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Recommended Citation

Sarah Gerwig-Moore, *Remedial Reading: Evaluating Federal Courts' Application of the Prejudice Standard in Capital Sentences from "Weighing" and "Non-Weighing" States*, 20 U. Pa. J. Const. L. Online (2018).

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**REMEDIAL READING: EVALUATING FEDERAL COURTS' APPLICATION
OF THE PREJUDICE STANDARD IN CAPITAL SENTENCES FROM
"WEIGHING" AND "NON-WEIGHING" STATES**

*Sarah Gerwig-Moore*¹

INTRODUCTION

On March 31, 2016, the State of Georgia executed my client, Joshua Bishop.² Until the time of his execution, several successive legal teams challenged his conviction and sentence through the usual channels: direct appeal, state habeas corpus proceedings, and federal habeas corpus proceedings. The last hearing on the merits of his case was before a panel of the United States Court of Appeals for the Eleventh Circuit,³ which accepts appeals from death penalty cases out of Georgia, Florida, and Alabama. In a lengthy opinion describing the many mitigating circumstances present in Mr. Bishop's case, the Eleventh Circuit denied relief.⁴ This is not uncommon. What stood out, however, in the preparation of his petition for certiorari in the United States Supreme Court, was certain terminology in the opinion that seemed to indicate it had re-weighed evidence offered in aggravation and mitigation of his death sentence. This was disconcerting, since Georgia is a "non-weighing" state.⁵ This error formed the basis for Mr. Bishop's final legal challenge—which was ultimately unsuccessful, but which attracted national interest.⁶ This Article describes the heart of that challenge and explains why the appropriate legal tests matter in such cases: life is at stake.

¹ Associate Professor of Law, Mercer University School of Law. J.D., Emory Law School, 2002. M.T.S., Candler School of Theology, Emory University, 2002. I would especially like to thank the current and former students who have ably served as research assistants on this issue. These include Caryn Dreibelbis, Katie Hall, Sara Witherspoon, and Courtney Britt. I would also like to honor the work of the students participating through the Mercer Habeas Project in the representation of Joshua Bishop. Dianna Lee, a 2014 graduate of Mercer Law School, provided particular leadership on the petition for certiorari in his case, and my heartfelt thanks goes to her and to the many others who so zealously advocated for our dear client.

² See Rhonda Cook, *Georgia Executes Joshua Bishop for 1994 Murder*, ATLANTA JOURNAL-CONSTITUTION: METRO ATLANTA / STATE NEWS (Mar. 31, 2016, 9:41 PM), <http://www.ajc.com/news/local/georgia-executes-joshua-bishop-for-1994-murder/cMjL3hrLCd0XaCk9AEUI3K/>.

³ See *Bishop v. Warden, Ga. Diagnostic & Classification State Prison*, 726 F.3d 1243, 1253 (11th Cir. 2013).

⁴ *Id.*

⁵ See *infra* note 45.

⁶ See Maureen Johnston, *Petitions to Watch*, SCOTUSBLOG (Sept. 17, 2014, 1:30 PM),

In the summer of 1994, Joshua Bishop was a homeless nineteen-year-old⁷ who spent his childhood in foster care, group homes, or on the streets—manipulated, beaten, and abandoned. Mr. Bishop had always been a “sweet kid,” but began staying with Mark Braxley, a former lover of his mother’s.⁸ Within weeks, though he had never before been charged with a crime more serious than a misdemeanor, Mr. Bishop faced murder charges for the tragic results of his connection with Braxley.⁹

These circumstances never provided excuse sufficient to establish legal innocence of his crimes committed in those summer weeks; in fact, Mr. Bishop confessed within hours of his arrest and sought to plead guilty.¹⁰ While the question of Mr. Bishop’s guilt was not a difficult one for his trial jury—hearing his confession, it returned a verdict after only a few hours—it struggled with whether to deliver a sentence of death.¹¹

During the sentencing phase, the jury heard from several witnesses about Mr. Bishop’s horrific childhood. The prosecution also played Mr. Bishop’s custodial confession to participation in the beating death of Ricky Willis, a man who had assaulted Mr. Bishop’s mother.¹² When Willis bragged to others about the assault, Mr. Bishop became very angry and [] beat . . . Ricky Willis.¹³ Mr. Bishop then told the police that Mark Braxley—who had a violent history with Willis—slit Willis’s throat, killing him.¹⁴ Mr. Bishop admitted he helped Braxley bury the body and his statement to police was consistent with the medical examiner’s testimony indicating Willis had died from knife injuries and not from the abrasions to his head and face.¹⁵

On February 13, 1996, Mr. Bishop was sentenced to death.¹⁶

Years later, in state habeas proceedings, new counsel raised a number of claims related to ineffective assistance of trial counsel.¹⁷ Trial counsel testified to their belief and their trial strategy that Mr. Bishop was truthful in his

<http://www.scotusblog.com/2014/09/petitions-to-watch-the-long-conference-of-september-29-part-iii/> (identifying *Bishop v. Humphries* as a “petition to watch”).

⁷ *Warden*, 726 F.3d at 1250–51.

⁸ Brief of Amici Curiae Public Counsel et al. in Support of Petitioner at 4, *Bishop v. Humphrey*, 135 S. Ct. 67 (2014) (mem.) (No. 13–1345), 2014 WL 2612611, at *4.

⁹ Brief of Amici Curiae, *supra* note 8, at 4–5; *Warden*, 726 F.3d at 1249.

¹⁰ See *Bishop v. State*, 486 S.E.2d 887, 891 (Ga. Sup. Ct. 1997).

¹¹ *Warden*, 726 F.3d at 1252–53 (noting that the jury deliberated for nine hours before recommending a sentence of death).

¹² *Id.* at 1249.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1250.

¹⁶ *Id.* at 1252–53. On September 11, 1996, Mark Braxley accepted the State’s offer of a life sentence with the possibility of parole and pleaded guilty to the murder of Ricky Willis and Leverett Morrison and one count of armed robbery.

¹⁷ See *id.*

custodial statement, remorseful for his crimes, and less culpable for the crimes than his co-defendant, Mark Braxley. Three law enforcement officers who agreed with these general assertions testified by sworn affidavit in Mr. Bishop's habeas proceedings.¹⁸

Trial counsel described the officers' reluctance to testify at trial,¹⁹ but explained he never attempted to compel them to tell the jury about their impressions of Mr. Bishop's truthfulness, remorsefulness, or limited role in the crimes.²⁰ The presentation of additional mitigation and context—available, but never provided to the sentencing jury—was voluminous, including descriptions of Mr. Bishop as desperate for, and vulnerable to, father figures.²¹

Told of this evidence, a number of the sentencing jurors also testified by affidavit that they would not have voted for death.²² Nevertheless, Mr. Bishop's state and federal challenges were unsuccessful.²³ The language in the Eleventh Circuit opinion, discussed *infra*, claimed that any errors of trial counsel were harmless because the new evidence was insufficient to “undermine” the evidence presented in aggravation of the sentence.²⁴

The use and application of that language was troubling.

When states re-crafted death penalty statutes after *Gregg v. Georgia*,²⁵ which allowed jurisdictions to reinstate capital punishment, some—“weighing states”—promulgated laws allowing juries to impose death sentences only after determining that aggravating circumstances outweighed mitigating factors.²⁶ Others—“non-weighting” states—instructed jurors that they could return a sentence less than death for any reason or no reason at all, even after finding a statutory aggravator.²⁷ It is clear that *Strickland v. Washington* establishes the universal test for evaluating ineffective assistance of counsel claims.²⁸ The majority of federal appellate courts, however, do not appropriately apply the *Strickland* test for penalty-phase prejudice according

¹⁸ *Id.* at 1254–55.

¹⁹ *Id.* at 1255.

²⁰ Brief of Amici Curiae, *supra* note 8, at 14–15.

²¹ *See Warden*, 726 F.3d at 1252.

²² Brief of Amici Curiae, *supra* note 8, at 16–19.

²³ *Warden*, 726 F.3d at 1253, 1259.

