

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RYAN THORNELL, DIRECTOR, )  
ARIZONA DEPARTMENT OF CORRECTIONS, )  
Petitioner, )  
v. ) No. 22-982  
DANNY LEE JONES, )  
Respondent. )  
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Pages: 1 through 73  
Place: Washington, D.C.  
Date: April 17, 2024

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5                                    Petitioner,                    )

6                                    v.                                    ) No. 22-982

7   DANNY LEE JONES,                            )

8                                    Respondent.                    )

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11                                   Washington, D.C.

12                                   Wednesday, April 17, 2024

13

14                                   The above-entitled matter came on for  
15 oral argument before the Supreme Court of the  
16 United States at 10:15 a.m.

17

18   APPEARANCES:

19   JASON D. LEWIS, Deputy Solicitor General, Phoenix,  
20                                   Arizona; on behalf of the Petitioner.

21   JEAN-CLAUDE ANDRE, ESQUIRE, Santa Monica, California;  
22                                   on behalf of the Respondent.

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-982, Thornell versus Jones.

Mr. Lewis.

ORAL ARGUMENT OF JASON D. LEWIS

ON BEHALF OF THE PETITIONER

MR. LEWIS: Thank you, Mr. Chief Justice, and may it please the Court:

The Ninth Circuit erred in two critical ways. First, it failed to give any deference to the district court's factual determinations. After hearing the evidence and testimony at the evidentiary hearing, the district court made factual findings as to whether Jones suffered from specific mental conditions and whether those conditions caused him to murder Robert and Tisha Weaver. The Ninth Circuit disregarded those findings, instead substituting its own judgment.

My friend defends this error by positing that the district court's only role was to determine whether unrepresented mitigation evidence existed. This view eviscerates the --

1 the traditional role of trial courts in the  
2 fact-finding process and would radically change  
3 habeas practice, resulting in far more writs  
4 undoing state sentences.

5           The Ninth Circuit further erred by  
6 failing to meaningfully consider the aggravating  
7 evidence or its weight. Strickland does not  
8 allow for a sentence to be undone whenever there  
9 is some new mitigation that addresses moral  
10 culpability. Instead, it requires a reasonable  
11 probability that the new mitigation would have  
12 changed the sentence in light of the balance  
13 between the total mitigation and the aggravating  
14 evidence. The Ninth Circuit's approach is  
15 contrary to this longstanding test and must be  
16 rejected.

17           I urge this Court to reverse the Ninth  
18 Circuit's judgment, clarify the applicability of  
19 clear error review in the Strickland context,  
20 and reaffirm the principle that a Strickland  
21 prejudice determination requires a reviewing  
22 court to reweigh both the total mitigation and  
23 the aggravation.

24           I welcome the Court's questions.

25           JUSTICE THOMAS: Can we resolve this

1 simply by saying that de novo review is  
2 improper?

3 MR. LEWIS: I think so, Your Honor.  
4 You know, in my friend's responsive brief, he  
5 argues that Village Lakeside stands for the  
6 proposition that these types of mixed questions  
7 addressing constitutional issues are totally de  
8 novo. I think there's more room in the  
9 Strickland question than that and specifically  
10 in the Strickland prejudice context.

11 JUSTICE SOTOMAYOR: I'm sorry, I don't  
12 think I understand your answer.

13 There's no dispute that the court  
14 below did not -- I'm not talking the federal  
15 court. The state court never reached the  
16 prejudice prong, correct?

17 MR. LEWIS: We haven't raised that  
18 issue, Your Honor, no.

19 JUSTICE SOTOMAYOR: No. And you're  
20 not raising it now?

21 MR. LEWIS: No, Your Honor.

22 JUSTICE SOTOMAYOR: You're accepting  
23 that de novo review with respect to the  
24 prejudice prong is correct at least for purposes  
25 of this argument?

1 MR. LEWIS: De novo review is correct  
2 as to the legal determination on the mixed  
3 question, yes, Your Honor.

4 JUSTICE SOTOMAYOR: All right. So  
5 that, I think, was the question being asked.

6 JUSTICE KAGAN: Right. So that it's  
7 not AEDPA deference that you're seeking?

8 MR. LEWIS: No, Your Honor.

9 JUSTICE KAGAN: Yes. Okay.

10 JUSTICE ALITO: You're -- just to  
11 clarify, you're saying that there's de novo  
12 review in the district court, not de novo review  
13 on appeal?

14 MR. LEWIS: There's de novo review of  
15 the district court's -- the district court made  
16 a prejudice determination, and we haven't raised  
17 the question of whether the state court made a  
18 prejudice determination and --

19 JUSTICE ALITO: Yeah.

20 MR. LEWIS: -- that judgment was  
21 entitled to deference under AEDPA.

22 JUSTICE ALITO: The --

23 MR. LEWIS: So the district court made  
24 a prejudice determination.

25 JUSTICE ALITO: Right.

1           MR. LEWIS: We're asserting that that  
2           determination would be reviewed de novo as to  
3           the legal question in the Strickland inquiry.  
4           But, on the factual question of the mixed  
5           question, then those factual determinations are  
6           entitled to clear error deference under Rule 52  
7           and this Court's precedents.

8           JUSTICE SOTOMAYOR: Assuming we accept  
9           your argument that the court below didn't weigh  
10          the aggravating and mitigating factors, you're  
11          asking us for a reversal. Why isn't a vacate  
12          and remand appropriate?

13          MR. LEWIS: I think concepts of  
14          finality would dictate that the circuit court  
15          has had this case for so long and has spent so  
16          much time granting relief on certain issues,  
17          reserving other ones, and then having it sent  
18          back continuously, it has to end at some point.

19          JUSTICE SOTOMAYOR: That's nice, but  
20          we're not fact finders, and we generally don't  
21          weigh evidence. There's thousands of pages in  
22          this record.

23          I -- I'm still not quite sure why -- I  
24          -- I understand the basis of your argument. The  
25          district -- the -- the circuit court did lay



1       forth the fact that it should balance  
2       aggravating and mitigating, but I accept that it  
3       really didn't do that. It mentioned them but  
4       didn't compare them --

5                   MR. LEWIS: Yes, Your Honor.

6                   JUSTICE SOTOMAYOR: -- to the  
7       mitigating. That's the step you say is missing?

8                   MR. LEWIS: Yes, Your Honor.

9                   JUSTICE SOTOMAYOR: And I accept that  
10      under Arizona law, the aggravating factors that  
11      it failed to weigh are usually given great  
12      weight --

13                   MR. LEWIS: Yes, Your Honor.

14                   JUSTICE SOTOMAYOR: -- under Arizona  
15      law. So -- but that still -- I could accept  
16      that they didn't weigh them the way they're  
17      supposed to. Why are you asking us to do that?  
18      I think that that's something that shouldn't --  
19      isn't better practice for us to tell the court  
20      what it's supposed to do so it gets it right the  
21      next time?

22                   MR. LEWIS: Yes, Your Honor, I think  
23      so, and I think that's what this Court did in  
24      Wong v. Belmontes. We've just asked for sort of  
25      this extra step because, in our view, the

1     aggravating evidence is so compelling and the  
2     mitigating evidence that was developed in the  
3     federal evidentiary hearing is -- is so slight.

4             JUSTICE SOTOMAYOR: Well, really? I  
5     mean, let me just mention one, the head  
6     injuries. The original sentencing court knew of  
7     two or three head injuries. In none of them was  
8     there proof that the defendant had gone  
9     unconscious as there was in the new evidence  
10    that was develop that when I think he was -- if  
11    I don't -- if -- the facts are close to this.  
12    If I don't get the details right, please forgive  
13    me.

14            MR. LEWIS: Sure, Your Honor.

15            JUSTICE SOTOMAYOR: But I -- you can  
16    correct me if I'm wrong -- that at five years  
17    old, he fell, went unconscious. His mother  
18    found him just waking up. In another incident,  
19    he fell on his head on a metal roof and taken to  
20    the hospital and there was brain swelling.

21            Don't you think that those facts are  
22    sufficiently more serious than what was  
23    presented at first and would have shown greater  
24    -- for a fact finder reasonably to conclude that  
25    there was neurological damage from this number

1 of injuries?

2 MR. LEWIS: So, as to the two  
3 incidents --

4 JUSTICE SOTOMAYOR: And types of  
5 injuries.

6 MR. LEWIS: Yes, Your Honor. I -- I  
7 think that the -- the evidence concerning when  
8 Jones was five years old and fell off the swing  
9 and had lost consciousness, I believe that was  
10 introduced through Dr. Potts's testimony. And I  
11 believe that the 11-year-old incident was --  
12 came in through Dr. Potts as well, which was  
13 presented to the trial court, along with the  
14 evidence of -- of Jones's having, you know, been  
15 passed out while he was in the military and sort  
16 of the report associated with that. I -- I  
17 could be wrong, Your Honor.

18 JUSTICE SOTOMAYOR: I -- I --

19 MR. LEWIS: That was my understanding  
20 of the record.

21 JUSTICE SOTOMAYOR: -- I think --

22 MR. LEWIS: Okay.

23 JUSTICE SOTOMAYOR: Assume my set of  
24 facts.

25 MR. LEWIS: Sure.

1 JUSTICE SOTOMAYOR: I do know that  
2 some of the incidents were introduced at trial  
3 by Dr. Potts but that the more serious ones were  
4 found on habeas review and after a more detailed  
5 mitigation examination by the experts.

