No.

IN THE

Supreme Court of the United States

JAMES CALVERT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Mr. Calvert, proceeding pro se, was made to wear a shock cuff and leg brace throughout his capital trial. Mid-trial, deputies activated the shock cuff, causing Mr. Calvert to scream. Though jurors were not in the courtroom at the time, they were in the hallway adjacent to it. Counsel interjected that he "highly suspected" jurors heard Mr. Calvert's screams.

On direct appeal, the Texas Court of Criminal Appeals held that "activating the shock cuff as a means to get Appellant to stand up when addressing the trial court violates due process." However, the court affirmed the conviction because there was "no evidence that the shock cuff's activation had a negative effect on the jurors' impartiality or the presumption of innocence." In state postconviction proceedings, Mr. Calvert alleged counsel was ineffective for failing to investigate and present evidence that jurors heard and were impacted by Mr. Calvert's screams. Despite Mr. Calvert's proffer from an alternate juror that she, while with other jurors, heard the screams, the postconviction court precluded Mr. Calvert from presenting evidence in support of his ineffectiveness claim.

The question presented is: Where a state's highest criminal court finds constitutional error but holds the record on direct appeal is insufficient to require reversal, does due process require that the state postconviction court afford the postconviction petitioner an opportunity to present the evidence in support of his attorney ineffectiveness claim?

RELATED PROCEEDINGS

Texas Criminal Proceedings
Texas 241st District Court (Smith County):

State v. Calvert, No. 241-1467-12 (Oct. 14, 2015) (state trial court proceeding).

Texas Court of Criminal Appeals:

James Calvert v. State of Texas, No. AP-77,063 (Oct. 9, 2019) (state appellate court decision on direct appeal).

James Calvert v. State of Texas, No. AP-77,063 (June 17, 2020) (state appellate court order denying motion for rehearing)

United States Supreme Court:

James Calvert v. State of Texas, No. 20-701 (May 17, 2021) (order and opinion respecting denial of certiorari).

Texas Post-Conviction Proceedings
Texas 241st District Court (Smith County):

Ex parte Calvert, No. 241-1467-12-A (July 22, 2021) (state habeas court postconviction proceeding).

Texas Court of Criminal Appeals:

Ex parte Calvert, No. WR-85,283-01 (Oct. 6, 2021) (state appellate court denying habeas petition)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RELATED PROCEEDINGS.................................... ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS AND ORDERS BELOW........................ 1

JURISDICTION.. 1

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED 2

STATEMENT OF THE CASE.................................. 2

Trial Proceedings.. 4

State Direct Appeal Proceedings 8

State Postconviction Proceedings 9

REASONS FOR GRANTING THE WRIT.............. 15

I. Certiorari Should Be Granted Because The Petition Presents An Important, Unresolved Question About The Minimum Due Process Required In Capital Postconviction Proceedings 18

A. This Court has held in other criminal postconviction contexts that states must afford defendants certain minimum due process protections. 19

B. Texas denies certain minimum due process protections in resolving post-conviction constitutional claims. 22

C. This case presents an excellent vehicle for resolving the question presented. 28

CONCLUSION 30

APPENDIX

APPENDIX A Postconviction Opinion of Texas Court of Criminal Appeals (October 6, 2021) 1a

APPENDIX B Findings of Fact and Suggested Conclusions of Law (241st Dist. Ct. of Smith Cnty. Tex. July 22, 2021) 5a

APPENDIX C Direct Appeal Opinion of Texas Court of Criminal Appeals (October 9, 2019) 131a

APPENDIX D *Calvert v. Texas* Opinion Respecting Denial of Certiorari Following Direct Appeal (May 17, 2021) 315a

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. Manzo,
380 U.S. 545 (1965).. 20

Ballinger v. Prelesnik,
709 F.3d 558 (6th Cir. 2013).............................. 27

Blue v. Thaler,
665 F.3d 647 (5th Cir. 2011)........................ 21, 27

Boddie v. Connecticut,
401 U.S. 371 (1971).. 19

Cullen v. Pinholster,
563 U.S. 170 (2011).. 27

Ellis v. Lynaugh,
873 F.2d 830 (5th Cir. 1989)............................. 26

Evans v. McCotter,
805 F.2d 1210 (5th Cir. 1986)............................ 26

Evitts v. Lucey,
469 U.S. 387 (1985)..................................... 15, 19

Ex parte Empey,
757 S.W.2d 771 (Tex. Crim. App. 1988)............ 24

Ex parte Evans,
964 S.W.2d 643 (Tex. Crim. App. 1998)............ 24

Ex parte Johnson,
811 S.W.2d 93 (Tex. Crim. App. 1991).............. 26

Ford v. Wainwright,
477 U.S. 399 (1986)...............15, 18, 19, 20, 21, 26

Glossip v. Gross,
576 U.S. 863 (2015).. 25

Goldberg v. Kelly,
397 U.S. 254 (1970).. 20

Hall v. Quarterman,
534 F.3d 365 (5th Cir. 2008).................. 20, 26, 27

Harrington v. Richter,
562 U.S. 86 (2011).. 2, 22

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992)... 18, 21

Morrissey v. Brewer,
408 U.S. 471 (1972).. 18

Ohio Adult Parole Auth. v. Woodard,
523 U.S. 272 (1998).. 22

Panetti v. Quarterman,
551 U.S. 930 (2007).. 21

Schriro v. Landrigran,
550 U.S. 465 (2007).. 20

Tercero v. Stephens,
738 F.3d 141 (5th Cir. 2013).............................. 21

