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

No. _____

BILLY JOE WARDLOW,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTION PRESENTED

Mr. Wardlow's initial state habeas proceeding was essentially a sham, in which the trial court wholly allowed the prosecutor to determine the course of proceedings and decide the case, the Texas Court of Criminal Appeals in its review of the trial court's recommendations dismissed the proceeding on mistaken procedural grounds, and that dismissal controlled the outcome of federal habeas proceedings.

When the Court of Criminal Appeals finally acknowledged its mistake in dismissing the proceeding, it denied all Mr. Wardlow's clams on the merits, including his claim of trial counsel's ineffectiveness in investigating penalty phase mitigation, without any explanation.

The merit of Mr. Wardlow's trial ineffectiveness claim is comparable to the merit of the claim in *Andrus v. Texas*, ___ U.S. ___, 2020 WL 3146872 (June 15, 2020), but the manner in which the Court of Criminal Appeals finally got to and considered the merit of Mr. Wardlow's claim is worse than that which compelled the court to grant, vacate, and remand in *Andrus*.

Accordingly, the Court should consider:

Whether in Mr. Wardlow's case to grant certiorari, vacate the decision of the Texas Court of Criminal Appeals, and remand for reconsideration in the manner required of that court in *Andrus*.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

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

Wardlow v. State, No, 72,102 (Tex.Crim.App. 1997) (unpublished) (direct appeal)

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 (unpublished) (initial state habeas corpus)

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

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

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

Ex parte Wardlow, 2020 WL 2059742 (Tex.Crim.App. 2020) (reconsideration of initial state habeas corpus application)

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INTRODUCTION:

Billy Wardlow's State Habeas Corpus Proceeding, from the Beginning to the Present, Was Conducted with a Careless, One-Sided Approach Reflecting the Same Kind of Indifference to Constitutional Protections that the Court Recently Addressed in *Andrus v. Texas*

In *Andrus v. Texas*, ___ U.S. ___, 2020 WL 3146872 (June 15, 2020), the Court issued a *per curiam* opinion addressing Mr. Andrus's claim of ineffective assistance of trial counsel in investigating the penalty phase of his capital trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003). What was remarkable about the case was that in state habeas corpus proceedings, the trial court held an eight-day evidentiary hearing on the claim and recommended that Mr. Andrus be granted habeas relief and a new sentencing trial. *Id*. at *1. "The court found the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial." *Id*. Despite this, the Texas Court of Criminal Appeals (CCA) summarily rejected the trial court's recommendation, and concluded "without elaboration that Andrus had 'fail[ed] to meet his burden under [both prongs of] *Strickland v. Washington*, 466 U.S. 668 (1984)....'" *Id*. at *4.

The CCA's decision was so much in conflict with this Court's decisions on deficient performance in investigating the penalty phase of capital trials, *id*. at *4-*8, that this Court determined without further briefing by the parties that Mr. Andrus's counsel performed deficiently in failing to investigate mitigation and the state's case in aggravation. *Id*. at *8-*9. The Court remanded the case to the CCA for it to address the prejudice prong of *Strickland*, *id*. at *9, explaining, "Its [the CCA's] one-sentence denial of Andrus' *Strickland* claim ... does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient

performance under *Strickland*'s first prong, that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong, or that Andrus had failed to satisfy both prongs of *Strickland*." *Id*. at *8.

An equally intolerable process, also involving a *Wiggins* claim, took place in state habeas proceedings in Mr. Wardlow's case. In the trial court, the state habeas judge at every turn handed over the judicial function to the prosecutor. Thus, the judge signed without modification: the prosecutor's proposal for determining which claims had controverted factual issues, the procedure proposed by the prosecutor for resolving those disputed facts, and finally, the prosecutor's proposed findings of fact and conclusions of law recommending to the CCA the denial of all claims. At each of these turns, counsel for Mr. Wardlow opposed the prosecutor's position and moved for a different resolution. However, at no point did the trial judge appear to take into account Mr. Wardlow's position. No order on any of these outcome-determining matters reflected at all Mr. Wardlow's arguments or factual allegations. The orders were nothing more than partisan orders written by one side in the case. Then, on review of the trial court's recommendations in 2004, the CCA, out of the blue and without the prosecutor or the trial judge having made any such recommendation, found that Mr. Wardlow had waived state habeas proceedings, failing to realize that he in fact had not done so.

Mr. Wardlow then pursued federal habeas proceedings between 2004 and October 15, 2019, when the Court denied certiorari. Throughout the proceedings, the State argued that the CCA's procedural dismissal barred federal review. Mr. Wardlow argued that he had not waived state habeas proceedings and that the procedural dismissal by the CCA was not an adequate state procedural ground. However, he always lost that argument. With the denial of certiorari, the

barrier to Mr. Wardlow's return to state court was removed.[1]

When he did return to state court by filing a suggestion that the CCA reconsider its 2004 order on its own motion, the CCA did what Mr. Wardlow asked. On April 29, 2020, the court "reconsider[ed] that dismissal" due to "Applicant's pleadings and the evolution of Article 11.071[2] caselaw." *Ex parte Wardlow*, 2020 WL 2059742 *1 (Tex.Crim.App.) [attached as Appendix 1]. The court then listed the claims Mr. Wardlow had raised in his habeas application and held without any explanation, "After reviewing Applicant's claims and the record of the case, we have determined that the claims should be denied." *Id*.

Mr. Wardlow's *Wiggins* claim paralleled the claim before the Court in *Andrus*. The performance of defense counsel was just as clearly deficient. The prejudice was also very strong. And as in *Andrus*, the basis for the CCA's denial was inscrutable. The only difference was that in *Andrus* the denial was one sentence, and in Mr. Wardlow's case the denial was one word. Because trial counsel's performance in failing to investigate mitigation was just as egregious as in *Andrus*, the Court should grant the same relief to Mr. Wardlow as it did to Mr. Andrus: a remand to the CCA to consider the prejudice associated with counsel's failure to investigate mitigation.

OPINION BELOW

The order of the Texas Court of Criminal Appeals reconsidering the dismissal of Mr.

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[1]The Court of Criminal Appeals precludes state courts from entertaining any matter that is the subject of federal habeas litigation until that federal litigation is completed. *Ex parte Soffar*, 143 S.W.3d 804, 807 (Tex. Crim. App. 2004). Thus, until the denial of certiorari on October 15, 2019, Mr. Wardlow could not return to state court.

[2]Article 11.071 is the section of the Texas Code of Criminal Procedure setting forth the procedure to be followed in capital habeas corpus proceedings.

