No. 19-8392

IN THE

Supreme Court of the United States

JUAN BALDERAS,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

Balderas was represented by the Office of Capital and Forensic Writs on state habeas review, which filed an application for writ of habeas corpus raising fourteen allegations and supported by seventy-four exhibits. The trial court designated all fourteen issues for review, pursuant to Texas Code of Criminal Procedure Article 11.071, § 9, noting that it would resolve the issues "by application of the applicable law, some by review of the appellate record and application of applicable law, some by review of the pleadings, some by review of affidavits submitted by trial counsel, some by recollection of the trial court, and some by review of submitted habeas exhibits." *See* 5 SHCR 1450-51. The trial court ordered affidavits from trial counsel addressing six of the fourteen issues, and set two issues for evidentiary hearing, allowing live testimony from four witnesses. Both parties submitted proposed findings of fact and conclusions of law, and the trial court adopted the State's proposed findings (with some revision) and recommended denial of relief on all claims. The Texas Court of Criminal Appeals denied relief, "[b]ased upon the trial court's findings and conclusions and our own review." *See* Petition Appendix A, at 2, 7.

Upon these facts, did the state court's review of Balderas's postconviction proceedings violate his due process right to notice and an opportunity to be heard?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Balderas was found guilty and sentenced to death for the capital murder of Eduardo Hernandez, committed while in the course of committing or attempting to commit burglary of a habitation. *See* 1 CR[1] 2-3. Balderas now seeks certiorari review of the denial of his petition for writ of habeas corpus by the Texas Court of Criminal Appeals (CCA). However, Balderas is unable to present any special or important reason for certiorari review because he fails to demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts of the crime in its opinion affirming Balderas's conviction and sentence on direct appeal:

> In 2004, the victim, Eduardo Hernandez, became a member of the Barrio Tres Alief ("BTA"), a regional subset of the La Tercera Crips ("LTC") street gang in Houston. Balderas, a long-time member of the LTC gang and one of the founding members of the BTA subset, had introduced Hernandez to the gang. Initially, the other LTC members liked Hernandez, and Hernandez was proud to be part of the gang. LTC member Israel Diaz befriended Hernandez, and for a while Hernandez lived with Diaz. However, in late 2004, this friendship soured after Diaz let Hernandez borrow a vehicle that

[1] "CR" refers to the Clerk's Record of pleadings and documents filed with the clerk during trial, while "RR" refers to the Reporter's Record from trial. "SHCR" refers to the Clerk's Record filed during state habeas proceedings, while "SHRR" refers to the Reporter's Record from the evidentiary hearing.

Diaz had stolen the week before. Police officers stopped and arrested Hernandez while he was driving the stolen vehicle. After Hernandez informed them that he had borrowed the vehicle from Diaz, they arrested Diaz for aggravated robbery.

Diaz bonded out of jail in April 2005. He was angry with Hernandez for "snitching" on him. He "lectured" Hernandez about giving his name to the police, and Hernandez promised that he would not testify against Diaz in the aggravated robbery case. Balderas's defense counsel argued at trial that Hernandez's snitching gave Diaz a motive for murder, but Diaz denied that he wanted to kill Hernandez. Diaz testified that he knew that two other witnesses could identify him as the thief and that police had found his fingerprints on the stolen vehicle; therefore, preventing Hernandez from testifying would not have helped him avoid the robbery conviction. Also, because of the pending robbery case, Diaz knew that he would be the first suspect if anything happened to Hernandez. Diaz testified that even though he personally did not want to kill Hernandez, other LTC members viewed Hernandez's conduct as being disrespectful of the gang and thought that Hernandez needed to be punished. Diaz testified that he asked those members to wait until his trial was over before they took action against Hernandez.

After the snitching incident, Hernandez stopped associating with other LTC gang members. He also moved out of his family home so that LTC members could not easily locate him. In August or September 2005, he began dating Karen Bardales ("Karen"). Hernandez and Karen spent much of their time "hanging out" in an apartment belonging to one of Karen's friends, Durjan Decorado, who was not in a gang. Karen's older sister, Wendy Bardales ("Wendy"), and Wendy's boyfriend, Edgar Ferrufino, also spent much of their time in that apartment. Karen and Wendy's friends, including members of several rival gangs, would visit them there. Hernandez socialized with those friends.

Over the next few months, LTC gang members heard rumors that Hernandez was associating with members of rival gangs and flashing rival gangs' hand signs, which constituted acts of disloyalty and disrespect against the LTC gang. After seeing images of Hernandez on social media confirming these rumors,

some indignant LTC members urged the gang to take action against him. Three or four days before Hernandez's killing, senior members of the gang called a meeting. Those in attendance agreed to shoot and kill Hernandez. Although they did not expressly select an individual to kill him, everyone understood that Hernandez was Balderas's responsibility because he had introduced Hernandez to the gang.

On the afternoon of December 6, 2005, Wendy, Ferrufino, Karen, and Hernandez were hanging out in Decorado's apartment. Jose Vazquez, a senior LTC gang member, stopped by to talk to Hernandez. Karen began saying disrespectful things about the LTC gang, which upset Vazquez. Vazquez wanted Hernandez to leave the apartment with him, but Hernandez refused. Hernandez was visibly upset after Vazquez left. He told Karen that he was worried that something was going to happen. Later, Hernandez left with his sister to go shopping and have dinner. He and Karen reunited at the apartment complex that night.

Around 9:45 p.m., Wendy, Ferrufino, Decorado, and Decorado's cousin were in Decorado's apartment. Ferrufino and Wendy were playing a video game in the living room. As Karen and Hernandez approached the apartment, Karen noticed fresh LTC gang graffiti on the exterior wall. Immediately after entering the apartment, they heard gunshots, and then the front door opened and a gunman ran into the apartment. Hernandez dropped to the floor and pulled Karen down with him, positioning himself between Karen and the gunman. Decorado and his cousin fled to the bedrooms, and Ferrufino crouched next to the television stand. Wendy, who was sitting on the floor between the couch and the television, froze. She could see the gunman as he entered the apartment, and her eyes followed him until he left.

The gunman fired his gun as he ran around the living room. Wendy saw that he was wearing khaki pants and a black hoodie, with the hood pulled up over his head. She got a good look at his face when his hood fell down as he passed her. The gunman paused in front of Ferrufino, who asked him not to shoot. He did not shoot Ferrufino and began to move back toward the entryway, but then he stopped and stood over Hernandez. He shot Hernandez in the back and head multiple times. Karen, who was lying face-down

next to Hernandez, did not see the gunman's face, but when the gunman extended his arm toward Hernandez, Karen could see that he was wearing a black sweater. After shooting Hernandez at least nine times, the gunman left. Ferrufino called 9-1-1.

