No. 19-8392

In the Supreme Court of the United States

JUAN BALDERAS,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

OFFICE OF CAPITAL AND FORENSIC WRITS
Benjamin B. Wolff,* Director
benjamin.wolff@ocfw.texas.gov
Torrance Castellano**
Torry.Castellano@ocfw.texas.gov
Leslie Wine***
Leslie.Wine@ocfw.texas.gov
1700 N. Congress Ave., Ste. 460
Austin, Texas 78701
(512) 463-8600

* *Counsel of Record*
Member, Supreme Court Bar
**Barred in the District of Columbia
*** Barred in the State of Texas

Counsel for Petitioner

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REPLY TO BRIEF IN OPPOSITION

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari (hereinafter "BIO) to this Court.

I. The Procedural Due Process Rights of State Habeas Applicants Are Compelling and In Need Of Elucidation By This Court

The State suggests that Mr. Balderas was not entitled to due process in the state court adjudication of his habeas corpus application. BIO at 24. This suggestion is as breathtakingly broad as it is wrong.

Judicial adjudications of rights must always comport with due process. This includes criminal post-conviction proceedings, even though "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). While a "state . . . has more flexibility in deciding what procedures are needed in the context of postconviction relief," *id*. at 69, due process nonetheless requires that prisoners be afforded certain procedural rights in post-conviction procedures that implicate protected liberty interests. Whenever the judiciary adjudicates rights, the relevant question is never whether process is due, but what process is due.

As this Court observed over fifty years ago, "there is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law," *Harris v. Nelson*,

394 U.S. 286, 292 (1969). Despite this, only a handful of this Court's cases have touched on the process a state owes an individual who has invoked a post-conviction statute sounding in habeas corpus. This Court should give further guidance on exactly how much process is due a state habeas applicant, especially in light of modern developments in federal habeas corpus which make state courts the principal—and usually *only*—forum for asserting constitutional challenges to state convictions.

A. This Court's Decisions Only Tangentially Touch Upon the Process Due a Prisoner Who Has Invoked a State Statute Providing Habeas Corpus Review in a State Judicial Forum

Since 1986, this Court has considered the process owed by a state in post-conviction proceedings in a handful of cases, but none that meaningfully illuminated the process owed an incarcerated person who invokes a habeas corpus statute to challenge the validity of a judgment.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court addressed what process a state court owes to a person who alleges in a post-conviction context that the Eighth Amendment precludes his execution because he is not mentally competent to be executed. After recognizing that the Eighth Amendment precludes the execution of the condemned who were unaware of their execution or did not understand the reason for it, Justice Powell, in an opinion deemed to be controlling, laid out the process due by a state to a prisoner making such a claim. Justice Powell concluded that in this context a state "should have substantial leeway to determine what process best balances the various interests at stake" once it has met the "basic requirements"

required by due process. *Id*. at 427. The "basic requirements" included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence." *Id*.

Justice Powell offered three reasons why due process in this context would not require the state to afford a "full-scale 'sanity trial'" of the sort Justice Marshall's opinion in the case proposed. *Id*. at 425. First, execution competency could arise as an issue "only after the prisoner has been validly convicted of a capital crime and sentenced to death," and therefore the State's interest in taking the prisoner's life as punishment for his crime "is not called into question by" the prisoner's claim. *Id*. The only question presented in such a context is "not *whether*, but *when*, his execution may take place." *Id*. Second, the claim did not arise "against a neutral background," because, having been validly convicted, the prisoner "must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court." *Id*. at 425-26. Thus, the State could presume the prisoner's continued competence. *Id*. at 426. Third, the competency issue did not resemble the basic issues at trial or sentencing that present "issues of historical fact," but instead called "for a basically subjective judgment." *Id*.

Likewise, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court again considered the due process protections that apply when an individual challenges not the validity of the judgement, but the timing of its execution. In *Panetti,* the Court identified several deficiencies in Texas's adjudication of Mr. Panetti's incompetence-to-be-executed claim. Among the due process violations were the failure to apprise

the petitioner as to the opportunity to present his case; the determination of competency was made solely on the expert opinion of court-appointed expert and the petitioner did not have an opportunity to present affirmative or controverting evidence; the state court arguably violated state law in failing to hold an evidentiary hearing. *Id*. at 950-51. Additionally, the state court's "violation of the procedural framework Texas has mandated for the adjudication of incompetency claims" undermined reliance on the State's "substantial leeway" to determine suitable process. *Id*. at 950.