Wardlow's initial habeas corpus application, then denying his claims on the merits, including the *Wiggins* claim, was entered April 29, 2020. *Ex parte Wardlow*, 2020 WL 2059742 (unpublished) [Appendix 1]. This order was entered in case number WR-58,548-01. The same order also included a ruling on Mr. Wardlow's subsequent habeas corpus application, case number WR-58,548-02. That ruling is the subject of a separate petition for writ of certiorari, previously filed and docketed in this Court as case number 19-8712.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to ... the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

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

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Statement of Relevant Facts

1. The un-investigated evidence of mitigation

Billy Wardlow grew up in a very poor family in Cason, Texas. ROA.26.[3] His mother Lynda was the dominant adult in the family. *Id*. She herself had grown up in a very poor, extremely abusive family. She and her family were often homeless, evicted time and again because of their inability to pay the rent. ROA.128.

Lynda suffered deeply from the trauma of her childhood. Throughout her adult life, she experienced frequent rage episodes, during which she would exhibit extraordinary strength, anger, and violence. She experienced voices directing her during these episodes. ROA.129. Her family, especially Billy, lived in fear of these episodes because they were the targets of her rage. ROA.133, 139. Lynda also believed deeply that she had been abducted by aliens. Her belief was so strong that she became convinced that her first child was conceived during an abduction. She shared her belief with Billy that she had been abducted by aliens. ROA.130. Billy thereafter believed he was similarly abducted. *Id*.

Lynda was extremely protective of her children, Billy and his older brother John. She severely limited their activities, forbidding contact with people whom she did not approve. Billy was not allowed to participate in sports or school-related social activities. ROA.125. As a result of his mother's over-protectiveness, Billy did not develop friendships and felt very different from other children. ROA.133.

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[3]Citations are to the Electronic Record on Appeal filed in the Fifth Circuit in connection with the federal habeas appeal. It is the most complete and accessible compilation of the record in Mr. Wardlow's case.

Billy's own life history was, in many ways, as hard and marginalized as his mother's. He was born late and experienced head trauma and a loss of oxygen at birth. ROA.125. He developed slowly, though he grew quickly. He did not walk until 19 months. By that time he already weighed 37 pounds. *Id*. As he grew up, he was painfully aware of the fact that he was socially isolated and socially inept. Machines were his friends. He was unable to socialize with other children. ROA.133-34. He continued to wet his pants at night and at school until age 10. He was painfully humiliated by this experience. Children at school teased him and at home his mother made him walk around with his wet underwear on his head. ROA.125.

As Billy grew into his mid-teens, life became more difficult for him. His parents' enforced isolation from other children meant that he was not a part of any "crowd" at school. He felt very different from the other kids and was not very close to anyone. ROA.133. There was also a growing tension between him and his mother during this time and he began to experience serious emotional distress. ROA.125. He had attempted suicide twice by the time he was arrested for the murder of Mr. Cole. ROA.126-27, 149.

In October, 1991, Billy met Tonya Fulfer, who was a special education student at Daingerfield High School. ROA.134. They soon learned that they both considered themselves to be "black sheep" in their family, and they found it easy to open up to each other. Tonya was the first person Billy ever opened up to and is the only person with whom he ever experienced love. *Id*. Tonya had been severely abused at home and was able to talk to Billy about these problems. The two became inseparable. *Id*.

In early 1993, Billy and Tonya decided to leave Cason. They dropped out of school and went to Fort Worth, where Billy's brother lived and moved into his apartment. For several

months, Billy had jobs but then his truck broke down and could not be fixed. R.134. He borrowed a vehicle from a friend until he lost his last job. In early June 1993, he and Tonya test drove a truck, and while driving it, decided to move to Montana and start a new life. Several days later, they were arrested and admitted stealing the pickup after test driving it. The owner of the pickup dropped the charges. *Id*.

In Cason, Billy and Tonya continued to talk about leaving home and going to Montana. ROA.135. They decided to steal some money and a pickup, thinking they could escape their pain by leaving home and finding a new life in Montana. The course they chose was tragically flawed and led to the murder of Mr. Cole.

In connection with the state habeas investigation by his defense team, Billy was seen and evaluated by a clinical psychologist, Paula Lundberg-Love, Ph.D., who reviewed extensive information about his background and his family and interviewed his parents. ROA.167-72.

With this information, Dr. Lundberg-Love was able to explain how Billy functioned. Because he had a "familial tendency for schizophreniform disorder," a form of schizophrenia,[4] he sometimes experienced "disruption of logical thought processes," including thinking that was "disorganized, loosely connected, and tangential," "[d]elusions and/or hallucinations," and a "flat, somewhat detached" emotional tone. ROA.175. People with this illness, like Billy, often "lack close friends or confidants," "possess[ed] odd beliefs [and] engage[d] in magical thinking that influences their behavior," have "paranoid thinking," and engage in "behavior that may seem odd, eccentric, or peculiar." *Id*. Dr. Lundberg-Love reported that "both Lynda and Billy

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[4]American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, Fifth Edition, at 97 (2013).

Wardlow possess some type of schizophreniform disorder." *Id* .

With an understanding of Mr. Wardlow grounded in his life history, Dr. Lundberg-Love was able to cast the killing of Mr. Cole in a starkly different light:

> ... Billy's schizophreniform symptomatology played [a powerful role] in the etiology of the crime. Because both Billy and Tonya engaged in similar magical thinking, over time they came to reinforce each other's magical thinking/delusional beliefs, such that they truly believed that they could transform the pain in each others' lives by escaping to Montana. Their shared delusion was that if they just superficially threatened Mr. Cole, he would not offer any resistance, and would give them his vehicle and enable their dream to come true. Under the influence of this magical thinking and a shared delusion, Tonya and Billy were not prepared for the reality of a crime victim being frightened, resisting, and fighting back.

ROA.175.

2. <u>The capital murder</u>

On direct appeal, the Court of Criminal Appeals summarized the relevant facts of the crime in the following manner:

> When the victim attempted to retreat into his home, appellant drew his gun and blocked the door. The victim apparently then lunged at appellant and grabbed his arm. In his first 'confession' letter to the sheriff, appellant stated that, although the 82-year-old victim was stronger than he expected, appellant managed to shake the victim off. At this point, appellant shot the victim. Appellant recanted this statement in his second 'confession' letter saying that he shot the victim while they were struggling. However, given that the victim was shot between the eyes, and given the medical examiner's testimony that the gun was at least three feet from the victim when he was shot, the jury could have reasonably believed appellant's first statement.