Around that time, Diaz heard from another LTC gang member that "they" had "found [Hernandez,]" which Diaz understood to mean that Hernandez was about to be (or had just been) killed. He and other LTC members gathered across the street from the apartment complex. They could see an ambulance and police cars in the parking lot. Diaz saw Balderas waiting near the apartment complex. Balderas was wearing a dark blue or black sweater-like top and khakis. When Balderas noticed Diaz and the others, he crossed the street to join them. Balderas hugged everyone and seemed "joyful" as he reported that he "finally got him." Diaz saw Balderas change the magazine of a silver handgun. Diaz recognized the handgun as one of two silver guns that Balderas regularly carried.

That night, law enforcement officials took Wendy, Karen, and Ferrufino to the police station to give witness statements. In the early morning hours of December 7, Wendy gave a statement that was committed to writing by Officer Thomas Cunningham. Wendy stated that she had never seen the gunman before, and she described him as a "skinny Hispanic guy dressed in a black hooded sweatshirt type jacket." She also stated that he had a "dark birth mark" on his face but she could not remember where.

Around 10:30 p.m., Sergeant Norman Ruland drove to Wendy's apartment to show her a photo array of six suspects that included Diaz but not Balderas. Wendy did not identify the gunman, but she recognized Diaz. She stated that he was a friend of Hernandez who went by the street name "Cookie," and that she was sure he was not the gunman. She told Ruland that the gunman had a dark mark on his cheek that did not resemble the scars that were visible on Diaz's face.

On December 12, Ruland returned to Wendy's apartment with a second photo array that included Balderas's photograph. Wendy immediately pointed to Balderas, saying that she recognized him as a friend of Hernandez and Diaz who went by the street name

> "Apache." She also stated that he "looked like the shooter." When Ruland asked Wendy if Balderas was the shooter, she reiterated that Balderas's "face looked exactly like the shooter's face." She signed and dated Balderas's photograph to confirm her identification. Although Ruland felt that Wendy was confident in her identification of Balderas as the gunman, he was confused by her verbal phrasing in making the identification. Therefore, the following day, he returned to Wendy's apartment to seek clarification. On this occasion, Wendy expressly identified Balderas as the gunman, stating that she was positive in her identification. She wrote a sentence in Spanish on the back of the lineup to confirm her positive identification. Based on this identification, police obtained a warrant for Balderas's arrest.
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> On December 16, Officer Rick Moreno drove to an apartment complex where he watched for Balderas and another LTC gang member, Rigalado Silder, and waited for the assistance of a SWAT team. After Moreno had been watching the complex for about 25 minutes, he observed Balderas and Silder leave an upstairs apartment and start down the stairs. Each man was carrying a large box, and Balderas had a black bag slung over his shoulder. When they saw the SWAT team arriving, Balderas and Silder set everything down and started running. Moreno caught Silder in the apartment complex, while the SWAT team pursued Balderas into the neighborhood and caught him as he tried to hide under a car. Moreno saw that the boxes and bag contained firearms and other weapons, bullet-proof vests, identification holders, magazines, and ammunition. One of the weapons recovered from the box that Balderas had been carrying was a handgun that was later identified, through ballistics testing, as the murder weapon in Hernandez's killing. A shell casing from a semiautomatic handgun was recovered from Balderas's right rear pants pocket.

Balderas v. State, 517 S.W.3d 756, 763-65 (Tex. Crim. App. 2016) (Petition Appendix E).

II. Evidence Introduced at Punishment.

The jury heard testimony that, in May 2001, fourteen-year-old Balderas was placed on probation for theft, evading arrest, and unauthorized use of a motor vehicle. 33 RR 11, 16-17; State's Exhibits (SX) 162-64. Balderas was ordered to attend the Drug Free Youth Program, where he received counseling for drugs, anger management, and gang education; regular drug screening, and access to an education specialist. 33 RR 23-26. Balderas agreed to remove visible gang tattoos as part of the gang intervention program. 33 RR 25-27. However, while in this program, Balderas obtained another gang-related tattoo hidden from view on his abdomen. 33 RR 26-30; SX 167.

His probation officer testified that Balderas abused marijuana and inhalants; she got him into an in-patient drug-treatment program, but he left after two days. 33 RR 30-31. Balderas was detained by the police and placed in a second in-patient program but was temporarily kicked out for assaulting two new patients. 33 RR 31-33. Balderas was permitted to return but was discharged a week later for continued behavioral problems; he returned to custody for violating his probation. 33 RR 33-34.

In December 2001, Balderas's probation was revoked, and he was sent to boot camp. 33 RR 34-37; SX 165. While in boot camp, Balderas was charged with assaulting another inmate and returned to court; he was adjudicated on a charge of assault and causing bodily injury and sent back to boot camp. 33

RR 38-39; SX 166. Upon release from boot camp, he returned to probation which he successfully completed after two years. 33 RR 43-45. His probation officer felt Balderas wanted to change but was loyal to his gang. 33 RR 40-42.

Dr. Matthew Shelton performed a psychological screening on Balderas for the juvenile probation department. 33 RR 48-49. Balderas had an average IQ, was on grade level, and exhibited no signs of a mental health issue or learning disability. 33 RR 50-53, 56-60. Dr. Shelton diagnosed him with a conduct disorder, adolescent onset-type. 33 RR 62. Despite the evidence of abuse Balderas presented in his mitigation defense, Dr. Shelton saw no sign of abuse and none was reported in his background. 33 RR 53-54.

The jury also heard that, from September through December 2005, Balderas participated in four separate shootings, resulting in three murders, and two injuries. Specifically, Houston Police Officer Derrick Dexter testified that on September 12, 2005, he responded to the scene of a home invasion and a shooting. 33 RR 74-100. Officer Dexter found fifty-two-year-old Daniel Zamora suffering from a fatal shotgun wound to the abdomen and another gunshot wound to the left thigh. 34 RR 74-77, 81-82, 89-90; SX 186. Zamora's brother, forty-four-year-old Guadalupe Sepulveda, who was wheel-chair bound, was shot in the back but survived. 34 RR 6, 35-36.

Sepulveda testified that four people entered his home wearing ski-masks and gloves and carrying a rifle and handguns. 34 RR 8-16; *see also* 33 RR 99;

34 RR 101. The men ordered Zamora to get face-down on the ground; Zamora complied. 34 RR 16-18. One of the men held a gun to Sepulveda's head, while the man holding the shotgun ordered Sepulveda to give him all the jewelry, money, guns, and drugs in the house or he would kill them. 34 RR 7, 18-21. In the house, Sepulveda had $2,400, two guns, and cocaine and marijuana. 34 RR 24-27. The man with the shotgun struck Sepulveda with the gun, demanded money, and knocked him out of his wheelchair, while two other men ransacked Sepulveda's bedroom. 34 RR 29-32. The assailants collected Sepulveda's property, then the man with the shotgun left the room; Sepulveda heard the shotgun fire and, later two more shots from the handguns. 34 RR 35-36. Someone then shot Sepulveda in the back. 34 RR 35-36.

