

No. 26-5430

IN THE
Supreme Court of the United States

RODERICK NAPOLEON HARRIS,
Petitioner,

v.

ERIC GUERRERO, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

KEN PAXTON
Attorney General of Texas

TOMEE M. HEINING
Chief, Criminal Appeals Division

BRENT WEBSTER
First Assistant Attorney General

MOLLY M. KNOWLES
Assistant Attorney General
Counsel of Record

AMBER PLATT
Associate Deputy Attorney General
For Criminal Justice

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
molly.knowles@oag.texas.gov

Counsel for Respondent

CAPITAL CASE QUESTIONS PRESENTED

Should this Court grant certiorari to review the Fifth Circuit’s denial of a certificate of appealability (COA) as to Harris’s ineffective-assistance-of-trial-counsel claims based on the following issues:

1. Under *Strickland v. Washington*, 466 U.S. 668 (1984), were the lower courts required to rely on and cite standards, such as the American Bar Association Guidelines, when assessing whether trial counsel performed deficiently?
2. Were the lower courts required to disregard trial counsel’s justifications for his strategic decisions—and deem them improper post hoc rationalizations—when the record corroborates trial counsel’s justifications?
3. In assessing *Strickland*’s prejudice prong, were the lower courts required to apply a different standard because Harris’s death sentence was imposed under the “non-weighting” capital murder sentencing scheme in Texas?

LIST OF ALL PROCEEDINGS

State v. Harris, No. F09-00409 (Dist. Ct. No. 7, Dallas County, Texas) (judgment entered May 21, 2012)

Harris v. State, No. AP-76,810, 2014 WL 2155395 (Tex. Crim. App. May 21, 2014) (not designated for publication) (affirming conviction)

Ex parte Harris, No. WR-80,923-01, 2020 WL 8079824 (Tex. Crim. App. Dec. 16, 2020) (not designated for publication) (denying state habeas application)

Harris v. Lumpkin, 756 F. Supp. 3d 249 (N.D. Tex. 2024) (denying federal habeas petition)

Harris v. Guerrero, No. 24-70009, 2026 WL 887102 (5th Cir. Mar. 31, 2026) (unpublished) (denying certificate of appealability)

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
LIST OF ALL PROCEEDINGS	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	3
I. Facts of the Crime	3
II. Facts Pertaining to Punishment	5
III. Course of State and Federal Proceedings.....	8
REASONS FOR DENYING THE WRIT.....	8
I. The Fifth Circuit Correctly Denied a COA for Harris’s IATC claims.	11
A. Trial counsel reasonably investigated Harris’s cognitive and psychological functioning.....	13
B. Trial counsel reasonably investigated Harris’s psychosocial history.....	17
C. Trial counsel acted reasonably in strategically introducing testimony about Harris being left alone on an elevator, and in handling the resulting stun- belt testimony.	18
D. Harris was not prejudiced by trial counsel’s conduct.	20
II. Under This Court’s Precedent, the Lower Courts Were Not Required to Cite ABA Guidelines, or Similar Standards, When Assessing <i>Strickland</i> Deficiency.....	26
III. The Lower Courts Did Not Impermissibly Rely on Post Hoc Rationalizations When Assessing <i>Strickland</i> Deficiency.....	30
IV. Under This Court’s Precedent, the Same <i>Strickland</i> Prejudice Standard Applies in Death-Penalty Cases Originating From “Weighing” and “Non-Weighing” States.....	33
CONCLUSION	36

TABLE OF AUTHORITIES

Cases

<i>Anderson v. City of Bessemer City, N.C.</i> , 470 U.S. 564 (1985)	10
<i>Anderson v. Kelley</i> , 938 F.3d 949 (8th Cir. 2019)	30
<i>Andrus v. Texas</i> , 590 U.S. 806 (2020)	2, 12, 20, 34
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	9
<i>Barrientes v. Johnson</i> , 221 F.3d 741 (5th Cir. 2000)	9
<i>Blackledge v. Allison</i> , 431 U.S. 63 (1977)	17
<i>Bobby v. Van Hook</i> , 558 U.S. 4 (2009)	2, 26, 27, 30
<i>Brown v. Sanders</i> , 546 U.S. 212 (2006)	35
<i>Brumfield v. Cain</i> , 576 U.S. 305 (2015)	10
<i>Buck v. Davis</i> , 580 U.S. 100 (2017)	9, 28, 34
<i>Burt v. Titlow</i> , 571 U.S. 12 (2013)	12
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	12, 22
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005)	25
<i>Druery v. Thaler</i> , 647 F.3d 535 (5th Cir. 2011)	27
<i>Dunn v. Reeves</i> , 594 U.S. 731 (2021)	12
<i>Ex parte Andrus</i> , 622 S.W.3d 892 (Tex. Crim. App. 2021)	36
<i>Ex parte Martinez</i> , 195 S.W.3d 713 (Tex. Crim. App. 2006)	36
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	10, 12
<i>Hatten v. Quarterman</i> , 570 F.3d 595 (5th Cir. 2009)	25
<i>Hodges v. Colson</i> , 727 F.3d 517 (6th Cir. 2013)	30

<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986)	25
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	10
<i>James v. Collins</i> , 987 F.2d 1116 (1993)	35
<i>Johnson v. Puckett</i> , 176 F.3d 809 (5th Cir. 1999).....	11, 17, 34
<i>Johnson v. Quarterman</i> , 306 F. App'x 116 (5th Cir. 2009)	27
<i>Kemp v. Kelley</i> , 924 F.3d 489 (8th Cir. 2019)	30
<i>Lagrone v. State</i> , 942 S.W.2d 602 (Tex. Crim. App. 1997)	22
<i>Mendoza v. State</i> , 87 So.3d 644 (Fla. 2011)	30
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	9
<i>Mosley v. State</i> , 983 S.W.2d 249 (Tex. Crim. App. 1998)	35
<i>Murphy v. Davis</i> , 737 F. App'x 693 (5th Cir. 2018).....	30
<i>Nichols v. Scott</i> , 69 F.3d 1255 (5th Cir. 1995)	10
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	27
<i>Schlang v. Heard</i> , 691 F.2d 796 (5th Cir. 1982)	17
<i>Segundo v. Davis</i> , 831 F.3d 345 (5th Cir. 2016)	16
<i>Shockley v. Crews</i> , 696 F. Supp. 3d 589 (E.D. Mo. 2023)	30
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	9
<i>Smith v. Quarterman</i> , 471 F.3d 565 (5th Cir. 2006)	25
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	passim
<i>Stringer v. Black</i> , 503 U.S. 222 (1992).....	34
<i>Thornell v. Jones</i> , 602 U.S. 154 (2024)	12, 20, 34
<i>United States v. Fields</i> , 761 F.3d 443 (5th Cir. 2014)	23

<i>Weaver v. Massachusetts</i> , 582 U.S. 286 (2017)	25
<i>White v. Ryan</i> , 895 F.3d 641 (9th Cir. 2018).....	28, 29
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	passim
<i>Williams v. Allen</i> , 542 F.3d 1326 (11th Cir. 2008)	28, 29
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	10
<i>Wong v. Belmontes</i> , 558 U.S. 15 (2009).....	21, 22
Statutes	
28 U.S.C. § 2253(c)(1)(A)	9
28 U.S.C. § 2253(c)(2)	9
28 U.S.C. § 2254.....	8
28 U.S.C. § 2254(d)	9, 10, 26
28 U.S.C. § 2254(e)(1)	13
Other Authorities	
The Antiterrorism and Effective Death Penalty Act of 1996.....	8
Rules	
Sup. Ct. R. 10	8

INTRODUCTION

Petitioner Roderick Harris was convicted of capital murder and sentenced to death by a Dallas County jury in May 2012. In convicting Harris, the jury found him guilty of murdering Alfredo Gallardo while in the course of committing a home invasion robbery of the Gallardo family home. Harris has unsuccessfully appealed his conviction and sentence through both state and federal courts. Harris now seeks certiorari review, arguing that the lower courts incorrectly assessed and rejected his ineffective-assistance-of-trial-counsel (IATC) claims under the familiar framework put forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See generally* Pet. But his claims are unworthy of certiorari review by this Court.

