No. 19-8712
No. 19A1064

IN THE
Supreme Court of the United States

BILLY JOE WARDLOW,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals and Application for a Stay of Execution

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE

QUESTION PRESENTED

Does the state court's reliance on an independent and adequate state law ground preclude this Court's consideration of Wardlow's successive and abusive claim under *Roper v. Simmons*, 543 U.S. 544 (2005), especially where Wardlow was a legal adult when he committed the offense, where the jury determined he was death-eligible as a result of the senseless and needless execution of a robbery victim, and where the jury properly determined he was a future danger?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases **Pages**

Statutes

Rules

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Petitioner Billy Joe Wardlow is scheduled for execution after 6:00 p.m. on July 8, 2020, for the callous murder of eighty-two-year-old Carl Cole during a robbery. Wardlow has previously and unsuccessfully challenged the constitutionality of his Texas capital murder conviction and death sentence in both state and federal courts. After initial federal habeas proceedings terminated, Wardlow unsuccessfully sought to file a subsequent application for writ of habeas corpus and several motions for stay of execution in the Texas Court of Criminal Appeals (CCA), relying upon this Court's decision in *Roper* in support of his claim that he is ineligible for the death penalty under Texas's capital sentencing scheme because he was just over eighteen-years-old when he murdered the elderly Mr. Cole.

Wardlow now requests a stay of execution and certiorari review of the Texas high court's dismissal of his application as an abuse of the writ. Pet'r App. 1; *Ex parte Wardlow*, Nos. WR-58,548-01, WR-58,548-02, 2020 WL 2059742 (Tex. Crim. App. Apr. 29, 2020) (unpublished). However, certiorari is foreclosed because the state court's disposition of his claim relied upon an adequate and independent state procedural ground. In addition, Wardlow's claim is wholly meritless. Thus, neither certiorari review nor a stay of

execution is appropriate under the circumstances, and both his requests should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit summarized the facts of Wardlow's capital murder as follows:

> Wardlow shot and killed Carl Cole while committing a robbery at Cole's home in the small east Texas town of Cason. When he was in jail awaiting trial, Wardlow wrote a confession to the sheriff investigating the murder. The State relied on that letter to prove the intent element required for a capital murder conviction. The letter stated that Wardlow went to Cole's house, intending to steal a truck. Once inside the house, Wardlow said that he pulled a gun on Cole. Wardlow added:
>
> Being younger and stronger, I just pushed him off and shot him right between the eyes. Just because he pissed me off. He was shot like an executioner would have done it. He fell to the ground lifeless and didn't even wiggle a hair.
>
> Wardlow testified and confirmed he killed Cole but gave a different reason for doing so. He told the jury that he did not intend to kill Cole when he went to his house; instead, he and his girlfriend Tonya Fulfer only intended to rob Cole and steal his truck. When Wardlow brought out the gun and told Cole to go back inside the house, Cole lunged at Wardlow and grabbed his arm and the gun, attempting to push Wardlow away. Wardlow testified that Cole was stronger than he expected, so he was caught off balance and began falling backwards. Wardlow said he shot the gun without aiming, hoping it would get Cole off him. The bullet hit Cole right between the eyes.
>
> The state countered Wardlow's claim about his intent by noting inconsistencies in his story and testimony from a medical

> examiner inconsistent with the gunshot occurring during a struggle.

Wardlow v. Davis, 750 F. App'x 374, 375 (5th Cir. 2018) (unpublished).

II. State's Punishment Evidence

Deputy Barnard testified that while on patrol on January 11, 1993, he observed Wardlow driving at a high rate of speed and attempted to pull him over. 39 Reporter's Record (RR) 19. Wardlow refused to pull over, and Deputy Barnard was forced to pursue him. 39 RR 20. Deputy Barnard followed Wardlow for several miles, but Wardlow continued traveling at over 100 miles per hour on the highway and 70 miles per hour on a narrow county road. 39 RR 20–21, 27–28. Wardlow was arrested for fleeing. 39 RR 28–30.

John Schultz, a salesman at a used car lot in Fort Worth, testified that on June 5, 1993, Wardlow, accompanied by a woman, took a 1989 Chevrolet pickup for a test drive and never brought it back. 39 RR 31–34.

Morris County jailer J.P. Cobb testified that on February 20, 1994, while Wardlow was incarcerated awaiting trial, jailers found a two-foot metal bar with a six- or eight-inch rod extending from the middle behind Wardlow's bunk in the cell he shared with three other inmates. 39 RR 141–42. One of Wardlow's former cellmates testified that Wardlow had planned to use the metal bar to hit one of the jailers in the head, take his keys, and escape. 39 RR 145–47. The State also offered into evidence several letters Wardlow wrote while he was

incarcerated in Morris County Jail, in which he threatened to harm other inmates, jailers, and the sheriff. 39 RR 173–76.

Deputy Sheriff Warren Minor testified that while being transported from the Titus County Jail to the courtroom the second day of trial, Wardlow stated the jail was using trustees as guards, and "if they don't stop using them I am going to double my time on one of them." 39 RR 177–78.

