norms that apply to an applicant's specific claims?
>
> (2) Is it reasonable for trial counsel to rely on a pretrial expert's conclusion that the defendant has very little or no brain damage and subsequently, for counsel not to pursue mitigation evidence of alleged fetal alcohol spectrum disorder or childhood lead exposure, which are conditions that are not diagnosed unless a person has brain damage? In evaluating an ineffective assistance of counsel claim, can a court consider trial counsel's testimony and opinions about a particular aspect of an investigation or lack thereof and how additional evidence, in context, might have impacted the punishment case?
>
> (3) In a state habeas proceeding, is it improper for the state court to apply not only the standard applicable to *Strickland*'s prejudice prong—a reasonable probability that the result of the proceeding would have been different—but also the general burden of proof in a state post-conviction habeas proceeding—a preponderance of the evidence?

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BRIEF IN OPPOSITION

Petitioner Roderick Harris was found guilty and sentenced to death for the capital murder of Alfredo Gallardo committed in the course of a home-invasion robbery. Harris now seeks certiorari review of the TCCA's rejection of his state habeas ineffective assistance of counsel (IAC) claims. But this Court does not have jurisdiction because Harris filed his petition for writ of certiorari more than 150 days after the TCCA issued its judgment. The TCCA does not allow petitions for rehearing of a state habeas decision, and Harris's suggestion the lower court reconsider its decision on its own initiative did not toll his 150-day period for filing a petition.

Moreover, Harris's petition does not warrant this Court's attention. In his first two issues, Harris primarily asserts various theories regarding the TCCA's application of *Strickland*'s deficient-performance prong. In his third issue, Harris alleges the TCCA applied the wrong legal standard to *Strickland*'s prejudice prong. Although Harris attempts to demonstrate misapplication of the *Strickland* standard, the record shows the state court correctly applied *Strickland*. No writ of certiorari should issue.

STATEMENT OF JURISDICTION

The TCCA entered its order denying habeas relief on December 16, 2020. (Petitioner's App. A at 5). Considering the time period allowed by statute and this Court's rules (usually a 90-day deadline but extended to 150 days due to the COVID-19 pandemic), Harris's petition should have been filed by May 15, 2021. Instead, Harris filed his petition on June 28, 2021. He calculated his deadline by incorporating

the time period during which his suggestion that the TCCA reconsider its order on its own initiative was pending. Texas law explicitly precludes an applicant from filing a petition for rehearing of the TCCA's denial of state habeas relief in a death penalty case, and this Court should not construe the TCCA's denial of Harris's suggestion for reconsideration on the court's own motion as a *sua sponte* consideration and denial of rehearing. Because the petition was not filed within the 150 days prescribed by statute and this Court's rules, it is untimely, and this Court lacks jurisdiction

STATEMENT OF THE CASE (COUNTER-STATEMENT)

I. Trial Evidence

The evidence showed that on the evening of March 17, 2009, Alfredo Gallardo was in his east Dallas mobile home with his wife, Maria, his brother, Carlos, a young son, a grandson, and his thirteen-year-old daughter. (RR58: 61, 63-64, 67-68, 133).[1] Alfredo was about to exit the front door when Harris burst through and pointed his gun at Alfredo's head. (RR58: 77-79, 126-28). Harris struck both Alfredo and Carlos in the face with his gun, forced them to lie on the living room floor, and took their wallets. (RR58: 85-89, 128-30). Alfredo's older son, Omar, was in his bedroom. (RR58: 39, 42). When Omar realized an intruder was in the home, he climbed out his bedroom window and located the neighborhood security guard, who called 911. (RR58: 30-31, 35, 39-44, 47, 50-51, 135; RRSE 6, 6A).

[1] Throughout this brief, "RR" refers to the Reporter's Record from trial. "RRSE" refers to the State's exhibits at trial. "SHRR" refers to the Reporter's Record from the habeas evidentiary hearing. "SHSE" refers to the State's habeas exhibits, and "SHDE" refers to Harris's habeas exhibits.

During the robbery, Harris demanded money and jewelry. (RR58: 90-91, 130, 132). Alfredo's daughter gave him two dollars from her mother's purse and a little jewelry. (RR58: 84, 90-92, 118, 131; RRSE 20, 21). Harris forced the family through the master bedroom and bathroom and into the closet. (RR58: 89-90, 93-94, 131-33). While the family was in the closet, Harris searched for valuables. (RR58: 96-98, 133; RRSE 19). At one point, Harris threatened to take first Maria and then her daughter from the closet. (RR58: 100-01, 134, 136). Harris threatened to kill them. (RR58: 102, 134-35, 144-45). Then, he grabbed Alfredo's t-shirt and pulled him out of the closet into the master bathroom. (RR58: 101-03, 136, 148-49). Carlos followed. (RR58: 104, 116, 137). Harris and Alfredo fell into the large bathtub, and Harris shot Alfredo in the face and chest. (RR58: 102-03, 113-16; RR59: 20, 267-69). Carlos ducked down next to the sink, and Harris shot him in the face and shoulder. (RR58: 104, 107, 116; RR59: 291). Y.G. felt a bullet fly past her in the closet. (RR58: 105-06, 137).

The Dallas Police Department had responded immediately to the 911 call and were surrounding the home when Harris fired five gunshots. (RR58: 31, 44, 155, 158-60, 170, 172, 190, 205-06, 208-10). Shortly after, Harris exited the front door. Officers yelled, "Police!" and instructed Harris to get on the ground. (RR58: 172-73, 190-91). He shot at the officers instead and ran toward the rear of the trailer where he bumped into an officer in the dark. (RR58: 166, 173-74, 191-92, 195-97, 211-13; RR59: 31, 33-34). The officer shot Harris in the back and leg. (RR58: 213-14, 220-21; RR59: 107, 119-20). Medical personnel declared Alfredo and Carlos dead at the scene. (RR58: 42).

During the punishment phase of trial, the State offered evidence Harris committed several violent offenses during the month before the charged capital murder, including another capital murder. On February 15, 2009, Harris and a cohort confronted Luis Gonzalez at his apartment door, restrained him, ransacked the apartment, and robbed him of cash and property. (RR62: 230-43, 255-57). Harris's DNA was on a glove left at the scene. (RR62: 253; RR63: 13-16, 113-16; RRSE 176, 279-80).

On the evening of March 3, 2009, Harris and two other men robbed Karen De La Cruz Espinoza and her family in their apartment. (RR63: 190-96). The robbers pointed their guns at the children, threatened to kill the family, ransacked the home, and stole money and property. (RR63: 196-205, 209; RRSE 201, 203). After Harris and another robber left the apartment, Espinoza pushed the remaining robber out the front door and locked it. (RR63: 204-07).

Elsewhere in the same complex, Harris attempted to enter Roberto Ramos's apartment. (RR63: 232, 246). While Ramos and Harris struggled, Harris shot Ramos's two brothers. Eustacio was shot in the chest; Martin was shot in the face. (RR63: 234-36, 243-50). Then, in the apartment breezeway, a neighbor saw Harris shoot Ramos three times—in the upper back, mouth, and left thigh. (RR62: 232-35; RR63: 236, 250, 272-78; RR64: 104-05; RRSE 211). Roberto died, but his two brothers survived. Authorities found DNA matching Harris's DNA profile on an item from Espinoza's apartment that the robbers dropped in the parking lot. (RR64: 93-96; SE 254-55). Eight days later, surveillance video recorded Harris pawning Espinoza's Xbox; the

pawn ticket had Harris's name on it. (RR63: 296-302; RR64: 44-49; RRSE 248, 249, 251). Harris used an eyewitness-identification expert to challenge his identification as the person who shot Ramos. (RR64: 155-91, 211-14).