Harris's enumerated arguments for granting certiorari are three-fold. First, he argues the lower courts failed to cite American Bar Association (ABA) Guidelines, or similar standards, when evaluating trial counsel's conduct under *Strickland*. Second, he claims that the lower courts improperly relied on post hoc justifications in finding that his trial counsel's conduct did not amount to deficient performance. And third, he asserts that the lower courts should not have reweighed the aggravating and mitigating evidence in his case when assessing *Strickland's* prejudice prong. Pet. 17–35.

As an initial matter, Harris's IATC claims are meritless, and in denying a certificate of appealability (COA), the Fifth Circuit correctly found that reasonable jurists would not debate the district court's rejection of his claims. Pet. App. 1a–4a. Harris's enumerated arguments for granting certiorari are likewise without merit.

This Court has never held that courts are required to cite and strictly apply ABA Guidelines in assessing *Strickland*'s deficiency prong; quite the opposite, the Court has held that while ABA Guidelines and similar standards may serve as “guides” when assessing the reasonableness of a trial counsel’s conduct, they do not define what reasonable conduct is. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009); *see Strickland*, 466 U.S. at 688–89. And although courts should not rely on post hoc rationalizations when addressing the reasonableness of a trial counsel’s performance, *see Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003), the record does not reflect that the lower courts did so in Harris’s case. Finally, this Court has held that in evaluating *Strickland* prejudice in a death-penalty case, reviewing courts must consider the totality of the mitigation evidence and “reweigh it against the evidence in aggravation,” including in a Texas capital case. *Andrus v. Texas*, 590 U.S. 806, 821 (2020) (citations omitted).

Given that Harris’s arguments for granting certiorari are foreclosed by this Court’s precedent and/or unsupported by the record, his petition does not demonstrate any special or important reason for this Court to review the lower court’s decision. No writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of the crime as follows:

On the evening of March 17, 2009, [Harris] robbed the Gallardo family in their east Dallas mobile home. He held three adults, one teenage girl, and two boys at gunpoint. During the robbery, he shot and killed the father, Alfredo, and his brother, Carlos.

The evidence showed that, at 9:00 p.m. on St. Patrick's Day, Alfredo was at home with his wife, Maria, his brother, Carlos, a son, a grandson, and his thirteen-year-old daughter, Yahaira. Alfredo was about to go out to look for Yahaira's older sister when a "black guy" burst through the door and pointed his gun at Alfredo's head. Yahaira was "shocked" and "scared," the more so when the man—[Harris]—told her, "Come here, b[****]." Yahaira's mother started to cry as [Harris] pointed his gun at them and, in a loud voice, asked for money, jewelry, and drugs. Yahaira translated [Harris]'s demands for her parents because they did not speak much English. She took her mother's purse from the counter and gave [Harris] all of the money inside—two dollars.

Yahaira's father was sitting on the sofa, but when he started to stand up, [Harris] hit him so hard in the face with the back of his gun that his cheek started bleeding. Then, when Carlos tried to get his wallet out of his pocket, [Harris] hit him near the eyebrow with the gun. Carlos also started bleeding. [Harris] told Alfredo and Carlos to get down on the floor, and then, still pointing his gun at them, [he] took their wallets from their pants pockets.

Then he took everyone to the master bedroom, and Yahaira handed him the little bit of jewelry—a necklace and two rings—that they had. [Harris] pushed them all through the bathroom and toward a closet, still pointing his gun at them. He told Yahaira to tie her uncle's hands with some belts while he tied her father's hands. He was shouting at them as he kept trying to close and lock the closet door, and Yahaira's mother was crying. Yahaira thought, "We were going to die." [Harris] then asked for the keys to their red truck, but Yahaira told him that her

brother Omar had them and that he was at a party.[¹]

[Harris] “told us like, what kind of family like us didn’t have money? And that if we didn’t have money, we should do like—we should do what he did; that he didn’t hurt people, he just robbed houses.” Then he pointed to Yahaira’s mother and said that she was to go with him because “he wanted to take her.” She was crying and praying in Spanish, so [Harris] pointed to Yahaira and said that he was going to take her instead. When Yahaira’s mother kept crying, [Harris] finally pointed his gun at Alfredo while telling Yahaira’s mother to calm down or he would “hurt” them. Yahaira thought he would shoot them.

Then [Harris] grabbed Alfredo’s shirt and started walking him toward the restroom, but they fell on top of the Jacuzzi “and that’s when the shooting came out[.]” [Harris] shot Alfredo in the face and chest. Then Carlos, Yahaira’s uncle, got up as if he were trying to help, and [Harris] shot him in the face and shoulder. Yahaira and her mother were crying on the floor of the closet when Yahaira felt the wind from another bullet pass by her. She thought [Harris] had fired a total of about six bullets.

Yahaira looked back out the bathroom and saw [Harris] push “my dad off of him like he was disgust[ed], because of the blood.” He finally ran out the door. Yahaira heard “snoring” sounds from either her father or her uncle lying on the floor and saw her father shaking. Finally, a policeman ran in and took them out of the house.[²]

¹ Yahaira knew that Omar was in his room in the house, but she didn’t want [Harris] to find him. Unbeknownst to Yahaira, Omar had heard his father speaking in a “panicked” voice from the living room, so he peeked out the door of his bedroom and saw [Harris] pointing a gun at his father’s head. Omar quietly closed and locked his bedroom door, climbed out the bedroom window, and found the security guard for the mobile-home park. The security guard called 911 after Omar told him about the ongoing robbery at his home. [Footnotes in original, under different number.]

² The police responded immediately to the security guard’s 911 call and were surrounding the Gallardo’s home when [Harris] shot Alfredo and Carlos. One officer heard five shots and shortly thereafter, [Harris] came running outside. When the officers saw him, they yelled, “Police,” and told [Harris] to get down on the ground. He didn’t. Instead, he shot at them. As he ran toward the back of the trailer, he bumped into one officer, who then shot [Harris] in the back and leg.

[Harris] had killed both Alfredo and Carlos.

Harris v. State, No. AP-76,810, 2014 WL 2155395, at *1–2 (Tex. Crim. App. May 21, 2014).

II. Facts Pertaining to Punishment

During the punishment phase, the State offered evidence of several other aggravated robberies, including another capital murder, that [Harris] had committed during the month before the charged capital murder. On February 15, 2009, [Harris] and his cohort confronted Luis Gonzalez at his apartment door, forced him inside, tied him up, and robbed him of his wallet with \$450 in it, his watch and shoes, a set of wheel rims, a stereo, and his friend’s wallet, which was hidden in the sofa, with \$900 in it. Then they dragged Mr. Gonzalez into the bedroom while they ransacked his apartment. Mr. Gonzalez managed to untie himself while [Harris] and his fellow robber were carrying items out to their car, and he ran and locked them out of his apartment. [Harris] started beating on the door, saying, “[O]pen the door, you son-of-a-you-know-what.” Mr. Gonzalez did not open the door, but he couldn’t call the police because [Harris] had stolen his cell phone. The robbers finally left in [Harris]’s car. [Harris]’s DNA was on a glove left at Mr. Gonzalez’s apartment.

