IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

No. _____

BILLY JOE WARDLOW,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

---

PETITION FOR WRIT OF CERTIORARI

RICHARD BURR*
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 fax

Counsel for Petitioner

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

THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTION PRESENTED

Over the past fifteen years, neuroscientific research has established with scientific certainty that because of continuing brain development until sometime in our early 20's, the neurological basis for a person's character, and hence his or her character, is not fully formed prior to the age of 21. Because of this, it is now clear that there can be no reliable prediction concerning future dangerousness for a person who has committed a capital murder prior to the age of 21. Billy Wardlow was 18 at the time of his murder. These facts raise the following question:

Whether, under the Eighth and Fourteenth Amendments, Texas may continue to impose, and carry out previously imposed, death sentences for which future dangerousness is or was used to determine death eligibility for defendants who were under 21 years old at the time of the crime?

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

State of Texas v. Billy Joe Wardlow, No. CR12764, 76th District Court of Titus County, Texas (judgment February 11, 1995) (trial proceeding)

Wardlow v. State, No, 72,102 (Tex.Crim.App. 1997) (unpublished) (direct appeal)

Ex parte Wardlow, No. WR-58,548-01 (Tex.Crim.App.) (unpublished) (initial state habeas corpus)

Wardlow v. Director, 2017 WL 3614315 (E.D.Tex. 2017) (federal habeas corpus)

Wardlow v. Davis, 750 Fed.Appx. 374 (5th Cir. 2018) (certificate of appealability application)

Wardlow v. Davis, ___ U.S. ___, 140 S.Ct. 390 (2019) (petition for writ of certiorari)

Ex parte Wardlow, 2020 WL 2059742 (Tex.Crim.App. 2020) (subsequent state habeas corpus)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Secondary Authority

INTRODUCTION:

Billy Wardlow's Case Presents an Issue that Is Timely and Worthy of the Court's Time

Billy Wardlow was 18 years old at the time he killed Carl Cole in a robbery at Mr. Cole's home in rural northeast Texas in 1993. In early 1995, Billy was convicted of capital murder and sentenced to death. The only aggravating factor in the Texas death penalty statute at that time was that the defendant would likely be dangerous in the future. The jury found that Billy would be.

The importance of Billy's age is that since the decision in *Roper v. Simmons*, 543 U.S. 544 (2005), precluding the death sentence for anyone 17 years old or younger at the time of the crime, scientific research has established that the brains of young people between 18 and 20 years old are functionally indistinguishable from the brains of 17 year-olds in the ways that are relevant to Eighth Amendment moral culpability. Billy does not put this forward as a basis to extend *Roper*'s preclusion to anyone under 21. Instead, he argues that this new scientific fact means that the Texas death penalty statute, which makes the prediction of future dangerousness the determinant of eligibility for a death sentence, is unconstitutional with respect to people who were under 21 years old at the time of their crimes. Because the brains of people under 21 are still developing, the character of these young people, just like the 17-year-old's in *Roper*, is not fully formed. Their "failings," accordingly, cannot be equated "with those of an adult [21 years or older], for a greater possibility exists that a minor's [18-20 year old person's] character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

At the beginning of his dissenting opinion in *Miller v. Alabama*, 567 U.S. 460, 493 (2012), Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, wrote:

> Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions. The pertinent law here is the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments.'

Billy Wardlow is not asking the Court to determine the appropriate sentence for an 18, 19, or 20 year old convicted of capital murder. He is asking the Court to do precisely what the Chief Justice says the Court must do, "apply the law" – here, the Eighth Amendment, as it has been interpreted and applied by the Court in previous decisions – to newly-established scientific facts.

The Court has long held that the Eighth Amendment requires heightened reliability in the decision to sentence a person to death. That means, in Texas, that the decision to sentence someone to death must be based on a reliable determination that he or she is likely to be dangerous in the future. At the time Mr. Wardlow was sentenced to death, we – including a majority of this Court – believed that a determination of future dangerousness could be made reliably with respect to people 18-20 years of age, as reliably as it could be made with respect to people 21 and older. *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (noting, without distinction as to the age of the defendant at the time of the offense, "[t]he fact that such a determination is difficult ... does not mean that it cannot be made"). Now, we know as a matter of scientific certainty that a determination of future dangerousness for 18-20 year-olds cannot be made reliably. Death sentences determined on this basis cannot, therefore, stand, as a matter of Eighth Amendment law.

Billy Wardlow's case is an appropriate vehicle for examining this issue, because the course of his life as and after his brain matured demonstrate unequivocally the inherent flaw in trying to prediction future dangerousness for an 18-year-old. The arc of Billy's life is summed

up by two people who have come to know Billy well over the last 20-25 years, one, fellow death row inmate Tony Ford, who has known Billy since he was 23 years old, the other, journalist Dan Zegart who has known Billy since he was 26 years old:

> Billy doesn't walk around trying to be all religious so that people will respect him. But he has morals and principles, and he has a feel for people. He has this way of empathizing with people, especially when they are hurting.... [He] has done something that few people have been able to do and that is discover a humanity within themselves.

Exhibit 6 to the Subsequent Application for Writ of Habeas Corpus, at 3 (declaration of Tony Ford).

> Billy Wardlow is a peace-maker, an enhancer of the good in other men, and someone who can be relied on in any correctional facility to be a positive influence overall.

Letter to the Texas Board of Pardons and Paroles, from Dan Zegart, April 20, 2020.

The Court should grant this petition and redress the fundamental flaw in the use of the death penalty statute in Texas against people under 21 years old at the time of their crimes.

OPINION BELOW

The order of the Texas Court of Criminal Appeals (hereafter, "CCA") refusing to authorize consideration of Mr. Wardlow's subsequent application for writ of habeas corpus raising a claim based on the Eighth and Fourteenth Amendments to the Constitution of the United States was entered April 29, 2020. *Ex parte Wardlow*, 2020 WL 2059742 (unpublished) [Appendix 1].

STATEMENT OF JURISDICTION

The final order of the Court of Criminal Appeals of Texas herein was entered April 29, 2020. *See* Appendix 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Eighth and Fourteenth Amendments to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

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

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Billy Wardlow grew up in a poor family with a mentally ill, domineering, and sometimes-terrifying mother and a withdrawn father. His mother kept him away from other kids, and he lived in the social margins at school. By the time he reached his later teens, he desperately wanted to get away from his family. When Billy was 17, he found a kindred spirit in Tonya Fulfer, who was also 17 and also from an abusive family. Tonya wanted to flee her family, too. Billy was intellectually able. Tonya was not. But they connected through their hearts.