Officers learned that four or five Hispanic males were involved, and that a white, four-door sedan-type vehicle was spotted at the scene. 33 RR 99; 34 RR 101-02, 108-09. A fired .40 caliber shell casing was recovered from the crime scene, and Sepulveda later found and gave to police a second .40 caliber shell casing. 34 RR 107-14. However, the police had no suspects until December 9, 2005, when they received information that Balderas, Israel Diaz, Jose Luviano, Alejandro Garcia, and Efrain Lopez were involved. 34 RR 110-16.

Alejandro Garcia testified that in 2005, when he was sixteen, he was charged as a juvenile with capital murder for his involvement in Zamora's

death.[2] 34 RR 151-52. Garcia testified to the details of the crime and said that he willingly participated because he was hoping Balderas would make him an LTC member. 34 RR 214-16; *see also* 34 RR 172, 176-77. According to Garcia, on September 12, 2005, Balderas and three others drove up to him on the street, in a white Dodge Stratus, and told him to get in. The men drove to Sepulveda's street, and passed his house several times. 34 RR 208-11. They parked behind Sepulveda's house, and four of them exited the car with weapons and walked through a field to the house. 34 RR 211-13. Balderas had his .40 caliber handgun,[3] while Lopez had the shotgun. 34 RR 213. Either Lopez or Balderas gave Garcia an unloaded handgun. 34 RR 213, 216. Balderas and Lopez led the group across the field to the front door of the house where everyone rushed in the door. 34 RR 217-19.

Inside the house, Balderas wheeled Sepulveda's chair into his bedroom, while Lopez held the shotgun on Zamora. 34 RR 219-22. Lopez hit Zamora in the side with the butt of the shotgun. 34 RR 221-22. Garcia went into Sepulveda's bedroom and took some boxes out to the car which was now in the front of the house; he returned to the house where Balderas was threatening

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[2] Only Garcia was charged with capital murder for Zamora's death; the others could have been charged but were charged with other crimes instead. 34 RR 117-19.

[3] According to Garcia, Balderas was known to carry a .40 caliber weapon and a .357 that he always had in his possession. 34 RR 195-200.

Sepulveda who was now out of his wheelchair on the ground. 34 RR 223-24. As Garcia left the room to take the second box to the car, he heard gunshots from inside the room. 34 RR 225-26. Garcia walked past Lopez and Zamora; Lopez was threatening Zamora, who was begging for his life and talking about his little girl. 34 RR 227. When he got to the door, Garcia looked back and saw Lopez shoot Zamora with the shotgun. 34 RR 227-28. Garcia continued out the door, followed by Balderas and Lopez. 34 RR 228-29. From the robbery, the men obtained guns, drugs, jewelry, and a cell phone. 34 RR 234-3. Garcia eventually used this cell phone to contact his girlfriend, leading the police to him. Garcia gave statements implicating Balderas and the others in the Zamora/Sepulveda shootings. 34 RR 237-38; 35 RR 42-45.[4]

Garcia also testified that on December 3, 2005, he was smoking marijuana at his home with Jose Hernandez, when Balderas, Diaz, and, later, Taz[5] came by. 35 RR 10-11. The men were standing outside talking when they noticed a car drive by repeatedly. Balderas announced that the driver, identified as Eric Romero, was a member of the rival Cholo gang. 35 RR 11-18.

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[4] Garcia testified that he met with the Balderas prosecutors in December 2013 and made a deal to reduce his charges to aggravated robbery in exchange for his testimony against Balderas and other defendants in other cases. Garcia could be sentenced to a range from probation to 99 years, but the State would not ask for any sentence on his behalf. Garcia was released on bond in 2013. *See* 34 RR 151-57.

[5] The record does not formally identify Taz but indicates that he is deceased. *See* 28 RR 179, 185, 228.

The LTC members got into Balderas's car with Israel driving; all had weapons. 35 RR 18-21. The LTC car pulled up parallel to Romero's car, when Hernandez began shooting at Romero, followed by Balderas; Romero did not fire a gun. 35 RR 21-24. The men continued shooting until Romero's car slowed down, then the LTC members made a U-turn and returned to Garcia's house. 35 RR 25-28. Romero died from the shooting. 35 RR 28. The medical examiner noted six bullet wounds to Romero's body, with a seventh reentry wound. 35 RR 28, 184-97. Investigators noted seven bullet holes in the driver-side door, two bullet holes in the rear-driver-side door, and two on the passenger-side back door window; and found nine shell casings along the road where the shooting happened. 35 RR 154, 159-72, 176-77. Romero's girlfriend was a passenger in the car at the time but was unhurt. 35 RR 210-25.

Witness McKinley Polk testified that, on November 14, 2005, he was a passenger in a car driving behind a gold Honda when he witnessed the male passenger of the Honda lean over the male driver and shoot towards children exiting a school bus. 36 RR 11-26; *see also* 36 RR 162-65, 168-72 (victim's testimony that someone in a gray-ish sedan shot from the driver's side of car). Polk's car followed the Honda and wrote down the license plate, which he then gave to an officer at the scene of the shooting. 36 RR 21-24. Officer S. L. Grant testified that the license plate number was registered to Balderas. 36 RR 35-41. According to Officer Grant, sixteen-or-seventeen-year-old Luis Garcia

received a gun-shot wound to the left hand but was uncooperative with police officers, and a suspect was never located. 36 RR 33-34, 40-43, 49, 172-76. Luis Garcia testified that the injury caused long-term problems with his hand. 36 RR 174-75. He also stated that, on that day, he was wearing black which is the color worn by Cholos gang members. 36 RR 164.

On December 15, 2005, Courtney Altimore witnessed the murder of thirty-one-year-old Jose Garcia. 36 RR 59-61. Altimore was driving home that evening when she approached a four-way stop sign; she observed three cars—a small silver car in the intersection and two other cars pulled off the road just beyond the intersection. Initially she thought the three cars were involved in an accident. 36 RR 97-99. She then saw a man get out of the right-hand side of the silver car and try to run away but was having difficulty moving; a man then got out of the driver's side, ran around to the right side, and shot the other man in the head three to five times. 36 RR 99-100; 110-11. After the shots were fired, the man got back into the silver car, and all three cars drove off. 36 RR 103-04. Altimore observed the license plate number of the silver car; she called 9-1-1 and relayed the information. 36 RR 104, 108. The license number was registered to Balderas. 36 RR 109-10.[6] Although it was dark and Altimore

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[6] Later, Altimore wrote the number down on a piece of paper so that she would not forget it. Fearing she might be remembering incorrectly, she also wrote other combinations of the same numbers. In preparation for her trial testimony, she gave that piece of paper to the prosecution. 36 RR 105-07; SX 308

could not see very well, she observed the shooter was "of ethnic origin, either Asian or Mexican descent." 36 RR 102.

The medical examiner testified that Jose was shot five times, with fatal shots to the head and chest. 37 RR 16-32. From the crime scene, Officer Andrew Taravella collected evidence from an at least two-vehicle car crash, three .40 caliber shell casings, a .45 caliber shell casing, and a fired projectile. 36 RR 61-89, 94-95. Witness Ricardo Gamez testified that Jose Garcia was not a gang member but was a musician and a sound engineer. 36 RR 154-58.