Townsend v. Sain,
372 U.S. 293 (1963).. 18

Trevino v. Thaler,
569 U.S. 413 (2013).. 3, 16

Constitutional Provisions

U.S. CONST. amend. XIV, § 1 2

Statutes

28 U.S.C. § 1257 1

TEX. CODE CRIM. PROC. art. 11.071.....2, 10, 18, 23, 24

Other Authorities

Steiker et al., *The Problem of* Rubber-Stamping *in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous. L. Rev. 889 (2018).................... 26

INTRODUCTION

Petitioner James Calvert respectfully petitions for a writ of certiorari to review the denial of his application for habeas corpus by the Texas Court of Criminal Appeals in connection with his conviction and sentence of death.

OPINIONS AND ORDERS BELOW

The order of the Texas Court of Criminal Appeals denying the application for a writ of habeas corpus is unreported and reproduced at Pet. App. 1a-4a. The state district court's findings of fact and conclusions of law in connection with the application for writ of habeas corpus are unreported and reproduced at Pet. App. 5a-130a. The Texas Court of Criminal Appeals' opinion denying Petitioner's direct appeal is unreported and available at 2019 WL 5057268 and Pet. App. 131a-314a. This Court denied certiorari on May 17, 2021, with Justice Sotomayor issuing a statement respecting the denial of certiorari on direct appeal is available at 141 S.Ct. 1605 and Pet. App. 315a-319a.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on October 6, 2021. Pet. App. 4a. On December 30, 2021, this Court granted Petitioner's application to extend the time to file a petition for a writ of certiorari until February 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

The Texas Code of Criminal Procedure, art. 11.071, which provides in part:

> 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. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

TEX. CODE CRIM. PROC. art. 11.071, § 9(a).

STATEMENT OF THE CASE

The Antiterrorism and Effective Death Penalty Act ("AEDPA") recognizes "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 88, 103 (2011). Indeed, on account of AEDPA's barriers to evidentiary development and merits review in federal court, *see* 28 U.S.C. § 2254(d), (e), state post-conviction proceedings are designed to be the *last* and

only forum in which a prisoner may marshal evidence and secure merits review of his claims. But where state courts skirt the opportunities for factual development and merits review, particularly where they claim to have made factual determinations that could inoculate against later evidentiary development, due process demands the existence of some forum where a death-sentenced prisoner may present evidence and secure meaningful review of his constitutional claims.

In Texas, the first meaningful opportunity for a prisoner to raise and obtain review of an effective counsel of claim is in state postconviction. *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). Mr. Calvert was given no such opportunity. Despite the Texas Court of Criminal Appeals ("CCA") recognition on direct appeal that Mr. Calvert's due process rights were violated when court officials electrocuted him and caused him to scream out in pain, it recognized the lack of "evidence in the record [on direct appeal] that jurors heard Appellant scream." Pet. App. 154a-155a.

Trial counsel's inexplicable failure to investigate and present evidence jurors heard and were impacted by the screams was one of Mr. Calvert's central claims in postconviction. But the state postconviction court precluded Mr. Calvert from presenting the prejudicial evidence he contends was available to his trial attorneys. It did so notwithstanding Mr. Calvert's proffer of such evidence alongside his application. Instead, it denied him an evidentiary hearing or an opportunity to present actual evidence via affidavit. Perversely, the state postconviction court then relied on the absence of evidence that Mr. Calvert's electrocution had

any effect on the jury to deny his claim of ineffective assistance of counsel. Pet. App. 25a.

This case thus illustrates the adverse consequences of state courts refusing to uphold their end of the federalism bargain struck by the Antiterrorism and Effective Death Penalty Act.

The Petition should be granted, and the decision below should be reversed.

Trial Proceedings

Petitioner James Calvert was married to Jelena Sriraman. HR1 111.[1] The two divorced in 2010. *Id.* Ms. Sriraman had primary custody of their children and Mr. Calvert weekend and certain weekday visitation rights. *Id.* In 2012, Ms. Sriraman successfully petitioned to allow her and the children to move up to 500 miles away. *Id.* at 113. Mr. Calvert, already in a fragile state from several prior severe depressive episodes, would learn of this shortly before he was scheduled to take their children trick-or-treating. *Id.* at 124. On the evening of Halloween 2012, Mr. Calvert arrived to pick up the children but after Ms. Sriraman answered his knock at the door, an altercation ensued, and she was shot and killed. RR 128:59. Mr. Calvert was convicted of shooting his ex-wife and

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[1] The Reporter's Record from the trial is abbreviated as "RR"; the Clerk's Record from the trial is abbreviated as "CR"; the state habeas record transmitted July 28, 2021, to the CCA is abbreviated as "HR1"; the state habeas record transmitted July 23, 2021, to the CCA is abbreviated as "HR2", the state habeas record transmitted July 22, 2021, to the CCA is abbreviated as "HR3".

departing her home with the couple's four-year-old son. CR 25:5641. Mr. Calvert had no significant prior criminal record. HR1 130. He did, however, have a history of depression and severe mental illness. HR1 108.