Harry Washington, an undercover narcotics agent, testified that on September 9, 1992, he and an informant approached Wardlow, attempting to buy some marijuana from him. 40 RR 208–09. Wardlow told Washington that he did not mess with drugs. 40 RR 209. When Washington inquired about a .45 handgun he observed lying on the seat next to Wardlow in the pickup, Wardlow laid his hand on top of the gun and responded, "I'll shoot you with it." 40 RR 210.

Royce Smithey, an investigator with the unit that prosecutes felony offenses occurring within the Texas prison system, testified regarding the various levels of security within the prison system. 40 RR 215–16, 220. He told the jury that, while capital murder defendants who receive a death sentence are segregated from general population and are strictly monitored with limited access to prison employees, capital defendants who receive a life sentence can be placed into the general population and are initially classified no differently than any other felony offender. 40 RR 221–22, 225–27. Smithey testified that

violent crimes, which sometimes involve prison employees, occur often within the Texas prison system, and the incidence of such crimes is much greater in the general population than on death row. 40 RR 222–27.

III. Course of State and Federal Proceedings

Wardlow was convicted and sentenced to death in 1995 for the murder of eighty-two-year-old Carl Cole, in the course of committing a robbery. 2 Clerk's Record (CR) 147–55, 157–64, 165–68. Wardlow's conviction and sentence were affirmed on direct review to the CCA. *Wardlow v. State*, No. 72,102 (Tex. Crim. App. Apr. 2, 1997). That same year, Wardlow appeared at a hearing before the state trial court and, through counsel, indicated that he did not desire to have counsel appointed for filing a state application for writ of habeas corpus and did not wish to pursue any further appeals. Supp. Findings of Fact (Sept. 22, 1997) 1. The trial court found that Wardlow was mentally competent, had voluntarily and intelligently waived his right to have counsel appointed, and waived his right to proceed pro se in open court. *Id.*

Wardlow subsequently "entered into a legal representation agreement with attorney Mandy Welch . . . in which she agreed to notify the appropriate courts that [Wardlow] did, in fact, wish to pursue his post-conviction remedies." *Ex parte Wardlow*, No. WR-58,548-01, 2004 WL 7330934, at *1 (Tex. Crim. App. 2004). After receiving confirmation from the trial court that Wardlow did wish to pursue postconviction relief, the CCA appointed Welch to represent

Wardlow and ordered that his state habeas application be filed within 180 days. *Id*.

Eighteen days before Wardlow's filing deadline, Wardlow wrote another letter to the CCA again expressing a desire to waive all further appeals. *Id*. The CCA granted Wardlow's request, based on the trial court's prior hearing. *Id*. Despite this order, Welch filed a state habeas application in the trial court on the 180th day after her appointment. State Habeas Clerk's Record (SHCR) 1–67.

The state trial court issued findings of fact and conclusions of law, recommending denial of habeas relief, which were forwarded to the CCA. Supp. SHCR 3–21. However, the CCA dismissed Wardlow's application, declining to review the merits of his claims based on its prior order granting Wardlow's request to abandon further appeals. *Ex parte Wardlow*, 2004 WL 7330934, at *1.

Wardlow then filed a petition for habeas relief in federal court, which the court denied. *Wardlow v. Director*, No. 4:04-CV-408, 2017 WL 3614315 (E.D. Tex. Aug. 21, 2017) (unpublished). The Fifth Circuit denied Wardlow's application for a certificate of appealability, *Wardlow*, 750 F. App'x at 375, and this Court denied Wardlow's petition for writ of certiorari. *Wardlow v. Davis*, 140 S. Ct. 390 (Oct. 15, 2019).

IV. Litigation Related to Wardlow's Present Execution

Eight days after the Court denied Wardlow's petition, Wardlow filed a subsequent state habeas application, raising, as relevant here, a new claim under *Roper*. Two days after that, the state trial court entered an order setting Wardlow's execution for April 29, 2020. Execution Order, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. Oct. 24, 2019). More than a month later, Wardlow filed in the CCA a suggestion that the court, on its own motion, reconsider its dismissal of Wardlow's initial habeas application, along with a motion to allow him to withdraw his previous waiver of state habeas proceedings.

On March 12, 2020, Wardlow filed a motion for stay of his execution in the CCA, pending disposition of the subsequent application and suggestion to reconsider. Soon thereafter, Wardlow filed a supplemental motion for stay of execution, citing primarily the then-recent COVID-19 pandemic. On April 3, 2020, the State moved to modify Wardlow's April 29 execution date, citing recent decisions by the CCA staying executions due to the pandemic. That same day, the state trial court granted the State's motion and reset Wardlow's execution date for July 8, 2020. Execution Order, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. Apr. 3, 2020).

On April 29, 2020, the CCA issued a single order disposing of all Wardlow's pending proceedings. *Ex parte Wardlow*, Nos. WR-58,548-01, WR-

58,548-02, 2020 WL 2059742 (Tex. Crim. App. Apr. 29, 2020) (unpublished). First, it reconsidered its dismissal of Wardlow's initial state habeas application and denied it on the merits. *Id*. at *1. Second, it dismissed Wardlow's subsequent habeas application as an abuse of the writ without reviewing the merits of the claims raised. *Id*. at *2. Third, it denied Wardlow's motions for stay of execution. *Id*. This proceeding follows.[1]

REASONS FOR DENYING THE WRIT

I. The Court Below Dismissed Wardlow's Claim on an Adequate and Independent State Law Ground Depriving the Court of Jurisdiction.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). The state law ground barring federal review may be "substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

[1] Eight days after filing the instant petition for writ of certiorari, Wardlow filed a motion under Federal Rule of Civil Procedure 60(b) in federal district court, seeking to reopen the federal habeas proceedings in light of the CCA's reconsideration and denial-on-the-merits of his initial habeas application. Five days after that, he filed a second petition for writ of certiorari in this Court, seeking this Court's review of the CCA's disposition of his initial state writ. *See Wardlow v. State*, No. 19-8835. Both proceedings are pending.