²⁴ *Id.* at 1256.

²⁵ *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

²⁶ *See The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 135 n.6 (2006); *Gregg*, 428 U.S. at 193, 197.

²⁷ *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 135 n.6 (2006).

²⁸ *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”).

to the underlying states' capital sentencing statutes. The question explored here identifies a split among the federal circuits and has not been addressed by the United States Supreme Court.

This Article argues that it is error, as occurred in Mr. Bishop's case, for a federal appellate court to undertake identical analyses of penalty-phase prejudice in capital cases arising from both weighing and non-weighing states. Additionally, the Article discusses how the current analysis of many federal circuit courts errs by improperly "weighing" aggravation against mitigation evidence rather than applying a prejudice test appropriate to individual states' capital sentencing statutes.²⁹

I. EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES

A. *History and Background of the Sixth Amendment Test for Effective Assistance of Counsel*

The test for Sixth Amendment ineffective assistance of counsel claims is well-established.³⁰ Since it was decided in 1984, *Strickland v. Washington*³¹ has caused consternation for those representing criminal defendants.³² Supreme Court Justice Thurgood Marshall famously (and presciently) warned about the failures of that test.³³

²⁹ The first piece to address issues close to the ones discussed in this Article is by Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1343-44 (1994) ("In jurisdictions where the sentencer is instructed to weigh the aggravating and mitigating factors to determine the appropriate penalty, the Court has concluded that aggravating factors guide the sentencer's discretion and, consequently, reliance on an invalid aggravating factor improperly tilts the sentencing balance in favor of death. In weighing jurisdictions, therefore, the Court has prohibited automatic affirmance of death sentences that rest in part on invalid aggravating factors. On the other hand, in jurisdictions whose statutory schemes do not require the sentencer to weigh the aggravating and mitigating factors, the Court has determined that the invalidation of one or more aggravating factors is meaningless, as long as at least one valid aggravating factor remains to support the defendant's death penalty.").

³⁰ *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'") (quoting 28 U.S.C.A. § 2254(d)(1)); cf. Bill Cristman, *Chandler v. United States: Does the Defense Attorney Have a Legal Obligation to Present Mitigation Evidence in Eleventh Circuit Death Penalty Cases?*, 18 GA. ST. U. L. REV. 563, 564-65 (2001) (noting that the holding of an Eleventh Circuit death penalty case "seemingly eviscerates" the *Strickland* test for ineffective assistance of counsel).

³¹ *Strickland*, 466 U.S. 668.

³² See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1972, 1986-88, 1992 (2005); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 640-45 (1986).

³³ *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting) (footnote omitted) ("The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance. Today, for the first time, this Court attempts to synthesize and clarify those standards. . . . [I]n its zeal

In *Strickland*, the United States Supreme Court explained that “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”³⁴ To this end, the Court laid out a two-prong approach to determine whether “counsel’s representation fell below an objective standard of reasonableness”³⁵ and whether, in the case of a trial, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁶

As “the range of reasonable applications is substantial,”³⁷ “[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors.”³⁸ That is, the question of prejudice is necessarily circumscribed by the specific legislation governing the imposition of *that particular* death sentence.³⁹

Strickland’s general rule was, naturally, applied to the Florida case before it: a death sentence that had been handed down after a capital jury found the aggravating circumstances had outweighed the mitigating circumstances.⁴⁰ The Court assessed the question of prejudice and found that the “question is whether there is a reasonable probability that, absent the errors, the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”⁴¹

The *Strickland* standard is unquestionably the law of the land—the baseline standard by which courts are to adjudicate Sixth Amendment claims—

to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding.”)

³⁴ *Id.* at 691–92 (majority opinion).

³⁵ *Id.* at 687–88.

³⁶ *Id.* at 694.

³⁷ *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

³⁸ *Strickland*, 466 U.S. at 695.

³⁹ *See id.* (“In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”); *see also* *Washington v. Strickland*, 693 F.2d 1243, 1282 (5th Cir. Unit B 1982) (observing that the district court took into account the death penalty statute at issue when deciding that counsel’s ineffectiveness prejudiced the defense), *rev’d*, 466 U.S. 668 (1984).

⁴⁰ The Court found, in order to show prejudice under the Florida statute, a defendant must prove that “there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent that it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. The former Fifth Circuit analyzed the facts under the contemporary state death penalty statute, FLA. STAT. ANN. § 921.141 (West, Westlaw through 2017 First Reg. Sess. and Spec. “A” Sess. of the 25th Legis.). *See Washington*, 693 F.2d at 1247 (describing the factual and procedural history of the conviction).

⁴¹ *Strickland*, 466 U.S. at 695.

but courts should consider those claims in consultation with the relevant state death penalty statute. “The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors.”⁴²

This Court further explained that “[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”⁴³ Weighing the mitigating and aggravating circumstances is required under the capital sentencing statute relevant to *Strickland*.⁴⁴ The standard that governs a Georgia capital jury’s decision, on the other hand, does not require a weighing analysis or deliberation.⁴⁵ The United States Supreme Court has repeatedly affirmed the legitimacy of Georgia’s unique capital sentencing scheme.⁴⁶

Literature reviewing the provision of counsel for criminal defendants has identified problems on a number of levels and for a number of reasons.⁴⁷ One piece notably claimed that “[w]hile in theory the Sixth Amendment requires that counsel be minimally effective,” that was not the practical result:

To avoid overturning convictions in droves, the Supreme Court has watered down the definition of effective assistance of counsel under the Sixth Amendment, so any “lawyer with a pulse will be deemed effective.” As too

⁴² *Id.* (emphasis added).

⁴³ *Id.*

⁴⁴ FLA. STAT. ANN. § 921.141 (West 2017) (requiring both jury and judge to determine “[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist”).

⁴⁵ GA. CODE ANN. § 17-10-30 (2017) (requiring the court to find at least one aggravating circumstance to impose the death sentence but not to conduct any weighing); *Zant v. Stephens*, 462 U.S. 862, 864, 873–75, 888–91 (1983) (footnote omitted) (“In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard.”).

⁴⁶ *See Id.* at 879 (“The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore remain convinced, as we were in 1976, that the structure of the statute is constitutional.”); *Godfrey v. Ga.*, 446 U.S. 420 (1980) (reversing one application of Georgia’s death penalty statute but impliedly reaffirming the statute’s constitutionality); *Bell v. Cone*, 543 U.S. 447, 454 (2005) (recognizing that the *Godfrey* Court had not taken issue with Georgia’s death penalty statute, only with the Georgia Supreme Court’s construction of the statute in one particular case).

⁴⁷ *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1837 (1994) (outlining “the pervasiveness of deficient representation” in death penalty cases); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 433-36 (1993) (“This Article argues for a narrower definition of ‘counsel’ that encompasses only those licensed attorneys with the requisite skill and knowledge to wage an adequate criminal defense.”); Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a “Ford Taurus” Defense*, A.B.A. J. (Mar. 19, 2013), http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense/ (highlighting Justice Elena Kagan’s acknowledgement that “there’s a lot we still need to do” to improve legal assistance provided to poor criminal defendants and recalling Justice Kagan’s statement that criminal defendants “deserve at least . . . a lawyer who has the skills, resources and competence needed to thoroughly advise a client . . .”).

many cases chase too few lawyers with too little funding, the inevitable result is chronic ineffectiveness.⁴⁸

The provision of zealous counsel in capital and other criminal cases is an important topic, but not the primary focus of this Article. Under examination here is whether and how federal circuits—as evidenced by the Eleventh Circuit’s treatment of Mr. Bishop’s case—inconsistently apply the *Strickland* penalty-phase test for prejudice.⁴⁹

B. How Capital Sentencing Structures Make a Difference in the *Strickland* Analysis

Responding to the U.S. Supreme Court’s warning in *Furman v. Georgia* “to see to it that general laws are not applied sparsely, selectively, and spotily to unpopular groups,” states promulgated statutes specifying the factors to be considered and the procedures to be followed in deciding when to impose a capital sentence.⁵⁰ Ultimately, the United States Supreme Court specified that “[w]hile the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death.”⁵¹ Thus, in the wake of *Furman* and *Gregg*, death penalty states⁵² developed statutory schemes that generally fall into one of two categories: “weighing”⁵³ and

⁴⁸ Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1288 (2013) (footnotes omitted) (quoting Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999)).