After the shooting, the police soon found Mr. Calvert driving away with his son in the back seat. RR 139:87-88. One officer later testified that Mr. Calvert looked "dazed," was "[j]ust staring at us," and that "[n]ormally when people run from us, they don't just stare at you." RR-140:184. The officer testified that when Mr. Calvert was stopped and arrested, he "made a very conscious statement of '[j]ust don't shoot my child.'" RR 140:186.

Mr. Calvert, due to his indigent status, received appointed counsel Jeff Haas and Matt Cassell to represent him on charges of capital murder. CR 1:22, 63. From the start, trial counsel maintained a strained relationship with Mr. Calvert, who exhibited erratic and disturbing behavior and believed Mr. Haas "ha[d] already decided on what [Mr. Calvert's] fate [was] going to be." RR 5:22.

Mr. Calvert's frustrations with appointed counsel boiled over into a demand that he be allowed replacement counsel. When that request was denied, he reluctantly agreed to proceed pro se. RR 12:3. The trial court did not appoint independent counsel to advise Mr. Calvert on the wisdom of proceeding pro se or to assess Mr. Calvert's competency to represent himself in the most stressful of proceedings—a capital trial. Instead, the court's appointed expert Dr. Dunn issued a brief report which downplayed Mr. Calvert's

conditions and concluded he was competent to waive his right to counsel (though it did not further conclude he was also competent to represent himself). RR 14. Appointed counsel made no objection and did not ask any questions of Dr. Dunn. *Id.* Thus, despite Mr. Calvert's glaring mental health issues, he was allowed to proceed pro se. RR 14:64-65. In a concededly unprecedented move, trial counsel were then appointed as standby counsel. RR 14:81; 21:80 ("I've never seen this before in a capital murder case where the State's seeking the death penalty.").

Throughout the trial, Mr. Calvert was made to wear a shock cuff—a kind of electric collar capable of delivering a 50,000-volt electric shock upon the court's activation. RR 124:28. Though nominally for security, the trial court would later make clear: "I'm not talking a security threat. I'm talking about you listening to me. When the jury comes in, stand up. When you object, stand up. When the Court rules, sit down." RR 155:77.

During the trial's guilt phase, the court held a hearing shortly before which the jury had exited the courtroom but remained within earshot. During a substantive discussion regarding the direction of Mr. Calvert's recent questioning of a witness, the trial court instructed Mr. Calvert to "stand up," and the following exchange ensued:

> THE COURT: Stand up when you talk to the Court. All they need you to do is stand up when you talk to the Court. That's what lawyers do. They stand up. Mr. Haas, he's—

CAPTAIN CARAWAY: Stand up.

SGT. SHOEMAKER: I told you to stand up.

CAPTAIN CARAWAY: Stand up

(Shock bracelet [sic] activated on defendant.)

RR 155:221. Although the court transcript did not pick up Mr. Calvert's screams, news reporters present at the time contemporaneously indicated that Mr. Calvert had screamed for about five seconds—a fact further confirmed by the CCA's findings. Pet. App. 149a-151a. Likewise, standby counsel noted the scream, which no one disputed, and indicated they "highly suspect[ed]" the jury heard it as well. Pet. App. 147a.

In the aftermath of the shock cuff event, the trial court terminated Mr. Calvert's pro se representation and reappointed standby counsel as trial counsel. HR1 39. Despite the obvious necessity for doing so, trial counsel made no effort to ascertain whether jurors heard the screams. The Court acknowledged that it "of course, [could not] say how far up the hall . . . the jury went." RR 157:24. But Mr. Haas, who was newly reinstated as counsel and present when the jury left the courtroom and the shock cuff incident occurred, stated on the record: "God knows, if the jury, which I highly suspect, did hear the screams that Calvert let out after he was zapped." RR 157:167-17. Despite the court's and counsel's suspicions, counsel did not investigate. With no evidence before it, the court denied a mistrial motion in part because there was

"no evidence in this record to reflect in any way that any juror heard anything . . . ." RR 157:24.

Following the prosecution's closing, the jury returned a swift verdict finding Mr. Calvert guilty of "capital murder" "as charged in the indictment." CR 25:5641.

At the penalty phase, the prosecution marshalled 24 witnesses in support of a death sentence. HR1 19. Defense counsel called a single witness and failed to object to the prosecution's introduction of evidence concerning other inmates' violent activities. *See* Pet. App. 317a (Sotomayor, J., respecting the denial of certiorari on direct appeal) ("Calvert raises a serious argument that the State's reliance on a graphic instance of violence by an unrelated inmate to prove that he posed a future danger deprived him of his right to an individualized sentencing."). The jury then found that there was "a probability" that Mr. Calvert would commit criminal acts of violence that would constitute a continuing threat to society and insufficient mitigating circumstances existed to warrant a sentence of life imprisonment. CR 25:5707-08.

