No. 21-1090

IN THE

Supreme Court of the United States

JAMES CALVERT,
Petitioner,

vs.

STATE OF TEXAS
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Assistant Attorney General
Counsel of Record

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Represented by counsel on state habeas review, Calvert filed an application for writ of habeas corpus raising seven allegations for relief and supported by twenty-one exhibits. The application included the claim that trial counsel were ineffective for failing to demonstrate at trial that "the jury was aware of, and detrimentally affected by, the court's use of a stun belt." Petitioner's Appendix A, at 23a, #1. One of the proffered exhibits—a declaration of an alternate juror—supported his claim. *See* 1 SHCR 173. Pursuant to Texas Code of Criminal Procedure article 11.071, §9, the trial court designated the four ineffective assistance of trial counsel claims for future resolution, and ordered trial counsel to submit affidavits addressing those claims. 2 SHCR 320-21. Both parties submitted proposed findings and fact and conclusions of law for consideration by the court; the trial court adopted the State's proposed findings. The Texas Court of Criminal Appeals (CCA), based on its own review as well as the findings and conclusions of the trial court, denied relief. *See* Petition Appendix A.

Upon these facts, was Calvert provided sufficient and notice and opportunity to be heard on his ineffective assistance of trial counsel claim, as required by the Due Process Clause?

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BRIEF IN OPPOSITION

Petitioner James Calvert was convicted and sentenced to death for the capital murder of his ex-wife, committed in the course of committing or attempting to commit burglary or kidnapping. Calvert now seeks certiorari review of the denial of his petition for writ of habeas corpus by the CCA. However, Calvert is unable to present any special or important reason for certiorari review because he fails to demonstrate a violation of any federal constitutional right. Indeed, Calvert has no due process right to state collateral proceedings, thus any alleged error in those proceedings cannot serve as a basis for federal relief. And regardless, the state habeas court complied with the statutory requirements of Texas Code of Criminal Procedure article 11.071, §9 and provided Calvert with an opportunity to be heard on his postconviction claims. Calvert was entitled to nothing more. Certiorari review should therefore be denied.

I. FACTS OF THE CRIME

Calvert married Jelena in 2004, and within four years, they had two children together. *See* 129 RR 133; State Ex. 27. Over the course of their marriage, Calvert threatened to kill Jelena, and she became increasingly fearful that he would. 129 RR 38–40. They divorced in 2010. 129 RR 132–33; State Ex. 27.

In 2012, Jelena sought and obtained a change in custody, allowing her to move with the children to Houston. 128 RR 185–87; 129 RR 135. Twelve days later, after a series of phone calls and text messages from Calvert, Jelena told four people she was afraid Calvert was going to hurt her. 128 RR 142, 145; 129 RR 38–50, 83–84; 132 RR 143–69, 184; 135 RR 115–16. Shortly

thereafter, she was murdered. *See* 129 RR 65; 132 RR 142, 171–76; 137 RR 23; 158 RR 165.

The evidence showed that someone broke into Jelena's home,[1] and shot her six times in front of her and Calvert's then-four-year old son. *See* 128 RR 54–65; 132 RR 135; 153 RR 73; 158 RR 16–40. Jelena was shot first in the back, then after she fell, in the abdomen, arm, and, finally, the back of the head. 158 RR 110. Within minutes of the gunshots, a man who looked like Calvert was seen leaving her home carrying her and Calvert's son. 132 RR 73–83; 137 RR 23–35.

Calvert fled with his son, stopping at McDonald's restaurants along the way, to connect to WiFi to search Jelena's murder and related Amber Alerts. 138 RR 144–81; 139 RR 163–66; 159 RR 120–39; State Ex. 147. That evening, Calvert engaged the police in a high-speed chase in West Monroe, Louisiana. 139 RR 111–14, 145–47; 140 RR 22, 180–81; 141 RR 82–89, 120; 142 RR 90; State Exs. 149, 151, 157 164 & 165.

When the police finally caught Calvert, they removed the loaded murder weapon from his lap and physically extracted him from his car. 139 RR 164–66; 140 RR 168–69; 141 RR 89–96; 148 RR 97–98, 100–05, 113–14. Another fully loaded pistol was found on the floorboard in front of his son, and four more guns in the trunk. 140 RR 21; 141 RR 38–39, 96; 149 RR 40–45, 55–65, 72–76, 96–97, 129–30; 150 RR 46–47, 132, 133, 135, 138, 148, 153, 170, 179; 153 RR 90–92. Jelena's phone was also found in his car. 128 RR 153, 155; 142 RR 110; 153 RR 91.

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[1] 132 RR 109; 153 RR 71.

II. PUNISHMENT EVIDENCE

A. THE STATE'S PUNISHMENT CASE

During the punishment phase of trial, the State called twenty-four witnesses, twenty-two of whom testified to Calvert's character.

Thirteen Smith County jail employees testified about their experiences with Calvert. They described him as "irate and combative,"[2] "manipulative,"[3] "controlling,"[4] "difficult,"[5] "disrespectful,"[6] "aggressive,"[7] "verbally abusive,"[8] "non-compliant,"[9] "high risk,"[10] and "dangerous."[11] They supported their characterizations of him with specific experiences: For example, Calvert actively resisted officers' attempts to move him,

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[2] 162 RR 45; 163 RR 64.

