No. 19-8835
No. 19A1065

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

Should the Court expend its limited time and resources to review an unremarkable claim of ineffective assistance of trial counsel (IATC) for failure to investigate mitigating evidence where four state and federal courts, both trial and appellate, have found the claim without merit?

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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 initially raised an IATC claim for failing to investigate mitigating evidence in his state habeas application in 1998. Wardlow only filed his state habeas application, however, after a great deal of vacillation regarding whether he wanted to waive and forgo all further appeals in state court. Ultimately, the state trial court issued findings of fact and conclusions of law recommending the denial of habeas relief, making it the first of many courts to find that Wardlow's IATC claim had no merit. Because of his vacillation, however, the Texas Court of Criminal Appeals (CCA) dismissed Wardlow's application based on his waiver.

Wardlow then sought federal habeas relief on the same IATC claim. But the federal district court found the claim procedurally defaulted based on the CCA's dismissal and, on alternative de novo review, without merit. The Fifth Circuit then denied Wardlow a certificate of appealability (COA), finding that neither the district court's procedural determination nor its alternative merits determination was debatable. The two federal courts marked the second and third courts to find Wardlow's IATC claim without merit.

More than a month after this Court denied certiorari in Wardlow's federal habeas proceedings, Wardlow filed a suggestion that the CCA, on its own motion, reconsider its prior dismissal of his initial state habeas application. The CCA chose to exercise its discretion, reconsidered its prior dismissal, and denied Wardlow's claims on the merits. The CCA was the fourth court to make the latter determination.

Almost two months later, Wardlow now requests a stay of execution and certiorari review of the Texas high court's denial of his IATC claim. 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, Wardlow provides no compelling reason that this Court should exercise its discretion to review the CCA's decision. Indeed, as four courts—both state and federal—have found, his claim is entirely 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 federal district court accurately summarized the facts surrounding Wardlow's capital murder as follows:

> In the late afternoon of June 14, 1993, Charles Cole ("Charles") arrived at the home of his 82-year-old father, Cole, in the rural community of Cason, Texas. He observed that his father's 1993

Chevrolet four-wheel-drive pickup truck was missing, and he noticed blood on the steps in front of the door. Fearing that his father had injured himself and had gone for help, Charles attempted to call nearby hospitals. After discovering that the phone had been disconnected, Charles became alarmed and contacted Morris County Sheriff Ricky Blackburn ("Sheriff Blackburn") from a neighbor's house. Upon returning to his father's house, Charles found his father's blue jeans, shirt, and boots laid out on a rocking chair in his bedroom. The house reportedly appeared undisturbed, but Cole, his billfold, and the keys to his truck were missing.

Sheriff Blackburn arrived at Cole's residence shortly thereafter. He discovered a broken pair of glasses, a partial set of dentures, and a small amount of blood in the carport near the door. Authorities also discovered that Cole's phone lines had been disconnected from outside the house. At that point, the sheriff initiated a full-scale investigation into Cole's whereabouts.

Law enforcement officers combed the surrounding area searching for any sign of Cole or his pickup, the registration number of which had been forwarded to the National Crime Information Center. At about midnight, Morris County, Texas, Deputy Sheriff Bill Barnard ("Deputy Barnard") discovered several items that appeared to have been dumped from Cole's truck—his checkbook, some farm tools, and an adding machine—at a turnaround on a small backroad in nearby Titus County. There was still no sign of Cole or his pickup.

In the pre-dawn hours of June 15, after an all-night search of the surrounding area, game warden Billy Dodd ("Game Warden Dodd") and state trooper David McFarland ("Trooper McFarland") accompanied Charles back to his father's house where the three conducted a thorough, room-by-room search. They scoured Cole's bedroom in the darkness, looking behind doors and under the bed with a flashlight. Charles opened his father's closet, and Game Warden Dodd shone the flashlight inside. There, in the closet, stood the body of Cole, a bullet hole between his eyes.

Game Warden Dodd immediately closed the closet door and ushered Charles out of the room. He then returned to check the

body. Cole's face was swollen, and there was a prominent wound between his eyes at the bridge of his nose. He had on a pajama top and undershorts and was wrapped in a bedspread. Game Warden Dodd could not detect a pulse, and he noted that Cole's arm was cold and stiff. The body was removed from the closet and transported to Dallas County for an autopsy.

Medical examiner Dr. Jeffrey J. Barnard ("Dr. Barnard") determined that Cole died as the result of a single gunshot wound to the head. The bullet, which Dr. Barnard recovered from Cole's body, entered between his eyes, directly above his nose, traveled through the nasal bone, the mouth, the spinal cord, and finally lodged in the lower portion of the cervical vertebra. There were also abrasions and contusions on Cole's back, which Dr. Barnard testified were consistent with drag marks, and a laceration on the back of Cole's head, which reportedly could have been caused by either Cole falling backward or being struck from behind. Dr. Barnard testified that the absence of any identifiable residue on the entrance wound indicated that the gun had been fired from a distance of three feet or more. He further opined that the path of the bullet indicated that it had traveled downward; nonetheless, he could not determine whether Cole had been standing, kneeling, sitting, or lying when he was shot.

Later on June 15, Lynda Wardlow ("Lynda"), Wardlow's mother, reported to Sheriff Blackburn that the previous morning she had noticed that a Llama .45 semi-automatic pistol was missing from her home. She provided the gun's serial number and some ammunition she had used in the gun. She also stated that Wardlow and his girlfriend, Fulfer, had been staying at her house for a few days; nonetheless, Lynda claimed she had not seen the couple since late on the evening of June 13. Will Emery ("Emery"), Wardlow's neighbor, told authorities that on the evening of June 13, Wardlow and Fulfer visited his home, at which time Wardlow showed Emery a blue steel .45 pistol with a wooden handle.