As a result of these and other serious errors, Mr. Calvert was sentenced to death. CR 25:5707-09.

State Direct Appeal Proceedings

On direct appeal, in addressing Mr. Calvert's constitutional claim arising out of his mid-trial electrocution, the CCA agreed with Mr. Calvert that "activating the shock cuff as a means to get Appellant

to stand up when addressing the trial court violate[d] due process." Pet. App. 152a.

However, the CCA affirmed the conviction on this point because "[a]bsent evidence in the record that jurors heard Appellant scream, [it would] not speculate that they did" and, therefore, there was "no evidence that the shock cuff's activation had a negative effect on the jurors' impartiality or the presumption of innocence." Pet. App. 154a-155a.

Mr. Calvert then filed a petition for writ of certiorari requesting that this Court review the CCA's decision on this and other points of error. His petition was denied. However, Justice Sotomayor wrote separately with respect to the denial on direct appeal, noting that "[a]lthough it may be appropriate for this Court to defer to the lower court's factbound prejudice determination… [i]f there could ever be an excuse for such violence, enforcing courtroom decorum would not be it." Pet. App. 317a. Justice Sotomayor also noted that, although his unrelated Eighth Amendment claim "[did] not meet the Court's traditional criteria for granting certiorari," it may also "implicate due process" and Mr. Calvert nevertheless "raise[d] a serious argument that the State's reliance on a graphic instance of violence by an unrelated inmate to prove that [Mr. Calvert] posed a future danger deprived him of his right to an individualized sentencing." Pet. App. 317a-318a.

State Postconviction Proceedings

Following conclusion of Mr. Calvert's trial, he obtained new counsel to represent him in postconviction

habeas litigation. Mr. Calvert filed his Initial Application for Writ of Habeas Corpus (the "Application") on November 1, 2018, advancing seven claims for relief. HR1 3-238. Of particular relevance, Mr. Calvert alleged that trial counsel unreasonably and prejudicially failed to demonstrate the jury was aware of, and was detrimentally affected by, the court's use of the shock cuff. HR1 65. Counsel had made no effort to ascertain whether the jurors heard the screams, despite trial counsel stating on the record: "God knows, if the jury, which I highly suspect, did hear the screams that Calvert let out after he was zapped…" RR 157:16-17. As it turns out, the jurors had. Alongside his Application, Mr. Calvert submitted a proffer in the form of a declaration by an alternate juror who stated that while situated with the other jurors after leaving the courtroom, she heard Mr. Calvert's screams. HR1 173.

The trial court, now sitting in its capacity as state habeas court to review the conviction it just entered, designated four claims for future resolution which concerned the ineffective assistance of counsel received, on grounds that "controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist." TEX. CODE CRIM. PROC. art. 11.071; *see also* HR2 320-21.

Mr. Calvert, however, would be given no opportunity to present evidence in support of his claims or confront the new evidence offered against him. Instead, what followed was a process that was both at odds with Texas' own statutory protocol and contrary to the minimum requirements of Due Process.

To begin, the State filed what it styled a "Preliminary Answer" to the Application in which it conceded that unresolved factual issues existed concerning claims one through four relating to the ineffective assistance of trial counsel. HR2 203-317.

Despite that, Mr. Calvert was denied an opportunity to put on evidence. Instead, the State proposed, and the court agreed, to limit the nature of the evidence the court would receive and manner in which the court would receive it. It moved the court to hold a "hearing" by ordering trial counsel to produce affidavits responding to the Application, after which the State would submit a "supplemental answer" incorporating such information. HR2 242-243.

The court then ordered an asymmetric hearing "by way of affidavit only" in which trial counsel (and only trial counsel) would submit affidavits responding to the allegations raised in the Application. HR2 320-21. Mr. Calvert objected to this procedure, HR2 381-417, and repeatedly moved the court to hold the required evidentiary hearing and permit postconviction production and discovery from the state.[2] In the alternative, Mr. Calvert requested that the court also afford him an opportunity to submit affidavits and thereby allow him to present the testimony he would have presented at an evidentiary hearing. HR3 214.

[2] Mr. Calvert would repeatedly move the court, over a two-year period, to hold the required evidentiary hearing and permit postconviction production and discovery, including on May 17, 2019, March 12, 2021, June 8, 2021, and June 11, 2021. *See* HR2 381-417; HR3 19-20, 210-213, and 214-224. The court would ignore all of Petitioner's motions below.

The court ignored those motions and never ruled on them.

Postconviction counsel uncovered during investigation the very evidence the Court of Criminal Appeals said was necessary to substantiate Mr. Calvert's allegations: evidence that jurors indeed heard Mr. Calvert's screams. *See* HR1 173-74. This initial evidence, in the form of a declaration by an alternative juror,[3] was included alongside Mr. Calvert's Application as a proffer of the evidence which could be adduced in support of one of Mr. Calvert's seven claims for relief. By its nature, the proffer suggested that other available evidence existed from more jurors which could be adduced in appropriate proceedings or at minimum, used as foundation for testing the decision by trial counsel to willfully blind themselves as to what the jury heard.