Most recently, in *District Attorney's Office for Third Judicial Dist. v. Osborne*, the Court addressed the process a state owed to an incarcerated person who asserted that he had a due process right to access evidence in post-conviction in order to conduct DNA testing, through which he hoped to develop evidence of innocence. 557 U.S. at 52. The Court recognized that such a statute created a protected liberty interest.[1] *Id.* at 68. It held, however, that in the context of a state statute providing a post-conviction right to relief that did not implicate the fairness of the trial, due process would not be violated unless the state court procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "transgresses any recognized principle of fundamental fairness in

[1] Relevant to capital cases, a majority of the Court has also recognized that prisoners under sentence of death maintain protected life interests until their execution. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, J., Ginsburg, J., and Breyer, J.) (death-sentenced prisoners retain life interest); *id*. at 291 (Stevens, J., dissenting) (same).

operation." *Id.* at 69. The Court reasoned that, given "a valid conviction" which constitutionally deprived the prisoner of his liberty interest, the State had more flexibility in deciding what procedures were adequate than it would in a criminal trial itself. *Id.*

None of these decisions have spoken meaningfully to what process a state court owes a prisoner in a post-conviction proceeding sounding in the nature of habeas corpus, *i.e.*, where the prisoner alleges that the underlying criminal judgment pursuant to which he is confined *was* obtained unfairly and in violation of the United States Constitution. In none of the post-conviction proceedings at issue in *Ford*, *Panetti*, and *Osborne* was the validity of the prisoner's conviction or lawfulness of his custody being challenged. Hence, each presumed a fair trial and a prisoner who had been validly deprived of his liberty or life. Thus, the balance of the "interests at stake" is not the same as these cases as it would presumably be in a state post-conviction case that sounds in habeas corpus.

If anything, the due process protections should be stronger in a case such as this, which is a habeas corpus challenge to the constitutional validity of a conviction and death sentence. Whereas, in *Ford* and *Panetti*, the challenge centered around the timing of a constitutionally valid death sentence, here, Mr. Balderas raised 14 claims that challenged the constitutionality of his conviction and sentence. Mr. Balderas, however, was denied a meaningful opportunity to be heard on these claims.

II. The State Exaggerates The Amount of Process Afforded Mr. Balderas

Mr. Balderas pleaded 14 constitutional claims in a habeas application that stretched nearly 400 pages. These claims were substantiated by evidentiary proffers and exhibits totaling another nearly 500 pages. The trial court initially designated these 14 claims for resolution at a hearing. Later, however, without any meaningful change in circumstances, the habeas court instead allowed for only two extremely narrow and mischaracterized areas of factual development during one short day of testimony. Compounding this error, instead of simply designating the issues for the hearing, the habeas court predetermined what evidence it would consider and from what witnesses it would hear it, denying Mr. Balderas agency over what evidence might be offered in support of even these two narrow claims. The habeas court and the Texas Court of Criminal Appeals then denied Mr. Balderas the opportunity to be heard on exculpatory evidence withheld by the State until after the evidentiary hearing had concluded. The TCCA then denied relief to Mr. Balderas on the merits of his claims, upholding the findings of fact and conclusions of law issued by the trial court, but nearly entirely drafted by the State, despite the fact that he had been denied the opportunity to present evidence in support of these claims. These facts are indisputable.

The State, however, misrepresents the amount of process afforded Mr. Balderas, conflating the habeas "record" with evidence. *See* BIO at 29-30. Unlike other habeas proceedings in Texas, capital post-conviction proceedings are governed by the Rules of Evidence. *Compare* Tex. Code Crim. Proc. art. 11.071 sec. 10 (the rules

of evidence apply to capital post-conviction proceedings) *with* art. 11.07 (no requirement that the rules of evidence apply in non-capital felony post-conviction cases), art. 11.072 (no provision requiring the rules of evidence in community supervision cases). This means that unlike other, inapposite areas of post-conviction practice in Texas, a party in a capital habeas proceeding cannot present information and "evidence" for the court's merits consideration simply by attaching documents to pleadings. The State, however, ignores the statutory distinction between the different Texas post-conviction proceedings, citing community supervision post-conviciton cases to argue that a capital post-conviction court can consider everything in the "record" as "evidence." *See* BIO at 29-30.

Of course, attachments to pleadings are part of the habeas record. But in a post-conviction statutory scheme where the Rules of Evidence apply, materials attached to pleadings cannot constitute evidence for the purposes of fact adjudication when no party has moved to admit them as evidence, the opposing party has not had an opportunity to object to their admission, and no court has admitted them for the purpose of adjudicating any identifiable fact dispute. Were it otherwise, any documents filed by any party with the court clerk would be considered evidence because it was part of the habeas "record."

III. The TCCA Opinion Was Unreasoned and Unreliable

The State strains to argue that Mr. Balderas was not denied due process because the TCCA conducted its own review of the habeas court's findings of fact and conclusions of law, and "denied relief in a reasoned opinion that specifically addressed the claims raised in Balderas's habeas application." BIO at 29.