On December 16, 2005, a day after Jose's murder, Lt. Mitch Weston from the Harris County Fire Marshal's office investigated the burning of a champagne-colored[7] 1996 Honda. 36 RR 125-27, 133. The fire department extinguished the fire, but the car was completely burned. 36 RR 127-28. Lt. Weston determined that the fire started in the passenger compartment and was ignited with an open flame. 36 RR 128-38. According to Lt. Weston, the fire was set intentionally, with an accelerant. 36 RR 147-48. The license plates were missing, but Lt. Weston was still able to read the vehicle's VIN number and determined that Balderas owned the vehicle. 36 RR 138-44; SX 211.

Officer Rick Moreno testified that, when Balderas was arrested, he and Rigaldo Silder were exiting a building carrying boxes, and Balderas was also

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[7] The "champagne" color was described as "metallic" and "a mix of a little gold and a little silver." 36 RR 133.

carrying a bag; the boxes and bag contained a modified rifle and assault rifle, a .357 caliber handgun, two .40 caliber handguns, a large variety of ammunition for numerous types of weapons, a gun holster, and ballistics vests. 36 RR 229-49; *see also* 36 RR 250-66 (testimony of Officer Glen West).

On December 16, 2005, Officers searched an apartment. In this search, officers collected almost $5,000 in cash; ten cell phones; numerous weapons, including a machete, a pocketknife, a loaded .9 millimeter semiautomatic gun, a BB gun, a rifle with a scope, and a plastic bag of unfired .9 millimeter bullets; drugs and drug paraphernalia, including a bottle with what appeared to be marijuana soaking in a liquid, rolling papers, a pipe, a glass tube with marijuana seeds, a plastic bag of marijuana, additional bags, possible crack cocaine, a scale, and a bottle of pills; gang-related items, including blue bandanas, blue rosaries, and dog tags with the inscription "Apache LTC Barrio Tres Alief" (Balderas's nickname); a black ski mask; and material identifying Balderas as an occupant of the apartment, including paper work addressed to Balderas, notebooks with Balderas's name, and photographs of Balderas with guns and making gang signs. 37 RR 36-39, 48-87; SX 369-410.

On December 21, 2005, while executing a search warrant for Jose Luviano, Officer Michael Scott recovered a laptop computer. 37 RR 90-93; SX 438. Balderas was identified in numerous photographs recovered from the computer. 35 RR 34-41; 37 RR 98-113; SX 221, 333, 430-35. Several

photographs depicted men exhibiting gang signs and brandishing weapons, *see* SX 221, 333, 431, 432; while three showed sexually explicit images of Balderas and other gang members and a sixteen-year-old girl, 37 RR 98-101, 106-14; 41 RR 51-52; SX 433, 434, 435. A video found on the computer showed one of the men having sex with the underage girl, while Balderas held her head and covered her face with a blue bandana. 37 RR 109-13; 41 RR 56-57; SX 436. Testimony from the defense revealed that the girl was video-taped having sex with all the men that night, including Balderas. 41 RR 48-57.

Officer Ponder testified that LTC was a criminal street gang, known to commit theft, burglary, robbery, and homicide. 36 RR 268. While Officer Ponder does not personally know Balderas, he believed he is a member of LTC based upon his tattoos depicting "La Tercera," a three-point crown, and the letters LTC; as well as pictures of Balderas making the three-point crown with his hands. 36 RR 268-83; SX 221, 333, 359-67.

Houston Police Department Fire Arms Examiner Kim Downs testified that the double-ought buckshot pellets recovered from Daniel Zamora's autopsy were fired from an unidentified shotgun. 34 RR 80-81; 37 RR 114-17; SX 219. Officer Downs identified a fired shell-casing recovered from the Zamora crime scene as a .40 caliber Smith & Wesson bullet, which matched SX 110, the .40 caliber Taurus gun recovered when Balderas was arrested and linked to Eduardo's murder. 25 RR 237-38; 28 RR 26-40; 34 RR 113-14; 37 RR

118-19; SX 184. Officer Downs also matched the fired .40 caliber cartridge given to the police by Sepulveda on December 9, 2005, to SX 110. 34 RR 113-15; 37 RR 119; SX 185.

Officer Downs examined five spent shell casings recovered from the scene of the Luis Garcia shooting and testified that two of the five shell casings were .40 caliber Smith & Wesson but were "necked down" or converted so they could be fired from a .357 Sig, and matched SX 113, the Sig Taurus, recovered when Balderas was arrested. 36 RR 44-49, 231-32; 37 RR 120-25; SX 208. The remaining three shell casings were .357 Sig cartridges, also fired from SX 113. 36 RR 47-48; 37 RR 125-27; SX 209.

Officer Downs further testified that eight fired .357 Sig cartridge cases and one .40 caliber "necked down" to a .357 Sig, all recovered from the Romero crime scene, matched SX 113. 35 RR 168-71; 37 RR 127-31; SX 254-262. Fired bullet jackets recovered from Romero's car matched SX 113, the .357 Sig Taurus. 35 RR 128-35; 37 RR 136-38; SX 276A & B, 277A. Officer Downs testified that a fired bullet jacket that could not be matched to any weapon, did match a fired jacketed bullet recovered from Romero's autopsy; both were fired from the same gun, although they were not matched to a gun. 35 RR 195-96; 37 RR 138-39; SX 278A, 353. Both were consistent as having been fired from a .357 magnum or a .38 special. 37 RR 139-40. Bullets recovered at Romero's autopsy were fired out of SX 113. 35 RR 195-96; 37 RR 142-43; SX 354, 355.

Finally, Officer Downs matched .40 caliber cartridges "necked down" for a .357 gun, all recovered from the Jose Garcia crime scene, to SX 113. 36 RR 88; 37 RR 144-46; SX 303, 304, 306. A fired bullet recovered from the crime scene and two bullets recovered from Jose's autopsy, matched to SX 113. 36 RR 88; 37 RR 28-29, 145-48; SX 305, 331, 332.

As rebuttal witnesses, the State presented Woodrow Thompkins, certified peace officer for Houston Police Department, who works at the Harris County Jail. On November 20, 2005, Thompkins received a call that officers had a violent prisoner—Balderas—in custody and were bringing him to the jail. Thompkins was able to calm Balderas down, searched him, and put him in a cell to wait for fingerprinting. 42 RR 134-37. While in the holding-cell, Balderas kicked another prisoner who was lying on the floor; when told not to do it again, Balderas cursed at Thompkins twice and kicked the prisoner again. 42 RR 138-44. Thompkins entered the cell to move Balderas to a solitary cell; he cuffed one of Balderas's hands, but Balderas started hitting him with the other hand. Other officers had to intervene. 42 RR 141-42. Thompkins filed felony charges for assault of public servant against Balderas. 42 RR 142-43; SX 443. Balderas was released on bond. 42 RR 144-45; SX 442.