At about 10:30 p.m. on March 3, 2009, Karen De La Cruz Espinoza was walking through the parking lot of her apartment complex with her eleven-year-old son when she saw three black men coming hurriedly toward her. As she got to her front door, one of them—[Harris]—pushed open the door and shoved her and her son inside. Her husband and three of her four other children were already inside. The robbers immediately closed all of the shades, pointed their guns at the heads of two of her children, and told Karen that they wanted her handbag with money and that “if we didn’t give them what they wanted, that they were going to kill us all.” One of the robbers went to the back room, grabbed Karen’s husband, pulled him into the living room, and threw him on the floor.

The robbers then ransacked the bedrooms, pulling out all of the drawers and emptying the contents on the floor and beds. They took Karen’s wallet with her paycheck in it, as well as her husband’s wallet,

her watch, an Xbox, DVDs, and other items. As two of the robbers started taking items down the stairs, Karen heard several shots and thought that the robbers had “found someone else” to hurt. The third robber immediately picked up the rest of the bags of property that they had collected, but Karen rushed forward, pushed him out the door, and locked it. They all stood back from the door because they were worried the robber would start shooting through it.

[Harris] then went to another apartment at the complex, that of Roberto Ramos. Roberto’s 27-year-old brother, Eustacio, heard a commotion in the hallway while he was in the bathroom talking on the phone to his grandmother in Mexico. When he looked out, he saw Roberto struggling with [Harris], who had gotten inside the apartment. Roberto was trying to push him back outside, but [Harris] was too big and strong. When Eustacio went to help Roberto, [Harris] shot Eustacio in the chest from about four feet away. Roberto cried, “Oh, he shot you, he killed you, he hit you in the heart.” Eustacio was “stunned” and fell backwards as he saw his brother struggling with [Harris]. Eustacio said, “I heard a shot and then a moment later, seconds later, I heard another shot. And I was saying, oh, God, and I was screaming to my brother. After that, I didn’t know anything else.”

A third brother, Martin, came into the living room and saw Roberto struggling with [Harris], but when Martin came toward the door, [Harris] reached over Roberto’s shoulder and shot him in the face. Then, as another neighbor watched from his door, Roberto “bearhugged” [Harris] who then shot Roberto three times—in the upper back, in the mouth, and in the left thigh. Roberto died in the apartment breezeway, but his two brothers, Eustacio and Martin, survived. Roberto’s thirteen-year-old daughter, Jasmine, called 911 and then found her dead father outside: “I told him I loved him and I kissed him on the cheek.” The robbers escaped.

The State also offered evidence of [Harris]’s youthful conduct: He was assigned to a behavioral adjustment classroom for disruptive students when he was in middle school. A school resource officer testified that [Harris] had a poor reputation for being peaceful and law-abiding at age fourteen and recalled an incident in which [Harris] became “combative” when his mother reported him as a run-away. In high school, he carried a knife with a six-inch blade to school. When it was discovered, he was arrested. He was arrested the next year for possession of marijuana.

[Harris] had numerous gang tattoos on his body, including “HUSTLA” on his right forearm. The State’s gang expert explained that this tattoo indicated that [Harris] is “hustling for his money. He is hustling in life. He is hustling to get ahead,” usually by selling narcotics. He also had a “Fish Trap” tattoo, stars, and the numbers 212 and 3500, which indicate that [Harris] is a Fish Trap Bloods gang member. The expert said that the Fish Trap Bloods are a particularly violent gang known for “murders, aggravated robberies, narcotics selling, assaults, home invasion robberies. You name it, they have done it.”

The State also called several police officers who testified that they had arrested [Harris] in Dallas for various offenses: on December 5, 2002, for unauthorized use of a motor vehicle; on December 23, 2003, on warrants for probation violation and burglary; on September 20, 2006, for traffic violations in which he was later charged with being a felon in possession of a firearm; on April 17, 2007, for unauthorized use of a motor vehicle; and on December 27, 2007, for possession of marijuana.

In his punishment case, [Harris] called four family members to testify to his family history, youth, education, and good character. They said that [Harris] was diagnosed with attention deficit disorder at age six or seven and that he was placed in special education classes because of his behavioral problems. When he was young, [Harris] set a room of his family’s house on fire. Family members testified that [Harris]’s mother, who suffers from manic depression and schizophrenia, gave him insufficient attention and affection when he was young. By the time he was eleven or twelve, he was helping to care for his two younger brothers and protecting them from his parents’ violence and fighting.

[Harris] started using drugs—alcohol, marijuana, and PCP—when he was young. He would become paranoid and hear voices when he used drugs. [Harris] has three children. While in jail awaiting trial, [Harris] told the mother of one of his children—who had accused him of not “caring” or he would not have put himself in his present situation—that he had “motherf[*****] bills to pay.” In another phone call, [Harris] told a friend that when he got to prison he would “put bread in his pocket” and continue “the hustle.” He was already running the jail tank by bullying other inmates and using their commissary funds.

Id. at 2–4.

III. Course of State and Federal Proceedings

In 2012, Harris was convicted by a Texas jury of the capital murder of Alfredo Gallardo and sentenced to death. ROA.782, 1485.³ The CCA affirmed Harris’s conviction and sentence on direct appeal. *Harris*, 2014 WL 2155395. Harris also applied for state habeas relief, but the CCA denied his application. Pet. App. 77a–81a; *Ex parte Harris*, WR-80,923-01, 2020 WL 8079824 (Tex. Crim. App. Dec. 16, 2020) (not designated for publication).

Harris then filed a habeas petition in federal district court under 28 U.S.C. § 2254. ROA.61–166. Applying AEDPA,⁴ and alternatively conducting its own de novo review, the district court denied Harris habeas relief. Pet. App. 5a–76a; *Harris v. Lumpkin*, 756 F. Supp. 3d 249 (N.D. Tex. 2024). Harris filed a motion for a COA in the Fifth Circuit, which the court denied. Pet. App. 1a–4a; *Harris v. Guerrero*, No. 24-70009, 2026 WL 887102 (5th Cir. Mar. 31, 2026) (unpublished). Harris now seeks certiorari review of the Fifth Circuit’s decision.

REASONS FOR DENYING THE WRIT

The questions Harris presents for review are unworthy of the Court’s attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for “compelling reasons.” Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is “rarely granted.” *Id.*

³ “ROA” refers to the record on appeal filed in the court below.

⁴ The Antiterrorism and Effective Death Penalty Act of 1996.

Furthermore, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). A petitioner must first obtain a COA as a jurisdictional prerequisite to appellate review. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In determining whether to issue a COA, a court must consider whether the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The COA standard:

. . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.”

Buck v. Davis, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484.

Furthermore, “the determination of whether a COA should issue must be made by viewing the petitioner’s arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d).” *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 (“We look to the District Court’s application of AEDPA to petitioner’s constitutional claims and ask whether that resolution was debatable amongst jurists of reason.”). Under § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) “‘was contrary to’ federal law then clearly established in the holdings of” the Supreme Court; or (2) “‘involved an unreasonable application of’” clearly established Supreme Court

precedent; or (3) “‘was based on an unreasonable determination of the facts’ in light of the record before the state court.” *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)). Even when a state court’s findings include a verbatim adoption of proposed findings from one party, those findings are still entitled to a presumption of correctness. *Nichols v. Scott*, 69 F.3d 1255, 1277 (5th Cir. 1995) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 571 (1985)). Moreover, this Court has emphasized § 2254(d)’s demanding standard, stating:

[u]nder § 2254(d), a habeas court must determine what arguments or theories supported, or [] could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

...

It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.