Mr. Calvert would be given no opportunity to present this or any other evidence in support of the grounds which both the State and court *agreed* raised controverted, previously unresolved factual issues. Instead, the court unquestioningly adopted the state's devised procedure.

In March 2021, trial counsel finally submitted their affidavits. The affidavits did not, however, resolve the controverted material issues. Indeed, as Mr.

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[3] Texas postconviction rules do not require the submission of affidavits alongside the application. Mr. Calvert did so to reinforce the necessity of evidentiary development—i.e., to demonstrate that though the allegations in his application should be sufficient to warrant a hearing, there were more.

Haas remarked in his statement, "There is an allegation that Trial Counsel was ineffective by refusing to turn over our mitigation reports to Mr. Calvert. I really have no memory of when or even if this happened." HR3 17. Other issues, such as counsel's ineffectiveness in failing to advance readily available defenses including that no burglary or kidnapping occurred—in light of Mr. Calvert's invitation to the home to take his child trick-or-treating—were omitted from counsels' affidavits entirely. *See* HR3 11-18, 23-27. This latter issue was particularly important in order for the State to establish *capital* murder, distinguished from murder for which the maximum penalty was life imprisonment. *See* HR1 51.

The State then moved the court to unseal certain *ex parte* records which—despite being available in 2019 during the State's initial answer—were now said to contain the last information needed to answer the Application. The court granted the motion, finding: "The Court ordered trial counsel to prepare affidavits in response to those grounds [concerning ineffective assistance]. Those affidavits have been filed with the Court and, while very helpful, they do not provide sufficient information regarding all of the allegations made against them by writ counsel." HR3 32.

On May 28, 2021, the State submitted proposed findings of fact and conclusions of law. HR3 105-165. In doing so, the State impliedly asked the postconviction court to deny Mr. Calvert the opportunity to present any evidence in support of his claims and deny him a hearing from which proposed findings could be drafted, as contemplated by Art. 11.071. Mr. Calvert renewed his outstanding motions for evidentiary

hearing and postconviction discovery. At a minimum, he asked that the Court set a date by which Mr. Calvert could submit his own proposed findings of fact and conclusions of law (despite the lack of any opportunity to present evidence or challenge the State's evidence) following the State's sua sponte submission. HR3 210.

Mr. Calvert shortly thereafter filed a full Motion for Relief for Violations of Art. 11.071 in which he requested seven alternative grounds for relief, including that the State's improper and untimely "supplemental" answer and proposed findings be struck and a hearing held concerning Mr. Calvert's Application. HR3 214-224. The habeas court again ignored Mr. Calvert's motions and issued no ruling on either. Facing the risk that the state court would consider Mr. Calvert's right to submit proposed findings waived and unquestioningly adopt the State's submission, Mr. Calvert then submitted his own proposed findings while maintaining his objection to the lack of process. HR3 230-282.

Soon thereafter, the Court adopted the State's findings of fact and conclusions of law verbatim. HR3 287-353. Perversely, these adopted findings then relied on the lack of evidence that Mr. Calvert's electrocution had any effect upon the jury's deliberations or their guilty verdict in denying Mr. Calvert's claim for ineffective assistance of counsel. The court reasoned, "The record remains the very same now as on appeal. There is still no evidence that any deliberating juror was actually aware of the second shock incident when deliberating guilt…." HR3 301.

The court then simultaneously ordered Mr. Calvert's Application be submitted to the CCA for decision, confirming Mr. Calvert would receive no opportunity to present evidence in support of his Application. HR3 353.

On October 6, 2021, the Texas Court of Criminal Appeals issued a short, four-page order in which it "adopt[ed] the trial court's findings of fact and conclusions of law" and denied Mr. Calvert's Application, asserting without any reasoned decision that "Applicant fails to meet his burden under *Strickland*…" and that the remaining claims were procedurally barred. Pet. App. 2a-4a.

REASONS FOR GRANTING THE WRIT

AEDPA enshrines federal respect for state habeas decisions; however, such deference is conditioned on the existence of a fair state habeas process that comports with due process. While state courts are not constitutionally required to provide a mechanism for postconviction review of a capital case, when a state provides one, those proceedings must comport with constitutional strictures, including 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).