Dorothy Smith ("Smith"), a live-in caregiver for Cole's 86-year-old sister, Waldine Henderson ("Henderson"), testified that she had seen a young couple matching the description of Wardlow and Fulfer near Cole's house at about 6:30 a.m. on June 14. Smith watched the couple from a window as they stood talking directly in

front of Henderson's house. Smith saw them walk toward Cole's house, which was down the street from Henderson's house, and stop at a van parked in the driveway of Cole's next-door neighbor. As the couple stood looking inside the back of the van, Smith saw a gun with a brown handle in the man's back pocket.

The man then walked under Cole's carport out of Smith's sight, and the woman followed. A minute or two later, Smith heard a gunshot and saw the woman run out from under the carport, stop quickly, and then bend over. Smith thought the man had shot a snake behind Cole's house, and she returned to her housework unconcerned. Approximately five minutes later, Smith returned to the window and observed Cole's pickup truck back out of the carport and drive away at a slow rate of speed. She assumed that Cole was driving, but she could not see through the tinted windows of the pickup.

Also on June 15, Jerry Wagner, part owner of a used car dealership in Norfolk, Nebraska, finalized a deal with a young couple fitting the description of Wardlow and Fulfer. The couple drove off the lot in a black 1987 Ford Mustang convertible with $8,000 cash. The car and the cash were received in exchange for what was later determined to be Cole's 1993 Chevrolet pickup.

On the evening of June 16, 1993, a patrolman in Madison, South Dakota, apprehended Wardlow and Fulfer and took them into custody after receiving a teletype advising that a Texas warrant had issued for their arrest on charges of capital murder. A Llama .45 semi-automatic pistol was found under the passenger seat of the car and seized pursuant to an inventory search. Firearms examiner Raymond Cooper confirmed that the bullet recovered from Cole's body was, in fact, fired from that gun, which was admitted into evidence at trial. Sheriff Blackburn, Game Warden Dodd, and Trooper McFarland transported Wardlow to Texas on June 22-23, 1993, and Wardlow was immediately incarcerated in the Morris County jail.

On February 28, 1994, Wardlow wrote Sheriff Blackburn a letter, delivered through the jail's in-house mail system, wherein he confessed to the robbery and shooting of Cole. It read in pertinent part:

Ricky,

I told you I would give you a statement, so here is what happened on June 14, 1993. The night before I was at the neighbor's house me and my girlfriend, and we were watching a movie. I already had in my possession the Llama .45 Automatic that was used for the shooting. I showed the gun to my neighbor William Emery, who examined it and complemented me on it. At about 11:30 p.m. on 06/13/93 I left with my girlfriend to go and check out the place and see if anyone was up. There were no lights on and not a sound to be heard. I reached the porch and undid the phone line, so that no one could call the police. I knocked on the door and there was no answer. I then decided to go back home after two other tries later that day and early the next morning. The intention was to get him to let me use the phone and once inside, I would rob him. I had stolen trucks before, but this time I had no money. When we got home I set the alarm for 5:00 a.m. so I could go and get the job done. My girlfriend followed me to my neighbor's house and there she stayed until I came back with the truck. It was actually about 6:05 a.m. when I left the house. I got there and still no one was up. I knocked on the door and there was no answer. I went up the road and waited at the house that had recently burned down and when his light came on I went back. I knocked on the door, and he answered. I told him my car was broke down, and wanted to know if I could use the phone so I could call my friend. He reached inside the door and picked up a cordless phone and handed it to me. It didn't work because the lines were disconnected. He set the phone down on the table and started to close the door. I then caught the door and ask if he had another phone and that that phone's batteries might be dead. He said no and persisted to close the door and then is when I drew out the .45 from in my pants. And as I brought it out, I corked [sic] a shell into the chamber. I raised it up and told him to walk inside the house. He ran at the door for me and screamed when

he caught my arm. Being younger and stronger, I 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. I proceeded inside found his jeans and removed all money and keys from it since I didn't know which keys were to the truck. I then thought of putting the body in the truck and hauling it off in the woods, but decided I didn't have any time to waste, since a .45 shot that early in the morning was bound to draw some attention. I went to the bedroom and grabbed the blanket, went outside and wrapped up the body. I picked up the body and went back into the bedroom. There I put him in the closet and shut the door thinking it would be some time before he would be found. I proceeded out of the house not even thinking of fingerprints. I got the truck which already had keys in it and left. I headed out toward 144 S. then onto 11. There I went toward Pittsburg and turned off on the road where the corner is right before you get to the bridge SE 35A. At the corner that goes to the creek I went down the trail in the truck and unloaded anything that wasn't paperwork for the truck. I then left going out the other way ending up on SE 35 then onto 144 N. I then turned up on the back roads to my neighbor's house which is on the blacktop by my house. Here I parked and got my girlfriend and we walked over to the house and got our things which were already packed and in the back of my pickup. Carried them to the truck and left by way of 144 N. to 49 and then to Mt. Pleasant. I gassed up with the 47 dollars I found in the wallet which I kept. Then I stopped at the store right by the interstate and got a Coke. I then thoroughly searched the wallet and found $100 bill and then threw it in the dumpster. We then proceeded to a destination along the way I told her the above things just as they happened and told her she didn't have to go if she didn't want to, but I assured her I wouldn't be caught.

The letter was admitted as evidence at Wardlow's trial and was read into the record in the jury's presence.