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

Regardless of which confession is credible, Mr. Wardlow's testimony at trial gave further meaning to the Court of Criminal Appeals' statement, *supra*, that "[t]he victim apparently then

lunged at appellant and grabbed his arm." Billy testified at trial that he "did not intend to kill the victim [Carl Cole] when he went there." ROA.6425. Mr. Cole "surprised me or the actual fact that he challenged me," ROA.6436, and when Mr. Cole challenged him, "it caught me by surprise that he was stronger than I thought he was or guessed he was." ROA.6432. After the shooting, Mr. Wardlow testified, "I stood there, I didn't know what to do, everything had gone wrong, the plans had blown up." *Id*. Billy and Tonya, aghast at what happened, took Mr. Cole's truck and fled. They were arrested a couple days later in South Dakota.

3. <u>How the un-investigated mitigation would have changed the picture at sentencing</u>

In the penalty phase of Mr. Wardlow's trial, the defense presented the testimony of three witnesses, a youth minister, a high school librarian, and an assistant high school principal.

The youth minister testified that Mr. Wardlow participated in Church fundraisers, and was a hard worker, well mannered, very bright and respectful to her. ROA.6898. She knew that he was involved in a church youth group, but since she was not connected with that group, she could not provide any information about the group's activities or his involvement in it. ROA.6896-97. The librarian testified that Mr. Wardlow often came to the library before school and during lunch. ROA.6903. He enjoyed working with the computer programs and reading books about mechanics, cars, and technology. ROA.6903-04. He also volunteered to help move the library books and equipment during a school remodeling project. ROA.6904-05. The assistant principal for Daingerfield High School testified that there were no disciplinary procedures lodged against Mr. Wardlow while he was in high school and that he was in attendance 95% of the time. ROA.6907-08.

On cross-examination, the prosecutor made the point that these witnesses had no contact with Mr. Wardlow during the year and a half to two years before Mr. Cole was killed. ROA.6900, 6908. And in closing, the prosecutor argued that this evidence had no mitigating value:

> He [Bird Old, lead defense counsel] was talking about mitigation and, you know, we don't have a mentally retarded defendant, ... we don't have any evidence that family background was terrible, we don't have any evidence of any kind of strong mitigating circumstances in his life but they bring up those things about the librarian and his junior high church activities and what does it have to do with the fact that he cold-bloodily [sic] murdered an elderly man?
>
> Nothing.

ROA.6974.

The summary of the mitigating evidence that could have been presented, *supra*, shows that the prosecutor would have been precluded from making any of these points had counsel done their job. The defense could have presented evidence of mental illness (though not mental retardation), and evidence of a "family background [that] was terrible" – evidence that the prosecutor characterized as "strong mitigating circumstances." And, critically, the defense could have presented evidence that offered a mitigating explanation for "the fact that [Mr. Wardlow] cold-bloodily murdered an elderly man."

B. <u>Procedural history of the case</u>

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

Mr. Wardlow timely filed his initial state habeas corpus application on July 20, 1998. *Ex parte Wardlow*, No. WR-58,548-01 (Tex.Crim.App. September 15, 2004) (order dismissing habeas application). On September 15, 2004, the CCA dismissed his application under the mistaken view that Mr. Wardlow had waived his right to pursue state habeas remedies.[5]

Mr. Wardlow timely filed his federal habeas petition in the United States District Court for the Eastern District of Texas on November 23, 2004. On August 21, 2017, the court denied relief, finding that his purported waiver of state habeas corpus proceedings was a procedural bar to the consideration of his claims, but also in the alternative, determining that the claims had no merit. *Wardlow v. Director*, 2017 WL 3614315 (unpublished). On October 22, 2018, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. *Wardlow v. Davis*, 750 Fed.Appx. 374. Thereafter, Mr. Wardlow filed a petition for writ of certiorari, but the Court denied certiorari on October 15, 2019. *Wardlow v. Davis*, ___ U.S. ___, 140 S.Ct. 390.

On October 25, 2019, the trial court scheduled Mr. Wardlow's execution for April 29, 2020. That order was modified on April 6, 2020, re-scheduling his execution for **July 8, 2020**.

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[5]Mr. Wardlow vacillated about filing or waiving his initial state habeas application. On July 9, 1998, the CCA entered an order allowing him to waive habeas. Thereafter, he changed his mind and filed his application on the due date along with a statement explaining why he had vacillated and making clear that he wanted to pursue habeas proceedings. He never vacillated again after that. Four years after it dismissed Mr. Wardlow's initial habeas proceeding, the CCA explained that, while "an applicant [for habeas corpus] may 'waive' his right to habeas review, ... because an applicant can waffle in his decision until the day the application is due, a 'waiver' is not truly effective until after that date has passed." *Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex.Crim.App. 2008). Since Mr. Wardlow changed his mind about waiving state habeas and filed his application on the day it was due, the waiver which the CCA had approved was effectively withdrawn. The CCA made a mistake in dismissing Mr. Wardlow's initial habeas application.

Appendix 2.

On December 3, 2019, Mr. Wardlow filed a "Suggestion That the Court, on its Own Motion, Reconsider its Dismissal of Applicant's First Habeas Corpus Application."[6] On April 29, 2020, the CCA "reconsider[ed] that dismissal" due to "Applicant's pleadings and the evolution of Article 11.071 caselaw." *Ex parte Wardlow*, 2020 WL 2059742 *1 (Tex.Crim.App.) (Appendix 1). The CCA then listed the claims Mr. Wardlow had raised in his initial habeas application and immediately thereafter held as follows: "After reviewing Applicant's claims and the record of the case, we have determined that the claims should be denied." *Id*. The CCA also denied Mr. Wardlow's motions for a stay of execution. *Id*.

REASONS FOR GRANTING CERTIORARI

Mr. Wardlow's Initial State Habeas Proceeding Was a Sham, in Which the Trial Court Allowed the Prosecutor to Determine the Course of Proceedings and Decide the Case, the CCA Dismissed the Proceeding on Mistaken Procedural Grounds, and that Dismissal Controlled the Outcome of Federal Habeas Proceedings.

When the CCA Finally Acknowledged Its Mistake in Dismissing the Proceeding, It Denied All Mr. Wardlow's Clams on the Merits, Including his *Wiggins* Claim, with No Explanation.

The Merit of Mr. Wardlow's *Wiggins* Claim Is Comparable to the Merit of the Claim in *Andrus v. Texas,* but the Manner in Which the CCA Ultimately Considered and Denied his Claim Is Worse Than That Which Compelled the Court to Grant, Vacate, and Remand in *Andrus*.

Billy Wardlow's case has striking parallels to *Andrus v. Texas*, ___ U.S. ___, 2020 WL 3146872 (June 15, 2020). Like Terence Andrus, Mr. Wardlow presented a highly meritorious claim of ineffective assistance of trial counsel in the failure to investigate mitigation – a claim

[6]Texas does not allow the filing of a motion for rehearing or reconsideration in the CCA in state habeas cases, but does allow such a "suggestion" to be filed.

commonly referred to as a *Wiggins*[7] claim. As in Mr. Andrus's case, the CCA denied Mr. Wardlow's claim on the merits with no explanation, even in the face of two of the very same deficiencies in counsel's performance the Court found compelling in *Andrus*: "First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case." 2020 WL 3146872 at *5. If these were the only equities in Mr. Wardlow's case, the Court would be hard pressed not to grant him the same relief as Mr. Andrus.

