

No. 26-5430

(CAPITAL CASE)

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

REPLY BRIEF

ADAM H. CHARNES
KILPATRICK TOWNSEND &
STOCKTON LLP
2001 Ross Avenue
Suite 4400
Dallas, TX 75201

GWENDOLYN C. PAYTON
Counsel of Record
JOHN R. NEELEMAN
KILPATRICK TOWNSEND &
STOCKTON LLP
1420 Fifth Avenue
Suite 3700
Seattle, WA 98101
(206) 626-7714
gpayton@ktslaw.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	2
I. The State’s opposition confirms the need to clarify that <i>Van Hook</i> did not dispense with <i>Strickland</i> ’s professional-norms requirement.	2
A. The State misstates Harris’s professional-norms argument.....	2
B. The State’s response confirms that this case cleanly presents the need to clarify <i>Strickland</i> ’s professional-norms requirement.	4
C. Without objective professional norms, the courts below substituted counsel’s post-hoc explanations for the inquiry <i>Strickland</i> requires.	6
II. The State’s lengthy prejudice argument is irrelevant.....	10
III. The Fifth Circuit’s stun-belt ruling conflicts with <i>Deck</i> and applies the law of the wrong state.....	11
A. The Fifth Circuit ignored this Court’s holding that stun-belt evidence is inherently prejudicial.....	11
B. In assessing prejudice, the lower courts used the wrong state’s law.....	12
C. The State mischaracterizes <i>Andrus</i> , and its characterization is contrary to this Court’s precedents.	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Andrus v. Texas</i> , 590 U.S. 806 (2020) (per curiam)	14, 15
<i>Bobby v. Van Hook</i> , 558 U.S. 4 (2009) (per curiam)	1, 2, 3, 5
<i>Border Demolition & Env't, Inc. v. Pineda</i> , 535 S.W.3d 140 (Tex. App. 2017)	4
<i>Brown v. Sanders</i> , 546 U.S. 212 (2006)	13
<i>Canales v. Davis</i> , 966 F.3d 409 (5th Cir. 2020)	13
<i>Cosgrove v. Grimes</i> , 774 S.W.2d 662 (Tex. 1989)	4
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005)	2, 11, 12
<i>Ex parte Gonzales</i> , 204 S.W.3d 391 (Tex. Crim. App. 2006)	12, 13, 15
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	3
<i>Mosley v. State</i> , 983 S.W.2d 249 (Tex. Crim. App. 1998)	13, 14
<i>Murphy v. Davis</i> , 901 F.3d 578 (5th Cir. 2018)	7
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	1, 3, 4, 5, 6, 7, 9, 10, 13, 15
<i>Thornell v. Jones</i> , 602 U.S. 154 (2024)	12, 13, 14, 15
<i>White v. Ryan</i> , 895 F.3d 641 (9th Cir. 2018)	5

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	3, 7, 9
--	---------

<i>Williams v. Allen</i> , 542 F.3d 1326 (11th Cir. 2008)	5, 6
--	------

Statutes

Tex. Code Crim. Proc. art. 37.071, § 2(e)(1)	13, 14, 15
--	------------

INTRODUCTION

The State's claim that Petitioner Roderick Harris's death sentence is constitutional depends on a premise forbidden by *Strickland v. Washington*, 466 U.S. 668 (1984): that a habeas court may reject a petitioner's evidence of prevailing professional norms, identify no norms of its own, and still pronounce counsel's performance objectively reasonable. BIO 30. But *Strickland* explicitly requires the opposite: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688. *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam), did not change this requirement. *Van Hook* held that the ABA Guidelines are only one possible source of professional norms; it did not license courts to dispense with professional norms altogether.

Harris offered the ABA Guidelines, Texas capital-defense standards, and expert testimony on prevailing Texas practice. The State offered no competing norms, and no court below identified any. Without a benchmark, the lower courts treated counsel's after-the-fact explanations as proof of reasonableness—crediting an email trial counsel received in the middle of trial from a neuropsychologist claiming she had nothing helpful to say as justification for trial counsel's failure to investigate Harris's fetal alcohol spectrum disorder (FASD) and lead-poisoning leads they knew about before trial.