Sgt. David Davis, Harris County Sheriff's Department, testified that when Balderas was booked into jail on December 18, 2005, for Eduardo's murder, he was initially placed in a high-risk housing but, in April 2007, he

was moved to administrative segregation. He was transferred to super segregation in May 2009, but sent back to regular segregation in July 2009. However, in March 2012, he was transferred back to super segregation, where he has remained at the time of trial. 42 RR 159-62.

Sgt. Davis also testified to Balderas's many disciplinary violations while in Harris County Jail. On August 20, 2006, Balderas was written up for two violations and lost privileges for fifteen days for destroying county property and possessing tattoo paraphernalia. 42 RR 162, 166-75; SX 444, 455. Also on August 20, 2006, Balderas pled guilty for possession of contraband and received five days loss of privileges. 42 RR 175-77; SX 446. On April 3, 2007, Balderas was disciplined for showing a gang sign, received a thirty-day disciplinary separation and was transferred to administrative segregation. 42 RR 177-780; SX 447. On June 16, 2008, Balderas was disciplined for fighting, resulting in a loss of privileges for fifteen days. 42 RR 179-80; SX 448. On April 20, 2009, Balderas was disciplined for tampering with the jail cell, and received twenty-day loss of visitation and commissary privileges. 42 RR 180-81; SX 449. On May 26, 2009, Balderas was found guilty of possession of a manufactured weapon and received thirty days disciplinary separation. 42 RR 181-83; SX 450. Balderas pled guilty to the September 16, 2009 charge of destroying, altering, or damaging county property, resulting in ten days loss of visitation and commissary privileges. 42 RR 182-83; SX 457. On April 14, 2009, Balderas

was found guilty of possession of contraband resulting in a fifteen-day loss of privileges. 42 RR 183; SX 452. On June 7, 2010, Balderas was found guilty of misuse of medication, resulting in twenty days loss of privileges.[8] 42 RR 183-87; SX 453. On September 25, 2012, Balderas received an administrative charge for possession of contraband—the highest charge possible in the Harris County Jail leading to a state charge from the district attorney's office—for which he received thirty days loss of privileges.[9] 42 RR 187; SX 454. On July 24, 2013, Balderas was sanctioned for possession of contraband—two brass drill bits—resulting in 15 days loss of privileges. 42 RR 187-210; SX 455.

Finally, Chris Aguero, former Harris County Sheriff's Deputy, testified that on May 10, 2009, he was letting Balderas out of his cell when Balderas grabbed a pocket knife from Aguero's pocket and pointed it at him. Balderas eventually threw the knife down to the first level of the jail. 42 RR 257-68.

III. The State-Court and Federal Appellate Proceedings.

Balderas was convicted and sentenced to death in March 2014. *See* 12 CR 3284, 3334-45, 3355. The CCA affirmed the judgment on November 2, 2016. Petition Appendix E. This Court denied certiorari review of that decision on

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[8] In his cell officers found thirty-four pills, a pen, and 2 razor blades. 42 RR 249-54; SX 453.

[9] A cell search revealed 123 prescription pills; some were packaged individually, and many were not prescribed to Balderas. *See* 42 RR 213-20, 228-40; SX 458.

February 27, 2017. *Balderas v. Texas,* 137 S. Ct. 1207 (2017). The CCA denied Balderas's application for writ of habeas corpus on December 18, 2019. *Ex parte Balderas,* No. WR-84-066-01, 2019 WL 6885361 (Tex. Crim. App. 2019) (Petition Appendix A). The instant petition followed.

REASONS FOR DENYING THE WRIT

The question that Balderas presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

As shown below, no compelling reason exists to review this case. And even if the Court was inclined to grant review, it need not do so in the instant proceeding because Balderas has yet to seek federal habeas corpus relief. As Justice Stevens noted:

> This 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. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

Balderas suggests that the Court should consider his claims now because it will be more difficult for him to prevail during federal habeas review as a result of Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Petition at 38-40. But this argument is misguided. AEDPA standards are "'difficult to meet[]' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to [. . .] to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Granting Balderas's request would thus frustrate this clear purpose. This Court should therefore decline to allow Balderas to circumvent the AEDPA by granting his petition at this premature juncture—especially since Balderas's petition presents no important questions of law to justify the exercise of certiorari jurisdiction in the first place.

I. Balderas Has No Due Process Right to State Collateral Proceedings.

Balderas contends that the state court's failure to follow mandatory statutory procedures for adjudicating habeas corpus claims violated his right to due process in those proceedings. Petition at 20. But this Court has held that

a petitioner like Balderas has no due process right to collateral proceedings at all. *See Murray v. Giarratano,* 492 U.S. 1, 7-8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano,* 492 U.S. at 10. Therefore, this Court held, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id.*

And because Balderas has no due process right to the proceeding itself, he also has no due process right to the appointment of counsel during those proceedings. *Finley*, 481 U.S. at 555. Therefore, it stands to reason that, if Balderas has no constitutional right to collateral review or to the effective assistance of counsel in those collateral proceedings, the state court's alleged failure to follow state statutory procedures in his collateral proceeding should also implicate no due process right.

More importantly, where a State allows for post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not

state a claim for federal habeas relief). Indeed, as the 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).

This is quite a different position from those situations involving the right to counsel on first appeal and the right to be free from cruel and unusual punishment, i.e., competency to be executed and intellectual disability. Because these rights are firmly grounded in the Constitution, any measures taken by the States to allow vindication of them will necessarily implicate due process. *See Brumfield v. Cain*, 576 U.S. 305 (2015); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Evitts v. Lucy*, 469 U.S. 387 (1985). For these reasons, Balderas is not entitled to certiorari review.

But, as will be discussed below, the state court complied with all statutory requirements and provided Balderas with a fair opportunity to present evidence in support of his habeas appeal. Therefore, Balderas received exactly what he was entitled to receive under state law and cannot claim any deprivation of due process. *Finley,* 481 U.S. at 559.

II. The State Court Complied with Texas Code of Criminal Procedure Article 11.071 and the Fourteenth Amendment.

Balderas argues the trial court's adjudication of his claims deviated substantially from statutory process and did not satisfy the Fourteenth

Amendment due process requirements. Petition at 24. Specifically, he complains that (1) the trial court did not designate all his clams as controverted issues of material fact, pursuant to article 11.071 § 9, instead limiting its designation to only two issues; (2) the trial court limited the scope of evidentiary development of those two issues, and did not allow Balderas to confront adverse witnesses; and (3) the CCA summarily adopted the trial court's proposed findings. *See* Petition at 20, 24-38. Balderas contends that, considered in aggregate, the trial court's alleged deviations from the statutorily-mandated proceeding rendered the fact-finding process arbitrary and unfair, and nothing more than "a sham," and concludes "death-sentenced persons in Texas cannot rely on the fair application of the statutory post-conviction procedural rules." Petition at 37-38.

Certiorari review is not warranted on these claims. Balderas does not present this Court with any precedent that specifically holds that a Texas habeas court's alleged failure to comply with article 11.071, § 9, constitutes a due-process violation requiring reversal of the lower court. Indeed, as noted, state habeas proceedings are not required under the Constitution; consequently, any failure by the state court to follow the State's own evidentiary rules and procedures cannot rise to a constitutional violation in the general run of cases.

