IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

No. _____

BILLY JOE WARDLOW,

Petitioner,

v.

LORIE DAVIS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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***Member, Bar of the Supreme Court**

THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit has again violated the standard for determining whether a Certificate of Appealability should issue with respect to the appeal of various procedural and substantive issues in a capital federal habeas case, as this Court has found it has repeatedly done since 2003?

2. Whether the Texas Court of Criminal Appeals' order one week before Petitioner's state habeas application was due that permitted Petitioner to waive state habeas proceedings and thereafter served to preclude Petitioner from having his state habeas application considered even though, on the due date of the state habeas application, he changed his mind and filed his application, could then be treated as an adequate state procedural ground to bar federal habeas proceedings?

3. Whether findings of fact entered by a state habeas corpus trial court on a state habeas corpus application are made by "a court of competent jurisdiction," *Sumner v, Mata*, 449 U.S. 539 (1981), and thus afforded a presumption of correctness in subsequent federal habeas corpus proceedings, when on review by the state appellate court, that court determines that the state habeas corpus applicant waived his right to file a state habeas corpus application prior to filing it and refuses to review the trial court's findings?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondent, Lorie Davis, Director of the Correctional Institutional Division of the Texas Department of Criminal Justice, was represented by Texas Assistant Attorney General Gwendolyn Vindell.

The Petitioner, Billy Joe Wardlow, incarcerated on Texas' death row at the Polunsky Unit of the Texas Department of Criminal Justice, was represented by undersigned counsel, Richard Burr.

There are no other parties to the proceeding below.

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The opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability on the procedural issues and substantive claims on which this petition is based was entered October 22, 2018. *Wardlow v. Davis*, 750 Fed.Appx. 374 [Appendix 1]. The court denied rehearing December 11, 2018 [Appendix 2]. The opinion of the United States District Court for the Eastern District of Texas denying Mr. Wardlow's federal habeas petition was entered August 21, 2017. *Wardlow v. Director, TDCJ-ID*, 2017 WL 3614315 [Appendix 3]. The district court denied a Fed.R.Civ.Proc. 59(e) motion October 26, 2017. *Wardlow v. [Director, TDCJ-ID]*[1], 2017 WL 4868229 [Appendix 4].

The Texas Court of Criminal Appeals' order dismissing the state habeas application because of its previous order permitting Mr. Wardlow to waive state habeas remedies was entered September 15, 2004. *Ex parte Wardlow*, 2004 WL 7330934 [Appendix 5].

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit denying a certificate of appealability on the procedural issues and substantive claims addressed herein was entered on October 22, 2018, and rehearing was denied December 11, 2018. *See* Appendices 1 and 2. Justice Alito extended the time for the filing of the petition for writ of certiorari to May 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Sixth and Fourteenth Amendments to the United States

[1]The Rule 59 order was mistakenly styled, *Billy Joe Wardlow v. United States of America*, in the district court.

Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> [N]or shall any state shall deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

The Petition also involves the following provisions of the federal habeas corpus statute:

28 U.S.C. § 2253(c) –

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court....
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(e) –

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct....

STATEMENT OF THE CASE

I. Introduction

Billy Joe Wardlow is on death row in Texas for a crime he committed on June 14, 1993, when he was 18 years old. He was sentenced to death on February 11, 1995, when he was 20 years old and went to death row two days later. Mr. Wardlow has been on death row ever since.

Mr. Wardlow had a very difficult time in the first three years he was on death row. He

felt that he was treated cruelly by various officers and suffered immensely from the conditions under which he and others lived. By the summer of 1997 he told the Texas Court of Criminal Appeals (hereafter, CCA) that he did not want to pursue state habeas proceedings and wanted to be executed. The CCA directed the trial court to determine if he was competent and able to make a voluntary and intelligent waiver of further review of his case. The trial court held a hearing and determined that he was competent and was making a voluntary and intelligent waiver and reported the same to the CCA. ROA.658-81.[2] Shortly thereafter, however, Mr. Wardlow changed his mind and the CCA appointed state habeas counsel for him, requiring that his state habeas application be filed 180 days later, or by July 20, 1998. ROA.317.

Approximately three weeks before the due date for the habeas application, Mr. Wardlow changed his mind again and sent a handwritten letter to the CCA stating, "I wish to waive and forgo all further appeals." ROA.106. The CCA entered an order allowing him to waive habeas proceedings because of his stated desire and the previous determination that he was competent and able to make a voluntary and intelligent waiver. ROA.108.

Just before the due date for the habeas application, Mr. Wardlow changed his mind yet again and decided to file the habeas application that his attorney had prepared. Along with the timely-filed application, he submitted a "Statement of Applicant," in which he authorized the filing of the application, asked the court "to proceed with the consideration of my application," and explained why he had gone back and forth about pursuing state habeas:

> My decision to waive my appeals was brought about by the intolerable conditions of confinement which I believe to be unconstitutional and by the abusive and unfair treatment of myself and other death row prisoners, particularly by some of

[2]Citations to "ROA" are to the electronic record on appeal in the Fifth Circuit.

> the guards on what is referred to as the 'second shift.' At the time I wrote the Court of Criminal Appeals, I did not know how much longer I could withstand these conditions without breaking.

ROA.110.

On March 2, 2004, the trial court entered proposed findings of fact and conclusions of law on the merits of Mr. Wardlow's habeas claims and forwarded the case to the CCA. ROA.7338-55. At no time during the proceedings did the State or the trial court question the effectiveness of Wardlow's rescission of his previous waiver of state habeas review. On September 15, 2004, however, the CCA dismissed Wardlow's application without any reference to the proposed findings of fact and conclusions of law because of his previous waiver and its order permitting him to waive state habeas proceedings. ROA.114-115.

On federal habeas thereafter, the district found that the CCA's order of dismissal amounted to a procedural default that precluded consideration of the merits of Mr. Wardlow's claims. Appendix 3, at *10. In the alternative, the district court gave deference to the state trial court's fact-findings on the habeas claims, despite Wardlow's argument that the CCA's dismissal of the habeas proceeding because of his waiver meant that the trial court was without jurisdiction to consider the application. Appendix 3, at *10-*11. With deference to the state fact-findings, the court found no merit to some claims, and even without deference to state fact-findings as to other claims, also found no merit to these claims. Appendix 3, at *20-*33. The district court denied a Certificate of Appealability (hereafter, COA) on both the procedural issues and the substantive claims. Appendix 3, at *35.

On Mr. Wardlow's application for a COA to the Fifth Circuit, the court denied a COA on the procedural default ground challenged by Mr. Wardlow – whether the CCA's ruling that

Wardlow waived state habeas remedies was an adequate state procedural ground precluding federal review. On the substantive claims, the Fifth Circuit also denied a COA, first by failing to consider Wardlow's argument that the state trial court's fact findings on the merits of his habeas claims were due no deference in federal habeas proceedings since the CCA's waiver ruling rendered the state trial court without jurisdiction over Mr. Wardlow's case. Then, the court found that deference to the fact-findings "is a big part of why Wardlow cannot meet the COA threshold on his substantive claims." Appendix 1, at *378.