Here, the TCCA summarily adopted the habeas court's findings, holding that Mr. Balderas failed to meet his burden of proof on his claims even though he was denied the opportunity to introduce evidence in support of his claims. They also rejected Mr. Balderas's *Brady* claim for want of supporting evidence, while also failing to reference, or even consider, the motion for remand filed with the court following the State's late-breaking *Brady* disclosures. *See Ex parte Balderas*, No. WR-84-066-01, 2019 WL 6885361 (Tex. Crim. App. 2019). By ignoring the motion to remand, the TCCA circumvented its obligation to undertake a good-faith and reasoned review of the *Brady* claims alleged by Mr. Balderas.

Out of Mr. Balderas's fourteen claims, the TCCA denied relief citing inadequate evidence in nine claims. *See* App.A (denying claims one, two, three, four, five, six, seven, eight, and nine for failure to demonstrate these claims through sufficient evidence). Mr. Balderas, however, was denied the opportunity to present evidence for most of these claims, and then in an astounding display of judical gaslighting, denied relief for failing to support his claims with evidence. Mr. Balderas raised a claim that his death sentence was unconstitutional because it was imposed due to racial and ethnic animus; the TCCA, however, pretended this claim did not exist and failed to adjudicate it. Mr. Balderas also raised a *Batson v. Kentucky* claim based on the collusion between trial counsel and the State to systematically exclude African-American jurors from the case. Even though this claim was predicated on the collusion of trial counsel, the TCCA held that the claim was procedurally barred because it should have been the subject of a trial objection. App.A. And in

adjudicating Mr. Balderas's claim of juror misconduct, the TCCA mischaracterized Mr. Balderas's claim, unfairly and erroneously splitting Mr. Balderas's claim, denying Mr. Balderas the cumulative effect of prejudice. App.A.

This Court is unfortunately all too aware of the lack of meaningful review in the TCCA. In *Andrus v. Texas*, 140 S. Ct. 1875 (2020), this Court considered an analogous case from the TCCA, where it was entirely unclear what, if any, legal analysis had been done. *See id.* at 1886 ("It is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all."). In *Andrus*, the Supreme Court summarily reversed the TCCA adjudication of a *Wiggins* claim, which the TCCA denied in one sentence of an unpublished decision that engaged in no meaningful analysis. The conclusory, one-sentence denial of Mr. Andrus's *Strickland* claim did not reveal any legal analysis from which it could have been determined that Mr. Andrus failed to satisfy one, the other, or both *Strickland* prongs. *Id.*[2]

Just as in *Andrus*, the TCCA's analysis of Mr. Balderas's claims, if any, was entirely cursory. The Texas court failed to engage with the *Brady* claim, mischaracterized other claims, and completely failed to decide a racial animus claim. *But see Buck v. Davis*, 137 S. Ct. 757, 777 (2017) ("Some toxins can be deadly in small doses."). While the State argued that the decision below was based on a "thorough opinion" that reflected an independent "review of the record", the reality is far from

[2] *See also* Jordan M. Steiker, et al., The Problem of "Rubber Stamping in State Capital Habeas Proceedings, 55 HOUS. L. REV. 889, 893 (2018) (noting as an example of the unreliable judicial decision making of the TCCA, the routine practice of adopting the habeas court's findings of fact and conclusions of law absent any reasoned analysis of the claims presented in capital post-conviction matters).

that. BIO at 40. At most, the TCCA engaged in an abbreviated analysis—which this Court has rejected—and failed to conduct the "weighty and record-intensive analysis" necessary to adequately address ineffective assistance of counsel claims. *Andrus*, 149 S. Ct. at 1887.

Hostility to review, unfortunately, is commonplace in Texas. *See, e.g., id.; see also Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring) ("On remand, the [TCCA] repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." Were this Court to allow the TCCA decision in this case to stand, it would encourage the TCCA to disregard the correct and well-articulated legal principals of this Court, while also discouraging other habeas courts from conducting meaningful review in capital postconviction proceedings.

IV. The State's Brief Reveals a Hostility to Review Inconsistent With This Court's Practice and Precedent

The State begins its argument for denying the writ by stating that Mr. Balderas's question presented is not a "compelling reason" and thus "unworthy of the Court's attention." BIO at 20. However, if the amount of process due in collateral proceedings that implicate the constitutional validity of a conviciton and death sentence is not a "compelling reason", it is hard to see what would be. The State then argues that "even if the Court was inclined to grant review, it need not do so in the instant proceeding because Mr. Balderas has yet to seek federal habeas corpus relief." *Id*. The State's reasoning on this point is flawed because this argument would leave little room for this Court to review any state proceedings. Far from challenging the

merits of Mr. Balderas's argument, the State's position regarding review demonstrates a hostility towards this Court's examination of Texas state habeas decisions and a willful ignorance of recent decision making by this Court.