The plan that led to Mr. Cole's murder was to steal his new truck and flee to Montana to start over. The plan did not include killing Mr. Cole. However, that plan went awry when Mr. Cole resisted, struggled over a gun Billy brandished, and was shot. On direct appeal, the Court of Criminal Appeals summarized the relevant facts of the crime in the following manner:

> When the victim attempted to retreat into his home, appellant drew his gun and blocked the door. The victim apparently then lunged at appellant and grabbed his arm. In his first 'confession' letter to the sheriff, appellant stated that, although the 82-year-old victim was stronger than he expected, appellant managed to shake the victim off. At this point, appellant shot the victim. Appellant recanted this

> statement in his second 'confession' letter saying that he shot the victim while they were struggling. However, given that the victim was shot between the eyes, and given the medical examiner's testimony that the gun was at least three feet from the victim when he was shot, the jury could have reasonably believed appellant's first statement.

Wardlow v. State, No. 72,102 (Tex.Crim.App. April 2, 1997) (not designated for publication) , at 3.

Regardless of which confession is credible, Billy's testimony at trial gave further meaning to the Court of Criminal Appeals' statement, *supra*, that "[t]he victim apparently then lunged at appellant and grabbed his arm." Billy testified at trial that he "did not intend to kill the victim [Carl Cole] when he went there." SF 37, at 644.[1] Mr. Cole "surprised me or the actual fact that he challenged me," *id*., at 652, and when Mr. Cole challenged him, "it caught me by surprise that he was stronger than I thought he was or guessed he was." *Id*. at 648. After the shooting, Billy testified, "I stood there, I didn't know what to do, everything had gone wrong, the plans had blown up." *Id*. Billy and Tonya, aghast at what happened, took Mr. Cole's truck and fled. They were arrested a couple days later in South Dakota.

Billy was tried for capital murder in Titus County, Texas, for the June 14, 1993 robbery-murder of Mr. Cole. He was convicted on February 8, 1995, and sentenced to death on February 11, 1995. His conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on April 2, 1997. *Wardlow v. State*, No. 72,102 (Tex.Crim.App. April 2, 1997).

Billy timely filed his initial state habeas corpus application on July 20, 1998. *Ex parte Wardlow*, No. WR-58,548-01 (Tex.Crim.App. September 15, 2004) (order dismissing habeas

---

[1] "SF" refers to the Statement of Facts, or court report's transcript of trial proceedings. The volume number and page number(s) within that volume follow "SF."

application). On September 15, 2004, the Texas Court of Criminal Appeals (hereafter, "CCA") dismissed his application under the mistaken view that Billy had waived his right to pursue state habeas remedies.

Billy 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, finding that his purported waiver of state habeas corpus proceedings was a procedural bar to the consideration of his claims, but also in the alternative, determining that the claims had no merit. *Wardlow v. Director*, 2017 WL 3614315 (unpublished). On October 22, 2018, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. *Wardlow v. Davis*, 750 Fed.Appx. 374. Thereafter, Billy filed a petition for writ of certiorari, but the Court denied certiorari on October 15, 2019. *Wardlow v. Davis*, ___ U.S. ___, 140 S.Ct. 390.

On October 23, 2019, Billy filed a subsequent application for habeas corpus relief in the trial court raising the claim presented herein and one other claim. Pursuant to the Texas habeas corpus statute, Tex. Code Crim. Proc. Art. 11.071 § 5, the trial court transmitted the application to the CCA for it to determine whether the claims met the statutory criteria for consideration in a subsequent habeas application. On October 25, 2019, the trial court scheduled Billy's execution for April 29, 2020. That order was modified on April 6, 2020, re-scheduling his execution for **July 8, 2020**. Appendix 2.

On April 29, 2020, the CCA entered an order with respect to the subsequent habeas corpus application. *Ex parte Wardlow*, 2020 WL 2059742. The court first summarized the claim underlying the Question Presented to this Court:

[Wardlow] asserts that *Roper v. Simmons*, 543 U.S. 544 (2005), and ensuing

> Supreme Court cases, together with recent scientific advances, preclude the use of the future dangerousness issue to determine death eligibility in a capital sentencing proceeding for offenders under 21 years old at the time of their crimes.

2020 WL 2059742 *2. The Court then found "that the allegations [in the subsequent habeas application] do not satisfy the requirement of Article 11.071 § 5," and "[a]ccordingly, ... dismiss[ed] the application as an abuse of the writ without reviewing the merits of the claim raised." *Id*. The CCA also denied Billy's motions for a stay of execution. *Id*.[2]

REASONS FOR GRANTING CERTIORARI

The Court Should Determine Whether under the Eighth Amendment Texas May Continue to Use, And May Carry Out Previously-Imposed Death Sentences that Used, Future Dangerousness to Determine Death Eligibility for Defendants Who Were under 21 Years Old at the Time of Their Crimes, in the Face of Scientific Certainty That Such a Determination Cannot Be Made Reliably for People under 21 Years Old.

A. The Court's prior decisions concerning the constitutionality of Texas' use of future dangerousness and concerning the age of offenders eligible for the death penalty frame the context in which this question arises.

As we have noted from the beginning of this application, Billy Joe Wardlow was 18 years old when he killed Carl Cole. In the penalty phase of Billy's trial, the sentence was determined by the jury's response to two Special Issues – Special Issue 1, whether "the Defendant will more likely than not, commit criminal acts of violence in the future so as to constitute a continuing threat to society," SF 40, at 286-87, and Special Issue 2, whether "there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death

[2]Despite the stated rationale for the CCA's ruling, that rationale had no "fair or substantial support," *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920), under applicable state law. Accordingly, as we argue in Section G of the Reasons for Granting Certiorari, *infra*, the CCA's ruling cannot stand as an independent and adequate state ground insulating the decision from review by this Court.

sentence," SF 40, at 292. Thus, the State's case for death – the death eligibility issue – turned entirely on whether the jury determined that Billy posed a future danger to others.

When the Court considered the constitutionality of Texas' capital sentencing procedure in *Jurek v. Texas*, 428 U.S. 262 (1976), the major challenge to the statute was to Special Issue 1, with "the petitioner argu[ing] that it is impossible to predict future behavior...." *Id*. at 274. The Court's response was that, "[t]he fact that such a determination is difficult, ... does not mean that it cannot be made," *id*. at 275, noting that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system [referring to decisions concerning bail, sentencing, and parole]." *Id*. The Court concluded, "[t]he task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Id*. at 275-76.

In 1983, the Court again addressed Texas' use of future dangerousness in its capital sentencing scheme. *Barefoot v. Estelle*, 463 U.S. 880 (1983), examined a challenge to the prosecution's use of mental health experts in the prediction of future dangerousness. Reasoning that if lay jurors are competent to assess future dangerousness on the basis of all the evidence, as *Jurek* held, the Court held that the testimony of experts concerning this prediction is not so unreliable as to be constitutionally inadmissible. 463 U.S. at 896-97. Key to this holding was the Court's view that "the adversary process can[] be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness...." *Id* at 901.

Barefoot thus echoed a foundational principle in *Jurek*: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must

determine." *Jurek*, 428 U.S. at 276. Within the body of "relevant information" the jury needed to have to assess future dangerousness was "the age of the defendant...." *Id*. at 273.[3] Just how age should be weighed, however, was not addressed in *Jurek* or *Barefoot*.

