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

No. 19-8835
No. 19A1065

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 BRIEF

In response to the Brief in Opposition, Mr. Wardlow sets forth the following:

Respondent seeks to gloss over the raw truth of the habeas proceedings underlying the question presented in this petition. The truth is that the trial judge presiding over the state habeas proceeding did nothing even to give the appearance that he was actually presiding over the case. He held no hearing at which counsel could be heard on any matter. He adopted the state's position on every matter and never once explained his reasoning for doing so. He provided no vehicle for developing the factual disputes on the claims. He adopted the state's proposed findings and conclusions simply by initialing the proposal submitted by the state. How is this any different, in substance, from the conduct of the proceeding by the state without the

judge? A difference in form, perhaps, but no difference in substance.

Then, the Texas Court of Criminal Appeals dismissed Mr. Wardlow's habeas application as having been waived. Just as Davis here pretends that Mr. Wardlow's counsel filed his habeas application *despite* her client's waiver, BIO at 13,17, so did the CCA. Neither Davis here, nor the CCA ever, has spoken the truth about what happened, even though both know the truth. Mr Wardlow did waive his right to pursue state habeas but changed his mind, and affirmatively said so in writing in two different documents filed along with his habeas application in the trial court, on the date his application was due. Under universal waiver principles, how is it that anyone can say Mr. Wardlow waived his state habeas proceeding? Incredibly, the CCA did, and the state now repeats that delusion here.

Then, the federal habeas courts got lost in the thicket of the unfounded "procedural default" just described. That default holding cast a shadow over the federal courts' review of the merits, as explained in the petition for writ of certiorari filed today from the United States Court of Appeals for the Fifth Circuit.

Finally, the CCA corrected its jaw-dropping procedural mistake in 2020 and then simply denied the claim presented here, notwithstanding the gaping holes in the relationship between the facts of record and the state's findings and conclusions masquerading as the trial court's work.

Davis does nothing meaningful to draw into question this history. She just pretends that because four courts have conducted some form of review of the underlying *Wiggins* claim, and found the claim "wholly without merit," BIO, at 23, that should be the end of the story. It should not be.

Against this backdrop, there can be little wonder, as Davis says, "[Wardlow] apparently

believes that only this Court can honestly fulfill its judicial duty." BIO, at 20. This is the only statement by Davis with which we agree. She is absolutely correct.

The points that Davis tries to make about the adequacy of trial counsel's investigation, the "strategic" reasons for counsel's gross ineptitude in investigating mitigation, trial counsel's failure to be aware of, much less investigate, the red flags raised by their own mental health expert's pretrial evaluation, and the pitiful mitigation presented in comparison to the case that could have been presented, BIO, at 25-37, magnify the horrible rot at the core of the entire judicial process that unfolded in Mr. Wardlow's case.

The truth is that no court gave anything like meaningful consideration to Mr. Wardlow's case. The state, using the trial judge as a ventroloquial figure, cut off every avenue for possible meaningful exploration of the disputed facts about trial counsel's performance and the power of uninvestigated evidence.

So, yes, the record on Mr. Wardlow's *Wiggins* claim is starkly different than the record in Terence Andrus's case. The reason is that Mr. Andrus had a meaningful state habeas process before a trial court judge who actually presided over his case and acted like a judge. Mr. Andrus's encounter with the CCA is where his case went off the rails. Mr. Wardlow's case never got to the rails. And yet, the seeds of a case of ineffective trial counsel, different from but potentially just as powerful as Mr. Andrus's case, are there. With a fair evidentiary process in some court, somewhere, Mr. Wardlow can establish that. The Sixth and Fourteenth Amendments require that he be provided the opportunity.

These are the reasons why Mr. Wardlow's case needs to be returned to the CCA to require that court to do its duty under the Constitution – for the same reasons the Court did this in *Andrus v. Texas*, ___ U.S. ___, 2020 WL 3146872 (June 15, 2020).

FOR THESE REASONS, Mr. Wardlow asks that the Court stay his execution, grant certiorari, vacate the CCA's order, and remand the case for further proceedings consistent with the guidance the Court will give the CCA.

Respectfully submitted,

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

Counsel for Billy Joe Wardlow

*Counsel of Record, Member of the Bar of the Supreme Court of the United States