The State's remaining arguments miss the mark. It devotes many pages to arguing that Harris suffered no prejudice from counsel's deficiencies during the mitigation case and that counsel's introduction of stun-belt evidence was not deficient, but the Fifth Circuit never reached either issue. And on the stun-belt

claim—the only claim decided on prejudice—the Fifth Circuit ignored this Court’s holding in *Deck v. Missouri*, 544 U.S. 622 (2005), that restraints are inherently prejudicial, and it approved the district court’s reliance on Arizona’s weighing framework in a Texas non-weighing case. The petition should be granted.

ARGUMENT

I. The State’s opposition confirms the need to clarify that *Van Hook* did not dispense with *Strickland*’s professional-norms requirement.

A. The State misstates Harris’s professional-norms argument.

The State rebuts an argument Harris never made. It contends that Harris’s argument is foreclosed because *Van Hook* held that neither the ABA Guidelines nor state guidelines are binding rules of constitutional law. BIO 26–27. As the petition expressly says, Harris agrees that no particular set of guidelines controls. Pet. 1, 18. He argues that courts must identify *some* prevailing professional norms against which to measure counsel’s conduct. Neither court below did so.

Van Hook held that professional guidelines are “only guides” to reasonableness, not “inexorable commands.” 558 U.S. at 7–8. But it did not decide that a court can reject all objective evidence of prevailing standards, nor did it explain what a court should do after rejecting the professional standards a habeas petitioner offers. Justice Alito’s concurrence addressed that question, emphasizing that “[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case” to satisfy the Constitution. *Id.* at 14 (Alito, J., concurring). But the Court has never squarely addressed a court’s obligation when the petitioner offers evidence of prevailing norms and the State offers none. This case

presents that question.

The State offered no contrary norms, and none of the courts below identified any. The State contends that none was required. BIO 30. This Court should clarify that *Van Hook* permits courts to reject a habeas petitioner's suggested norms, but does not dispense with *Strickland's* objective professional-norms inquiry altogether.

The State's reliance (BIO 2, 30) on *Strickland*, 466 U.S. at 688–89, confuses flexibility in applying professional norms with permission to dispense with them entirely. The passage the State cites explained why no rules can anticipate every circumstance or prescribe the answer to every tactical choice. But the same passage stated: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 688. *Strickland* requires the court to adopt appropriate norms and apply them to the unique facts of the case.

Nor does *Strickland's* deference to strategic judgment eliminate the need for objective inquiry. Strategic choices are “virtually unchallengeable” *only* when “made after thorough investigation,” and a decision to limit investigation is reasonable *only* to the extent that “reasonable professional judgments support the limitations on investigation.” *Id.* at 690–91. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), therefore requires courts to examine “whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . was itself reasonable.” And *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011), distinguishes “the objective reasonableness of counsel’s performance” from “counsel’s subjective state of mind.” The question is not whether counsel can explain the challenged conduct later, but whether that conduct

was objectively reasonable under prevailing norms.

Texas's own legal-malpractice law provides a useful analogy. In Texas courts, expert testimony establishes the standard of care when evaluating an attorney's conduct. *See, e.g., Border Demolition & Env't, Inc. v. Pineda*, 535 S.W.3d 140, 156–58 (Tex. App. 2017). And in *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989), the Texas Supreme Court rejected the same kind of subjective assertions as evidence of professional competence: “The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.” *Id.* at 665.

This analogy illustrates the elementary distinction the State obscures: *the professional standard is different from the evidence used to establish it*. An expert in a malpractice action does not decide whether the lawyer was negligent. The expert articulates the professional standard against which the lawyer's conduct is measured. So too here. Expert Richard Burr did not purport to decide whether Harris's counsel violated the Sixth Amendment. He supplied evidence of prevailing Texas capital-defense practices. The constitutional judgment remained for the court.

B. The State's response confirms that this case cleanly presents the need to clarify *Strickland's* professional-norms requirement.