With the Court's decision in *Roper v. Simmons*, 543 U.S. 544 (2005), the consideration of age in the assessment of future dangerousness changed dramatically. Deciding that the death penalty could no longer be imposed on people under the age of 18 at the time of their offenses, the Court reasoned that the adversarial process could no longer be trusted to sort out life-and-death sentences simply by taking age into account. The reasoning was based on "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569. Those differences included "'[a] lack of maturity and an underdeveloped sense of responsibility,'" *id*., "susceptib[ility] to negative influences," and – critical to the question Mr. Wardlow presents – "character ... that is not as well formed as that of an adult." *Id*. 569-70. Since "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

---

[3] *Jurek* mentioned age in the context of explaining how the CCA had construed the future dangerousness issue so as to account for mitigating evidence. *Id*. 272-73 (quoting *Jurek v. Texas*, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975)). In the version of the Texas capital statute examined in *Jurek*, there was no special issue requiring the consideration of mitigating evidence. However, in Jurek's case, the Court of Criminal Appeals interpreted the future dangerousness issue as allowing the consideration of mitigation. Thus, "'[i]n determining the likelihood that the defendant would be a continuing threat to society the jury could consider ... [among other matters] ... the age of the defendant....'" 428 U.S. at 272-73.

In 1989, the Court held that this process for the consideration of mitigation was inadequate, *Penry v. Lynaugh*, 492 U.S. 302 (1989), leading Texas to revise the sentencing procedure to include only two special issues, the mitigation issue and the future dangerousness issue, as in Billy's case.

irreparable corruption," *id*. at 573, the Court held that the ban on the death penalty for anyone under the age of 18 must be categorical:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

Id. at 572-73.

The quality of the not-fully-formed character of those under 18 sheds important light on the manner in which age should be accounted for in assessing future dangerousness:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 570.

In reaching these conclusions, the Court recognized that "[d]rawing the line at 18 years of age" can be questioned, *id*. at 574, because "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id*. "[H]owever, a line must be drawn." *Id*. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood[,] [i]t is, we conclude, the age at which the line for death eligibility ought to rest." *Id*.

The holding and rationale of *Roper* and subsequent decisions by the Court applying *Roper*, together with new research findings by the neurosciences that further corroborate and give meaning to the Court's recognition that turning 18 does not turn a youth into an adult, gives rise

to the claim now presented by Mr. Wardlow. His claim is not that the death penalty must be banned categorically for people who were 18, 19, or 20 at the time of their crimes. He is not arguing that *Roper* must be extended to include anyone under 21. Rather, his argument is that the qualities of people under 21 recognized by the Court in *Roper* and its progeny, along with the advances in scientific understanding of those qualities since *Roper* was decided, demonstrate that the prediction of future dangerousness called for by the Texas capital sentencing statute *cannot* reliably be made for a capital defendant under 21 years old. The very qualities of those who have not yet turned 18 – which make "it ... less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," *Roper*, 543 U.S. at 570 – are equally applicable to those who have turned 18, 19, or 20 but not yet lived past the time their brains have matured into adult brains.

In the face of these legal and scientific developments, *Jurek*'s and *Barefoot*'s approval of the use of future dangerousness as an aggravating factor to determine the fate of Texas capital defendants can no longer stand for people under 21 years old at the time of their crimes.

In making this argument, Mr. Wardlow recognizes that he calls into question the sentences of everyone in Texas sentenced to death for offenses that occurred before they were 21 years old. This is not an insignificant number of people.[4] That is one of the reasons why the Court should grant certiorari. This question is embedded in the application of the Texas death

[4]In addition to Mr. Wardlow, there are now 44 other people on Texas' death row who were under 21 years old at the time of the crimes for which they were convicted – 18 who were 18 years old, 10 who were 19 years old, and 16 who were 20 years old – a total of 45 people including Wardlow. *See* https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last viewed June 10, 2020), providing information, including birth dates and dates of capital offenses, about people on Texas' death row.

penalty statute and will not go away if the State of Texas executes Mr. Wardlow.

B. The Eighth Amendment requires heightened reliability in the determination that death is the appropriate punishment for a person convicted of capital murder.

In *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988), the Court recounted that the Eighth Amendment requires a heightened need for reliability in the capital sentencing decision:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. *See Gardner v. Florida,* 430 U.S. 349, 363-364 (1977) (White, J., concurring in judgment) (quoting *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976)).

In addition to being reliable in the ordinary sense of that word – trustworthy and warranted – reliability has another meaning in this context. As the Court expressed it in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), to "ma[k]e a reliable determination that death is the appropriate sentence, *Woodson*, 428 U.S. at 304, 305[,] '... the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.' *California v. Brown*, 479 U.S. [538,] 545 [(1987)] (O'Connor, J., concurring)."

We now know that the capital sentencing procedure utilized in Billy's trial, in which the eligibility for a death sentence in the penalty phase was determined solely by the jury's assessment of future dangerousness, no longer meets either of these meanings of reliability for a defendant like Billy, who was 18 years old at the time of his crime.

C. Advances in neuroscience since the decision in *Roper* have established that there is no significant difference between the brains of 18-20 year olds and 17 year olds with respect to the formation of one's character.

Among the qualities of people under 18 years old that led the Court to prohibit the death penalty for people under 18 was the lack of a fully formed "character." *Roper*, 543 U.S. at 569-

70. The Court reasoned on the basis of human experience that such "qualities ... do not disappear when an individual turns 18." *Id*. at 574. Advances in scientific research since *Roper*, however, have shown unequivocally that for people between 18 and 20, the lack of a fully formed character is identical to the lack of a fully formed character in a 17-year-old.

Six years after *Roper*, the National Institute of Mental Health began reporting on how "[p]owerful new technologies have enabled [researchers] to track the growth of the brain and to investigate the connections between brain function, development, and behavior." *The Teen Brain: Still Under Construction*, NATIONAL INSTITUTE OF MENTAL HEALTH (2011), p. 2 [Exhibit 2 to the Subsequent Habeas Corpus Application]. The NIMH report continued,

> The research has turned up some surprises, among them the discovery of striking changes taking place during the teen years. These findings have altered long-held assumptions about the timing of brain maturation. In key ways, the brain doesn't look like that of an adult until the early 20s....
>
> The parts of the brain responsible for more 'top-down' control, controlling impulses, and planning ahead—the hallmarks of adult behavior—are among the last to mature.

Id. at 2-3.