To be adequate, a state law ground must be "'firmly established and regularly followed.'" *Lee v. Kemna*, 534 U.S. 362, 885 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Discretion does not deprive a state law ground of its adequacy for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Ultimately, situations where a state law ground is found inadequate are but a "small category of cases." *Kemna*, 534 U.S. at 381.

A state law ground is "independent of federal law [when it] do[es] not depend upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). There is no presumption of federal law consideration. *Coleman*, 501 U.S. at 735. To so find, the state court's decision must "fairly appear to rest primarily on federal law, or to be interwoven with the federal law." *Id.* Where there is no "clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult." *Id.* at 739–40.

A. The CCA's abuse-of-the-writ bar is independent and adequate.

Texas, like Congress, has imposed significant restrictions on second-in-time habeas applications. *Compare* Tex. Code Crim. Proc. art. 11.071 § 5, *with* 28 U.S.C. § 2244(b). A Texas court may not reach the merits of a claim in a

subsequent application "*except* in exceptional circumstances." *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). The applicant bears the burden of providing "sufficient specific facts establishing," Tex. Code Crim. Proc. art. 11.071 § 5(a), one of these "exceptional circumstances," *Ex parte Kerr*, 64 S.W.3d at 418.

First, an applicant can prove either factual or legal unavailability of a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). A claim is legally unavailable when its legal basis "was not recognized or could not have been reasonably formulated from a final decision of the [this Court], a court of appeals of the United States, or a court of appellate jurisdiction of this state," Tex. Code Crim. Proc. art. 11.071 § 5(d), and factually unavailable when its factual basis "was not ascertainable through the exercise of reasonable diligence," *id.* § 5(e).

Second, an applicant can prove that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." *Id.* § 5(a)(2). This requires an applicant to "make a threshold, prima facie showing of innocence by a preponderance of the evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citation omitted).

Third, an applicant can prove that, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the [S]tate's favor one or more of the special issues." Tex.

Code Crim. Proc. art. 11.071 § 5(a)(3). Section 5(a)(3), "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, 505 U.S. 333 (1992)." *Ex parte Blue*, 230 S.W.3d 151, 151 (Tex. Crim. App. 2007).

In state court, Wardlow accepted the burden of proving an exception to the abuse-of-the-writ bar. Subsequent Appl. for Postconviction Writ Habeas Corpus 37–39. He argued both factual and legal unavailability, and the *Sawyer* analogue exception. *Id*. But the CCA did not agree, finding that Wardlow failed to "satisfy the requirements of Article 11.071 § 5" and dismissing the claim "as an abuse of the writ without reviewing the merits of the claim raised." Pet'r Ap. 1, at 4 (citing Article 11.071 § 5(c)).

Before this Court, Wardlow does not dispute that Texas's abuse-of-the-writ statute is an independent and adequate state-law ground for disposing of Wardlow's claim, and to be sure, he could not. *See*, *e.g.*, *Moore v. Texas,* 122 S. Ct. 2350, 2353 (2002) (mem.) (Scalia, J., dissenting) ("There is no question that [the § 5] bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.").

Rather, he argues that he substantially complied "in every real sense" with the bar, and this Court should therefore set it aside and review the merits of his claim. *See* Petition 25–32 (citing *N.A.A.C.P. v. Ala. ex rel. Flowers*, 377 U.S. 288 (1964)). In essence, he argues that the CCA's determination as to factual and legal unavailability was simply incorrect.[2] But whether a claim is legally or factually unavailable under § 5 is purely a question of Texas state law, *cf. Moore*, 122 S. Ct. at 2353 (Scalia, J., dissenting) (noting that insofar as § 5(a)(1) is concerned, Texas courts are not passing on any issue of federal law), and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). Because the CCA relied only on state law to bar this claim, the Court does not have jurisdiction to consider the claim's merits.

Wardlow's citation to *Flowers* does not warrant any different result—*Flowers* dealt not with the *correctness* of the Alabama court's procedural bar, but rather with the *adequacy* of it. In that case, this Court held that the Court's review of asserted constitutional rights "may not be thwarted by simple recitation that there has not been observance of procedural rule" with which

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[2] Wardlow does not appear to challenge the CCA's denial of his *Sawyer* analogue exception argument.

there is substantial compliance. 377 U.S. at 297. The procedural rule at issue was Alabama's novel application of the rules governing the form of an appellant's brief to decline reviewing the merits of the appellant's claims. *Id*. at 294–95, 301. This Court found that "Alabama courts ha[d] not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown" in that case. *Id*. at 297. The Court thus found the rule wholly inadequate to divest it of jurisdiction and proceeded to conduct a merits review of the underlying claim. *Id*. at 301–02. *Flowers* is inapposite to Wardlow's case because Texas's abuse-of-the-writ bar is undoubtedly adequate, and there can be no "substantial compliance" with it.

