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

No. 19-8712

BILLY JOE WARDLOW,

Petitioner,

v.

STATE OF TEXAS

Respondent.

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

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CAPITAL CASE–EXECUTION JULY 8, 2020

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

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Petitioner, Billy Joe Wardlow, replies to the State's Brief in Opposition as follows:

The State tries to persuade the Court to accept the Texas Court of Criminal Appeals' baseless attempt to shield from review on state grounds its disregard for the requirements of the Eighth and Fourteenth Amendments, by arguing (1) that the Court cannot look behind the shield, (2) that if the Court does look behind the shield, the shield is supported in law and fact, (3) that in any event relief would be barred under the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), and (4) that the claim presented by Mr. Wardlow is too insignificant to warrant the Court's consideration. None of this right.

1. The Court can, and has, examined whether a state court's avoidance of constitutional issues on state law grounds has "any fair or substantial support."

The Court has long recognized that, "if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920). Accordingly, the Court explained that it must examine whether such grounds are "without any fair or substantial support." *Id.* In support of this proposition, the Court cited the following: *Union Pacific R. R. Co. v. Public Service Commission*, 248 U. S. 67 (1918); *Leathe v. Thomas*, 207 U. S. 93, 99 (1907); *Vandalia R. R. Co. v. South Bend*, 207 U. S. 359, 367 (1907); *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468 (1912); *Creswill v. Knights of Pythias*, 225 U. S. 246, 261 (1912); *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U. S. 157, 164 (1917). The Court then added, "And see" the following additional cases: *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443 (1861); *Huntington v. Attrill*, 146 U. S. 657, 683, 684 (1892)); *Boyd v. Thayer*, 143 U. S. 135, 180 (1892); *Carter v. Texas*, 177 U. S. 442, 447(1900).

The State argues that the inquiry the Court makes in these circumstances is whether the

state ground is "adequat[e]" and not whether it is "correct[]." This is an attempt to make a distinction where there is no difference. The decision in *Ward* itself makes this clear. In *Ward*, the Oklahoma Supreme Court had before it a claim by members of the Choctaw Nation that their land had been taxed in violation of federal law by means of coercion. The state court denied relief on the ground that "the taxes were not collected by coercive means, but were paid voluntarily, and could not be recovered back as there as there was no statutory authority therefor[.]" 253 U.S. at 21. This Court determined that "the finding or decision that the taxes were paid voluntarily was without any fair or substantial support[,]" *id*. at 23, and then explained its determination by reciting the facts that showed there was no factual basis for the state court's decision. This finding was both that the ground for the state court decision was factually incorrect and that it was inadequate.

Accordingly, the State's argument is wrong.

2. The CCA's abuse of the writ determination here is "without any fair or substantial support."

The State argues 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 v. Simmons* 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. 551, 572 (2005). 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.

The State also argues that the factual basis for this claim was available by 1998, when Mr. Wardlow filed his initial state habeas application. It goes on to argue that since science is an "ever-evolving field of study, ... by Wardlow's logic, every time a new scientific study or finding is produced, petitioners would have new factual bases for their claims." BIO at 19. This argument may have superficial appeal but it ignores the exponentially different set of facts that Mr. Wardlow presented to the CCA. In the CCA, he demonstrated that the field of neurobehavioral science has made ground-breaking breakthroughs in understanding the functioning and development of the brains of teenagers and young adults since 2005 – such that in 2018 Dr. Robert J. McCaffrey wrote, on behalf of the American Academy of Pediatric Neuropsychology:

> 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*.

Subsequent Application for Writ of Habeas Corpus, Exhibit 5, at 11 (emphasis supplied). Needless to say a "paradigmatic shift" in scientific understanding is not the sort of evolutionary process the State says Mr. Wardlow relies on. It can provide the basis for new understandings of the law.

Moreover, when medical experts declare that a paradigmatic shift has happened in the understanding of the behavior of adolescents and young adults – and there is no contradictory medical evidence, as in this case – the Court has made clear that the law should be informed by the science.