As it has done repeatedly over the last twenty years, the Fifth Circuit did not undertake the kind of analysis required by the decisions of this Court for a COA determination. The Fifth Circuit did precisely what this Court most recently faulted it for doing in *Buck v. Davis*, 137 S.Ct. 759, 773 (2017): It "phrased its determination in proper terms – that jurists of reason would not debate that Buck should be denied relief, 623 Fed.Appx. at 674 – but it reached that conclusion only after essentially deciding the case on the merits." In doing so, the Fifth Circuit not only violated COA standards, it also violated this Court's longstanding axiomatic principles governing the determinations of whether a state procedural dismissal is adequate to bar federal review and whether any deference at all was due the state trial court's findings of fact on the habeas claims where the CCA later determined that the trial court, in essence, had no jurisdiction to consider the habeas application.

These collective violations of this Court's previous decisions call for the Court's intervention under Rule 10(c) of the Rules of the Court.

II. Course of Prior Proceedings

Billy Joe Wardlow was tried for capital murder in Titus County, Texas, for the robbery-

murder of Carl Cole at his home. ROA.923. He was convicted on February 8, 1995, and sentenced to death on February 11, 1995. ROA.1107. His conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on April 2, 1997. ROA.817-37.

Mr. Wardlow timely filed his state habeas corpus application on July 20, 1998. ROA.317 (order establishing due date for habeas application). Less than three weeks prior to the filing, Mr. Wardlow informed the CCA that he wanted to waive habeas proceedings. ROA.106. The CCA treated Wardlow's statement as a request and granted it on July 14, 1998, noting that he had previously been determined to have the capacity to make a voluntary and intelligent waiver of habeas proceedings. ROA.108. Before the filing deadline of July 20, 1998, however, Wardlow changed his mind and timely filed his habeas application. With his state habeas corpus application, Wardlow filed a statement that he wanted to pursue state habeas remedies and authorized his attorney to file his habeas application. ROA.110-12. On March 2, 2004, the trial court entered the State's proposed findings of fact and conclusions of law denying relief but made no mention of Wardlow's pre-filing waiver. ROA.7338-55.

On September 15, 2004, without reference to any procedural rule, the CCA cited its previous order granting Wardlow permission to waive further appeals and noted that "[d]espite this order, counsel filed applicant's state habeas application [when it was due]." The court then dismissed the application "[f]or the reasons stated in the order of July 14, 1998...." Appendix 5. Wardlow filed an unopposed motion for rehearing, ROA.117-22, but the Court denied the motion without opinion.[3]

[3]Because the CCA's rules do not authorize motions for rehearing in state habeas proceedings, the rehearing motion urged the Court to reconsider its decision on its own motion in light of Wardlow's signature on the application and his statement in which he withdrew his previous waivor and authorized the filing. The state did not

Wardlow timely filed his federal habeas petition in the United States District Court for the Eastern District of Texas on November 23, 2004. On August 21, 2017, the court denied relief as well as a certificate of appealability. Appendix 3. As we have noted, the court held that the CCA's procedural dismissal of Wardlow's habeas application precluded federal review of the claims he raised in state habeas, Appendix 3, at *10, and in the alternative, denied Wardlow's claims on the merits after rejecting his argument that the state trial court's fact-findings were due no deference because the CCA's dismissal of his state habeas application rendered the trial court without jurisdiction to consider the application. *Id* at *10-*11,*20-*33. Following the denial of a motion to vacate, alter, or amend the judgment under Fed.R.Civ.Proc. 59(e), Appendix 4, Wardlow timely filed a notice of appeal. ROA.813.

III. Disposition of the Case by the Fifth Circuit

On October 22, 2018, the Fifth Circuit denied a certificate of appealability and affirmed the district court in a four-page opinion. *See* Appendix 1. The panel agreed with the district court that the CCA's ruling was adequate to bar federal habeas review, *id*. at *376-77, noting only that the CCA entered an order accepting Wardlow's waiver, and "Wardlow never asked the Court of Criminal Appeals to rescind its waiver order." *Id*. at *376. The panel did not identify, or consider the adequacy of, any state procedural rule on which the CCA based its decision.

The panel also agreed with the district court's rejection of Wardlow's argument challenging deference to the state trial court's factfindings, *id*. at *377-78, without examining the argument Wardlow made both to the district court and the panel.

With respect to the three substantive claims Wardlow presented in his COA application,

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oppose the motion or dispute its contents.

the Fifth Circuit's entire discussion was the following:

> That deference to the state court factfinding that our caselaw and AEDPA requires is a big part of why Wardlow cannot meet the COA threshold on his substantive claims. Essentially for the reasons the district court provided when analyzing the merits of Wardlow's claims under that deferential lens, we do not find debatable its resolution of the three substantive claims Wardlow seeks to appeal.

Id. at *378.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The CCA's dismissal of Wardlow's habeas application because of its previous order allowing him to waive state habeas remedies is not based on an adequate state procedural ground.

The Fifth Circuit's contrary determination on a COA application – that this ground was adequate and no reasonable judge could debate its adequacy – flouts every applicable decision by this Court governing the adequacy of state procedural grounds and the standard for deciding COA requests.

A. This Court's principles governing the determination of the adequacy of state procedural grounds for decision are well-settled and very clear.

"The question whether a state procedural ruling is adequate is itself a question of federal law. *Lee v. Kemna,* 534 U.S. 362 (2002)." *Beard v. Kindler*, 558 U.S. 53, 60 (2009). As the Court went on to recount in *Kindler*, 558 U.S. at 60, "We have framed the adequacy inquiry by asking whether the state rule in question was "'firmly established and regularly followed.'" [*Lee v. Kemna*], at 376 (quoting *James v. Kentucky,* 466 U.S. 341, 348 (1984))."

This way of "fram[ing] the adequacy inquiry" has deep roots in the Court's jurisprudence, stretching from the present, *Johnson v. Lee*, 136 S.Ct. 1802, 1805 (2016), back through *Kindler* in 2009, *Lee* in 2002, and *James* in 1984, to civil rights-era cases when states unsuccessfully tried to preserve unconstitutional prosecutions of civil rights activists by deflecting federal judicial review through state-law procedural rulings, *see Barr v. City of Columbia*, 378 U.S. 146, 149

(1964) (citing *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964); *Wright v. Georgia*, 373, U.S. 284 (1963); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). Particularly relevant to Mr. Wardlow's case, the "firmly established" part of the adequacy inquiry focuses on whether the procedural rule applied in a particular case has been applied for the first time. The Court first gave meaning to this aspect of the inquiry in *N.A.A.C.P. v. Alabama ex rel. Patterson, supra*, when it explained that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court...." 357 U.S. at 457. *Accord Ford v. Georgia*, 498 U.S. 411, 423 (1991).

B. The Fifth Circuit failed to "frame[] the adequacy inquiry," *Beard v. Kindler*, 558 U.S. at 60, ignored Wardlow's argument that the inquiry had to be framed as this Court has repeatedly emphasized, and simply decided the CCA's order was based on an adequate state ground because Wardlow did not ask the CCA to rescind its previous waiver order.