Wardlow simply disagrees with the CCA's imposition of its abuse-of-the-writ bar and wishes that it had ruled in his favor. But such disagreement does not constitute a valid basis for vesting this Court with jurisdiction over the state court's interpretation of its own state law, and Wardlow's petition should be denied.

B. Even if the "correctness" of a state's application of state procedural law is a proper subject of review, it was correct.

Wardlow argues that his "claim met both the legal and factual criteria" set out in Article 11.071 § 5(a). Petition 26. The CCA disagreed, and to the extent this Court can consider the "correctness" of that decision, the CCA was

undoubtedly correct to find that his claim was both factually and legally available prior to the filing of his initial state habeas application in 1998.

1. Wardlow's claim was legally available before 1998.

Wardlow argues that his claim could not have been reasonably formulated by 1998 because this Court's *Roper* decision provided the legal basis for his claim since "[n]o decision by this Court or any other court had held that 16 or 17 year olds were ineligible for the death penalty." Petition 26. Wardlow argues that "[o]nly with the decision in *Roper v. Simmons*—in 2005, seven years after Mr. Wardlow's initial habeas application . . .—did the legal tools begin to be available to make the claim he now makes." *Id*. at 27. Those legal tools, he alleges, were *Roper*'s recognition that there are distinctions between juveniles and adults that do not disappear when a juvenile turns eighteen years old. *Id*. at 28.

But the problem with Wardlow's argument is that he is not truly alleging a claim under *Roper*. Indeed, Wardlow explicitly disavows that he is seeking a categorical ban on the death penalty for those who were eighteen years old when they committed the murder. Petition 11 ("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." *Id*. Rather, Wardlow's claim is that advances in neuroscience demonstrate that predictions about future dangerousness for

capital defendants under twenty-one years of age are so inherently unreliable as to render such offenders ineligible for the death penalty under Texas's capital sentencing scheme. *Id*. at 11, 17.

However, an allegation that future dangerousness predictions are inherently unreliable in any respect could have been reasonably formulated from the line of cases that began with *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion), not with *Roper*. In *Jurek*, this Court noted that it was "not easy to predict future behavior[,]" but "[t]he fact that such a determination is difficult, however, does not mean that it cannot be made." 428 U.S. at 897. "Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Id*. Six years later, the Court faced, and rejected, a similar allegation that expert testimony about future dangerousness was "far too unreliable to be admissible." *Barefoot v. Estelle*, 463 U.S. 880, 896–903 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). That is, lay or expert predictions on future dangerousness did not violate the Eighth Amendment's heightened reliability principles. *Id*.

Then, in *Johnson v. Texas*, 509 U.S. 350, 352 (1993), the Court considered a nineteen-year-old petitioner's claim that the Texas special issues did not allow a jury to give adequate mitigating effect to evidence of petitioner's youth. In finding that the Texas death penalty scheme adequately allowed a jury to give effect to relevant aspects of petitioner's youth, the Court found that

"[i]t strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second [future dangerousness] special issue." *Id*. at 368. Indeed, the Court found "that there 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." *Id*. And the Court noted that some of those difficulties involve a "lack of maturity and an underdeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions." *Id*. at 366. These are precisely the same considerations that later were repeated in *Roper* as being relevant to the disproportionality inquiry. *See Roper*, 543 U.S. at 569 (citing *Johnson*).

Consequently, as late as 1993—five years before Wardlow filed his initial habeas application—he could have reasonably formulated a claim that future danger predictions as to eighteen-year-old offenders were unreliable under this Court's Eighth Amendment heightened reliability jurisprudence. *Roper* dealt not with reliability but with proportionality—thus necessitating a categorical exemption of a certain class of offenders from eligibility for the death penalty. *See*, *e.g.*, *Roper*, 543 U.S. at 571 ("Once the diminished culpability of juveniles is recognized, it is evidence that the penological justifications for the death penalty apply to them with lesser force than to adults."). But as Wardlow makes clear he is *not* seeking such a categorical ban. Taking him at his word,

he is instead arguing, as did the petitioner in *Johnson*, that under Texas's scheme, the future dangerousness inquiry is inherently unreliable when applied to offenders under twenty-one years of age. *See* Petition 28 (arguing that the qualities of youth "cannot adequately be taken into account as mitigation in assessing the risk of future dangerousness posed by an 18-year-old"). Wardlow is essentially attempting to raise nearly the same as-applied challenge to Texas's capital sentencing scheme that the petitioner in *Johnson* did. *See, e.g.*, Petition 24 ("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 for people under 21 years old . . . . However, that does not amount to a categorical ban against the death penalty for 18-20 year olds . . . . It simply means that [] Texas . . . must adopt a different sentencing scheme, in which a finding of future dangerousness is not a prerequisite[3] for imposition of the death penalty[.]").[4]

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[3] Wardlow's assertion here is incorrect—a finding of future danger is not even constitutionally necessary for purposes of narrowing eligibility for a death sentence. *See* Argument III.B, *infra*.