The State offered evidence of Harris's juvenile conduct, including that he was assigned to a behavioral adjustment classroom for disruptive students in middle school, he had a poor reputation for being peaceful and law-abiding at age fourteen, and he was arrested for possession of marijuana and for carrying a knife to school. (RR62: 30-32, 74-79, 84-90; SE 166). The State also offered evidence of Harris's prior adult arrests for two incidents of unauthorized use of a motor vehicle, probation violation and burglary, traffic violations, felon in possession of a firearm, and possession of marijuana. (RR62: 119-31, 166-71, 175-82, 188-94, 197-200; RR63: 125-36; SE 171-72).

The trial court admitted photos of Harris's tattoos into evidence, and the State's gang expert testified some of the tattoos were associated with gangs. (RR62: 40-42; RRSE 150-63). The expert testified that several tattoos indicated Harris was a member of the Fish Trap Bloods, a criminal street gang named after the former Fish Trap projects in Dallas. (RR62: 50-53, 64; RRSE 158-60, 162). The expert said that the Bloods, which originated in Los Angeles, are a violent gang that commits violent offenses. (RR62: 53, 64). On cross-examination, the expert indicated the Fish Trap Bloods are not an organized gang with an organizational hierarchy or meeting place, and the members do not engage in criminal activity as a group. (RR62: 65-68).

He also testified Harris had not been identified as a gang member by the Dallas Police Department's gang unit. (RR62: 68-69).

In his punishment-phase case, Harris presented lay and expert witness testimony consisting of the following.

- two experts who explained the Texas Department of Criminal Justice's inmate classification system, its ability to manage and control inmate behavior, and prison security and administration (*See* Petitioner's App. B at 31);

- a psychologist, Gilda Kessner, who testified about childhood risk factors evident in Harris's childhood from an early age that correlate with potential violence later in life (*See* Petitioner's App. B at 35);

- a clinical pharmacologist, John Roache, who testified about drug addiction, the effects of chronic PCP and marijuana use, ADHD as a risk factor for addiction, and entries in some of Harris's jail mental health records (*See* Petitioner's App. B at 35-36);

- Harris's mother, stepfather, brother, and cousin, who testified about Harris's upbringing, youth, family history, education, and character, including that: when he was a small child, his mother smoked marijuana, drank alcohol, and often left him with other people; his biological father was incarcerated, had little involvement with Harris, and used crack cocaine; Harris was knocked unconscious in a car accident at age two; his mother and stepfather had a volatile relationship; his stepfather was physically abusive and violent toward Harris and other family members for many years; Harris was left in charge of his siblings as early as age 11; his parents abused marijuana and alcohol; he was diagnosed with ADHD at about age 6; he was in special education beginning in elementary school; he dropped out of school in the tenth grade; his mother suffers from manic depression and schizophrenia; there is mental illness in his maternal and paternal families; Harris was depressed and suicidal as a child; he joined a gang at age 10; he helped care for his younger siblings and attempted to protect them from violence in the home; he was fun-loving as a youth and protective of younger relatives; he used alcohol, marijuana, and PCP; he began running away from home at age 13 due to abuse; he has exhibited signs of mental illness; he has three children; and he has expressed remorse for his offenses (*See* Petitioner's App. B at 15-16); and

- an eyewitness-identification expert, who testified about a witness's identification in an extraneous capital murder (*See* Petitioner's App. B at 36).

Harris was convicted and sentenced to death on May 21, 2012. The TCCA affirmed the judgment on direct appeal. *Harris v. State*, No. AP-76,810, 2014 WL 2155395 (Tex. Crim. App. May 21, 2014) (not designated for publication). This Court denied certiorari review of that decision on January 12, 2015. *Harris v. Texas*, 135 S. Ct. 945 (2015).

II. State Habeas Evidence on Alleged Ineffective Assistance

Harris recounts the habeas evidence throughout his petition by relying only on his proposed findings of fact and conclusions of law in the trial court and his objections to the trial court's findings and conclusions, resulting in a skewed account of the habeas evidence and trial counsel's performance. The State disagrees with Harris's summary and interpretation of the habeas and mitigation evidence in its entirety.

Harris's state habeas complaints relevant to this petition are that his trial counsel were ineffective in the punishment phase of trial for (a) not investigating and presenting evidence he has a fetal alcohol spectrum disorder (FASD); (b) not investigating and presenting evidence he had childhood lead poisoning from a smelter plant in Dallas; and (c) not presenting testimony from a social historian, school-to-prison-pipeline expert, and defense gang expert.

During the pretrial investigation, Harris's mother initially denied alcohol use during pregnancy. (SHRR7: 62). She later admitted to Harris's mitigation specialist and neuropsychologist to some, but not much, alcohol use early in her pregnancy.

(SHRR7: 68-69). One trial attorney recalled having learned that she drank a couple of glasses of wine on weekends during the first six to eight weeks of pregnancy. (*See S*HRR4: 136-37). Another attorney recalled that she told the trial team she had an occasional glass of wine during the first six weeks of her pregnancy. (SHRR7: 162). During the habeas proceeding, Harris's mother indicated she drank wine fortified with alcohol, which was different from what she reported to the trial team. (*See* SHRR2: 33, 65-66; SHRR5: 47, 108).

During the pretrial investigation, trial counsel retained Antionette McGarrahan, a forensic neuropsychologist. (SHRR4: 75). She evaluated Harris, reviewed records, provided analysis of Harris's life history, and attended some team meetings. (SHRR4: 75, 77, 80-83; SHRR6: 151; SHSE 7). She reported to the trial team that her testing showed "very little, if anything, in the way of cognitive impairment." (SHRR7: 80, 84, 105; SHSE 7). She was qualified to diagnose FASD. (SHRR7: 67). Her testing was sufficient to capture deficits due to any medical neurological condition, which would include fetal alcohol and lead exposure. (*See* SHRR7: 60-61). At the habeas hearing, Dr. McGarrahan explained that Harris's testing did not show significant cognitive impairment, and his neuropsychological profile was consistent with his low average intellectual abilities. (SHRR7: 85). She said he exhibited some deficits with respect to memory, but those were on tests administered when he was fatigued, which could have influenced his performance. (SHRR7: 80-81, 109-10, 116). He did not exhibit impairment in executive functioning.

(SHRR7: 110-15). She did not believe further testing, including an MRI, was warranted. (SHRR7: 124-25).

A State's expert, Christine Reed, a clinical and forensic psychologist, evaluated Harris prior to trial; but because Harris did not call an examining expert as a trial witness, only the trial judge had access to Dr. Reed's written report and results—until the habeas proceeding. (SHRR4: 5-6, 9, 13-16; SHSE 2-3). Dr. Reed concluded Harris had no gross problems in memory; his testing in that area was within normal limits. (SHRR4: 23). At the habeas hearing, Dr. Reed characterized her testing as generally consistent with Dr. McGarrahan's testing. (SHRR4: 9).