Regardless, the record shows that the procedures utilized in his habeas proceedings more than adequately complied with both due process and article 11.071. Balderas concedes that the Texas state habeas statute facially complies with the Fourteenth Amendment. Petition at 24. He also acknowledges that the habeas court may select the manner in which it hears evidence, Petition at 31, and that due process does not require live testimony, Petition at 21. Nevertheless, Balderas asserts that the state habeas court's purported failure to adhere to article 11.071, § 9 deprived him of due process. But, as demonstrated below, Balderas fails to show that his state habeas proceedings did not comply with due process or even the governing statute. Accordingly, certiorari review should be denied.

A. Balderas received due process.

Balderas fails to provide any precedent that specifically holds that the purported deviations from article 11.071 that occurred in his case can render an applicant's proceeding constitutionally inadequate under the Fourteenth Amendment. Instead, Balderas extrapolates that the trial court's alleged violations of article 11.071 are impermissible pursuant to this Court's holdings in cases such as *Townsend v. Sain*, 372 U.S. 291 (1963), *Morgan v. United States*, 298 U.S 468 (1936), *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Ford v. Wainwright*, 477 U.S. 399 (1986) (Powell, J., concurring). Petition at 20-24.

But even assuming arguendo that a state habeas court's noncompliance with article 11.071 could rise to the level of a due process violation, the record plainly shows that Balderas was afforded due process's core protections. *Ford*, 477 U.S at 413 ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (federal habeas case extending core procedural due process protections to inmates seeking to prove that they are ineligible for the death penalty due to being underage, but noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted); *see also* Petition at 21 ("Due process, at a minimum, requires notice and the opportunity to be heard in a manner appropriate to the nature of a case."). In this case, Balderas had notice and the opportunity to be heard. During state habeas, Balderas was represented by the Office of Capital and Forensic Writs, a state public defender statutorily mandated to provide Texas death row inmates with full-service postconviction representation, and he filed a lengthy habeas application raising fourteen claims for relief and accompanied by seventy-four exhibits. *See* 1 SHCR 1-396; 2 SHCR 397-666; 3 SHCR 667-965. The trial court designated all fourteen issues for further review pursuant to article 11.071, § 9, *see* 5

SHCR 1450-51, and ordered affidavits from trial counsel addressing six of the fourteen claims, 5 SHCR 1455-59. The court also ordered an evidentiary hearing for additional development of two issues, at which Balderas presented four witnesses. 7 SHCR 1948-49. And Balderas submitted his own proposed findings of fact and conclusions of law for consideration by the court. 9 SHCR 2376-2759. The CCA, based on its own review as well as the findings and conclusions of the trial court, denied relief in a reasoned opinion that specifically addressed the claims raised in Balderas's habeas application. *See* Petition Appendix A.

The Texas habeas system thus gave Balderas the means and opportunity to make claims, marshal evidence in support of his cause, and address the adverse evidence adduced against him. Simply because Balderas did not prevail does not mean that he was denied notice or an opportunity to be heard.

B. The state habeas proceeding complied with article 11.071.

As to Balderas's specific complaints that (1) the trial court did not designate all his clams as controverted issues of material fact, pursuant to article 11.071 § 9; (2) the trial court limited the scope of evidentiary development; and (3) the CCA summarily adopted the trial court's proposed findings, *see* Petition at 20, 24-38, these complaints fail to demonstrate a due process violation. For the reasons discussed below, certiorari should be denied.

1. The trial court designated all issues for review.

Balderas's first contention is plainly meritless because the trial court did indeed designate all fourteen issues. Both parties filed motions asking the trial court to designate all fourteen issues pursuant to article 11.071 § 9. 5 SHCR 1428-49.[10] The trial court signed the State's proposed order, but noted:

> [P]ursuant to Tex. Code Crim. Proc. art. 11.071, the Court will resolve—based on the manner the Court deems appropriate—some of the designated issues by application of the applicable law, some by review of the appellate record and application of applicable law, some by review of the pleadings, some by review of affidavits submitted by trial counsel, some by recollection of the trial court, and some by review of submitted habeas exhibits.

5 SHCR 1450-51. This was permissible under the statute. *See* Tex. Code. Crim. Proc. art. 11.071 § 9 (a) ("To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.")

Balderas's complaint stems largely from the trial court's refusal to allow him to develop evidence at the hearing in support of all fourteen claims. *See* Petition at 24-25. But the court is not required to hold an evidentiary hearing on all claims, especially where the record is sufficient to resolve the issues. *See e.g., Ex parte Simpson,* 136 S.W.3d 660, 663 (Tex. Crim. App. 2004) (although

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[10] While the State agreed the trial court should designate all fourteen issues, the State did not agree that a live evidentiary hearing was necessary. *See* 5 SHCR 1448.

advisable to have evidentiary hearing on intellectual disability claims, it is not necessary where applicant relies primarily upon trial testimony, both sides had opportunity to fully develop pertinent facts at trial, and habeas judge had opportunity to assess credibility and demeanor of witnesses at trial); *Ex parte Hines,* No. WR–40,347–02, 2005 WL 3119030, *1 (Tex. Crim. App. Nov. 23, 2005) ("While we have said that the better practice is to conduct a live hearing in cases such as this, . . . the evidence before the trial court was extensive and we did not specify that a live hearing was necessary when we remanded the case."). This was certainly true in this case where Balderas had submitted a lengthy application for habeas relief accompanied by seventy-four exhibits, and where the trial court ordered trial counsel to submit affidavits addressing six of the fourteen claims. *See* 5 SHCR 1455-59.

Balderas suggests that the seventy-four exhibits proffered at the pleading stage should not be considered evidence for the purposes of 11.071 § 9, arguing that his only burden at the pleading stage is to allege facts which, if true, might entitle him to relief. *See* Petition at 25, and n.6; *see also* Petition at 29-30. This argument finds no support in Texas law. *See Ex parte Campbell*, 226 S.W.3d 418, 423 (Tex. Crim. App. 2007) (noting that exhibits attached to the State's motion to dismiss "are as much a part of this habeas record as are applicant's attachments"); *Ex parte Fassi*, 388 S.W.3d 881, 887 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (finding that documents attached as

exhibits to the defendant's 11.072 habeas application and the State's response could be considered by the habeas court even though they were not introduced into evidence by any party); *Ex parte Reagan*, 549 S.W.2d 204, 205 (Tex. Crim. App. 1977) (relying on *Killion v. State* to affirm where court and parties treated governor's warrant in habeas corpus hearing as if admitted into evidence); *Killion v. State*, 503 S.W.2d 765, 765–66 (Tex. Crim. App. 1973) (court permitted to consider defendant's stipulations to charged offenses where considered by trial court in adjudicating guilt for theft and burglary, although written stipulations were not admitted into evidence). Indeed, the primary case cited by Balderas as support, *see* Petition at 25, says only that, while evidence is not required at the preliminary stage, a state writ application "may, and frequently does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief." *Ex parte Medina,* 361 S.W.3d 633, 637-38 (Tex. Crim. App. 2011). At no point does *Medina* suggest that these proffers are not part of the record.[11]