To determine that the CCA's dismissal of Mr. Wardlow's habeas application was based on an adequate state ground, the Fifth Circuit had to disregard this Court's decisions about how the adequacy inquiry must be framed. The panel started out the correct way: "A state-law procedural bar is adequate to preclude federal consideration if it is 'firmly established and regularly followed.'" Appendix 1, at 376 (citing *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). Having recited the correct rule, however, the court then immediately ignored it. It did not take the next step required to undertake the necessary analysis. As articulated by another Fifth Circuit panel, "[T]he relevant question is whether there was a firmly established rule that barred [Wardlow's habeas application]?" *Jones v. Stephens*, 612 Fed.Appx. 723, 728 (5th Cir. 2015). Instead, the court simply declared that, since "Wardlow never asked the Court of Criminal Appeals to rescind its waiver order," *id*., deference to the CCA's decision was required.

Instead of asking the relevant question and examining its possible answer, the Fifth Circuit simply inferred the existence of a state law requirement that a habeas petitioner who informs a court that he wants to waive habeas, and then gets an order allowing him to waive habeas, must ask the court to rescind its order if he later changes his mind and decides he wants to pursue habeas. The court did not ask whether there was such a rule in Texas and if so, whether it was firmly established and regularly followed.

Had it done so, the Fifth Circuit would have found that the CCA cited no rule of procedure violated by Mr. Wardlow when it dismissed his habeas application in 2004. ROA.114-115. If the reason had been that Wardlow was required to ask the CCA to rescind its order allowing him to waive habeas proceedings, *it would have said so* – but that is not what it said. It said only that "counsel," *not* the *applicant*, filed the application "despite th[e] order" granting Wardlow's request to waive habeas proceedings. A more plausible reading of the CCA's decision is that it, like the federal district court, see Appendix 3, at *10 ("Wardlow ... never rescinded his waiver"), erroneously concluded that counsel filed the habeas application without authority and against the express wishes of her client – which of course was not accurate. The "order" the CCA referred to in its dismissal of the habeas application could not have been a reason for the CCA to dismiss the habeas application. Indeed the previous order was nothing more than a re-determination of Wardlow's legal entitlement to waive habeas proceedings because (a) he wanted to do so, and (b) there was no legal barrier to his doing so, in that the trial court had previously determined he was competent to waive and able to make a voluntary and intelligent decision to do so. This order did not erect a barrier to Wardlow's filing a habeas application – it merely permitted him not to file an application. It was thus not an order that had

to be withdrawn to enable Wardlow to file his habeas application.

For these reasons, counsel for Mr. Wardlow argued to the CCA in a motion for rehearing that the CCA had apparently overlooked Wardlow's rescission of his waiver:

> The Court overlooked the fact that Applicant changed his mind and decided to pursue his 11.071[4] remedy and to file application for post-conviction relief before the deadline for filing his application passed, and that he expressly authorized undersigned counsel to file an 11.071 application on his behalf. On July 20, 1998, applicant's written statement to this effect was filed along with his verified application for post-conviction relief, and copies were served on the District Attorney. The same statement was submitted to this Court along with the filed application by cover letter dated August 21, l998. A copy of applicant's statement is attached hereto.
>
> In light of Applicant's timely decision that he wished to pursue his 11.071 remedies and his authorization of the filing of his 11.071 application before the filing deadline, Applicant respectfully urges this court to rehear this matter, on its own motion, and to address the application for post-conviction relief on its merits.

ROA.117. As reflected in this motion, *the Texas Attorney General did not oppose the motion*:

> Gina Bunn, Assistant Attorney General and attorney for the State[,] has authorized undersigned to advise this Court that she does not oppose applicant's request for rehearing.

ROA. 117-18.

Even more significantly, the Attorney General apparently *agreed* with Mr. Wardlow's lawyer that he had the right to rescind his waiver of habeas remedies and to file a timely habeas application *without asking the CCA for its permission to do so*. In addition to not opposing the motion for rehearing, the Assistant Attorney General never suggested that Wardlow was required to ask the CCA to withdraw its order permitting waiver before he could file his state habeas application. Had there been such a requirement, she would have asserted it in the state trial court

[4] "11.071" refers to Tex. Code. Crim. Proc. Article 11.071, the state habeas corpus statute applicable to capital cases.

in response to Wardlow's state habeas application. However, she did not argue that Wardlow's application should be dismissed because his decision to rescind his waiver had to be approved by the CCA. She simply responded to the claims made by Wardlow. *See* ROA.7455-7489 (State's Answer to Application for Writ of Habeas Corpus).

As the Fifth Circuit explained more than thirty years ago, "If the state does not *clearly announce* the procedural rule or the state courts do not strictly or regularly follow the procedural rule, then the federal courts may reach the issue the state court refused to address." *Wheat v. Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986) (emphasis supplied), *cert. denied*, 480 U.S. 930 (1987). Neither the CCA nor any Texas statute has ever "clearly announced" the rule the panel articulated. And of course, the CCA has never "strictly or regularly follow[ed]" such an unannounced rule. This alone would make the rule inadequate to bar federal review, for as the Court explained in *Ford v. Georgia*, 498 U.S. at 423, "Novelty in procedural requirements cannot be permitted to thwart review...." The force behind this jurisprudential rule is obvious: In the absence of a rule, how could Wardlow or his counsel know that they had to ask the CCA for permission to withdraw his waiver before they could file his habeas application?

Finally, two CCA decisions in the four years following the dismissal of Mr. Wardlow's habeas application confirm that the procedural rule inferred by the panel is not a firmly established procedural rule in Texas. In *Ex parte Reynoso*, 257 S.W.3d 715 (Tex.Crim.App. 2008), four years after the dismissal in *Wardlow*, the CCA recognized that, in a previous interlocutory order in Reynoso's case, "we implicitly held that an applicant may 'waive' his right to habeas review." *Id*. at 720 n.2. "However," the court went on to explain, "because an applicant can waffle in his decision until the day the application is due, *a 'waiver' is not truly*

effective until after that date has passed." *Id.* (emphasis supplied). The Fifth Circuit distinguished this decision in *Reynoso* from Wardlow's case, because "[t]here was never an order finding waiver from either the trial court or Court of Criminal Appeals that had to be rescinded." Appendix 1, at *377. The Fifth Circuit then construed this supposed difference between *Reynoso* and *Wardlow* as determinative: "It might have helped Wardlow if he had ever asked the Court of Criminal Appeals to revoke its waiver, but he never did." *Id*.

The history of John Reynoso's vacillation about waiving state habeas belies the distinction the Fifth Circuit attempted to make, because both the trial court and the CCA entered orders respecting Reynoso's right to pursue or waive habeas proceedings up until the due date of the application. As recounted in a 2005 CCA decision in *Reynoso*, after the trial court appointed habeas counsel for Reynoso, "[t]he appointment was withdrawn [because] applicant advised the trial court that applicant wished to waive his right to seek relief by writ of habeas corpus." *In re Reynoso*, 161 S.W.3d 516 (Tex.Crim.App. 2005). Prior to the habeas filing deadline, Reynoso changed his mind and asked the trial court to appoint habeas counsel. *Id*. The trial court did so. *Id*. The CCA upheld this order on the basis of the rule concerning the effectiveness of waivers of state habeas, not on whether Reynoso asked the court to withdraw a previous order:

> Because applicant had not exhausted his time to file a writ of habeas corpus when he asked the trial court to again appoint counsel, despite having waived his right to have the assistance of counsel and to file a habeas application under Article 11.071, we affirm the actions of the trial court in reinstating ... counsel.