> As we instructed in *Hall [v. Florida*, 572 U.S. 701 (2014)], adjudications of intellectual disability should be 'informed by the views of medical experts.' 572 U.S., at 721; *see id*., at 710. That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus.

Moore v. Texas, ___ U.S. ___, 137 S.Ct. 1039, 1044 (2017).

Thus, as the petition for writ of certiorari makes clear, there was no fair or substantial support for the CCA's determination that the claim presented to this Court could have been raised as a matter of law and fact at the time Mr. Wardlow filed his initial state habeas application in 1998.

3. Non-retroactivity principles do not bar relief.

The State argues that the non-retroactivity principles of *Teague v. Lane* bar relief. That is patently incorrect, because this Court has held that *Teague* "does not" "constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion." *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008).

In keeping with this, sometimes the CCA gives effect to what it finds to be new rules of criminal procedure that it could otherwise find barred under non-retroactivity principles. *See, e.g., Ex parte Hood*, 304 S.W.3d 397, 404-05 (Tex.Crim.App. 2010) (the court has previously recognized "that *Tennard [v. Dretke*, 542 U.S. 274(2004)]; *Smith I [Smith v. Texas*, 543 U.S. 37 (2004)]; *Abdul–Kabir [v. Quarterman*, 550 U.S. 233 (2007)]; *Brewer [v. Quarterman*, 550 U.S. 286 (2007)]; and *Smith II [Smith v. Texas*, 550 U.S. 297 (2007)] announced new law, and addressed the merits of the death-row inmate's habeas corpus claim" in other cases). On the other hand, sometimes the CCA does not give effect to new rules. *See, e.g., Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex.Crim.App. 2013) (refusing to give retroactive effect to *Padilla v. Kentucky*, 559 U.S. 356 (2010)); *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex.Crim.App. 2008)

(refusing to give retroactive effect to *Crawford v. Washington*, 541 U.S. 36 (2004)).

Importantly, when the CCA decides that non-retroactivity principles bar relief, it says so. Here, the CCA did not mention that the claim pressed by Mr. Wardlow, if deemed meritorious, would be barred by such principles. Thus, the State's argument is entirely speculative and cannot be given any weight.

4. The claim presented by Mr. Wardlow warrants the Court's consideration.

Misconstruing Mr. Wardlow's claim, the State argues, "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.... But the Court has not, and that is because no constitutional error flows from the practice." BIO at 29. Mr. Wardlow's position is emphatically *not* that this Court has overlooked the constitutional error when capital defendants under 21 are deemed a future danger. To the contrary, the Court has devoted considerable attention to the prediction of future dangerousness for youthful offenders beginning in 1976 with *Jurek v, Texas* and continuing through 1993 with *Johnson v. Texas*. Through those cases, it has found that the qualities associated with youthfulness could be taken into account adequately as mitigation. In 2005, however, the Court recognized for the first time, in *Roper*, that youthfulness could not be given adequate consideration as mitigation for offenders under 18. That decision, coupled with the paradigmatic shift in the way that the behavior of adolescents and young adults is understood since *Roper*, has opened the door to the claim presented by Mr. Wardlow.

Mr. Wardlow is keenly aware, as the State has noted, that this Court one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.5 (2005). This observation was made with respect to arguments that were not presented to or considered by the lower courts in *Cutter* and in the cases cited for this proposition by *Cutter*. By contrast, here all the arguments and

evidence before this Court were presented to the CCA. That court chose to dismiss the claim on unsupported procedural grounds. It could continue to do this in cases like Mr. Wardlow's as a way of deflecting review by this Court. That should be no more tolerable here, however, than it was in the recent case of Terence Andrus, in which the CCA summarily denied a *Wiggins* claim without explanation. The Court required the CCA in Mr. Andrus's case to address fully the constitutional issue presented. *See Andrus v. Texas*, ___ U.S. ___, 2020 WL 3146872 (June 15, 2020). At a minimum, the Court should do the same here.

FOR THESE REASONS, Mr. Wardlow asks that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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