Wardlow testified at the guilt-innocence phase of trial regarding the circumstances under which he wrote the letter confessing to the crime. He also testified regarding the facts of the offense, and his trial testimony was consistent with the letter. Wardlow told the jury, however, that contrary to the letter, Fulfer accompanied him to Cole's home. He also stated that he did not intend to kill Cole when he went to his home; rather, he intended only to rob Cole and take his truck. When Wardlow brought out the gun and told Cole to go back into 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 expected and, as a result, Wardlow was caught off balance and began to fall backwards. Wardlow claimed he shot the gun without aiming, hoping it would get Cole off of him. Physical evidence, however, confirmed that Cole was shot between the eyes. The trial testimony revealed that Cole, while strong and active for an 82-year-old man, stood five feet, seven inches tall and weighed approximately 145 pounds. Wardlow stands six feet, four inches tall.

Wardlow told the jury that he had been planning to rob Cole for less than a week, but that he had been planning to travel to Montana for some time. He and Fulfer were on their way to Montana when they were apprehended in South Dakota. He admitted that he and Fulfer had discussed the danger of leaving a witness to their crime. This discussion apparently took place when the couple discovered, before knocking on Cole's door, that there was a set of keys to Cole's pickup on the dashboard. Thus, according to Wardlow, they realized they could either take the pickup without having to confront Cole and risk him informing the authorities as soon as he awoke, or they could confront Cole, rob him, and "incapacitate" him by either kidnapping and dumping him in some remote area or leaving him tied up so he could not contact the authorities. They ultimately decided on the latter course of action.

When asked by the prosecutor why, if he intended to tie up Cole, he failed to bring any rope with him, Wardlow responded that he planned to use a telephone cord or anything else he might find in

> the victim's home. Significantly, evidence was presented at trial indicating that Cole knew Wardlow (also a resident of Cason) and would likely have been able to identify him as the perpetrator. Wardlow, no doubt, was fully aware of this fact. Wardlow also acknowledged that, before their arrest, he and Fulfer bought several personal items with the cash they received from the sale of Cole's pickup.

Wardlow v. Director, No. 4:04-CV-408, 2017 WL 3614315, at *3–6 (E.D. Tex. Aug. 21, 2017) (unpublished) (internal citations omitted).

II. Evidence Relating to Punishment

A. The State's case

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.

B. The defense's mitigation case

Amy Billingslea, Wardlow's former church youth minister, testified that she had known Wardlow since he was a baby and had worked with him when he became involved in the church youth group as a teenager. 40 RR 260–61. She described Wardlow as quiet, well mannered, hard-working, bright, and respectful. 40 RR 262–63. He played on the church basketball team and participated in church fundraisers. 40 RR 261. Although Wardlow attended church regularly during his early teens, he quit attending several years prior to the murder. 40 RR 262, 265.

Glendon Gillean, a librarian at Daingerfield High School, testified that as a student, Wardlow would often come to the library before school and during lunch to work on educational computer programs and volunteered to help pack and move books when the library was relocated. 40 RR 267–69. Wardlow regularly checked out books on topics such as mechanics, technology, and

aeronautics. 40 RR 269. Wardlow never created a disciplinary problem for Gillean. 40 RR 270. Assistant Principal Gerald Singleton testified that Wardlow had attended school regularly and had never had any disciplinary procedures lodged against him. 40 RR 271–72. But Wardlow had quit school before completing his junior year. 40 RR 273.

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 to abandon further appeals, 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 (FFCL), 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 raised his IATC claim in a petition for habeas relief in federal court, which the court denied, finding the claim procedurally defaulted and, alternatively, meritless. *Wardlow v. Director*, 2017 WL 3614315, at *1. The Fifth Circuit denied Wardlow's application for a COA on the same issue. *Wardlow v. Davis*, 750 F. App'x 374, 375 (5th Cir. 2018) (unpublished).

Wardlow then sought review of the Fifth Circuit's decision in this Court, but this Court declined to do so. *Wardlow v. Davis*, 140 S. Ct. 390 (Oct. 15, 2019).

IV. Litigation Related to Wardlow's Present Execution

A little over a week after this Court denied Wardlow's petition for writ of certiorari, the state trial court entered an order setting Wardlow's execution for April 29, 2020.[1] Execution Order, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. Oct. 24, 2019). More than a month after that, 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

[1] Just prior to that, Wardlow filed a subsequent state habeas application, raising two new claims for relief. *Ex parte Wardlow*, No. WR-58,548-02.

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. Pet'r App. 1. First, it reconsidered its dismissal of Wardlow's initial state habeas application and denied it on the merits. *Id.* 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.[2]

REASONS FOR DENYING THE WRIT

I. 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

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[2] A little under two weeks before filing the instant petition for writ of certiorari, Wardlow filed a petition for writ of certiorari seeking review of the CCA's dismissal of his subsequent state habeas application. *See Wardlow v. State*, No. 19-8712 (filed June 15, 2020). And five days before filing the instant petition, 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 of his initial habeas application. *See Wardlow v. Director*, No. 4:04-CV-408 (E.D. Tex. June 30, 2020). On June 30, 2020, the federal district court found that Wardlow's motion was actually a second-or-successive habeas petition and transferred the cause to the Fifth Circuit. *Id.* Both the appeal and Wardlow's first petition for certiorari review are currently pending.

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, no allegation of direct conflict between the state court and this one, and no important question. *See* Sup. Ct. R. 10(a)–(c). That absence lays bare Wardlow's true request—for this Court to correct the state court's application of a properly stated rule of law. But that is hardly a good reason for the Court to expend its limited resources on an ordinary IATC claim. *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 that is because "[e]rror is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). Wardlow's petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h).

II. This Case is a Poor Vehicle for Reviewing Wardlow's Claim Because Four Different Courts Have Denied it on the Merits.