Just four years later, an article in SCIENTIFIC AMERICAN reported in more detail these earlier findings by the National Institute of Mental Health. The key finding is the "mismatch" between the part of the brain in which emotions arise and the part which subjects emotion to scrutiny before it can result in behavior. Jay N. Giedd, "The Amazing Teen Brain," SCIENTIFIC AMERICAN (June 2015), Vol. 312 (No. 6) at 32-37 [Exhibit 3 to the Subsequent Habeas Corpus Application]. As Dr. Giedd, a noted child and adolescent psychiatrist, explains,

> The most recent studies indicate that the riskiest behaviors arise from a mismatch between the maturation of networks in the limbic system, which drives emotions

> and becomes turboboosted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses. Indeed, we now know that the prefrontal cortex continues to change prominently until well into a person's 20s.

Id. at 34.

Two years later, a group of neuroscientists and legal experts, working together in the MacArthur Foundation's Research Network on Law and Neuroscience, wrote a report focused in part on young adulthood. *See* B.J. Casey, Richard J. Bonnie, Andre Davis, David L. Faigman, Morris B. Hoffman, Owen D. Jones, Read Montague, Stephen J. Morse, Marcus E. Raichle, Jennifer A. Richeson, Elizabeth S. Scott, Laurence Steinberg, Kim Taylor-Thompson, Anthony Wagner, *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* (2017) [Exhibit 4 to the Subsequent Habeas Corpus Application]. "Young adulthood" is defined by neuroscientists and behavioral scientists as the period between ages 18 and 21. *Id*. at 3 The authors report, "Researchers have found that in young adulthood, as in adolescence, areas of the brain that regulate functions like judgment and self-control are still not fully mature." *Id*. Significantly, for purposes of the issue presented by Mr. Wardlow,

> In certain emotionally charged situations, the capacity of young adults to regulate their actions and emotions appears more like that of teens than adults in their mid 20s or older....
>
> When young adults feel threatened, they become more impulsive and more likely to take risks.

Id.

In December 2018, in a declaration filed in connection with litigation in the state of Oregon seeking to expand *Roper*'s categorical ban on the death penalty to people under 21 years

old,[5] the American Academy of Pediatric Neuropsychology reported comprehensively on the findings of researchers concerning young adults since the decision in *Roper*. [Exhibit 5 to the Subsequent Habeas Corpus Application (Declaration on Behalf of the American Academy of Pediatric Neuropsychology, by Robert J. McCaffrey, Ph.D.)]. This declaration is highly instructive as well on the issue presented by Mr. Wardlow.

The Academy notes that "[i]ncremental yet profound advances in neuroscience and neuropsychology have emerged in the 13 years since the *Roper* decision, and especially in the last decade." *Id*. at 11. These advances "have unequivocally demonstrated that significant brain development supporting greater complexity in brain functions continues to take place well beyond the age of 18 years." *Id*.

To place these advances in context, the Academy explains the critical role played by the last portion of the brain to develop, the prefrontal cortex:

> Twentieth century neuroscience long held that the prefrontal cortex (the last portion of the human brain to evolve) is the master control center of the mature brain. This brain region evaluates complex behavioral decisions and signals other parts of the brain and appraises actions to be taken (or not to be taken) constantly based on new information received throughout the cortex as well as feedback loops present in the brain, on how and when to behave, to act, how to act, and how not to act, and exerting inhibitory control over all behavioral functions.

Id. at 7. In keeping with the other expert information presented by Mr. Wardlow, the Academy explains that "[t]his region of the brain, when mature, is the only brain region empowered to over-ride the powerful urges of the limbic system and its more reflexive and emotionally-laden response patterns." *Id*.

By comparison to 17 year olds, the prefrontal cortex in 18-20 years olds, is similar:

---

[5] *Guzek v. Kelly*, No. 17CV08248, Circuit Court for the State of Oregon, Marion County.

> [T]he same areas of the brain associated with the ability to assess the consequences of behavior and the proclivity for engaging in risky and rash behavior that are under-developed or immature in 17-year-olds, remain so in the 18-to-20-year-old population, and in fact do not show, on average, maturity of function until after age 20. It is increasingly clear that the brains of 18-to-20-year-olds are not yet fully developed in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance, and are poorly distinguished from the brain development of 17-year-olds with regard to these important brain systems.

Id. at 5.

Summarizing the relevant research, the Academy expands critically on the Court's observation in *Roper*, 543 U.S. at 574, that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."

> While academics continue to debate the exact age of brain maturation, it is clear that this does not happen until after age 20. There is no clear way to differentiate the functioning of the brains of 17-year-olds from those aged 18, 19, and 20 in terms of risk taking behaviors, the ability to anticipate the consequences of their actions (i.e., engage in a cost-benefit analysis), to evaluate and avoid negative influences of others, *and to demonstrate fully formed characterological traits not subject to substantive change over the next decade of their lives*. The key aspects of brain development governing these abilities and characteristics simply are not yet mature or fully functional until sometime after the age of 21.

Declaration of the Academy, at 3 (emphasis supplied). In sum, "there is no bright line regarding brain development nor is there neuroscience to indicate the brains of 18-year-olds differ in any significant way from those of 17-year-olds." *Id*.

The post-*Roper* scientific advances are particularly instructive for the assessment of future dangerousness for a person in the 18-20 year old age range. The Academy declaration hones in on the aspect of teens' brain functioning noted by the Court that is the most relevant to the future dangerousness question: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is

evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. The Academy addresses this directly for a person like Mr. Wardlow: "Characterological features of behavior are hardly settled in reliably predictable ways by the age of 18 given the amount of neurobiological development yet to occur." Declaration of the Academy, at 16. Dr. Giedd addresses the same feature in this manner:

> Appreciating that the brain is changeable throughout the teen years obliterates the notion that a youth is a 'lost cause.' It offers optimism that interventions can change a teenager's life course....
>
> [T]he teen years are a turning point for a life of peaceful citizenship, aggression or, in rare cases, radicalization. Across all cultures, adolescents are the most vulnerable to being recruited as soldiers and terrorists, as well as the most likely to be influenced to become teachers and engineers.

"The Amazing Teen Brain," SCIENTIFIC AMERICAN, at 37.

D. The prediction of future dangerousness for a person 18 years old is just as unreliable as the prediction for a person who has not reached the age of 18.

As we have pointed out, one of the reasons the Court found most compelling in its decision in *Roper* to ban the death penalty for 17 year olds is that, because of their continuing to develop, "even a heinous crime committed by a juvenile" cannot reliably be taken as "evidence of irretrievably depraved character." 543 U.S. at 570. In a case five years after *Roper*, examining "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime," *Graham v. Florida*, 560 U.S. 48, 52-53 (2010), the Court amplified and emphasized the importance of this principle.

Referring to amicus briefs, the Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id*. at 68. The Court then explained that "parts of the brain involved in behavior control continue to mature

through late adolescence." *Id*. And critically, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id*. (quoting *Roper*). Emphasizing this characteristic, the Court continued:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.... As one court concluded in a challenge to a life without parole sentence for a 14–year–old, 'incorrigibility is inconsistent with youth.' *Workman v. Commonwealth,* 429 S.W.2d 374, 378 (Ky.1968).