[4] Here, Wardlow's claim is brought into focus: he makes a procedural, not a substantive, challenge to Texas's death penalty statute. But such a new rule presents nonretroactivity problems that Wardlow wholly fails to address. Indeed, aside from the nonretroactivity issues it presents to this Court, *see* Argument III.A, *infra*, it also means that the CCA may have had another independent and adequate basis for dismissing Wardlow's application. To be sure, the CCA could have applied state non-retroactivity principles to Wardlow's claim, given that the new rule he seeks is clearly procedural. *See id.*; *see also Ex parte Oranday-Garcia*, 410 S.W.3d 865, 869 (Tex. Crim. App. 2013) (finding that petitioner had failed to make a prima facie showing

Wardlow merely appends *Roper* to a long-available legal basis in hopes of resurrecting it. But *Roper* did not rely on the heightened reliability standard to which Wardlow cites. *See* Petition 12 (citing to *Johnson v. Mississippi*, 486 U.S. 578 (1988)). Thus, the CCA correctly determined that Wardlow had not demonstrated legal unavailability.

2. Wardlow's claim was factually available before 1998.

Similarly, the CCA correctly determined that Wardlow failed to meet the factual unavailability exception to the abuse-of-the-writ bar. Wardlow asserts that "only with the advances in neuroscience in the years following *Roper* . . . did the full factual basis for this claim become available." Petition 27. Applicant points to several reports and articles which he argues demonstrate 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." Petition 12–17, 30–32. Wardlow argues that these studies led to a "'paradigmatic shift in the way that the behavior of adolescents and young adults is understood,'" which "occurred only in the decade following *Roper*." Petition 31–32.

To arrive at this conclusion, Wardlow discounts a 1993 study cited to by the State below, which suggested that the human brain, and in particular the

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that this Court's opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010) "applies to the facts of his case because of" the CCA's prior decision in *Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App. 2013), which held that *Padilla* does not apply retroactively).

"highest order-latest maturing neural network," continues to develop up to the middle 20s. *See* Jesus Pujol, Pere Vendrell, Carme Junque, Josep L. Mart-Vilalta, Antoni Capdevila, *When Does Human Brain Development End? Evidence of Corpus Callosum Growth Up to Adulthood*, ANNALS OF NEUROLOGY, (July 1993), https://onlinelibrary.wiley.com/doi/pdf/10.1002/ana.410340113. He asserts that this study, while "an early step in understanding the timeline of brain development[,] . . . would not have been enough to support the claim in 1998 that Mr. Wardlow brought to the CCA," because the research was "too limited" at that time. *Id*. at 31. But Wardlow's argument raises the question of what amount of research is ever enough. Science is an ever-evolving field of study, and by Wardlow's logic, every time a new scientific study or finding is produced, petitioners would have new factual bases for their claims. This cannot be the case. *See, e.g.*, *Branch v. State*, 236 S.o.3d 981, 986 (Fla. 2018) (rejecting argument that advances in neuroscience warrant extension of *Roper* because the court has "rejected similar claims on the basis that scientific research with respect to brain development does not qualify as newly discovered evidence"). Or, if not every new study constitutes a new factual basis, then the courts are left to determine whatever modicum of science is enough to amount to the critical threshold of a new factual basis. Stated another way, it is not clear whether one, ten, or a hundred studies must

be published before a factual basis for a claim emerges.[5] At the very least, given this lack of clarity, the CCA was certainly free to conclude that the factual foundation for his claim was available the day he chose to murder an elderly man when he was eighteen years old.

In any case, Wardlow misses the point. The facts that underpin his argument are common sense ones that science *confirmed*, not created—the *Roper* Court identified three features that marked youth: a lack of maturity and underdeveloped sense of responsibility, susceptibility to negative influences, and a lack of a fully formed character. *Roper*, 543 U.S. at 569–70. These were qualities that "any parent knows" and "scientific and sociological studies" just tended to confirm. *Id.* at 569. And these same qualities had been previously noted by the Court in *Johnson*, in relation to the nineteen-year-old petitioner's claim regarding youth as a mitigating factor. *See* 509 U.S. at 367 ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and

[5] Indeed, the difficulty this question presents is likely precisely why this Court did not base its decision in *Roper* solely on the scientific studies. It looked to those studies only *after* holding that a national consensus existed prohibiting the imposition of the death penalty on juvenile offenders. *See Roper*, 543 U.S. at 565–67; *cf. Zebroski v. State*, 179 A.3d 855, 862 (Del. 2018) ("*Roper*'s choice to divide childhood from adulthood at age 18 was not based solely—and perhaps not even primarily—on scientific evidence.").

decisions."). Further, the idea that these qualities extend beyond a person's eighteenth birthday was proffered to this Court as early as 1989:

> Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact "a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s."

Stanford v. Kentucky, 492 U.S. 361, 396 (Brennan, J., dissenting) (citing Brief for American Society for Adolescent Psychiatry et al. as Amici Curiae 4, which itself cited social scientific studies); *see also* Br. of Ky. & Ala. et al. as Amici Curiae for Resp'ts, *Wilkins v. Missouri*, 492 U.S. 361 (1989) (No. 87-6026), 1987 WL 880575, at *37 ("Several of these organizations are already suggesting that the 'bright line' should be drawn beyond the age of 18."). It is clear the CCA was correct to determine that the factual basis of Wardlow's claim was available long before he filed his first application in 1998. As such, he could not show he exercised reasonable diligence in discovering the basis of his claim.