6 MR. LEWIS: Sure. And --

7 JUSTICE SOTOMAYOR: The ones showing  
8 his unconscious nature and the brain swelling.

9 MR. LEWIS: And so, even -- even  
10 assuming that those incidents happened and that  
11 that information was only introduced  
12 post-sentence, the district court's findings  
13 about the credibility of Jones's expert  
14 witnesses are compelling and entitled to  
15 deference because the head injury alone isn't  
16 really dispositive of anything. It just says  
17 that Jones fell and hit his head and he lost  
18 consciousness and there may have been some  
19 swelling in these things.

20 But, without the underlying expert  
21 opinions to explain why that affected Jones and  
22 why that affected his conduct at the time of the  
23 crimes, it's not as compelling of mitigation as  
24 it would be otherwise.

25 JUSTICE SOTOMAYOR: Can I say

1 something?

2 MR. LEWIS: Sure.

3 JUSTICE SOTOMAYOR: If a judge, a  
4 district court were to say I will only consider  
5 mitigating evidence if it is confirmed by 1,000  
6 scientists beyond a reasonable doubt --

7 MR. LEWIS: I don't think that's --

8 JUSTICE SOTOMAYOR: -- and then -- and  
9 then says I'm not going to consider it --

10 MR. LEWIS: Sure.

11 JUSTICE SOTOMAYOR: -- even if you  
12 credit it, you could come back and say the  
13 aggravators still outweigh the mitigators,  
14 correct?

15 MR. LEWIS: Correct, Judge.

16 JUSTICE SOTOMAYOR: So -- but, if a  
17 judge were to make that error --

18 MR. LEWIS: Mm-hmm.

19 JUSTICE SOTOMAYOR: -- would that be a  
20 legal error?

21 MR. LEWIS: I think so, you know,  
22 because it -- it wouldn't reflect the actual  
23 sentencing process where the sentencer has to  
24 have the ability to consider any relevant  
25 mitigating evidence.

1 JUSTICE SOTOMAYOR: All right. So I  
2 read the circuit court here as saying that's  
3 what the district court did or how it erred, not  
4 in ignoring the credibility determinations, et  
5 cetera, but in requiring more proof than the law  
6 required. Even under Arizona law, for example,  
7 it says you don't need to prove a nexus between  
8 the injury and the crime. That's what -- I'm --  
9 I have Tennard, T-E-N-N-A-R-D. It's a -- it's a  
10 Arizona case that says you don't need to prove  
11 that connection.

12 MR. LEWIS: Right.

13 JUSTICE SOTOMAYOR: All right? So  
14 what the -- I read the Ninth Circuit as saying  
15 is the court applied the wrong standard. It  
16 might want to give it less weight in the  
17 calculus, but that's not what it did. It set a  
18 legal standard that said you had to show  
19 conclusively that it was present.

20 MR. LEWIS: I -- I don't think the  
21 district court ever purported to say that it was  
22 refusing to consider any of this evidence for  
23 what it was worth. What we had here for --

24 JUSTICE SOTOMAYOR: What it said is  
25 Jones did not present "evidence confirming that

1 [he] suffers from neurological damage caused by  
2 head trauma or other factors." I don't see how  
3 that's not requiring positive proof.

4 MR. LEWIS: I think you can split it  
5 up. So the district court, when it was faced  
6 with conflicting experts on specified diagnoses,  
7 said, I have to figure out what's true and  
8 what's not true.

9 JUSTICE JACKSON: Except that's not  
10 what we've said in Porter. I mean, I'm sort of  
11 picking up on Justice Sotomayor's point here.  
12 This Court appears to have looked at a similar  
13 situation and said, you know, even -- I'm  
14 talking about the Porter case.

15 MR. LEWIS: Mm-hmm.

16 JUSTICE JACKSON: Even though the  
17 state's experts identified problems with the  
18 defendant's expert testimony, it was not  
19 reasonable for the court, the district court, to  
20 discount entirely the effect that this testimony  
21 might have had on the jury and the sentencing  
22 judge.

23 So I take that to mean that the -- the  
24 responsibility or the role of the district court  
25 is to see that there's mitigating evidence there

1 and, in the ultimate weighing perhaps, take into  
2 account whether the -- the district court thinks  
3 something is more or less credible as it weighs  
4 it against the aggravating evidence.

5 But to discount it, to say I'm not  
6 going to look at it because you haven't proven  
7 or whatever, seems like a problem with the  
8 district court's analysis.

9 MR. LEWIS: Sure. So two points about  
10 that. If -- if I'm remembering Porter  
11 correctly, I think what you had there wasn't the  
12 same sort of battle of experts that you had here  
13 because, in Porter, I believe the state's  
14 experts said that they couldn't agree on whether  
15 or not it would establish the sort of statutory  
16 mitigating circumstance.

17 So I think it's much different when  
18 you have experts that are saying categorically  
19 no, Jones does not suffer from cognitive  
20 impairment or PTSD, and the district court is  
21 forced to decide which account of Jones's mental  
22 condition is more accurate.

23 JUSTICE JACKSON: But what I guess  
24 what you're -- you're asking us here to say that  
25 the court of appeals erred in recognizing what



1 could be a problem with the district court's  
2 analysis. The court of appeals had to defer to  
3 these credibility findings under circumstances  
4 in which it isn't clear that the district court  
5 was supposed to be making this kind of finding.  
6 So it feels like one step more you -- you want  
7 us to establish here.

8 MR. LEWIS: Sure. And -- and, you  
9 know, I would just point out, Your Honor, that  
10 the -- the district court still considered the  
11 evidence establishing the foundation of all of  
12 these specified diagnoses.

13 For instance, the district court  
14 considered the impact of Jones's alleged further  
15 physical and sexual abuse, but the district  
16 court didn't give it very much weight because,  
17 as the district court saw it, Jones wasn't a  
18 credible reporter for that history --

19 JUSTICE KAGAN: But isn't --

20 MR. LEWIS: -- especially --

21 JUSTICE KAGAN: I'm sorry, go ahead.

22 MR. LEWIS: Oh, just especially in  
23 light of the trial court's finding that Jones  
24 had manufactured the tale about this third-party  
25 culpability theory and -- and presented it to

1 the jury.

2 JUSTICE KAGAN: I mean, isn't it  
3 possible that the district court misunderstood  
4 its role here? And this doesn't at all go to  
5 the question of whether the court of appeals  
6 might have also misunderstood its role.

7 But just focusing on the district  
8 court for a moment, that the district court  
9 seemed to think that it was the fact finder in  
10 this case and using a kind of  
11 preponderance-of-the-evidence standard, did you  
12 show this, did you show that, you know, by  
13 51 percent.

14 MR. LEWIS: Mm-hmm.

15 JUSTICE KAGAN: But I don't think that  
16 that's what the reasonable probability asks a  
17 district court to do. I mean, if you were just  
18 to put some artificial numbers on this, suppose  
19 that there was enough evidence in mitigation  
20 that a court could say something like, I don't  
21 know, there's like a 30 percent chance that this  
22 might have affected the way the original  
23 sentencer would have decided.

24 MR. LEWIS: Mm-hmm.

25 JUSTICE KAGAN: Now a 30 percent

1 chance is not a 51 percent chance. So, if I'm  
2 the fact finder, I find you haven't met your  
3 burden.

4 MR. LEWIS: Mm-hmm.

5 JUSTICE KAGAN: But, as I understand  
6 what we've asked district courts to do in this  
7 special Strickland area, it's basically to ask a  
8 different kind of question which does not give  
9 you a 51 percent threshold. It just says, you  
10 know, if there's some kind of chance, it might  
11 be 30 percent or it might be 25 percent or  
12 whatever it is --

13 MR. LEWIS: Mm-hmm.

14 JUSTICE KAGAN: -- that the district  
15 court -- that the original sentencer would have  
16 done something differently, then I'm supposed to  
17 give it back to the original sentencer.

18 So that's where I think it -- it looks  
19 to me as though the district court misunderstood  
20 its role, and I'm wondering what the answer to  
21 that is.

22 MR. LEWIS: I mean, it's -- it's  
23 possible, I suppose, Your Honor, that -- that --  
24 you know, the -- these are trial courts and  
25 they're used to, you know, settling disputes

1 between conflicting evidence.

2 JUSTICE KAGAN: Completely. It seems  
3 like a very natural thing for the district court  
4 to have done. I'm a fact finder. I'm going to  
5 say you're credible; you're not. You've met  
6 your 51 percent burden; you haven't. But this  
7 is a special context where we -- we actually  
8 have said that that's not the right inquiry.

9 MR. LEWIS: And, you know, I think the  
10 district court was doing things that were still  
11 proper even under this view. It's just that  
12 those things would happen in the weighing of the  
13 prejudice determination.

14 JUSTICE ALITO: Mr. -- Mr. Lewis, have  
15 we ever said that it's enough to show there's  
16 some kind of chance?

17 MR. LEWIS: No, Your Honor.

18 JUSTICE ALITO: Did the district court  
19 ever say that it was applying a  
20 preponderance-of-the-evidence standard?

21 MR. LEWIS: No, Your Honor.

22 JUSTICE KAGAN: Is it a reasonable  
23 understanding of their opinion to think that it  
24 was doing fact finding in the normal way?