Richter, 562 U.S. at 102 (citations omitted); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (if “[r]easonable minds reviewing the record might disagree’ about the finding in question, ‘on habeas review that does not suffice to supersede the trial court’s . . . determination.’”). The Court has noted that “[i]f this standard is difficult to meet, that is because it was meant to be.” *Richter*, 562 U.S. at 102. “Section 2254(d) reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Harris’s petition presents no compelling reasons, important questions of law, or genuine conflicts among the circuit courts to justify certiorari. To the contrary, Harris’s petition contains factual contentions refuted by the record and legal arguments foreclosed by this Court’s precedent. Certiorari should be denied.

I. The Fifth Circuit Correctly Denied a COA for Harris’s IATC claims.

As a preliminary matter, Harris’s claims are meritless. He claims that his trial counsel was ineffective for: (1) failing to investigate fetal alcohol spectrum disorder (FASD) or toxic lead exposure; (2) failing to investigate and present his psychosocial history;⁵ and (3) eliciting (or failing to object to) testimony that Harris wore a stun belt during jury selection. *See* Pet. 5–9. The Fifth Circuit properly relied on this Court’s precedent and found that Harris had not met his burden to entitle him to a COA. Pet. App. 1a–4a.

Under *Strickland*, an inmate must establish that counsel’s actions or omissions were deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687–94. As to deficiency, an inmate must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. A “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance applies. *Id.* at 689. And “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

⁵ Harris did not raise his IATC-psychosocial-history claim in the district court. *See* ROA.61–166. Therefore, the Fifth Circuit may have considered the claim waived. *Johnson v. Puckett*, 176 F.3d 809, 814 (5th Cir. 1999) (“We have repeatedly held that a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court’s denial of habeas relief.” (citation omitted). Regardless, the claim is meritless. *See infra*, Sections I.B, I.D.

unchallengeable.” *Id.* at 690–91. As to *Strickland*’s prejudice requirement, an inmate must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. In relation to the sentencing phase in a death-penalty case, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.* at 695; *Andrus*, 590 U.S. at 821; *Wiggins*, 539 U.S. at 534; *Thornell v. Jones*, 602 U.S. 154, 163 (2024).

Moreover, the state court rejected Harris’s IATC-punishment-phase claims. *See* Pet. App. 77a–81a. Therefore, Harris is entitled to relief only if the state court’s determination that he did not satisfy *Strickland* is objectively unreasonable under § 2254(d). *Richter*, 562 U.S. at 101. Given the application of *Strickland* and AEDPA, a federal court’s review of the state court’s rejection of Harris’s IATC claims is “doubly deferential.” *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). In other words, the Court “owe[s] deference to both [Harris’s] counsel *and* the state court[,]” and may only grant relief if counsel “took an approach that no competent lawyer would have chosen.” *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (citing *Burt v. Titlow*, 571 U.S. 12, 23–24 (2013)).

Under these standards, Harris is not entitled to habeas relief, the Fifth Circuit correctly denied his request for a COA, and the Court should deny certiorari.

A. Trial counsel reasonably investigated Harris’s cognitive and psychological functioning.

Harris argues that the lower courts wrongly rejected his claim that his trial counsel was ineffective for failing to investigate potential FASD or toxic lead exposure. *See* Pet. 17–31. “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 U.S. at 691. Furthermore, “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Wiggins*, 539 U.S. at 533.

Harris’s trial counsel’s punishment-phase investigation and presentation was not unreasonable or deficient.⁶ Most relevant to Harris’s instant claim, trial counsel retained Dr. Antoinette McGarrahan, a forensic neuropsychologist, to evaluate Harris’s intellectual, cognitive, and psychological functioning. ROA.22315, 22320–23. Dr. McGarrahan was also tasked with reviewing records and providing analysis of Harris’s life history. ROA.22315, 22317. During Harris’s state habeas proceedings, Dr. McGarrahan explained that while FASD is not her area of expertise, she is qualified to diagnose it, and it is a neurocognitive condition that neuropsychologists

⁶ Harris points to trial counsel’s billing records to support his ineffectiveness claim, Pet. 5–6, but the state court found that the billing records do not contain all of the work the trial team undertook. ROA.28737. The state court’s factual determination is presumed to be correct, and Harris fails to rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

encounter on a regular basis. ROA.22699–700, 22706. Dr. McGarrahan further testified that alcohol use by Harris’s mother, Pamela Maddox, was on the defense’s radar, trial counsel told her to look into it, and she requested to meet with Pamela. ROA.22705–06. Pamela indicated to Dr. McGarrahan that “for the first three months of pregnancy there may have been some alcohol but not that much.” ROA.22707.

As it relates to Dr. McGarrahan’s cognitive testing, the test results showed very little, if anything, in the way of cognitive impairment. ROA.22723. Dr. McGarrahan further explained that there were signs of malingering during Harris’s psychological testing and Harris easily met the criteria for antisocial personality disorder. ROA.22698, 22718–19. Based on her evaluation, Dr. McGarrahan did not believe Harris needed additional medical tests, and typically she would not recommend an MRI unless she saw more signs of cognitive impairment. ROA.22763–64. Dr. McGarrahan informed trial counsel that she did not believe the results of her neuropsychological evaluation would be helpful to Harris at trial. ROA.22718. Therefore, she recommended that trial counsel use family members and expert Dr. Gilda Kessner to describe the mitigating aspects of Harris’s childhood. ROA.22321.

Accordingly, trial counsel called four of Harris’s family members to testify at trial. ROA.19903, 19944, 20014, 20073. Through these witnesses, jurors heard that Harris’s mother had him at a young age and did not know how to be a mother, and his biological father was not a part of his life. ROA.19907, 19909–10, 19922. Trial counsel elicited testimony that Harris’s stepfather was abusive towards Harris and Harris’s mother, Harris was placed in special education classes and was diagnosed

with ADHD as child, Harris stood up for his mother against his stepfather's abuse, and Harris tried to protect his brothers. ROA.19913, 19916–18, 19921, 19925, 19945, 19948, 19952, 20026–27. The jury also heard that there was a history of mental illness in Harris's maternal and paternal lineages. ROA.19925–26. Having listened to this testimony, psychologist Dr. Kessner testified about the childhood risk factors that correlate with violence later in life, and identified multiple risk factors from Harris's childhood that may have contributed to his violence, such as childhood hyperactivity, being born to a young mother without parenting skills, and a lack of secure attachment to a caregiver. ROA.20139–43.

Trial counsel also presented Dr. John Roache, a pharmacologist, during the punishment phase. ROA.20104. Dr. Roache testified that PCP has a dissociative effect, has high abuse and dependence potential, and can cause hallucinations and psychotic-like effects. ROA.20114–16. Dr. Roache concluded that Harris was dependent on marijuana and PCP, but once substances are withdrawn from someone, that person becomes clearer and more in control. ROA.20124–25.

During state habeas proceedings, Harris's trial counsel was asked whether he would want to present a permanent neurological condition to the jury, to which he responded:

I would if that's all I got, of course. But in this case, we could not trace the mild deficits back to any one cause, and we preferred to present the jury with a scenario where the violent actions can be traced not to underlying cognitive impairments that were incurable and persistent, life-long, and rather blame them on the PCP usage which stopped once he reached jail and he wasn't violent.

ROA.22337. In other words, trial counsel knew that evidence of an incurable cognitive impairment would undermine the defense's future dangerousness theory that Harris's violence was tied to his PCP use.

As summarized above, the record shows that trial counsel investigated Harris's childhood, family history, cognitive functioning, and psychological background. Given that Harris's mother claimed to have barely drank at the beginning of her pregnancy and Harris had little, if anything, in the way of cognitive impairment, it was not unreasonable for trial counsel to rely on Dr. McGarrahan's decision not to recommend further testing. *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (counsel is entitled to rely on experts to alert counsel if additional information is needed). Relatedly, given the lack of cognitive impairment, it was reasonable under the circumstances for trial counsel not to further investigate possible causes of brain damage. *See* ROA.22324–25; *Wiggins*, 539 U.S. at 533. Instead of chasing nonexistent leads, trial counsel made the reasonable decision that further investigation into an incurable neurological condition—such as FASD or an impairment from lead exposure—was unnecessary. *See Strickland*, 466 U.S. at 691.

