No. 20-8462
(CAPITAL CASE)

IN THE
Supreme Court of the United States

RODERICK NAPOLEON HARRIS,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

REPLY BRIEF

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REPLY BRIEF

Texas concedes that neither the Texas Court of Criminal Appeals (CCA) nor the Texas trial court articulated any professional norms for measuring trial counsel's performance. The State argues that habeas courts are not required to identify any professional norms. But Texas is wrong, and this Court should clarify that habeas courts must articulate applicable professional norms before determining whether counsel's performance constituted ineffective assistance.

As this case illustrates, when habeas courts fail to make findings regarding professional norms, they inevitably—and improperly—rely on trial counsel's subjective, post hoc rationalizations. Here, the CCA accepted trial counsel's post hoc rationalizations for their failure to investigate powerful mitigating evidence that Harris suffered from effects of Fetal Alcohol Syndrome Disorder (FASD) and lead poisoning. The CCA also accepted trial counsel's post hoc excuses for failing to prepare a psycho-social history for Harris, or to use a gang expert to respond to the State's false claim that Harris belonged to a violent street gang.

Thus, the CCA failed to conduct the "weighty and record-intensive" prejudice analysis that this Court recently reiterated must occur. *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020).

The Court should grant the petition, vacate the order below, and remand this case with instructions to identify and apply professional norms, consider the mitigating evidence, and reassess the prejudice prong in light of that mitigating evidence.

I. HARRIS'S PETITION FOR CERTIORARI WAS TIMELY FILED.

The State begins by trying to avoid the merits of Harris's petition, making a baseless argument that Harris's petition for certiorari was not timely filed and therefore this Court lacks jurisdiction. The State reasons that because Tex. R. App. P. 79.2(d) purportedly 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. State's Br. 1,13–15.

The State's jurisdictional argument is wrong. The Fifth Circuit has repeatedly rejected this exact argument. The time for filing a petition for certiorari does not begin until "the denial of" "a petition for rehearing . . . timely filed in the lower court by any party." Sup. Ct. R. 13.3. Harris filed his Petition within 150 days of the CCA's denial of his properly filed suggestion for reconsideration. State's Br. 13–15.

The Fifth Circuit has held that despite Tex. R. App. P. 79.2(d), a suggestion for reconsideration *is* a petition for rehearing that tolls the running of the time for seeking review. *See, e.g., Emerson v. Johnson*, 243 F.3d 931, 934–35 (5th Cir. 2001); *Hooks v. Quarterman*, 224 F. App'x 352, 353–54 (5th Cir. 2007) (unpublished). Here, the CCA issued its opinion affirming the trial court's decision on December 16, 2020. Appendix A. The CCA denied Harris's Suggestion for Reconsideration on January 27, 2021. Appendix C. Pursuant to the Supreme Court's March 19, 2020 Order, the 90-day deadline set forth in 28 U.S.C. § 2101(c) is extended to 150 days. Harris filed his Petition within 150 days on Monday, June 28, 3021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

The Fifth Circuit reasoned that even if Tex. R. App. P. 79.2(d) could be read as prohibiting a motion for rehearing of an order denying a state habeas application, Texas courts have actually considered suggestions for reconsideration. *Emerson*, 243 F.3d at 934–35; *Hooks*, 224 F. App'x at 353–54. Thus, to avoid uncertainty, it held that the time for seeking review does not begin to run until a suggestion for reconsideration is denied notwithstanding Rule 79.2(d). *Id.*; *see also, e.g., Molina v. Davis*, No. 2:20-CV-00154, 2021 WL 3934367, at *8 (S.D. Tex. Jan. 27, 2021), *report and recommendation adopted*, No. 2:20-CV-154, 2021 WL 3931056 (S.D. Tex. Sept. 2, 2021).

Harris's Petition is timely and this Court has jurisdiction over it.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT HABEAS COURTS MUST ARTICULATE PROFESSIONAL NORMS.