⁴⁹ This Article represents thorough research into each federal circuit and its analysis of state capital convictions involving *Strickland*. This involved review of penalty phase prejudice analysis in hundreds of cases. The focus below is on some of the most illustrative cases and circuits.

⁵⁰ *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).

⁵¹ *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). See also Katie Morgan & Michael J. Zydney Mannheim, *The Impact of Information Overload on the Capital Jury’s Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1094 (2009) (“Aggravating factors serve two purposes. First, the presence of an aggravating factor renders the defendant eligible to be sentenced to death. Second, aggravating factors are then compared by the jury to any mitigating factors in selecting the defendant’s sentence. Recent years have seen an increased amount of aggravating evidence at both the eligibility and selection stages.”).

⁵² As of this publishing, the following states do not have the death penalty: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited August 31, 2017). The District of Columbia does not employ capital punishment either. *Id.*

⁵³ These include Alabama, ALA. CODE § 13A-5-46(e) (2017); Arkansas, ARK. CODE ANN. § 5-4-603(a)–(b) (West 1987); California, CAL. PENAL CODE § 190.3 (West 1978); see also *Brown v. Sanders*, 546 U.S. 212, 221–23 (2006) (describing the way a jury should consider aggravating factors and invalidated factors under California’s death penalty statute); Connecticut, CONN. GEN. STAT. ANN. § 53a-46a (West 2015); Delaware, DEL. CODE ANN. tit. 11, § 4209(c)(3), (e)(1) (West 2013), *invalidated by* *Rauf v. State*, 145 A.3d 430 (Del. 2016); Florida, FLA. STAT. ANN. § 921.141 (West 2017); Idaho, IDAHO CODE ANN. § 19-2515(3), (7) (West 2006); Indiana, IND. CODE ANN. § 35-50-2-9(a), (d) (West 2016); Kansas, KAN. STAT. ANN. § 21-6617(c), (e) (West 2014);

“non-weighing.”⁵⁴ The majority of states are “weighing,” in which juries must find that aggravating circumstances outweigh mitigating factors in order for the defendant to be sentenced to death.⁵⁵ However, non-weighing states allow juries to consider aggravating and mitigating factors and the jury

Massachusetts, MASS. GEN. LAWS ANN. ch. 279, § 68 (West 1982), *invalidated by* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984); Mississippi, MISS. CODE ANN. § 99-19-101(2), (3) (West 2013); Nebraska, NEB. REV. STAT. ANN. § 29-2522 (West 2011); Nevada, NEV. REV. STAT. ANN. § 200.030(4)(a) (West 2013); New Hampshire, N.H. REV. STAT. ANN. § 630:5 (2017); North Carolina, N.C. GEN. STAT. ANN. § 15A-2000(b) (West 2012); Ohio, OHIO REV. CODE ANN. § 2929.04 (West 2016); Oklahoma, OKLA. STAT. ANN. tit. 21, § 701.11 (West 1987); Pennsylvania, 42 PA. STAT. AND CONST. STAT. ANN. § 9711(c) (West 1999); Tennessee, TENN. CODE ANN. § 39-13-204(c), (e) (West 2014); and Utah, UTAH CODE ANN. § 76-3-207(5)(a)–(b) (West 2016).

⁵⁴ These include Georgia, GA. CODE ANN. § 17-10-30 (West 2017); Kentucky, KY. REV. STAT. ANN. § 532.025(1) (West 2012); Louisiana, LA. CODE CRIM. PROC. ANN. art. 905.3 (1988); Missouri, MO. ANN. STAT. § 565.032 (West 2017); Oregon, OR. REV. STAT. ANN. § 163.150 (West 2005); South Carolina, S.C. CODE ANN. § 16-3-20 (2010); South Dakota, S.D. CODIFIED LAWS § 23A-27A-1 (1995); Texas, TEX. CRIM. PROC. CODE ANN. art. 37.071 (West 2013); Virginia, VA. CODE ANN. § 19.2-264.2 (West 1977); and Washington, WASH. REV. CODE ANN. § 10.95.030 (West 2015).

Some states are difficult to categorize or are considered “hybrid” states *vis-à-vis* whether capital jurors are instructed to weigh mitigating and aggravating evidence when determining sentencing. These include Arizona, *see* ARIZ. REV. STAT. ANN. § 13-752(G) (2012) (“At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. . . . [T]he state may present any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding the defendant’s character, propensities, criminal record or other acts.”); Colorado, *see* COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2014) (providing that “the jury shall deliberate . . . [w]hether at least one aggravating factor has been proved . . . sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and . . . whether the defendant should be sentenced to death or life imprisonment” but stipulating that a unanimous jury must find both an aggravating factor and “insufficient mitigating factors to outweigh” it); *see also* People v. Tenneson, 788 P.2d 786, 791 (Colo. 1990) (en banc) (“We are persuaded . . . that the statute must be interpreted to require that in order to support the imposition of the death penalty, each juror must be convinced that the mitigating factors, if any, do not weigh more heavily in the balance than the proven statutory aggravating factors.”); Illinois, *see* 720 ILL. COMP. STAT. ANN. 5/9-1(g) (West 2015) (“If the jury determines unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence, the court shall sentence the defendant to death.”); Montana, *see* MONT. CODE ANN. § 46-18-305 (West 2003) (mandating that mitigating factors must be “sufficiently substantial to call for leniency” in order for a death sentence not to be imposed); Wyoming, *see* WYO. STAT. ANN. § 6-2-102 (West 2001) (providing that the jury deliberate whether aggravating and mitigating factors exist, and that “[t]he mere number of aggravating or mitigating circumstances found shall have no independent significance”).

⁵⁵ Cody G. Winchester, *Weighing Death: Is Death Penalty Eligibility “Especially Heinous, Cruel or Depraved?”* 58 ARIZ. L. REV. 511, 523 (2016) (“Weighing-state statutes also vary widely in the number of statutory mitigators that sentencers consider, and some do not have any mitigators at all [Legislative] silence indicates the legislature’s intent for the sentencing body to adopt the broadest view possible to determine what amount of leniency is appropriate. This [] is important because, although the number of statutory mitigators is consistently lower than the number of aggravators, the statute is actually more expansive. Such breadth is desirable because it gives defense attorneys the ability to present anything that could call for leniency, reducing the chance a defendant will be sentenced to death. Ultimately, it helps ensure that those who do not deserve to receive the death penalty are given lengthy prison sentences instead.”).

may return a verdict for life for any reason or no reason at all.⁵⁶

While *Strickland* provides a clear penalty-phase test for prejudice, the federal courts' application of *Strickland* has resulted in uneven and illogical results given their inconsistent application of the underlying states' statutory schemes.⁵⁷

Several federal circuits—the Fourth⁵⁸, Fifth⁵⁹, and Eleventh⁶⁰ Circuit Courts of Appeals—routinely analyze penalty-phase prejudice without explicit regard to whether the sentence emerges from a weighing or non-weighing capital sentencing scheme.⁶¹

Other federal circuits, however, properly account for the state-specific weighing/non-weighing instructions underlying a capital conviction.⁶² The Ninth Circuit Court of Appeals provides a model worth consideration. It tailors its prejudice analysis to the relevant state's statutory scheme to “evaluate whether the difference between what was presented and what could have been presented is sufficient to ‘undermine confidence in the outcome’

⁵⁶ Nicholas A. Fromherz, Note, *Assuming Too Much: An Analysis of Brown v. Sanders*, 43 SAN DIEGO L. REV. 401, 404–05 & n.17 (2006) (explaining that in “non-weighing” states, “the jury weigh[s] any and all mitigating factors against a set of aggravating factors that may or may not include the factors making the defendant eligible for death, but which, in the event that such aggravating factors do include the eligibility factors, are not limited to them,” and that “[i]n both weighing and non-weighing states, the sentencer engages in a weighing process, balancing mitigating factors against aggravating factors to determine whether death is warranted. . . . [T]he distinction lies not in whether weighing occurs, but in what is weighed”).