The lower courts properly applied a heavy measure of deference to trial counsel's judgment, and Harris has not overcome the strong presumption that trial counsel's representation fell within the wide range of reasonable professional assistance. *Id.* at 689. Thus, Harris fails to establish *Strickland* deficiency, particularly where review of trial counsel's conduct is doubly deferential. *Id.* at 688–89.

B. Trial counsel reasonably investigated Harris’s psychosocial history.

Harris argues that trial counsel failed to develop and present his psychosocial history.⁷ *See* Pet. 28–29. To the extent Harris continues to raise his argument as a standalone claim, it is conclusory and meritless.

Harris fails to specify exactly how trial counsel’s actions were deficient in this area. *See id.* For example, he does not outline what reasonable steps trial counsel should have taken to further investigate his psychosocial history.⁸ *See id.* Therefore, his claim is insufficient to raise a constitutional issue. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (“The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” (citations omitted)); *see also Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982) (“Mere conclusory statements do not raise a constitutional issue in a habeas case.”).

⁷ As previously noted, Harris did not raise a claim in his federal habeas petition in district court alleging that trial counsel was ineffective for failing to investigate his psychosocial history. *See* ROA.61–166. Therefore, his claim was waived by the time he raised it in his motion for a COA. *Johnson*, 176 F.3d at 814.

⁸ Aside from evidence of alleged FASD and toxic lead exposure, Harris claims that had trial counsel investigated further, trial counsel “would have discovered his deeply traumatic childhood and resulting mental illness, [and] . . . that he was not a gang member.” *See, e.g.,* Pet. 2, 7, 28–29. But the record reflects that trial counsel did present evidence of Harris’s traumatic childhood and family history of mental illness. *See supra*, Section I.A. The record also reflects that Harris admitted to his trial team that he was in a gang. ROA.22865. Harris cites no law to support the notion that trial counsel had a constitutional duty to pursue a false narrative. Furthermore, Harris contends that the State tied one of his tattoos to his gang membership, but he did not get the tattoo until after he was arrested. Pet. 14. Even if Harris’s claim was true, evidence that Harris got a gang tattoo while in jail, while awaiting trial for capital murder, would not have been helpful to his defense.

Regardless, Harris’s claim is refuted by the record, which shows that trial counsel investigated his childhood, family history, and cognitive and psychological functioning. *See supra*, Section I.A. Trial counsel used multiple experts and presented Harris’s background through lay witnesses, who testified about Harris’s upbringing, ADHD, learning disorder, familial abuse and substance use, and lack of a relationship with his biological father. *See id.* A mitigation specialist was also appointed to Harris’s case. ROA.22950. Although the mitigation investigator did not remember everything about Harris’s case when she was questioned during Harris’s state habeas proceedings, she testified that she had frequent contact with Harris’s trial counsel throughout the case and that she would have tried to interview Harris’s family, friends, teachers, employers, therapists, doctors, and any relatives. ROA.22950–51.

Under these circumstances, Harris has not overcome the strong presumption that trial counsel’s actions were reasonable, and he has not established *Strickland* deficiency. *Strickland*, 466 U.S. at 688–89.

C. Trial counsel acted reasonably in strategically introducing testimony about Harris being left alone on an elevator, and in handling the resulting stun-belt testimony.

Harris challenges the Fifth Circuit’s denial of a COA as to his claim that trial counsel was ineffective for eliciting testimony that Harris wore a stun belt during jury selection. At punishment, the State called Bobby Moorehead, who was a bailiff during individual voir dire proceedings in Harris’s case. ROA.20219. On cross examination, trial counsel elicited testimony regarding an “elevator incident,” during which the bailiffs supervising Harris inadvertently left him unattended on an

elevator on the way to individual voir dire. ROA.20225–30. The elevator went to another floor, where two court employees got onto the elevator with Harris. Harris identified himself as the defendant in his case, and the elevator arrived back to the appropriate floor without further incident. ROA.20225–30. Moorehead volunteered that, immediately before the elevator incident, he placed Harris in a stun belt worn under Harris’s clothes for the purpose of transporting him from the jail to the courthouse. ROA.20225–26. Trial counsel did not object to the mention of the stun belt, but later attempted to elicit, and implied, that the stun belt was standard procedure. ROA.20227–28.

Harris’s trial counsel testified during state habeas proceedings that if the State had not called Moorehead, he planned to do so himself. ROA.22347–48. Harris’s trial team felt the elevator incident was “powerful evidence to show a jury that [Harris] would not be a future danger once he’s off of PCP, and like he had been for three years waiting to go to trial. [They] thought that was evidence that he could be trusted in that type of situation.” ROA.22351, 22790 (“So we definitely brought [the elevator incident] out as here’s an opportunity where . . . he could have been a future danger. He could have shown that he’s an unrepentant violent individual, and of course he didn’t. He didn’t even try to escape.”).

When Moorehead volunteered information about the stun belt, trial counsel made a strategic decision not to object; he figured “the jury had to know that there was some restraints on any capital murder defendant standing trial. So it was obvious he was not shackled; he was not wearing handcuffs. So [he] figured that they would

observe or not be surprised by the fact that he’s wearing a stun belt.” ROA.22352–53. In trial counsel’s view, the benefit of how the elevator incident turned out outweighed the jury’s learning that Harris was wearing a stun belt. ROA.22353.

The district court correctly concluded “that the decision by [trial counsel] not to interrupt the flow of his punishment phase cross-examination of [D]eputy [M]oorehead by objecting to the spontaneous utterance about the stun belt was objectively reasonable.” ROA.525. Trial counsel’s strategic decision not to object to Moorehead’s testimony is virtually unchallengeable, and Harris has not overcome the strong presumption that trial counsel’s representation fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687, 690–91.

D. Harris was not prejudiced by trial counsel’s conduct.

In a death penalty case, when assessing prejudice in the context of an IATC-punishment-phase claim, the question is whether there is a reasonable probability that, absent the alleged errors, the jury “would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; *Andrus*, 590 U.S. at 821; *Wiggins*, 539 U.S. at 534; *Jones*, 602 U.S. at 164. And when “[d]etermining whether a defense expert’s report or testimony would have created a reasonable probability of a different result if it had been offered at trial necessarily requires an evaluation of the strength of that report or testimony.” *Jones*, 602 U.S. at 164. The Court must also consider “the totality of the evidence before the judge or jury[.]” *Strickland*, 466 U.S. at 695, and “*all* the relevant evidence that the jury would have had before it if [defense counsel] had pursued a different

path”—both additional mitigation evidence and any aggravating evidence that would have come in with it. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

First, as to Harris’s allegation that trial counsel should have investigated FASD or toxic lead exposure, the record reflects that Harris was not prejudiced by trial counsel’s conduct. During his state habeas proceedings, Harris presented affidavits and reports from experts to support his claim. ROA.25269–90, 27959–73, 27886–89, 27915–48. Harris also underwent MRI testing, and both parties were permitted to file expert reports related to the testing. ROA.22465–66, 28766. The State’s expert concluded that Harris’s MRI was normal and Harris’s experts reached conflicting findings. ROA.28047–52. Furthermore, Harris retained Dr. Joan Mayfield, who disagreed that Dr. McGarrahan’s testing showed little to no cognitive impairment, and concluded that Harris’s test scores were consistent with an FASD diagnosis. ROA.22497–99, 22525–26. However, Dr. Mayfield did not meet with or evaluate Harris and could not conclusively diagnose him with FASD. ROA.22519–20. Harris also presented state habeas testimony from Dr. Thomas Dydek, who concluded Harris “more likely than not was exposed to excessive levels of lead in utero and as a small child,” and that “early life lead exposure could result in violent behavior in adult years.” ROA.22218–19. Dr. Dydek had not reviewed evidence that Harris was ever tested for blood lead levels as a child, nor had he seen evidence that Harris’s mother had been tested. ROA.22233.