In Texas, the first meaningful opportunity for a prisoner to raise and obtain review of an effective

counsel of claim is in state post-conviction. *Trevino v. Thaler*, 569 U.S. 413, 428 (2013). By its nature, the claim will not be capable of being raised during trial. And unlike other states, Texas makes it "virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim on direct review." *Id.* at 423 (internal quotation marks omitted). Thus, this Court concluded, "as a matter of its structure, design, and operation," the Texas procedural system "does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 428. Accordingly, "a writ of habeas corpus … is essential to gathering the facts necessary to evaluate ineffective-assistance-of-trial-counsel claims." *Id.* at 424 (alterations and quotation marks omitted). Thus, without adequate state postconviction review, the Sixth Amendment right to effective assistance of counsel lacks meaningful enforcement. That is, at least in part, because "[f]ederal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

Here, the state habeas court—which also sat as the trial court during the time Mr. Calvert's electrocution violated his due process rights[4]—denied Mr. Calvert procedural due process in the following ways: 1) despite recognizing that material, disputed issues

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[4] Pet. App. 152a-154a.

of fact concerning Mr. Calvert's ineffectiveness claims existed, it engaged in an asymmetric procedure which failed to provide Mr. Calvert with an opportunity to present evidence in support of his claims, 2) it further denied Mr. Calvert the opportunity to challenge adverse evidence, and 3) it did both while following a "process" unhinged from the Texas Code of Criminal Procedure which appeared designed to deny Mr. Calvert the opportunity to support his Application.

This case shows that Texas has developed a post-conviction that falls short of what the Due Process Clause demands and, in so doing, breached the federalism bargain struck by Congress in AEDPA. Indeed, if the State's representations below are accurate, the lack of process Mr. Calvert experienced is "a very common practice across [the] State." HR3 226. The case thus presents an important question with implications that extend far beyond the particular case.

Certiorari should be granted to resolve whether a state postconviction system violates Due Process were it purports to allow for meaningful postconviction review but, in application, precludes death-sentenced prisoners from presenting evidence to substantiate their claims. These concerns are particularly acute in Mr. Calvert's case, and manifestly displayed, where the direct appeals court previously concluded constitutional error occurred and Mr. Calvert made a proffer indicating that other available evidence exists to substantiate his claim.

I. Certiorari Should Be Granted Because The Petition Presents An Important, Unresolved Question About The Minimum Due Process Required In Capital Postconviction Proceedings

Due process requires that a habeas applicant be afforded certain procedural rights, including notice and the opportunity to be heard. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963) (finding the availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence."), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992); *see also Ford*, 477 U.S. at 413 ("[A] fundamental requisite of due process of law is the opportunity to be heard." (quotation marks omitted)). *Cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that parolees are generally entitled to, *inter alia*, the opportunity to be heard and present witnesses and documentary evidence, the right to confront and cross examine adverse witnesses, and a neutral and detached hearing officer). Thus, when the judiciary acts, the relevant question is not *whether* process is due but *what* process is due.

Texas law provides a mandatory statutory procedure for resolving constitutional claims alleged in an application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. art. 11.071. Accordingly, the minimum guarantees of the Due Process Clause apply, and the Constitution further demands that Texas's postconviction procedures be applied fairly.

In Mr. Calvert's case, however, the habeas court failed to afford Mr. Calvert the minimum

constitutionally required process and failed to follow Texas's mandatory procedures. Instead, the state court adopted the State's concocted procedure for resolving Mr. Calvert's claims over which material, disputed issues of fact existed. HR2 320-21. It denied Mr. Calvert the opportunity to prove his allegations and denied him the opportunity to confront statements by witnesses relied on by the State.

A. This Court has held in other criminal postconviction contexts that states must afford defendants certain minimum due process protections.

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, e.g., Evitts*, 469 U.S. at 401 ("[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, [it] has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford*, 477 U.S. at 411 (plurality opinion).

A fair hearing requires the opportunity to present evidence in support of constitutional claims and confront adverse evidence. *See, e.g.*, *Ford*, 477 U.S. at 413

(finding the state process that failed to permit a death-sentenced person to present evidence relevant to his competence to be executed violated due process) (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.").

While a hearing in the postconviction context may be less formal than a trial, *Ford*, 477 U.S. at 427 (Powell, J., concurring), 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))); *see also Hall v. Quarterman*, 534 F.3d 365, 389 (5th Cir. 2008) (Higginbotham, J., concurring in part) ("[T]he factfinder's burden of making the final determination 'based upon all of the evidence and determinations of credibility' cannot be met by a judge's credibility assessment of conflicting affidavits."). Indeed, in the federal postconviction context, "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

This Court has set out certain basic due process requirements in specific state capital postconviction contexts. In *Panetti v. Quarterman*, this Court explained that in competency-to-be-executed

proceedings, "[due process] 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) (finding that Texas failed to provide due process protections announced in *Ford*). Additionally, in *Ford*, this Court recognized that the absence of a neutral decisionmaker, along with the prisoner's ability to present evidence, rendered Florida's competency-to-be-executed proceedings constitutionally infirm. *Ford*, 477 U.S. at 412-13, 416; *see also Panetti*, 551 U.S. at 971-72 (Thomas, J., dissenting) ("[T]he Florida procedures required neither a neutral decisionmaker nor an opportunity for the prisoner to present evidence."). In most cases, "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a… jurisdiction to correct its own errors in the first instance." *Keeney*, 504 U.S. at 9.