Julian Davies, a pediatrician and FASD expert in the habeas proceeding, examined Harris and diagnosed him with alcohol related neurodevelopmental disorder (ARND), one of the FASDs. (SHRR3: 42-43, 56, 65, 75; SHDE 28). Dr. Davies testified his evaluation and diagnosis were grounded in assessing four areas: growth deficiency; facial features; brain dysfunction and impairment; and history of prenatal alcohol exposure. (SHRR3: 85-86). Harris did not have growth deficiency or facial features. (SHRR3: 86). Dr. Davies indicated that if a person has a history of ADHD, a math learning disability, and participation in special education (like Harris), any amount of prenatal alcohol intake by the mother meets the modern criteria for alcohol exposed. (SHRR3: 89-90). He considered Dr. McGarrahan's pretrial neuro-psychological testing of Harris and concluded it evidenced significant impairment in memory and executive functioning. (SHRR3: 60-61). In diagnosing Harris, Dr. Davies further relied heavily on Harris's ADHD diagnosis, his learning disability in math,

and a split of 15 points between his verbal and perceptual reasoning scores on his IQ testing. (SHRR3: 61-63). A second habeas expert for Harris, neuropsychologist Joan Mayfield, reviewed the results of Dr. McGarrahan's pretrial neuropsychological testing and concluded it was consistent with Dr. Davies's diagnosis. (SHRR6: 15). Dr. Mayfield did not evaluate or diagnose Harris. (SHRR6: 50-51).

Harris's habeas expert Thomas Dydek, a toxicologist and engineer, opined that Harris likely was exposed to excessive levels of lead in utero and as a small child from a nearby former lead smelter plant. (SHRR3: 145-46, 148-49). The toxicologist did not examine Harris or review any medical records. (*See* SHRR3: 127-28, 159; Petitioner's App. B at 75-77). He testified that childhood lead exposure can result in ADHD, lack of impulse control, criminality, antisocial behavior, and violent behavior, including in adulthood. (SHRR3: 136-37, 139). He relied on another habeas expert's conclusion Harris had brain damage, which he said correlated with lead exposure. (SHRR3: 159-60; Petitioner's App. B at 77-78). Harris did not present any blood or bone lead testing confirming his alleged exposure to lead. (SHRR3: 159; Petitioner's App. B at 77).[2]

The State retained Jed Falkowski, a neuropsychologist, to evaluate Harris during the habeas proceeding. Dr. Falkowski reviewed Dr. McGarrahan's testing and agreed that the testing reflects little if any cognitive impairment. (SHRR6: 81-82). Consistent with Dr. McGarrahan, Dr. Falkowski testified Harris exhibited significant indicators of malingering mental illness during his testing. (SHRR6: 118-22; SHRR7:

[2] Harris offered but the trial court did not admit a report that his mother had lead exposure, because Harris proffered it after the trial court's deadline for accepting additional habeas evidence and in contravention of the court's prior order. (Petitioner's App. B at 24).

100-01). He also testified the fifteen-point spread in Harris's verbal and perceptual reasoning IQ scores occurs in 20 percent of the general population. (SHRR6: 88-89).

In support of his fetal-alcohol and lead-exposure claims, Harris underwent MRI and Diffusor Tensor imaging during the habeas proceeding. (SHRR5: 72-73; Petitioner's App. B at 61). The lower court received markedly conflicting expert opinions on the interpretation of the brain imaging. While Harris's experts concluded the imaging showed widespread abnormalities consistent with brain damage caused by lead toxicity, traumatic brain injury, and FASD, the State's expert concluded that Harris's "MRI is normal" and that Harris's experts utilized methodology "outside the standard practice of medicine and neuroradiology" that did not support any evidence of abnormality. (*See* Petitioner's App. B at 61-65).

A licensed social worker, Laura Sovine, interviewed Harris, reviewed records, compiled his social history, and testified about how his life experiences impacted him in terms of brain development, trauma, social environment, abuse and neglect, abandonment, organic brain disorder, and untreated mental illness. (SHRR2: 106-07, 115, 124-25; SHRR3: 113-24; SHRR7: 11-38). She concluded Harris had a genetic disposition to major mental illness, was exposed to toxins in utero and as a child, grew up in a violent environment, and had untreated mental illness, dysthymia, and suicidal ideations. (SHRR2: 106-07; SHRR3: 113-24; SHRR7: 11-38). Courtney Robinson, a school-to-prison-pipeline expert, reviewed some of Harris's records and testified that the school system overdisciplined him and failed to provide adequate

services to him beginning at a young age, which resulted in his trajectory into the criminal justice system. (SHRR5: 6, 10, 12, 19-20, 23-37).

Harris filed an affidavit in the habeas proceeding from his gang expert, John Hagedorn. Dr. Hagedorn advocated that society and the criminal justice system have a prejudice against gang association which is often rooted in misleading stereotypes, that gang membership is transitory for most youth rather than a permanent identity, and that juvenile gang membership is not a predictor of the type of adult a youth will become. (Petitioner's App. B at 108). Based on a review of two photographs and a jail record, Dr. Hagedorn opined that Harris appeared not to have gang-related tattoos when he committed the capital murder, that Harris may have acquired the tattoos while awaiting trial, and therefore that the State's gang expert misled the jury about Harris's gang status. (*See* Petitioner's App. B at 109-10, 113). Dr. Hagedorn reviewed all of Harris's available juvenile and Dallas Police Department records and offense reports and concluded that, because the records did not indicate gang membership or that Harris's offenses were gang related, the records did not support a conclusion Harris was a gang member at the time of the capital murder. (*See* Petitioner's App. B at 111-12).

After the trial court entered findings of fact and conclusions of law recommending denial of Harris's habeas petition, the TCCA denied relief. (Petitioner's App. A). The instant petition followed.

REASONS FOR DENYING THE PETITION

The questions Harris presents for review are unworthy of the Court's attention. Review on writ of certiorari is not a matter of right, but of judicial discretion, and is granted only for "compelling reasons." *See* Sup. Ct. R. 10. Where a petitioner asserts only factual errors or misapplication of a properly stated rule of law, certiorari review is "rarely granted." *Id*. The lower court record does not support Harris's claims, and no compelling reasons exist to justify this Court's review.

I. This Court Lacks Jurisdiction Because the Petition is Untimely.

Under 28 U.S.C. § 2101(c), Supreme Court Rule 13.1, and this Court's March 19, 2020 Order relating to COVID-19, Harris's petition for writ of certiorari was due within 150 days after the TCCA's denial of his habeas petition. The time limit for filing a petition for certiorari is "mandatory and jurisdictional." *Missouri v. Jenkins,* 495 U.S. 33, 45 (1990).

Texas procedural rules bar a motion for rehearing on an order denying relief in state habeas proceedings. Tex. R. App. P. 79.2(d) ("A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case."). Thus, there is no mechanism in Texas for the TCCA to rehear, on Harris's motion, the denial of his state habeas application.

After the TCCA's December 16, 2020 denial, Harris filed a "Suggestion for the [TCCA] to Reconsider Writ On Its Own Motion." The TCCA summarily denied Harris's "suggestion" on January 27, 2021, via a postcard from the Clerk, opting not

to reconsider the case on its own initiative. (Petitioner's App. C). Because Texas does not allow a motion for rehearing of an order denying a state habeas application, Harris should have calculated his petition deadline from the December 16, 2020 judgment. The deadline for Harris to file his petition was May 15, 2021. Instead, he filed his petition on June 28, 2021, 194 days after the TCCA's denial. One hundred fifty days from January 27, 2021 was June 26, 2021, which fell on a Saturday. Harris filed his petition June 28, 2021, the next business day.