A. This Court Has Mandated that Every Habeas Court Must Identify Applicable Professional Norms, and The State Concedes that the CCA Failed to Do So Here.

The State concedes that the CCA and the trial court failed to identify professional norms in any factual findings. Thus, there is nothing in the CCA's factual findings that assessed whether trial counsel's performance was deficient measured against "prevailing professional norms" in trial counsel's locale at the time of trial, as required by *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The State claims that "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." State's Br. 17.

The State's argument is contrary to this Court's precedents, statutory requirements, and common sense. This significant misapprehension on the part of Texas highlights the need for clear direction from this Court regarding its requirement that habeas courts identify professional norms.

This Court has clarified that the substance of the professional norms is a factual issue to be decided by the individual State habeas courts. *Strickland* requires each habeas court to identify whether the representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The habeas courts must determine what "professional norms" prevail the time and place of the trial, and measure counsel's conduct against those prevailing professional norms. *See id.; Harrington v. Richter*, 562 U.S. 86, 105, 110 (2011).

Prevailing professional norms differ by locale, and are not codified in any law. As a result, they are factual issues that habeas courts must determine. The habeas court's task is to identify "'[p]revailing norms of practice,'. . . and 'standard practice.'" *Bobby v. Van Hook*, 558 U.S. 4, 8 n.1 (2009) (citations omitted). "It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution . . . ." *Id.* at 14 (Alito, J., concurring).

B. The Habeas Courts Must Make Factual Findings as to Professional Norms because Such Findings Are Essential for Judicial Review.

Habeas courts must make written findings regarding professional norms. Absent written findings, there is nothing meaningful for the Courts of Appeals or this Court to review. Indeed, without written findings, there can be no assurance

that habeas courts determined and then applied any professional norms at all. It is for this reason that state and federal habeas statutes require and expect written findings of fact from habeas courts. *See* Tex. Code Crim. Proc. art. 11.071(f); 28 U.S.C. § 2254(f), (g). As the CCA itself has explained:

> The legislative framework of article 11.071 contemplates that the habeas judge is "Johnny-on-the-Spot." He is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief. This Court then has the statutory duty to review the trial court's factual findings and legal conclusions to ensure that they are supported by the record and are in accordance with the law.

Ex parte Simpson, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004). The State habeas court's findings must be "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." *Wainwright v. Witt*, 469 U.S. 412, 426 n.7, 430 (1985); *see also Johnson v. Trigg*, 28 F.3d 639, 644 (7th Cir. 1994) ("[O]ne of the statutory conditions, a condition implicit as it happens in any review of findings other than those made by juries and arbitrators, is that there must be 'reliable and adequate written indicia' of the state court's finding . . . .") (quoting *Wainwright*, 469 U.S. at 430).

It is essential that habeas courts identify professional norms and issue explicit findings stating those norms. This is the only way that reviewing courts can ensure that the lower habeas court's conclusion about trial counsel's performance involved its measurement of the evidence against objective professional norm. Here, the State admits there was no factual finding regarding

professional norms but claims none was necessary. The Court should grant certiorari to clarify to habeas courts that written findings establishing professional norms are mandatory.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE INSTEAD OF COMPARING TRIAL COUNSEL'S CONDUCT TO OBJECTIVE PROFESSIONAL NORMS, THE CCA RELIED UPON SUBJECTIVE ASSERTIONS OF TRIAL COUNSEL.

A. The CCA Accepted Trial Counsel's Subjective, Post Hoc Assertions, Which Are Not Credible.

This case illustrates well the need for the habeas court to make findings regarding professional norms. Here, absent any finding about what the professional norms are, the CCA accepted trial counsel's post hoc rationalizations for their failure to investigate powerful mitigating evidence. But "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington*, 562 U.S. at 109 (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). Post hoc rationalizations of trial counsel are not objective or credible because of trial counsel's conflict of interest. *E.g., Gray v. Pearson*, 526 F. App'x 331, 334–35 (4th Cir. 2013) ("We find that a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented Gray in his state post-conviction proceedings; the conflict is anything but 'theoretical.'") (citation omitted).