As an initial matter, Wardlow's case presents serious policy and prudential concerns. This case does not come to the Court by way of the normal process—on direct review of a petitioner's straightforward state habeas proceeding, on the path to initial federal habeas review. Rather, Wardlow seeks this Court's review of the CCA's denial of his IATC claim after several other

courts have found the same claim meritless. Indeed, the state trial court, in an apparent misunderstanding of the status of Wardlow's waiver, allowed evidentiary development of and issued FFCL on his IATC claim. Supp. SHCR 3–21. In those findings, the trial court concluded that Wardlow had failed to show that his counsel was deficient or that he was prejudiced by any deficiency. Supp. SHCR 15–17 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The CCA declined to review the trial court's recommendation at that time, instead dismissing Wardlow's application. *Ex parte Wardlow*, 2004 WL 7330934, at *1.

On federal habeas review, the district court concluded that the CCA's dismissal was a valid procedural bar to consideration of his claims in federal court but "in the interest of justice" also chose to examine the merits of his claim on de novo review. *Wardlow*, 2017 WL 3614315, at *29 n.6. The district court assumed that counsel was deficient but found that Wardlow wholly failed to demonstrate prejudice.[3] *Id.* at *30–31.

But his merits review did not end there. In denying COA, the Fifth Circuit found not only that the district court's procedural dismissal was not debatable, but that even if it were, Wardlow "would not be entitled to appeal

[3] Though the court did not discuss any of the state trial court's findings of fact in its analysis, it had previously correctly found that the findings were entitled to deference under 28 U.S.C. § 2254(e)(1). *See Wardlow*, 2017 WL 3614315, at *10–11. But to the extent that the district court did *not* rely on the state trial court's findings of fact in denying Wardlow's IATC claim, Wardlow received the *most* favorable standard of review he could receive in *any* federal court—i.e., a truly de novo review—and still the court found the claim lacked merit.

for the additional reason that the merits of his claims are not debatable." *Wardlow*, 750 F. App'x at 375, 377. And this Court declined to review largely the same complaints that Wardlow now raises. *See* Pet. Writ Cert. 27–35, *Wardlow v. Davis*, 140 S. Ct. 390 (2019) (No. 18-9273).

Then, with an execution date looming, Wardlow returned to state court to ask the CCA to reconsider its 2004 dismissal of his habeas application. Though Texas rules do not permit the filing of a motion for rehearing on the dismissal of a habeas application, the rules allow the court to reconsider on its own initiative. *See* Tex. R. App. p. 79.2(d). Still, this is an "unusual step" that the CCA only undertakes in extraordinary circumstances. *See Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008). Here, after considering Wardlow's "pleadings and the evolution of [Tex. Code Crim. Proc.] *Article 11.071 caselaw*,"[4] the CCA, in an act of grace, reconsidered its dismissal and denied Wardlow's application on the merits. Pet'r App. 1, at 1 (emphasis added).

In all, four courts, state and federal, have reviewed and rejected Wardlow's claim. In the typical Texas case, petitioners come to this Court on

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[4] Indeed, four years after the CCA dismissed Wardlow's initial state habeas application, it decided *Ex parte Reynoso*, in which it noted that a state habeas applicant's waiver is not effective until after his deadline for filing an application has passed. 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008); *see also* Argument IV, *infra*. Here, the waiver was accepted before the deadline passed, thereby making *Reynoso* the likely "evolution" the CCA was referencing.

direct review from state court proceedings with perhaps one, or at most two, merits-reviews of a claim. And the "Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Rather, "the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." *Id.* That is precisely what occurred here—Wardlow has carried his claim through all appropriate avenues for consideration. If the *possibility* of federal review warrants denial of certiorari, then surely the *actuality* of completed and unsuccessful federal habeas review warrants the same. Certainly, prudence counsels against this Court reviewing what four other courts have already deemed wholly without merit. *Cf. Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990) (noting that the doctrine of collateral estoppel "protects parties from multiple lawsuits and the possibility of inconsistent decisions, and it conserves judicial resources").

Wardlow evades this prudential concern by casting aspersions on nearly every court in this process: he complains that the state trial court proceedings were "one-sided" and a "sham" because the trial court adopted nearly all of the State's positions, Petition 13–15; that the federal district court's alternative analysis was essentially fraudulent, preordained as it was by its then-proper imposition of a procedural bar, *id.* at 16; and that the CCA's reconsideration

and denial on the merits of his claim was "indefensible," *id.* at 17. His disagreement with the outcome in each court has essentially transformed into paranoia. He sees judicial abdication in every corner. And he apparently believes that only this Court can honestly fulfill its judicial duty. In short, he is asking for de novo review in this Court.

But the Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Indeed, as indicated in Argument I, *supra*, the Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Hous., Tex.*, 137 S. Ct. 1277, 1278 (2017) (mem.) (Alito, J., concurring) (citing Sup. Ct. R. 10); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 612–13 (1996) (Ginsburg, J., dissenting) (noting that the "Court is not well equipped for [the] mission" of correcting the "'misapplication of a properly stated rule of law'"). And the Court has noted that, except in exceptional circumstances, it defers to state-court factual findings, "even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim."). His mere disagreement does not constitute those exceptional circumstances.

Nor does his complaint about the manner in which the state courts resolved his habeas case 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). 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. 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 ". . . fundamental requisite of due process of law is the opportunity to be heard.'" *Ford v. Wainwright*, 477 U.S. 399, 413 (1986) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *see also Townsend v. Sain*, 372 U.S. 293, 312 (1963) (availability of habeas corpus "presupposes the opportunity to be heard, to argue and [to] present evidence"). There is no question that Wardlow had the opportunity to be heard in the state trial court and undoubtedly was heard by the CCA when it reconsidered its prior dismissal. Indeed, he admits that he moved to expand the order designating issues; he requested an evidentiary hearing; he renewed his request for an evidentiary hearing after

evidence was developed through affidavits; and he filed fifty-five pages of proposed FFCL. Petition 14.