The district court properly concluded that Harris’s FASD and lead poisoning evidence was weak. Pet. App. 49a. Harris did not present evidence of a low birth

weight and size, or a history of physical developmental delays. ROA.22126, 22149, 22160. Moreover, the State’s experts during Harris’s state habeas proceedings agreed he had very little cognitive impairment, ROA.22265, 22574–75, and experts agreed that any low or abnormal scoring during neuropsychological testimony could be attributed to a variety of factors other than FASD or lead exposure. ROA.22595, 22757. Even Dr. Mayfield conceded that any impairment she testified to could have been caused by a combination of factors, including ADHD, a disadvantaged childhood, low socioeconomic status, or a learning disability, and she admitted that she did not consider Harris’s chronic drug use when developing her opinion. ROA.22507, 22512–13, 22527–29. As to lead exposure, Dr. Dydek’s opinion was non-definitive.⁹ ROA.22218–19.

In assessing prejudice, the Court must not only look to the weak FASD and lead exposure evidence, but also consider the evidence that would have come in alongside it. *Wong*, 558 U.S. at 20. For instance, the State would have been able to offer a competing expert at trial, and the jury would have learned about Harris’s antisocial personality disorder. *See Lagrone v. State*, 942 S.W.2d 602, 610–11 (Tex. Crim. App. 1997); ROA.22269, 22719. The jury could have also learned that Harris

⁹ Harris relies on his mother’s bone-lead concentration test results to support his claim. Pet. 12. The state court did not consider those test results because they were filed without permission. ROA.28729. Since the state court did not consider the test results when adjudicating Harris’s claim, they should not be considered in federal habeas review. *See Pinholster*, 563 U.S. at 181–82 (“We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”). Harris’s claim that the State prevented him from receiving similar testing rests only on his own proposed findings filed in state court. Pet. 12 (citing ROA.28365). Harris previously claimed the Texas Licensing Board was the entity that inhibited his ability to receive bone lead testing within the State of Texas. ROA.27859–60.

exaggerated symptoms during his psychological testing. ROA.22592. Even more, evidence of FASD or toxic lead exposure would have been double-edged: it could have harmed Harris on the future dangerousness issue, particularly because it would be at odds with trial counsel's theory that Harris would no longer pose a risk of violence once isolated from drugs in prison. *See United States v. Fields*, 761 F.3d 443, 459 (5th Cir. 2014) (noting that evidence of mental illness "can lead a jury to conclude that a defendant poses a future risk of violence").

Second, the record shows that trial counsel reasonably investigated Harris's psychosocial history and the jury heard a thorough mitigation case. For instance, they heard that Harris's mother had him when she was seventeen years old, she did not know how to raise a child, and she paid very little attention to him growing up. ROA.19907–10, 19922. The jury heard that Harris's mother and stepfather had an abusive relationship and that his stepfather would whoop Harris and his brothers with a belt. ROA.19913, 19925. Trial counsel also presented evidence that Harris was placed in special education classes in elementary school, was diagnosed with ADHD at a young age, and had a learning disability. ROA.19916–18. Harris's brother told the jury that Harris was protective when they were growing up, and that their mother had beat Harris so hard with a broom one time that it broke. ROA.19945, 19948. Evidence was presented that Harris's mother and stepfather drank and smoked marijuana around him and his brothers, but that Harris was a fun-loving and happy person growing up. ROA.20027, 20075. Trial counsel further used Dr. Kessner to

explain to the jury how the risk factors in Harris's life could explain his trajectory. ROA.20139–47.

On the other side of the scale, the aggravating evidence in Harris's case was overwhelming. The brutal and senseless nature of Harris's crime is evident from the record. Harris invaded the Gallardo home, held the Gallardos at gunpoint, and shot and killed the father, Alfredo, and his brother, Carlos, in the course of the robbery. ROA.18453–83. He then fired at police officers when they tried to apprehend him. ROA.18548–50. Harris committed an additional brutal and senseless murder in the course of a robbery in the weeks leading up to the violent events at the Gallardo home, during which he shot three individuals, fatally wounding one of them. ROA.19558–81, 19600–07, 19613–21. In another instance, Harris pushed his way into an apartment, pointed a gun at a man's head, covered the man's head, wrapped the man's hands with cords, and ransacked his apartment. ROA.19325–35. Years earlier, Harris pulled a gun on a neighbor and tried to force his way into his apartment. ROA.19195.

Under these circumstances, Harris cannot show that there is a reasonable probability that, but for trial counsel's decision not to further investigate and present evidence of possible FASD and toxic lead exposure, or additional evidence of Harris's psychosocial history, the outcome of his trial would have been different. *Strickland*, 466 U.S. at 700 (“Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the

sentence imposed.”); *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006) (“In [] light of [the] brutal and senseless nature of the crime, and all of the other evidence of Smith’s violent conduct, it is unlikely that evidence of his head injury, his troubled childhood and chaotic upbringing, pleas for mercy from his relatives, or the jail and juvenile records that Smith says his counsel should have discovered and presented would have made any difference.”).

Finally, as to his IATC-stun-belt claim, Harris implies that under *Deck v. Missouri*, 544 U.S. 622 (2005), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), shackling is inherently prejudicial and therefore *Strickland* prejudice should be presumed. *See* Pet. 31. But even when a jury can see visible shackles—which was not the case here—shackling is not *presumptively* prejudicial. *See Hatten v. Quarterman*, 570 F.3d 595, 604 (5th Cir. 2009) (on collateral review of a state court conviction, federal courts will only grant a writ when the use of restraints “had a ‘substantial and injurious effect or influence in determining the jury’s verdict.’” (citations omitted)). Furthermore, even when structural error underlies an IATC claim, a petitioner must still show *Strickland* prejudice. *Weaver v. Massachusetts*, 582 U.S. 286, 305 (2017) (“When a structural error is raised in the context of an ineffective-assistance claim, [] finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.”). Given this, the Fifth Circuit correctly applied *Strickland* and reasoned that based on the weight of the aggravating evidence, a reasonable jurist could conclude that trial counsel’s conduct did not prejudice the defense. Pet. App. 4a. That

is, a reasonable jurist could conclude that there is not a reasonable probability that, absent the alleged error, the jury “would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695.

For the foregoing reasons, the state court’s rejection of Harris’s IATC claims was not unreasonable, his claims do not entitle him to federal habeas relief under § 2254(d), and the Fifth Circuit correctly concluded that reasonable jurists could not disagree with the district court’s rejection of his claims. Pet. App. 1a–4a. Harris’s disagreement with the lower courts’ decisions does not present a compelling reason for review, and the Court should deny certiorari.

II. Under This Court’s Precedent, the Lower Courts Were Not Required to Cite ABA Guidelines, or Similar Standards, When Assessing *Strickland* Deficiency.