25 MR. LEWIS: I think it was reasonable

1 to assume from the opinion that the district  
2 court, when confronted with the conflicting  
3 evidence on specified diagnoses, did what it had  
4 to do to separate truth from fiction.

5 JUSTICE BARRETT: Counsel, can I ask  
6 you about the evidentiary hearing in the -- in  
7 the first place? I've been trying to figure out  
8 because this case has a long procedural history,  
9 and the state isn't challenging this, I  
10 understand, but I just want to understand the  
11 rationale for it.

12 Why -- do you think the district court  
13 was right to conduct an evidentiary hearing and  
14 take in the extra evidence? Because, you know,  
15 2254(e)(2) requires the court to find two things  
16 before the -- the new evidence is taken in, and  
17 one is "a factual predicate that could not have  
18 been previously discovered through the exercise  
19 of due diligence and" -- that was what the Ninth  
20 Circuit found -- and -- and, B, "the facts  
21 underlying the claim would be sufficient to  
22 establish by clear and convincing evidence that  
23 but for the constitutional error, no reasonable  
24 fact finder would have found the applicant  
25 guilty of the underlying offense."

1                   How did -- how did that figure into  
2                   the conducting of the evidentiary hearing? I  
3                   mean, maybe -- maybe it was right. Like I say,  
4                   the procedural -- you know, the procedural  
5                   history of this is complicated.

6                   MR. LEWIS: Sure.

7                   JUSTICE BARRETT: Was that correct,  
8                   and, if it wasn't, why isn't the state  
9                   challenging that?

10                  MR. LEWIS: Well, this was a -- a  
11                  pre-Pinholster evidentiary hearing. So I  
12                  believe the hearing was granted in 2003,  
13                  thereabouts, if I'm remembering correctly. I --  
14                  I can't give the reasons for why --

15                  JUSTICE BARRETT: Yeah.

16                  MR. LEWIS: -- the state didn't more  
17                  vehemently oppose the hearing.

18                  JUSTICE BARRETT: Well, was it proper  
19                  to have the evidentiary hearing?

20                  MR. LEWIS: I think probably not, Your  
21                  Honor, but this is -- you know, we live in this  
22                  sort of post-Ramirez world where, you know, we  
23                  expect people to exhaust their claims and  
24                  develop their records in state court before  
25                  those claims can be considered in federal court

1 and without the benefit of any new evidence that  
2 wasn't put before the state court.

3 So I think where we are now, we -- we  
4 would clearly say this is improper, but at the  
5 time when the court granted the hearing in 2003,  
6 you know --

7 JUSTICE BARRETT: Okay.

8 MR. LEWIS: -- it's hard to say. I  
9 appreciate the question, though.

10 JUSTICE JACKSON: Can I direct your  
11 attention to the second alleged problem --

12 MR. LEWIS: Sure.

13 JUSTICE JACKSON: -- with the court of  
14 appeals? You said that they failed to  
15 meaningfully consider the aggregating -- the  
16 aggregating evidence and its weight.

17 MR. LEWIS: Sure.

18 JUSTICE JACKSON: And I'm just trying  
19 to understand that argument in light of what  
20 they actually did. I see them as listing three  
21 aggravating factors, as saying this -- the  
22 correct standard. I think you agree that the  
23 standard is that they say, on de novo review, we  
24 must weigh these factors against the mitigating  
25 evidence developed in the state record that was

1 available but not presented. Is that the right  
2 standard?

3 MR. LEWIS: Sure. Yeah.

4 JUSTICE JACKSON: All right. And then  
5 they say, reweighing the evidence in aggravation  
6 against the total -- totality of the mitigating  
7 evidence, they conclude that the mitigating  
8 evidence outweighs. But the important part, I  
9 think, is that they go on to say: This  
10 conclusion is supported by the Strickland  
11 prejudice analysis conducted by the Supreme  
12 Court and our court in similar cases.

13 MR. LEWIS: Mm-hmm.

14 JUSTICE JACKSON: And then they go  
15 through case after case after case, identifying  
16 an aggravating factor that is similar to the one  
17 in this case and explaining how, in that case,  
18 the court, whether it's this Court or another  
19 court, found it to be outweighed by similar  
20 mitigating evidence.

21 So why --

22 MR. LEWIS: Sure.

23 JUSTICE JACKSON: -- why is that not a  
24 kind of weighing analysis that -- that is proper  
25 in this circumstance?



1           MR. LEWIS: Well, first, you know,  
2 there's -- there's no ascription by the circuit  
3 court of any type of weight to the aggravating  
4 circumstances. So what we have here is the  
5 district court making the first de novo review  
6 of the prejudice question. It wasn't made in  
7 state court. We haven't raised that here. The  
8 district court's the first one to make it. And  
9 the district court ascribes great weight to the  
10 aggravating circumstances present here.

11           The Ninth Circuit doesn't rebut that  
12 at all, and they don't make any comment on the  
13 actual weight of those aggravating circumstances  
14 to give some context for how it's actually being  
15 weighed.

16           JUSTICE JACKSON: So you're saying  
17 they have to speak direct -- because what I see  
18 them as doing here is rebutting that in the  
19 context of its review of other cases that have  
20 talked about similar aggravating factors and  
21 have done the weighing.

22           MR. LEWIS: Mm-hmm.

23           JUSTICE JACKSON: I mean, I total ---  
24 I'm totally with you if they hadn't --

25           MR. LEWIS: Yeah.

1 JUSTICE JACKSON: -- done that.

2 MR. LEWIS: Yeah.

3 JUSTICE JACKSON: Right? Because then  
4 we -- we see them not even grappling with the  
5 idea of weighing. But it looks like they've  
6 gone through and they've said, okay, let's find  
7 other cases where similar aggravating factors  
8 have been present --

9 MR. LEWIS: Mm-hmm.

10 JUSTICE JACKSON: -- and mitigating  
11 factors were not presented and what did the  
12 court say in the -- in those situations and --  
13 and this one is similar. I -- I guess you're --  
14 you're saying that the error here is that they  
15 had to have an additional paragraph in which  
16 they directly said, and so the district court  
17 got it wrong or --

18 MR. LEWIS: You know, I think that's  
19 possible because that's the last thing we have  
20 in the record that actually ascribes any sort of  
21 weight to the aggravating circumstances. And if  
22 you read Judge Bennett's dissent, you see what  
23 we would be looking for in that type of  
24 situation.

25 In a lot of the cases that my friend

1 cites, you know, we were dealing with AEDPA  
2 review of a state court determination. And when  
3 you think about Williams v. Taylor, you know,  
4 this Court is saying that the state court  
5 correct -- correctly emphasized the strength of  
6 the prosecution evidence supporting the future  
7 dangerousness to aggravating circumstance. Even  
8 a sentence like that shows that the court has  
9 assigned some weight to an aggravating  
10 circumstance and considered it in some way.

11 But we don't have that here. We just  
12 have a bare recitation that aggravating  
13 circumstances were found, that they existed, but  
14 the court focused solely on the weight of the  
15 new mitigating evidence. And I think that  
16 demonstrates that they didn't consider what  
17 Strickland calls for them to consider, which is  
18 the balance between the total mitigation and the  
19 aggravation.

20 CHIEF JUSTICE ROBERTS: Counsel, you  
21 mentioned, I think, in -- in your opening if I'm  
22 remembering correctly, that one thing we should  
23 do today is clarify the legal standards that are  
24 applicable.

25 MR. LEWIS: Yeah.

1 CHIEF JUSTICE ROBERTS: What do you  
2 want us to say that we haven't said already?

3 MR. LEWIS: You know, I -- I do think  
4 that this Court in Strickland was -- was clear  
5 that, you know, there's a factual component to  
6 this inquiry and that the legal questions are  
7 whether there was deficient performance and  
8 whether there was prejudice from such deficient  
9 performance.

10 But I think there's a little room  
11 within those legal determinations for factual  
12 findings that are entitled to deference. These  
13 prejudice determinations are so fact-intensive  
14 because you're -- reviewing courts are required  
15 to engage with the circumstances of the crime,  
16 with life history details, and to figure out how  
17 those would be weighed and -- and resolve the  
18 issue.

19 So I think, when the district court  
20 makes those types of weighing determinations  
21 with the benefit of seeing live testimony, the  
22 demeanor of how people are presenting their  
23 opinions, all these things that trial courts are  
24 so well situated to do, makes them a good fact  
25 finder in this context, even when you're within

1 the legal question of prejudice, for instance,  
2 that I think deference is appropriate.

3 And it would be helpful to -- to any  
4 courts conducting these type of reviews to  
5 understand how far that deference to their  
6 factual determination extends.

7 JUSTICE BARRETT: So, to be clear, you  
8 would say that underlying facts like the head  
9 injury, for example, would be entitled to clear  
10 error deference by the court of appeals?

11 MR. LEWIS: I think so, Your Honor.

12 JUSTICE BARRETT: And that it's only  
13 the prejudice weighing, the weighing of the  
14 mitigating and the prejudicial evidence, that  
15 gets de novo review in the court of appeals?

16 MR. LEWIS: I think that's right  
17 because, you -- the -- there, the district court  
18 is applying the legal test that this Court gave  
19 in Strickland for finding prejudice, and so that  
20 would be naturally subject to de novo review.