⁵⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See generally Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347 (1995) (analyzing the impact of applying either a weighing or a non-weighing statute on the outcome of a case).

⁵⁸ *Lovitt v. True*, 403 F.3d 171, 181 (4th Cir. 2005); *Tucker v. Ozmint*, 350 F.3d 433, 442–43 (4th Cir. 2003); *Rose v. Lee*, 252 F.3d 676, 691 (4th Cir. 2001); *Hunt v. Lee*, 291 F.3d 284, 292 (4th Cir. 2002).

⁵⁹ *Garza v. Stephens*, 738 F.3d 669, 680–81 (5th Cir. 2013); *Wood v. Quarterman*, 491 F.3d 196, 202–03 (5th Cir. 2007); *Faulder v. Johnson*, 81 F.3d 515, 519–20 (5th Cir. 1996); *Motley v. Collins*, 18 F.3d 1223, 1227–28 (5th Cir. 1994).

⁶⁰ *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000); *Bolender v. Singletary*, 16 F.3d 1547, 1556–59 (11th Cir. 1994); *Cummings v. Sec’y for Dept. of Corr.*, 588 F.3d 1331, 1356–60, 1365–66 (11th Cir. 2009); *Wood v. Allen*, 542 F.3d 1281, 1313–14 (11th Cir. 2008).

⁶¹ See Winchester, *supra* note 55, at 523 (“Weighing-state statutes also vary widely in the number of statutory mitigators that sentencers consider, and some do not have any mitigators at all. . . . Even though a few states have zero statutory mitigators, each either leaves the definition of a mitigating factor open to include any other factors that call for leniency raised by the evidence, or they simply describe the weighing function without reference to statutory mitigators. . . . This caveat is important because, although the number of statutory mitigators is consistently lower than the number of aggravators, the statute is actually more expansive.”).

⁶² Research revealed no federal appellate analysis of *Strickland* prejudice in a capital case in the First or the Second Circuit Courts of Appeal. See Fromherz, *supra* note 56, at 403–10 (noting that many states have now abandoned capital punishment and most death penalty states are “weighing” states; therefore, some federal circuits only rarely encounter capital sentences or only review those from weighing states).

of the proceeding.”⁶³ It is notable, however, that the Ninth Circuit has its own concerns related to application of appellate precedent on further review and remand.⁶⁴

While there is confusion regarding the difference, and the ensuing significance, between weighing and non-weighing states, the “unique seriousness”⁶⁵ of a capital trial demands that clarity be given to circuit courts. In accordance with relevant precedent of this Court, federal appellate courts considering state-imposed death sentences should take note of the underlying state’s death penalty framework,⁶⁶ the role of the jury under that framework, and the assurance of due process for each capital defendant.⁶⁷

⁶³ *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *see also* *Caro v. Woodford*, 280 F.3d 1247, 1256 (9th Cir. 2002); *Correll v. Ryan*, 539 F.3d 938, 951 (9th Cir. 2008); *Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006) (“The aggravating evidence in *Hovey*’s case was strong, but it was not so overwhelming as to preclude the possibility of a life sentence. Heinous crimes do not make mitigating evidence irrelevant.”).

⁶⁴ Recent Case, *Ninth Circuit Affirms That Courts Must Consider Aggravating Impact of Evidence When Evaluating Claims of Ineffective Assistance of Counsel—Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012), 126 HARV. L. REV. 2139, 2143 (May 2013) (“[T]he Ninth Circuit [has] resolved a longstanding inconsistency between its own cases and Supreme Court precedent . . . where counsel fails to present mitigating evidence. . . . But the majority failed to clarify how it weighed the defendant’s mitigating and aggravating factors under this standard, providing lower courts with little practical guidance on when the balance of likely effects does or does not produce a reasonable probability that the sentence would have been different.”).

⁶⁵ *Strickland*, 466 U.S. at 704 (Brennan, J., concurring in part and dissenting in part).

⁶⁶ Weighing states vary in the number of aggravating factors they consider: Some states have a low number of aggravators, such as Montana, which has only 6; others have a high number of aggravators, like Delaware, which has 22. Of the 32 states, 15 have 10 or more aggravators. The presence of a large number of aggravators is not necessarily an indicator of increased application of the death penalty. For example, Kansas and Montana rank very low in executions per capita, whereas Oklahoma—which has only eight aggravators in its capital sentencing statute—ranks first in executions per capita, and second in actual executions per death sentence. Compared to Oklahoma, both Delaware and Pennsylvania have high numbers of aggravators; 22 and 18, respectively. Delaware, with 22 aggravators, ranks second in executions per capita and first in actual executions per death sentence. Pennsylvania, meanwhile, with 18 aggravators, has only executed three inmates since 1976.

Winchester, *supra* note 55, at 522–23 (N.B. Several of the states listed and described here no longer employ capital punishment).

⁶⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 111–12 (1982) (“[T]he Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. . . . [T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)); *Zant*, 462 U.S. at 873.

I. A Number of Circuit Courts of Appeal Appear to Conflate the Analysis of Penalty-Phase Prejudice of Cases Arising from Non-Weighing States with Analysis Appropriate to Weighing States

The Eleventh Circuit includes two weighing states—Florida and Alabama—and one non-weighing state—Georgia.⁶⁸ Eleventh Circuit *Strickland* prejudice determinations, however, seem to inappropriately conflate weighing and non-weighing analysis without regard to the statutory scheme of each particular state.⁶⁹

The Fifth Circuit, which also includes non-weighing states, Texas and Louisiana, regularly misapplies the *Strickland* test in considering penalty-phase prejudice.⁷⁰ While the Texas capital punishment statute does not require a jury to conduct a balancing inquiry, federal appellate courts regularly do so on appellate review.⁷¹ Particular emphasis on the circumstances of the

⁶⁸ See *supra* notes 53 and 54.

⁶⁹ See, e.g., *Holsey v. Warden*, 694 F.3d 1230, 1268 (11th Cir. 2012) (stating, in reviewing a Georgia capital sentence penalty phase, that appellate courts must undertake a balancing inquiry to determine prejudice—“[C]ourts must ‘evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.’”) (quoting *Callahan v. Campbell*, 427 F.3d 897, 936 (11th Cir. 2005)); *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998) (finding deficiency of counsel prejudiced Georgia capital sentencing after weighing aggravating and mitigating factors); *Ward v. Hall*, 592 F.3d 1144, 1165 (11th Cir. 2010) (finding no prejudice in Georgia penalty phase after weighing aggravating and mitigating factors); *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001) (finding no prejudice in Alabama capital sentencing procedure after weighing mitigating and aggravating evidence); *Brownlee v. Haley*, 306 F.3d 1043, 1070–71 (11th Cir. 2002) (same); *Wood v. Allen*, 542 F.3d 1281, 1313–14 (same); *Bolender v. Singletary*, 16 F.3d 1547, 1556–59 (finding no prejudice in Florida sentencing procedure after weighing mitigating and aggravating evidence); *Cummings v. Sec’y for Dept. of Corr.*, 588 F.3d 1331, 1356–60, 1365–66 (same).

⁷⁰ The conflation of weighing and non-weighing language is evidenced in *Sonnier v. Quarterman*, 476 F.3d 349, 359–60 (5th Cir. 2007): “[The] mitigation evidence . . . would have shown some favorable aspects of Sonnier’s character, after re-weighing the aggravating evidence of record against it, we do not find that there is a reasonable probability that its introduction would have caused the jury to decline to impose the death penalty in this case.” See also *Ransom v. Johnson*, 126 F.3d 716, 723–24 (5th Cir. 1997); *Williams v. Cain*, 125 F.3d 269, 277 (5th Cir. 1997); *Hankins v. Quarterman*, 288 Fed. Appx. 952 (5th Cir. 2008); *Garza v. Stephens*, 738 F.3d 669, 680–81 (5th Cir. 2013); *Wood v. Quarterman*, 491 F.3d 196, 202–03 (5th Cir. 2007); *Motley v. Collins*, 18 F.3d 1223, 1227–28 (5th Cir. 1994); *Hood v. Dretke*, 93 Fed. Appx. 665, 671 (5th Cir. 2004); *Pondexter v. Quarterman*, 537 F.3d 511, 524 (5th Cir. 2008); *Moore v. Maggio*, 740 F.2d 308, 319 (5th Cir. 1984).