560 U.S. at 72-73.

As the science we have summarized makes clear, the brains of 18-20 year olds are just like the brains of 17 year olds in this respect. "Characterological features of behavior are hardly settled in reliably predictable ways by the age of 18 given the amount of neurobiological development yet to occur." Declaration of the Academy, at 16. Accordingly, juries cannot make reliable assessments of future dangerousness for young adults and could not have done so for Billy Wardlow.

In light of the Court's pronouncements about this and the clarity of scientific knowledge concerning people under 21 years old, it is also clear that the second kind of reliability required under the Eighth Amendment for a capital sentencing decision cannot be met in these circumstances: There can be no reasoned moral response to capital murder by an 18 year old when that response hinges on an attempt to assess the future dangerousness of that person. As the Court explained in *Penry*, 492 U.S. at 319, to "ma[k]e a reliable determination that death is the appropriate sentence, '... the sentence imposed at the penalty stage should reflect a reasoned

moral response to the defendant's background, character, and crime.'" (Citations omitted.) Given the Court's observations about the impossibility of determining that a person under 18 has an "irretrievably depraved character," or that such a person will be a future danger because s/he is "incorrigible" – and the science that shows the same is true for an 18 year old – the imposition of a death sentence on Billy Wardlow *could not and did not* "reflect a reasoned moral response to [his] background, character, and crime."

E. The course of Billy Wardlow's life since he turned 21 demonstrates unequivocally the truth that the brain functioning of an 18 year old is not different from the brain functioning of a 17 year old.

The course of Billy's life after his brain matured demonstrates that his character – assessed by the jury as likely posing a threat of dangerousness in the future – was anything but that. His character, once fully formed, was in no respect "irretrievably depraved," *Roper*, 543 U.S. at 570, or "incorrigible," *Graham*, 560 U.S. at 72. Since he turned 21 years old, Billy has not engaged in any dangerous behavior and has not posed any threat of dangerousness.

Two people also on death row in Texas, Tony Ford and Mark Robertson, have known Billy for most of the time he has been on death row. *See* Exhibits 6 (declaration of Tony Ford) and 7 (Declaration of Mark Robertson) to the Subsequent Habeas Corpus Application. Their experiences with Billy and perspectives on his character – all of which arose after Billy had reached his early 20's – are directly relevant to the aspect of youthfulness and not-fully-formed character that the Court identified in *Roper* as relevant to future dangerousness.

Mr. Ford first learned about Billy when death row was still located in the Ellis I Unit near Huntsville. In 1997 or 1998, Mr. Ford saw Billy on the recreation yard. "I spoke to him then but it would be a while before we got to be friends. But from what everyone that knew something

about him said, there was universal agreement that Billy was one of the 'good guys,' meaning he plays it straight and you can depend on him to keep his word and not play games." Exhibit 6 at ¶ 6.

While still at the Ellis I Unit, Mr. Ford learned more about Billy and the respect he had from other inmates:

> One day on the recreation yard, some guards came out looking for Billy. They were known to try to rile up inmates so they could beat us. A bunch of black guys were on the yard. They saw what the guards were up to and started grumbling about the guards trying to mess over Billy. The guards realized what they were about to step into so they asked Billy if he would come with them. Billy said 'sure' and left without anyone being harmed. Billy is the only person who could have inspired people of a different race to come to his aid if he needed it. He is not a gang member. He does not try to intimidate people. He does not bully, steal, or manipulate. He is just someone that everyone likes.

Exhibit 6 at ¶ 7.

After death row moved to the Polunsky Unit, Mr. Ford and Billy often had recreation at the same time in adjacent areas. They talked a lot as a result of being placed in adjacent areas for outdoor recreation, and they "just 'clicked.'" Exhibit 6 at ¶ 8. They had their most serious conversations while they were both on the recreation yard. *Id*. at ¶ 11. Billy often talked Tony through problems he was having. One that was especially important to Tony involved the death of his mother. The way he did that touched Tony deeply:

> When my mother passed, it hit me hard. I couldn't do anything for days without crying and breaking down. Billy let me. He was there for those times. He'd let me express myself. Then he'd begin talking, sharing with me the loss of his mother and how he dealt with it. He wasn't doing what so many people do, like they are comparing losses, like they are somehow ignoring your loss and pain to say, 'but what about my loss and pain?' Billy's conversation with me didn't have that ring to it. He started off just speaking, like he was in that moment with me, and I believe that he was. Then, next thing you know, I'm speaking in the manner in which he is speaking. Calmly. Not breaking down. But as he is telling me

how he began to deal with his loss and pain, I felt myself in that space of calm. Looking at my mother's death, assessing it, and then gradually dealing with it.

Exhibit 6 at ¶ 11.

This is how Billy is. Billy has this straightforward way of talking to me and everyone. He looks you in the eyes. Normally he has this smile on his face, and despite all the years of being here, Billy still looks pretty much like a big kid. But when he is serious and he talks with you, he talks TO YOU. His energy will slow. And before you know it, it is like you both are in sync breathing. You are calm. And he talks, and you understand.

Exhibit 6 at ¶ 12.

Mr. Ford also reflected on how Billy relates with prison staff:

Billy is a type of person that everyone gets along with, even prison staff, even the prison staff that acts like they don't like anyone. He will get along with them. That is not to say that Billy hasn't had his problems with some prison staff.... So, there have been times certain guards would 'try' him, try and rattle him or set him up, so that he could get written up. I think what sets him apart in another way is that he doesn't fall for these things. He will still talk to guards who act this way where most people back here will show obvious hostility. They will curse and yell. They will threaten. Billy won't do this. And because of this the guards respect him.

Exhibit 6 at ¶ 14.

Mr. Ford returned again to the way other inmates feel about Billy, especially across racial lines:

Sure, Billy has had his struggles, but Billy has been able to constantly have the support of people back here across all racial lines. Billy is one of the few white guys here who stand up to racism. He won't stand for it. I've never seen him not do it. Billy doesn't walk around trying to be all religious so that people will respect him. But he has morals and principles, and he has a feel for people. He has this way of empathizing with people, especially when they are hurting.

Exhibit 6 at ¶ 15.

Mark Robertson also was at Ellis I Unit when Billy arrived there. Exhibit 7 at 1. Over

time, talking with each other because of being in cells near each other and on the recreation yard together, they too became friends. *Id*. Reflecting on their friendship. Mr. Robertson observed: "What made it so easy being Billy's friend was his open-mindedness and sociable nature. Billy is someone virtually anyone will find easy to talk to because he likes finding mutual interests in others and that was my personal experience with him in the beginning." *Id*.

Their mutual interests blossomed, with Billy providing important support to Mr. Robertson:

> We both liked science and were both into astronomy, and when Billy sent me a book on the Sun, I was hooked. He knew I was mathematically inclined and introduced me to something to put my math skills to use: astrology.... Over the years Billy learned about classical physics and some quantum theory via the books written for laypersons. We found a common joy in Prof. Michio Kaku, the well known co-founder of string theory and Professor of Theoretical Physics at the City University of New York.

