

No. _____

In The
Supreme Court of the United States

JUAN BALDERAS,
Petitioner,

v.

TEXAS,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Juan Balderas, seeks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Mr. Balderas, currently incarcerated on Texas's death row, is represented by the Office of Capital and Forensic Writs, a state public defender agency charged with representing indigent individuals in state post-conviction proceedings. In 2014, the 179th District Court of Harris County, Texas, found that Mr. Balderas was indigent, and he was given court-appointed counsel. Thereafter, the Office of Capital and Forensic Writs was appointed to represent Mr. Balderas in state post-conviction proceedings pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 2. Mr. Balderas has been granted leave to proceed in forma pauperis during the entire history of this state post-conviction matter, including in proceedings below before the Texas Court of Criminal Appeals.

Wherefore, Mr. Balderas moves this Court for leave to file the attached petition for writ of certiorari in forma pauperis.

/s/ Benjamin Wolff
Counsel of Record for the Petitioner

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

PETITION FOR WRIT OF CERTIORARI

OFFICE OF CAPITAL AND FORENSIC WRITS

Benjamin B. Wolff,* ** Director

Benjamin.Wolff@ocfw.texas.gov

Tanya Rivera***

Tanya.Rivera@ocfw.texas.gov

Torrance Castellano****

Torry.Castellano@ocfw.texas.gov

1700 N. Congress Ave., Ste. 460

Austin, TX 78701(512) 463-8600

**Member, Supreme Court Bar*

*** Counsel of Record*

**** Barred in the State of Texas*

*****Barred in the District of Columbia*

CAPITAL CASE

QUESTION PRESENTED

It is fundamental that, when a state provides for capital state post-conviction proceedings, the state court proceedings must comport with due process. However, this Court has not reached the question of precisely how process is due in capital state post-conviction proceedings, where a death-sentenced prisoner has the first opportunity to raise constitutional violations that occurred at his capital trial.

Mr. Balderas was convicted of capital murder largely on the basis of an identification that a majority of the Texas Court of Criminal Appeals agreed was impermissibly suggestive, and the testimony of a gang member who told the jury that Mr. Balderas confessed to the crime.

In post-conviction, Mr. Balderas alleged that this gang member testified falsely, and the state suppressed impeachment evidence as to this witness and other exculpatory evidence.

Mr. Balderas alleged that he received ineffective assistance of counsel during both the guilt/innocence and punishment phases at trial in violation of the Sixth Amendment, in part because his trial attorneys failed to investigate alibi evidence, misidentification evidence, and mitigation evidence. In addition, Mr. Balderas raised other extra-record claims relating to due process violations under *Brady v. Maryland*, the State's use of false testimony by its star witness, extraneous influence on the jury, violations under *Batson v. Kentucky*, and other constitutional challenges to his conviction.

Here, although Texas state law provided mandatory procedures to permit Mr. Balderas to prove his alleged constitutional violations and the ability to confront adverse evidence against him, the state courts failed to comply with these basic procedures. Despite meeting the pleading burden for his legal claims in state post-conviction proceedings, Mr. Balderas was denied the opportunity to prove his case and introduce evidence in support of his claims. Instead, the state habeas court conducted an overly narrowed hearing on just two severely constricted issues, wherein Mr. Balderas was only permitted to present limited evidence from specific witnesses chosen by the court. The State, by contrast, was allowed to submit controverting evidence that was never subjected to adversarial testing. The state habeas court adopted the State's proposed findings and conclusions nearly verbatim, recommending that Mr. Balderas be denied relief.

Following the evidentiary hearing, the State disclosed long-suppressed evidence that undermined the credibility of the testimony of its star witness. The suppressed evidence was that an individual who was present during the alleged confession heard no such confession, and never had reason to believe that Mr. Balderas was the culprit. The Texas courts, however, did not permit Mr. Balderas

to reopen the evidentiary hearing to present evidence that utterly undermined the credibility of the State's star witness.

The Texas Court of Criminal Appeals (TCCA) then rubberstamped the process, presumptively overruling all of Mr. Balderas's objections to the state habeas court process and violations of due process, summarily affirming the state habeas court's facially inadequate findings and conclusions. Further, the TCCA failed to rule on Mr. Balderas's motion to remand his case to the trial court to allow Mr. Balderas an opportunity to fully support his claims with evidence and to address the new exculpatory evidence disclosed by the State after the evidentiary hearing had ended. Thus, this case presents the following question:

In a death penalty case, where a state provides a post-conviction procedure for challenging the unresolved constitutional violations that occurred at a capital trial, and where the state court violated mandatory state procedures and denied habeas relief on the merits for failing to present sufficient evidence, after having prevented an applicant from having presented evidence, do minimal due process protections of having the opportunity to present evidence and challenge adverse evidence apply?

PARTIES TO THE PROCEEDINGS BELOW

All parties on the cover page in the caption of the case.

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- APPENDIX C Order Adopting State's Proposed Supplemental Order Designating Issues To Be Resolved Via Evidentiary Hearing, *Ex parte Balderas*, Cause No 1412826-A (179th Dist. Ct. March 21, 2018).
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PETITION FOR WRIT OF CERTIORARI

Juan Balderas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The unpublished order of the Texas Court of Criminal Appeals (TCCA) denying relief sought in the habeas corpus application is attached as Appendix A. The habeas court's recommended findings of fact and conclusions of law are attached as Appendix B. The habeas court's 2018 Order Adopting State's Proposed Supplemental Order Designating Issues To Be Resolved Via Evidentiary Hearing is attached as Appendix C. The habeas court's 2016 Order Designating Issues is

attached as Appendix D. The Texas Court of Criminal Appeals' opinions on appeal are attached as Appendix E.

JURISDICTION

This Court has jurisdiction to review these orders pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 11.071 of the Texas Code of Criminal Procedure provides, in relevant part, as follows:

Sec. 8. (a) Not later than the 20th day after the last date the state answers the [habeas] application, the convicting court shall 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.

[...]

Sec. 9. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

[...]

Sec. 10. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to

custody or ordering the applicant's release, as the law and facts may justify.

The Fourteenth Amendment to the U.S. Constitution provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. INTRODUCTION

In his state-post conviction application for a writ of habeas corpus, Juan Balderas met his pleading burden under Texas law by pleading sufficient facts, which if true, might entitle him to relief. *Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011) ("Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief."). In his application, Mr. Balderas, raised fourteen constitutional claims including due process violations under *Brady v. Maryland*; violations of due process for the State's use of an informant's false testimony; ineffective assistance of counsel both at guilt-innocence and punishment phases, including trial counsel's failure to investigate and present evidence to rebut the State's weak identification evidence, Mr. Balderas's alibi evidence, and failure to investigate and present Mr. Balderas's abusive and traumatic childhood. Mr. Balderas also raised jury misconduct and *Batson*-related claims.

Under Texas law, if the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order designating the issues of fact to be resolved and the manner in which the issues shall be resolved. TEX. CODE CRIM. PROC. art. 11.071 (hereinafter "Article 11.071") sec. 9(a). To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection. What the trial court cannot do is limit the presentation of evidence. In Mr. Balderas's case, the convicting court, under Judge Guiney, entered an order which designated factual issues within the 14 claims raised for resolution and stated the court would "resolve them based on the manner the court deemed appropriate by application of the applicable law." AppD. Judge Guiney lost re-election to Judge Roll, who was later recused and replaced by Judge Wortham. Judge Wortham then decided to only designate two severely narrowed issues for an evidentiary hearing. AppC.