Ultimately, the abuse-of-the-writ bar—a state-law ground clearly and unambiguously applied by the CCA and to which no exception was demonstrated—prohibits this Court from exercising jurisdiction over the claim for which Wardlow now seeks review. *See Kunkle v. Texas*, 125 S. Ct. 2898, 2898 (2004) (mem.) (Stevens, J., concurring) ("I am now satisfied that the Texas court's determination was independently based on a determination of

state law, *see* Tex. Code Crim. Proc. art. 11.071 § 5 [], and therefore that we cannot grant petitioner his requested relief."). Accordingly, Wardlow's petition should be denied.

II. In Any Event, Wardlow Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The question Wardlow presents for review is unworthy of the Court's attention. The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). The Court, however, would be hard pressed to discover any such reason in Wardlow's petition, let alone amplification thereof. Indeed, Wardlow makes no allegations of circuit or state-court-of-last-resort conflict. *See* Sup. Ct. R. 10(a)–(b). The best Wardlow musters is a conclusory statement that the Court should grant the petition to "redress the fundamental flaw" in Texas's death penalty statute as it applies to offenders under twenty-one years old when they committed the murder. Petition 3. But the problem with Wardlow's attempt to manufacture an important question for this Court's review, *see* Sup. Ct. R. 10(c), is that he omits a key part of the Court's memorialization of that justification—that "a state court . . . *has decided* an important question of federal law that has not been, but should be, settled by this Court." *Id*. (emphasis added). The CCA did not reach Wardlow's claim on the merits; it applied a state law procedural bar. *See*

Argument I, *supra*. Accordingly, the state court has *not* decided an important question of federal law, and that justification for certiorari review is lacking.

Moreover, while the question may be important to Wardlow, he does not explain why it is important to the judiciary or citizenry at large. Indeed, his argument undermines his assertion of importance as the new rule he advocates is expressly limited to Texas because, according to Wardlow, no other states include future dangerousness as a statutory prerequisite for imposition of the death penalty. *See* Petition 24, 24 n.6. Again, Wardlow fails to prove the importance of the question he presents.

Left with no true ground for review in his briefing, the only reasonable conclusion is that Wardlow seeks mere error correction. But that is hardly a good reason to expend the Court's limited resources. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And such a request is especially problematic here because the court below did not reach the merits of Wardlow's claim, and this Court is one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In the end, Wardlow's complaint about the manner in which the CCA resolved his habeas case does not warrant review because states are not constitutionally required to provide collateral proceedings nor "to follow any particular federal role model in these proceedings." *Murray v. Giarratano*, 492

U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). And where a State allows for postconviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must take." *Finley*, 481 U.S. at 555, 557, 559; *cf. Estelle*, 502 U.S. at 67–68 ("'[F]ederal habeas corpus relief does not lie for errors of state law.'") (citation omitted). As this Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

The state court proceedings in Wardlow's case were more than adequate; he is merely displeased with the final result. Certiorari review is not merited on this basis. Thus, Wardlow's petition should be denied.

III. This Court Should Not Ignore the Application of State Law to Review Wardlow's Claim.

In his petition, Wardlow argues that this Court should grant him certiorari review on his claim that *Roper* and its progeny, along with recent scientific advances, preclude the use of future dangerousness in capital sentencing proceedings for offenders under twenty-one years old at the time they committed the murder. Petition 7–24. That is, Wardlow expressly asks this Court to extend its proportionality jurisprudence under *Roper* to

encompass the heightened reliability jurisprudence under *Jurek* to find that the latter part of the Eighth Amendment prohibits what the former did not. But such an extension of law would be a violation of the anti-retroactivity principles enumerated in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). Regardless, Wardlow's claim is wholly without merit because he shows no constitutional deficiency with the jury's proper determination that he was a future danger. This Court should thus deny his petition.

A. This Court should not grant certiorari because non-retroactivity principles bar relief.

Habeas is generally not an appropriate avenue for the recognition of new constitutional rules. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). Thus, for the most part, new constitutional rules do not apply to convictions final before the new rule was announced. *Id*. This facilitates federal- and state-court comity by "validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKeller*, 494 U.S. 407, 414 (1990). The *Teague* inquiry consists of three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution. If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow

> exceptions to the *Teague* doctrine. The first, limited exception is for new rules forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. The second, even more circumscribed, exception permits retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Whatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.

O'Dell v. Netherland, 521 U.S. 151, 156–57 (1997) (alterations in original) (citations omitted) (internal quotation marks omitted). Applying *Teague*, it is clear that relief must be denied.

Wardlow's conviction became final on July 1, 1997, "when [the] time for filing a petition for certiorari expired." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). The question then is whether the relief sought by Wardlow constitutes a new constitutional rule. It undoubtedly does.

Wardlow claims that the Court's rationale in *Roper* coupled with advances in neuroscience means that "as a matter of scientific certainty . . . a determination on future dangerousness for 18-20 year-olds cannot be made reliably." Petition 2. Thus, while Wardlow disclaims seeking an extension of the categorical rule enumerated in *Roper*, he still seeks an extension of the heightened reliability rule in *Jurek*, *Barefoot*, and *Johnson*. *See* Argument I.B.1, *supra*. He asks this Court to find that, contrary to these cases, future dangerousness predictions are so difficult to make with respect to offenders

under twenty-one years of age that they should be deemed inherently unreliable. He is clearly proposing a new rule. *See Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."). The inquiry then turns on whether the rule Wardlow proposes is substantive or a watershed rule of criminal procedure. It is neither.