Exhibit 7 at 1.

Electronics became another field of interest that Billy introduced Mark to. Exhibit 7 at 2. Their interest in electronics also helped others on death row:

> Billy learned how to work on the Smith Corona typewriters and word processors that the prison allows us to have. He got a manual for repairing these machines and helped many people whose machines had broken down. He taught me to do the same thing.

Id. Generously, "When Billy was moved to another cellblock, he sent me the repair manual without me asking for it. He wanted me to have it so I could keep helping guys in my area." *Id*.

Mr. Robertson recounted much more about the kindness and generosity that characterizes Billy:

> Among peers and staff alike, he is respectful and well-liked. He shares his special commissary 'care packages' from people on the outside with others on the row.

> He takes it on himself to keep the showers we all use clean, not because he is assigned to do this, but because those assigned to do it usually only halfway do it. He humbles himself enough to scrub the showers and does it regularly even though there is no reward in doing so.

Exhibit 7 at 2.

Mr. Robertson also made note of how well Billy has done despite the difficulty of prison culture, which can generate conflict and disrespect:

> The prison environment would be a culture shock to anyone because of the rampant barbarism and cold-hearted, unwritten code of conduct. Billy did quite well, despite this, and that speaks to his personal potential. He was always bright, and time showed that he was nobody's fool in here. He didn't follow the lead of others, and that's much to his credit. He would avoid trouble in general and wouldn't get involved in the bickering of others unless to point out the facts of life.

Exhibit 7 at 2.

From these accounts, it is plain that the Court's observation in *Roper* about the character of a 17 year old is just as applicable to the character of an 18 year old, as evidenced by the life Billy has lived after his conviction and death sentence. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." 543 U.S. at 570. Billy Wardlow's character deficiencies surely were reformed by the time he was in his 20's. The decision to sentence him to death, for a crime committed when he was 18, because he would continue to be dangerous, cast in stone a character that was not yet the character he would have – because his brain was just as much in the formative stage as the brain of Christopher Simmons and others

who have not yet reached the age of 21.

F. *Roper* supports, and in no way, precludes the claim brought by Mr. Wardlow.

Roper held that "[t]he Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." 543 U.S. at 579. *Roper* does not hold that the characteristics of people under the age of 18 that preclude imposition of the death penalty are irrelevant to other constitutional challenges to the imposition of the death penalty. These characteristics, *Roper* noted, "do not disappear when an individual turns 18." *Id*. at 574. Mr. Wardlow has shown (1) that advances in neuroscience since *Roper* confirm unequivocally that these characteristics continue to shape the lives of people until they are 21, and (2) these characteristics make predictions of future dangerousness constitutionally unreliable. *Roper* therefore *supports* and does not in any respect preclude Mr. Wardlow's claim.

As a practical matter, because of the manner in which the Texas death penalty statute structures the capital sentencing process, Mr. Wardlow's claim would preclude the death penalty in Texas for people under 21 years old at the time of their crimes. However, that does not amount to a categorical ban against the death penalty for 18-20 year olds in apparent contradiction to the line drawing, 543 U.S. at 574, at age 18 done by *Roper*. It simply means that if Texas wants to seek the death penalty against 18-20 year olds, it must adopt a different sentencing scheme, in which a finding of future dangerousness is not a prerequisite for imposition of the death penalty – making Texas like every other death penalty jurisdiction.[6]

---

[6]Until recently, only one other death penalty jurisdiction, Oregon, included future dangerousness as a statutory prerequisite for imposition of the death penalty. The Oregon

G. The CCA's summary dismissal of this claim as "an abuse of the writ" cannot thwart the Court's consideration of the claim, because Mr. Wardlow complied with the applicable state procedural rules "in every real sense," *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964).

The CCA dismissed the claim that is the subject of this petition on state procedural grounds. The entirety of its ruling was as follows: "We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claim raised. Art. 11.071 § 5(c)." *Ex parte Wardlow*, 2020 WL 2059742 *2 (Tex.Crim.App. 2020) [Appendix 1].

The State of Texas will argue that the CCA's dismissal of this claim as an abuse of the writ is an independent state ground that precludes review by this Court. The Court cannot credit the argument, however, because it has no support in state law as applied in Mr. Wardlow's case.

The Court has a long, unbroken history of refusing to allow state courts to defeat the review of federal rights by reliance in their decisions on state procedural grounds when those grounds have no fair or substantial support. Thus, in *Flowers*, *supra*, the Court held, "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." 377 U.S. at 297. The Court has long recognized that, "if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to

---

procedure was modeled after the Texas procedure, but the Oregon legislature has now eliminated the future dangerousness question as a statutory special issue. *See* Or. Laws 2019, ch 635. (SB 1013), effective September 29, 2019. Section 5 of that bill eliminated former ORS 163.150(1)(b)(B) ("Whether there is a probability that the defendant would commit criminal acts of violence that would constituted a continuing threat to society[.]").

review easily may be avoided." *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920). Accordingly, the Court must examine whether such grounds are "without any fair or substantial support." *Id.* (citing ten previous decisions). It "becomes our duty to ascertain, '... in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment.'" *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (quoting *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931)).

In conducting this examination, the Court analyzes the requirements of the state procedural rules in question. *See Flowers*, 377 U.S. at 295-301; *Patterson*, 357 U.S. at 455-58; *Ward*, 253 U.S. at 23-25. That analysis here demonstrates unequivocally that Mr. Wardlow satisfied the state procedural rules.

Under Tex. Code Crim. Proc. Article 11.071 § 5(a) – the abuse of the writ rule relied on by the CCA – a claim presented in a subsequent habeas corpus application satisfies the requirement for consideration in such a proceeding if it "ha[s] not been and could not have been presented ... in a previously considered application ... because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application...." Mr. Wardlow's claim met both the legal and factual criteria of this provision.

The legal and factual bases for this claim were unavailable when Mr. Wardlow filed his initial habeas application on July 20, 1998. No decision by this Court or any other court had held that 16 or 17 year olds were ineligible for the death penalty. To the contrary, *Stanford v. Kentucky*, 492 U.S. 361 (1989), rejected the proposition that the constitution barred the death penalty for 16 and 17 year olds. Only with the decision in *Roper v. Simmons* – in 2005, seven

years after Mr. Wardlow's initial state habeas application and after his case was in federal habeas proceedings – did the legal tools begin to be available to make the claim he now makes. *See* Tex. Crim. Code Art. 11.071 § 5(d) (habeas applicant must show that the claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state"). However, only with the advances in neuroscience in the years following *Roper*, as we have shown herein, did the full factual basis for this claim become available. No exercise of "reasonable diligence" by Mr. Wardlow in 1998 could have led to the discovery of these facts. Art. 11.071 § 5(e).