Similar minimum due process protections, such as the opportunity to be heard, to present evidence, and to develop a claim before a neutral factfinder, 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) (finding habeas petitioner raising Eighth Amendment ineligibility claim was 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) ("[T]here is no sound basis for concluding that such [due process] protections do not extend to other instances, such as [a] *Roper* claim" of ineligibility due to age). This Court has also acknowledged,

even in the context of clemency, that "some minimal procedural safeguards apply to clemency proceedings." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

It would be incongruous if those same protections did not apply to state postconviction proceedings in which a death-sentenced person is afforded his only opportunity to raise challenges to the constitutionality of his conviction and death sentence. Further, AEDPA effectively imposes "a complete bar on federal[] court relitigation of claims already rejected in state proceedings," reflecting the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington,* 562 U.S. at 88, 102-103. It would be invidious if states, in the age of AEDPA, could purport to resolve a death-sentenced person's constitutional claims without adhering to such protections and effectively foreclose the claims' consideration by a federal court. *See Gonzalez v. Wong*, 667 F.3d 965, 1016 (9th Cir. 2011) (Fletcher, J., concurring) ("To hold that an improper state court denial of discovery necessary to develop a federal constitutional claim prevents a federal court from considering in the first instance evidence discovered during federal habeas unnecessarily binds the federal court to the inadequate factfinding of the state court.").

B. Texas denies certain minimum due process protections in resolving postconviction constitutional claims.

The state habeas court—which also sat as the trial court during the time Mr. Calvert's electrocution

violated his due process rights[5]—denied Mr. Calvert procedural due process in the following ways: 1) despite recognizing that material, disputed issues of fact concerning Mr. Calvert's claims existed, it engaged in an asymmetric procedure which failed to provide Mr. Calvert with an opportunity present evidence in support of his claims, 2) it further denied Mr. Calvert the opportunity to challenge adverse evidence, and 3) it did both while following a "process" unhinged from the Texas Code of Criminal Procedure which appeared designed to deny Mr. Calvert the opportunity to support his Application.

The Texas Code of Criminal Procedure sets out the mandatory process by which habeas corpus applications which challenge judgments imposing death are determined. *See* TEX. CODE CRIM. PROC. art. 11.071. Following the State's submission of an answer, the habeas court is required to determine "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." *Id.* § 8(a). "If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, … [t]o resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection." *Id.* § 9(a). As the statute itself contemplates, constitutionally, some meaningful mechanism must exist to resolve these evidentiary disputes.

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[5] Pet. App. 152a-154a.

Crucially though, even sworn allegations in a habeas application and related evidentiary proffers are not evidence. *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, 648 (Tex. Crim. App. 1998) (same). A proffer in connection with an application, while not required, instead goes to show whether disputed factual issues require resolution at a hearing. Evidence, then, is the proof admitted at a hearing pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 9(a).

In March 2019, the statutorily prescribed procedure quickly unraveled. HR2 203. The State called for a "hearing by … affidavit only" on the four constitutional claims alleging ineffective assistance of counsel, and further suggested that the State would file a "supplemental" answer once the affidavits were received. HR2 242-43. The habeas court adopted the State's asymmetric procedure and ordered Mr. Calvert's trial counsel to produce affidavits concerning his ineffectiveness claims so that it may hold a hearing "by way of affidavit only" on the designated claims raising material, unresolved factual issues.[6] HR2 320. Despite Mr. Calvert's multiple requests for an evidentiary hearing at which he could affirmatively present evidence in support of his claims and challenge any

[6] As the postconviction court itself acknowledged, the two affidavits did not "provide sufficient information regarding all of the allegations made against [trial counsel] by writ counsel." HR3 29. By way of example, Jeff Haas acknowledged, "I really have no memory of when or even if this happened," HR3 246 (Pet. App. 129a) and co-counsel Jason Cassel stated, "Admittedly, time may have dimmed my memory of certain details," HR3 24 (Pet. App. 112a).

statements by trial counsel, he was denied the opportunity. HR2 381-418; HR3 19-20, 210-213, 214-224. He was likewise denied his alternative request to submit affidavits of his own, as evidence, to substantiate his claims and challenge trial counsel's affidavits. HR3 214. In turn, the habeas court adopted the State's proposed findings and conclusions verbatim and sent the writ to the CCA for decision. HR3 287. Those findings provided for the denial of Mr. Calvert's claims in part because "[t]he record remains the very same now as on appeal. There is still no evidence that any deliberating juror was actually aware of the second shock incident when deliberating guilt…," HR3 301, despite his years-long pleas to be allowed to introduce that very evidence. HR3 214.

Mr. Calvert was thus denied due process in attempting to demonstrate the deprivation of his Sixth Amendment right to counsel. And it is not just Mr. Calvert whose rights are implicated here. The "use of the death penalty has become increasingly concentrated geographically." *See Glossip v. Gross*, 576 U.S. 863, 941 (2015) (Breyer, J., dissenting). Texas carries out the most executions of any State and is one of the three states responsible for approximately 80% of all executions in the United States. *Id.* at 941-43 (Breyer, J., dissenting). In other words, a significant portion of all state capital postconviction proceedings run through Texas courts before receiving any federal consideration. If the State here is correct that "it is a very common practice across [Texas] to order trial counsel to respond [to ineffectiveness claims] in the form of an affidavit" without an evidential hearing, HR3 226-27, there are grave concerns that Texas has and will continue to fall short of this Court's demand that, "[i]n

capital proceedings generally, … factfinding procedures aspire to a heightened standard of reliability." *Ford*, 477 U.S. at 411 (plurality opinion); *see also, e.g.*, *Ex parte Johnson*, 811 S.W.2d 93, 97 (Tex. Crim. App. 1991) (remanding to alternatively hold an evidentiary hearing or obtain affidavits). The problem is only worsened by the reality of postconviction proceedings in Texas generally: one analysis has found that postconviction judges adopt the State's proposed findings of fact and conclusions of law *verbatim* 96% of the time, while also unearthing several instances of postconviction judges signing findings before they have been filed or following *ex parte* communications with prosecutors.[7]