21 JUSTICE BARRETT: And so just to  
22 connect it back to some of the questions Justice  
23 Kagan was asking you, you're saying that for the  
24 underlying fact like, for example, the head  
25 injury, a preponderance standard would apply,

1 but that the Strickland standard, the special  
2 Strickland -- Stick -- Strickland standard --  
3 sorry -- applies at the weighing only?

4 MR. LEWIS: I'm not sure. I don't  
5 think we've really briefed what burden would  
6 apply to -- to establish these facts. You know,  
7 in a traditional mitigating hear -- you know, in  
8 a penalty phase hearing in a -- in a trial  
9 court, in Arizona at least, capital defendants  
10 are required to prove their evidence by a  
11 preponderance of the evidence.

12 But, even if it's under a reasonable  
13 probability standard, that is, whether there's a  
14 reasonable probability that a sentencer would  
15 find it compelling in the weighing, that's still  
16 a burden that they have to meet, and the  
17 district court or trial court's determination in  
18 that regard would be entitled to deference.

19 JUSTICE KAGAN: Mr. Lewis, I -- I  
20 agree with you entirely that the circuit court  
21 is supposed to treat the district -- should  
22 treat the district court's evaluation of these  
23 kinds of claims with great care. The district  
24 court is the one that sat there through all the  
25 evidence. The district court presumably knows

1 the record a lot better than the circuit court  
2 does. So I'm full square with you on that.

3 But, when you start talking about sort  
4 of clear error review of fact finding, that's  
5 when I see a real switch in the way we do the --  
6 in the way we understand the Strickland inquiry,  
7 because that would suggest to district courts  
8 that their job in this procedure -- proceeding  
9 -- may I finish?

10 CHIEF JUSTICE ROBERTS: Yes, sure.

11 JUSTICE KAGAN: Is to say: Was there  
12 a head injury, was there not a head injury? Did  
13 he have PTSD, did he not have PTSD? Which is,  
14 of course, the usual thing that district courts  
15 do but not the usual thing that we've asked them  
16 to do in this context.

17 MR. LEWIS: I mean, I see the point,  
18 Your Honor. I just think that there is room for  
19 these types of factual determinations and,  
20 because the district court is so well situated  
21 to make those determinations, that they should  
22 be entitled to deference.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Mr. Lewis, the  
2 question of prejudice is a mixed question,  
3 right?

4 MR. LEWIS: Yes, Your Honor.

5 JUSTICE ALITO: All right. What's the  
6 legal component and what is the factual  
7 component?

8 MR. LEWIS: The legal component is  
9 whether there's a reasonable probability that,  
10 in consideration of the total mitigation and the  
11 aggravating evidence, the sentence would have  
12 changed.

13 JUSTICE ALITO: You think that whether  
14 there's a reasonable probability is a question  
15 of law?

16 MR. LEWIS: I think that's -- that's  
17 the standard that Strickland formulated.

18 JUSTICE ALITO: Probability is a  
19 question of law? Is -- if I flip a coin, what's  
20 the probability that it's going to be heads?

21 MR. LEWIS: Fifty-fifty, Your Honor.

22 JUSTICE ALITO: Is that a legal  
23 question?

24 MR. LEWIS: No, Your Honor.

25 JUSTICE ALITO: Is that a factual



1 question?

2 MR. LEWIS: Yes, Your Honor.

3 JUSTICE ALITO: Somebody jumps out a  
4 -- out of a -- a third-story window. What is  
5 the probability that the person is going to die?  
6 Is that a factual question?

7 MR. LEWIS: Perhaps an actuary and a  
8 doctor could formulate some probability to guess  
9 at that.

10 JUSTICE ALITO: Yeah, well give me a  
11 situation in which probability is anything other  
12 than a factual question.

13 MR. LEWIS: Right, Your Honor.

14 JUSTICE ALITO: Then why do you -- why  
15 are you saying that whether there's a reasonable  
16 probability is a -- is a legal question?

17 There's a legal part of the -- of the  
18 prejudice inquiry. It's what is the standard.  
19 The standard is reasonable probability. If the  
20 district court says, no, it's any minor  
21 probability, that's wrong. If the district  
22 court says it's beyond a reasonable doubt,  
23 that's wrong. But they're -- that's the legal  
24 part. Then the factual part is applying that to  
25 the facts of the case, was there a reasonable

1 probability.

2 You with me so far?

3 MR. LEWIS: Yes, Your Honor.

4 JUSTICE ALITO: Thank you.

5 MR. LEWIS: Thank you, Judge.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 JUSTICE SOTOMAYOR: The district court  
9 never said that this defendant never experienced  
10 those head injuries. He just said he didn't  
11 believe that they were tied to the crime,  
12 correct?

13 MR. LEWIS: I think, in some regards,  
14 because you had all these other injuries that  
15 were being reported in the -- the evidentiary  
16 hearing --

17 JUSTICE SOTOMAYOR: But he never said  
18 he believed -- disbelieved the reporting of the  
19 mother that the child -- that the defendant had  
20 at five years old?

21 MR. LEWIS: Not as to the  
22 five-year-old incident.

23 JUSTICE SOTOMAYOR: And -- and not to  
24 any of it. All right. Justice Barrett asked  
25 you about 2254(e)(2). I think Cullen itself

1 said that when there's de novo review of an  
2 issue, the state court -- presented to the state  
3 court that it never reached, that a fact finding  
4 was -- fact finding was appropriate in habeas?  
5 That might be the reason why the state didn't  
6 fight the fact finder?

7 MR. LEWIS: Perhaps, Your Honor. I --  
8 I didn't come prepared to -- to answer those  
9 questions. I apologize.

10 JUSTICE SOTOMAYOR: But -- but Cullen,  
11 I will say Cullen at 185 says that.

12 MR. LEWIS: Thank you, Your Honor.

13 JUSTICE SOTOMAYOR: As you know, I  
14 dissented there, so I know that decision well.

15 MR. LEWIS: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?  
17 Justice Gorsuch?

18 JUSTICE GORSUCH: Just want to see if  
19 I understand where the ball has bounced this  
20 morning.

21 MR. LEWIS: Sure, Your Honor.

22 JUSTICE GORSUCH: So one could view  
23 reasonable probability, as your colloquy with  
24 Justice Alito suggested, as a factual inquiry,  
25 right?

1 MR. LEWIS: Sure, Your Honor.

2 JUSTICE GORSUCH: Or one could, I  
3 think, as you've suggested otherwise in response  
4 to other questions, suggest that it has both a  
5 factual and a legal component, and in order to  
6 assess whether a jury or a judge at sentencing  
7 would have changed its mind, you first need to  
8 know what the facts are --

9 MR. LEWIS: Yes, Your Honor.

10 JUSTICE GORSUCH: -- that would be  
11 relevant to that -- that inquiry, call it legal,  
12 call it factual, and somebody has to decide what  
13 those facts are.

14 MR. LEWIS: Yes, Your Honor.

15 JUSTICE GORSUCH: Was he hit on the  
16 head? How many times? Did it -- did it change  
17 his cognitive abilities at the time of the  
18 crime? Those are all facts that somebody needs  
19 to find. Is that your point?

20 MR. LEWIS: Yes, Your Honor. And --  
21 and that's what we've advocated for in this case  
22 through the briefing, is that the district court  
23 was faced with diametrically conflicting  
24 evidence. Jones has PTSD. Jones does not have  
25 PTSD. And the district court had to determine

1 what was true and what was not true before it  
2 could move on to the legal question.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6 JUSTICE JACKSON: So I guess where I'm  
7 getting a little confused about all of this is  
8 that I thought that the standard at issue, as  
9 you articulated it in response to Justice Alito,  
10 was whether, in consideration of the total  
11 mitigating evidence, a reasonable -- that is --  
12 there's a reasonable probability that the  
13 outcome would have been different.

14 Is that right?

15 MR. LEWIS: So, as Strickland terms  
16 it, it's a reasonable probability that the  
17 sentence would have been different in  
18 consideration of the total mitigation weighed  
19 against the aggravating circumstances.

20 JUSTICE JACKSON: Perfect. All right.  
21 I agree.

22 I -- I think what Justice Kagan is  
23 saying is that that standard takes into account  
24 for the purpose of its application that all of  
25 the mitigating evidence is being presented, that

1 we present this mitigating evidence, we present  
2 this aggravating evidence, and would, if all of  
3 that had happened, be out -- is there a  
4 reasonable probability that the outcome would be  
5 different.

6 I think the problem that's happening  
7 here is that the district court, being a  
8 district court, is screening the mitigating  
9 evidence upfront. There's sort of like another  
10 layer being added to this on the front end where  
11 the district court, as you said in response to  
12 Justice Gorsuch, is deciding, well, is this  
13 really mitigating evidence? Is this a fact?  
14 Did this thing happen?

15 And it's sort of putting that initial  
16 screen on it so that when we get to the  
17 Strickland weighing, we have a smaller corpus of  
18 mitigating evidence because we've already weeded  
19 out the stuff that the district court -- I think  
20 that's not what's supposed to be happening  
21 actually.

22 I think that whether or not this thing  
23 is actually a fact is determined ultimately,  
24 that at this level right now, the district court  
25 is just deciding whether or not -- that -- that

1       this basically has to go back to the states,  
2       whether the person gets habeas and it's got to  
3       be done over again in some sense.  And in --  
4       later is where we find out whether or not the  
5       thing is really true.