While the State is correct that review on writ of certiorari is discretionary, *id*., the State's position smacks of conflating this Court's discretion to grant review with foreclosure of review. The State brazenly argues that this Court's review of state collateral proceedings would "frustrate th[e] clear purpose" of AEDPA. BIO at 21. In support, the State cites Justice Stevens's concurrence in *Kyles v. Whitley*[3], highlighting his observation that "the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." BIO at 20. However, the State fails to acknowledge that *Kyles v. Whitley* was decided *six years prior* to Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which significantly narrowed the scope of federal habeas review. It is simply disingenuous to apply what Justice Stevens noted in a pre-AEDPA case to a post-AEDPA world.

Moreover, if the State's argument were accepted it would imply that recent cases arising out of state habeas proceedings were improvidently granted and decided because they frustrated the will of Congress. *But see Andrus,* 140 S. Ct. at 1875 (vacating the judgment of the Texas Court of Criminal Appeals and finding "[t]he evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*."); *Moore v. Texas*, 137 S. Ct. 1039 (2017)(*Moore*

[3] 498 U.S. 931 (1990).

I)(holding that the factors adopted by the Texas Court of Criminal Appeals used to evaluate an *Atkins* claim create an "unacceptable risk" of executing a person with intellectual abilities in violation of the Eighth Amendment); *Moore v. Texas*, 139 S. Ct. 666 (2019)(*Moore II*)(holding that "the [TCCA's] opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rest upon analysis too much of which too closely resembles what we previously found improper."); *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (reversing the judgment of the Louisiana post-conviciton court and finding a due process violation); *Hinton v. Alabama*, 571 U.S. 263 (2014)(vacating the Court of Criminal Appeals of Alabama decision and finding deficient performance by defense counsel under *Strickland*); *Smith v. Cain*, 565 U.S. 73 (2012) (reversing a state court's denial of a *Brady* claim); *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reversing a state court denial of a *Batson* claim). *See also Padilla v. Kentucky*, 599 U.S. 365 (2010)(reversing a state court judgment and holding that *Strickland*'s ineffective assistance test applies not only to "affirmative misadvice" but also to the alleged omissions by counsel regarding immigration consequences of criminal convictions).

This Court considered and rejected similar arguments in *Wearry*. There, the Court noted that it exercised its jurisdiction to review final judgments of state post-conviction courts in appropriate circumstances. 136 S. Ct. at 1008. As such, the Court noted that "reviewing the Louisiana courts' denial of postconviction relief is thus hardly the bold departure the dissent paints it to be. The alternative to granting

review, after all, is forcing Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed." *Id.*

This Court's decisions in *Dunn v. Madison*[4] and *Madison v. Alabama*[5] are also illustrative of the centrality of certiorari review over state court judgments to ensure that constitutional rights are vindicated in the age of AEDPA. At issue was the petitioner, Vernon Madison's, claim that his dementia and complete memory loss of the offense precluded his execution under *Ford*.[6] In *Dunn*, the Court reversed the *Ford* stay granted by the Eleventh Circuit, holding that, pursuant to AEDPA, it was not clearly established whether *Ford* protected persons whose suffered from from dementia. In concurring with the decision, Justices Ginsberg, Breyer, and Sotomayor invited this question to be raised again—not in the federal habeas/AEDPA context -- but in a state habeas application that could be reviewed on certiorari. *Dunn,* 138 S. Ct. at 12 ("The issue [presented] is a substantial question not yet addressed by the Court. Appropriately presented, *the issue would warrant full airing*. But in this case, the restraints imposed by the Antiterrorism and Effective Death Penalty Act of 1996, I agree, preclude consideration of the question.") (emphasis added). This is exactly what happened. The following year, after litigation of the *Ford* question in state post-conviction proceedings, this Court granted certiorari in *Madison v. Alabama*, and decided the Eighth Amendment question in its review of the state court judgment. *Madison*, 139 S. Ct. at 726 (acknowledging "[b]ecause the case now comes to us on

[4] 138 S. Ct. 9 (2017)
[5] 139 S. Ct. 718 (2019)
[6] *Ford v. Wainwright*, 477 U.S. 399 (1986)

direct review of the state court's decision (rather than in a [federal] habeas proceeding), AEDPA's deferential standard no longer governs").

As much as the State might wish otherwise, AEDPA does not block Supreme Court review of state habeas proceedings and it is far-fetched to suggest otherwise.

CONCLUSION

This Court should grant certiorari to delineate what process is generally due in the capital post-conviction context, where state courts adjudicate claims regarding the constitutional validity of a conviction and death sentence.

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

/s/ Benjamin Wolff
Benjamin Wolff, Counsel of Record*
Torrance Castellano**
Leslie Wine***
Office of Capital and Forensic Writs
1700 North Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600

Counsel for Petitioner,
Juan Balderas

**Barred in the District of Columbia
*** Barred in the State of Texas