This Court's Rule 13.3 provides that the time for filing a petition for certiorari runs from the date of entry of the order sought to be reviewed; or, "if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for writ of certiorari . . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." Sup. Ct. R. 13.3. Thus, the filing deadline runs from a date other than the initial entry of judgment if (1) a petition for rehearing is timely filed, (2) the lower court entertains an untimely petition for rehearing, or (3) the lower court *sua sponte* considers rehearing. *See id.* Because Texas law bars a petition for rehearing, a timely one could not be filed nor an untimely one entertained. Also, the lower court did not *sua sponte* consider rehearing: it denied Harris's suggestion that it *sua sponte* reconsider. *Sua sponte* involves consideration without prompting, on the court's own initiative. The TCCA denied Harris's suggestion; it did not reconsider anything. Because none of the three circumstances set out in Rule 13.3 existed to toll the deadline, Harris's deadline

ran from the date of the TCCA's denial of his habeas petition, not its denial of his suggestion for *sua sponte* reconsideration.

Harris's petition for writ of certiorari is untimely under 28 U.S.C § 2101(c) and this Court's March 19, 2020 Order. This Court therefore lacks jurisdiction in this case. Should this Court assume jurisdiction over the petition, it should nevertheless be denied.

II. Harris Seeks to Apply a More Rigorous Standard to the Deficient-Performance Prong than *Strickland* Requires.

In his first issue, Harris alleges the TCCA did not identify and apply prevailing professional norms or objective standards of reasonableness in its analysis of *Strickland*'s first prong. (Pet. at 22, 24-25). Harris argues that *Strickland* requires courts to identify the specific prevailing professional norms that apply to the circumstances of the case, and he advocates that courts base prevailing professional norms they identify on national bar association practice standards, expert testimony, or other recognized sources. But this Court has declined to provide more explicit requirements for *Strickland*'s first prong other than those already established in its jurisprudence, and Harris provides no valid or persuasive reason for the Court to change course now. In reaching its decision, the TCCA properly determined whether trial counsel's representation fell below an objective standard of reasonableness under *Strickland*. The law requires nothing else.

A. The TCCA applied the proper standard in this case under *Strickland*'s deficient-performance prong and considered whether trial counsel's representation fell below an objective standard of reasonableness.

Under *Strickland*'s first prong, an applicant alleging IAC must show his trial counsel's performance was deficient. An applicant establishes deficient performance by showing "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984); *Harrington v. Richter,* 562 U.S. 86, 104 (2011). Reasonableness of counsel's representation is judged based on "prevailing professional norms" at the time counsel rendered assistance, not whether the representation deviated from best practices or most common custom. *Strickland,* 466 U.S. at 690; *Richter*, 562 U.S. at 105.

Strickland mandates that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690. A court "must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

This Court has declined to "[specify] particular requirements of effective assistance." *Id.* at 688 (indicating that more specific guidelines than the objective-standard-of-reasonableness standard are not appropriate). "These standards require no special amplification in order to define counsel's duty to investigate," particularly not "mechanical rules." *See id.* at 690, 696.

Harris alleges, however, that *Strickland*, *Richter*, and *Van Hook* mandate a court to "identify" the applicable professional norms and to rely only on objective evidence of professional norms before deciding whether an attorney's performance is objectively reasonable. (Pet. at 22, citing *Strickland*, 466 U.S. at 688; *Richter*, 562 U.S. at 105, 110; *Bobby v. Van Hook,* 558 U.S. 4, 14 (2009) (Alito, J., concurring)). But there is no requirement for a habeas court to make explicit findings of fact regarding the particular prevailing professional norms that apply to the complained-of acts or omissions. Nor must a court receive and admit "objective evidence" regarding those prevailing professional norms. *Strickland* and its progeny simply do not mandate such findings and evidence. While *Strickland* established the legal principles governing an IAC claim, it "declined to articulate specific guidelines for appropriate attorney conduct and instead . . . emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 687).

In its December 16, 2020 decision, the TCCA listed Harris's IAC claims, and then held he "fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness." (Petitioner's App. A at 3). At the conclusion of its order, the TCCA adopted the trial court's findings of fact and conclusions of law and denied relief based on both the trial court's recommendations and its own review of the record. (Petitioner's App. A at 4-5). Before deciding Harris's habeas claims, the trial court set out the proper standard for *Strickland*'s first prong.

It then recited both state and federal caselaw pertaining to the application of *Strickland*'s first prong. (Petitioner's App. B at 26-28).

B. Harris simply failed to meet his burden to show deficient performance.

Harris complains the lower court deprived him of due process by failing to properly apply *Strickland*'s first prong to his IAC allegations that trial counsel failed to investigate and present evidence of brain damage due to fetal alcohol spectrum disorder (FASD) and lead poisoning; failed to present experts to explain the effects of his upbringing; and failed to present evidence he was not in a violent gang. (Pet. at 23-25). But his complaints merely evidence his disagreement with the outcome below.

Effective representation requires an attorney to conduct a reasonable investigation into the law and facts of the case, and counsel did so here. *See Strickland*, 466 U.S. at 691. In analyzing Harris's complaint that his trial counsel performed deficiently by failing to investigate and present mitigation evidence that Harris had a fetal-alcohol-related disorder, the lower court considered the results of Harris's pretrial neuropsychological exam by his own expert, the information trial counsel had before trial regarding Harris's mother's use of alcohol during her pregnancy, the feasibility of presenting the jury with evidence of alleged severe brain damage when Harris's own pretrial expert and the State's pretrial expert separately concluded Harris had very little or no brain damage, and the credibility of the experts Harris presented at the habeas hearing.

Harris's lead counsel testified at the habeas hearing that he relied on his expert neuropsychologist to advise him of issues or impairments Harris had and how

those issues affected his behavior. (Petitioner's App. B at 37). The neuropsychologist advised counsel that Harris's cognitive deficits were minimal and would not have affected his behavior. (*See* Petitioner's App. B at 37, 46-48).

Harris's habeas expert, a pediatrician whose specialties included FASD, examined Harris and diagnosed him with ARND. He based his diagnosis on the amount and pattern of Harris's brain dysfunction, the history of prenatal exposure to alcohol (as described at the habeas phase), and by ruling out other possible etiologies.[3] (*See* Petitioner's App. B at 39-43). A second habeas expert for Harris, a child clinical and neuro psychologist, testified that Harris's pretrial neuropsychological testing was consistent with the pediatrician's FASD diagnosis. (Petitioner's App. B at 44-46). The lower court heard conflicting evidence, however, from three other experts: Harris's own pretrial neuropsychologist, (Petitioner's App. B at 46-49, 52-55), the State's expert psychologist who examined Harris pretrial, (Petitioner's App. B at 49-50, 58-61), and the State's expert neuropsychologist in the habeas proceeding, (Petitioner's App. B at 55-58). All three disagreed with Harris's habeas experts' conclusions regarding the amount and pattern of brain dysfunction. The lower court also received conflicting medical interpretations of Harris's MRI and Diffusor Tensor imaging, ranging from opinions from Harris's experts that the imaging showed widespread abnormalities consistent with lead toxicity, traumatic brain injury, and FASD, to the opinion from the State's expert that the "MRI is normal" and that Harris's experts

[3] One of the possible etiologies the pediatrician ruled out as responsible for Harris's alleged significant cognitive impairment was possible childhood lead exposure. (Petitioner's App. B at 41).

utilized methodology contrary to that accepted in the medical community. (*See* Petitioner's App. B at 61-65).