However, additional equities call for intervention in Mr. Wardlow's case. Unlike Mr. Andrus's case, Mr. Wardlow's state habeas proceeding was a sham, from beginning to end, that had the toxic effect of impeding meaningful review of his *Wiggins* claim in federal habeas proceedings.

We will fill in the details of this outline in the sections that follow.

A. <u>Mr. Wardlow's State Habeas Proceeding Was a Sham</u>

After the filing of a state habeas corpus application and the State's answer, the habeas statute requires the trial court to "determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination." Tex. Code Crim. Proc. Art. 11.071 §8(a). Here, the prosecutor proposed that the court designate the "allegations of ineffective assistance of counsel presented in Wardlow's fifth and seventh claims for relief," as "issues for further factual development and conduct a hearing by affidavit...." ROA.7528. The fifth claim included the *Wiggins* claim. The

[7] *Wiggins v. Smith*, 539 U.S. 510 (2003).

trial court followed the prosecutor's recommendation:

> The Court finds ... that the only controverted, previously unresolved factual issue requiring evidence is the following issue:
>
> 1) Applicant's claims of ineffective assistance of counsel at trial as contained in Applicant' s Fifth and Seventh claims for relief in his application for a post-conviction writ of habeas corpus.
>
> The Court will accept evidence by way of affidavit to resolve the issue. No hearing on the matter is necessary.

ROA.7533.

Mr. Wardlow moved to expand the order designating issues and for an evidentiary hearing. ROA.7546-7554. The rationale put forward for an evidentiary hearing was that "[t]he fact-finding process for a claim of ineffective assistance of counsel should ... rest upon testimony by trial counsel in an adversarial proceeding, where the fact finder is able to determine the truth based upon trial counsel's candor in being confronted with and responding to all the factors that went into particular judgments." ROA.7548.

The prosecutor opposed this request, ROA.7260-7565, and proposed an order denying the request, ROA.7556-7559. The trial court signed the proposed order with no changes. ROA.7610-7612.

Thereafter, after the affidavits were filed in keeping with the proposed order signed by the trial court, Mr. Wardlow filed a renewed motion for an evidentiary hearing, ROA.7679-7682. He also filed 55 pages of proposed findings of fact and conclusions of law. ROA.7683-7739. The prosecutor filed 18 pages of findings of fact and conclusions of law. ROA. 7648-7665. Without holding any hearing or oral argument, the trial court handwrote on the cover page of the state's proposed findings and conclusions, "Adopted and signed 3/2/04," with his signature. ROA.7336.

The findings and conclusions that he signed were the findings and conclusions proposed by the prosecutor, with no change. ROA 7338-7355.

In short, the proceedings in the trial court bore no indicia of a court exercising any judgment of its own. All the trial court did was to sign orders suggested or prepared by the prosecutor. As we will demonstrate, in Section C, *infra*, the court's findings and conclusions, as a result, were not supported by, indeed were at odds with, the record. Not surprisingly, the prosecutor's, and thus the court's, resolution of the facts was one-sided and its conclusions, contrary to law.

On review of the trial court's recommended findings and conclusions, the CCA lost its way. It determined that its order of July 9, 1998 *permitting* Mr. Wardlow to waive habeas proceedings, somehow became an order *precluding* his pursuit of habeas proceedings – even though the record in the trial court was crystal clear that he had changed his mind after July 9 and decided to pursue state habeas proceedings by the time the habeas application was due on July 20, by filing a timely habeas application. Neither the prosecutor nor the trial court questioned the validity of Mr. Wardlow's rescission of his previous waiver, but the CCA did. Instead of reviewing the trial court's unsupported recommended findings of fact and conclusions of law, the CCA dismissed his application because Mr. Wardlow had waived his right to file it nearly three weeks before it was due. As we have noted, the apparent rationale for this decision – if there was one – was expressly rejected by the CCA four years later in *Ex parte Reynoso*, 257 S.W.3d at 720 n.2.

B. <u>The CCA's Order Dismissing Mr. Wardlow's State Habeas Application Precluded Meaningful Review in Federal Habeas Proceedings</u>.

As a result of the CCA's order dismissing Mr. Wardlow's habeas application, the federal district court found that the claims raised in the application, including the *Wiggins* claim, were "procedurally barred." *Wardlow v. Director*, 2017 WL 3614315 *1 (E.D.Tex. 2017). The court rejected Mr. Wardlow's argument that, in light of *Reynoso*, the CCA's dismissal of the application was not based on an adequate state procedural ground. Despite its procedural bar holding, the court nevertheless reviewed the merits of Mr. Wardlow's claims "in the interest of justice," 2017 WL 3614315 at *19, *29 n.6. However, this was a hollow declaration since the procedural bar holding precluded relief on the claims, *see Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (the "adequate and independent state grounds doctrine ... applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement"). Accordingly, the results of a review in the interest of justice were preordained. Sure enough, the district court found no merit in the *Wiggins* claim. 2017 WL 3614315 at *29-*32.

On appeal, the Fifth Circuit affirmed the district court and denied a certificate of appealability, *Wardlow v. Davis*, 750 Fed.Appx. 374 (5th Cir. 2018), and the Court denied certiorari. *Wardlow v. Davis*, ___ U.S. ___, 140 S.Ct. 390 (2019).

Thus, the sham state habeas proceeding precluded any meaningful review of the *Wiggins* claim in federal habeas proceedings.

C. When the CCA Finally Acknowledged Its Mistake in Dismissing the Initial State Habeas Proceeding and Ruled on the Merits of Mr. Wardlow's Claims, Its Denial of the *Wiggins* Claim Was as Indefensible as its Denial of the *Wiggins* Claim in *Andrus v. Texas*.

The *Wiggins* claim focused on trial counsel's failure to investigate Mr. Wardlow's life history and provide that information to the defense mental health expert who assisted the defense before trial. As a result, the defense could only present superficial, uninformed character evidence in the penalty phase and did not have available the wealth of life history information and evidence of mental illness that would have helped the jury understand Mr. Wardlow, why the crime was committed, and why his life should be spared. Counsel's performance was both deficient and prejudicial under the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and numerous subsequent decisions of this Court and the United States Courts of Appeals addressing the failure of counsel to conduct constitutionally necessary mitigation investigation.