That the state habeas court rejected Wardlow's arguments in favor of the State's, *see* Petition 13–15 (arguing that the court adopted the state's proposed order designating issues, followed the State's recommendation on the method of evidentiary development, and adopted without modification the State's proposed FFCL), does not make the process fundamentally inadequate. *Cf. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."); *Green v. Thaler*, 699 F.3d 404, 416 (5th Cir. 2012) (noting that, although this Court has criticized the practice of verbatim adoption of the State's proposed findings, it has "never found it to violate due process or to entitle a state court's decision to less deference" on federal habeas); *Brownlee v. Haley*, 306 F.3d 1043, 1067 n.19 (11th Cir. 2002) (noting that this Court has consistently upheld the use of verbatim adoption of proposed orders "as long as they were adopted after adequate evidentiary proceedings and are fully supported by the evidence").

Ultimately, the state court proceedings in Wardlow's case were more than adequate. He is merely displeased with the final result. However, he cannot escape that the final result—in both the state courts and in the two federal courts to review the merits of his claim—was to find his IATC claim

without merit. Given that four state and federal courts have already reviewed and rejected Wardlow's claim, his case presents a poor vehicle for reviewing his question presented. Certiorari review should be denied.

III. Setting Aside Prudential Concerns, This Court Should Not Review the CCA's Straightforward and Correct Application of the Law in Denying Wardlow's IATC Claim.

The primary thrust of Wardlow's argument is his belief that his case has "striking parallels" to this Court's recent decision in *Andrus v. Texas*, --- U.S. ---, 2020 WL 3146872 (June 15, 2020). Petition 12. Those parallels, Wardlow alleges, are "a highly meritorious" IATC claim with counsel who conducted "'almost no mitigation investigation, overlooking vast tranches of mitigating evidence'" and whose failure resulted in the presentation of evidence that "'backfired by bolstering the State's aggravation case.'" *Id.* at 12–13 (quoting *Andrus*, 2020 WL 3146872, at *5). He also argues that, like *Andrus*, "the basis for the CCA's denial was inscrutable" with the only difference being that the denial in *Andrus* was one sentence, where Wardlow's was one word. *Id*. at 3. Wardlow argues that these similarities mean that he should get the same relief as in *Andrus*—a remand for consideration of prejudice. *Id*. at 13.

But Wardlow's case bears little resemblance to *Andrus*. For one thing, his claim can hardly be characterized as "highly meritorious" when four different courts—state and federal, trial and appellate—have found the claim wholly without merit. *See* Argument II, *supra*. This stark difference is most

apparent in the fact that in *Andrus*, the state habeas court recommended *granting* relief based on an eight-day evidentiary hearing where a "'tidal wave'" of mitigating evidence was presented, which the state habeas court found "so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus[.]" 2020 WL 3146872, at *1, 4. No court has come close to finding the same in Wardlow's case, and all have concluded quite the opposite.

Importantly, every court to deny the merits of Wardlow's claim was correct to do so. Wardlow claimed that his trial counsel was ineffective for failing to conduct any investigation into Wardlow's life history, which resulted in the failure to provide his mental health expert, Dr. Don Walker, with a full picture of Wardlow's life prior to trial. Petition 17. He also challenged Dr. Walker's report with the opinion of Dr. Paula Lundberg-Love, whom state habeas counsel retained during state habeas proceedings. *See* SHCR 90; ROA.166–176.[5] But Wardlow wholly fails to demonstrate ineffectiveness in any respect.

[5] For ease of reference, the State will cite to the electronic record on appeal filed in cause no. 17-70029 in the Fifth Circuit proceeding challenging the district court's determination of his IATC claim.

A. Counsel's investigation was reasonable.

Unlike *Andrus*, trial counsel's investigation was more than adequate. In *Andrus*, counsel admitted during the eight-day evidentiary hearing on multiple occasions that he conducted nearly no investigation. During the punishment phase of Andrus's trial, counsel presented only two witnesses—Andrus's mother and biological stepfather with whom he only lived for one year when he was a teenager—before initially resting. *Andrus*, 2020 WL 3146872, at *2. After a sidebar discussion with the court, however, counsel then called three more witnesses—an expert witness who testified in a "terse direct examination" as to the general effects of drug use on developing brains, a prison counselor who worked with Andrus, and Andrus himself. *Id*. At the hearing, Andrus's counsel admitted that he was "barely acquainted with" any of these witnesses: he met Andrus's mother for the first time when she was subpoenaed to testify and Andrus's father when he showed up at the courthouse, and had not gotten into touch with the expert witness until just before voir dire. *Id*. at *5.

By stark contrast here, and as found by the state habeas court, Wardlow's attorneys interviewed numerous potential character witnesses, including Wardlow's parents. ROA.7348. In fact, Wardlow's counsel Bird Old "had a lot of knowledge about the Cason community where [Wardlow] and his family were from" because it was "a very small, rural community." ROA.143.

And, unlike in *Andrus*, Old "knew [Wardlow]'s parents—his father better than his mother—and [he] knew the Cole family" as well. *Id.* Old's familiarity with the community meant that he was aware that Wardlow's "reputation in Cason was bad and people thought a whole lot of Carl Cole." *Id.* He knew most people would be unwilling "to testify for the person who killed Carl Cole" and cited one example of an interview with a man who, when asked whether he could say something good about Wardlow, said, "You don't want me on your witness stand." *Id.* 144.