Id. Thus, even though a court enters an order accepting the waiver of state habeas, such an order does not preclude an applicant from changing his mind and reinstating his pursuit of state habeas so long as that change of mind occurs before he has "exhausted his time to file a writ of habeas

corpus." *Id*.

The Fifth Circuit infers that the state law rule is that a waiver prior to the due date, if permitted by a court, precludes the applicant from filing thereafter unless he or she asks the court to withdraw the order permitting waiver. Such a rule cannot be drawn from *Reynoso* or any other case. The *Reynoso* decisions make it very clear that the rule is that waivers of state habeas have no legal effect until the due date for the application has passed. To be sure, Reynoso had to return to court when he changed his mind about waiving habeas in order to get counsel re-appointed. However, there is nothing in the *Reynoso* decisions that suggests a habeas applicant who has waived habeas and had a court enter an order granting him the right to do so *must*, if he changes his mind, return to court and ask for that order to be withdrawn before he can file an application. Texas law simply does not require, or even suggest, there is such a requirement.[5]

Moreover, logic does not support such a requirement. If a waiver is not effective until the day a habeas application is due, then a habeas applicant's choice to waive habeas proceedings cannot be enforced against him until the due date has passed without his filing an application. Such a choice is entirely within the province of a habeas applicant. Even a court order previously permitting the applicant to waive habeas proceedings cannot logically impinge on his right to waive or not on the date the application is due. Such an order merely determines that there is no

[5]Perhaps in an effort to ground its decision in Texas law, the Fifth Circuit quoted the following from *Ex parte Reedy*, 282 S.W.3d 492, 494-96 (Tex.Crim.App. 2009): "Texas courts recognize that 'an express waiver of the right to post-conviction relief may be enforceable when it is 'knowingly and intelligently' executed.'" Appendix 1, at 376. If this was the intent of the Fifth Circuit's citation to *Reedy*, it was inapposite. *Reedy* does not examine a situation like Mr. Wardlow's. It instead "address[es] whether a defendant, pursuant to a plea agreement, may waive the right to file an application for writ of habeas corpus." *Id*. at 494. The operative question in such cases is whether the defendant could know, and thus make a knowing and intelligent waiver of, the specific post-conviction claims he is waiving at the time of the plea bargain. *Id*. at 495-99. *Reedy* thus sheds no light on a situation like the one recognized in *Reynoso*, where a defendant "waffle[s] in his decision [to pursue post-conviction] until the day the [post-conviction] application is due." *Reedy* provides no support for the state law rule the Fifth Circuit divined.

legal barrier – such as incompetence, involuntariness, or ignorance – to an applicant waiving habeas corpus. However, it does not erect a barrier to an applicant changing his mind and deciding to file a habeas application.

In sum, the Fifth Circuit manufactured a state procedural rule to enforce a procedural ruling that was applied on an *ad hoc* or factually misinformed basis in Wardlow's case. Without the intervention of the Court, the Court's decisions guiding the determination of the "adequacy" of a state procedural ground will be undermined in the Fifth Circuit.

C. The way in which the Fifth Circuit went about denying COA on this procedural issue is the way in which this Court has repeatedly faulted the Fifth Circuit.

1. The standard for certification of appeal announced by this Court.

"The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). While issuance of a COA "must not be pro forma or a matter of course," a prisoner need only make a "threshold showing" that "jurists of reason could disagree with the district court's resolution of his constitutional claims" or "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 337 (2003). Where, as in Mr. Wardlow's case, a procedural ruling is asserted to have interfered with proper merits disposition, then a movant must also show that reasonable jurists could debate the procedural ruling as well. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

2. The Fifth Circuit's COA practice has in the past diverged and continues to diverge wildly from this Court's requirements.

The Fifth Circuit has a well-established history of using the COA threshold inquiry to

thwart almost all appellate review of denials of habeas corpus applications. This Court has already once granted certiorari in *Miller-El* to correct the Fifth Circuit's application of "too demanding a standard" for certifying appeal. 537 U.S. at 341. The Court stressed there that § 2253(c) did not require – and even prohibited – a federal court from basing its COA determination on its view of whether an appeal would succeed. *Id*. at 337. The Court criticized the Fifth Circuit's inordinate focus on whether the petitioner would ultimately prevail because "when a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying a denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id*. at 336-37. However, the issue on COA is "only [whether] the District Court's decision was debatable." *Id*. at 348.

Despite *Miller-El*, the Fifth Circuit has persisted in applying an inappropriately high COA standard. The best evidence that the Fifth Circuit is disregarding *Miller-El*'s debatability standard is the number of times since that decision that this Court has not only granted certiorari in cases in which the Fifth Circuit had denied an appeal but also issued reversals in them. *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (reversing COA denial where Fifth Circuit had only "pa[id] lip service to the principles guiding issuance of a COA" and overruling Fifth Circuit's interpretation of the Eighth Amendment as inconsistent with clearly established federal law); *Banks v. Dretke*, 540 U.S. 668, 703-05 (2004) (reversing COA denial because the application "surely fits" the standard for a COA); *Abdul-Kabir v. Quarterman*, 543 U.S. 985 (2004) (vacating COA denial on basis of *Tennard*); *Jimenez v. Quarterman*, 555 U.S. 13 (2009) (reversing COA denial and overruling Fifth Circuit's application of the statute of limitations in certification proceeding); *Buck v. Davis*, 137 S.Ct. 759 (2017) (reversing COA denial and

deciding the merits of the issue underlying a Rule 60 (b)(6) motion). *See also Trevino v. Thaler*, 569 U.S. 413 (2013) (overruling legal principal announced in *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), a Fifth Circuit case in which a COA was denied).

3. Despite paying lip service to the principles guiding issuance of a COA, the Fifth Circuit reached its conclusion only after fully rejecting – not considering the reasonableness of – Mr. Wardlow's argument about the inadequacy of the state ground for default.

As demonstrated in section I.B., *supra*, at the very least Mr. Wardlow made a colorable argument that the state law ground on which the CCA dismissed his case was inadequate, and that reasonable jurists could debate this matter. Despite Wardlow's having presented argument that was clearly "adequate to deserve encouragement to proceed further," the Fifth Circuit denied COA on the threshold procedural default issue, refusing to permit him to appeal the district court's denial of his three merits claims. *See Miller-El*, 537 U.S. at 338 ("a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail"). No court examining whether Mr. Wardlow's argument was debatable among jurists of reason could fairly conclude, as the Fifth Circuit did, that it was not debatable.

II. In presuming the state trial court's fact-findings on the substantive habeas claims to be correct, the Fifth Circuit ignored Wardlow's argument that the CCA's dismissal of his habeas application because of his prior waiver of habeas proceedings rendered the trial court without jurisdiction. With this, the Fifth Circuit ignored this Court's fundamental teaching that only findings by a state court of competent jurisdiction can be presumed correct.