During Mr. Balderas's evidentiary hearing, the habeas court denied Mr. Balderas the opportunity to meaningfully present evidence to prove the constitutional claims he had pleaded. The habeas court denied Mr. Balderas the opportunity to present witnesses who had exculpatory information to support Mr. Balderas's claims of misidentification, false informant testimony and prosecutorial misconduct. The habeas court also denied Mr. Balderas the opportunity to present evidence supporting his ineffective assistance of counsel claims. The habeas court then issued findings of fact and conclusions of law denying Mr. Balderas relief. The

Court of Criminal Appeals adopted the trial court's findings of fact and denied Mr. Balderas relief, stating it in its unpublished opinion that Mr. Balderas failed to present sufficient evidence to support his claims.

II. TRIAL PROCEEDINGS

On April 12, 2006, a grand jury indicted Mr. Balderas of capital murder for intentionally causing the death of Eduardo Hernandez in the course of committing or attempting to commit a burglary of a habitation. 1CR3.[1]¹ Nearly eight years after indictment, voir dire commenced on January 13, 2014, and concluded on February 7, 2014. 4-21RR. On February 12, 2014, the trial court held a hearing on Mr. Balderas's motion for speedy trial. The court denied Mr. Balderas's motion that same day. 22RR. Mr. Balderas was arraigned on February 17, 2014, and he entered a plea of not guilty. 24RR11.

During the guilt/innocence phase of Mr. Balderas's trial, the State presented evidence that Mr. Balderas was a member of La Tercera Crips ("LTC"), a local gang based in Southwest Houston. The State's theory was that Mr. Balderas killed Eduardo "Powder" Hernandez, a member of LTC, in retaliation for Hernandez snitching on Israel "Cookie" Diaz, an older member of LTC. Diaz had been incarcerated along with Mr. Balderas since December 2005. Diaz was also facing capital murder charges on a different case. 26RR121. On the eve of Mr. Balderas's

¹ The Clerk's Record from the trial is abbreviated as "CR"; the Reporter's Record from the trial is abbreviated as "RR"; the State habeas proceedings is abbreviated with the volume number "SHRR"; the Evidentiary Hearing is abbreviated as "EH".

trial, Mr. Diaz secured a plea deal with the state, wherein the State reduced Mr. Diaz's capital murder charge to aggravated robbery in exchange for Diaz's testimony against Mr. Balderas at trial.

The State presented evidence through Israel Diaz that Eduardo Hernandez had encountered problems with the LTC gang when he snitched on Diaz. 26RR139-41. The LTC called a meeting in December 2005 to discuss how to handle the Hernandez issues. During the meeting it was decided that Hernandez would be killed. 26RR153-54.

On December 6, 2006, Eduardo Hernandez was shot and killed, just before 10 p.m., when a man in a black hoodie entered the apartment where Hernandez was staying and shot Hernandez several times. 24RR124-26, 244-46. Only one of the three other people in the apartment, Wendy Bardales, claimed to have seen the shooter's face. 25RR186-88. On the night of December 6, 2005, Bardales told police she had never seen the shooter before. 26RR55. On December 12, 2005, during a police photo lineup, Bardales, pointed at Juan Balderas, indicating he looked like the shooter. Bardales did not indicate she knew Mr. Balderas, despite knowing him before the shooting. 26RR13-17. The police went back to speak with Bardales on December 13, 2005, and it was during the second photo lineup that Wendy claimed she was able to identify Mr. Balderas as the shooter. 26RR68-71.

Israel Diaz also testified that on the night Hernandez was shot, shortly after the shooting, Diaz and other LTC members, including Alejandro Garcia, were standing outside the apartment complex where Hernandez lived, when Mr.

Balderas approached the group, hugged everyone individually, gave Diaz a kiss on the cheek, and told Diaz he “finally got him,” referring to Hernandez. 26RR156-161.

The State also presented to the jury that on December 16, 2005, Juan was arrested with another LTC member outside of Mr. Balderas’s apartment. In close proximity was a green box and black bag containing a variety of weapons, including one that was later tied to the homicide.² 25RR212.

The defense case at the guilt/innocence phase consisted of only three witness: a crime scene investigator, Jeff Crusier, to tell the jury how many bullets were recovered at the scene; the Houston police officer who took a statement from Wendy Bardales on the night of the shooting; and Walter Benitez, a member of the LTC gang. Benitez testified that Victor Arevalo, the leader of LTC in 2004 and 2005, had killed Eduardo Hernandez. 28RR143, 225-27. Diaz had called an LTC meeting three days before Hernandez was killed to deal with Hernandez snitching on Diaz. 28RR161. At this meeting Diaz was trying to get the “green light” from Arevalo to kill Hernandez. 28RR169. Mr. Balderas told Arevalo not to give the green light for Hernandez to be killed, but Diaz did not want to take the risk. 28RR172-73.

² Regarding the alleged murder weapon, in its opinion denying relief, the TCCA stated that Mr. Balderas was arrested in possession of the murder weapon. AppA. The record reflects, however, that the green box and black bag containing various weapons, including the one later tied to the homicide, were brought to the location of Mr. Balderas’s arrest earlier that day by someone else, Victor Arevalo, who admitted to murdering Mr. Hernandez and showed the gun he used to kill the decedent to a third person. 24RR214-15; 28RR136-231. Post-conviction counsel obtained affidavits from additional witnesses that attest to Mr. Balderas not being the individual who shot and killed Eduardo Hernandez, and who also explain that Mr. Balderas’s role in the gang was holding on to and transporting the gang’s guns. Mr. Balderas was denied the opportunity to present these affidavits and/or testimony at his evidentiary hearing. 4EH280-297. In its opinion denying relief, the TCCA ignored the evidence pointed out from trial regarding the murder weapon, and then did not allow post-conviction counsel to introduce additional evidence demonstrating this falsity, before finding this inculpatory fact. *See* AppA.

On December 16, 2005, Arevalo went to Benitez's house and offered him a gun for Benitez's protection. Arevalo took the gun from a green box similar to the green box in Mr. Balderas's proximity when he was arrested. Arevalo was carrying a .40 Glock handgun, and another LTC member, "H" was carrying a .357 Barretta. Benitez testified that his understanding was that they were going to drop all the guns off with Juan Balderas. 28RR181-82.

The jury deliberated for approximately fourteen hours before indicating to the court that it was deadlocked. Trial counsel moved for a mistrial and the court denied the motion. The court gave the jury an Allen charge. 31RR20-24. After several more hours of deliberations, the jury returned a guilty verdict on February 27, 2014. 32RR10.

Punishment phase began the same day the guilty verdict was rendered. 33RR6-10. During the punishment phase of trial, the State attempted to tie Mr. Balderas to four extraneous offenses: three other murders and a shooting in which several LTC members were also implicated. The State argued that the .40 caliber weapon and a .357 discovered when Mr. Balderas was arrested were used in those crimes.

The State also presented the testimony of Alejandro Garcia who testified that Mr. Balderas was involved in two of the extraneous murders³ Alejandro Garcia was

³ On August 20, 2018, four and a half years later, the State disclosed that in December 2013, prosecutors met with Alejandro Garcia on two separate occasions and on both of those occasions, Garcia gave exculpatory information. On December 12, 2013 Garcia stated that at school, Eduardo "Powder" Hernandez's brother told Garcia that MS had killed Hernandez. On December 19, 2013, Garcia stated that he did not suspect that Mr. Balderas killed Hernandez; that Mr. Balderas did not tell Garcia he had killed Hernandez and that Garcia thought MS killed Hernandez.

also arrested the same day as Mr. Balderas. Alejandro Garcia was charged with capital murder in one of the extraneous offenses the State presented against Mr. Balderas. 34RR50-51. Garcia was offered a plea deal in exchange for his testimony against Mr. Balderas. Garcia pled to aggravated robbery one week before he testified in Mr. Balderas's case, and testified as he awaited sentence. The range of his sentencing exposure was as incredibly broad: depending on what the State recommended based on his testimony against Mr. Balderas, he faced anywhere from probation to life in prison. 34RR155-57. The State rested its punishment case on March 5, 2014. 33RR11-37RR169.