⁷¹ See *supra* note 70 for list of cases. The Fifth Circuit further explained that on review the United States Supreme Court must “reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Sonnier*, 476 F.3d at 359–60 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)); see also *Clark v. Thaler*, 673 F.3d 410, 422 (5th Cir. 2012) (requiring “a reasonable probability that, absent [counsel’s] errors, the sentence . . . would have concluded that the *balance* of aggravating and mitigating circumstances did not warrant death” (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984))) (emphasis added).

crime as compared to available mitigation evidence is indicative of this improper analysis.⁷²

Similarly, although the Fourth Circuit includes states with both weighing and non-weighing statutory schemes, its Court of Appeals analyzes penalty-phase prejudice without consideration of the differing capital sentencing statutes.⁷³ This is also the case in decisions of the Third Circuit Court of Appeals.⁷⁴

2. *The Eighth and Tenth Circuit Courts of Appeal Have Expressed Concern About the Proper Method of Analyzing Penalty-Phase Prejudice in Cases from States with Differing Capital Sentencing Statutes*

The Eighth Circuit Court of Appeals has expressed concern about the lack of clarity regarding review of capital sentencing in weighing and non-weighing states. The Eighth Circuit is comprised of four states with capital punishment statutes; it includes two non-weighing states—Missouri and South Dakota—and two weighing states—Arkansas and Nebraska.⁷⁵

Prior to *Brown v. Sanders*,⁷⁶ discussed *infra* Part III, the Eighth Circuit, in *Rousan v. Roper*, properly reviewed state capital sentencing in light of the weighing/non-weighing distinction.⁷⁷ Though the particular result in *Rousan* would be identical under the weighing or non-weighing jurisprudence,⁷⁸ it is impossible to predict the effect of an abandonment of this state-specific analysis.

⁷² See e.g., *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (noting that certain mitigating evidence is “double edged” and overwhelming evidence of future dangerousness made it “virtually impossible to establish [sentencing] prejudice.”).

⁷³ See, e.g., *Lovitt v. True*, 403 F.3d 171, 181 (4th Cir. 2005) (applying weighing analysis to a Virginia case, which is a non-weighing state); *Briley v. Bass*, 750 F.2d 1238, 1247–48 (4th Cir. 1984); *Emmett v. Kelly*, 474 F.3d 154, 170–72 (4th Cir. 2007); *Hunt v. Lee*, 291 F.3d 284, 292 (4th Cir. 2002); *Jackson v. Kelly*, 650 F.3d 477, 493, 495 (4th Cir. 2011); *Gray v. Branker*, 529 F.3d 220, 235 (4th Cir. 2008); see also Note, *Criminal Procedure—Confrontation Clause—Fourth Circuit Finds No Right to Confrontation During Sentence Selection Phase of Capital Trial*, 128 HARV. L. REV. 1027, 1033–34 (2015) (noting that a criminal defendant has a Sixth Amendment right to a jury determination of all facts necessary to render him eligible for the death penalty).

⁷⁴ See, e.g., *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001) (requiring reviewing courts to evaluate the totality of the available mitigation evidence and reweigh it against the evidence in aggravation); see also *Saranchak v. Sec’y, Pa. Dept. of Corr.*, 802 F.3d 579, 600 (3d Cir. 2015).

⁷⁵ See *supra* notes 53 and 54.

⁷⁶ 546 U.S. 212, 219 (2006) (“This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.”).

⁷⁷ *Rousan v. Roper*, 436 F.3d 951, 963 (8th Cir. 2006) (“We have long analyzed the effect of an invalid aggravating circumstance on the constitutionality of a death sentence by first determining whether the defendant was sentenced in a ‘weighing’ or ‘non-weighing’ state.”).

⁷⁸ *Id.* at 964 n.5 (“We would reach the same result under the previous weighing/non-weighing jurisprudence.”).

There is also a lack of clarity about how *Strickland* should be applied in light of different capital sentencing statutes of the states in the Tenth Circuit.⁷⁹ This may in part be due to the fact that the Tenth Circuit includes a number of states with “hybrid” death penalty sentencing statute.⁸⁰ That federal appellate court is at least explicit about describing the lack of guidance for review from a hybrid state,⁸¹ which indicates an awareness of and desire to comply with the appropriate application of the facts to the test.

3. Some Federal Appellate Courts, Especially the Ninth Circuit Court of Appeals, Appear to Take Special Care to Analyze Penalty-Phase Prejudice According to Whether a Sentence Has Rendered in a “Weighing” Or “Non-Weighing” State

The Ninth Circuit Court of Appeals properly applies *Strickland* and tailors its analysis to whether it is dealing with a weighing state or a non-weighing state.⁸² The Ninth Circuit is comprised of weighing and non-weighing states.⁸³ In particular, in the Ninth Circuit the court demonstrates deference to specific and individual state law, noting that “in establishing prejudice under *Strickland*, it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome

⁷⁹ Some states in the Tenth Circuit, such as Oklahoma, have been defined as weighing by further analysis on the state death penalty statute. *See* *Castro v. Ward*, 138 F.3d 810, 816 (10th Cir. 1998) (“Accordingly, the jury must find the existence of at least one aggravating factor beyond reasonable doubt and then must conclude the circumstance or circumstances outweigh any mitigating evidence presented by the defendant before it may recommend a death sentence.” (citing *Castro v. Oklahoma*, 71 F.3d at 1505-06 n.3; Okla. Stat. Ann. tit. 21, § 701.11-.12 (West 1995))). The Colorado statute requires the jury to weigh mitigation evidence against statutory aggravators (like a weighing state) but allows the jury to make a final determination using all available evidence during the final stage of deliberation. *See* *People v. Tenneson*, 788 P.2d 786, 791 (Colo. 1990).

⁸⁰ *See* *Davis v. Exec. Dir. of Dep’t. of Corr.*, 100 F.3d 750, 768 (10th Cir. 1996) (describing Colorado’s sentencing system as a “hybrid” system).

⁸¹ *Id.* (noting that the Supreme Court “has not specifically indicated whether the *Clemons* re-weighing/harmless-error analysis or the *Zant* analysis applies to states having ‘hybrid’ systems like Colorado’s” (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Zant v. Stephens*, 462 U.S. 862 (1983))).

⁸² *See e.g.*, *Correll v. Ryan*, 539 F.3d 938, 951-52 (9th Cir. 2008) (applying correctly the *Strickland* test to an ineffective-counsel claim in an Arizona capital sentencing, and finding prejudice after observing “that, in capital cases, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating factors, re-weighing them afresh” and that “[a]t the time of [Defendant’s] appeal, the Arizona Supreme Court was also required to conduct an independent proportionality review”); *Smith v. Mahoney*, 611 F.3d 978, 990 (9th Cir. 2010) (applying Montana’s mitigation and aggravation standards to the *Strickland* analysis); *Lambright v. Schiro*, 490 F.3d 1103, 1121, 1126 (9th Cir. 2007) (evaluating an attorney’s performance under *Strickland* in light of Arizona sentencing law); *see also* *Henry v. Ryan*, 720 F.3d 1073, 1093–94 (9th Cir. 2013); *Summerlin v. Schiro*, 427 F.3d 623, 629-36 (9th Cir. 2010); *Allen v. Woodford*, 395 F.3d 979, 1000–02 (9th Cir. 2004); *Douglas v. Woodford*, 316 F.3d 1079, 1985–87 (9th Cir. 2003); *Smith v. Stewart*, 140 F.3d 1263, 1269–70 (9th Cir. 1998).