The undisputed evidence shows that trial counsel completely failed to investigate powerful mitigating evidence: (1) trial counsel were aware that Harris's mother drank while pregnant with Harris, and that he grew up in a Superfund site,

but they failed even to investigate FASD or lead poisoning, even though they knew this would be powerful mitigating evidence; (2) trial counsel failed to develop a psycho-social history of Harris's life; (3) trial counsel failed to call an expert to respond to the State's claim that Harris belonged to a dangerous street gang.

The State tries to excuse trial counsel's failures, arguing that all this should be ignored because they consulted with Antoinette McGarrahan, PhD, a neuropsychologist, and she told them a week into trial she had nothing to contribute to Harris's defense. McGarrahan had done some testing on Harris, which she admits showed neuropsychological deficits. Roderick Harris's Proposed Findings of Fact and Conclusions of Law, Cause No. F-0900409-Y, In Criminal District Court No. 7 Dallas County, Texas, filed October 23, 2019, ¶¶ 63–64. But it is undisputed that she did not tell Harris's trial counsel what her conclusions and possible testimony were until a week after trial had already started. HPFFCL, ¶ 60–61. As a result, trial counsel called no expert to address any of Harris's neuropsychological deficits. HPFFCL, ¶¶ 63–64. Trial counsel also asserted that they did not think that it was important that Harris' mother consumed alcohol while pregnant with him because Harris's mother told them that she drank a couple of glasses of wine on weekends during the first six to eight weeks of pregnancy. State's Br. 7–8. But had trial counsel asked what kind of wine and probed further regarding how often, they would have learned that Harris's mother drank Wild Irish Rose and Thunderbird "every weekend" during her first trimester. HPFFCL, ¶ 55. Wild Irish Rose and

Thunderbird are wines "typically fortified to alcohol by volume content of about 13 to 18 percent . . . [and] substantially stronger than wine." HPFFCL, ¶ 55.

The State does not dispute that trial counsel did not instruct McGarrahan to investigate whether Harris suffered from FASD or lead poisoning and that she had never made such a diagnosis for anyone. HPFFCL, ¶¶ 54–62, 132–34. The State tries to excuse the failure to investigate by arguing that "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." State's Br. 21. But this ignores the key point: trial counsel could not make an informed strategic decision about *whether* to open this door because they did not investigate in the first place. *Escamilla v. Stephens*, 749 F.3d 380, 392 (5th Cir. 2014) ("We reject[ ] any suggestion that a decision to focus on one potentially reasonable trial strategy. . . . [i]s 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background[.]'") (alterations in the original) (citation omitted).

The State does not deny that trial counsel failed to prepare a psycho-social history for Harris. But the State justifies this failure by claiming that trial counsel decided to focus on other things such as the idea that Harris took drugs (but was not dangerous if he was not given drugs), that he had some challenges when he was a child, that he hit his head at age two, and that some people in his family had a history of mental illness and that he had a few symptoms himself. The State never explains, however, why trial counsel's pursuit of these issues excuses their failure to investigate Harris' psycho-social history and or why a plan to offer these anecdotes

made a psycho-social history unnecessary. In 2003, *Wiggins*, 539 U.S. at 517, 524, recognized preparation of a psycho-social history is a professional norm. The post hoc identification of trial counsel's "themes" does not redeem their failure to prepare a psycho-social history for Harris: having a few "themes" on hand is not a mitigation defense.