The defense case at the punishment phase touched on the childhood sexual abuse Mr. Balderas suffered from his stepfather, and the early abandonment Mr. Balderas experienced from his mother. Mr. Balderas's mother testified that she sent Mr. Balderas to live with her family in Mexico for approximately one year when he was eight or nine years old. 28RR41-109. Two of her relatives from Mexico attempted to testify via Skype and to offer mitigation evidence relating to Mr. Balderas's life history, but their testimony was cut short due to repeated technical difficulties. 39 RR7-24, 35, 110-12, 173-76, 194-95.

Expert testimony about the sexual abuse that Mr. Balderas suffered from his stepfather was also presented, 38RR125-83; 39RR37-108, as well as the overall trauma that Mr. Balderas suffered in his youth and how it likely impaired his development. 41RR251-71; 42RR6-95. The jury deliberated for a day and a half before returning with the verdict of death: answering "Yes" to Special Issue One,

the future dangerousness determination, and “No” to Special Issue Two, concerning the existence of mitigating factors that would render a life sentence. 44RR9.

III. STATE POST-CONVICTION PROCEEDINGS

A. State Habeas Investigation and Allegations

Following trial, the trial court appointed the Office of Capital and Forensic Writs (OCFW) to represent Mr. Balderas in post-conviction habeas litigation. Mr. Balderas filed his Initial Application for Writ of Habeas Corpus (“Application”) on August 28, 2015. SHR2. While Mr. Balderas’s post-conviction proceedings were pending, the TCCA affirmed Mr. Balderas’s conviction and death sentence. AppE.

The prosecution’s trial case was largely circumstantial and based on the testimony of biased, interested witnesses, yet the jury clearly struggled with the decision before them. Post-conviction investigation uncovered significant evidence that was not presented at Mr. Balderas’s trial that calls into question the reliability of the verdicts.

First, post-conviction counsel discovered through an interview with Mr. Diaz that Diaz never told prosecutors that Mr. Balderas confessed to killing Eduardo Hernandez. Diaz committed to the story of Mr. Balderas’s alleged confession, the day before Mr. Balderas’s trial started in exchange for a plea deal where Diaz’s capital murder charge was reduced to aggravated robbery. Diaz’s recantation was independently corroborated by the prosecutors’ notes which were included in *Brady* material that post-conviction counsel uncovered in its investigation. Post-conviction counsel also uncovered compelling alibi evidence that the jury never heard. Two witnesses, Anali Garcia and Octavio Cortes, independently recalled that Mr.

Balderas spent the afternoon and evening of December 6, 2005 with them at their family's apartment, such that he could not have shot Eduardo Hernandez.

Post-conviction counsel also learned of the inner workings of the Alief branch of the LTC at the time Mr. Balderas was involved with the gang. Post-conviction counsel obtained an affidavit from Jose "Pepe" Perez, a "knowledge keeper" or intelligence officer for LTC Alief in 2005. Jose Perez recalled in detail that Israel Diaz wanted Eduardo Hernandez dead and that Diaz and Arevalo planned to kill Hernandez and place the blame on Mr. Balderas. Jose Perez attested that Arevalo confessed to the shooting in detail to Perez. Post-conviction counsel also obtained three affidavits that revealed that Wendy Bardales, the sole eyewitness, had been in an ongoing, intimate relationship with Diaz in the year leading up to the shooting. An additional affidavit from a woman, Celeste Munoz indicated that in the year before the Hernandez shooting, Wendy Bardales had a previous encounter with Mr. Balderas at his home, where Mr. Balderas kicked her out of his home because Wendy Bardales was associated with a rival gang.

Post-conviction counsel also obtained affidavits from Jose Perez and Efrain Lopez, two former LTC members who Diaz had claimed were with him and Alejandro Garcia at the crime scene when Mr. Balderas supposedly confessed to Diaz. Both Perez and Lopez attested that they were not with Diaz and Garcia on the night of Hernandez's shooting.⁴

⁴ The habeas court did not allow Mr. Balderas to impeach Diaz at the evidentiary hearing with Perez's and Lopez's sworn statements. The habeas court did not allow Mr. Balderas to introduce these sworn affidavits into evidence. 4EH280-297.

Post-conviction counsel alleged that the pre-trial identification procedures were highly suggestive and violated due process. Eyewitness identification expert Dr. Roy Malpass provided a post-conviction affidavit detailing numerous defects in Bardales's identification of Mr. Balderas, which a majority of the TCCA agreed were overly suggestive when this case was decided on direct appeal.⁵

Regarding the punishment phase, post-conviction counsel discovered that had trial counsel investigated they would have learned that Mr. Balderas had been in the process of distancing himself from the LTC for months prior to his arrest and that his attempt to do so angered other members of the gang. The LTC had a history of responding to perceived traitors by setting them up for crimes they did not commit. Post-conviction counsel obtained affidavits from several witnesses who believed the LTC had set up Mr. Balderas in response to Mr. Balderas attempting to leave the gang.

Post-conviction counsel also uncovered that in addition to the trial testimony concerning Mr. Balderas's sexually abusive stepfather and absent father, Mr. Balderas's mother was also highly unstable and absent in Mr. Balderas's life. In addition to the family members who were not able to adequately testify during trial because of technical difficulties, post-conviction counsel also interviewed and obtained affidavits from additional witnesses who all echoed the same sentiment:

⁵ On appeal, five judges agreed that the sole eyewitness identification in this case was tainted by an overly suggestive identification procedure. Four of those judges, however, allowed Mr. Balderas's conviction to stand because of the "totality of the circumstances" *See* AppE31 (concluding that the identification procedure "was suggestive, and perhaps impermissibly so:"). A fifth judge concluded that the identification was irretrievably and impermissibly tainted, and "observed that until [the TCCA] disallows tainted identifications based on suggestive photo spreads, as occurred in this case, Texas will continue to be a leader in the wrongful convictions of innocent people" *See* AppE36

Mr. Balderas had grown up in very violent and unstable environments, yet, Juan was a protector, who was trying to find a way out of the gang life he was living, and who constantly tried to help his family and friends also live better lives.

B. State Habeas Adjudication

Mr. Balderas pleaded a prima facie case of unconstitutional confinement and supported his allegations with affidavits and other evidentiary proffers. Upon meeting the pleading burden, Texas law provides for the mandatory procedure for the habeas court to resolve an applicant's legal claims. *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8-9. In Mr. Balderas's case, the habeas court, however, failed to follow this mandatory procedure.

In Texas, initial proceedings on a habeas application occur in the same court that presided over the trial. Once an application challenging a judgment imposing death is filed, the Texas Code of Criminal Procedure directs the habeas court to determine, based on the application and the State's answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist" and then "issue a written order of the determination." TEX. CODE CRIM. PROC. art. 11.071 § 8(a).