Indeed, accepting Wardlow's express statement that he is not seeking a categorical exemption from the death penalty, Wardlow's rule is necessarily not substantive. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990) (a rule is not substantive if it "neither decriminalize[s] a class of conduct nor prohibits imposition of capital punishment on a particular class of persons"). Regardless, the rule proposed is clearly procedural—it regulates how states must handle sentences based on findings of future danger for certain offenders. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) ("[R]ules that regulate only the manner of determining the defendant's culpability are procedural."). But it is not a watershed one.

To qualify as "watershed," "[f]irst, the rule must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction[,]" and, "[s]econd, the rule 'must alter our understanding of the bedrock elements essential to the fairness of a proceeding.'" *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (quoting *Schriro*, 542 U.S. at 356) (internal quotation marks omitted). "In

providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335 [] (1963) (right to counsel), and only to this rule." *Beard v. Banks*, 542 U.S. 406, 417 (2004). "[I]t should come as no surprise that [the Court has] yet to find a new rule that falls under the second *Teague* exception." *Id*. And certainly Wardlow's rule—which applies only to Texas, depends on evolving science, and has no apparent support from state legislatures that Wardlow can point to—"simply lacks the 'primacy' and 'centrality'" necessary to qualify as a watershed rule. *Id*. at 421. Because Wardlow seeks creation of a new rule and fails to prove an exception to *Teague*, he cannot garner the relief he seeks.

B. Setting aside retroactivity, this Court should not grant certiorari because the claim is without merit.

The consideration of future danger in a capital sentencing scheme is constitutional. *Jurek*, 428 U.S. at 275. Indeed, the consideration of future danger is a fundamental tenet of the American criminal justice system, regardless of sentence. *See id*. ("The task that a Texas jury must perform in answering the statutory question [of future danger] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice."); *see also Barefoot*, 463 U.S. at 898 ("Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call

into question those other contexts in which predictions of future behavior are constantly made."). Despite forty years of review of Texas's capital sentencing scheme, the Court has never struck down its use of future danger. And more broadly, in that same forty years, the Court has not struck down any sentencing scheme solely because it considered future danger, as they all do to various degrees. Yet Wardlow's position is that this Court has simply overlooked the constitutional error that occurs when offenders under twenty-years-old are deemed future dangers. *See, e.g.*, Petition 3 (asking this Court to redress this "fundamental flaw" with Texas's death penalty scheme). But the Court has not, and that is because no constitutional error flows from the practice.

Indeed, the Court would have to break significant, unprecedented ground to adopt Wardlow's view of the Eighth Amendment's heightened reliability principles. To be sure, the Court has expressly recognized that, though predictions as to future danger may be difficult to make, that does not make them impossible. *Jurek*, 428 U.S. at 274–75. Thus, there is no constitutional error with the jury's consideration in the instant case of Wardlow's future dangerousness, regardless of his age.

Notably, under Texas's death penalty scheme, the question of future dangerousness is constitutionally superfluous to whether Wardlow is *eligible* for the death penalty. In Texas, the circumstances which elevate the offense of

murder from first-degree to capital satisfy the narrowing, or eligibility, requirement of the Eighth Amendment. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) ("The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern."); *Jurek*, 428 U.S. at 270 ("Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed."). Texas *further* narrows death-eligible murderers by requiring a finding of future danger but that is not constitutionally required. *Lowenfield*, 484 U.S. at 246. ("The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process."); *Sonnier v. Quarterman*, 476 F.3d 349, 364–67 (5th Cir. 2007). Thus, Wardlow's sentence would be constitutionally firm if the only aggravating circumstance found by the jury was that he needlessly executed an elderly man to prevent him being a witness to the robbery of a truck that had the keys in it, combined with a finding that there were insufficient mitigating circumstances. *See Lowenfield*, 484 U.S. at 246 (finding no constitutional infirmity when only a single aggravating factor of "intent to kill or to inflict great bodily harm upon more than one person" was combined with a mitigation instruction).

Regardless, as the CCA found on direct review of Wardlow's conviction and sentence, there was sufficient evidence supporting the jury's determination of future dangerousness. *See Wardlow v. State*, No. 72,102; *see also* Statement of the Case II, *supra*. In addition to the cold, callous, and premeditated manner in which he murdered the elderly Mr. Cole, the State offered other evidence of his dangerousness. Most significantly, three years before he murdered Mr. Cole, he threatened to shoot an undercover narcotics officer with a gun; he had been previously involved in a high-speed chase and arrested for fleeing; and just one week before the murder, he had stolen a pickup truck. *See* Statement of the Case II, *supra*. And, while incarcerated awaiting trial, he was found hiding a weapon in his cell, which he intended to use to assault a guard and escape. *Id*. He made numerous threats to jail staff and other inmates as well, which may only not have been carried out because of law enforcement's preemptive efforts to prevent such action. *Id*. The jury's determination that Wardlow would be a future danger was proper.