6                       But, in the context of Strickland  
7       prejudice, we're just saying this fact was never  
8       presented at all, and the question is to what  
9       extent was the defendant prejudiced by that  
10      omission.  So we're not screening upfront for  
11      whether or not that fact was true in any sense.  
12      We're sort of accepting it and -- and -- and  
13      saying:  Well, in any event, the defendant might  
14      not even be prejudiced because it was such a  
15      thing, right, that it doesn't outweigh the  
16      aggravators, so we're not going to send it back.

17                      So I think the problem with your  
18      analysis is it's got -- it has -- and the  
19      district court's analysis in -- in this case is  
20      it has the district court doing something that  
21      actually doesn't fit in this Strickland dynamic.

22                      Does that make sense?

23                      MR. LEWIS:  I see your point, Your  
24      Honor.  That's not the argument that we've made.  
25      And I think, even under your point, even if it

1 was improper for the district court to -- to  
2 screen the things in the manner that -- that the  
3 point says that they do, I think that those  
4 determinations are still properly made in the  
5 weighing.

6           When you look at a case like Belmontes  
7 and the Court is talking about how what  
8 courts -- reviewing courts need to consider is  
9 the interaction between this evidence, how it  
10 changes the entire evidentiary picture, where  
11 the district court is saying things like Jones's  
12 experts are not credible for X, Y, and Z  
13 reasons, then, even under this view, those  
14 considerations become relevant in the weighing.

15           JUSTICE JACKSON: Thank you.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18           Mr. Andre.

19           ORAL ARGUMENT OF JEAN-CLAUDE ANDRE

20           ON BEHALF OF THE RESPONDENT

21           MR. ANDRE: Mr. Chief Justice, and may  
22 it please the Court:

23           The issue in this case is whether Mr.  
24 Jones was prejudiced at his capital sentencing  
25 hearing by the concededly deficient performance



1 of his counsel. Counsel had only been a lawyer  
2 for three-and-a-half years and never as lead  
3 capital counsel.

4           Despite numerous red flags about  
5 Jones's mental health and emotional disorders,  
6 counsel did not start his mitigation case or  
7 mitigation investigation until after Jones's  
8 conviction, and all he did was request an  
9 Arizona Rule 26.5 evaluator.

10           The result was that the sentencing  
11 judge heard only about Jones's complicated  
12 birth, abuse by his first step-father up until  
13 age six, some head injuries, and from the Rule  
14 26.5 evaluator that Jones had some "possible"  
15 neurological abnormalities, and that was because  
16 the evaluator did not have the time and it would  
17 be beyond his charge to make actual diagnoses.

18           At the federal evidentiary hearing in  
19 this case, of course, Mr. Jones introduced  
20 substantial new mitigation evidence that  
21 sentencing -- that the sentencing judge had  
22 never heard. The new mitigating evidence showed  
23 that Jones was chronically abused throughout his  
24 entire formative years in childhood, well beyond  
25 age six by not just one but by multiple male

1 family members, he was plied with alcohol by a  
2 step-grandfather who then sexually abused him,  
3 and, most critically, the new mitigation  
4 evidence actually included diagnoses, evidence  
5 about the effects that all the abuse and head  
6 injuries had on Jones.

7           These included the opinions of four  
8 experts who diagnosed him with, among other  
9 things, brain damage, PTSD, bipolar depressive  
10 disorder, and a learning disability.

11           All this new evidence would have  
12 dramatically changed the sentencing calculus  
13 both in the trial court and before the Arizona  
14 Supreme Court on its independent review.

15           But, instead of looking at the sum  
16 total of all the evidence and asking whether it  
17 established a reasonable probability that the  
18 Arizona court system might have imposed a  
19 different sentence, the district court serially  
20 nit-picked all of Jones's mitigating evidence  
21 and then offered its view of what it thought the  
22 more persuasive side was.

23           That was error. The Ninth Circuit  
24 properly corrected it, and this Court should  
25 affirm. If this Court has questions, I welcome

1       them.

2                   JUSTICE THOMAS:  It seems the district  
3       court did not say from -- at least from my  
4       reading that this evidence was as significant as  
5       you say it is.  Otherwise, it would have found  
6       prejudice, right?

7                   MR. ANDRE:  Well, the district court  
8       -- I think, in the most recent colloquy between  
9       Justice Jackson and Mr. Lewis, I think the  
10      district court did exactly what Justice Jackson  
11      described, which was the district court here  
12      went through and said:  Okay, here's this  
13      disputed fact, I'm going to resolve it 51/49,  
14      60/40, whatever I -- I -- I view of it, and  
15      then, because Jones loses on that point, it  
16      doesn't get considered with respect to  
17      Strickland prejudice.

18                   And so, to -- to answer your -- I  
19      guess your question more directly, yes, the  
20      district court thought the state should win  
21      here, but the problem is that -- and I  
22      understand this.  You know, district courts  
23      sentence federal defendants all the time and are  
24      called on to make -- make findings that then are  
25      subject to clear error review, right, vulnerable

1 victim, loss calculations, which, you know,  
2 white-collar defendant's financial loss expert  
3 is more credible. That's not this context.

4 This is a context where the district  
5 court is supposed to collect all this evidence  
6 and make its observations about what -- what --  
7 what -- how significant the evidence is, how  
8 weighty it is, but actually address Strickland  
9 prejudice at the back end and then, when the  
10 appellate court looks at it, the only things to  
11 which clear error review would attach would be  
12 the kind of core factual findings that this  
13 Court has said it should be making: is the  
14 evidence new, is it mitigating, is it  
15 substantial, was it available at the time, and  
16 then whatever other kind of screening  
17 mechanisms the district court wants to --

18 JUSTICE KAGAN: Well, but there's  
19 something else that the circuit court is  
20 supposed to do, which is the circuit court is  
21 supposed to weigh the mitigating evidence  
22 against the aggravating evidence.

23 And, here, you know, the circuit court  
24 once said that that was what it was doing, but  
25 then it completely ignores all the aggravating

1 evidence, which was substantial in this case.

2 So, you know, what everyone can say  
3 about what the district court did wrong, we're  
4 reviewing the circuit court opinion, and that  
5 opinion doesn't do what it's supposed to do.

6 MR. ANDRE: So, it's -- I will  
7 acknowledge, Justice Kagan, that that is the --  
8 the -- the hardest part for me, at least my  
9 view, of the Ninth Circuit opinion. I mean, the  
10 Ninth Circuit did go through over four pages and  
11 compare the facts of this case to the facts of  
12 other cases. But I -- I take the point, and I  
13 forget which one of Your Honors mentioned it,  
14 that the --

15 JUSTICE KAGAN: Right, but it's  
16 comparing, like, oh, in these other cases, the  
17 court had all this mitigating evidence, and,  
18 here, there's the same kind of mitigating  
19 evidence, and that means our job is done.

20 But that's -- you know, what we've  
21 said is that the circuit court has to look at  
22 the good and the bad. So the circuit court is  
23 supposed to look at the mitigating evidence, as  
24 well look at the rebuttal case that the state  
25 put on about -- about the strength of that

1 mitigating evidence, and then, most crucially,  
2 weigh it against the aggravating evidence.

3 And that -- that most crucial last  
4 stage -- I mean, there were lots of aggravators  
5 in this case, and the circuit court doesn't even  
6 mention some of them.

7 MR. ANDRE: Well -- so I'd guess --  
8 I'd like to push back on you, respectfully. So  
9 the Ninth Circuit did three times separately  
10 acknowledge its obligation to do the reweighing.  
11 Then the Ninth Circuit twice didn't just cite  
12 but actually quoted the aggravating factors cite  
13 -- found by the trial court. And so -- that --  
14 that listed them, and they have, you know,  
15 brutal language built right into them.

16 Then the court, you know, also didn't  
17 shy away from the -- the underlying facts of  
18 these murders. It recounted them in detail in  
19 the beginning of the opinion and again in the  
20 section where it did engage in the comparison.

21 Again, I -- I acknowledge this is -- I  
22 wish the Ninth Circuit had said more on this  
23 particular part of its analysis because it is  
24 the -- the thinnest, but I think it's still  
25 enough.

1                   And what's notable also about this  
2 case, because, you know, you mentioned the  
3 additional bad evidence that may have come out,  
4 this is not a case like Wong v. Belmontes. In  
5 fact, Wong, I like that case quite a bit because  
6 it's a great contrast for us. There is no new  
7 bad, unlike a new -- an additional murder like  
8 we had in Wong. There is no new additional bad  
9 to be introduced in this case. The only  
10 rebuttal case the state had to what we presented  
11 at the federal evidentiary hearing were its  
12 competing views of our experts.

13                   And as, you know, we've been  
14 discussing, that ultimately -- that ultimate  
15 credibility determination is best reserved for  
16 the state center. When you have competing  
17 experts -- they're not Daubertable, if I can  
18 make up that word, they're not looney tunes and  
19 subject to Rule 702 -- they go to the ultimate  
20 fact finder if it's a toxic tort case or the  
21 ultimate sentencer if it's a criminal case.

22                   And so, again, here, there really  
23 isn't new bad to be weighed. There's just what  
24 was always in the case that was aggravating --  
25 and it's significant. I -- I get that. Three

1 murders, you know, this is a brutal case. But  
2 against this wealth of mitigation evidence, old  
3 and new, that we were able to put in between the  
4 various proceedings, and, on balance, this case  
5 looks like a lot like Williams and Porter.