Section 9 of Article 11.071, entitled "Hearing," governs the proceeding when the habeas court determines that controverted, previously unresolved factual issues exist material to the legality of confinement. In that circumstance, the habeas court must designate by written order the issues of fact that are to be resolved and the manner by which the court will consider evidence to resolve those issues. *Id.* § 9(a). To resolve the issues, the court can hold a hearing appropriate to the case; the

statute authorizes the court to receive evidence via affidavits, depositions, interrogatories, live witnesses, and personal recollection. *Id.* Thereafter, a transcript of the hearing must be prepared, and the habeas court must order the parties to file proposed findings of fact and conclusions of law for it to consider no later than thirty days after the transcript of the hearing is filed. *Id.* § 9(d)-(e). The court must then make written findings of fact that are necessary to resolve the controverted facts and make conclusions of law based on those fact-findings. *Id.* § 9(e).

On August 5, 2016, Mr. Balderas filed a Motion to Designate Issues of Fact to be Resolved and Request for Evidentiary Hearing Under Article 11.071, Section 9(A). SHR1426. In his motion, Mr. Balderas argued that, in particular, his ineffective assistance of counsel claim required an evidentiary hearing to resolve the disputed factual issues between the proffers attached to his Application and those attached to the State's Answer. *Id.* Additionally, he argued that his claims of the State knowingly or unknowingly sponsoring false testimony and withholding exculpatory and impeachment evidence, in violation of due process, required resolution at an evidentiary hearing. *Id.* at 1432-34. The State filed State's Motion to Designate Issues on September 7, 2016, SHR1447, and Order for Filing Affidavits on September 7, 2016, SHR1460. In its filings, the State requested the habeas court to order the submission of trial counsel affidavits.

On September 16, 2016, Judge Guiney entered an order designating issues, designating Mr. Balderas's fourteen claims for further fact-finding and resolution.

AppD. On that same date, Judge Guiney also entered an order directing Mr. Balderas's trial counsel to submit affidavits responding to the allegations in Mr. Balderas's claims. SHR1462. Pursuant to that order, affidavits were due November 15, 2016. Trial counsel, Jerome Godinich and Alvin Nunnery submitted their affidavits on August 9, 2017 and August 11, 2017, respectively. SHR1485. Subsequently, the presiding judge lost reelection and a new judge took over. That Judge, however, was recused for bias. SHR1522. On December 28, 2017, yet another judge was appointed to preside over this case, Judge Wortham. On January 2, 2018, Mr. Balderas filed a renewed motion requesting a live evidentiary live hearing, which was granted in part. SHR1788. But two months later, without any legally meaningful change in circumstances, Judge Wortham adopted the State's proposed order for a more "narrowly tailored evidentiary hearing," limiting the controversy to just two conclusory issues: 1) whether the State either knowingly or unknowingly presented false testimony at trial through Israel Diaz and 2) whether trial counsel were ineffective for failing to investigate and present evidence of an alibi defense.

AppC. Apart from limiting the issues to be decided, the habeas court limited the evidence Mr. Balderas was permitted to introduce in support of his claims. As to the first issue, the court only permitted the testimony of Israel Diaz, and for the second issue, the court limited the evidentiary presentation to two specific witnesses.

AppC.

Four days before the evidentiary hearing was to begin in May 2018, the State disclosed voluminous information about Israel Diaz relevant to Mr. Balderas's

Brady claims requested by Mr. Balderas since 2015. Counsel requested a continuance to properly review the documents and media files disclosed, which the habeas court denied.

During the evidentiary hearing, the court severely restricted the ability of Mr. Balderas to present evidence to support his claims. Mr. Balderas sought to present trial counsel's testimony related to the ineffective assistance of counsel claims. The habeas court denied this request. Mr. Balderas also sought to present testimony from three additional witnesses who could support Mr. Balderas's claims of misidentification. The habeas court also denied this request. Mr. Balderas sought to introduce additional affidavits which would impeach Diaz's testimony at the evidentiary hearing; the habeas court denied this request. 4EH280-297.

On July 11, 2018, counsel for Mr. Balderas filed a motion to supplement the record and to expand the evidentiary hearing. SHR2251. Counsel for Mr. Balderas also asked for the opportunity to move affidavits and additional documents into evidence. SHR2268. The habeas court denied the request. Findings of Fact and Conclusions of Law were issued on June 20, 2018. SHR2844.

Notably, the habeas court did not allow Mr. Balderas to present any evidence in support of his claims, other than the witnesses it arbitrarily specified before the hearing began. While Mr. Balderas attached evidentiary proffers to his application in order to meet his pleading burden, the court never gave Mr. Balderas an opportunity to move these into evidence or present other evidence in support of his claims, and in so doing failed to provide Mr. Balderas the opportunity to present

any evidence post-filing other than the constricted evidentiary caricature proposed by the State. The habeas court adopted the State's proposed findings nearly verbatim, issuing them a day after the State submitted a Word format proposal per the court's request; using the same exact letterhead as the State's; using the same footnotes; and referencing to the same citations in the record. In fact, out of 317 of the trial court's findings of fact, 310 were verbatim the State's findings of fact, and *all* 64 of the trial court's conclusions of law were verbatim the State's conclusions of law, changing just seven words. *Compare* SHR2755 *with* SHR2844. In its findings, the habeas court relied upon the unopposed affidavits of Mr. Balderas's trial counsel, but none of Mr. Balderas's own proffers, because it refused counsel for Mr. Balderas the opportunity to move his affidavits into evidence. 4EH16-18, 280-297.

On August 20, 2018, two months after the habeas court recommended that relief be denied, the state disclosed that in December 2013, Harris County prosecutors had met with Alejandro Garcia on two occasions and Garcia had stated in these meetings that Eduardo Hernandez's brother told Garcia another gang, MS-13, had killed Hernandez; that Garcia did not suspect that Mr. Balderas had killed Hernandez; that Mr. Balderas had not told Garcia that he had killed Hernandez, and that Garcia thought MS-13 killed Hernandez. This exculpatory information undermined Israel Diaz's testimony at trial and at the evidentiary hearing.

Following Texas law, *see* Tex. R. App. P. 73.7, Mr. Balderas moved to remand to present additional evidence in support of his *Brady* and false testimony claims, and reopen the evidentiary hearing so that he might present evidence based on the

newly discovered exculpatory evidence. However, the TCCA never responded to Mr. Balderas's motion to remand to the trial court, instead, denying relief on December 18, 2019. Significantly, the TCCA's opinion denied relief on the claims for due process violations—the State's use of false testimony to obtain a guilty verdict and the State's failure to disclose *Brady* evidence—on the grounds that Mr. Balderas failed to support his claims with adequate facts.

REASONS TO GRANT THE WRIT

Mr. Balderas is due some amount of process in the adjudication of his state post-conviction proceedings. However, this Court has not yet reached the question of how much process must be afforded in a habeas applicant's "one bite at the apple" in capital state post-conviction proceedings. In this case, Mr. Balderas was not even afforded the statutory process mandated by Texas state law. Certiorari should therefore be granted to establish that in Mr. Balderas's case, the state court violated the minimal protections of due process in adjudicating his constitutional claims for relief.

While state courts are not constitutionally required to provide a mechanism for post-conviction review of a capital case, when a state provides one, those proceedings must comport with the Due Process Clause. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 416 (1986) (holding that Florida's competency-to-be-executed proceedings did not meet minimum due process requirements); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (holding that due process requires the effective assistance of appellate counsel when the state provides an appellate procedure).

Texas law provides for capital post-conviction review, and the meaningful opportunity to prove claims of unconstitutional confinement before neutral factfinders. Mr. Balderas, however, was denied even that opportunity, even though he pleaded a prima facie case for relief on the basis of fourteen claims.