The most contested issues in the habeas proceeding were, first, whether Harris had severe cognitive deficits or brain damage that should have been presented to the jury and, second, what potentially caused the alleged brain damage. In his petition, Harris falsely conveys to this Court that evidence of brain damage was uncontested. (*See* Pet. at ii (stating "undisputed evidence now shows that Harris suffers from Fetal Alcohol Spectrum Disorder (FASD) [and] has brain damage from lead exposure and FASD"); Pet. at 34 (stating "[t]he [TCCA] ignored the undisputed record introduced by habeas counsel—MRI evidence that Harris had organic brain damage, [the] diagnosis that he suffered from FASD, and [the] testimony that he was poisoned in utero and as a child by lead"). Notably, with the exception of the MRI and other imaging, Harris's habeas experts reinterpreted pretrial testing that Harris's own expert concluded reflected very little or no brain damage.

The record indicates the lower court conducted a fact-based analysis of Harris's fetal-alcohol-related complaint and considered the reasonableness of the challenged conduct, as viewed from the time of trial. The court's analysis included the following considerations:

- the jury heard evidence Harris's mother used alcohol, marijuana, and cigarettes until she learned she was pregnant six weeks into the pregnancy, and trial counsel emphasized in closing arguments Harris suffered from in utero exposure to harmful substances (Petitioner's App. B at 38-39);

- Harris's pretrial neuropsychologist advised trial counsel that her testimony would be more harmful than helpful to Harris for a variety

of reasons, including (a) Harris was malingering mental illness and psychiatric symptoms, (b) despite a diagnosis of schizoaffective disorder by jail personnel, she did not believe he suffered from any severe mental disease, and (c) she would have had to testify he met the diagnostic criteria for Antisocial Personality Disorder (Petitioner's App. B at 49, 51-52);

- if Harris had called any expert at trial who had examined him, it would have opened the door for the State to call its own examining expert—who otherwise was barred from testifying (*See* Petitioner's App. B at 50, 59-60, 72);

- expert testimony established that Harris's cognitive profile was consistent with and could be the result of a variety of circumstances, including his extensive history of PCP use, depression, ADHD, poor education, or disadvantaged upbringing (*See* Petitioner's App. B at 54, 57, 71);

- Harris's FASD experts were influenced by confirmation bias (Petitioner's App. B at 66); and

- presentation of evidence Harris suffered from a permanent neurological condition would have been inconsistent with one of the defense team's punishment themes—that Harris was not a future danger when he was not on PCP (Petitioner's App. B at 72).

In analyzing Harris's IAC complaint based on alleged childhood lead exposure, the lower court considered the testimony of Harris's expert toxicologist and the credibility of the evidence Harris had brain damage from lead exposure. (Petitioner's App. B at 75-79). It was uncontested that Harris's family lived in the proximity of a former lead smelter site in Dallas at the time of Harris's birth and during his early childhood. (Petitioner's App. B at 76). Based on a review of various records, the toxicologist concluded Harris likely was exposed to excessive levels of lead in utero and as a small child. (Petitioner's App. B at 76). The lower court's analysis of the claim included the following considerations:

- Harris's pretrial neuropsychologist's conclusion he had little or no brain damage was either inconsistent with a theory he was exposed to lead as a child or established that he showed no continuing evidence of lead exposure (Petitioner's App. B at 79);

- Harris's habeas counsel only gave the toxicologist one habeas expert's opinion that Harris had severe brain damage but not the conflicting expert opinions Harris had little or no brain damage (Petitioner's App. B at 78-79);

- documentation Harris offered into evidence on the smelter plant site indicated not all residents in the adjacent neighborhoods sustained elevated lead blood levels (Petitioner's App. B at 80); and

- the presentation of evidence childhood lead exposure results in violent behavior in adulthood would have been detrimental to Harris's punishment case, supporting an affirmative answer to the future-danger special issue (Petitioner's App. B at 80-81).

Accordingly, the lower court considered the conflicting evidence of severe cognitive impairment, the evidence the alleged cognitive impairment resulted from FASD or lead poisoning, and whether trial counsel were deficient for not presenting those claims, and it concluded Harris failed to establish deficient performance. (*See* Petitioner's App. B at 71, 81).

Harris also complains about the lower court's rejection of his complaints that trial counsel were deficient for not presenting a social historian, a school-to-prison-pipeline expert, and a gang expert in the punishment phase of trial. In analyzing the deficient-performance claim regarding the social historian and school-to-prison-pipeline experts, the lower court's findings and conclusions reflect the following:

- the lower court considered the testimony the social historian and school-to-prison-pipeline expert would have given had they been called to testify at Harris's trial, in comparison with the testimony of the two experts Harris presented at trial: a psychologist who testified about Harris's childhood risk factors and a clinical pharmacologist who

testified about drug and PCP dependence and its biological impacts on the brain (*See* Petitioner's App. B at 82-87, 91-99);

- presentation of a social historian at trial who interviewed Harris would have opened the door for the State to present testimony from its pretrial examining psychologist (Petitioner's App. B at 87-88);

- trial counsel made a strategic decision to use Harris's family members as fact witnesses to describe his upbringing and schooling first-hand (*See* Petitioner's App. B at 87, 96);

- the information the social historian gathered and recorded, including in her interview with Harris, contained information detrimental to Harris's case that the State was likely not aware of but would have received if the social historian were called to testify at trial (*See* Petitioner's App. B at 87-88);

- the social historian's testimony posed risks of harm to Harris's punishment case, afforded little benefit, and was not particularly credible or compelling (Petitioner's App. B at 87-88); and

- trial counsel presented a punishment case that included a blend of lay and expert witnesses, which was consistent with the professional standards described by attorney Richard Burr, Harris's IAC expert (Petitioner's App. B at 89, 96-99).

Accordingly, the lower court weighed numerous factors, including the effectiveness of the testimony of the two proffered habeas experts before a jury, the testimony of the two experts Harris presented at trial, and his counsel's decision to use family members instead of an expert to describe his upbringing, before rejecting Harris's IAC complaint.

In analyzing the deficient-performance claim proposing use of a gang expert[4] to contextualize Harris's gang membership as mitigating, rebut the State's gang

[4] Harris's habeas claims did not include a claim his trial counsel failed to investigate relevant gang evidence, only that counsel should have presented a defense gang expert. (Petitioner's App. B at 107).

evidence, and rebut evidence of Harris's association with a street gang, the lower court's findings and conclusions reflect the following:

- during trial counsel's cross-examination of the State's gang expert, the jury learned that the gang Harris associated with—the Fish Trap Bloods—was not an organized gang with a leader, an organizational hierarchy, or a meeting place; the Fish Trap Bloods did not engage in criminal activity as a group; the members were identified by the neighborhood they lived in, but the neighborhood no longer existed; and Harris was not identified as a gang member in the Dallas Police Department gang unit's files (Petitioner's App. B at 103-04);

- trial counsel sought and received a limiting instruction on the gang-related evidence, both orally and in the jury charge (Petitioner's App. B at 104);

- although Harris provided inconsistent information about when he entered the gang, he told his pretrial expert, the State's pretrial expert, and a habeas expert that he was in a gang beginning in his pre-teen or early teen years until his late teens (Petitioner's App. B at 104, 107);

- the lower court considered an affidavit submitted by Dr. John Hagedorn, Harris's habeas-phase gang expert, and a response affidavit submitted by an Assistant District Attorney who participated in the trial of this case; the Assistant District Attorney advised how he would have cross-examined a defense gang expert and described and attached rebuttal evidence he could have offered (*See* Petitioner's App. B at 107-20);