For the Court to appreciate the strength of this claim, we must review the trial court's findings of fact and conclusions of law. Unlike Mr. Andrus, Mr. Wardlow did not have the benefit of a trial court judge who held an evidentiary hearing, and on that basis "found the abundant mitigating evidence so compelling, and so readily available," *Andrus*, 2020 WL 3146872 at *1, that the claim met both prongs of *Strickland*. For this reason, the analysis of the facts underlying Mr. Wardlow's *Wiggins* claim is necessarily more painstaking and granular. But that analysis will show, as in *Andrus*, "the evidence makes clear that [Wardlow's] counsel provided constitutionally deficient performance under *Strickland*." *Andrus*, 2020 WL 3146872 at *4. The analysis will also show that the prejudice associated with counsel's deficient

performance is sufficient, as in *Andrus*, to remand to the Court of Criminal Appeals to "address the prejudice prong of *Strickland* in the first instance." *Id.*

1. <u>The basis for the claim</u>

The claim was presented as two separate but intertwined claims in the habeas petition, ROA.7414-7419, 7419-7421. Mr. Wardlow's attorneys did not conduct any investigation of his family history and background, much less the "thorough investigation" the constitution requires. *Andrus v. Texas*, 2020 WL 3146872 at *4 (citing *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (*per curiam*) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), and *Wiggins v. Smith*, 539 U.S. at 521). Their investigation of mitigation focused solely on finding people who would "say something good about Billy." ROA.144. Lead counsel Bird Old found that "Billy's reputation in Cason was bad and ... there really wasn't anybody to be found in that community that wanted to testify for the person who killed Carl Cole." ROA.143-144. Old found that Mr. Wardlow's parents "were loose cannons and would not make good witnesses.... Physically, they didn't have a good appearance and I did not think that their demeanor was appealing." ROA.144. His mother in particular "appeared unstable and very unpredictable[,] ...[and] did not appear to be an affectionate person." *Id*. In Old's "opinion, Billy's parents gave the appearance of being very cold and I didn't think them testifying would help." *Id*. Though his focus was on good character witnesses who would make an appealing appearance to the jury, Old did ask Mr. Wardlow and his parents "about any evidence of brain damage or other illnesses" and learned nothing "remarkable." *Id*.

Old nevertheless engaged a psychologist, Dr. Don Walker, to evaluate Mr. Wardlow. ROA.144. Old was unable to provide any significant family history and background information

to Dr. Walker due to the defense team's lack of investigation. Dr. Walker conducted a clinical interview of Mr. Wardlow and psychological testing. Based solely on the interview and testing, Dr. Walker reported information suggestive of mental illness:

> When asked if he were depressed, he stated that he had on a couple of occasions, 'attempted suicide.'

ROA.149.

> The [personality testing] protocol suggests[:] [S]evere depression with anxiety and agitation.... Difficulty thinking and concentrating.... Disassociation and memory blackouts are possible.... Fantasy and reality are often seen as the same....

ROA.152.

> Many persons with this profile [on personality testing] have come from destructive family backgrounds.... These individuals have often been repeatedly hurt in childhood resulting in fears of being hurt as an adult.... Many persons with this profile came from broken families or had poor living conditions.

ROA.153.

All of these findings by Dr. Walker were red flags that demanded more investigation. "Yet counsel disregarded, rather than explored, the multiple red flags." *Andrus*, 202 WL 3146872 at *5. Even though "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses[,]" *Wiggins*, 539 U.S. at 525, Mr. Wardlow's lawyers conducted no further investigation. Instead, they went into Mr. Wardlow's penalty phase with the scarce fruit of their minimal investigation: three character witnesses who had only superficial exposure to Wardlow and knew almost nothing about him.

Even Mr. Wardlow's prosecutor had a better sense of what constituted substantial mitigation than defense counsel did. "[W]e don't have a mentally retarded defendant, ... we

don't have any evidence that family background was terrible, we don't have any evidence of any kind of strong mitigating circumstances in his life...." ROA.6974. The defense evidence in no way addressed "the fact that he cold-bloodily [sic] murdered an elderly man." *Id.*

But for defense counsel's ineffectiveness, the defense would have presented evidence of everything the prosecutor characterized as "strong mitigating circumstances in his life."

2. <u>The trial court's disposition of the claim</u>

The trial court's initial findings tracked the affidavit of defense counsel Bird Old describing his mitigation investigation, all of which we have already cited in describing the basis for the claim:

> Wardlow's trial attorneys conducted a punishment-phase investigation in this case. They interviewed a number of potential character witnesses. Most either did not want to testify for Wardlow or had nothing that counsel believed would be helpful to the defense. Counsel also spoke with Wardlow's parents, but ultimately determined that they would not be good witnesses. They concluded that Wardlow's parents did not have a good demeanor or appearance, gave inconsistent information, appeared unaffectionate and very cold, and were 'loose cannons.' Wardlow's mother appeared 'unstable and very unpredictable.' Counsel determined that their testimony would not be beneficial to Wardlow's defense. Counsel also asked Wardlow and his parents whether there was any evidence of brain damages or other illnesses, but they provided no remarkable information.

ROA.7348.

The trial court then observed, as shown by the trial record, that "Wardlow's trial counsel did in fact present the testimony of three witnesses at the punishment phase of trial, witnesses who were acquainted with him through school and church and who could testify as to his positive character traits...." *Id*. The court then inferred, again from the trial record, that 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*.

With respect to mental health evaluation, the court found the following concerning Dr. Walker's evaluation:

> Walker interviewed Wardlow and conducted some psychological tests. During the interview, Wardlow denied being abused as a child but indicated he was bruised as a child when he was 'butt whipped'; he claimed to have 'attempted suicide' on a couple of occasions five years prior to the interview.... Counsel received a written report of the evaluation from Walker and concluded it contained nothing helpful to Wardlow's defense. Indeed, Walker found no evidence of mental illness or defect and arrived at a primary diagnosis of antisocial personality disorder or borderline personality disorder.

ROA.7348-7349. As to the evaluation by Dr. Lundberg-Love, the court found:

> Lundberg-Love disagrees with Walker's diagnosis of antisocial personality disorder, criticizing him for failing to consider other possible diagnoses such as post-traumatic stress disorder, schizophrenia, or schizophreniform disorder. However, there is no evidence that Walker did not consider and reject such alternative diagnoses. Furthermore, some of the information upon which 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: Wardlow's trial testimony; information provided by Wardlow to Walker during the pretrial evaluation; Walker's findings noting the absence of any delusional thought processes; and Wardlow's own affidavit in these proceedings, which contains no indication of 'magical thinking.'

ROA.7349.