Contrary to the requisites of procedural due process and fundamental fairness, the habeas court 1) deprived Mr. Balderas of the opportunity to present evidence in support of the allegations he raised and 2) denied him the ability to confront adverse evidence. Even though each of the fourteen issues raised by Mr. Balderas in his Initial Application were disputed by the State in its Answer, the habeas court only designated two severely narrowed issues and strictly limited Mr. Balderas's ability to present evidence and be heard on them.

Thus, certiorari should be granted to ensure that Mr. Balderas receives meaningful review of his constitutional legal claims, including his allegations of the State's use of false or misleading testimony and the violation of his Sixth Amendment right to the effective assistance of counsel. In deviating substantially from the mandatory statutory process governing habeas corpus applications in Texas, the state court proceedings adjudicating Mr. Balderas's claims failed to satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause. The result was unreliable fact-finding made without Mr. Balderas having had a fair opportunity to present evidence in support of his allegations or to challenge trial counsel's affidavits submitted on the State's request.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATE COURT ADJUDICATION VIOLATED DUE PROCESS AND WAS INADEQUATE TO RELIABLY RESOLVE MR. BALDERAS'S IMPORTANT CLAIMS AND PROTECT HIS RIGHTS

Texas law provides a mandatory statutory procedure for resolving constitutional claims alleged in an application for writ of habeas corpus. Accordingly, the Due Process Clause applies, and the Constitution demands that Texas's post-conviction procedures be applied fairly. In Mr. Balderas's case, however, the habeas court failed to follow Texas's mandatory procedures. The habeas court denied Mr. Balderas the opportunity to prove his allegations in several of his claims. In the two severely narrowed claims that the court did allow evidentiary development, it accepted evidence from the State but not Mr. Balderas, and did not allow Mr. Balderas to confront statements by adverse witnesses presented by the State in its response. Compounding the error, TCCA summarily adopted the habeas court's findings, making a premature merits determination on several Mr. Balderas's claims based entirely on his pleadings. Consequently, Mr. Balderas was deprived of a fair hearing and denied the due process protections this Court has previously recognized.

A. State Court Must Observe Due Process When Adjudicating Constitutional Claims Raised in a Post-Conviction Proceeding.

While a state is not required to provide a mechanism for a habeas applicant to collaterally attack a criminal conviction, when it does, the procedures employed must comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-

and, in particular, in accord with the Due Process Clause.”). Due process, at a minimum, requires notice and the opportunity to be heard in a manner appropriate to the nature of a case. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). This Court has repeatedly recognized that, “[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.” *Ford*, 477 U.S. at 411 (Marshall, J., concurring) (plurality opinion).

A fair hearing requires the opportunity to present evidence in support of constitutional claims and controvert adverse evidence. *See, e.g., Ford*, 477 U.S. at 413 (the state process that did not permit a death-sentenced person to present evidence relevant to his competence to be executed violated due process) (Marshall, J., concurring) (plurality opinion); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

This is particularly important in post-conviction cases because “[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.” *Townsend*, 372 U.S. at 312. Resolutions of disputed factual questions must be based on evidence that is admitted at a hearing before a judge. *Morgan v. United States*, 298 U.S. 468, 480-81 (1936). *See also Ford*, 477 U.S. at 413; *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Thus, while a hearing in the criminal post-conviction context may be less formal than a trial, *Ford*, 477 U.S. at 427 (Powell, J., concurring), and may not even require live testimony, a “hearing” at least requires that there be a formal process for admitting, objecting to, and

challenging the substance of evidence offered by a party. *See Goldberg*, 397 U.S. at 267 (“The hearing must be ‘at a meaningful time and in a meaningful manner.’”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *Cf.* 28 U.S.C. § 2246 (“On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”). Due process also requires that the parties are given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve. *See Goldberg*, 397 U.S. at 268 (“rudimentary due process” requires “an effective opportunity” to present one’s case, including “by confronting adverse witnesses”).

This Court has delineated basic due process requirements in specific state post-conviction contexts. In *Panetti v. Quarterman*, this Court explained that in competency-to-be-executed proceedings, “*Ford* requires, at a minimum, that a court allow a prisoner’s counsel the opportunity to make an adequate response to evidence solicited by the state court.” 551 U.S. 930, 952 (2007). Additionally, in *Ford*, this Court recognized that the absence of a neutral decision-maker, along with the prisoner’s inability to present evidence, rendered Florida’s competency-to-be-executed proceedings constitutionally infirm. *Ford*, 477 U.S. at 412-13; *see also Panetti*, 551 U.S. at 971-72 (“the Florida procedures required neither a neutral decisionmaker nor an opportunity for the prisoner to present evidence”).

Similarly, minimal due process protections, such as the opportunity to be heard and to present evidence, apply when a death-sentenced prisoner raises a claim of ineligibility for the death penalty. *See Blue v. Thaler*, 665 F.3d 647, 656-57 (5th Cir. 2011) (in proceedings on Eighth Amendment claim of ineligibility for death penalty on basis of intellectual disability, habeas petitioner is entitled to “a set of core procedural due process protections: the opportunity to develop and be heard on his claim that he is ineligible for the death penalty”); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (“there is no sound basis for concluding that such [due process] protections do not extend to other instances, such as [a] *Roper* claim” of ineligibility for the death penalty due to age). Even in the context of clemency, this Court acknowledged that “some minimal procedural safeguards apply to clemency proceedings.” *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272 (1998); *see also Wolff v. McDonnell*, 418 U.S. 539 (1974) (extending due process protections to civil rights actions raising basic constitutional rights).

It would be incongruous if those same protections did not apply to state post-conviction proceedings in which a death-sentenced prisoner is afforded his only opportunity to raise challenges to the constitutionality of his conviction and death sentence. Since the life and liberty interests at stake in state post-conviction collateral review are the same as—or even greater than—those at issue in claims of ineligibility for the death penalty and in clemency proceedings, it would be at odds with this Court’s prior holdings to determine that lesser due process protections apply. Yet, in this case, the habeas court’s fact-finding procedure violated these

basic tenets of due process and consequently was not adequate for reaching reasonably reliable results concerning Mr. Balderas's legal claims.

B. The Procedure Used to Dispose of Mr. Balderas's Habeas Claims Did Not Comply with the Texas Statute or Basic Due Process Protections as Articulated by This Court.

Although the Texas statute governing the adjudication of habeas corpus applications filed by death-sentenced prisoners in Texas may comply with the requirements of due process, the state court adjudication of Mr. Balderas's constitutional claims deviated substantially from the statutory process and certainly did not satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause. Where a state provides for a post-conviction process, it must apply the rules fairly. *See Evitts*, 469 U.S. at 401. Texas, here, did not.

1. The statutory procedure governing capital habeas applications in Texas creates a process that capital habeas applicants should be able to expect the state courts to follow

In violation of Texas Code of Criminal Procedure Article 11.071, Section 9, the habeas court did not designate multiple, controverted issues of fact material to Mr. Balderas's claims of unconstitutional confinement. Instead, the habeas court designated two significantly limited issues regarding factual innocence, and ignored the rest of Mr. Balderas's controverted issues of fact regarding constitutional violations of due process. The facts surrounding claims concerning the State's use of false testimony, ineffective assistance of counsel in both the guilt and punishment phases, extraneous influence of the jury, and racial discrimination are all disputed in this case. Yet, Mr. Balderas was denied an evidentiary hearing or post-filing

evidentiary development on any claims beyond the severely narrowed false testimony and alibi issues. The habeas court then short-circuited the requisite process by mischaracterizing the factual issues at hand, severely limiting the scope of the factual development, hand picking just two specific witnesses that Mr. Balderas was allowed to present in order to prove his case. The habeas court further denied Mr. Balderas due process by denying him the opportunity to confront statements by adverse and self-serving witnesses presented by the State in its response.