The State's response confirms that this case presents a clean vehicle for resolving the question presented. The State identified no prevailing professional norms, and the state habeas court, district court, and Fifth Circuit likewise applied no such norms in evaluating counsel's conduct. Instead, the State defends their absence: “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.” BIO 30. The dispute is therefore legal, not factual: whether *Strickland* permits a court to reject the petitioner’s evidence of prevailing norms, identify no alternative, and nevertheless find counsel’s conduct objectively reasonable. That important question warrants review.

The State minimizes the issue by reducing it to a requirement that courts “cite” professional standards. BIO 1, 26. But Harris does not complain about missing citations. He challenges the absence of the *substantive* inquiry *Strickland* requires. A court may apply appropriate professional norms without citing the ABA Guidelines. Conversely, citing the Guidelines accomplishes nothing if the court never measures counsel’s conduct against them. The question is whether the court applied an objective professional benchmark. Here, no court has done so.

Nor is there any threshold dispute over which norms the lower courts selected. They identified none, and the State now defends that omission. The Court therefore need not choose among competing standards. This case squarely presents the question *Van Hook* left unresolved: what *Strickland* requires a court to do after it rejects the petitioner’s evidence of prevailing professional norms.

Finally, the State’s attempt to distinguish *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018), and *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), fails. BIO 28–30. Both cases identified the governing norms and measured counsel’s conduct against them. *White*, 895 F.3d at 668; *Williams*, 542 F.3d at 1339. The Fifth Circuit identified no norms at all. The State’s claim that those cases are factually distinguishable also fails. Like counsel in *Williams*, who had reports showing mental-health issues and

an abusive upbringing yet did little more than interview the defendant's mother, *see* 542 F.3d at 1339–40, Harris's counsel knew of prenatal alcohol exposure and lead exposure before trial and never investigated either one.

C. Without objective professional norms, the courts below substituted counsel's post-hoc explanations for the inquiry *Strickland* requires.

The State's defense of counsel's performance shows the consequence of dispensing with professional norms. The State acknowledges that "post hoc rationalizations should not be used to justify a trial counsel's conduct." BIO 31. It thus agrees that counsel's concern about opening the door to damaging rebuttal evidence could justify limiting the mitigation case only if it followed a reasonable investigation. BIO 32–33. Yet rather than identify norms governing what reasonable capital counsel should have done after learning that Harris had been exposed to alcohol and lead, the State merely summarizes the limited efforts by counsel and their experts and treats those efforts as justification for stopping the investigation.

The State relies principally on neuropsychologist Antoinette McGarrahan as evidence that some investigation took place. BIO 13–16, 31–32. It contends that counsel investigated Harris's "intellectual and cognitive impairment" through McGarrahan and then made an informed strategic choice not to investigate FASD or lead poisoning. *Id.* When prenatal alcohol exposure arose as a concern, she requested time with Harris's mother and grandmother to determine whether his mother had used alcohol during pregnancy. ROA.22705–06. Those facts establish only that McGarrahan performed work for the defense and that prenatal alcohol exposure was, as she put it, "on [her] radar." *Id.* But she never investigated whether Harris suffered

from FASD or lead poisoning, and—despite her advice about the risks of presenting her own testimony—she never told counsel not to investigate those conditions. And counsel never did. They could not intelligently weigh the mitigating value of such evidence against the risk of opening the door to the State’s evidence of antisocial personality disorder without first investigating it. *Strickland* requires a reasonable investigation before deference attaches, and that did not happen here.

Counsel knew before trial that Harris’s mother drank during pregnancy, that Harris had been exposed to lead, and that FASD could provide powerful mitigation. Yet counsel did not direct McGarrahan to investigate whether Harris suffered from FASD or lead poisoning. ROA.22379:2–14; ROA.22381:8–22382:18; ROA.22710:14–24. The fact that counsel retained an expert did not permit them to abdicate responsibility for pursuing known mitigation leads; counsel must “make reasonable investigations” or “a reasonable decision that makes particular investigations unnecessary.” *Murphy v. Davis*, 901 F.3d 578, 591 (5th Cir. 2018) (quoting *Strickland*, 466 U.S. at 691). “When the omission alleged is failing to investigate something in particular, we look at ‘the known evidence’ and whether it ‘would lead a reasonable attorney to investigate further.’” *Id.* (quoting *Wiggins*, 539 U.S. at 527).