6 JUSTICE ALITO: Mr. -- Mr. Andre, can  
7 I ask you about what seems to be your lead  
8 argument? This is on page 14 of your brief in  
9 the summary. "If the defendant presents  
10 substantial evidence of the kind that a  
11 reasonable sentencer might deem relevant to the  
12 defendant's moral culpability, even despite  
13 powerful aggravation evidence, relief is  
14 warranted." Okay?

15 So let's think of a case where the  
16 defendant is sort of like Hannibal Lecter, all  
17 right? You've got a defendant who has kidnapped  
18 and hideously tortured 25 children and sent  
19 messages to the media saying: I love to kill  
20 and I'll always kill if I have the chance.

21 So you've got the most horrible  
22 aggravating evidence that you possibly can have.  
23 Then you say that all that's necessary in order  
24 to get resentenced is for the defendant to come  
25 up with evidence that a reasonable sentencer



1 might deem relevant to the defendant's moral  
2 capability? That's your argument?

3 MR. ANDRE: I -- I will acknowledge in  
4 -- that is in the summary of argument section of  
5 the brief, not the argument. I think our -- our  
6 position is quite more nuanced. I mean,  
7 ultimately, what it is, is that the sum total of  
8 evidence, the good and the bad, is then compared  
9 against the guideposts that, whether you're the  
10 district court or you're the Ninth Circuit, the  
11 guideposts that those courts have, and those  
12 guideposts are this Court's Strickland  
13 precedents.

14 JUSTICE ALITO: All right. Let me ask  
15 you about another legal argument that you make,  
16 and this is on page 15. "A district  
17 court...errs when its fact finding assumes the  
18 role of state sentencer by disregarding the  
19 opinions of one party's experts based on the  
20 superior credibility of the other" -- "other  
21 party's experts..."

22 All right. So, I mean, let's think of  
23 a case where the state's expert is minimally  
24 qualified, is torn apart on cross-examination in  
25 the hearing before the district court, and then

1 the defendant has -- and let's say the issue is  
2 whether there's organic brain damage. The  
3 defendant has the country's five leading experts  
4 on organic brain damage, and they all testify.

5 You say, well, the -- the can't -- the  
6 court can't make a -- a credibility  
7 determination?

8 MR. ANDRE: So --

9 JUSTICE ALITO: Or is it the -- does  
10 it go just the other way? I mean, just go one  
11 way?

12 MR. ANDRE: No. The --

13 JUSTICE ALITO: The court -- the court  
14 can't say I'm not going to give any real weight  
15 to this very -- this expert who has low  
16 qualifications, testimony was horrible, I don't  
17 believe him, he -- he looked like a liar on the  
18 stand, and then all these other experts whose  
19 credentials are unimpeachable and their  
20 testimony was very impressive, can't make a  
21 credibility determination?

22 MR. ANDRE: So I'd like to unpack that  
23 with a number of responses if I may, Justice  
24 Alito. First, I read the Ninth Circuit's use of  
25 credibility in that section of its opinion as --

1 as a little imprecise. The Ninth Circuit  
2 acknowledged in its opinion that a district  
3 court remains free to make credibility  
4 determinations. Then, in the next sentence, it  
5 said the trial court or the district court here  
6 erred in determining which side's experts were  
7 more credible.

8 JUSTICE ALITO: Well, I'm not -- I'm  
9 not really talking here about what the Ninth  
10 Circuit said. I'm talking about what you said  
11 in your brief.

12 MR. ANDRE: Oh, I --

13 JUSTICE ALITO: Can the -- can the  
14 court make credibility determinations about  
15 experts, yes or no?

16 MR. ANDRE: Yes. And the district  
17 court here did not, and that's what I was trying  
18 to get at by explaining what the Ninth Circuit  
19 was saying. The district court didn't say that  
20 these experts are trying to sneak in junk  
21 science, that, you know, Andre was there on the  
22 stand, he was sweating bullets, he wouldn't let  
23 anybody -- look anybody in the eyes; therefore,  
24 I don't believe him.

25 The district court effectively

1 resolved this battle of the experts based on the  
2 transcript. To be sure, the district court did  
3 sit through the hearing, but when you look at  
4 the district court's ruling, nowhere does the  
5 court layer on any of the kind of in-court  
6 demeanor observations that the -- Rule 52 itself  
7 says you have to give kind of even special  
8 deference to.

9           So my point being the -- the district  
10 court is free to make these kinds of credibility  
11 determinations that are unique to it when it is  
12 receiving evidence live. This district court  
13 didn't do that.

14           The Ninth Circuit's point and my point  
15 is that in the Strickland prejudice context, it  
16 is error for a district court to say I think  
17 that the state's experts are more persuasive  
18 than Jones's; therefore, I'm going to not  
19 consider all of the evidence that came from  
20 Jones's experts, and, therefore, he loses on  
21 Strickland prejudice.

22           JUSTICE ALITO: Well, there's no  
23 question that a fact finder gets special  
24 deference when the -- the credibility -- when he  
25 makes a credibility determination based on

1 demeanor, et cetera, in -- in a hearing before.

2 But, even if it's -- even if the --  
3 the court says, look, I've looked at the  
4 credentials of this person and I've looked at  
5 the credentials of this other person, I've  
6 looked at the report, a very poor, short  
7 conclusory report of this one expert, these  
8 other reports that are much longer, much more  
9 detailed, much more impressive, can't say I'm  
10 not going to give any real weight to this one as  
11 opposed to the other one? Can't do that, and  
12 that's subject -- that's not subject to clear  
13 error review?

14 MR. ANDRE: In -- in -- in this  
15 context, no. And -- and, actually, even in  
16 other contexts, I'm not sure it would be. It  
17 would still get kind of careful respect, as  
18 Justice Kagan noticed -- noted, because we do  
19 care what, you know, the lower court judges  
20 think about issues as they percolate up. That's  
21 why courts often remand even pure questions of  
22 law back to lower courts, to get their input on  
23 how should we resolve this.

24 JUSTICE GORSUCH: Well --

25 JUSTICE JACKSON: And there's a --

1 JUSTICE GORSUCH: -- counsel, how does  
2 -- how does a district court do -- do the  
3 Strickland analysis without finding some facts?  
4 It has to do a reasonable probability analysis.  
5 You -- I think you've conceded that --

6 MR. ANDRE: Absolutely.

7 JUSTICE GORSUCH: -- today. Well,  
8 okay. Well, page 24 of your brief says the  
9 state sentencer does that, not the federal  
10 district court. So I -- you know, I -- I'm a  
11 little flummoxed by that, I've got to confess  
12 too, as Justice Alito was.

13 But having acknowledged that, that the  
14 federal district court has to make a reasonable  
15 probability determination, I would think that  
16 sometimes at least a district court could say,  
17 putting aside the facts of your case, that I --  
18 I believe this expert rather than that expert,  
19 and that's -- that informs my reasonable  
20 probability analysis. I have to determine what  
21 the facts are before I can decide whether a jury  
22 would or, in this case a sentencing judge,  
23 would -- there's a reasonable probability, not a  
24 51 percent probability, we all agree, but a  
25 reasonable probability that the outcome might

1 have been different.

2 And if -- if one of the experts is  
3 patently unbelievable, incredible, just assume  
4 that, wouldn't that be a factual finding that  
5 could inform a probable -- a probabilistic  
6 analysis?

7 MR. ANDRE: Yes. And, again, that's  
8 not -- that -- that's not our case.

9 JUSTICE GORSUCH: I understand that.  
10 But, in -- in that case, so you agree that's a  
11 fact finding that a district court can make. Do  
12 you -- do you also agree that would be  
13 reviewable for clear error?

14 MR. ANDRE: Yes.

15 JUSTICE GORSUCH: Okay.

16 MR. ANDRE: So, again, this, the kind  
17 of 702, Daubertable, or just pure demeanor,  
18 in-court observation findings, those are factual  
19 findings that go beyond the ones relating to  
20 whether the evidence is new, whether it's  
21 mitigating, and whether it was available at the  
22 time, that a district court is free to make but  
23 our district court did not here. And because  
24 we're --

25 JUSTICE GORSUCH: I understand, but --

1 but we agree on the legal principle that  
2 sometimes a probabilistic analysis is going to  
3 depend on what the facts are?

4 MR. ANDRE: Yes.

5 JUSTICE GORSUCH: And a district  
6 court's best positioned to do that?

7 MR. ANDRE: Right.

8 JUSTICE GORSUCH: And that's  
9 reviewable for clear error?

10 MR. ANDRE: Right. But, in --

11 JUSTICE JACKSON: But --

12 MR. ANDRE: -- a case like this, where  
13 you have all of this evidence and there wasn't a  
14 true credibility determination, that then all of  
15 that evidence gets thrown into the reasonable  
16 probability analysis on the back end, which,  
17 again, the district court has to make that call  
18 in the first instance.

19 We're not suggesting any kind of, you  
20 know, gag order on district courts when they're  
21 conducting these evidentiary hearings and  
22 issuing their rulings after them.

23 The question is what deference must  
24 the court of appeal and this Court give to the  
25 district court's observations, gloss, on -- on



1 the evidence.