In addition, Wardlow's other attorney Lance Hinson "interviewed a number of potential character witnesses whose names he got from [Wardlow]." They called a few of those people as witnesses at trial and subpoenaed others whom Hinson was unable to reach, but ultimately they "decided not to call them after talking to them at the courthouse." *Id.* And Old interviewed Wardlow's parents, who he determined were not good witnesses because they did not have a good demeanor or appearance, provided inconsistent information, appeared unaffectionate and cold, and were "loose cannons." *Id.* Importantly, when asked if there was any history of brain damage or other mental illness, both Wardlow and his parents "provided no remarkable information." *Id.*

Despite this, Wardlow's trial attorneys asked their trial expert Dr. Walker to perform a psychological examination of Wardlow prior to trial.

ROA.144. Counsel explained to Dr. Walker the State's theory of how the crime was committed and provided background information, including Wardlow's age and education. *Id*. Dr. Walker interviewed Wardlow and conducted psychological tests. *Id*. During the interview, Wardlow again denied any abuse as a child, although he indicated he was bruised as a child when he was "butt whipped." ROA.7348. Wardlow also claimed he attempted suicide at least a couple times five years prior to the interview, and he expressed anger and disbelief over his mother "turning him in." *Id*. Dr. Walker submitted to counsel a written report of the evaluation, in which Dr. Walker found no evidence of mental illness or defect and arrived at a primary diagnosis of antisocial personality disorder or borderline personality disorder. ROA.7348–49. Counsel appropriately concluded that the report contained nothing helpful to Wardlow's defense and decided against calling Dr. Walker as a witness. ROA.144, 7349.

This investigation is nothing like the inadequate investigation done in *Andrus*. Wardlow's counsel did not "'abandon [his] investigation of [Wardlow's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources.'" *Andrus*, 2020 WL 3146872, at *5 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). Nor did he "'ignore[] pertinent avenues for investigation of which he should have been aware,' and indeed was aware." *Id*. (quoting *Porter v. McCollum*, 558 U.S. 30, 40 (2009)). Andrus's

counsel "performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence." *Andrus*, 2020 WL 3146872, at *6. Contrastingly, here, Wardlow's counsel had extensive familiarity with the community and performed as much investigation as he could under the circumstances. Any limitations on his investigation were due not to willful disregard, *see Andrus*, 2020 WL 3146872, at *5, but to the limitations of uncooperative or unhelpful witnesses and limited resources. To be sure, Wardlow has offered no records of any type documenting child abuse, neglect, or psychological treatment.

Andrus does not stand for the proposition that counsel is deficient merely because he did not uncover and present the *additional* mitigating evidence state habeas counsel—with a far more cooperative defendant and defendant's family—uncovered and presented. Indeed, counsel's actions are usually based, quite properly, on informed strategic decision based on information supplied by the defendant. *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); *Johnson v. Cockrell*, 306 F.3d 249, 252–53 (5th Cir. 2002) (evidence of any history of abuse or brain injury never disclosed despite specific questions on these topics). The evidence Wardlow

now relies on, unlike that presented in *Andrus*, was therefore not necessarily available to counsel through means independent of Wardlow and his family.

Wardlow points to certain "red flags" in Dr. Walker's report as evidence that trial counsel did not properly investigate Wardlow's case. *See* Petition 19, 23. But trial counsel was aware of the contents of the report and nonetheless did not believe such evidence was in Wardlow's best interest. ROA.7348–49. It is reasonable for counsel to believe that such evidence was more likely to be perceived as aggravating, rather than mitigating, to a jury, especially when some of that evidence was a primary diagnosis of antisocial personality disorder. *See Wiggins,* 539 U.S. at 535 (Wiggins's history "contained little of the double edge we have found to justify limited investigations in other cases."); *Kitchens v. Johnson*, 190 F.3d 698, 702–03 (5th Cir. 1999) (finding counsel's decision not to investigate mitigating evidence of child abuse, alcoholism, and mental illness was sound strategy where evidence was "double-edged" in nature). Instead, counsel presented testimony from three witnesses who were acquainted with Wardlow through school and church and could testify as to his positive character traits. ROA.7348. This was consistent with counsel's strategy—also apparently supported by Wardlow—to combat the State's future dangerousness case:

> [A]t the conclusion of the punishment phase of Wardlow's trial, outside the jury's presence, Wardlow himself acknowledged in open court that he did not wish to testify at the punishment phase

> and that he did not wish to call any further witnesses. Counsel had explained the tactical reasons for that decision. It is evident from the evidence presented and arguments made by counsel at the punishment phase of trial that trial counsel employed a punishment-phase strategy of emphasizing the lack of violent history on the part of Wardlow and arguing that the State had failed to prove future dangerousness.

Id.; *Schriro v. Landrigan*, 550 U.S. 465, 476–77 (2007) (finding that where the defendant interferes with counsel's attempts to present a case in mitigation, he cannot later claim ineffective assistance).

This is again unlike *Andrus*, where counsel, though repeatedly questioned on the topic, "never offered, and no evidence support[ed], any tactical rationale for the pervasive oversights and lapses." *Andrus*, 2020 WL 3146872, at *6. Indeed, counsel's failure to investigate was "all the more alarming given that counsel's purported strategy was to concede guilt and focus on mitigation"—"counsel justified his decision to present 'basically' 'no defense' during the guilt phase by stressing that he intended to train his efforts" on mitigation." *Id.* "As the habeas hearing laid bare, that representation blinked reality." *Id.* Wardlow's case is a far cry from *Andrus*.