McGarrahan’s mid-trial email makes the problem especially clear. The email vaguely states that McGarrahan believed that presenting her neuropsychological evaluation might do more harm than good. ROA.21852–53. The State contends that the email memorialized earlier discussions between McGarrahan and counsel. BIO 32. But the email says nothing about FASD, prenatal alcohol exposure, or lead

exposure, nor does the State point to record evidence that before trial she advised counsel that further investigation of those subjects was unnecessary. *Id.* The State thus converts advice not to present the results of the investigation McGarrahan performed into justification for not conducting the *different* investigation counsel never asked her to perform.

McGarrahan's habeas testimony does not show that trial counsel investigated whether Harris suffered from FASD or lead poisoning. She testified that prenatal alcohol exposure had been "on [her] radar" and that, at counsel's direction, she asked Harris's mother and grandmother whether the mother drank during pregnancy. ROA.22705–06. That inquiry confirmed that the exposure occurred—the factual predicate for an FASD investigation. But the trial team never went on to determine whether Harris suffered from FASD and, if so, what neurological effects it had. And although McGarrahan testified that she was qualified to diagnose FASD, when asked about her prior experience she could say only that she believed she had written reports stating that findings "may be consistent with" FASD. ROA.22706. And, significantly, the testimony does not show any investigation of lead toxicity at all.

Most importantly, McGarrahan's testing did not resolve the FASD question. She admitted that Harris's cognitive testing was consistent with several conditions reflecting possible brain impairment, including FASD. ROA.22700. Yet counsel never asked her to determine whether Harris suffered from FASD or lead poisoning. ROA.22379; ROA.22381–82; ROA.22710. The State reasons backward, treating McGarrahan's initial, incomplete inquiry as the justification for stopping.

The State's reliance on the punishment-phase case follows the same pattern. It emphasizes that counsel called four family members who described Harris's childhood, and a few experts who testified about generalized childhood risk factors and drug use (but not about Harris specifically). BIO 14–16. But evidence that counsel presented *some* mitigation evidence does not establish that professional norms permitted them to abandon the investigation of FASD and lead toxicity. Moreover, the experts who addressed psychosocial matters had not reviewed the record, interviewed witnesses, or met Harris, and testified only in general terms. ROA.20104; ROA.20137. Counsel did not prepare those experts until trial was underway and then only briefly. ROA.22906–07.

That is why *Strickland* requires an objective benchmark before granting deference to counsel's judgment. Counsel may make a reasonable strategic decision to stop investigating, but only when "reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. *Wiggins* likewise directs courts to examine "whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." 539 U.S. at 523. Burr supplied evidence addressing precisely that question: prevailing professional norms required that when counsel learned there was prenatal alcohol exposure, they needed to investigate FASD, and when they learned Harris had lived next to a toxic Superfund lead site, they needed to investigate that exposure. ROA.23020–21. The State offered no norms to counter that.

Measured against uncontested norms, the question is whether Harris's counsel

investigated known neurological leads sufficiently to make an informed decision to stop. The courts below never asked that question. Instead, they accepted explanations for why counsel's conduct *might* have made sense. The lower courts relied on McGarrahan's testing, concerns about malingering, and the consequences of calling her as a witness. Pet. App. 3a. But counsel could not intelligently weigh the risks of presenting FASD or lead-poisoning evidence against its mitigating value without investigating whether Harris suffered from those conditions in the first place.

II. The State's lengthy prejudice argument is irrelevant.

The State devotes much of its opposition to arguing that counsel's failure to investigate and present mitigating evidence did not prejudice Harris. BIO 20–26. But the Fifth Circuit never reached that question. It rejected Harris's mitigation claim based *solely* on its finding that counsel's conduct was not deficient, concluding that a reasonable jurist could find that counsel reasonably stopped investigating based on McGarrahan's neuropsychological evaluation. Pet. App. 3a. The court did not address prejudice as to counsel's mitigation investigation at all.

The State's extensive prejudice argument is therefore irrelevant. It asks this Court to decide a fact-intensive issue the Fifth Circuit never reached. If this Court concludes that reasonable jurists could debate whether counsel's investigation satisfied *Strickland*, the Fifth Circuit can address any remaining issues on remand.