The court's conclusions of law concerning the performance prong of *Strickland*'s test for ineffective assistance were minimal – concluding that it was "a reasonable trial strategy" to "employ[] a punishment-phase strategy of emphasizing the lack of any violent history by Wardlow and arguing that the State had failed to prove that he would constitute a continuing threat to society." ROA.7351. The conclusions then conceded,

> even if Wardlow could prove that counsel was constitutionally deficient for failing to present at the punishment phase of his trial the additional evidence his habeas

> counsel have uncovered, he has failed to prove that, had this evidence been presented, there exists a reasonable probability the jury in his case would have answered the punishment-phase issues such that Wardlow would not have been sentenced to death.

Id. As to the mental health evaluation, the court concluded with respect to trial counsel's performance:

> Counsel was not deficient in their attempts to develop psychological evidence for use at the punishment phase of trial. The fact that habeas counsel has managed to locate a psychologist willing to expound more favorable testimony does not mean that trial counsel were deficient in their efforts.

Id.. As to prejudice, the court concluded:

> Wardlow has also failed to demonstrate that Walker's diagnosis would have changed had he been privy to additional information about Wardlow's childhood.... Wardlow has failed to prove that, had the jury heard Lundberg-Love's opinion regarding Wardlow, Wardlow would not have received the death penalty.

Id.

3. <u>The trial court's findings and reasoning were contradicted by the record and by applicable case law</u>.

a. The findings concerning the scope of counsel's investigation of mitigating evidence as to lay witnesses were accurate, but the findings concerning Dr. Walker's pretrial evaluation were fundamentally inaccurate.

The findings concerning the scope of counsel's investigation of mitigating evidence with lay witnesses were accurate. As Bird Old stated in his affidavit, ROA.144, counsel investigated for the sole purpose of finding witnesses who could "say something good about Billy." They found few people who could or would do that. Mr. Wardlow's parents failed the test because counsel found them off-putting.

The findings concerning Dr. Walker's pretrial evaluation, however, were fundamentally

inaccurate. The court found that Dr. Walker's report "contained nothing helpful to Wardlow's defense." ROA.7349. "Indeed," the findings continued, "Walker found no evidence of mental illness or defect...." *Id*. That is simply not true. Dr. Walker noted signs of mental illness that counsel should have taken as red flags requiring further investigation:

(a) Dr. Walker noted, "When asked if he were depressed, [Mr. Wardlow] stated that he had on a couple of occasions, 'attempted suicide.'" ROA.149. He also found that the personality testing he administered "suggests severe depression with anxiety and agitation." ROA.152. Dr. Lundberg-Love found these to be "salient signs of depression." ROA.174.

(b) Dr. Walker also found that on personality testing ""[d]ifficulty thinking and concentrating are indicated," "[d]isassociation and memory blackouts are possible," "[p]aranoid delusions may be evident," and "[f]antasy and reality are often seen as the same." ROA.152. Dr. Lundberg-Love also found these symptoms of mental illness in her evaluation. *See* ROA.173 ("[t]he results obtained on ... [personality testing] ... were consistent with and supported the results revealed on the [personality] testing by Dr. Walker]").

(c) Dr. Walker found, on the basis of personality testing, that

> Many persons with this profile have come from destructive family backgrounds.... These individuals have often been repeatedly hurt in childhood resulting in fears of being hurt as an adult.... Many persons with this profile came from broken families or had poor living conditions.

ROA.153. Dr. Lundberg-Love found that this suggested a "type of Post-Traumatic Stress Disorder that might have been related to childhood physical and emotional maltreatment." ROA.174.

The trial court also conducted a comparative analysis of the evaluations conducted by Dr.

Lundberg-Love and Dr. Walker and made two findings with respect to that. These findings were also fundamentally inaccurate.

The first finding was, in part, the following:

> Lundberg-Love disagrees with Walker's diagnosis of antisocial personality disorder, criticizing him for failing to consider other possible diagnoses such as post-traumatic stress disorder, schizophrenia, or schizophreniform disorder. However, there is no evidence that Walker did not consider and reject such alternative diagnoses.

ROA.7349. This finding is inaccurate, because the court completely ignored Dr. Lundberg's analysis of why she and Dr. Walker reached different conclusions. Dr. Lundberg-Love explained that the reason "[wa]s information." ROA.174. She then explained further what she meant:

> Billy Wardlow's trial attorneys did not provide Dr. Walker with any investigational/mitigational data. It does not appear that he was able to review any school records. Nor was he provided any interview data with school personnel. He never had the opportunity to talk with Lynda and Jimmy Wardlow. Nor did he review any social history information. He had no knowledge of the childhood trauma experienced by Billy Wardlow. Dr. Walker knew nothing about the magical thinking/delusional beliefs of Lynda Wardlow, which had significantly altered Billy's cognitive view of his universe.

Id. Had Dr. Walker been able to consider all this information, "he would have been aware that Billy did not fit the criteria for Antisocial Personality Disorder, that there was no evidence for the presence of conduct disorder prior to age 15, and he would have had to eliminate Antisocial Personality Disorder as his primary diagnosis." ROA.175.[8]

The court's finding that "there is no evidence that [Dr.] Walker did not consider and reject [the] alternative diagnoses [of Dr. Lundberg-Love]," ROA.7349, is also fundamentally

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[8]Then, as now, "For this diagnosis [Antisocial Personality Disorder] to be given, the individual ... must have had a history of some symptoms of conduct disorder before age 15 years." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at 659.

inaccurate, because the court ignored what Dr. Lundberg-Love had to say. As we have explained, Dr. Walker had far less information about Mr. Wardlow and his upbringing than Dr. Lundberg-Love had. Thus, there is no way Dr. Walker could have "consider[ed] and reject[ed]" the diagnoses that Dr. Lundberg-Love made, because he did not have the information that Dr. Lundberg-Love had about Mr. Wardlow. As Dr. Lundberg-Love explained, "[I]f Dr. Walker had the opportunity to review social history data he would have been better able to sort out the information in his computer generated MMPI analysis that was supported by social history data and rule out those features that were inconsistent with Billy's history." ROA.175. Dr. Lundberg-Love concluded with an observation about the power of more information for a mental health clinician:

> [A]s an educator who teaches graduate students how to conduct clinical assessments of clients, this illustrates the axiom that the reliability and validity of ones [sic] diagnostic conclusions are only as strong as the depth and breadth of ones [sic] combination of interview data, social history data, and objective measurements. In my professional opinion, had Dr. Walker had all of the information available to this practitioner, the pieces of his diagnostic puzzle would have coalesced into a significantly different constellation.

ROA.175-176.

The second inaccurate finding associated with the comparative analysis of the evaluations conducted by Dr. Lundberg-Love and Dr. Walker concerned "information" upon which Dr. Lundberg-Love relied that "appear[ed] to be inconsistent with the evidence presented in this case," including Mr. Wardlow's trial testimony, his ability to provide information coherently to Dr. Walker, the absence of any delusional thinking during Dr. Walker's evaluation, and Mr. Wardlow's affidavit in habeas proceedings (ROA.132-137) – all of which contained "no indication of 'magical thinking.'" ROA.7349.