To the extent he now relies on subsequent behavior in prison to undermine the jury's verdict, *see* Petition 19–24, such an allegation is also contrary to precedent. Indeed, this Court has made clear that a death penalty prisoner who is fairly convicted and legally guilty may not bring such challenges, at least not without an attendant claim of actual innocence, *Herrera v. Collins*, 506 U.S. 390 (1993), which Wardlow cannot allege. *Sawyer*,

505 U.S. at 347. *See also Lincecum v. Collins*, 958 F.2d 1271, 1281 (5th Cir. 1992) ("The Supreme Court has never intimated that the factual correctness of the jury's prediction on the issue of future dangerousness, either in a particular case or over time, bears upon the constitutionality of the Texas capital sentencing statute."). And any suggestion that Wardlow has been nonviolent while on death row must be placed into context—"[Wardlow] has been in a highly confined atmosphere of a death row prison cell; lack of violence in that environment is not necessarily indicative of a lack of violence in free society or in the less structured general prison population[.]" *Ex parte Pondexter*, No. WR-39,706-03, 2009 WL 10688459, at *2 (Tex. Crim. App. Mar. 2, 2009) (Cochran, J., concurring). Thus, an assertion that the jury's determination was inherently unreliable in his case is without merit.

Finally, to the extent he claims that there is something special about eighteen- to twenty-years-olds that renders future dangerousness determinations as applied to *them* inherently unreliable, that claim similarly fails. Indeed, while it is true that in *Roper* this Court noted certain characteristics differentiating juveniles from adults in a manner sufficient to justify exempting the former from imposition of the harshest penalty, 543 U.S. at 569–70, it is also true that the Court recognized that those characteristics do not magically disappear upon a juvenile's eighteenth birthday, *id*. at 574. Yet the Court rejected the notion that any similarities that extend into early

(and legal) adulthood means that the line of demarcation should be drawn any further:

> Drawing the line at eighteen years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen. By the same token, some under eighteen have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of eighteen is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id. This decision was not arbitrary. Rather, it reflected a careful and deliberate determination that eighteen years of age is the line at which most governmental and social institutions recognize legal adulthood. "[A]lmost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent." *Id*. at 569. And, notably, the Court has continued to identify eighteen as the critical age distinguishing juveniles from legal adults—in two decisions following *Roper*, this Court held that juveniles, i.e. those under eighteen years of age, were exempt from sentences of life without parole (LWOP). *See Miller v. Alabama*, 567 U.S. 460, 465 (2012) (prohibiting LWOP sentences for homicide offenders who committed their crimes before age eighteen); *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (prohibiting LWOP sentences for nonhomicide offenders who committed their crimes before age eighteen). Wardlow offers no reason that the Court should

second-guess its prior logic to hold that a jury is incapable of determining whether a legal adult poses a future danger. Certiorari review should be thus denied.

IV. Wardlow Is Not Entitled to a Stay of Execution.

A stay of execution is an equitable remedy and "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A "party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be better than negligible." *Id*. The first factor is met, in this context, by showing "a reasonable probability that four Justices consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). If the "applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest."

Nken, 556 U.S. at 435. "These factors merge when the [State] is the opposing party" and "courts must be mindful that the [State's] role as the respondent in every . . . proceeding does not make the public interest in each individual one negligible." *Id*.

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence" and courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Thus, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id*. at 585.

As discussed above, Wardlow cannot demonstrate a strong likelihood of success on the merits. While he claims otherwise, his briefing on this point is conclusory, and in any case, he is incorrect. Appl. Stay Exec. 2. He has not preserved any claim alleging a violation of his constitutional rights. Therefore, this Court cannot even reach the issue, let alone grant certiorari review, let alone reverse the lower court. And even if his claim was preserved, it is unworthy of this Court's attention because he seeks a new rule that is barred

by nonretroactivity principles. Wardlow fails to show what is necessary to stay his execution.

Wardlow effectively forfeits argument on the other stay factors by failing to brief them. He argues irreparable harm to him because of the strong likelihood "he has been denied the protection of the Eighth and Fourteenth Amendments." *Id*. But since he has failed to show a meritorious claim, *see* Argument III, *supra*, his conditional argument fails. And his equally conclusory argument that "the equities" strongly favor him, Appl. Stay Exec. 2, falls short of showing the remaining *Nken* factors.

Moreover, there is harm to the State and the public. As noted above, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Certainly, the State has a strong interest in carrying out a death sentence imposed for a brutal capital murder that occurred almost thirty years ago. Indeed, the public's interest lies in executing a sentence duly assessed and for which more than two decades' worth of review has terminated without finding reversible error. The public's interest is not advanced by staying Wardlow's execution to consider a procedurally defaulted and meritless claim after Wardlow senselessly executed elderly Carl Cole to steal his truck, something that could have been taken without violence because the keys were in it. This Court should not further delay justice. *See Martel v. Clair*, 565 U.S. 648, 662 (2012)

("Protecting against abusive delay *is* an interest of justice." (emphasis in original)). Considering all the circumstances in this case, equity favors Texas, and this Court should deny Wardlow's application for stay of execution.

CONCLUSION

The state court's dismissal of Wardlow's claims on an adequate and independent state law ground divests this Court of jurisdiction to consider this petition. Regardless, Wardlow fails to present a compelling reason to grant certiorari review. For all the reasons discussed above, the petition for a writ of certiorari and application for stay of execution should be denied.

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