Furthermore, the record plainly indicates the trial court's intent to consider all the exhibits and documentary evidence presented by the parties in

[11] Balderas also cites *Ex parte Empey,* 757 S.W.2d 771, 775 (Tex. Crim. App. 1988), and *Ex parte Evans,* 964 S.W.2d 643 (Tex. Crim. App. 1998), for the proposition that sworn allegations are insufficient proof to meet his evidentiary burden. Petition at 30. However, both cases address the insufficiency of sworn allegations from the applicants themselves proffered as proof of their claims.

making its determination. *See* 5 SHCR 1450-51 (After designating all fourteen issues, trial court stated it would resolve "some of the designated issues . . . *by review of the pleadings*, . . . and *some by review of submitted habeas exhibits*.") (emphasis added). In fact, prior to the start of the evidentiary hearing, habeas counsel sought to move into evidence "all of the exhibits and affidavits in support of the initial application," but the trial court explicitly stated that such evidence was already part of the record and did not need to be submitted into evidence at the hearing. 4 SHRR 17, 296-97. It is unreasonable to assume the court did not consider as evidence the 74 exhibits, comprising 569 pages of the record originally submitted with Balderas's petition, especially after such explicit declarations that this evidence was part of the record and would factor into the court's determination.

2. The trial court is permitted to limit review.

Balderas next complains that the trial court limited the scope of his evidentiary development to only two issues, and only allowed him to present two specific witnesses on the alibi issue (although he presented two additional witness on the false-testimony claim), without permitting him the opportunity to confront adverse witnesses—trial counsel who provided affidavits. Petition at 25, 29-32. The trial court's order did not violate due process.

After the trial court ordered the submission of affidavits from trial counsel, responding to the allegations raised in claims 3, 4, 6, 8, 9, and 10, *see*

5 SHCR 1455-59, *see also id.* 1471-91 (affidavits); the State moved for the trial court to find that controverted, previously unresolved factual issues material to the legality of the Balderas's confinement no longer existed, and order both parties to submit proposed findings of fact and conclusions of law within thirty days; the State reasoned that Balderas's legal and factual claims have been thoroughly addressed in the State's answer and exhibits, and "are resolvable through appellate record, applicable case law, and credible affidavits of trial counsel." 6 SHCR 1824-41 (State's Response to Appl.'s Mtn. in Opp. to State's Mtn. for Trial Court to Order Sub. Of Prop. Findings of Fact and Renewed Mtn. for Live Evid. Hrg.); *See also* 5 SHCR 1494-1504 (Unopposed Mtn. for 10-Day Ext. of Time to File Mtn. and Opp. to State's Mtn.); 6 SHCR 1659-1760 (hearing on motions). In the alternative, the State proposed a supplemental designation of just two issues to be resolved at an evidentiary hearing, narrowly tailoring the hearing to the issues of the State's alleged knowing presentation of false testimony and trial counsel's failure to investigate potential alibi evidence. 6 SHCR 1855-56. The trial court ordered a hearing to resolve the limited issues proposed by the State. 7 SHCR 1948-49.

Balderas admits, "the habeas court is allowed to select the manner in which it hears evidence," but states, without citation to any legal authority, that "the habeas court does not have the authority to choose the specific witnesses [that] can be called." Petition at 31. To the contrary, "Article 11.071

makes the habeas judge 'the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.'" *In re Harris,* 491 S.W.3d 332, 335-36 (Tex. Crim. App. 2016) (citing *Ex parte Simpson,* 136 S.W.3d at 668). This precedent "allots the trial judge a measure of discretion in managing the process of fact-finding in a capital writ proceeding." *Id.* at 336.

Furthermore, article 11.071, § (9)(a) explicitly permits trial judges to resolve controverted, previously unresolved material facts by "affidavits, depositions, interrogatories, and hearings, as well as using personal recollection." And in the federal habeas context, the Fifth Circuit has "repeatedly found that a paper hearing [in state court] is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims." *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *Hines v. Thaler*, 456 F. App'x 357, 363 (5th Cir. 2011) (unpublished) (noting that "while a live evidentiary hearing may be recommended in some *Atkins*[[12]] cases in Texas, a thorough presentation of evidence at the state habeas proceeding can obviate the need for such a hearing"); *Morrow v. Dretke*, 367 F.3d 309, 315

[12] *Atkins v. Virginia*, 536 U.S. 304 (2002).

(5th Cir. 2004) (presumption of correctness applies to state court fact findings made after "paper hearing"); *Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994) (finding that a hearing by affidavit was adequate to allow presumption of correctness to attach to the state court's factual findings); *see also Strong v. Johnson*, 495 F.3d 134, 139 (4th Cir. 2007) ("[C]redibility determinations may sometimes be made on a written record without live testimony. Specifically, there is no prohibition against a court making credibility determinations based on competing affidavits in certain circumstances."); *Tanberg v. Sholtis*, 401 F.3d 1151, 1161 (10th Cir. 2005) (a trial court's "determination of credibility of affidavits [will not be disturbed on appeal] unless that determination is without support in the record, deviated from the appropriate legal standard, or followed a plainly erroneous reading of the record."). In short, the trial court did nothing improper, and violated no constitutional right, by limiting the issues and witnesses for evidentiary development during the state habeas proceeding, and by relying on trial-counsel affidavits without allowing cross-examination.

Balderas suggests that the initial trial judge, Judge Kristin Guiney, found that Balderas met his burden of demonstrating controverted issues but the subsequently-appointed judge unfairly narrowed the hearing. Petition at 27-28. However, while Judge Guiney did sign the initial order designating all fourteen issues for consideration, she specifically noted that she may resolve

some designated issues on the law; review of the existing record, pleadings, affidavits of counsel; and habeas exhibits; and by the court's recollection. 5 SHCR 1450-51. At no point did Judge Guiney suggest she would hold a hearing or gather evidence on all fourteen issues. Therefore, Judge Wortham's narrowing of the evidentiary development following the submission of trial counsels' affidavits was not inconsistent with Judge Guiney's initial pronouncement and, as stated, was not impermissible under statute or law.