In the CCA, the State argued both that the claim could have been formulated by 1998, prior to *Roper*, and that the factual basis was available by 1998. Neither argument is even colorable.

1. The claim could not have been reasonably formulated prior to *Roper*.

The State argued that Mr. Wardlow could have formulated this claim on the basis of *Jurek v. Texas*, 428 U.S. 262 (1976), and its progeny, long before *Roper*. That was not possible.

Jurek and its progeny held that a capital defendant's youthfulness could be adequately accounted for as a mitigating factor in the jury's assessment of future dangerousness. In *Johnson v. Texas*, 509 U.S. 350, 368 (1993), the Court reiterated, "[T]here is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." That was the law with respect to the mitigating force of youthfulness for 16- and 17-year old capital defendants until *Roper* was decided in 2005, when the Court overruled that view. There, the state argued that because the

qualities of youth can be considered in mitigation, it is "unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age." 543 U.S. at 572. The Court responded, "*We disagree*." *Id*. (emphasis supplied). It then explained:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

Id. at 572-73.

Thus, in *Roper*, the Court held that the youthful qualities of 16- and 17-year-olds cannot be adequately considered in mitigation, requiring preclusion of the death penalty for 16- and 17-year-olds. Critically for Mr. Wardlow's claim, the Court also noted that while "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id*. at 574. Nevertheless, the Court drew the line at age 18 for death eligibility, because that "is the point where society draws the line for many purposes between childhood and adulthood." *Id*.

Despite the drawing of this line for purposes of the death eligibility threshold, *Roper* provided the basis for Mr. Wardlow to formulate the claim he now raises because of (1) its recognition that the qualities that differentiate children from adults cannot adequately be accounted for as mitigation, and (2) its recognition that the very "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." If these qualities cannot adequately be taken into account as mitigation for a 17-year-old, as *Roper* recognized, they cannot adequately be taken into account as mitigation in assessing the risk of future dangerousness posed by an 18-year-old, because those qualities go to the very core of a jury's

assessment of future dangerousness.

In addition to *Roper*'s reversal of the view that the qualities of youthfulness could be taken into account adequately as mitigation, the decision also marked the first time that the Court embraced research in the fields of developmental psychiatry and neurobiology in determining whether "in the exercise of [the Court's] own independent judgment, ... the death penalty is a disproportionate punishment for juveniles." 543 U.S. at 564. *See* Exhibit 4 to the Subsequent Habeas Corpus Application (B.J. Casey, et al., *How Should Justice Policy Treat Young Offenders?*) ("The case [*Roper v. Simmons*] marked the first time the Court had grounded its opinion in developmental science.") These fields of scientific expertise underpinned each part of the Court's rationale for precluding death as a punishment for anyone under 18 years old. 543 U.S. at 569 (referring to "the scientific and sociological studies respondent and his amici cite" that confirmed "[a] lack of maturity and an underdeveloped sense of responsibility"); *id*. (citing an article by Steinberg & Scott in THE AMERICAN PSYCHOLOGIST to confirm that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"); *id.* at 570 (citing E. Erikson, *Identity: Youth and Crisis* to confirm "that the character of a juvenile is not as well formed as that of an adult").

Developmental science contributed heavily to the Court's further analysis of this third rationale concerning the lack of a well-formed character:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. *See* Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and

> suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev.2000); *see also* Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty.

Id. at 573.

Accordingly, the second aspect of *Roper,* that recognized for the first time the need to account for the insights provided by developmental science, provided the additional tool needed to formulate the claim Mr. Wardlow presents.

2. The scientific basis for Mr. Wardlow's Eighth-Amendment-based claim was unavailable until after *Roper*.

Citing one article published in 1993, the State argued in the CCA that the factual basis for this claim was also available by the time Mr. Wardlow filed his initial habeas application in 1998. This was simply not so. The scientific research necessary to support Mr. Wardlow's claim was not anywhere close to being available in 1998.

The article cited by the State is one of the earliest reported efforts to explore the timeline of brain development in relation to the "highest order-latest maturing neural network of the brain." J. Pujol, et al., *When Does Human Brain Development End? Evidence of Corpus Callosum Growth Up to Adulthood*, 34 Annals of Neurology 71, 74 (July 1993). The article observes that "[a]ll the basic elements required for thinking are acquired by the developing brain by the early teenage years." *Id*. at 71. It then notes that "in later years young adults improve the speed, capacity, and ability of their mental functions beyond the age at which somatic growth has already stopped." *Id*. The article then goes on to document on the basis of the study it reports,

that the corpus callosum – "the largest tract in the human brain, [which] interconnects all the major subdivisions of the cerebral cortex including a great proportion of fibers from high-level associative areas," *id*. – continues to grow into early adulthood and appears to be the basis for improvement in mental functions through early adulthood.

While the study reported in this article was an early step in understanding the timeline of brain development, it would not have been enough to support the claim in 1998 that Mr. Wardlow brought to the CCA, because research on brain development in adolescents and young adults was too limited at that time. Two of the articles presented to the CCA as exhibits to the Subsequent Habeas Application make this point unequivocally. In Exhibit 4 – B.J. Casey, et al., *How Should Justice Policy Treat Young Offenders?* – the authors write,

> [Even] [a]t that time [of *Roper* (2005)], the neuroscientific research on adolescents was simply too limited. That changed significantly over the next decade, as new work, by the Research Network on Law and Neuroscience and others, added validity to arguments based in developmental psychology and showed that adolescents' behaviors were at least partly a result of the immaturity of their brains.

Exhibit 4, at 2. Again, in Exhibit 5 – the 2018 Declaration of Robert J. McCaffrey, Ph.D., on behalf of the American Academy of Pediatric Neuropsychology – the same point is driven home:

> Incremental yet profound advances in neuroscience and neuropsychology have emerged in the 13 years since the *Roper* decision, and especially in the last decade. Those advances have unequivocally demonstrated that significant brain development supporting greater complexity in brain functions continues to take place well beyond the age of 18 years. This research has led to a paradigmatic shift in the way that the behavior of adolescents and young adults is understood.

Exhibit 5, at 11.

In short, despite early pioneering studies like the one cited by the State in the CCA, the "paradigmatic shift in the way that the behavior of adolescents and young adults is understood"

occurred only in the decade following *Roper*. Only with that shift did the factual basis for Mr. Wardlow's claim become available. There simply is no basis for the State's argument that the factual basis for Mr. Wardlow's claim was available by 1998.

For these reasons, there is no "fair or substantial support," *Ward v. Board of County Commissioners*, 253 U.S. at 22, for the CCA's abuse of the writ determination. The basis for their dismissal of Mr. Wardlow's claim *does not* "independently and adequately support[] the judgment.'" *Patterson*, 357 U.S. at 455. Accordingly, the "procedural rule with which there has been compliance [by Mr. Wardlow] in both substance and form, in every real sense," *Flowers*, 377 U.S. at 297, is an untenable basis for preventing review of the merits of his claim.