2 JUSTICE JACKSON: So can I --

3 JUSTICE BARRETT: Given --

4 JUSTICE JACKSON: -- state what I  
5 understand you to be saying so that I can make  
6 sure that I understand it?

7 In response to Justice Gorsuch, you  
8 say that the district court can make these  
9 credibility determinations, but the problem, I  
10 think, with the I believe this expert, not this  
11 one, upfront is that once you then take that  
12 mitigating expert's evidence off the table and  
13 then do the weighing, you might reach a  
14 different result than if you take all the  
15 evidence and then, in the context of the  
16 weighing, you say this mitigating evidence is  
17 not going to be given as much weight.

18 MR. ANDRE: That's exactly right.

19 JUSTICE JACKSON: Is that what I'm  
20 saying? Because I understood the -- the  
21 Strickland question to be that the district  
22 court is answering, if the sentencing judge had  
23 heard the evidence that the counsel deficiently  
24 failed to present, was there a reasonable  
25 probability that the outcome would have been

1 different?

2                   And so he's -- he -- he's assuming  
3 that the incredible expert is going to be  
4 presented and -- and sort of folding into his  
5 ultimate weighing would the outcome have been  
6 different if I had heard from that expert, if  
7 the sentencing court had heard from that expert,  
8 whereas, in a situation like this one, if he  
9 takes that expert out of the picture ahead of  
10 time and then makes that analysis, he could  
11 reach a different result?

12                   MR. ANDRE: Absolutely. That's  
13 absolutely correct.

14                   JUSTICE JACKSON: Yeah.

15                   JUSTICE BARRETT: Counsel, if -- you  
16 know, Justice Kagan was asking you about whether  
17 the Ninth Circuit had considered the aggravating  
18 evidence alongside the mitigating evidence, and,  
19 you know, the Ninth Circuit's opinion, I -- I  
20 must say I read, similarly to Justice Kagan, it  
21 didn't really do that.

22                   Why wouldn't a vacate and remand be  
23 appropriate then?

24                   MR. ANDRE: I -- I -- if this Court  
25 finds that the Ninth Circuit's weighing on pages

1 58 to 62 of the -- of the Pet. App. is  
2 insufficient, I think that is the -- the proper  
3 recourse, to send it back to the Ninth Circuit.  
4 I -- again -- I think, for the reasons  
5 I explained to Justice Kagan, the Ninth Circuit  
6 said enough. It acknowledged its obligation.  
7 It quoted the actual aggravators. It didn't  
8 just point to. It cited them. It quoted them.  
9 It didn't shy away from the facts. And it -- it  
10 engaged in the comparative analysis that, I  
11 think, Strickland requires by saying, you know,  
12 here are all of these cases that are very  
13 similar with respect to how brutal the crimes  
14 were and with respect to what the mitigation  
15 was, and we think --

16 JUSTICE GORSUCH: Well --

17 MR. ANDRE: -- relief is warranted,  
18 but if the Court --

19 JUSTICE GORSUCH: -- what do you --  
20 what do you say, though, to your friend's  
21 argument on the other side that this case has  
22 been lingering for decades and that we've  
23 already vacated and remanded this case once and  
24 that if we think that the Ninth Circuit didn't  
25 engage in the classic Strickland analysis this

1 Court requires -- again, I know you disagree --  
2 but positing Justice Barrett's point, wouldn't  
3 there be some value to everybody to have some  
4 finality in this case and just have us do the --  
5 the Strickland weighing in the first instance?

6 MR. ANDRE: I'm not -- I'm not  
7 resisting this Court doing the weighing. It's  
8 just I think that the typical procedure is to  
9 send it back to the lower court. But, if this  
10 Court wants to do that, you know, you have the  
11 record. You have the law. You could do that  
12 reweighing if you think the Ninth Circuit was --  
13 was insufficient. But it's a question of law,  
14 so I don't think the Court, without engaging in  
15 that reweighing, could issue a judgment.

16 JUSTICE GORSUCH: Well, it just would  
17 be was there a reasonable probability? And, as  
18 you say, we have the whole record before us and  
19 nothing's changed in 20 years.

20 MR. ANDRE: Right.

21 JUSTICE KAVANAUGH: Why do you think  
22 there's a reasonable probability that the  
23 sentence would be different given that the  
24 sentencing judge, the original sentencing judge,  
25 had Dr. Potts's report before it and -- and

1 found mitigators that dealt with the -- the  
2 substance abuse, with the childhood, with the  
3 treatment, the abuse problem, and Dr. Potts's  
4 report had found, I think, seven mitigating  
5 circumstances that -- that basically were --  
6 were similar to what the -- the trial court  
7 ultimately found?

8 MR. ANDRE: Well, of course, the  
9 reasonable probability inquiry is not, you know,  
10 what would Judge Chavez have done had this  
11 evidence been before him in 1993. It's, you  
12 know, a non-idiosyncratic reasonable, objective  
13 sentencer.

14 But I -- I think whoever that person  
15 is in this hypothetical, there's a lot more  
16 evidence, and Dr. Potts was by no means a  
17 defense expert.

18 Dr. Potts noted seven possible  
19 mitigators, but even the three that related to  
20 psychological and neuropsychological disorders,  
21 they are couched expressly in conditional terms.

22 And I'm looking right at page JA 140:  
23 possibly an affective disorder, the likelihood  
24 of a major mental illness, an increased  
25 potential for neurologic sequelae. That's --

1 that's in stark contrast to the seven diagnoses  
2 that Jones's expert said this guy actually has.

3 And so I think that that changes the  
4 calculus right there. And then, on top of that,  
5 we have --

6 JUSTICE KAVANAUGH: Well, Dr. Potts  
7 reported on the likelihood that he suffers from  
8 a major mental illness, the head trauma he  
9 suffered, which increases the potential for  
10 neurologic problems, his intoxication at the  
11 time of the offense, his genetic loading for  
12 substance abuse, the chaotic and abusive  
13 childhood, was clearly before the sentencing  
14 judge.

15 Novak was the lawyer. The sentencing  
16 judge at the post-conviction review proceeding  
17 in 2000 said Novak is a very good attorney and  
18 did a good job with this difficult trial.

19 That attorney, Novak, testified that  
20 Potts, Dr. Potts, really -- they didn't do the  
21 mitigation expert back at the time the way it's  
22 done now but that Dr. Potts performed a role  
23 that really was quite similar to how mitigation  
24 experts work in the more modern times and that  
25 Potts was on their team, so to speak, in trying

1 to help them.

2 MR. ANDRE: I -- I mean, I think Novak  
3 was trying to effectively, you know, clear his  
4 own name in this context. Again, possibly,  
5 likelihood, potential, the three mental illness  
6 --

7 JUSTICE KAVANAUGH: Well, no, that's a  
8 fair point. The sentencing judge is the one who  
9 said Novak's a very good attorney who did a very  
10 good job in this difficult case.

11 MR. ANDRE: No -- no, that -- that's  
12 true. But, even if we go back to Dr. Potts, Dr.  
13 Potts said when he gave all these conditional  
14 hypotheses about what Jones may be suffering  
15 from, said: I would like to get more testing.  
16 I would like to know more.

17 And then that's exactly what we  
18 presented at the federal evidentiary hearing.  
19 And then, when Dr. Potts was confronted with  
20 that, he said: Yeah, that's exactly what we  
21 needed back then.

22 And so not only do you have, again,  
23 actual diagnoses now that are finally coming in  
24 in 2006 that the sentencer didn't hear in 1993,  
25 you also have additional facts that give rise to

1 those various diagnoses. So you have additional  
2 head injuries and you have a dramatically more  
3 significant history and pattern of abuse.

4 I mean, it's one thing for Jones to  
5 have been, you know, treated very, very poorly  
6 up until age six. It's another thing for Jones  
7 to have been abused by not just one stepfather  
8 but two and a step-grandfather, including  
9 sexually, all the way up to age 17.

10 JUSTICE KAVANAUGH: And then what's  
11 the -- I understand all that and I appreciate  
12 all that, that it's different and more. I -- I  
13 get that.

14 How -- how do we do the reweighing or  
15 how does whatever court does the reweighing do  
16 that reweighing given the horrible aggravators?

17 MR. ANDRE: Well --

18 JUSTICE KAVANAUGH: You know, I -- I  
19 don't know, are we putting ourselves in the  
20 perspective of a -- I think you said a  
21 non-idiosyncratic sentencing judge in Arizona in  
22 1992, or what -- what are we doing?

23 MR. ANDRE: No, that is what you do.  
24 And I guess I want to start out with one point.  
25 In all these cases, the question is, you know,



1 are the defendants getting from -- from zero to  
2 60. And I just want to be clear that it doesn't  
3 matter whether one defendant started, let's say,  
4 at 10 and then got to 60 miles an hour all at  
5 the evidentiary hearing stage in federal court  
6 or with Jones, where there was more mitigation  
7 than in Porter, Rompilla, Wiggins, and Williams.  
8 And so Jones might be starting out at 15 or 20  
9 miles an hour. But they have to get to 60 in  
10 order to establish the reasonable probability  
11 for relief.

12           And so the way that you would engage  
13 in this weighing is I think you would look at  
14 the four lead cases this Court has decided --  
15 Anders v. Texas is also relevant in this space  
16 based on how the Court characterized the  
17 evidence there -- and then say: Okay, that --  
18 that sets the -- the floor. That's the  
19 60-mile-an-hour speed test.