⁸³ *See supra* notes 53 and 54.

the aggravating circumstances.”⁸⁴ Likewise, the Sixth and Seventh Circuit Courts of Appeal Circuit appear to take care to analyze penalty-phase prejudice in light of the relevant state sentencing statute.⁸⁵

While some federal appellate courts properly consider penalty-phase prejudice, the majority of federal circuits require direction about how to apply *Strickland*'s test without ignoring the underlying capital sentencing scheme.

II. THE ANALYSIS OF THE ANALYSIS

Federal courts know well and liberally refer to and quote from the ubiquitous *Strickland* two-part test.⁸⁶ How, then, could it be possible that federal courts could crosswise with appropriate constitutional analysis by avoiding direct interaction with state sentencing statutes? A number of scholars have noted the difficult position federal appellate courts (and indeed, state appellate courts) find themselves in when analyzing penalty-phase prejudice in capital cases.⁸⁷ Cases of this sort include voluminous records with issues of varying strength and complexity.⁸⁸ And the breadth of what may be presented in capital sentencing hearings makes it difficult to imagine what impact (if any) new or invalidated evidence may have played in the jury's considerations.⁸⁹ Many courts, however, would find it burdensome to remand every capital sentencing case for new sentencing on the presentation of new mitigation evidence.⁹⁰ As a practical matter, many federal courts, unless

⁸⁴ *Lambright v. Schriro*, 485 F.3d 512, 530 (9th Cir. 2007).

⁸⁵ See e.g., *Woolley v. Rednour*, 702 F.3d 411, 420–29 (7th Cir. 2012) (conducting *Strickland* analysis in light of Illinois sentencing law); *Mason v. Mitchell*, 320 F.3d 604, 618 (6th Cir. 2003) (conducting *Strickland* analysis in light of Ohio sentencing law).

⁸⁶ John G. Douglas, *Confronting Death: Six Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1972 (2005) (arguing that “the whole of the Sixth Amendment applies to the whole of the capital case, whether the issue is guilt, death eligibility, or the final selection of who lives and who dies”).

⁸⁷ See, e.g., Widder, *supra* note 29, at 1372–73.

⁸⁸ Paul Marcus, *The United States Supreme Court (Mostly) Gives Up its Review Role with Ineffective Assistance of Counsel Cases*, 100 MINN. L. REV. 1745, 1752–59 (2016); See Michael Mello, “In the Years When Murder Wore the Mask of Law”; *Diary of Capital Appeals Lawyer*, 24 Vt. L. Rev. 583, 598 (2000) (Discussing the strenuous hours of labor often involved in litigating death penalty cases).

⁸⁹ See Ingrid A. Holewinski, “Inherently Arbitrary and Capricious”: *An Empirical Analysis of Variations Among State Death Penalty Statutes*, 12 CORNELL J.L. & PUB. POL'Y 231, 241–42 (2002) (describing the many kinds of mitigating evidence defendants may present).

⁹⁰ See Ryan C. Thomas, *Not-So-Harmless Error: A Higher Standard for Mitigation Errors on Capital Habeas Review*, 89 WASH. L. REV. 515, 522–26 (2014) (explaining that the jury must be able to hear and give meaningful effect to the mitigation evidence and give individual consideration to the facts of the case and characteristics of the defendant).

very carefully avoiding weighing language and analysis in scrupulous deference to death penalty statutes of the state in which a defendant was sentenced, “reweigh” evidence presented to the jury on post-conviction review.⁹¹

Let us return to the Eleventh Circuit Court of Appeals for examples and illustrations. Two recent Florida state cases with capital sentences feature explicit balancing language, as well they should: Florida is a weighing state.⁹² *Hardwick v. Florida Department of Corrections* explained, “The State correctly observes that the District Court was required to place both the aggravating circumstances and the mitigating circumstances in the scales to appropriately weigh them.”⁹³ Similarly, *Barwick v. Secretary, Florida Department of Corrections* held “the Florida Supreme Court was not unreasonable” when it determined that aggravating circumstances would have still greatly outweighed any mitigating circumstances⁹⁴ Consider, on the other hand, *Hosley v. Warden, Georgia Diagnostic Prison*, a Georgia case.⁹⁵ In examining alleged ineffective assistance of counsel, the Eleventh Circuit Court of Appeals explained that it must “evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.”⁹⁶ The court, which ultimately affirmed, discussed extensively whether the aggravating circumstances “outweigh” the mitigating, using it six times, in addition to “balance” twice, and “weigh” once.⁹⁷ Likewise, *Lance v. Warden, Georgia Diagnostic Prison* affirmed a conviction and death sentence, holding the prisoner suffered no prejudice in lower courts’ analyses of his Sixth Amendment claim.⁹⁸ The court here clearly used “weighing” analysis, citing cases deriving from Florida as legal precedence.⁹⁹ All of the cases

⁹¹ See James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 742 (1987); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration [by the reviewing court] of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976))).

⁹² See *supra* note 53.

⁹³ *Hardwick v. Fla. Dep’t of Corr.*, 803 F.3d 541, 559 (2015).

⁹⁴ *Barwick v. Sec’y, Fla. Dep’t of Corr.*, 764 F.3d 1239, 1251 (2015).

⁹⁵ *Hosley v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1268 (2012).

⁹⁶ *Id.* (quoting *Callahan v. Campbell*, 427 F.3d 897, 936 (11th Cir. 2005)).

⁹⁷ *Id.* at 1268–73; *id.* at 1289–94 (Barkett, J., dissenting).

⁹⁸ *Lance v. Warden, Georgia Diagnostic Prison*, No. 16-15008, 2017 U.S. App. LEXIS 16778, at *19, *24–25 (11th Cir. Aug. 31, 2017).

⁹⁹ *Id.* at *21 (“Indeed, ‘[o]ur analysis of the prejudice prong . . . must also take into account the aggravating circumstances associated with [Lance]’s case’ “At the end of the day, we are required to ‘reweigh the evidence in aggravating against the totality of available mitigating evidence.’” (first quoting *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998); then quoting *Boyd v. Allen*, 592 F.3d 1274, 1301 (11th Cir. 2010)) (alterations in original).

cited, including *Wiggins*, involved death sentences originating from weighing states or former weighing states.¹⁰⁰

But does appellate courts' use of the words "weigh," "reweigh," or "outweigh" alone signify that a federal court has employed an inappropriate *Strickland* analysis in a case from a non-weighing state? Not necessarily, though that is an area of concern. Some federal appellate opinions, long and exhaustive though they may be, do not explicitly reference the sentencing jury's instructions, which is not in itself error, but may indicate whether a court has borne the underlying statute and instructions in mind when considering ineffectiveness or additional mitigation.

Improper or overreaching analysis may likewise occur whether or not a court employs the actual words "weigh" or "reweigh." Returning to our example from the Introduction, *supra*, Mr. Bishop's federal habeas counsel alleged that trial counsel had failed in a number of ways, prejudicing Mr. Bishop in the sentencing phase of trial.¹⁰¹ Because mitigating testimony and physical evidence is particularly important in a state (such as Georgia) where *anything* could have persuaded a juror to vote for life,¹⁰² questions of attorney error and prejudice are extremely important.

Jury instructions to Mr. Bishop's sentencing jury—the standard instructions in Georgia—explained: "You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you or without any reason."¹⁰³ Under Georgia law, there is a reasonable probability that, had counsel presented the officers' testimony, the jury would have been given the "any reason satisfactory" needed to vote for a sentence of life. In Mr. Bishop's case, the Eleventh Circuit Court of Appeals never addressed the deficient performance prong and disposed of the issue after its prejudice analysis.¹⁰⁴ Specifically, it held the state habeas court's decision was not unreasonable because extensive mitigation evidence available (but not pre-

¹⁰⁰ See *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding penalty-phase prejudice due to ineffective counsel after "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence" in reviewing a Maryland capital sentencing, a former weighing state under MD. CODE ANN., CRIM. LAW § 2-303 (LexisNexis 2002) (repealed 2013))

¹⁰¹ *Bishop v. Warden, Ga. Diagnostic & Classification State Prison*, 726 F.3d 1243, 1250 (11th Cir. 2013).