In both the district court and the Fifth Circuit, Mr. Wardlow argued that the state trial court's findings of fact on the merits of the claims in state habeas proceedings could not be presumed correct under 28 U.S.C. § 2254(e)(1), because (1) the CCA's dismissal of his habeas

application due to his waiver of state habeas remedies meant that the state habeas trial court had no jurisdiction to decide any aspect of his case, and (2) as a result of this the trial court's findings did not survive review by the CCA. Both courts ignored his lack-of-jurisdiction argument. This was how the Fifth Circuit responded,

> AEDPA requires deference to a state trial court's factual findings unless they are expressly rejected by, or are directly inconsistent with, the highest state court's ultimate resolution of the case. *See Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008). That is true even when the state high court's ultimate resolution is on procedural grounds.... Because the Court of Criminal Appeals' procedural dismissal of Wardlow's application did not cast any doubt on the trial court's factual findings, we must accept them unless Wardlow can rebut them by 'clear and convincing evidence.' 28 U.S.C. § 2254(e).

Appendix 1, at *377-*378. The failure to consider Mr. Wardlow's jurisdictional argument was a fatal flaw that led to the Fifth Circuit's summary denial of COA on the substantive claims.

The Fifth Circuit's analysis was flawed, because this Court has made clear that the presumption of correctness afforded to state court fact-findings by the federal habeas corpus statute depends on the state court having jurisdiction over the case. In *Sumner v. Mata*, 449 U.S. 539 (1981), the Court noted that under the pre-AEDPA version of 28 U.S.C. § 2254(d), there was a presumption of correctness applied to "cases in which *a state court of competent jurisdiction* has made 'a determination ... of the factual issue.'" *Id*. at 546 (emphasis supplied). Nothing about the AEDPA version of the federal habeas statute has changed that fundamental requirement. There can be no question that the CCA's dismissal of Mr. Wardlow's habeas application because he waived his habeas remedy removed the trial court's jurisdiction over Wardlow's case.

When the trial court's findings and conclusions in Wardlow's case were reviewed by the

CCA, the court held: "For the reasons stated in the order of July 14, 1998, we dismiss applicant's post-conviction application for writ of habeas corpus." ROA.114-15. The reasons stated in the July 14 order were that Wardlow "desire[d] 'to waive and forego all further appeals.'" ROA.108. Thus, the order dismissing the habeas application held, in effect, that since Wardlow gave up his right to file a habeas application, his filing thereafter of his habeas application was unauthorized, and the trial court had no jurisdiction to consider it.

In analogous circumstances in Texas, where a civil plaintiff voluntarily dismisses his or her lawsuit, the trial court no longer has jurisdiction. As the Texas Supreme Court has explained,

> As a general rule, a plaintiff may voluntarily dismiss a case – take a non-suit – at any time before all of the plaintiff's evidence other than rebuttal evidence has been introduced. Tex.R.Civ.P. 162. When this occurs, the non-suit typically moots the case or controversy from the moment of its filing or pronouncement in open court. *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex.2006) (per curiam).

Klein v. Hernandez, 315 S.W.3d 1, 3 (Tex. 2010). Mr. Wardlow's waiver of his right to file a state habeas application was the legal equivalent in the civil context of the plaintiff voluntarily dismissing a lawsuit. It "moot[ed] the case or controversy." *Id*. Accordingly, the CCA held, without saying so explicitly, that the trial court had no power to adjudicate Wardlow's case.

This Court has explained that "[a] court of competent jurisdiction is a court with the power to adjudicate the case before it." *Lightfoot v. Cendant Mortgage Corporation*, 137 S.Ct. 533, 560 (2017). When the CCA dismissed Wardlow's habeas application because he had waived his right to file it, the CCA held that Wardlow could not, and thus as a matter of law, did not file a habeas application. Because of Wardlow's waiver, the trial court did not have a "case or controversy" before it, and thus, no power to adjudicate his case. It was, therefore, no longer a

"court of competent jurisdiction." Under *Sumner v. Mata, supra*, the trial court's findings of fact could not be presumed correct in federal habeas proceedings.

III. The Fifth Circuit's summary, sweeping denial of COA on the substantive claims because of the deference due to the state habeas court fact-findings reflects a fundamentally erroneous understanding of the district court's reliance on state fact-findings in denying the claims, as well as disregard for the standards guiding COA determinations.

As we have noted, the Fifth Circuit's entire discussion of the three substantive claims Mr. Wardlow presented in his COA application was the following:

> [D]eference to the state court factfinding that our caselaw and AEDPA requires is a big part of why Wardlow cannot meet the COA threshold on his substantive claims. Essentially for the reasons the district court provided when analyzing the merits of Wardlow's claims under that deferential lens, we do not find debatable its resolution of the three substantive claims Wardlow seeks to appeal.

Appendix 1 at *378. This summary, sweeping assessment of the substantive claims as controlled by deference to state fact-findings is factually erroneous, because with respect to only one of the three claims did deference to state court factfinding play a role in the district court's denial of the claim. Deference to state factfindings played no role at all in relation to the district court's denial of the other two claims. And, as with its assessment of the adequacy of the state ground for finding that Wardlow had waived state habeas remedies, the Fifth Circuit did not even purport to consider whether the district court's resolution of the merits claims was debatable among jurists of reason. As demonstrated below, a COA was warranted on all the merits claims.

A. A COA was warranted on the claim that the prosecution violated Wardlow's due process right to present evidence by discouraging his co-defendant from testifying in his behalf.

This claim was summarized in Mr. Wardlow's COA application as follows:

The prosecution violated Wardlow's right to due process by interfering with the

> choice of his co-defendant, Tonya Fulfer, about testifying on behalf of the defense that the shooting was unintentional. The prosecution accomplished this by insisting that its plea agreement with Fulfer could not be consummated until after Wardlow's trial, leading her and her lawyer to believe that if she testified for the defense she would lose her plea bargain.

COA Application and Supporting Brief, at 2.

In *Webb v. Texas*, 409 U.S. 95 (1972) (*per curiam*), this Court reversed a Texas conviction where the trial judge issued a warning to the sole witness for the defense of the severe consequences for him of not telling the truth. The Court held that the result of this overly harsh warning, the witness's refusal to testify, deprived the defendant of due process:

> The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify....
>
> In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment.

409 U.S. at 97, 98.

In the circuits, *Webb*, together with the Court's previous decision in *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the Sixth Amendment right to present a defense is incorporated into the Fourteenth Amendment's guarantee od due process), has led the the courts to hold that prosecution conduct that interferes with a potential defense witness's free and unhampered choice to testify violates due process. *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977). *See also United States v. Binker*, 796 F.2d 1218, 1228 (5th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Morrison*, 535 F.2d 223, 227-228 (3d Cir. 1976); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973). *Henricksen* is typical of these cases.

There, the government entered into a plea agreement with a co-defendant. As part of the agreement the co-defendant agreed not to testify regarding Henricksen and he was told that the agreement would be void if he did testify. At Henricksen's trial, the co-defendant refused to testify. The defendant challenged the government's conduct on appeal and the government confessed error. The Fifth Circuit held that "[s]ubstantial Government interference with a defense witness' free and unhampered choice to testify violates due process." 564 F.2d at 198.