Harris contends that *Strickland* requires courts to identify norms of practice against which to judge trial counsel’s reasonableness when assessing an IATC claim. Pet. 18–28. According to Harris, he provided the lower courts with the ABA Guidelines, the Texas Guidelines, and expert testimony, as evidence of professional norms for trial counsel at the time of his trial. *See id.*

Although the ABA Guidelines and similar standards may serve as “guides” as to what reasonableness means within the Sixth Amendment realm, they do not define what is reasonable conduct. *Van Hook*, 558 U.S. at 8. And “while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, [this Court has] held that the Federal Constitution imposes one

general requirement: that counsel make objectively reasonable choices.” *Id.* at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

In Harris’s case, the district court correctly acknowledged that the ABA Guidelines serve only as guides when assessing Sixth Amendment claims. Pet. App. 41a–42a (citing *Van Hook*, 558 U.S. at 8; *Druery v. Thaler*, 647 F.3d 535, 541 n.2 (5th Cir. 2011)). It further acknowledged this Court’s instruction in *Strickland*:

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Pet. App. 42a (citing *Strickland*, 466 U.S. at 688–89). In short, ABA Guidelines and similar standards do not serve as “inexorable commands with which all capital defense counsel must fully comply.” *Van Hook*, 558 U.S. at 8 (citation modified). Accordingly, Harris’s argument that the lower courts were required to cite or rely on ABA Guidelines or Texas Guidelines is foreclosed by binding precedent.¹⁰

¹⁰ Harris further contends that the lower courts were required to rely on the testimony of Richard Burr, an outside attorney who opined on professional standards in capital cases during Harris’s state habeas proceedings. Pet. 15, 19. But this Court has never held that a state court—or any court—is required to rely on “expert testimony” purporting to define constitutionally reasonable conduct under *Strickland*. The Fifth Circuit has aptly explained why reliance on such testimony may invade the province of the courts. *Johnson v. Quarterman*, 306 F. App’x 116, 129 (5th Cir. 2009) (unpublished) (“[I]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.” (quotation omitted)).

Next, the Fifth Circuit’s decision in his case does not conflict with decisions in other circuits and there is no circuit split on the issue. Harris cites to *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018), and *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), in an attempt to illustrate that the Fifth Circuit’s analysis of his claim was erroneous. Pet. 20–23. Notably, while the circuit courts in *White* and *Williams* cited the ABA Guidelines and found *Strickland* deficiency, those opinions were issued after a COA was granted and the courts undertook a full merits analysis. *See White*, 895 F.3d at 645 n.1; *see also Williams*, 542 F.3d at 1335. The Fifth Circuit was not required to undertake, nor does this Court’s precedent permit, a full merits analysis at the COA stage. *Buck*, 580 U.S. at 115 (the COA standard “is not coextensive with a merits analysis”). Procedural posture aside, the facts underlying *White* and *Williams* were meaningfully distinguishable from the facts in Harris’s case, and their holdings do not reflect a circuit split.

In *White*, trial counsel “failed to investigate any mitigating circumstances relating to [the petitioner]’s background despite having ample time to do so.” *White*, 895 F.3d at 667. In fact, trial counsel failed to order readily obtainable records from the petitioner’s time in custody and testified that he had no strategic reason for such failure. *Id.* at 667. In citing the 1989 ABA Guidelines, the Ninth Circuit noted that trial counsel was required to make “efforts to discover all reasonably available mitigating evidence,” including medical and mental health evidence. *Id.* at 668. The court acknowledged that “[i]t is one thing for counsel to decide not to investigate further if counsel has made some effort and there is reason to believe further effort

in a particular area would be fruitless.” *Id.* However, in *White*, “counsel did not even take the first step of interviewing witnesses or requesting records.” *Id.* at 669 (citations omitted).

In *Williams*, trial counsel had access to a psychological report and a presentence investigation report indicating that the petitioner had a low IQ, mental health issues, an alcoholic father, and an abusive upbringing. *Williams*, 542 F.3d at 1339. Aside from interviewing the petitioner’s mother, trial counsel did no further investigation. *Id.* at 1339. The Eleventh Circuit cited the 1990 ABA Guidelines and found that trial counsel had a duty to collect information pertaining to family and social history, and to find witnesses who could corroborate such information. *Id.* at 1339. Given trial counsel’s limited investigation in *Williams*, the court found the petitioner had established *Strickland* deficiency. *Id.* at 1342.

The different outcomes in Harris’s case and in *White* and *Williams* rest on the facts, not on any split in how circuits interpret or apply the law. In each case, the courts assessed trial counsel’s conduct for reasonableness. But unlike in *White* and *Williams*, Harris’s trial counsel conducted a thorough mitigation investigation. As outlined elsewhere, trial counsel presented multiple family members to testify to Harris’s childhood and background, and retained several experts to assist in Harris’s defense. *See supra*, Sections I.A–B. Even further, Harris’s trial counsel hired Dr. McGarrahan (who *was* qualified to diagnose FASD, ROA.22706) to conduct neuropsychological testing, and she found the results to be unhelpful to Harris. ROA.22718. Thus, unlike trial counsel in *White* and *Williams*, Harris’s trial counsel’s

investigation was not unreasonably cut short; trial counsel investigated Harris’s intellectual, cognitive, and psychological background. *See id.*

Harris cites additional lower court opinions to argue that his case presents a “strong vehicle for addressing the requirement that the courts identify applicable professional norms before evaluating the reasonableness of counsel’s behavior.” Pet. 23–28. But again, “the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Van Hook*, 558 U.S. at 9. The cases Harris cites establish the non-existence of a circuit split and illustrate that lower courts consistently apply this Court’s instruction that ABA Guidelines may serve merely as “guides” when assessing *Strickland* deficiency. *See Shockley v. Crews*, 696 F. Supp. 3d 589, 634 (E.D. Mo. 2023); *Mendoza v. State*, 87 So.3d 644, 653 (Fla. 2011); *Hodges v. Colson*, 727 F.3d 517, 534–37 (6th Cir. 2013); *Kemp v. Kelley*, 924 F.3d 489, 500–03 (8th Cir. 2019); *Murphy v. Davis*, 737 F. App’x 693, 703–08 (5th Cir. 2018); *Anderson v. Kelley*, 938 F.3d 949, 955–58 (8th Cir. 2019).

The Court has never held that courts are required to explicitly cite or identify standards, such as the ABA Guidelines, when disposing of *Strickland* claims. Rather, the Court’s precedent makes clear why no such requirement exists. *See Strickland*, 466 U.S. at 688–89. Accordingly, since Harris’s argument is foreclosed by binding precedent, certiorari should be denied.

III. The Lower Courts Did Not Impermissibly Rely on Post Hoc Rationalizations When Assessing *Strickland* Deficiency.

Harris argues that his trial counsel’s decisions are not entitled to deference because trial counsel did not conduct a reasonable investigation. Pet. 28–32. In turn,

he argues that the lower courts incorrectly relied on post hoc rationalizations to justify trial counsel's conduct. *Id.* Specifically, Harris alleges: (1) the lower courts' reliance on a mid-trial email from Dr. McGarrahan as evidence of a pretrial investigation equates to improper post hoc rationalization; (2) the district court's "open the door" rationale was an improper post hoc rationalization; and (3) trial counsel's introduction of the stun belt testimony was not supported by professional norms. *Id.*

As an initial matter, trial counsel's investigation was not inadequate. Trial counsel investigated Harris's childhood, family, cognitive functioning, and psychological background. *See supra*, Sections I.A–B. When the cognitive and psychological testing proved unhelpful, trial counsel was not obligated to pursue an investigative path unlikely to help Harris's punishment case. *See Wiggins*, 539 U.S. at 533. Therefore, trial counsel's strategic decisions during the punishment phase of trial are entitled to deference. *Strickland*, 466 U.S. at 690–91.

Next, the lower courts did not improperly rely on post hoc rationalizations when rejecting Harris's claims. Harris is correct that post hoc rationalizations should not be used to justify a trial counsel's conduct. *See Wiggins*, 539 U.S. at 526–27. But nothing in the record indicates that trial counsel—or the lower courts—conjured up strategic explanations after the fact.