- Harris's gang expert's theory that Harris acquired his gang-related tattoos while in jail awaiting his capital murder trial would have been more detrimental than helpful to Harris's case because (a) it refuted an impression Harris was no longer in a gang, (b) with his brother's testimony, it suggested Harris was in a gang from a young age through the time of trial, (c) it supported a "yes" answer to the future-danger special issue, and (d) the associated theory that he acquired the tattoos because he was a vulnerable inmate conflicted with other evidence he bullied jail mates and frequently "ran" his tank (*See* Petitioner's App. B at 107, 113-18);

- Harris's gang expert's theory that Harris's gang association was not related to the capital murder would not have had a substantial impact on his case because although Harris carried the trappings of gang

affiliation (red key ring, red cell phone, and red glove), there were no allegations the capital murder itself was gang motivated, and other evidence showed Harris committed robberies for personal gain and not in support of any gang agenda (*See* Petitioner's App. B at 107, 118-19, 122-23);

- Harris's gang expert's theory that the trial testimony misled the jury about Harris's gang affiliation at the time of the offense (because he may not have had certain gang tattoos) could have been rebutted with police department records reflecting that Harris had some gang-related tattoos years before the capital murder (*See* Petitioner's App. B at 109-11, 113, 118); and

- Harris's gang expert's theory that a survey of Harris's juvenile and Dallas Police Department records led to a conclusion he was not a gang member would have been detrimental to Harris's case because (a) the testimony would have been false [Harris's brother testified Harris was in a gang, and Harris admitted to experts and his trial counsel he was in a gang] and (b) the expert's review of the records to form his opinion would have opened the door to the admission of additional extraneous offenses consisting of one family violence assault, two aggravated assault shootings (including one offense that rendered the victim a paraplegic), and one robbery (*See* Petitioner's App. B at 111-13, 119-22).

After weighing the evidence, the lower court concluded that trial counsel's performance fell within reasonable professional norms when counsel decided to challenge the State's gang expert via a pretrial motion to exclude the evidence, through cross-examination, and without presenting its own gang expert.

While Harris complains the lower court failed to enter findings of fact identifying the prevailing professional norms applicable to his complaints, he fails to propose and articulate any norms the lower court should have entered. Harris seems to complain that the lower court did not accept his expert's testimony and opinions on effective assistance and professional norms in their entirety. (Pet. at 23-24).

Harris presented the expert testimony of Richard Burr, an attorney who specializes in representing capital defendants post-conviction. (Petitioner's App. B at 66-67). Although Burr testified that the attorney's trial files are the best evidence of trial counsel's investigation in a death penalty case, he did not review the trial or mitigation specialist's files in this case or speak to trial counsel regarding their representation. (Petitioner's App. B at 67). The lower court's written findings and conclusions reflect that it considered Burr's testimony in reaching its decisions on Harris's IAC claims. (Petitioner's App. B at 66-71, 88-89, 107). Burr, however, expressed no opinions regarding trial counsel's tactical decisions or the prejudice prong of *Strickland.* (Petitioner's App. B at 68). In its analysis, the lower court noted the case information Burr received and reviewed to form his opinions versus the information he lacked and concluded he had limited information. (*See* Petitioner's App. B at 67). Furthermore, Burr indicated there were no specific prevailing professional norms applicable to trial counsel's response to evidence of fetal-alcohol exposure in the time period of this case.[5] (Petitioner's App. B at 70).

Harris objects to the trial court's reference to the American and Texas Bar Associations' guidelines of practice in death penalty cases as "guidelines" and not law. (*See* Pet. at 20, 23). But this Court and many other courts acknowledge this, and Harris's IAC expert recognized it as well. (*See* Petitioner's App. B at 68). Moreover,

[5] Although Burr testified no specific prevailing professional norms regarding FASD investigations existed at the time of Harris's trial, he expressed his beliefs regarding how an attorney should proceed under facts similar to this case. The lower court determined Burr provided his personal recommendations, which extended beyond the scope of the standards of practice recommended by the bar association guidelines. (*See* Petitioner's App. B at 69-70).

the lower court referenced the bar association guidelines in several places in its written findings and conclusions. (*See* Petitioner's App. B at 34, 89-90).

Harris suggests this Court grant his petition for certiorari so it can emphasize "that trial counsel's performance must be measured through application of professional norms developed by lawyers experienced in representing capital defendants—whether offered through the ABA standards or expert testimony or other recognized sources for which there is a proper foundation." (Pet. at 26). Yet, a court may resolve an IAC claim by analyzing the facts and applying the governing legal principles already set out by this Court without explicitly articulating what counsel was required (or not required) to do at every step in the pretrial and trial proceedings and without explicitly identifying the bar association practice standards, expert testimony, or other principles supporting the conclusion.

In support of his assertion this Court needs to amplify the requirements of *Strickland*'s first prong, Harris describes three circuit court decisions rejecting IAC claims based on FASD or the selection of experts for a mitigation case. (Pet. at 26-27). But these are merely decisions Harris disagrees with, and they do not provide any support for increasing *Strickland*'s requirements.

There is no requirement for the habeas court to articulate and make findings regarding the prevailing professional norms that apply to every facet of an IAC claim and the investigation and presentation of evidence; the standard is merely that the habeas court properly apply *Strickland*. Here, the lower court properly applied *Strickland*. Harris simply did not carry his burden to show his counsel's performance

was constitutionally inadequate. The State asks the Court to deny review of Harris's first issue.

III. Harris Mischaracterizes the Evidence Supporting the Alleged Failure to Investigate and the Lower Court's Reliance on His Counsel's Judgment.

In his second issue, Harris alleges the lower court erred in giving deference to trial counsel's judgment regarding the mitigation investigation because trial counsel did not investigate certain potentially mitigating characteristics of his life. (Pet. at 29-30). He also argues the lower court erred in finding against him on *Strickland*'s prejudice prong. His complaints mischaracterize the evidence and the lower court's decision. The lower court relied on a variety of factors other than trial counsel's judgment in rejecting his claims, and these issues are not worthy of this Court's attention.

A. Harris's trial counsel conducted a reasonable investigation and were entitled to rely on their pretrial expert.

In determining whether trial counsel's investigation and presentation of mitigating punishment-phase evidence is effective under *Strickland*, reviewing courts consider how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads. *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008) (citing *Neal v. Puckett*, 286 F.3d 230, 237 (5th Cir. 2002)).

A defense attorney must reasonably investigate or "make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *Thomas v. Lumpkin,* 995 F.3d 432, 453 (5th Cir. 2021). The reasonableness of trial

counsel's investigation relates to "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Blanton,* 543 F.3d at 236 (citing *Wiggins,* 539 U.S. at 527). A decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Thomas,* 995 F.3d at 453. While in some instances "even an isolated error" can support an IAC claim if the error is "sufficiently egregious and prejudicial," it is difficult to establish IAC when counsel's overall performance indicates active and capable advocacy. *Richter,* 562 U.S. at 111 (citing *Murray v. Carrier,* 477 U.S. 478, 496 (1986)). A reviewing court's concern is not whether trial counsel could have done more because "[t]hat is often, maybe always, the case." *Thomas*, 995 F.3d at 454.