The State's conduct with respect to Mr. Wardlow's co-defendant, Tonya Fulfer, while not as explicit as the government's conduct in *Henricksen*, paralleled that conduct and substantially interfered with her free and unhampered choice to testify on behalf of Wardlow. The salient facts underlying this claim are the following:

- According to Tonya Fulfer's unsigned state habeas corpus affidavit,[6] Fulfer told her lawyer that Wardlow's shooting of Carl Cole was accidental when her lawyer told her the prosecution wanted her to testify that the shooting was intentional. ROA.160.

- In ongoing discussion of possible terms for a plea between Fulfer's lawyer and the prosecutor, it is likely that her lawyer communicated this to the prosecutor. There is some uncertainty about this, however, because Fulfer's lawyer did not address this question when he testified in Wardlow's mid-trial collateral hearing concerning the plea offer to Fulfer, and Fulfer does not know if he communicated this to the prosecutor. It is a pivotal fact, because if the prosecutor knew or had reason to know that Fulfer would testify that the shooting was accidental,

[6]Fulfer did not want to sign the affidavit state habeas counsel prepared after interviewing her for fear of hurting her chances for parole. However, she confirmed the accuracy of the affidavit to Wardlow's state habeas counsel. ROA.159. The federal district court accepted Fulfer's unsigned affidavit as reflecting her version of events.

he would have a more informed basis for discouraging Fulfer from testifying for the defense.

- Regardless of whether the prosecutor knew that Fulfer would testify that the shooting was accidental, the prosecutor's actions appeared to be designed to discourage Fulfer from testifying for the defense. The plea offer to her was completely contingent upon the conclusion of Wardlow's trial and could be withdrawn at any time. ROA.6513, 6518-19. Despite efforts by Fulfer's lawyer to persuade the prosecutor not to await the conclusion of Wardlow's trial to finalize her plea, the prosecutor steadfastly refused. *Id.* These circumstantial facts strongly support the inference that the prosecutor wanted to see whether Fulfer was going to testify for Wardlow.

- On the basis of the prosecutor's unwillingness to finalize Fulfer's plea until after Wardlow's trial, Fulfer's lawyer advised her not to testify for the defense. According to Fulfer's unsigned affidavit, he told her that "testifying for [Wardlow] would only hurt my chances of getting a good sentence." ROA.160. For these reasons, he advised her to assert her Fifth Amendment rights, and she did when she was called as a witness by Wardlow's counsel. *Id.*

Wardlow argued to the district court that he was entitled to an evidentiary hearing on his due process claim. The district court refused to do so for two reasons. The first – not in any respect related to the state court's factfindings – was that "there is no evidence ... that Fulfer was overtly threatened by any State actors." Appendix 3, at *24. That is accurate. But then the court found, "there is no indication that Fulfer's decision not to testify was based on anything other than her own unwillingness to incriminate herself." *Id.* That is not accurate. Fulfer's lawyer knew that the State could withdraw the plea offer at any time prior to its consummation, knew the State refused to consummate the plea until Wardlow's trial was over, and for these reasons,

told Fulfer that testifying for Wardlow would hurt her chances of getting a good sentence – obviously because if she testified for Wardlow she was at risk of losing her plea offer. Through these circumstances, the State threatened Fulfer indirectly but quite clearly.

The second reason the district court denied the claim without an evidentiary hearing was due to the state habeas trial court's findings concerning the testimony Fulfer gave at her plea hearing after Wardlow's trial. The state court read Fulfer's testimony, in which she said she did not actually see what happened the moment the gun discharged (killing Mr. Cole), as contradicting her statement in her unsigned affidavit that the shooting was accidental. Appendix 3, at *24-25. However, as we explained in the COA Application and Supporting Brief, at 43-46, her plea-hearing testimony about the circumstances immediately preceding the discharge of the gun – in which she saw Wardlow and Cole still struggling over the gun, *id*. – *was* consistent with her conclusion in her affidavit that the shooting was accidental. Without deference to the state court findings, a full evidentiary hearing on this issue could well have convinced the district court that Fulfer's testimony would have been helpful to Wardlow, and that the terms of the plea offer from the prosecutor substantially interfered with her free and unhampered choice to testify on behalf of Wardlow.

At the very least, the facts and argument presented to the Fifth Circuit, *see* COA Application and Supporting Brief, at 30-51, and Reply Brief in Support of COA Application, at 10-14, demonstrated that the district court's denial of the claim was debatable, and was not entirely due to the habeas corpus statute's "deferential lens" concerning state court factfindings.

B. A COA was warranted on the claim that trial counsel provided ineffective assistance in failing to object to pivotal testimony by the medical examiner.

This claim was summarized in Mr. Wardlow's COA application as follows:

> Trial counsel provided ineffective assistance by inadvertently failing to object to inexpert opinion testimony by the medical examiner concerning gunshot residue and the distance from which the murder weapon was fired, a fact critical to the jury's resolution of the central issue in the guilt phase of trial – whether the fatal gunshot was intentional or accidental.

COA Application and Supporting Brief, at 2.

The medical examiner, Dr. Jeffrey Barnard, testified on behalf of the prosecution that on autopsy he found no evidence of gunpowder residue at the entrance wound. ROA.5901. On this basis, he testified that the gun was fired from "somewhere around three feet or greater." *Id*. Thereafter, in his closing argument in the guilt phase, the prosecutor used this aspect of the medical examiner's testimony to rebut Wardlow's trial testimony that the gun went off during a struggle with Mr. Cole: "[T]he only problem with [Wardlow's testimony] ... of course, is that that doesn't jibe [sic] with what the medical examiner said. The medical examiner said that it had to be over three feet." ROA.6598.

Defense counsel failed to object to Dr. Barnard's testimony even though counsel realized later that the testimony was not within his expertise. In his affidavit in the state habeas proceeding, lead trial counsel gave no reason for his failure to object except that he was not "expecting a pathologist to give that sort of testimony," and "it just got by me." ROA.143. He acknowledged that Dr. Barnard did not appear to have the expertise to give this kind of opinion testimony. *Id*.

As a medical examiner, Dr. Barnard had the expertise to determine whether there was a

foreign substance such as gunshot residue on the skin of a homicide victim. *See Pollard v. State*, 2007 WL 2493144 *4-*5 (Tex.App.–Beaumont 2007) (testimony based on "specific wound characteristics" is within the expertise of a medical examiner). However, absent specialized training and experience in firearms analysis, and without having the actual murder weapon test fired, Dr. Barnard did not have the expertise or the factual basis to render an opinion about the likely distance from which the weapon was fired. *Pollard, supra* (noting that the medical examiner properly qualified his testimony as subject to being verified by a firearms examiner in the test-firing of the actual murder weapon). Nothing in the record established that Dr. Barnard had any special training or expertise in firearms analysis, and nothing established that the murder weapon was test fired to determine its pattern of depositing residue as a function of the distance from which it was fired.[7] Thus, at the time Dr. Barnard testified, there was no evidentiary basis for this aspect of his testimony.