CONCLUSION

For the reasons set forth herein, the Court should grant Mr. Wardlow's petition and hold that the State of Texas may not continue to use, and may not carry out previously-imposed death sentences that used, future dangerousness to determine death eligibility for defendants who were under 21 years old at the time of their crimes.

Respectfully submitted,

RICHARD BURR*
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 fax

Counsel for Billy Joe Wardlow

*Member of the Bar of the Supreme Court of the United States

Appendix 1

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-58,548-01 and WR-58,548-02

EX PARTE BILLY JOE WARDLOW, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS AND A MOTION FOR STAY OF EXECUTION IN CAUSE NO. CR12764 IN THE 76TH JUDICIAL DISTRICT COURT TITUS COUNTY

***Per curiam*.**

O R D E R

We have before us a subsequent post-conviction application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071 and a suggestion to reconsider Applicant's initial Article 11.071 writ application.[1] We also have before us a motion and supplemental motion for a stay of execution.

In February 1995, a jury found Applicant guilty of the 1993 capital murder of Carl

[1] Unless otherwise indicated, all references to Articles refer to the Texas Code of Criminal Procedure.

Cole. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set Applicant's punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Wardlow v. State*, No. AP-72,102 (Tex. Crim. App. Apr. 2, 1997) (not designated for publication).

Applicant initially asked this Court to refrain from appointing him counsel for habeas and to immediately set an execution date for him.[2] However, in September 1997, Applicant entered into a legal representation agreement with attorney Mandy Welch in which she agreed to notify the appropriate courts that applicant did, in fact, wish to pursue his post-conviction remedies. After receiving confirmation from the trial court that Applicant did wish to pursue habeas relief, this Court in January 1998 appointed Welch as Applicant's habeas attorney and ordered that any application be filed in the convicting court no later than the 180th day after the date of the appointment.

On July 2, 1998, this Court again received correspondence from Applicant that he wanted to discontinue his appeal. In light of that request, we issued an order granting Applicant's request "to waive and forego all further appeals." *Ex parte Wardlow*, No. AP-72,102 (Tex. Crim. App. July 14, 1998) (not designated for publication). Despite this order, counsel timely filed Applicant's habeas application on July 20, 1998. The trial court reviewed the application and issued findings and conclusions on the seven claims raised therein. Upon receiving the application in this Court, we dismissed it for the

---

[2] Under the version of Article 11.071 existing at that time, this Court appointed habeas counsel.

reasons stated in the order of July 14, 1998. *Ex parte Wardlow*, No. WR-58,548-01 (Tex. Crim. App. Sept. 15, 2004) (not designated for publication).

On December 3, 2019, Applicant filed in this Court a suggestion that this Court reconsider, on its own motion, its dismissal of Applicant's initial writ application. Having considered Applicant's pleadings and the evolution of Article 11.071 caselaw, we now reconsider that dismissal.

Applicant raises seven claims in his application. Specifically, he asserts that: his confession was obtained in violation of his Sixth Amendment right to counsel; he was deprived of the effective assistance of counsel on appeal and at trial; the State's pretrial plea bargain with his co-defendant deprived him of due process and a fair trial; the State's failure to disclose that the co-defendant's version of the events corroborated his second confession violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963); and the admission of false testimony violated his due process rights and his right to the effective assistance of counsel. After reviewing Applicant's claims and the record of the case, we have determined that his claims should be denied.

Before filing in this Court his suggestion to reconsider his initial writ application, Applicant filed in the trial court his first subsequent writ application. Applicant raises two claims in his subsequent application. In the first, he complains that the State unknowingly presented false penalty phase testimony from Royce Smithey. In the second, he asserts that *Roper v. Simmons*, 543 U.S. 544 (2005), and ensuing Supreme

Court cases, together with recent scientific advances, preclude the use of the future dangerousness issue to determine death eligibility in a capital sentencing proceeding for offenders under 21 years old at the time of their crimes.

We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claim raised. Art. 11.071 § 5(c). Accordingly, we deny his motion and supplemental motion for a stay of execution.

IT IS SO ORDERED THIS THE 29th DAY OF APRIL, 2020.

Do not publish

Appendix 2

Cause No. CR12764

STATE OF TEXAS	§	IN THE 76TH DISTRICT COURT
	§	
v.	§	OF
	§	
BILLY JOE WARDLOW	§	TITUS COUNTY, TEXAS

EXECUTION ORDER

You, BILLY JOE WARDLOW, were indicted by the Grand Jury of Morris County, Texas, and charged with the offense of capital murder in cause numbers 6989, 7127, and 7130. After venue was transferred to Titus County, Texas, a jury in this Court returned a verdict finding you guilty of the offense of capital murder on February 8, 1995, in cause number 12,764. On February 11, 1995, the same jury in this Court returned answers to the special issues, submitted to the jury at punishment pursuant to Article 37.071 of the Texas Code of Criminal Procedure, and this Court, in accordance with the jury's findings at punishment, assessed your punishment at death. The judgment of this Court was reviewed by the Texas Court of Criminal Appeals on direct appeal and it was affirmed by that court on April 2, 1997, with mandate issued on August 18, 1997. Subsequently, on September 15, 2004, the Court of Criminal Appeals dismissed your initial application for writ of habeas corpus. Thereafter, the District Court for the Eastern District of Texas, Sherman Division, denied your federal petition for writ of habeas corpus on August 21, 2017, and the United States Court of Appeals for the Fifth Circuit denied your application for a Certificate of Appealability on October 22, 2018. Afterwards, the United States Supreme Court denied your petition for writ of certiorari on October 15, 2019. A previous execution date was set by this Court for April 29, 2020. This Court now proceeds to modify your prior execution date and now enters the following order.

IT IS HEREBY ORDERED by this Court that the prior execution warrant of October 25, 2019, setting an April 29, 2020 execution date for BILLY JOE WARDLOW, is RECALLED.

IT IS HEREBY ORDERED by this Court that you, BILLY JOE WARDLOW, having been adjudged guilty of capital murder and having been assessed punishment at death, in accordance with the findings of the jury and the judgment of this Court, shall at some time after the hour of 6:00 p.m. on the 8th day of July, 2020, be put to death by an executioner designated by the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until your death, such execution procedure to be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

It is ORDERED that the Clerk of this Court shall issue a death warrant, in accordance with this sentence, to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, and shall deliver such warrant to the Sheriff of Titus County, Texas to be delivered by him to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice together with the defendant, BILLY JOE WARDLOW, if not previously delivered.

The Defendant, BILLY JOE WARDLOW, is hereby remanded to the custody of the Sheriff of Titus County, Texas, to await transfer to Huntsville, Texas, if not previously delivered, and the execution of this sentence of death.

DONE AND ENTERED this 3rd day of April, 2020.

Angela Saucier

ANGELA SAUCIER
Presiding Judge
76th District Court
Titus County, Texas