Wardlow's attempts to parse apart the factual findings of the state habeas court by relying on Dr. Lundberg-Love's report do not undermine that conclusion. *See* Petition 22–26. Indeed, trial counsel were entitled to rely on the expert assistance they obtained. *See Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1263 (2019) (holding that, although

hiring an expert and having her testify "does not give counsel license to 'completely abdicate . . . responsibility,'" "counsel should be able to rely on that expert to alert counsel to additional needed information or other possible routes of investigation"); *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled in part on other grounds*, *Tennard v. Dretke*, 542 U.S. 274 (2004)). That state habeas counsel found an expert willing to testify favorably does not mean that trial counsel were deficient in their efforts. This is doubly so when considering that Dr. Lundberg-Love was only a licensed professional counselor and psychological associate, whereas Dr. Walker was a licensed psychologist.[6] *See* ROA.166. Indeed, the Fifth Circuit has held that "testimony

[6] To be sure, any controverting opinions Dr. Lundberg-Love purports to assert in her affidavit are not credible for two reasons. First, as a licensed professional counselor (LPC) and psychological associate—not a licensed psychologist—Dr. Lundberg-Love was not qualified to diagnose Wardlow with any mental disease or disorder. According the Texas Board of Examiners of Professional Counselors, as an LPC, Dr. Lundberg-Love may interpret instruments designed to assess a person's mental disorders and she may evaluate and assess by counseling methods, but she may *not* use standardized projective techniques or diagnose a physical condition or disorder. Further, Dr. Lundberg-Love's licensure as a psychological associate requires that her work be *supervised*. *See* 22 Tex. Admin. Code § 465.2(h) (West 2001). Dr. Lundberg-Love's affidavit does not reflect that she conducted her evaluation of Wardlow under supervision or even submitted her evaluation to a supervising licensed psychologist for review. Second, even if she were qualified to render the opinions she purported to in her affidavit, some of the information upon which Dr. Lundberg-Love bases her diagnoses of post-traumatic stress disorder, schizophrenia, or schizophreniform disorder, appears to be inconsistent with the evidence presented in this case: namely, Wardlow's own trial testimony; information provided by Wardlow to Dr. Walker during pretrial evaluation; Dr. Walker's findings noting the absence of any delusional thought processes; and Wardlow's own affidavit in federal habeas proceedings, none of which contain any indication of "magical thinking."

of experts not involved in the [] trial proceedings" is "irrelevant to counsel's perspective" at the time of trial. *Martinez v. Dretke*, 404 F.3d 878, 886 (5th Cir. 2005).

At the time of trial, counsel were faced with a defendant and his family who were unwilling or unable to help, and it was certainly reasonable for trial counsel to believe that Wardlow would be infinitely more able to relay his background to Dr. Walker. The fact that Wardlow did not then—but does now—does not make trial counsel deficient and wholly distinguishes Wardlow's case from *Andrus*. In any event, Wardlow does not demonstrate that Dr. Walker's opinion would have changed had he been privy to this new information. Wardlow only provides the competing opinion of a second expert. This is not enough to establish that counsel was deficient.

B. Counsel's mitigation presentation did not "unwittingly aid the State's case in aggravation."

Wardlow argues that counsel's mitigation presentation of three witnesses who spoke favorably of Wardlow, *see* Statement of the Case II.B, *supra*, "has the unfortunate effect of 'bolstering the State's aggravation case.'" Petition 32 (quoting *Andrus*, 2020 WL 3146872, at *5). But, again, Wardlow's case is entirely distinguishable from the facts of *Andrus*.

This Court pointed to counsel's presentation of Andrus's mother as the best example of how counsel's "introduction of seemingly *aggravating* evidence

confirms the gaping distance between his performance at trial and objectively reasonable professional judgment." *Andrus*, 2020 WL 3146872, at *6. The Court noted that his mother's testimony painted a picture of a "tranquil upbringing, during which Andrus got himself into trouble despite his family's best efforts." *Id.* She attributed Andrus's drug use entirely to himself: she claimed that drugs were not available in the house, that Andrus did not use them at home, and that, had she known about his habits, she would have intervened. *Id.* In other words, his drug habit was nobody's fault but his own.

This turned a purported defense witness into a witness helpful to the State—increasing Andrus's culpability rather than minimizing it. Then, "[t]urning a bad situation worse," counsel's lack of investigation had the result of undermining Andrus's own testimony when he later took the stand. *Id.* at *7. Indeed, when Andrus testified that his mother had sold drugs in their home when he was a child, counsel pointed out the discrepancy between Andrus's testimony and his mother's. *Id.* Whatever the intent in doing so, the jury could have easily believed that counsel was insinuating Andrus was lying. *Id.* "Plainly, these offerings of seemingly aggravating evidence further demonstrate counsel's constitutionally deficient performance." *Id.*

This is far from the case here. Wardlow does not point to any specific evidence that was presented that was actually aggravating in nature. *See* Petition 32–33. The most he can point to is the State's *argument* that "there

was no mitigation at all." *Id.* at 32. But the State's argument is not evidence, and a State's routine discounting of mitigating evidence is not the same as defense counsel *bolstering* the aggravating case. Wardlow's attempt to shoehorn his case into the facts of *Andrus* fails.

C. Wardlow cannot show prejudice.

Finally, unlike *Andrus*, Wardlow cannot show prejudice. First, the mitigating evidence Wardlow now proffers is not substantial in quantity and does not present an overly sympathetic case. *See, e.g.*, *Wardlow*, 2017 WL 3614315, at *31 (citing *Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (per curiam)). Indeed, the primary thrust of the evidence relates to Wardlow's mother, *not* Wardlow himself, so its mitigating value is slight. *See* Tex. Code Crim. Proc. art. 37.071 § 2(e)(1) (focusing on "the circumstances of the offense, the *defendant's* character and background, and the personal moral culpability of the *defendant*") (emphasis added). Also, that Wardlow's social development was inhibited by his mother's behavior is contradicted by the record, as the witnesses who testified all described him as helpful and considerate. *See* Statement of the Case II.B, *supra*. The value of this evidence is thus minimal.