The federal district court's basis for denying this claim on the merits had nothing to do with the state court's factfindings. The basis for its decision was that "medical examiners who perform autopsies on crime victims often testify as to the distance from which a fatal gunshot was fired based on the presence or absence of gunshot residue." Appendix 3, at *32 (citing two Fifth Circuit cases). Because of this, the court rejected the argument that Dr. Barnard gave testimony for which he was unqualified, noting, "If defense counsel had objected to the medical examiner's

[7]In the state habeas proceeding, counsel for Wardlow submitted the affidavit of C.E. Anderson, former director of the Houston Police Department firearms laboratory. ROA.178-79. Consistent with state law as articulated in *Pollard*, Anderson explained that the only way to determine the distance from which a weapon is fired is for a qualified firearms examiner to test-fire that weapon and examine the residue that is deposited in the field of fire. *Id*. He pointed out that there was no evidence that such a procedure was followed prior to the time Dr. Barnard testified. *Id*. The prosecution firearms expert, Raymond Cooper, testified concerning the gun and the ammunition in it, but he did not indicate that a test-firing had been done. ROA.6126-41.

testimony on this topic, the trial court would have overruled the objection." *Id*.

As we explained in the COA Application and Supporting Brief, in the two Fifth Circuit cases cited by the district court in which similar testimony was admitted, the defendants did not challenge the admissibility of the testimony. Accordingly, state law had to be examined to determine whether an objection to Dr. Barnard's testimony would have succeeded. As we have noted, Texas law indicates that the objection likely would have been well-taken. However, neither the state habeas court nor the federal district court considered whether, had defense counsel objected to Dr. Barnard's testimony, the objection would have been sustained under applicable state law.

For these reasons, trial counsel's failure to object to the testimony of Dr. Barnard concerning the distance from which the fatal shot was fired was unreasonable. Other than surprise, trial counsel did not attempt to provide a reason for failing to object. And, as we demonstrated in the COA Application, there is a "reasonable probability," *Strickland v. Washington*, 466 U.S. 668, 694 (1984), that Dr. Barnard's testimony would not have been allowed under applicable state law had the defense objected, and that without his testimony, as demonstrated by the prosecutor's closing argument, *supra*, the outcome of the trial would have been different. At the very least, therefore, this claim deserved a COA. It was plainly debatable among jurists of reason.

C. A COA was warranted on the claim that trial counsel provided ineffective assistance in failing to conduct a reasonable investigation of Mr. Wardlow's life history, thereby depriving Wardlow of substantial mitigation based on mental illness and a traumatic upbringing.

This claim was summarized in Mr. Wardlow's COA application as follows:

> Wardlow's trial counsel provided ineffective assistance in the penalty phase of the trial by failing to investigate Wardlow's life history and provide that information to a defense mental health expert. As a result, the defense could only present superficial, uninformed character evidence in the penalty phase and did not have available the wealth of life history information and evidence of mental illness that would have helped the jury understand Wardlow, why the crime was committed, and why his life should be spared.

COA Application, at 2.

Billy Joe Wardlow was eighteen years old at the time he killed Carl Cole. He had never before been charged with a crime of violence and had never before been convicted of any crime.

Billy grew up in a very poor family in Cason, a small rural community in east Texas. ROA.26. His mother Lynda was the dominant adult in the family. *Id.* She had grown up in a very poor, extremely abusive family. She and her family were often homeless, evicted time and again because of their inability to pay the rent. ROA.128.

Lynda suffered deeply from the trauma of her childhood. Throughout her adult life, she experienced frequent rage episodes, during which she would exhibit extraordinary strength, anger, and violence. She experienced voices directing her during these episodes. ROA.129. Her family, especially Billy, lived in perpetual fear of these episodes because they were the targets of her rage. ROA.133, 139. Lynda also believed deeply that she had been abducted by aliens. Her belief was so strong that she became convinced that her first child was conceived during an abduction. She shared her belief with Billy that she had been abducted by aliens. ROA.130. Billy thereafter believed he was similarly abducted. *Id*.

Lynda was extremely protective of her children, Billy and his older brother John. She severely limited their activities, forbidding contact with people whom she did not approve. Billy was not allowed to participate in sports or school-related social activities. ROA.125. As a result

of his mother's isolating him, Billy did not develop friendships and felt very different from other children. ROA.133.

Billy's own life history was, in some ways, as hard and marginalized as his mother's. He was born late and experienced head trauma and a loss of oxygen at birth. ROA.125. He developed slowly, though he grew quickly. He did not walk until 19 months. By that time he already weighed 37 pounds. *Id*. As he grew up, he was painfully aware of the fact that he was socially isolated and socially inept. Machines were his friends. He was unable to socialize with other children. ROA.133-34. He continued to wet his pants at night and at school until age 10. He was painfully humiliated by this experience. Children at school teased him and at home his mother made him walk around with his wet underwear on his head. ROA.125.

As Billy grew into his mid-teenage years, life became more difficult for him. His parents' imposed isolation from other children meant that he was not a part of any "crowd" at school. He felt very different from the other kids and was not very close to anyone. ROA.133. There was also a growing tension between him and his mother during this time and he began to experience serious emotional distress. ROA.125. He had attempted suicide twice by the time he was arrested for the murder of Mr. Cole. ROA.126-27, 149.

In October, 1991, Billy met Tonya Fulfer, who was a special education student at Daingerfield High School. ROA.134. They soon learned that they both considered themselves to be "black sheep" in their family, and they found it easy to open up to each other. Tonya was the first person Billy ever opened up to and is the only person with whom he ever experienced love. *Id*. Tonya had been severely abused at home and was able to talk to Billy about these problems. The two became inseparable. *Id*.

In early 1993, Billy and Tonya decided to leave Cason. They dropped out of school and tried to find the means to move far away. ROA.134. With no success, they settled on a plan to steal some money and a pickup, thinking they could escape their pain by leaving home and finding a new life in Montana. The course they chose was tragically flawed and resulted in the murder of Mr. Cole as he discovered them trying to steal his truck.

The jury that sentenced Mr. Wardlow to death never knew any of this, because defense counsel failed to investigate Wardlow's life history, as this Court has recognized the Eighth Amendment requires. *Wiggins v. Smith*, 539 U.S. 510, 522, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Counsel's investigation of mitigation focused solely on finding people who would "say something good about Billy," ROA.144, and what he found was minimal. The prosecutor accurately derided the mitigation case in his closing argument:

> He [defense counsel]] was talking about mitigation and, you know, we don't have a mentally retarded defendant, ... we don't have any evidence that family background was terrible, we don't have any evidence of any kind of strong mitigating circumstances in his life but they bring up those things about the librarian and his junior high church activities and what does it have to do with the fact that he cold-bloodily [sic] murdered an elderly man?
>
> Nothing.

ROA.6974. But for defense counsel's ineffectiveness, the defense would have presented evidence, as we have summarized, *supra*, of a "family background [that] was terrible" and, of "strong mitigating circumstances in his life."

In addition to Mr. Wardlow's traumatic upbringing, reasonable investigation would have found that Mr. Wardlow suffered mental illness. Despite having conducted no life history investigation, defense counsel did arrange for a pretrial evaluation by a psychologist, Dr. Don

Walker. Solely on the basis of an interview with Mr. Wardlow, Dr. Walker reported multiple signs of mental illness and dysfunction:

- When asked if he had ever had difficulty with anger in the past, [Wardlow] stated that he had had a great deal of anger and at times rage.... He reported that anger for him was always 'just under the water's surface.'

- [Wardlow] ... stated that it was difficult for him to keep his mind on any subject for a long period of time.