¹⁰² *Heidler v. State*, 537 S.E.2d 44, 56 (2000) ("The trial court properly instructed the jury to consider mitigating circumstances, and that it could impose a life sentence for any reason or no reason at all."); *Drake v. Kemp*, 762 F.2d 1449, 1459 (1985) ("In the current Georgia capital punishment regime, the sentencing jury has complete discretion to choose between life imprisonment or death after the finding of one statutory aggravating circumstance.").

¹⁰³ See GA. CODE ANN. § 17-10-31(c) (West 2009) ("[Without a unanimous jury decision], the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.").

¹⁰⁴ *Bishop*, 726 F.3d at 1255.

sented) would not have “undercut” Mr. Bishop’s involvement in the murders¹⁰⁵ or “undermined in any way the statutory aggravator found by the jury.”¹⁰⁶

The Eleventh Circuit’s legal analysis of Mr. Bishop’s *Strickland* issue focused solely on the potential effect presentation of the testimony could have had on the State’s case for guilt or in aggravation. Whether the mitigating evidence “undercut” or “undermined” the State’s theory of the case is wholly irrelevant when reviewing the state court’s prejudice determination.¹⁰⁷ The Eleventh Circuit’s “weighing” analysis was inappropriate in that case and in others—inapposite to Georgia’s death penalty framework and to the instructions received by his sentencing jury. And whether the voluminous and compelling mitigating evidence omitted from Mr. Bishop’s trial “undercut” or “undermined” the State’s aggravating factors should have had no bearing on whether the state court was reasonable in concluding that “Bishop has failed to show how he suffered prejudice as a result of counsel’s decisions.”¹⁰⁸

Unfortunately, it appears that a number of courts overlook a primary point: the finding of an aggravating circumstance at the sentencing phase is presumed after a guilty verdict.¹⁰⁹ The question, therefore, is whether counsel’s error requires a new review of sentencing evidence by a factfinder appropriately instructed about the process of death penalty sentencing.¹¹⁰

¹⁰⁵ *Id.* at 1255–56.

¹⁰⁶ *Id.* at 1256.

¹⁰⁷ See *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (“Mitigating evidence . . . may alter the jury’s selection of penalty, even if it does not undermine the prosecution’s death-eligibility case.”).

¹⁰⁸ *Bishop v. Upton*, No. 5:08–CV–91 (HL), 2010 WL 1781008, at *9 (M.D.Ga. May 4, 2010) (citation omitted). Under Georgia’s sentencing legislation, “the jury receives no instructions to give special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance the aggravating and mitigating circumstances pursuant to any special standard.” *Simpkins v. State*, 486 S.E.2d 833, 836 (Ga. 1997) (quoting *Zant v. Stephens*, 462 U.S. 862, 873–74 (1983)). Further, as the United States Supreme Court explained in *Zant*, “[I]n Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.” *Zant*, 462 U.S. at 874.

¹⁰⁹ See *Wiggins*, 539 U.S. at 510.

¹¹⁰ See Ingrid A. Holewinski, *Inherently Arbitrary and Capricious: An Empirical Analysis of Variations Among State Death Penalty Statutes*, 12 CORNELL J.L. & PUB. POL’Y 231, 242 (2002) (“Jurors who are assisted with the evaluation of mitigating factors are less likely to impose death sentences. . . . Proper communication and explanation are essential to ensure that defendants are not sentenced to death merely due to confusion.”).

III. BUILDING A SOLUTION TO THE QUESTION OF INCONSISTENT ANALYSIS

A. *The United States Supreme Court Should Clarify the Appropriate Analysis of Penalty-Phase Prejudice in Capital Cases for Non-Weighing States*

Despite the split among federal circuits and despite what appears—at least to some advocates and scholars—to be a potential misapplication of *Strickland*, the United States Supreme Court has not yet addressed the error of conducting a weighing analysis of penalty-phase prejudice in a capital case from a non-weighing state. While in *Brown v. Sanders*¹¹¹ the United States Supreme Court considered the impact of weighing invalidated *aggravating* factors presented in capital sentencing, a different issue is described here.

The Court has considered weighing and non-weighing structures,¹¹² but not as to this particular question of the interplay between statutory structure and penalty phase prejudice.¹¹³ While *Brown* described the weighing versus non-weighing distinction as still “accurate” and the controlling law of today’s death penalty jurisprudence, it described the scheme as “needlessly complex” while noting it was developed “relatively early in the development of [its] death-penalty prejudice.”¹¹⁴ *Brown* also noted the difference between a weighing and non-weighing state is not one of semantics—reiterating that the Court 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.”¹¹⁵ *Brown*, however, addressed the legal role of sentencing aggravators under the weighing versus non-weighing scheme¹¹⁶; yet, the inverse issue—the role of mitigators—remains uncharted territory.¹¹⁷

¹¹¹ 546 U.S. 212, 214 (2006).

¹¹² See Widder, *supra* note 29 at 1343-44 (“In jurisdictions where the sentencer is instructed to weigh the aggravating and mitigating factors to determine the appropriate penalty, the Court has concluded that aggravating factors guide the sentencer’s discretion and, consequently, reliance on an invalid aggravating factor improperly tilts the sentencing balance in favor of death. In weighing jurisdictions, therefore, the Court has prohibited automatic affirmance of death sentences that rest in part on invalid aggravating factors. On the other hand, in jurisdictions whose statutory schemes do not require the sentencer to weigh the aggravating and mitigating factors, the Court has determined that the invalidation of one or more aggravating factors is meaningless, as long as at least one valid aggravating factor remains to support the defendant’s death penalty.”).

¹¹³ *Brown*, 546 U.S. at 220.

¹¹⁴ *Id.* at 217, 219.

¹¹⁵ *Id.* at 216–17 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)).

¹¹⁶ *Id.*

¹¹⁷ While the Supreme Court has also used weighing language when addressing prejudice claims from non-weighing states, it has not yet addressed mitigators. See *Wong v. Belmontes*, 558 U.S. 15, 16 (2009) (addressing prejudice claims from California); *Burger v. Kemp*, 483 U.S. 776, 776 (1987)

Since *Strickland*, the United States Supreme Court has considered distinctive issues of weighing versus non-weighing states and effective counsel in single cases—implicitly recognizing the relationship between the evidence presented to the jury and the role of counsel in the presentation of that evidence.¹¹⁸ All information given to the jury becomes critical for a capital defendant in a non-weighing state because the jury can return a life verdict based on any reason or no articulated reason.¹¹⁹ *Strickland* itself clearly notes, “whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently re-weighs the evidence—would have concluded that the *balance* of aggravating and mitigating circumstances did not warrant death.”¹²⁰ That case, of course, originated from Florida, a weighing state.¹²¹ Likewise, a number of other groundbreaking U.S. Supreme Court precedents related to ineffective assistance of counsel in capital cases have emerged from weighing states.¹²² Unless a federal appellate court pays very close attention to the capital sentencing scheme underlying a case heard and decided by the Supreme Court, it would be entirely possible to quote a case from the highest court in the land and miss its proper application. And while the Court has come close to reaching this issue, it has not squarely addressed it.¹²³

It seems incredible that the Supreme Court has allowed errors such as these to persist, and yet capital litigation is so complicated¹²⁴ (as is the process of granting or not granting certiorari), there are a number of variables that could be responsible for this.¹²⁵ The Court’s decision not to accept a

(addressing prejudice claims from Georgia); *Williams v. Taylor*, 529 U.S. 362, 367 (2000) (addressing prejudice claims from Virginia). Like the other constitutional issues the Court has analyzed when treating weighing versus non-weighing states differently, this case presents the first opportunity to take the non-weighing state sentencing practices into account when articulating the proper prejudice standard.

¹¹⁸ See, e.g., *Smith v. Spisak*, 558 U.S. 139, 145–49, 154 (2010).