Balderas also complains that the CCA refused to consider evidence disclosed by the State, after the conclusion of the state habeas proceedings. Petition at 33-35. Specifically, as part of an ongoing-effort to comply with Balderas's requests for discovery,[13] on August 20, 2018, the State filed a disclosure, pursuant to Texas Code of Criminal Procedure Article 39.14(h) and (k), containing five points of information. *See* 10 SHCR 2960-61. At issue now are two of the five points:

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[13] On April 19, 2018, Balderas filed a Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. 7 SHCR 1956-69. At the May 2, 2018 prehearing status conference, the State acknowledged its statutory disclosure obligations under Article 39.14, and assured the trial court that they would continue to screen work product that had not been previously disclosed pursuant to a public information request, but expressed that it was "an exorbitant amount of work" that could not be accomplished before the evidentiary hearing. The State would continue the task even after the evidentiary hearing. *See* 2 SHRR 16-19, 31, 95-96. The trial court characterized the State's obligation of disclosure as "ongoing," and admonished the State to adhere to its statutory and ethical obligations, reminding the State that "the rules impose a duty to continue to update and modify any relevant discovery that is found within a reasonable search of due diligence." 2 SHRR 30, 33-34, 60, 74. The trial court set no timeline for the State's compliance with court-ordered disclosures. 2 SHRR 95-96.

- On December 10, 2013, prosecutors Traci Bennett, Caroline Dozier, and Mary McFaden met with witness Alejandro Garcia and Garcia's counsel, Bob Loper. At this meeting, Garcia stated that, at school, Eduardo "Powder" Hernandez's brother told Garcia that MS had killed Hernandez.
- On December 19, 2013, prosecutors Traci Bennett, Caroline Dozier, and Mary McFaden met with witness Alejandro Garcia and Garcia's counsel, Bob Loper. At this meeting, Garcia stated that he did not suspect that the applicant killed Eduardo "Powder" Hernandez, that the applicant did not talk to Garcia about killing Hernandez, and that Garcia thought MS killed Hernandez.

10 SHCR 2961.

On December 3, 2018, based upon the disclosed information, Balderas filed his Motion for Stay of Proceedings and Remand to Reopen Evidentiary Hearing Pursuant to Tex. R. App. P. 73.7(b). The State filed a response in opposition on January 2, 2019, and Balderas filed a Reply on January 10, 2019. In opposition to Balderas's motion to reopen the State argued that (1) this information was not novel—these rumors were previously revealed at trial; (2) the disclosures did not affect Balderas's defense since he has never contended that Eduardo was murdered by a rival gang, but by another member of his own gang; and (3) Balderas has repeatedly challenged Garcia's credibility, veracity, and testimony, rendering these disclosures similarly not credible. *See* State's Resp. in Opp. to the Appl.'s Req. to Stay Proc.'s and Remand to Reopen Evid. Hrg., at 19-22. The CCA denied Balderas's application

on December 19, 2019, without reopening the hearing. The CCA violated no due process right in concluding that the disclosure was not worthy of remand.

Balderas fails to demonstrate a due process violation from the state court's failure to remand for consideration of the evidence. Balderas tries to draw comparisons to *Wearry v. Cain*, 136 S. Ct. 1002 (2016), where this Court reversed the state court on a *Brady*[14] claim for the State's failure to disclose material evidence that cast doubt on the credibility of the State's star witness. *See* Petition at 33-35. Specifically, the star witness contacted the police and said Wearry had confessed his involvement in the crime, but substantially changed his account over the course of four separate statements such that his testimony differed significantly from his original account. *Wearry,* 136 S. Ct. at 1003. A second witness also gave inconsistent statements and asserted that he was testifying of his own volition and sought no deal with the State. *Id.* at 1003. The only other evidence at trial was circumstantial. *Id.* On appeal, Wearry proved that the State withheld evidence that the star witness had a vendetta against Wearry and had tried to enlist others to testify falsely against him, and the State suppressed medical records regarding another party that undercut the star witness's testimony. *Id.* at 1004-05. On the second witness, the State failed to disclose that, contrary to his testimony, he had twice sought

[14] *Brady v. Maryland,* 373 U.S. 83 (1963).

a deal from the State, and police offered to talk to the district attorney on his behalf if he testified. *Id.* at 1004. This new evidence undermined confidence in the jury's verdict because the State's case was built on the jury crediting the testimony of two witnesses. *Id.* at 1006.

The disclosures at issue in Balderas's case pale in comparison. Indeed, the Alejandro Garcia disclosures involve hearsay and rumors, from a witness who did not testify at the guilt-innocence phase of trial. And, as the State argued, the information contained in these statements was well-known at trial. The friendships of various witnesses with MS-13 gang members, and the rivalry between gangs, particularly MS-13 and LTC, was well-known prior to trial and explored on the record by both parties. *See, e.g.,* 24 RR 40-42, 51-53, 76-80, 90, 96-98, 119-20, 234-41, 261-64; 25 RR 40; 26 RR 52-53, 63, 138-39, 145-50; 27 RR 93, 97-99; 28 RR 109-10, 141, 160, 204-209; 34 RR 250-51; 35 RR 26-27, 31-33, 107, 227-28; 36 RR 278-79; 37 RR 179, 198, 200, 202; 41 RR41. Regardless, Balderas did not argue that a rival gang killed Eduardo—despite the aforementioned-evidence. Instead, he has tried to prove that a member of his own gang killed him and blamed Balderas. *See* 28 RR 223-26; 2 SHRR 519-20 (affidavit of Walter Benitez), 654-55 (affidavit of Jose Perez).

Further, Alejandro Garcia testified during the punishment phase of trial that Eduardo's brother told Garcia about his death while at school, 34 RR 252; and that, on the night of the murder, Balderas and Diaz came to Garcia's

house, but did not talk about the murder, 34 RR 253. Garcia maintained that he found out about Eduardo's death at school, and that he had never gone to meet Diaz at the apartments where the Eduardo was killed. 34 RR 253-54; 35 RR 106-07; *see also* 35 RR 91 (on cross-examination, maintained he does not know anything about an LTC member involved in Eduardo's shooting). The State's disclosures were consistent with and could not be used to discredit Garcia's testimony. Accordingly, the substance of the State's August 2018 disclosures did not constitute new information, nor were they material to the outcome of his trial. The CCA reasonably declined to remand to the trial court.

3. The CCA denied relief on its own review of the record.

Finally, Balderas complains that the CCA summarily adopted the trial court's proposed findings after making a merits determination on several claims based entirely on pleadings. Petition at 20, 29. But, as noted, the trial court is permitted by statute to resolve controverted issues by means other than a live evidentiary hearing. *See* Tex. Code. Crim. Proc. art. 11.071 § 9 (a). Further, Balderas submitted seventy-four exhibits with his habeas application, the trial court collected affidavits from trial counsel addressing six of the claims, and the trial court held a live hearing with four witnesses addressing two of Balderas's claims. Balderas also submitted his own proposed findings and conclusions—the trial court simply rejected them. Regardless, the CCA did not "summarily" adopt the trial court's findings. Rather, the court

issued a thorough opinion after conducting its own review of the record, denying relief, "[b]ased upon the trial court's findings and conclusions and our own review." *See* Petition Appendix A, at 2, 7.

Thus, the record shows that Balderas's proceedings comported with the requirements of Article 11.071. And even if the state habeas proceedings did deviate from Article 11.071 in some minor way, the fact-finding process remained reliable, and any error was harmless. Certiorari should therefore be denied on this claim.

CONCLUSION

The CCA correctly denied Balderas's state habeas application. For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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