- When asked if he were depressed, he stated that he had on a couple of occasions, 'attempted suicide.'

- He did acknowledge that he is impulsive....

- The [personality testing] protocol suggests[:] [S]evere depression with anxiety and agitation.... Difficulty thinking and concentrating.... Disassociation and memory blackouts are possible.... Fantasy and reality are often seen as the same....

- Many persons with this profile [on personality testing] have come from destructive family backgrounds.... These individuals have often been repeatedly hurt in childhood resulting in fears of being hurt as an adult.... Many persons with this profile came from broken families or had poor living conditions.

ROA. 149-50, 152, 153.

All of these findings by Dr. Walker were red flags that demanded more investigation, but Wardlow's lawyers did nothing. Even though "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses[,]" *Wiggins v. Smith*, 539 U.S. 510, 525 (2003), Wardlow's lawyers conducted no further investigation. Instead, they went into Wardlow's penalty phase with the scarce fruit of their minimal investigation: three character witnesses who had only superficial exposure to Wardlow and knew almost nothing about him.

Prior to the filing of the state habeas application, Wardlow was seen and evaluated by a different psychologist, Dr. Paula Lundberg-Love, who reviewed extensive information about Wardlow's background and his family and interviewed Wardlow's parents. ROA.167-72. Some of her findings were similar to Dr. Walker's findings. ROA.173-74. ("perfection and compulsivity were present," along with difficulties in "thinking and concentrating," "paranoid delusions," mistaking fantasy for reality, and social isolation). However, Dr. Lundberg-Love found other impressions reported by Dr. Walker to be "inaccurate," ROA.174, most notably his conclusion that Wardlow had "Antisocial Personality or Borderline Personality Disorder." *Id*. Dr. Lundberg-Love explained that the reason her evaluation differed from Dr. Walker's "is information," *id*. – the extensive social and family history that habeas counsel developed in state habeas proceedings. *Id*.

Because of this information, Dr. Lundberg-Love was able to explain how Wardlow functioned:

> [There was a] familial tendency for schizophreniform disorder.... Central to the symptomatology of these disorders is the disruption of logical thought processes. Thoughts may be disorganized, loosely connected, and tangential. Delusions and/or hallucinations may be present. Affect (emotional tone) may be flat, somewhat detached, with a difficulty to experience pleasure (anhedonia). Such individuals also may lack close friends or confidants. They may possess odd beliefs, engage in magical thinking that influences their behavior, report unusual perceptual experiences, including bodily illusions, paranoid thinking, and behavior that may seem odd, eccentric, or peculiar. Indeed, both Lynda and Billy Wardlow possess some type of schizophreniform disorder....
>
> [B]ecause Billy Joe also has significant paranoid ideation and obsessive-compulsive tendencies, he ... typically works very hard to hold himself together in order to appear 'normal,' and can sustain this perception for periods of time. ... [I]f Dr. Walker had the opportunity to review social history data, ... he would have been aware that Billy did not fit the criteria for Antisocial Personality disorder....

ROA.175.

With an understanding of Wardlow grounded in his life history, Dr. Lundberg-Love was able to shine a more probative light on the killing of Mr. Cole:

> ... Billy's schizophreniform symptomatology played [a powerful role] in the etiology of the crime. Because both Billy and Tonya engaged in similar magical thinking, over time they came to reinforce each other's magical thinking/delusional beliefs, such that they truly believed that they could transform the pain in each others' lives by escaping to Montana. Their shared delusion was that if they just superficially threatened Mr. Cole, he would not offer any resistance, and would give them his vehicle and enable their dream to come true. Under the influence of this magical thinking and a shared delusion, Tonya and Billy were not prepared for the reality of a crime victim being frightened, resisting, and fighting back.

ROA.175.

This evidence would have gone a long way to explaining in a mitigating way "the fact that [Wardlow] cold-bloodily murdered an elderly man." ROA.6974.[8]

Without any deference to the state habeas court's findings, the district court denied relief on the merits of this claim. The court "assum[ed] that counsels' investigation was deficient," Appendix 3, at *30, but then found that Wardlow failed to show sufficient prejudice under *Strickland v. Washington*. The district court's reasons were insupportable:

- Relying upon *Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (*per curiam*), the district court found that "Wardlow's mitigating evidence is not substantial in quantity and does not present an overly sympathetic case." Appendix 3, at *31. Neither the district court nor the Fifth Circuit considered the critical differences between *Visciotti* and Wardlow's case: (a) Wardlow's chronic exposure to trauma inside his family and serious mental illness shaped his

[8]The description of the mitigating evidence in the preceding paragraphs that trial counsel could have found and developed with reasonable investigation is set forth more fully in the relevant portions of the federal habeas petition, ROA.26-34, 78-80, and accompanying exhibits, ROA.124-130, 132-137, 139-40, 166-77.

behavior far more than the psychological abuse and impulse disorder suffered by Visciotti; and (b) Wardlow's crime, with conflicting evidence of whether it was intentional, and Wardlow's criminal record, with no prior acts of violence, were far less aggravated than the crime and record of Visciotti.

- The district court found that Wardlow did not establish that Dr. Walker would have reached the same conclusions as Dr. Lundberg-Love if he had been provided the same information. Appendix 3, at *32. However, the courts routinely rely on the opinions of experts who have initially worked on a case in post-conviction proceedings and reviewed additional information about the defendant's background in connection with those proceedings to establish ineffective assistance of counsel in investigating mitigation. The courts have never required a petitioner to show that the new information would have caused the defense trial expert to change his opinion. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 392 (2005). The test of prejudice concerning un-investigated mental health mitigation is, instead, whether the new evidence, including new expert opinion, would have met *Strickland*'s reasonable probability test.

- The district court found that Wardlow failed to establish that trial counsel would have used evidence similar to Dr. Lundberg-Love's opinion. Appendix 3, at *32. This was entirely speculative, because until counsel has conducted a reasonable investigation, counsel cannot make a reasoned choice to pursue one theory over another. *See Williams v. Taylor*, 529 U.S. at 396; *Sears v. Upton*, 561 U.S. 945, 953 (2010).

- Finally, that the mental health evidence "could have contributed to a future dangerousness finding," Appendix 3, at *32, is not a reason to find no prejudice in trial counsel's failure to investigate such evidence. The Court made this clear when it rejected a similar

argument in *Sears*, 561 U.S. 951, in which the un-investigated mitigating evidence also revealed some adverse evidence.

In short, the merit of Mr. Wardlow's *Wiggins* claim was plainly debatable. The "reasons the district court provided when analyzing the merits of [this] claim[]," Appendix 1 (Fifth Circuit opinion), at *378 – adopted summarily with this statement by the Fifth Circuit – are not a basis for denying a COA.

CONCLUSION

As we have shown, the Fifth Circuit disregarded, flouted, or paid mere lip service to every applicable decision by this Court to deny a COA on the procedural and substantive issues presented by Mr. Wardlow's appeal. The review of his case provided by the Fifth Circuit thus amounted to no review at all.

For these reasons, Mr. Wardlow prays that the Court grant a writ of certiorari to review the decision of the Fifth Circuit, grant COA on all the issues presented, and remand to the Fifth Circuit for plenary appellate review.

Respectfully submitted,

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