Mr. Balderas's only burden at the pleading stage was to allege specific facts, which, if true, might entitle him to relief. *See, e.g., Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011) ("Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief."); *Ex parte Armstrong*, No. WR-78,106-01, 2015 WL 7354084, at *2 (Tex. Crim. App. Nov. 18, 2015) (noting that the applicant had "alleged facts that, if true, might entitle him to relief"). There is no requirement that habeas applicants adduce "evidence." *See Medina*, 361 S.W.3d at 639.⁶ The State may then answer or rely on a general denial. *See* Article 11.071 § 7.

When an applicant pleads facts that, if true, might call for relief, and the State denies those allegations, these factual issues are "controverted." *See, e.g., Ex*

⁶ When applicants attach affidavits and other documentary proffers to pleadings, it is not for the purposes of seeking to have such "evidence" considered under Article 11.071, Section 9; rather, it is a prudential step to meet the pleading burden of alleging specific facts. *See Medina*, at 637-38 ("The 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.").

parte Carnes, 579 S.W.2d 249 (Tex. Crim. App. 1979) (holding the finding of the absence of controverted, previously unresolved facts material to the legality of confinement to be an abuse of discretion where applicant pleaded a cognizable claim and the State admitted none of the facts alleged). *See also Ex parte Ramirez*, No. WR-64076-01, 2006 WL 1173437 (Tex. Crim. App. May 3, 2006) (holding applicant alleged unresolved factual issues material to confinement requiring resolution where applicant alleged ineffective assistance of counsel due to a conflict of interest).

In this case, Mr. Balderas alleged facts that, if true, would entitle him to relief. The State answered denying Mr. Balderas's allegations, thereby controverting Mr. Balderas's factual allegations. Under Article 11.071, within 20 days of the State's answer, the Texas habeas court should have issued a written order identifying the controverted, previously unresolved factual issues material to the legality of Mr. Balderas's confinement. *See* Article 11.071 § 8(a). This, the habeas court did not do.

The habeas court's refusal to follow the statute and designate factual issues for resolution is striking because the State *conceded* the existence of disputed factual issues material to the constitutionality of confinement between Mr. Balderas's Application and the State's Answer. *See* State's Answer, *Ex parte Balderas*, Cause # 1412826-A (179th Dist. Ct. Harris Ct. July 18, 2016) ("Respondent denies the factual allegations made in the instant application"). Indeed, the State moved the habeas court to order that trial counsel to respond to six of Mr. Balderas's claims, including several IAC claims and his *Brady* claim. State's Motion for

Affidavits, *Ex Parte Balderas*, Cause # 1412826-A (179th Dist. Ct. Harris Ct. Sept. 7, 2016) (moving the habeas court for affidavits from trial counsel and requesting that trial counsel respond to Applicant's 3, 4, 6, 8, 9, 10 IAC claims). Such post-filing evidentiary development regarding these claims would have been entirely superfluous were there no disputed issues of material fact regarding these claims or had the claims not met a prima facie threshold.

At first the habeas court, under Judge Guiney, seemed to acknowledge that most of the claims were controverted and that Mr. Balderas had met his pleading burden in his Initial Application. *See* AppD (the court designated 14 grounds that were controverted). However, following the change in Judge, the habeas court severely narrowed the issues for factual development while also mischaracterizing the claims themselves. For example, regarding Mr. Balderas's guilt phase IAC claim in which trial counsel failed to investigate and present alibi evidence, the habeas court at first correctly framed this claim as a broad failure to investigate guilt phase issues by trial counsel. *Id.* at 1 ("Alleged ineffective assistance of trial counsel for failure to investigate and present alibi evidence, failure to investigate and present other evidence of innocence; failure to present testimony of an eyewitness identification expert; and, failure to investigate alleged outside influences and juror misconduct as grounds for motion for new trial.") However, following a status hearing, the habeas court adopted the State's proposed order verbatim, designating just two issues for further factual development. This turn of events changed the characterization of a wide-ranging IAC issue, narrowing it to just one clause of the

original claim, focusing instead on “whether trial counsel was ineffective for failing to investigate and present evidence of an alibi defense during the guilt/innocence phase of trial” AppC. Compounding upon these severe constraints, the habeas court then designated the exact two witnesses that Mr. Balderas could present in order to prove his IAC claim. *Id.* (“this Court will permit the applicant to present the testimony of Anali Garcia and Octavio Cortes limited to what these witnesses would have stated if called to testify during the guilt-innocence phase.”)

With respect to Mr. Balderas’s claims concerning the false testimony of Mr. Diaz, the State’s star witness, the habeas court continually narrowed Mr. Balderas’s ability to be heard, to the point of nonexistence. In his Initial Application, Mr. Balderas put forth two broad claims concerning Mr. Diaz’s false and misleading testimony, arguing that the State violated due process by obtaining a guilty verdict through the knowing use of false testimony under *Giglio* and *Napue* and through the use of false evidence under *Chabot* and *Chavez*. See SHR47; SHR55. The State disputed these claims; therefore, they were controverted. Nevertheless, the habeas court itself stated that the purpose of the evidentiary hearing on these claims was to look at “very narrow specific issues”, and to that end the court steered the focus of the hearing to whether Mr. Diaz was *presently* recanting his testimony. 4EH18; 4EH164, 216, 295. When Mr. Balderas attempted to ascertain at the hearing whether Mr. Diaz was pressured by the State concerning his testimony in Mr. Balderas’s trial, the habeas court instructed Mr. Balderas to “move along” several times prohibiting him the ability to be heard on necessary aspects of his

controverted claims, namely whether the State presented false testimony and evidence in obtaining the guilty verdict. 4EH130, 138, 147, 148, 160.

The habeas court's failure to designate clearly controverted factual issues which needed factual development and resolution—contrary to the procedure clearly outlined in Article 11.071—deprived Mr. Balderas the ability to be heard, and not only in the limited claims described above. Following the habeas court's narrowing, all other controverted issues fell away, including the State's reliance on false testimony, trial counsel's ineffective assistance for failing to investigate mitigating evidence, extraneous influence on the jury, and multiple *Brady* violations. Then the TCCA summarily adopted the habeas court's findings, making a premature determination on of the merits on several of Mr. Balderas's claims even though the habeas court did not allow him to expand the record beyond the allegations and evidentiary proffers of his pleadings. Consequently, Mr. Balderas was deprived a fair hearing on these claims and denied the due process protections this Court has previously recognized.

2. The Habeas Court Denied Mr. Balderas the Opportunity to Introduce Evidence in Support of His Claims, But Allowed the State to Introduce Adverse Evidence.

In state post-conviction, Mr. Balderas bore the burden of proof. To be granted relief on, for example, his claim of ineffective assistance of counsel, his burden was to prove, by a preponderance of the evidence, that trial counsel's performance was deficient and that he was prejudiced as a result. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). Despite having the burden of proof, Mr. Balderas was denied any opportunity to meet that burden; instead, the habeas court constrained him to

factual allegations and evidentiary proffers attached to his habeas application. The habeas court's refusal to permit Mr. Balderas to prove the allegations he made, contrary to the mandatory statutory procedure, violated due process. *Ford*, 477 U.S. at 413; *Panetti*, 551 U.S. at 952.