Conversely, "submitting evidence suggesting that Wardlow was unstable, lacked family support, or had mental problems could have contributed to a future dangerousness finding." *Wardlow*, 2017 WL 3614315, at *32. And although there is no evidence that Dr. Walker would have reached

the same conclusions as Dr. Lundberg-Love if he had been presented with the same evidence, it is certainly true that evidence of a mental illness such as a schizophreniform disorder could be considered more aggravating than mitigating, thus further diminishing the mitigating value. *See id.*; *see also Trevino v. Davis*, 861 F.3d 545, 551 (5th Cir. 2017) (holding that proposed evidence showing that petitioner had Fetal Alcohol Spectrum Disorder, but also that he was violent and involved in gang activity, was "a significant double-edged problem that was not present in *Wiggins*," and which did not prejudice petitioner); *Miniel v. Cockrell*, 339 F.3d 331, 346–48 (5th Cir. 2003) (upholding the state court's conclusion that the petitioner was not prejudiced by counsel's failure to investigate and present evidence of abuse and neglect during his childhood); *Ladd v. Cockrell*, 311 F.3d 349, 349 (5th Cir. 2002) (failure to present evidence of troubled childhood, mental retardation diagnosis as a child, low IQ test score, being put on a psychomotor inhibitor, and good behavior in institutional settings not prejudicial because some of the evidence was double edged, and the rest had only "minimal[]" mitigating value).

Finally, when this new evidence is taken together with that presented at trial and weighed against the State's aggravating evidence, Wardlow cannot establish that he would not have been sentenced to death. Indeed, Wardlow continues to downplay the seriousness of the offense and to overemphasize his

lack of prior acts of violence, but as the federal district court properly found, Wardlow fails to acknowledge:

> [T]he victim was an elderly man, that [Wardlow] planned the crime and concocted a ruse to get into the victim's home, that he took his mother's gun and concealed it in his waistband, that he cut the victim's phone lines, that he went to the victim's house several times before finding the most opportune moment to commit the crime, and that he knew the keys were in the victim's truck thereby obviating any need to confront the victim if all he wanted to do was secure a vehicle to leave town.

Wardlow, 2017 WL 3614315, at *31. Yet Wardlow chose to carry out his plan at gunpoint, culminating in the execution-style gunshot to the victim's head. Wardlow cannot show that additional investigation, or the addition of Lundberg-Love's testimony, would have shown that the balance of the aggravating evidence against the mitigating evidence did not warrant death.

Thus, as every court to consider Wardlow's claim has held, Wardlow fails to demonstrate that he was prejudiced by any deficiency in counsel's performance. Indeed, even in the federal district court where deficiency was assumed for the sake of argument,[7] Wardlow failed on the prejudice prong. *See Wardlow*, 2017 WL 3614315, at *30–32. Thus, there is no need for this Court

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[7] Wardlow argues that the state trial court "conceded" deficiency by reaching the prejudice prong in the alternative, Petition 21, but that allegation is false. The state habeas court explicitly concluded that trial counsel were not deficient, but, in the tradition of many *Strickland* analyses, found that "even if" they were, there is no prejudice. ROA.7351 ¶ 3. This is in no way a concession, just as the district court's assumption is not.

to remand to the CCA for a determination that has been consistently made by it and several courts before it. Wardlow's petition should be 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.

Wardlow asks for a stay of execution in this Court because he believes it likely that this Court "would reverse the decision of the [CCA] refusing to decide the merits of the claim on state procedural grounds." Appl. Stay Exec. 2. Wardlow also claims there is "a strong likelihood that he has been denied the protection of the Eighth and Fourteenth Amendments." *Id*. at 3. But the CCA did not refuse to decide the merits of his claim, instead denying on the merits on reconsideration, and Wardlow's IATC claim is brought under the

Sixth, not Eighth, Amendment. Thus, Wardlow's motion wholly fails to make the showing necessary to warrant a stay.

Regardless, as discussed above, Wardlow utterly fails to prove likely success on the merits of his IATC claim. Indeed, Wardlow's claim has been thoroughly reviewed and rejected by trial and appellate courts, state and federal. Moreover, there is harm to the State and the public. Wardlow senselessly executed elderly Carl Cole to steal his truck, something that could have been taken without violence because the keys were in it. Since that murder, he has received more than two decades' worth of review and no constitutional infirmity has been demonstrated. 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. And the public's interest is not advanced by staying Wardlow's execution to consider a claim that has been determined to be meritless on four different occasions. 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)).

Finally, Wardlow has failed to exercise due diligence in pursuing this litigation. Wardlow did not pursue any remedies, like seeking a stay in federal court, in the fifteen years his case was pending in federal habeas after new state court caselaw suggested that the waiver of state habeas proceedings in his case was done erroneously. *See Ex parte Reynoso*, 257 S.W.3d at 720 n.2

(noting that a state habeas applicant's waiver is not effective until after his deadline for filing an application has passed); *see also Ex parte Soffar*, 143 S.W.2d 804, 804 (Tex. Crim. App. 2004) (permitting consideration of claims in a subsequent application that were also presented in parallel federal proceedings when the federal court stayed those proceedings). And even after this Court denied him certiorari review of his IATC claim in federal habeas proceedings, Wardlow waited over one month—all while under the threat of execution—before filing his suggestion in the CCA. *See* Statement of the Case III, *supra*. Importantly, Wardlow waited another two months after the CCA reconsidered and denied his initial application—and with only about two weeks left before his modified execution date—before seeking this Court's review of that denial. *Id.* Ultimately, Wardlow's complaints "could have been brought [long] ago" and "[t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam). Considering all the circumstances in this case, equity favors Texas, and this Court should deny Wardlow's application for stay of execution.

CONCLUSION

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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