Nor should the Court consider the State's lengthy comparison of the habeas mitigation evidence with the aggravating evidence at trial. BIO 20–26. That comparison concerns *Strickland's* prejudice prong. The Fifth Circuit's mitigation

ruling concerned whether counsel reasonably investigated before deciding to stop.
Pet. App. 3a.

III. The Fifth Circuit’s stun-belt ruling conflicts with *Deck* and applies the law of the wrong state.

A. The Fifth Circuit ignored this Court’s holding that stun-belt evidence is inherently prejudicial.

Unlike the mitigation claim, the Fifth Circuit decided Harris’s stun-belt claim solely on prejudice. For this reason, the State’s argument that counsel acted reasonably in introducing the stun-belt evidence (BIO 18–20) is irrelevant, addressing an issue not before this Court. The Fifth Circuit assumed that counsel’s conduct “was constitutionally deficient” but concluded that a reasonable jurist could find no prejudice because Harris “robbed a house, held a family at gunpoint, and killed two people,” and the jury heard evidence of other aggravated robberies and another capital murder. Pet. App. 3a–4a. “Given the weight of this evidence,” the court concluded, the state habeas court’s decision was not an unreasonable application of federal law. *Id.* at 4a.

That analysis fails, as does the State’s defense of it. BIO 33 n.11, 34–36. The Fifth Circuit never confronted the fact that stun-belt evidence is constitutionally distinctive. *Deck* holds that unjustified visible restraints at capital sentencing are “inherently prejudicial.” 544 U.S. at 635. Restraints affect the jury’s perception of the defendant’s character and suggest that authorities regard him as dangerous enough to require physical control. *Id.* at 630–33. Those effects are particularly acute at capital sentencing, where the jury evaluates the defendant’s character and

dangerousness, and they often “cannot be shown from a trial transcript.” *Id.* at 635.

Counsel here affirmatively presented testimony that the State required Harris to wear a stun belt. That disclosure conveyed precisely the message *Deck* found inherently prejudicial: that Harris was so dangerous he needed to be restrained. Yet the Fifth Circuit never addressed *Deck* or the distinctive prejudice resulting from restraints. It simply recited evidence that Harris had committed violent crimes. Pet. App. 4a. But *Deck* itself arose at the penalty phase of a capital trial, where the jury’s knowledge of the defendant’s violent crime did not eliminate the prejudice created by restraints. At minimum, reasonable jurists could debate whether counsel prejudiced Harris by placing before the jury evidence this Court recognizes as inherently prejudicial.

B. In assessing prejudice, the lower courts used the wrong state’s law.

Thornell v. Jones, 602 U.S. 154, 159 (2024), requires a court evaluating capital-sentencing prejudice to apply the sentencing framework of the state in which the defendant was sentenced. The district court applied the law of Arizona, reasoning that “where the aggravating factors greatly outweigh the mitigating evidence, there may be no “reasonable probability” of a different result.” Pet. App. 51a (quoting *Thornell*, 602 U.S. at 165). The Fifth Circuit then repeated the same approach, rejecting prejudice “[g]iven the weight” of the aggravating evidence. Pet. App. 4a.

But Texas is not Arizona. Texas law is different. The Texas Court of Criminal Appeals has expressly held that “Texas’ capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances.” *Ex parte*

Gonzales, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006). Texas’s mitigation special issue asks whether, considering all the evidence—including the offense, the defendant’s character and background, and his personal moral culpability—“there is a sufficient mitigating circumstance or circumstances to warrant” life rather than death. Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). And because a single juror’s vote against death prevents a death sentence, the Fifth Circuit has framed *Strickland* prejudice as whether there is a reasonable probability that “at least one juror could have determined that because of the defendant’s reduced moral culpability, death [is] not an appropriate sentence.” *Canales v. Davis*, 966 F.3d 409, 412 (5th Cir. 2020).