This finding is inaccurate because it, like the others, ignored Dr. Lundberg-Love's report. As she explained,

> [B]ecause Billy Joe also has significant paranoid ideation and obsessive-compulsive tendencies, he ... typically works very hard to hold himself together in order to appear 'normal,' and can sustain this perception for periods of time.

ROA,175 He appears to have held himself together during the time Dr. Walker spent with him. He did not report how much time that was. *See* ROA.148-155. Dr. Lundberg-Love spent a total of eight hours with him, ROA.166 ("five hours interviewing Mr. Wardlow and nearly three hours performing psychological testing"), and in that amount of time, "schizoid and schizotypal behavioral characteristics are apparent." ROA.175.

b. <u>The trial court's conclusions of law concerning deficient performance are erroneous</u>.

The trial court concluded that trial counsel were reasonable to "employ[] a punishment-phase strategy of emphasizing the lack of any violent history by Wardlow and arguing that the State had failed to prove that he would constitute a continuing threat to society." ROA.7351. The court also concluded that "[c]ounsel was not deficient in their attempts to develop psychological evidence for use at the punishment phase of trial." *Id.*. These conclusions are patently wrong.

Conducting some investigation of possible mitigation and making a strategic decision on that basis does not assure reasonable performance by counsel. In *Smith v. Dretke*, 422 F.3d 269 (5th Cir. 2005), the Court explained:

> As in *Wiggins*, counsel in the case before us did investigate possible mitigation evidence. Nonetheless, the Supreme Court made it clear in *Wiggins* that even though trial counsel did do some investigating, the question was whether the investigation conducted could be considered adequate in light of professional

> norms. If trial counsel's investigation was unreasonable then ... deference to the strategic decision trial counsel made [i]s also objectively unreasonable.

Id. at 280. The investigation conducted by Mr. Wardlow's counsel *cannot* "be considered adequate in light of professional norms."

Wiggins held that, in light of professional norms, counsel in a capital case are obliged to "'discover *all reasonably available* mitigating evidence,'" 539 U.S. at 524 (quoting the ABA Guidelines for the Appointment and Performance of Counsel in death Penalty Cases, 11.4.1(C), at 93 (1989)) (emphasis in original). This means developing a thorough "'*family and social history*.'" *Id*. (quoting ABA Guidelines, 11.8.6, at 133) (emphasis in original). Mr. Wardlow's counsel did not develop such a history. They asked a few specific questions of Mr. Wardlow and his parents concerning brain damage and other illnesses but did not obtain a life history. Most capital clients and their families do not know whether the client or family members suffer from brain damage or mental illness, because most such conditions have not been the subject of previous diagnosis and treatment. Family members can recount how each other behaves and can recount numerous incidents throughout various family members' lifetimes, but they seldom know the significance of those matters. The only way to get at such information is for the defense to develop a thorough family and social history. "Competent representation requires counsel proactively to reach out to a defendant's family members and friends to develop an understanding of the defendant's background." *Avena v. Chappell*, 932 F.3d 1237, 1249 (9th Cir. 2019).

In addition, as in *Wiggins*, "[t]he scope of [trial counsel's investigation] was also unreasonable in light of what counsel actually discovered in [the limited investigation they did

conduct]." 539 U.S. at 525. As we have discussed, in his pretrial evaluation of Mr. Wardlow, Dr. Walker obtained information from his clinical interview and testing that amounted to numerous investigative leads, none of which counsel followed up.

Prior to *Wiggins,* the Fifth Circuit recognized that defense counsel in a capital prosecution must pursue leads like these in order to provide effective assistance:

> There was enough information before counsel – repeated head injuries, black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction – to put him on notice that pursuit of the basic leads that were before him may have led to medical evidence that [petitioner] had mental and psychological abnormalities that seriously affected his ability to control his behavior.

Lockett v. Anderson, 230 F.3d 695, 714 (5th Cir. 2000). Like the leads that counsel failed to investigate in *Wiggins*, therefore, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses...." 539 U.S. at 525.

Accordingly, the strategic decision of Mr. Wardlow's counsel not to pursue a punishment-phase strategy based on family background or expert psychological testimony, and instead, to "emphasiz[e] the lack of any violent history by Wardlow and argu[e] that the State had failed to prove that he would be a continuing threat to society," ROA.7351, cannot be sustained. "It is axiomatic – particularly since *Wiggins* – that such a decision cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose." *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003). This decision by Mr. Wardlow's counsel was not "grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose." As in *Wiggins*,

> Counsel's investigation into [Wardlow's] background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the [pretrial psychological evaluation] – evidence that would have led a reasonably competent attorney to investigate further.

539 U.S. at 534.

Finally, the trial court attempted to bolster its conclusion that counsel were not deficient in attempting to develop mental health evidence with the following: "The fact that habeas counsel has managed to locate a psychologist willing to expound more favorable testimony does not mean that trial counsel were deficient in their efforts." ROA.7351. The problem with this reasoning is that it assumes that counsel performed effectively in attempting to develop mental health evidence with the expert they worked with at trial. If counsel's performance was reasonable in that respect, then of course the logic of the trial court's conclusion is correct. However, that is not what occurred here. Trial counsel for Mr. Wardlow *did not* perform reasonably in working with Dr. Walker.

The bottom line is that counsel cannot reasonably rely on a trial expert's evaluation if counsel has failed to provide enough life history information to the expert for the expert to perform a reliable evaluation. Where defense counsel fails to provide this kind of information to a mental health expert, the client is "effectively left without the assistance of any expert...." *Doe v. Ayers*, 782 F.3d 425, 440 (9th Cir. 2015). *See also Jacobs v. Horn*, 395 F.3d 92, 104 & n.7 (3d Cir.), *cert. denied sub nom., Jacobs v. Beard*, 546 U.S. 962 (2005) (counsel's performance was deficient in failing to provide mental health expert evaluating petitioner for diminished capacity defense information about the charges, the case against petitioner, and petitioner's background).

Even if the expert "did not state that he was incapable of forming a conclusion on the information available to him," *Jacobs*, 395 F.3d at 104 n.7, where counsel provided no background information to the expert, "it was patently unreasonable for counsel to rely solely on [the expert's] uninformed opinion in deciding not to investigate [the client's] mental health history further." *Id*.