Harris implies trial counsel failed to investigate his childhood at all. (*See* Pet. at 29) (comparing Harris's case to *Williams v. Taylor*, 529 U.S. 362 (2000)). This assertion is unfounded. Moreover, trial counsel's reliance on their neuropsychologist's pretrial conclusions was reasonable. *See Couch v. Booker,* 632 F.3d 241, 246 (6th Cir. 2011) ("Trial counsel may rely on an expert's opinion on a matter within his expertise when counsel is formulating a trial strategy.").

Harris's trial team of four attorneys was assisted in its investigation by a mitigation specialist and neuropsychologist. (*See* Petitioner's App. B at 29-31, 35). The neuropsychologist evaluated Harris's intellectual, cognitive, and psychological functioning. (Petitioner's App. B at 35). After evaluating Harris, reviewing records,

and considering his life history, she recommended using family members to describe the mitigating aspects of his life along with a non-examining psychologist in the punishment phase. (Petitioner's App. B at 35). In addition to the neuropsychologist, Harris's counsel consulted with and retained three prison experts, a second psychologist, a clinical pharmacologist, and an eyewitness-identification expert. (*See* Petitioner's App. B at 35-36). The team explored calling two treating physicians as witnesses but ultimately made a strategic decision not to do so. (Petitioner's App. B at 36). The team reviewed records pertaining to Harris's life and interviewed family members and witnesses. (SHRR4: 75, 82-83; SHRR6: 151-52, 154; SHRR7: 82, 91, 102; SHRR8: 62-64; SHRR9: 20, 22, 30, 49-50, 52-58; SHDE 9-10, 12-13).

As a result of the investigation, the team developed multiple themes for the punishment case, including that: (1) Harris was not a future danger when he had no access to PCP or other drugs; (2) his family made detrimental choices for him when he was a child (including prenatal exposure to marijuana, neglect, various types of abandonment by his parents and a step-parent, and exposure to domestic violence); (3) he suffered a head injury in a car accident at age two; (4) he had a familial history of mental illness; (5) he suffered an onset of psychiatric symptoms in his teens; and (6) he suffered from drug dependence. (*See* Petitioner's App. B at 31-33). The trial team ultimately presented a blend of lay and expert witness testimony in the punishment phase of trial, including but not limited to four family members, a psychologist, and a clinical pharmacologist.

Harris's habeas claims alleged failure to pursue certain discrete avenues of potentially mitigating evidence (a fetal-alcohol-related disorder and early childhood lead exposure, i.e., potential causes for alleged brain damage). But Harris's pretrial neuropsychologist had concluded he had very little or no cognitive impairment and further testing, including an MRI, was not warranted. (*See* Petitioner's App. B at 46-47, 54-55).

While Harris characterizes his complaints wholly as failure-to-investigate claims and hence alleges trial counsel's decisions cannot be given deference, what occurred is that trial counsel's investigation (neuropsychological testing revealing very little or no brain damage) was fundamentally inconsistent with the investigation Harris alleges should have occurred (into diagnoses grounded in brain damage).

Because Harris's pretrial neuropsychological testing did not reflect brain damage, it was reasonable under the circumstances for trial counsel then not to investigate disorders or neurological conditions evidenced by brain damage or possible causes or etiologies of brain damage. *See Wiggins*, 539 U.S. at 522 (holding that counsel's decision not to investigate a particular matter "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"); *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (indicating *Strickland* does not require counsel to "canvass[ ] the field to find a more favorable defense expert"); *Richter*, 562 U.S. at 107 (although "hypothetical experts" might be useful, counsel is entitled to "formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial

tactics and strategies"); *see also Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011) (unpublished) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information.").

Moreover, the pretrial evidence (as opposed to the habeas evidence) of Harris's mother's alcohol use during pregnancy was minimal. Harris's mother initially reported no alcohol use during pregnancy but later admitted to some—but not much—alcohol use early in her pregnancy. (SHRR7: 62, 68-69). Trial counsel recalled she reported drinking a couple of glasses of wine on weekends during about the first six weeks of pregnancy. (*See S*HRR4: 136-37; SHRR7: 162). While all involved agreed during the habeas proceeding that, according to the Centers for Disease Control, any alcohol use during pregnancy is dangerous to a fetus, Harris's lead counsel testified that in his opinion the value of this type of evidence before a jury is affected by the degree to which the witness engaged in the behavior. (SHRR4: 137). In its findings, the lower court considered the DSM-5's discussion of the amount of prenatal alcohol exposure that impacts neurodevelopmental outcomes. (*See* Petitioner's App. B at 43-44). The DSM-5 concludes that a history of more than minimal gestational exposure or light drinking is required and light drinking is defined as one to thirteen drinks per month with no more than two drinks consumed on one occasion. (Petitioner's App. B at 43-44) (citing the DSM-5 at 798-99). All of these circumstances, coupled with the results of Harris's pretrial testing, led the lower court to conclude trial counsel engaged in a reasonable investigation.

Harris also complains in his petition that his trial counsel failed to investigate and discover that the State's gang evidence was allegedly false and failed to develop a psycho-social history of Harris's life. (Pet. at 32). Harris, however, did not make either of these claims in his state habeas application. Instead, his habeas claims were that trial counsel failed to call a gang expert witness to counter the State's gang expert and failed to call an expert witness like a social historian to present Harris's psycho-social narrative to the jury.

B. Before making a decision on the prejudice prong, the lower court considered the trial and habeas records, including conflicting evidence presented by the parties in the habeas proceeding, and did not rely solely on trial counsel's alleged subjective post-hoc assertions.

Harris complains that, in determining his trial counsel's performance did not prejudice him, the lower court relied on the alleged "subjective post hoc assertions" of trial counsel who did "no investigation," while ignoring alleged "undisputed" MRI evidence of organic brain damage, his FASD diagnosis, his exposure to lead in utero and as a child, and his psycho-social history. (Pet. at 34-36). Harris further complains the lower court erred in deciding the prejudice prong by focusing on the prosecution's evidence at trial and ignoring the new, mitigating habeas evidence. (Pet. at 34-35).

To meet *Strickland*'s second prong, an applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In concluding there was no prejudice based on counsel's alleged failure to investigate and present evidence of a fetal-alcohol-related disorder, the lower court conducted a probing and fact-specific analysis of the possible effects of the new evidence, by considering that: (1) if Harris presented evidence of a diagnosis of ARND, the State could have presented an expert to testify that its testing showed Harris has little or no cognitive impairment, and that the State's and the defense's own testing were consistent[6]; (2) evidence Harris suffered from a permanent neurological condition was inconsistent with the defense team's theory that Harris's violent criminal behavior resulted from his PCP use and thus would cease in a controlled prison environment; (3) the weight and credibility of Harris's FASD expert testimony would have been impacted by various factors, including (a) the examining FASD expert's conclusions about significant cognitive impairment were primarily based on two test-scoring errors and an arguable misinterpretation of the executive functioning testing, and were made without knowledge of the fatigue Harris exhibited during the exam (which may have impacted his performance), (b) Harris's second FASD expert did not examine him or diagnose him with an FASD disorder, (c) the State's neuroradiologist found Harris's MRI imaging to be normal, (d) the State's neuroradiologist would testify that Harris's MRI experts used methodology not accepted in the general medical community or by the medical associations and not used in major medical centers to diagnose brain impairment, (e) the information

[6] All of Harris's experts on FASD and lead exposure in the habeas proceeding relied entirely on his pretrial neuropsychological exam. Thus, if one of those experts had been called at trial, the State would have received his pretrial neuropsychological results.

known at trial was that Harris's mother drank a few glasses of wine on the weekends during the first six weeks of pregnancy, which—though any exposure presents risks—is considered minimal exposure under the guidelines in the DSM-5, and (f) the jury might have believed that the primary deficit Harris exhibited during his testing, a memory deficit, was due to his extensive history of daily PCP use. (*See* Petitioner's App. B at 72-73). The lower court also considered that (1) the jury heard evidence Harris had childhood ADHD, was in special education, had some childhood mental health problems, and suffered other adverse childhood conditions; (2) because there was no evidence Harris still had ADHD or a learning disability as an adult, those adverse conditions, if caused by prenatal alcohol exposure, appear to have resolved prior to Harris's adult testing; and (3) calling an expert who examined Harris would have allowed the State to access information he was malingering symptoms of mental illness, which would have been detrimental to Harris's mitigation case, which included some evidence he suffered from mental illness. (*See* Petitioner's App. B at 73-74).