Harris does not contend, as the State suggests, that aggravating evidence must be ignored. BIO 33–36. Texas jurors consider all the evidence. But considering all the evidence is not the same as applying Arizona’s rule that prejudice disappears when aggravating circumstances “greatly outweigh” mitigation. *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998), uses “weigh” in the ordinary sense of considering the evidence; it does not convert Texas’s mitigation special issue into Arizona’s formal balancing framework. And *Brown v. Sanders*, 546 U.S. 212, 216–17 (2006), may caution that the labels “weighing” and “non-weighing” can mislead, but it does not authorize a federal court to substitute one State’s capital-sentencing framework for another’s. *Thornell* requires the opposite.

The error was material here. The Fifth Circuit asked whether the aggravating evidence overwhelmed any prejudice from the stun-belt disclosure. But the Texas question is whether there is a reasonable probability that at least one juror,

considering the circumstances bearing on Harris’s character and moral culpability, would have answered the mitigation special issue differently absent counsel-created evidence suggesting that Harris was so dangerous that the State had to restrain him with a stun belt. Harris’s violent crimes do not answer that question.

Nor did Harris waive this argument. BIO 34 n.13. Harris’s habeas petition stated that a reviewing court must “reweigh all the evidence in aggravation against the totality of available mitigating evidence.” ROA.115–16. That language describes the totality-of-the-evidence inquiry Texas law requires and uses “weigh” in the same ordinary sense as *Mosley*. It did not concede that Arizona’s aggravation-versus-mitigation balancing formula governs a Texas death sentence. Harris argued below that Texas is a non-weighing state and the district court erred by importing *Thornell*’s Arizona formulation. C.A. Reply Br. 19–25. The Fifth Circuit did not rely on waiver; it reached the prejudice issue and denied the claim on the merits. Pet. App. 4a.

C. The State mischaracterizes *Andrus*, and its characterization is contrary to this Court’s precedents.

The State’s reliance on *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam), is misplaced. BIO 34. The State extracts *Andrus*’s reference to “reweigh[ing]” mitigating and aggravating evidence from a discussion that repeatedly defines prejudice by reference to the sentencing decision Texas law requires. 590 U.S. at 821–24; see BIO 34. Immediately before the language the State quotes, *Andrus* asked whether there was a reasonable probability that “the jury would have made a different judgment about whether *Andrus* deserved the death penalty as opposed to a lesser sentence,” citing Texas’s mitigation special issue. 590 U.S. at 821 (citing Tex. Code Crim. Proc.

art. 37.071, § 2(e)(1)). Immediately afterward, the Court explained that prejudice required only a reasonable probability that “at least one juror” would have reached a different judgment concerning *Andrus*’s “moral culpability.” *Id.* at 822. And the Court remanded for the Texas Court of Criminal Appeals to conduct that “weighty and record-intensive analysis in the first instance.” *Id.* at 823–24. In context, “reweigh” describes consideration of the complete record; it does not transform Texas’s mitigation special issue into Arizona’s balancing framework.

Thornell confirms the distinction rather than erasing it. It instructed the reviewing court to determine prejudice by examining the capital-sentencing law of the state that imposed the sentence. 602 U.S. at 159. Arizona law required the weighing analysis the Court applied in *Thornell*. Texas law does not. “Texas’ capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances.” *Gonzales*, 204 S.W.3d at 394. Applying *Thornell* to Harris therefore requires applying Texas’s mitigation special issue, not importing Arizona’s rule that prejudice may disappear when aggravating factors “greatly outweigh” mitigation.

CONCLUSION

The Court should grant the petition. Alternatively, if the Court does not accept the case for plenary review, it should explain the lower courts’ errors, summarily vacate the decision below, and remand for application of the correct *Strickland* standards.

ADAM H. CHARNES
KILPATRICK TOWNSEND &
STOCKTON LLP
2001 Ross Avenue
Suite 4400
Dallas, TX 75201

Dated: October 8, 2026

Respectfully submitted,

/s/ Gwendolyn C. Payton

GWENDOLYN C. PAYTON

Counsel of Record

JOHN R. NEELEMAN

KILPATRICK TOWNSEND &

STOCKTON LLP

1420 Fifth Avenue

Suite 3700

Seattle, WA 98101

(206) 626-7714

gpayton@ktslaw.com