The State tries to excuse trial counsel's failure to investigate by claiming that trial counsel "presented a blend of lay and expert witness testimony in the punishment phase of trial." State's Br. 30. But it does not deny that neither expert called by the defense had any knowledge of the record or had ever interviewed any witnesses or even met Harris. HPFFCL, ¶ 146. Both specifically denied being asked to render an opinion about Harris himself, and only provided general information. *Id.* Counsel did not even meet with these "experts" until well into trial, and then only briefly. HPFFCL, ¶ 41. There is no plausible argument that this was a real mitigation defense.

The State's excuse for trial counsel's failure to call a gang expert is also comprised only of post hoc rationalizations. Trial counsel did not evaluate whether to call a gang expert, nor did the CCA consider whether any professional norm would have required a gang expert. The question is not whether the State can somehow explain away trial counsel's failures, or provide some alternative theory about its significance, but whether trial counsel exercised due care based on objective professional norms found by the habeas court.

Accordingly, the CCA relied entirely on trial counsel's subjective post hoc assertions in denying Harris's petition.

B. Harris Submitted Uncontested Evidence of Professional Norms, Which the CCA Ignored.

The State asserts that "[w]hile 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." State's Br. 25. This is demonstrably false. Harris presented ample evidence of objective professionals norms, through the ABA and Texas Guidelines, expert testimony, and case law. Pet. 18–19, 23–33.

1. Harris established professional norms regarding trial counsel's duty to investigate FASD and lead poisoning.

At the habeas hearing, Harris called Richard Burr to testify regarding local professional norms with respect to various issues, including trial counsel's duty to investigate the defendant's potential FASD and lead poisoning. Burr has 40 years of experience representing clients sentenced to death in Texas. HPFFCL, ¶ 349. He addressed McGarrahan's claim during trial that she had nothing helpful to say. Burr testified that even if a neuropsychological exam "doesn't show much," a reasonable capital defense attorney must "keep looking, because that doesn't negate having fetal alcohol disorder, especially if you have certain exposure over a period of time during the first trimester, which is when the brain is forming." HPFFCL, ¶ 364. "If . . . counsel is on notice that the defendant is living for a significant amount of time in a Superfund site that has been found to have toxic levels of lead," then he has "a duty under the prevailing norms to investigate that exposure." HPFFCL, ¶

373. "[B]y 2009, the death penalty defense community had known for quite some time that exposure to environmental toxins—and the most prevalent environmental toxin is lead, especially for poor people who grow up where there's lead-based paint in housing projects that has flaked off and gotten into the soil, that type of exposure can be harmful, much less living in the shadow of a Superfund lead smelter site." HPFFCL, ¶ 373. *See also Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir.) (explaining that fetal alcohol syndrome disorder is "widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored—as outlined in the ABA Guidelines and caselaw at the time"), *as amended* (Feb. 5, 2019).

2. Harris established professional norms regarding preparation of a psycho-social history.

Harris presented evidence that professional norms required trial counsel to develop a psycho-social history and present it through lay or fact witnesses. *See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.11 cmt. (Am. Bar Ass'n rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1061 (2003) (noting the importance of presenting "the client's complete social history" at punishment). It is well established that preparation of a social history report is a professional norm. *Wiggins*, 539 U.S. at 517, 524. And the Fifth Circuit has held that preparation of a psycho-social history is a professional norm in Texas. *Murphy v. Davis*, 737 F. App'x 693, 704–05, 707 (5th Cir. 2018).

Burr testified that retaining a gang expert is "essential" because gang membership is "one of the highest impact facts there is." HPFFCL, ¶ 423. "[T]he

mere mention of it gives rise to the fear and stereotyping that we all know is associated with it." *Id.* A gang expert would also have helped defense counsel discover that Harris's tattoos were not related to his membership in a violent gang because Harris got the tattoos in jail after he was arrested and were not related to a gang. HPFFCL, ¶ 425. The only evidence of prevailing professional norms shows that trial counsel should have called a gang expert. *Id.*

The Court should grant certiorari to establish that habeas courts must identify prevailing professional norms. This case is a prime illustration of why that is necessary. The CCA's findings and the State's arguments defending the CCA's findings are based on trial counsel's post hoc rationalizations that are not credible. Trial counsel's testimony is also contrary to the objective evidence that they failed to investigate and therefore could not have made informed strategic decisions.