Thus, the court conducted a detailed analysis of the proffered evidence in the context of other trial and habeas evidence in order to evaluate the prejudice prong. Likewise, after entering detailed findings and conclusions about evidence in support of and contrary to Harris's lead-exposure, social-historian, school-to-prison-pipeline, and gang-expert claims, the lower court concluded Harris failed to meet both prongs of *Strickland*. (*See* Petitioner's App. B at 75-125). Harris's complaints about the

methodology the lower court applied to *Strickland*'s prejudice prong do not warrant this Court's attention. This Court should deny review of Harris's second issue.

IV. The State Court Properly Applied *Strickland*'s Prejudice Prong.

Harris asks this Court to grant his petition for certiorari because the TCCA allegedly applied a preponderance-of-the-evidence standard to *Strickland*'s prejudice prong rather than a reasonable-probability standard. His question presented is: "Whether the standard for identifying prejudice under *Strickland* is a 'preponderance of the evidence,' as held in this case, or is it a 'reasonable probability' as articulated by this Court in *Strickland*?" The answer is easy: the TCCA knows and applied the correct standard to *Strickland*'s second prong, and this Court need not grant review of Harris's third issue.

The TCCA did not hold that a preponderance-of-the-evidence standard applies to the prejudice prong. But it cited the general standard of proof for habeas claims in Texas, i.e., preponderance of the evidence. Harris takes this routine recitation to mean that the lower court adopted the preponderance standard that *Strickland* explicitly rejected. It did not.

A. The TCCA applied the correct reasonable-probability standard to *Strickland*'s prejudice prong.

Strickland's prejudice prong requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.* While an applicant need not show that counsel's deficient conduct "more likely than not altered

the outcome in the case," it is not enough for him to show the errors only had "some conceivable effect on the outcome of the proceeding." *Id.* at 693.

In a prejudice analysis, the reviewing court weighs the quality and quantity of the available mitigating evidence from trial and post-conviction proceedings along with any aggravating evidence and asks whether there is a reasonable probability the new evidence would have caused a juror to change her answer to the mitigation special issue. *Blanton*, 543 F.3d at 236. The inquiry requires a court to engage in a "probing and fact-specific analysis" and to speculate as to the effects of the new evidence. *Sears v. Upton*, 561 U.S. 945, 955-56 (2010). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111–12 (citing *Strickland*, 466 U.S. at 693).

The TCCA set out and applied the proper *Strickland* standard in its December 16, 2020 decision. On Harris's IAC claims, the TCCA concluded:

> Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of these proceedings would have been different but for counsel's deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

(*See* Petitioner's App. A at 3). After discussing the denial of Harris's other claims, the TCCA adopted the habeas court's findings of fact and conclusions of law and denied relief. (*Id.* at 4-5).

In support of his claim the TCCA held him to a higher standard of proof than *Strickland* prescribes, Harris refers this Court to a paragraph from the trial court's

findings of fact and conclusions of law, setting out the general legal standard for proof of a habeas corpus claim in Texas, along with the *Strickland* standard. (*See* Pet. at 36). The paragraph is as follows:

> An applicant asserting a claim of [IAC] has the burden to prove, by a preponderance of the evidence, that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

(Petitioner's App. B at 26). Following that, the trial court expounded on the reasonable-probability standard:

> Determining whether prejudice exists in the context of a failure-to-investigate claim relating to the punishment phase requires courts to evaluate the totality of the evidence in determining whether, **if the jury had been confronted with the uninvestigated evidence, there is a reasonable probability it would have returned a different sentence**. *Ex parte Briggs*, 187 S.W.3d 458, 470 n.37 (Tex. Crim. App. 2005) (citing *Wiggins*, 539 U.S. at 536). An applicant must affirmatively prove prejudice; it is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceedings. *Strickland*, 466 U.S. at 693.

(Petitioner's App. B at 28) (emphasis added). These recitations of the correct standards indicate the lower court did not hold Harris to a higher standard for prejudice than the one *Strickland* sets out.

A post-conviction habeas applicant in Texas bears the burden of proving his claim by a preponderance of the evidence. *Ex Parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). In his petition, Harris discusses the lower court's decision in this case (Pet. at 36-37), an alleged circuit split on the reasonable-probability standard

(Pet. at 37-38), and an alleged "epidemic" problem of state courts using the wrong standard (Pet. at 38-39). But he does not recognize that the courts he refers to, including the lower court here, are merely incorporating the overall standard of proof for habeas claims in their jurisdiction (i.e., preponderance of the evidence).

This Court has previously addressed Harris's third issue—and put it to rest. A lower court's recitation of the general state habeas standard of preponderance of the evidence, where the standard for *Strickland*'s prejudice prong is also properly set out, does not warrant relief. *See Holland v. Jackson*, 542 U.S. 649, 654 (2004). This Court in *Jackson* recognized that the lower court's statement the applicant had the burden to prove his allegations by a preponderance of the evidence was reasonably read as addressing the applicant's general burden of proof on his factual contentions in a post-conviction proceeding. *Id.* This Court refused to "needlessly create internal inconsistency" in interpreting the state court's decision. *Id.* Generally, reviewing courts including this Court have recognized that when the correct *Strickland* standard is set out, subsequent use of shorthand, ambiguous, or truncated language and stray, imprecise articulations do not abrogate the lower court's use of the correct standard, even if some language in isolation does not entirely capture the correct standard: the decision must be read as a whole. *See, e.g., Woodford v. Visciotti,* 537 U.S. 19, 23-24 (2002) (occasional use of an imprecise, shorthand reference was not a repudiation of the *Strickland* standard); *Frost v. Pryor,* 749 F.3d 1212, 1226-27 (10th Cir. 2014); *Charles v. Stephens*, 736 F.3d 380, 392–93 (5th Cir. 2013).

The TCCA articulated and applied the proper standard under *Strickland* in determining there was no prejudice. When considered in the context of the whole decision and the surrounding analysis, any ambiguous or imprecise references in the trial court's findings and conclusions to the preponderance-of-the-evidence standard apply to the general standard of proof in a habeas proceeding. Furthermore, it is evident from the lower court's analysis that it did not believe the new habeas evidence had a reasonable probability of altering the jury's punishment verdict. Harris's third issue is meritless and does not warrant this Court's review.

CONCLUSION

Harris failed to overcome the rigorous burden of proof required under *Strickland*. The TCCA correctly denied Harris's state habeas application. His issues are unworthy of this Court's attention. For the foregoing reasons, Harris's petition for writ of certiorari should be denied.

Respectfully submitted,

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