AEDPA has led federal courts to acknowledge, albeit implicitly, when state postconviction proceedings fall short of the constitutionally required process. For example, the Fifth Circuit in the pre-AEDPA context approved of such State tactics. *See, e.g.*, *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989) ("We have held that the denial of a state writ application on the basis of pleadings and affidavits constitutes an adequate 'hearing.'" (citing *Evans v. McCotter*, 805 F.2d 1210, 1214 (5th Cir. 1986))). Following AEDPA, it has recognized that when a state habeas court purports to hold a "paper hearing," and the CCA fully adopts those findings, "errors in the state court's factual findings [a]re not corrected when they reach[] the CCA." *Hall*, 534 F.3d at 370. Indeed, the Fifth Circuit in *Hall* reversed the decision below and ordered the federal

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[7] *See Steiker et al.*, *The Problem of* Rubber-Stamping *in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous. L. Rev. 889, 907 (2018).

district court to hold the full evidentiary hearing which the state court had failed to hold on petitioner's *Atkins* claim. *Id.* at 372.

The result above represents a shifting of responsibility to federal habeas courts to correct the lack of process which ought to have been afforded in state court. In the *Atkins* context, for example, "if a state court dismisses a prima facie valid *Atkins* claim without having afforded the petitioner an adequate opportunity to develop the claim, it has run afoul of the Due Process Clause, and that due process violation constitutes an unreasonable application of clearly established federal law that is sufficient to deprive the state court's decision of AEDPA deference." *Blue*, 665 F.3d at 656. However, a new hearing in federal court to rectify a lack of due process in state postconviction is not guaranteed and particularly threatened where, as here, the state postconviction court purports to have made factual determinations. *See Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013) (noting in the pre-*Atkins* context that "district courts are precluded from conducting evidentiary hearings to supplement existing state court records when a state court has issued a decision on the merits with respect to the claim at issue" (*citing Cullen v. Pinholster*, 563 U.S. 170, 184 (2011))).

Nothing about the factfinding below suggests that Texas reached a reliable judgment resolving Mr. Calvert's constitutional claims. In light of AEDPA, this Petition likely represents the last opportunity to address the failure of Texas habeas courts to adhere to the minimum standards of due process. It is only through this Court's intervention at this stage that

the recurring Texas postconviction errors may be corrected.

C. This case presents an excellent vehicle for resolving the question presented.

Mr. Calvert's case presents an excellent vehicle for addressing the minimum process due death-sentenced individuals in state postconviction proceedings. The underlying issue concerning juror exposure to Mr. Calvert's electrocution was squarely presented on direct appeal. The state's highest court found a federal constitutional violation. However, due to a lack of record evidence concerning the prejudice of that violation, the court concluded it could not reverse on the record before it.

Mr. Calvert, in preparing his postconviction habeas application, unearthed that very evidence. Though not required, Mr. Calvert submitted a juror declaration as a proffer to substantiate the existence of evidence—and need for evidentiary development—that would prove prejudice flowing from counsel's ineffectiveness. As soon as the State indicated it intended to preclude Mr. Calvert from presenting evidence to demonstrate the prejudice flowing from the constitutional violation, Mr. Calvert objected. He requested an evidentiary hearing or, at a minimum, an opportunity to submit written evidence. The State did not respond, nor did the postconviction court issue a ruling. Mr. Calvert later moved for a ruling on his request for a hearing. That too was ignored. He then asked *a third time* and was again ignored. After the trial court issued its findings and the case was transferred to the Court of Criminal Appeals, Mr. Calvert

moved *that court* to remand the case, explaining an evidentiary hearing was required to present evidence of prejudice. That motion was denied. Each of Mr. Calvert's filings clearly and unequivocally raised the constitutional due process set out in this petition.

The issue was thus squarely presented below and there is no procedural impediment to the Court's review. The petition provides the Court with an ideal opportunity to consider and resolve the question presented. The question is undeniably important given the implications for death-sentenced prisoners, particularly those in Texas. Certiorari is appropriate.

CONCLUSION

Due process demands a meaningful opportunity for a death-sentenced prisoner to put on evidence and confront the evidence against him during postconviction review. Mr. Calvert's case illustrates that Texas is prejudicially ignoring these constitutional strictures. This Court should thus grant certiorari and clarify the scope of due process protections during state habeas review.

Respectfully submitted,

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