This case illustrates that where habeas courts do not identify professional norms in their findings, they inevitably rely on the subjective excuses of trial counsel, which are not credible.

IV. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CCA MUST IDENTIFY PROFESSIONAL NORMS IN ORDER TO DETERMINE WHETHER THE DEFENDANT WAS PREJUDICED UNDER *STRICKLAND*.

A. The CCA Only Considered Trial Counsel's Explanations, and Ignored New Evidence Offered at The Habeas Proceeding.

The CCA's finding that trial counsel's performance did not prejudice Harris considered only the evidence offered by the prosecution at trial, and ignored the new, mitigating evidence presented by habeas counsel. The CCA used trial counsel's post hoc rationalizations to dismiss Harris's MRI showing brain damage,

the uncontested diagnosis that Harris suffered from FASD, the uncontested evidence that Harris suffered cognitive impairments as a result of lead exposure in utero as a child, that the State falsely claimed that Harris was in a violent gang, and the compelling psycho-social history.

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.* Harris has more than met this burden. In defending the CCA's finding that trial counsel ineffective representation did not prejudice Harris, the State relies on the same assertions as it made in arguing that trial counsel were not ineffective in the first place. The State uses trial counsel's post hoc reasoning to claim that had trial counsel investigated, it would not have made a difference anyway. State's Br. 33–34.

This cursory dismissal of the ample new evidence presented in Harris's habeas proceed fails. The CCA should have considered whether there is a reasonable probability that the outcome would have been changed by the MRI showing brain damage, Harris's FASD diagnosis, the evidence of cognitive impairments as a result of lead exposure, and a psycho-social history. This is that "weighty and record-intensive analysis" that this Court recently reiterated should occur. See *Andrus*, 140 S. Ct. at 1887. Instead, the CCA simply adopted trial

counsel's post hoc explanations for failing to investigate as also the reasons that trial counsel's performance did not prejudice Harris.

B. The Court Should Correct Texas and Other State Courts' Widespread Failure to Apply The "Reasonable Probability" Standard, as Occurred Here.

The State admits that the CCA incorrectly stated that the burden of proof for *Strickland* prejudice is preponderance of the evidence. State's Br. 38 (quoting Appendix B at 26). However, the State claims that the error was harmless, and relies on *Holland v. Jackson*, 542 U.S. 649 (2004). There, the Court excused the lower court's statement that "the defendant has the burden of proving his allegations by a preponderance of the evidence" because it came after the lower court correctly stated the standard and in context it referred in shorthand to the petitioner's "general burden of proof." *Id.* at 654. But that is not what occurred here. Here, CCA incorrectly incorporated the wrong burden of proof, claiming it was preponderance of the evidence: "An applicant asserting a claim of [IAC] has the burden to prove, by a preponderance of the evidence, that . . . 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.'" Appendix B at 26.

The State also argues that because the CCA accurately quoted *Strickland*'s prejudice standard at one point in its opinion, this cured the admittedly incorrect application of the preponderance standard in the trial court's findings and conclusions adopted by the CCA. But the CCA adopted the trial court's findings and conclusions wholesale—including the incorrect burden of proof.

This is a widespread problem. Harris cites numerous state court cases, including Texas cases, applying the wrong standard. State's Br. 39. Each of those cases misstated the *Strickland* standard and claimed that the burden of proof is a preponderance of the evidence to show prejudice. *See* Pet. 36–39. It simply is not.

CONCLUSION

For these reasons and as explained in Harris's opening brief, the Court should grant the petition, vacate the order below, and remand this case with instructions to identify and apply professional norms, consider the mitigating evidence, and reassess the prejudice prong in light of that mitigating evidence and applying the correct standard of review.

Respectfully submitted,

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