¹¹⁹ The minority of states, however, do not require such specific standards. Georgia is in that minority. See *Ford v. State*, 360 S.E.2d 258, 260 (Ga 1987).

¹²⁰ *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (emphasis supplied).

¹²¹ FLA. STAT. ANN. § 921.141 (2013), *invalidated by* *Perry v. State*, 210 So.3d 630 (Fla. 2016).

¹²² See e.g., *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (emerging from Florida); *Rompilla v. Beard*, 545 U.S. 374 (2005) (emerging from Pennsylvania); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (emerging from Maryland); *Hinton v. Alabama*, 134 S.Ct. 1081 (2014) (emerging from Alabama).

¹²³ See e.g., *Spisak*, 558 U.S. at 145–49, 154.

¹²⁴ Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1656–61 (2008) (describing a modern trend toward heightened scrutiny of mitigation investigations in capital sentencing).

¹²⁵ See John G. Douglas, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1970, 1970 n.20 (2005) (discussing the failure of the Court to “put the Sixth Amendment pieces together” and the general lack of scholarly commentary on the application of the Sixth Amendment at capital sentencing); see also generally Thomas Aumann, *Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in Ring v. Arizona*, 34 LOY. U. CHI. L.J. 845 (2003) (arguing that the U.S. Supreme Court correctly extended the Sixth Amendment to

case for review has no legal bearing on the strength or weakness of the issues presented.¹²⁶ Further, concern about appropriate federal appellate review is more subtle than, say, an issue present since trial, such as racial bias, prosecutorial misconduct, or judge-issued sentences; there could be a number of reasons why counsel would choose to proceed on another claim.¹²⁷

This Article is not arguing mere semantics; Mr. Bishop's case illustrates how the weighing state *analysis* fails to adequately consider the role of a Georgia jury.¹²⁸ The simple use of the word "weigh" will not indicate whether a federal appellate court applied the correct analysis, nor will its absence; rather, as *Strickland* explains, the correct analysis requires an evaluation of the explicit considerations of the sentencing statute, the sentencing jurors' process, and the likelihood that omitted evidence may have impacted the outcome of the (sentencing) proceedings.¹²⁹ The Court has long recognized the high stakes involved in death penalty cases; thus, the proper application of the correct legal rule and subsequent analysis is absolutely critical.¹³⁰ Academically, this is important,¹³¹ and the outcome of the failure, of course, is an unjust execution.

Although, as discussed *infra*, the Ninth Circuit Court of Appeals has experienced its own struggles related to California's non-weighing capital sentencing statute,¹³² the sort of analysis undertaken in that federal court could well be a guide to follow. The likelihood of this Court accepting a model set by the Ninth Circuit, however, seems low.

the capital sentencing phase of trial).

¹²⁶ Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, 64-APR J. KAN. B.A. 25, 30 (1995).

¹²⁷ Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 765 (2000) (discussing how criminal defense attorneys are given broad discretion in their strategic trial decisions).

¹²⁸ See *Brown v. Sanders*, 546 U.S. 212, 216–18 (2006) (explaining how the weighing state analysis restricts jurors from considering facts and circumstances relevant to an invalid eligibility factor in another capacity).

¹²⁹ Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1096–97 (2009).

¹³⁰ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (recognizing that the unique stakes involved in death penalty decisions demand "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

¹³¹ See Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 550 (2011) ("While the states can be roughly categorized into weighing states – which limit the factors that may be considered in aggravation – and non-weighing states – which do not place limits on the factors considered in aggravation – there is a fair amount of variation in how the states ask triers of fact to engage in this balancing.").

¹³² See Karen Lamprey, *Brown v. Sanders: Invalid Factors and Appellate Review in Capital Sentencing*, 84 DENV. U. L. REV. 743, 745–46 (2006) ("If a jury used an invalid sentencing factor to determine eligibility for a death sentence, the United States Supreme Court requires either a re-weighing of all the factors or a harmless-error review if no mitigating factors are present.").

B. Unless and Until the Supreme Court Takes Up This Issue, Advocates Must Learn About and Continue to Raise This Issue Where Appropriate

Should the United States Supreme Court fail to accept a case on certiorari and resolve the issue, the next best step is training—both for capital defenders and federal judges. Practitioners from non-weighting states need to be proactive in advocacy before circuits of appeal, explicit about the correct review standards, and prepared to raise the issue in briefing and oral argument.¹³³

Where a defendant challenges his death sentence, the reviewing court should first determine whether the defendant's conviction was imposed in a weighing or non-weighting state.¹³⁴ In *Strickland* and other cases, the United States Supreme Court has explicitly demonstrated the analysis appropriate to a weighing state. In cases originating in a non-weighting state, however, the general *Strickland* standard governs, but should be applied consistent with the state death penalty statute at issue. This more adequately accounts for the role of mitigation and jury deliberations in non-weighting states because a jury may vote for life for any reason regardless of the weight of evidence.¹³⁵

The analysis of the Eleventh Circuit in Mr. Bishop's case and others exposes this confusion. Its penalty phase analysis did not mention Georgia law, and its opinion tracks that in cases arising from Florida and Alabama that have entirely different capital sentencing statutes. The Eleventh Circuit ultimately ignored Georgia's statutory scheme. Significantly, the problem is not confined to the Eleventh Circuit, as examples of confusion and conflation of this issue can be seen in other circuits as well.¹³⁶ Without guidance from

¹³³ It is worth noting here that fewer death sentences are being handed down nationwide. States are abolishing death penalty statutes and states that still employ the death penalty are seeing fewer and fewer death sentences that will need to be challenged through the post-conviction process. Georgia, for example, has had no death sentences since 2014. See Bill Rankin, *Death Sentences Now a Rarity in Georgia*, ATLANTA J. CONST. (Dec. 22, 2016), <http://www.myajc.com/news/local/death-sentences-now-rarity-georgia/WdQLa49GwzpRLG9XrBiMIM/>. Still, in the hundreds of remaining death penalty cases arising from non-weighting states, this may be an issue for federal post-conviction review.

¹³⁴ Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1368 (1995) (maintaining that the distinction between applying weighing versus non-weighting provisions is of critical importance to the result in a case).

¹³⁵ Implicitly, the United States Supreme Court recognized the cumulative impact different new or different mitigating evidence could make on a jury's decision in a non-weighting state. See *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000); see also *Cullen v. Pinholster*, 563 U.S. 170, 199-202 (2011) (using a weight of the evidence lens for non-weighting state of California).

¹³⁶ This applies to any circuit that includes a non-weighting state. See *Von Dohlen v. State*, 602 S.E.2d 738, 746 (2004) (quoting *State v. McClure*, 342 S.C. 403, 409 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case is more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.")). See also *Emmett v. Kelly*, 474 F.3d 154, 170-71 (4th Cir. 2007); *Ransom v. Johnson*, 126 F.3d 716, 725-26 (5th Cir. 1997).

the Court, federal appellate courts will continue to conflate the analysis of penalty phase prejudice in cases from weighing and non-weighing states.

Though *Strickland* itself has its limitations,¹³⁷ it nevertheless articulates the foundational standard for Sixth Amendment review. The fact that not all circuits follow its principle that the state capital sentencing scheme (or “governing legal standard”) defines the parameters of assessment of prejudice is an issue of concern, not merely from an academic perspective, but a practical one. The best and clearest course would be for the United States Supreme Court to accept a case with a procedural posture similar to Mr. Bishop’s and announce to federal courts that proper penalty-phase prejudice in non-weighing states is the general *Strickland* standard tailored to the underlying capital sentencing statute. Without guidance, lower federal courts will continue to conflate the analysis of penalty-phase prejudice in cases from weighing and non-weighing states. This is not only academically and philosophically important, but failure to do so allows improper review of the most significant case a court can review: a sentence of death.

¹³⁷ *Strickland*, 466 U.S. at 716–17 (Marshall, J., dissenting) (“In my view, a person on death row, whose counsel’s performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a ‘reasonable probability’ that he would have been given a life sentence if his lawyer had been competent . . . if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate.”).