The sworn allegations in a habeas application and related evidentiary proffers are, simply, not evidence, and a habeas applicant cannot meet his burden of proof through mere allegations. *See, e.g., Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988) ("Even sworn allegations are not alone sufficient proof."); *Ex parte Evans*, 964 S.W.2d 643 (Tex. Crim. App. 1998) (same). By contrast, evidence is the proof submitted at a hearing opened pursuant to Texas Code of Criminal Procedure Article 11.071, Section 9(a).

The habeas court denied Mr. Balderas the opportunity to introduce evidence in multiple ways. Regarding Mr. Balderas's IAC claim, only one party, the State, was permitted to procure evidence specifically related to trial counsel's ineffectiveness through the affidavits supplied by trial counsel. While Mr. Balderas was able to present two alibi witnesses supposedly in support of this claim, these witnesses did not and could not adequately address how Mr. Balderas's counsels' representation fell below an objective standard of reasonableness as required by *Strickland*. *Strickland v. Washington*, 466 U.S. 668 (1984). Further, the habeas court denied Mr. Balderas the opportunity to interrogate the self-serving trial counsel affidavits that the State was permitted to introduce.⁷ This denial closed off

⁷ Trial counsel in Texas capital cases possess an inherent conflict of interest after a capital conviction. Texas Code of Criminal Procedure, Article 26.052(d)(1)(C) requires that capital counsel who are

Mr. Balderas's ability to question counsel about bias and poke holes in their purported strategy regarding the use of alibi witnesses during the guilt phase.⁸

Mr. Balderas's inability to present evidence on this claim is especially troublesome considering the right to effective assistance of counsel at trial is a bedrock principle in our justice system. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). To that end, this Court has taken affirmative steps to ensure that post-conviction review of ineffective assistance claims is "meaningful." *See Trevino v. Thaler*, 133 S. Ct. 1911, 1919 (2013) (finding that cause and prejudice for defaulted ineffective assistance claim may be established by a showing of ineffective assistance of state post-conviction counsel because Texas does not "afford[] meaningful review of a claim of ineffective assistance of trial counsel").

As alluded to in the above section, the habeas court not only denied Mr. Balderas the ability to present evidence, but also denied him the ability to choose which witnesses he could present to support his claims. While the habeas court is allowed to select the manner in which it hears evidence, the habeas court does not have the authority to choose the specific witnesses can be called. In the habeas court's Order Designating Issues, the court mandated which witnesses Mr. Balderas could call: "this Court will permit the applicant to present the testimony of Anali Garcia and Octavio Cortes limited to what these witnesses would have stated if

found to have rendered ineffective assistance must be removed from the list of capital-qualified counsel and are ineligible for capital appointments.

⁸ Mr. Balderas's inability to confront trial counsel is especially striking considering the brief and blanket statements that Jerome Godnich and Alvin Nunnery provided in their affidavits regarding the use of alibi witnesses. In fact, in his response to Mr. Balderas's IAC claim about alibi witnesses Mr. Nunnery never even addressed the alibi witnesses the habeas court chose to have testify at the Evidentiary Hearing. *See Godnich Aff. at SHR1471-72; Nunnery Aff. at SHR1487.*

called to testify during the guilt-innocence phase.” AppC. It is unimaginable that in another circumstance, for instance in a civil lawsuit or criminal proceeding, that a court would dictate what witnesses can be used to prove claims in this way. Constricting the ability to choose which evidence and witnesses in this way is especially disturbing in a death penalty case where the stakes are so high.

Further, the habeas court should not—and could not—have resolved the controverted factual issues relevant to the disputed claims without a live, contested hearing. The false testimony issue for which the credibility of the State’s key witness is at issue is the precise scenario that calls for live, adversarial testing at a hearing. The Fifth Circuit has recently noted, “[p]rocess matters”, especially for those sentenced to death, where “[t]runcated hearings and exacting strictures can squeeze the life from due process” *Panetti v. Davis*, 863 F.3d 366, 378 (5th Cir. 2017).

The habeas court deprived Mr. Balderas of agency over how evidence might be presented in support of his claims by limiting the evidence presented to only the self-serving evidence supplied by trial counsel who were not subjected to cross-examination and to the two alibi witnesses handpicked by the habeas court. When Mr. Balderas attempted to present evidence regarding the limited issue of whether the State’s informant, Mr. Israel Diaz was presently recanting his trial testimony, the habeas court denied Mr. Balderas of the opportunity to submit affidavits or live testimony from witnesses not included in his Initial Application that would have impeached the credibility of the State’s informant.

3. The State violated *Brady v. Maryland* at trial, and the TCCA compounded the error by denying Mr. Balderas the opportunity to be heard on and to present evidence in support of his claim even after the State finally disclosed compelling, long-suppressed exculpatory evidence during State post-conviction proceedings

Mr. Balderas's Initial Application included a claim addressing the State's violations of due process when it withheld exculpatory and impeachment evidence. Throughout post-conviction proceedings, Mr. Balderas consistently made repeated demands for exculpatory and impeachment evidence from the State. Mr. Balderas made demands for notes the State took when it met with its two informants, Israel Diaz and Alejandro Garcia. The interview notes taken with both of these witnesses demonstrated the inconsistency between their pretrial statements to the prosecution and their trial testimony. Israel Diaz testified during the guilt phase to an alleged confession Mr. Balderas made to Diaz in the presence of Alejandro Garcia and other LTC members. Alejandro Garcia testified during the punishment phase to Mr. Balderas's involvement in the extraneous offenses the State alleged Mr. Balderas committed. 26RR155-161; 34RR-35RR44. Both Israel Diaz and Alejandro Garcia were charged with capital murder and received reduced charges of aggravated assault right before Mr. Balderas's trial started in exchange for their testimony.

It was not until after the May 11, 2018 evidentiary hearing, and two months after the trial court submitted its findings of fact and conclusions of law, however, that the State finally disclosed exculpatory and impeachment evidence it had in its possession since 2013. Among the items of disclosure were two bombshells related to Alejandro Garcia. According to the State's disclosure, Alejandro Garcia told

prosecutors in 2013 that Juan Balderas was not the killer; that the victim's brother had informed him that the gang MS-13 had actually committed the killing; and—contrary to evidence presented at trial—Juan Balderas never made any statements confessing to the killing in his presence, a statement that completely undermined the trial testimony of Israel Diaz. No trier of fact has ever heard this evidence.

In his post-conviction application, Mr. Balderas alleged that Mr. Diaz provided false testimony and provided a sworn statement from an investigator to whom Mr. Diaz had recanted. In the stunted post-conviction evidentiary hearing, Diaz recanted his recantation, and the trial court discounted the testimony of Mr. Balderas's investigator. A few short months later, however, the State finally disclosed that Alejandro Garcia provided information that was inconsistent with Diaz's trial account of a confession—and consistent with the earlier recantation to Mr. Balderas's investigator. The TCCA, however, would not allow Mr. Balderas to present this compelling new evidence.