Dr. Lundberg-Love addressed this matter squarely. After noting all the sources of information she had that Dr. Walker did not have, ROA.174 (quoted at p. , *supra*), Dr. Lundberg-Love explained that the absence of necessary information underlying Dr. Walker's assessment was the responsibility of counsel:

> It is not the responsibility of the mental health practitioner to conduct an informational investigation. It is the responsibility of the attorneys to supply the mental health practitioner evaluating the case with as much social, educational, health, mental health, and legal data, as is possible so that he/she can provide an informed opinion.

ROA.174. And the consequences were, "had [Dr. Walker] been given such data, his interpretation of this case and his diagnosis would have been significantly different." ROA.175.

c. <u>The trial court's conclusions of law concerning prejudice are erroneous and call for further consideration by the CCA</u>.

The trial court concluded with respect to counsel's deficient performance in working with Dr. Walker that Mr. Wardlow "failed to demonstrate that Walker's diagnosis would have changed had he been privy to additional information about Wardlow's childhood." ROA.7351. With respect to counsel's deficient performance in failing to investigate potential mitigating evidence, provide that evidence to a mental health expert, and present all the evidence to the jury, the trial court found that Mr. Wardlow failed to demonstrate a reasonable probability that the

sentence would have been different. *Id*. Neither conclusion can be sustained.

A habeas petitioner claiming ineffective assistance of counsel in working with a mental health expert *is not required* to demonstrate that the trial expert's diagnosis would have changed had counsel provided the information the expert needed to reach an informed conclusion. Courts routinely rely on the opinions of experts who have first worked on a case in post-conviction proceedings and reviewed additional information about the defendant's background in connection with those proceedings to establish prejudice as part of a claim of ineffective assistance of counsel in investigating mitigation. The courts have never required a petitioner to show that the new information would have caused the defense trial expert to change his opinion. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 392 (2005). Indeed, the relevant facts of *Rompilla* are parallel to Mr. Wardlow's case:

> The jury never heard any of this and neither did the mental health experts who examined Rompilla before trial. While they found "nothing helpful to [Rompilla's] case," *Rompilla*, 554 Pa., at 385, 721 A.2d, at 790, their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of "'red flags'" pointing up a need to test further. 355 F.3d, at 279 (Sloviter, J., dissenting). When they tested, they found that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Ibid*. They also said that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id*., at 280 (Sloviter, J., dissenting)....

545 U.S. at 392.

The trial court's further conclusion that Mr. Wardlow failed to demonstrate a reasonable probability that the sentence would have been different had counsel performed reasonably is equally insupportable. It results from the court's failure to fairly appraise the evidence that could

have been presented in comparison to the evidence at trial.

The determination of prejudice in an ineffective assistance of counsel claim rests on an assessment of the effect of the evidence that was not presented on the evidentiary picture that was before the jury. As the Court explained in *Strickland*, 466 U.S. at 695-96,

> In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect....

Mr. Wardlow's case is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing [jury]." *Id.* at 700.

Mr. Wardlow's jury had nothing before it to suggest that the capital murder was anything but a deliberate and cold-hearted act by a dangerous young man. The mitigating evidence the defense did present, three superficial observations by people who barely knew Mr. Wardlow, had the unfortunate effect of "bolstering the State's aggravation case." *Andrus*, 2020 WL 3146872 at *5. This meager presentation gave the prosecutor the opportunity to argue there was no mitigation at all. ROA.6974. The evidence that could have been presented would have countered all of this. The jury knew nothing about the "destructive family background[,]" ROA.153 (Walker report), that isolated Mr. Wardlow from healthy and varied social interactions, inflicted severe emotional damage, and caused him to try to take his own life on several occasions. Having "been repeatedly hurt in childhood," Mr. Wardlow feared "being hurt as an adult," *id*., and sought refuge in the friendship he developed with Tonya Fulfer. "Because both Mr. Wardlow and Ms. Fulfer engaged in similar magical thinking, over time they came to

reinforce each other's magical thinking/delusional beliefs..." and through this process, developed a plan to rob Mr. Cole and escape to Montana. ROA.175 (Dr. Lundberg-Love report). "Under the influence of this magical thinking and a shared delusion, Tonya and Billy were not prepared for the reality of a crime victim being frightened, resisting, and fighting back." *Id*. As in *Rompilla*,

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398....

545 U.S. at 393.

Accordingly, the deficient investigation by Mr. Wardlow's counsel plainly "had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Id*. at 695-96. This alteration in the evidentiary picture is enough to "undermine confidence in the outcome" of Mr. Wardlow's penalty trial, *Strickland*. 466 U.S. at 694, and, at the very least, call for the Texas Court of Criminal Appeals "to address the prejudice prong of *Strickland*...." *Andrus*, 202 WL 3146872 at *9.

CONCLUSION

For these reasons, we aks that the Court grant certiorari, vacate the decision of the Texas Court of Criminal Appeals, and remand for reconsideration in the manner required of that court in *Andrus*.

Respectfully submitted,

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Appendix 1

2020 WL 2059742
Only the Westlaw citation is currently available.

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Court of Criminal Appeals of Texas.

EX PARTE Billy Joe WARDLOW, Applicant

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

|
April 29, 2020

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

ORDER

Per curiam.

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

In February 1995, a jury found Applicant guilty of the 1993 capital murder of Carl Cole. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set Applicant's punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Wardlow v. State*, No. AP-72,102 (Tex. Crim. App. Apr. 2, 1997) (not designated for publication).

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

On July 2, 1998, this Court again received correspondence from Applicant that he wanted to discontinue his appeal. In light of that request, we issued an order granting Applicant's request "to waive and forego all further appeals." *Ex parte Wardlow*, No. AP-72,102 (Tex. Crim. App. July 14, 1998) (not designated for publication). Despite this order, counsel timely filed Applicant's habeas application on July 20, 1998. The trial court reviewed the application and issued findings and conclusions on the seven claims raised therein. Upon receiving the application in this Court, we dismissed it for the reasons stated in the order of July 14, 1998. *Ex parte Wardlow*, No. WR-58,548-01 (Tex. Crim. App. Sept. 15, 2004) (not designated for publication).

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

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

*2 Before filing in this Court his suggestion to reconsider his initial writ application, Applicant filed in the trial court his first subsequent writ application. Applicant raises two claims in his subsequent application. In the first, he complains that the State unknowingly presented false penalty phase testimony from Royce Smithey. In the second, he asserts that *Roper v. Simmons*, 543 U.S. 544 (2005), and ensuing Supreme Court cases, together with recent scientific advances, preclude the use of the future dangerousness issue to determine death eligibility in a capital sentencing proceeding for offenders under 21 years old at the time of their crimes.

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

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

All Citations

Not Reported in S.W. Rptr., 2020 WL 2059742

Footnotes

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

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

End of Document

Appendix 2

Cause No. CR12764

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

EXECUTION ORDER

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

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

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

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

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

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

Angela Saucier

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