20           Did Jones, with all of his mitigation  
21 balancing against the aggravating factors and  
22 the -- the facts of the crime, did he get there?  
23 And so it really is just a comparative analysis  
24 of the good and the bad of this case against  
25 this -- this Court's four lead precedents in

1 this space.

2 JUSTICE KAVANAUGH: And I guess I  
3 would think it different if the -- if the  
4 sentencing judge had no awareness of the  
5 childhood abuse, no awareness of the head  
6 injuries, no awareness of the substance abuse,  
7 but the -- was -- the sentencing judge was aware  
8 of all that, those basics --

9 MR. ANDRE: But --

10 JUSTICE KAVANAUGH: -- but still said  
11 these crimes are too much, you know, and we  
12 don't need to go through them, but they're --  
13 you know, the sentencing judge was too much.

14 MR. ANDRE: The -- that's why I used  
15 the zero-to-60 reference, Justice Kavanaugh. It  
16 doesn't matter where Jones started vis-à-vis the  
17 other defendants in these cases because Jones  
18 did start out a little bit ahead of them because  
19 there was more mitigation at the aggravation and  
20 mitigation sentencing hearing before Judge  
21 Chavez than there were in Porter, Rompilla,  
22 Williams, and Wiggins.

23 But my point is that I think Jones  
24 clearly got to 60 miles an hour, and he had an  
25 easier time getting there because he did have

1 more to start with.

2           But the question just is did they get  
3 there and then, you know, how bad is the  
4 aggravation. Again, brutal crimes here. We  
5 acknowledge that, but there's a lot of  
6 mitigation, and when you match it up against  
7 those -- the four cases from this Court, it's  
8 really hard to see any difference. There's, you  
9 know, longstanding childhood trauma, a lot of  
10 head injuries, and diagnoses by doctors who were  
11 not precluded from testifying because they were  
12 sneaking in junk -- junk science and not because  
13 they were looney tunes under 702. That all goes  
14 to the state sentencer to weigh. And -- and  
15 because we're not there yet, we're in the  
16 federal system, we're asking, is there a  
17 reasonable probability that all of that evidence  
18 might have persuaded that state sentencer to  
19 favor life?

20           CHIEF JUSTICE ROBERTS: Well, that --  
21 you know, just to continue with your analogy, I  
22 think the question is he didn't have to get to  
23 60, right? He needed to get to 120 given the  
24 aggravating circumstances that were before the  
25 -- before the jury.

1                   MR. ANDRE: That -- if that's --  
2                   that's what this Court feels, that's what this  
3                   -- this Court feels. And I guess this -- this  
4                   underscores why the analysis of the -- the  
5                   weight and persuasiveness to be given each piece  
6                   of evidence is best dealt with on the back end  
7                   under the prejudice prong, right?

8                   So the district court, again, is going  
9                   to take all this evidence and it's going to  
10                  express its views. The Ninth Circuit's going to  
11                  look at that. It's not going to have to defer  
12                  to those views, but it's going to do its own  
13                  weighing and it's going to come to this Court  
14                  and this Court's going to opine. And if this  
15                  Court, you know, wants to say, in Porter,  
16                  Rompilla, Wiggins, Williams -- actually,  
17                  Williams and Porter are the strongest for my  
18                  side -- yeah, those defendants only had to get  
19                  to 60, here Jones had to get to 120, that's for  
20                  this Court to do but for this Court to do  
21                  without deference to the district court's gloss  
22                  on the evidence from 13, 14 years ago.

23                  CHIEF JUSTICE ROBERTS: Thank you,  
24                  counsel.

25                  Justice Thomas?

1 Justice Alito?

2 JUSTICE SOTOMAYOR: Somehow we're  
3 losing, I think, a view of what this case is  
4 about. Nobody disputes that trial counsel was  
5 deficient.

6 MR. ANDRE: Correct.

7 JUSTICE SOTOMAYOR: In no capital case  
8 should any lawyer wait until someone's been  
9 found guilty to start mitigation because it  
10 doesn't give you enough time to do a thorough  
11 investigation, correct?

12 MR. ANDRE: Correct.

13 JUSTICE SOTOMAYOR: All right. And  
14 there's no doubt that there was a mountain of  
15 additional evidence that the new experts found  
16 with a proper investigation. But we're not here  
17 to undo the conviction, correct?

18 MR. ANDRE: Correct. The conviction  
19 is not in dispute and not -- it's not even --

20 JUSTICE SOTOMAYOR: All right.

21 MR. ANDRE: Yeah.

22 JUSTICE SOTOMAYOR: We're only here to  
23 decide who should decide whether to resentence  
24 him. And you said that's how the Court feels.  
25 But why is it our feeling? Shouldn't it be the

1 -- the trial court's feeling? An Arizona state  
2 judge should look at this. Isn't that what you  
3 want, an Arizona state court judge to look at  
4 this and say the aggravators outweigh the  
5 mitigators?

6 MR. ANDRE: The other way around,  
7 Justice Sotomayor.

8 JUSTICE SOTOMAYOR: All right.

9 MR. ANDRE: But -- but -- but --

10 JUSTICE SOTOMAYOR: No, you want them  
11 to say, but --

12 MR. ANDRE: Yes.

13 JUSTICE SOTOMAYOR: -- the point is  
14 that what we're asking for here is for the trial  
15 court to determine that weight?

16 MR. ANDRE: Absolutely. Absolutely.  
17 And I guess I want to be clear that, you know,  
18 the -- the rule we're asking --

19 JUSTICE SOTOMAYOR: So it really is  
20 should the Arizona court consider that evidence  
21 now?

22 MR. ANDRE: Right. It -- it -- was  
23 there enough -- was there enough mitigating  
24 evidence in total when weighed against the bad  
25 such that an Arizona court, when looking at this

1       anew, might reach the opposite result?

2                   And I guess one thing I do want to  
3       underscore really quickly is that, you know, our  
4       rule would cut both ways.  If there was a  
5       district judge in Judge Bolton's situation who  
6       made -- and I counted 13 -- she never used the  
7       word "preponderance," to your point earlier,  
8       Justice Alito, but a lot of synonyms for  
9       "preponderance."  If you had a district judge  
10      who made 13 findings favorable to the defense  
11      and the state were to appeal, our rule would  
12      help the state out there and say no, you know,  
13      the district court can do certain things  
14      factually, but generally speaking, when the  
15      court is evaluating which side's evidence is  
16      more persuasive, is there a diagnosis or not,  
17      that all gets dealt with on the back end under  
18      Strickland prejudice, and that at least is  
19      subject to de novo review on appeal.

20                   CHIEF JUSTICE ROBERTS:  Justice Kagan?  
21                   Justice Gorsuch?  All right.

22                   Justice Jackson?  Okay.

23                   Thank you, counsel.

24                   MR. ANDRE:  Thank you.

25                   CHIEF JUSTICE ROBERTS:  Rebuttal, Mr.

1 Lewis?

2 REBUTTAL ARGUMENT OF JASON D. LEWIS  
3 ON BEHALF OF THE PETITIONER

4 MR. LEWIS: Thank you, Mr. Chief  
5 Justice.

6 Even putting aside the particular  
7 questions about the scope and where the line is  
8 drawn and the factual question, on Strickland  
9 reweighing alone, this Court's action is  
10 compelled. The seven aggravating circumstances  
11 found here are among the most weighty  
12 aggravating circumstances under Arizona law.

13 And, you know, this was footnoted in  
14 the brief, and I wanted to scream it in the  
15 brief. The -- the district -- or the -- the  
16 circuit court barely mentioned the -- the fourth  
17 aggravating circumstance as to Tisha Weaver, the  
18 seven-year-old girl who Jones brutally murdered.  
19 That bare mention tells me and tells any reader  
20 that it did not factor into their determination.

21 When you look at those aggravating  
22 circumstances and you understand how Arizona  
23 courts treat those aggravating circumstances,  
24 this is, as we argue in our brief, almost a  
25 foregone conclusion that there is no reasonable



1 probability that this sentence would have been  
2 different.

3           And I would submit, even if you take  
4 every single scrap of Jones's evidence submitted  
5 at district court as true, the brutality  
6 inflicted upon the victims here -- and let's  
7 include Katherine Gumina, the grandmother who  
8 died but died too late because she was in a coma  
9 for months until she died right before trial  
10 started -- this is far different from those core  
11 cases that my friend relies on. There are more  
12 victims. The aggravation is more severe. And  
13 the difference in mitigation is less because, as  
14 you all have recognized, Jones had a pretty good  
15 mitigation case before the trial court.

16           The trial court found that he suffered  
17 from long-term substance abuse, that genetic  
18 factors and head injuries contributed to that  
19 substance abuse, that he was under the influence  
20 of drugs and alcohol at the time of the crimes,  
21 which is especially compelling in Arizona as far  
22 as mitigation evidence goes because it actually  
23 links the mitigating evidence to the crimes, and  
24 that Jones had a chaotic and abusive childhood.  
25 And it may have left out some details, I don't

1 know, but anything else that was added was  
2 cumulative and pales in comparison to the  
3 aggravation present here.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 The case is submitted.

8 (Whereupon, at 11:20 a.m., the case  
9 was submitted.)

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## Official

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