Taking Harris's contentions in order, Dr. McGarrahan's mid-trial email, which outlined her findings and recommendations, *see* ROA.21852–53, was sent to document what she had already discussed with trial counsel in the months leading

up to trial. ROA.22717–18. Counter to Harris’s assertions, Dr. McGarrahan had discussed FASD with trial counsel, set up time to discuss it with Harris’s mother and grandmother, and was qualified to diagnose FASD. ROA.22705–06. Therefore, the lower courts’ reliance on Dr. McGarrahan’s pretrial neuropsychological assessment of Harris—memorialized in a mid-trial email—when deciding the reasonableness of trial counsel’s investigation did not amount to improper post hoc rationalization.

Next, Harris asserts that trial counsel never investigated mitigating evidence, such as FASD or toxic lead exposure, because trial counsel feared opening the door to a state’s expert and rebuttal testimony that Harris had antisocial personality disorder. Pet. 30–31. Trial counsel did not limit his investigation based on a fear of opening the door; rather, the record reflects that trial counsel *did* investigate intellectual and cognitive impairment. *See, e.g.*, ROA.22317, 22321, 22873–74. Based on Dr. McGarrahan’s conclusion that Harris had little to no cognitive impairment attributable to any specific cause, trial counsel reasonably pursued a strategy attributing his violence to PCP use that stopped once he was incarcerated. ROA.22337. The district court did not improperly rely on a post hoc rationalization; it acknowledged that concern about opening the door to rebuttal expert testimony was a legitimate strategic factor taken into consideration after investigation. *See, e.g.*, Pet. App. 58a (district court noting: “Harris’s trial counsel acted reasonably in choosing not to present testimony from a mental health expert who had evaluated Harris because doing so could have opened the door to evidence of Harris’s ASPD from Dr. Reed or another prosecution mental health expert.” (citation omitted)).

Finally, Harris argues that the lower courts never applied a “professional-norms requirement” when assessing his IATC-stun-belt claim. Pet. 31–32. In Harris’s view, this means that the lower courts relied on post hoc rationalizations in denying his claim. *Id.* The lower courts were not required to cite some standard, such as the ABA Guidelines, in rejecting Harris’s claim. *See supra*, Section II. As to Harris’s post-hoc-rationalization argument, trial counsel testified during state habeas proceedings that when Moorehead volunteered the information about the stun belt, instead of objecting, he figured the jury would not have been surprised to learn that Harris wore a stun belt. ROA.22352–53. Again, in trial counsel’s view, the jury hearing that the elevator incident ended without violence or an escape attempt outweighed the risk of the jury hearing about the stun belt. ROA.22353, 22790. Harris points to nothing in the record to establish that trial counsel’s explanation for his trial strategy was a post hoc rationalization.¹¹

In sum, the record does not support Harris’s contention that trial counsel or the lower courts relied on post hoc rationalizations in denying his claims. Accordingly, his argument does not amount to a basis for granting certiorari.

IV. Under This Court’s Precedent, the Same *Strickland* Prejudice Standard Applies in Death-Penalty Cases Originating From “Weighing” and “Non-Weighing” States.

Harris contends that the lower courts incorrectly weighed or balanced aggravating and mitigating factors when deciding whether there is a reasonable

¹¹ As correctly noted by the Fifth Circuit, regardless of the issue of deficiency, Harris does not show prejudice as to his IATC-stun-belt claim. Pet. App. 4a; *see supra*, Section I.D.

probability that, but for counsel's conduct related to the stun-belt testimony, the outcome of his proceeding would have been different.¹² Pet. 32–35. Harris reasons that because Texas is a “non-weighing” state, the standard put forth by the Court in *Jones*, should not apply.¹³ *See id.*; *see also Jones*, 602 U.S. at 164.

The Fifth Circuit summarized the aggravating evidence in Harris's case and concluded that given the weight of the aggravating evidence, “the state habeas court's decision [rejecting Harris's IATC-stun-belt claim] was not an unreasonable application of federal law.” Pet. App. 4a. The Fifth Circuit's opinion indicates its sound rejection of Harris's weighing-vs.-non-weighing argument.

This Court has explained the correct procedure for evaluating prejudice in Texas capital cases and it is the same one that applies in all capital cases: a court must reweigh the totality of the mitigating evidence (new and old) against the evidence in aggravation. *Andrus*, 590 U.S. at 821. Harris's argument to the contrary is based in confusion. The Court distinguished between “weighing” and “non-weighing” capital punishment regimes in *Stringer v. Black*, 503 U.S. 222 (1992). “Weighing” states require a jury to weigh mitigating evidence against only statutorily

¹² Harris takes issue with the Fifth Circuit's one-paragraph disposal of the prejudice prong when rejecting his IATC-stun-belt claim. Pet. 34. But this Court has emphasized that the COA standard “is not coextensive with a merits analysis.” *Buck*, 580 U.S. at 115. Rather, the question at the COA stage should be decided without “full consideration of the factual or legal bases adduced in support of the claims.” *Id.* (citation omitted).

¹³ Harris's weighing-vs.-non-weighing argument was waived because he acknowledged the proper weighing standard in his federal habeas petition in the district court. ROA.115–16 (Harris's petition: “To determine whether a petitioner was prejudiced during the punishment phase of a capital trial, a court must reweigh all the evidence in aggravation against the totality of available mitigating evidence (had trial counsel chosen a different course.”); *see Johnson*, 176 F.3d at 814.

specified aggravating factors that the jury found applicable in concluding that the defendant was eligible for the death penalty. *Brown v. Sanders*, 546 U.S. 212, 217 (2006). In a “non-weighing” state, the jury may “consider aggravating factors different from, or in addition to” the statutory factors that make the defendant eligible for the death penalty. *Id.*

While Texas is a “non-weighing” state, *James v. Collins*, 987 F.2d 1116, 1120 (1993), the Court has warned that the weighing/non-weighing “terminology is somewhat misleading, since [it has] held that in *all* capital cases, the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant’s mitigating evidence.” *Brown*, 546 U.S. at 216–17. In Texas, after a jury finds a defendant eligible for the death penalty, the jury considers the “mitigation issue,” which “asks whether, after considering *all* the evidence, *sufficient* mitigating circumstances exist to warrant imposing a life sentence instead of the death penalty.” *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998). Harris fundamentally misunderstands Texas’s non-weighing scheme, which permits the jury to weigh *all* evidence in deciding whether a defendant deserves the death penalty. *See id.* at 263 n.18 (rejecting dissent’s conclusion that “aggravating evidence is irrelevant to the mitigation special issue”). The CCA has explained, “In determining whether to dispense mercy to a defendant after it has already found the eligibility factors in the State’s favor, . . . the jury is not, and should not be, required to look at mitigating evidence in a vacuum.” *Id.* Aligned with this interpretation, Texas courts routinely reweigh aggravating and mitigating evidence in assessing

Strickland prejudice in capital cases. See, e.g., *Ex parte Martinez*, 195 S.W.3d 713, 730 (Tex. Crim. App. 2006) (citations omitted); *Ex parte Andrus*, 622 S.W.3d 892, 899 (Tex. Crim. App. 2021) (“To answer [the *Strickland* prejudice] question we evaluate the totality of the aggravating and mitigating evidence adduced at trial and in the habeas proceedings.” (citation omitted)).

Accordingly, *Strickland* prejudice is not assessed differently where the Texas capital sentencing statute is at-play. The proper question in Harris’s case is whether there is a reasonable probability that, absent the alleged errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 534. As found by the lower courts, Harris has not met this burden. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Fifth Circuit correctly denied Harris’s request for a COA and Harris’s petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AMBER PLATT
Associate Deputy Attorney General
For Criminal Justice

TOME M. HEINING
Chief, Criminal Appeals Division



MOLLY M. KNOWLES
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Molly.Knowles@oag.texas.gov

Attorneys for Respondent