This case is strikingly similar to *Wearry v. Cain*, 136 S. Ct. 1002 (2016). Just as here, Mr. Wearry was convicted of capital murder and sentenced to death. As in Mr. Balderas's case, the State in *Wearry* relied on two informants, Sam Scott and Eric Brown who were also incarcerated at the time that they implicated Mr. Wearry. *Id.*, at 1004-1005. Just as here, both informants' accounts at trial were inconsistent from their original statements and both had changed their accounts multiple times. *Id.* Just like in Mr. Balderas's case, in *Wearry* the State withheld exculpatory evidence that could have been used to impeach the informants' testimonies,

including the inconsistent statements that they gave to police. *Id.* Just as in Mr. Balderas's case, the informants in *Wearry* had ulterior motives for providing false testimony, namely reduced sentences and personal vendettas against the defendant. The State had held the exculpatory evidence for years and was discovered only in state post-conviction investigation, exactly like in Mr. Balderas's case. One difference, however, between *Wearry* and the Mr. Balderas's case is that the State has, thus far, successfully obfuscated evidence of its misconduct, enabled by the denial of procedural due process to Mr. Balderas by Texas courts.

In Mr. Balderas's case, the previously withheld exculpatory evidence has never been heard. Given the similarity to *Wearry*, it is likely that if Mr. Balderas is given a fair opportunity to actually present evidence in support of his claims, his claims will be found meritorious. What this Court should not allow to stand is for Texas courts to compound one due process violation with another, by not letting Mr. Balderas into court with an opportunity to prove his claims.

4. The State Court Denied Mr. Balderas a Fair Hearing.

Mr. Balderas pleaded specific facts that, if true, entitled him to relief. Thereafter, Texas law mandated a particular procedure for adjudicating Mr. Balderas's legal claims. Yet the habeas court and the TCCA refused to follow Texas law and failed to provide him with the required due process, in violation of his rights under the Fourteenth Amendment. This case never progressed beyond the pleading stage, and Mr. Balderas had indisputably satisfied his pleading burden. *See Ex parte Medina*, 361 S.W.3d at 637. Consequently, the state courts made a premature

determination of the merits of his constitutional post-conviction claims without providing him the evidentiary proceedings required by state law.

In Mr. Balderas's case, no trier of fact ever heard live testimony from trial counsel or multiple witnesses who undermined the State's evidence against Mr. Balderas, including Alejandro Garcia or other alibi witnesses like Jose Vasquez and Efrain Lopez, as well as experts proffered to establish the weakness of the evidence presented by the State. Because Mr. Balderas's claims of false testimony, ineffective assistance of counsel, and extraneous influence of the jury were supported by the sworn affidavits of multiple witnesses, and because he was denied the opportunity to present this sworn evidence—or any other than the couple of witnesses arbitrarily selected by the court—in support of these claims, this Court should not further compound the constitutional violations by countenancing the process below.

Due process requires a fair playing field, where each party is granted the opportunity to be heard and the rules are evenly applied. Here, however, the habeas court applied entirely different rules for the State than it did for Mr. Balderas. In so doing, the habeas court deprived Mr. Balderas of due process.

In sum, in support of his habeas application and to meet his pleading burden, Mr. Balderas attached various sworn evidentiary proffers from potential witnesses. The State answered, controverting Mr. Balderas's factual averments. The statute was clear about what should have happened at this point: a written designation of controverted issues of fact material to the legality of Mr. Balderas's confinement and the opportunity to present evidence to prove his allegations in a hearing, thus

providing Mr. Balderas the opportunity to be heard, a touchstone of procedural due process. This did not happen. Instead:

- The habeas court initially issued an order designating fourteen issues pertaining to Mr. Balderas's habeas claims, however following a changeover in judges, but without a meaningful change in circumstances the habeas court instead allowed for only two extremely narrow and mischaracterized areas of factual development;
- The habeas court refused to provide Mr. Balderas any meaningful opportunity to present evidence in support of his allegations, relying instead on the self-interested predecessor counsel affidavits and a biased state witness;
- The habeas court denied Mr. Balderas the opportunity to challenge the self-serving affidavits;
- The habeas court handpicked the specific three witnesses that Mr. Balderas was allowed to present, denying Mr. Balderas agency over what evidence might be offered in support of his claim;
- The habeas court and the TCCA denied Mr. Balderas the opportunity to be heard on exculpatory evidence withheld by the State until after the evidentiary hearing had concluded;
- The habeas court and the TCCA denied relief to Mr. Balderas based on findings and conclusions that were drafted almost entirely by the State; and
- The habeas court and the TCCA denied relief to Mr. Balderas on the merits of multiple claims, notwithstanding the fact that Mr. Balderas had been denied the opportunity to introduce evidence in support of these claims.

When considered in the aggregate, the deviations from the statutorily mandated post-conviction procedure resulted in a fact-finding process that was arbitrary and demonstrably unfair.

The habeas court's unreliable findings flow directly from its deviations from mandatory statutory procedures for adjudicating habeas corpus applications in Texas. Had the court afforded Mr. Balderas the opportunity to prove his case, Mr. Balderas could have presented evidence and met his burden of proof.

Mr. Balderas's Sixth Amendment, Due Process, and other constitutional claims may or may not ultimately entitle him to relief from his death sentence. Regardless, he is at least entitled to a fair opportunity to prove that he was deprived of his constitutional rights during his death penalty trial and to an adjudication that complies with the mandated statutory procedure for disposing of habeas corpus applications. Otherwise, the procedures are no more than a sham, creating the illusion of process where none exists, and leading to the inescapable conclusion that death-sentenced persons in Texas cannot rely on the fair application of the statutory post-conviction procedural rules.

C. This is Mr. Balderas's Only Opportunity to Have a Court Review the Merits of his Constitutional Claims.

In the era of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the merits of constitutional claims are often barred from consideration by federal courts due to the narrowed scope of federal habeas review. As this Court has recently explained, AEDPA imposes "a complete bar on federal court relitigation of claims already rejected in state proceedings" except where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Put simply, AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Id.* at 103.

Moreover, as this Court has held, it is "virtually impossible" for *Strickland* claims to be raised and meaningfully considered on direct review in Texas. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). The state post-conviction proceeding is

therefore structured to be Mr. Balderas's first meaningful opportunity to raise and obtain judicial consideration of Texas's compliance with his right to effective counsel during his capital trial. *Id.* at 1920 (citing State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966, 977 (2006) (Guideline 12.2(B)(1)(d))). And because of AEDPA's introduction of preclusion into initial federal habeas corpus proceedings, *see* 28 U.S.C. § 2254(d), the state court post-conviction proceeding is likely also to be the *last* forum in which the merits of Mr. Balderas's Sixth Amendment claim would be considered by any court. *See, e.g., Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam) (finding preclusion to apply in federal habeas proceeding and accordingly "express[ing] no view on the merits of the underlying Sixth Amendment principle the respondent urges"); *Woods v. Donald*, 135 S. Ct. 1372 (2015) ("Because we consider this case only in the narrow context of federal habeas review, we 'expres[s] no view on the merits of the underlying Sixth Amendment principle'" (alteration in original) (quoting *Rodgers*, 133 S. Ct. at 1451)). *See also* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli (2015) ("Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a [federal] habeas petition as opposed to on direct appeal."). It is therefore essential that state courts afford a post-conviction process that is adequate for obtaining results reliable enough to vindicate the important constitutional rights that habeas corpus is supposed to safeguard—particularly critical in a death-penalty case. Additionally, in the overwhelming majority of criminal cases, a *certiorari* proceeding following

state post-conviction review is likely the only opportunity this Court will have to entertain the merits of Sixth Amendment claims.

CONCLUSION

Because Mr. Balderas may eventually be put to death without first having his habeas claims fairly and reliably adjudicated, and because this Court has not delineated the minimum safeguards that he and other capital habeas applicants should receive, this petition for writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

/s/ Benjamin Wolff
Benjamin B. Wolff, Director
Counsel of Record
Office of Capital and Forensic Writs
1700 North Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600

Counsel for Petitioner,
Juan Balderas