[3] 162 RR 105, 131, 147; 163 RR 63.

[4] 162 RR 129, 131, 150; 163 RR 64; 164 RR 164, 174, 196.

[5] 162 RR 142; 163 RR 63, 65.

[6] 162 RR 148; 163 RR 27, 61, 64; 164 RR 215.

[7] 164 RR 208.

[8] 162 RR 70.

[9] 162 RR 70, 102, 143; 164 RR 164, 196, 208.

[10] 162 RR 102.

[11] 162 RR 105, 143; 163 RR 66; 164 RR 237.

requiring them to carry him. 162 RR 46, 70, 74, 78–80, 87–88, 103–04. He kicked his leg brace at a deputy, so that it hit the deputy. 164 RR 198–201. Calvert called the officers racial slurs and other names, got in their faces, threatened them, and ordered them around. 162 RR 69, 74, 88–98; 163 RR 10, 12–13, 36, 52–55, 64, 98; 164 RR 176–77, 190, 198–201, 224. He stole court exhibits. 163 RR 12. He had his family members send packages that appeared to be from Amazon, allowing him to bypass the jail's search policies. 164 RR 134–35. He was caught with a handcuff key and a razor blade, along with other dangerous contraband. 162 RR 29–34, 36–37, 101–02. On cross-examination, though, defense counsel elicited from jail personnel that Calvert did not assault anyone while awaiting trial. *E.g.*, 162 RR 114, 122; 163 RR 18, 82–83.

The State also called two of Calvert's ex-girlfriends and his first ex-wife. Calvert's ex-girlfriends testified generally to his controlling nature and misogyny. 165 RR 38–43; 167 RR 97–114. Calvert's ex-wife, Deidre ("Dee Dee") Adams, described him as "extremely intelligent" but "controlling" and "manipulative," with "an explosive temper." 165 RR 91. Dee Dee testified that Calvert threatened to kill her while holding a gun to her head and beat her until she could not move. 165 RR 100–02, 112–13.

Calvert's sister, Debbie Campbell, testified that she believed her brother was dangerous, 166 RR 94. She described him as "very intelligent, . . . controlling and manipulative." 166 RR 89. She was concerned he was going to "lose it" and "shoot people" before he did. 167 RR 54. Calvert called Debbie once, threatening to shoot his first ex-wife, Dee Dee and her family if they stepped

foot on his lawn. Calvert also made veiled threats to Debbie based on her decision to testify in his family proceedings, suggesting that Debbie would not see her nephew again or that something would happen to her sick husband. 166 RR 86; 167 RR 34.

Three of Calvert's acquaintances who befriended Jelena when she moved to Tyler also testified. They observed Jelena to be afraid of Calvert early on and tried to help her escape. *See e.g.*, 166 RR 52–54; 166 RR 56; 167 RR 130–31.

The State also called two mental health experts, Drs. Edward Gripon and Michael Arambula. Dr. Gripon observed Calvert's personality to be controlling, excessive, overly organized, rigid, and defiant. 167 RR 196. Because personality characteristics are often cemented by eighteen years of age, the doctor explained that Calvert's would likely follow him. 167 RR 201–02. The doctor also spoke to Calvert's history of, and treatment for, depression and anxiety, 167 RR 170–71, but explained that neither affected his ability to control his behavior. Dr. Arambula's conclusions were similar. 168 RR 17–126. He testified that Calvert had a severe personality pathology that would present special risks wherever he went. 168 RR 41–42.

Finally, the State called Warden Stephen Bryant and retired prison guard David Logan to testify to the prison environment and the opportunity for violence therein. Warden Stephen Bryant testified generally about the prison system and where Calvert would be housed in if he received a life sentence. 164 RR 65–73. Logan testified that attacks on prison guards were frequent and spoke of one he endured. 164 RR 12–13. After an inmate managed to free himself from his

handcuffs, 164 RR 25–26, he stabbed Logan in the eye with a pencil leaving Logan disabled and blind in that eye, 164 RR 28.

B. CALVERT'S CASE IN MITIGATION

In mitigation, Calvert called his first cousin, Jason Calvert, 169 RR 10. He and Calvert were very close as children and continued their relationship as adults. 169 RR 13–16. Jason testified that Calvert was a "great" father, 169 RR 18, albeit "ornery" like all of the Calvert men. 169 RR 30.

C. THE JURY INSTRUCTIONS AND VERDICT

Before submitting the special issues, the trial court twice instructed the jury to consider Calvert's circumstances and character to the extent that it mitigated against the death penalty. 171 RR 7, 11. Still, the jury found Calvert would probably commit acts of violence posing a continuing threat to society and no mitigating evidence warranted a life sentence. 171 RR 157–58. The trial court sentenced Calvert to death. 171 RR 166–67.

III. EVIDENCE RELEVANT TO THE SHOCK-CUFF INCIDENT.

Following a disagreement with his court-appointed trial counsel—Jeff Haas and Jason Cassel—Haas filed a motion to withdraw, advising the court that Calvert wished to represent himself. *See* 2 CR 79–80; 5 RR 9-12. The court denied the motion, leaving Haas and Cassel as counsel. 5 RR 24-28.

A year later, Haas again advised the court that

Calvert wished to proceed pro se, and Calvert again confirmed. 12 RR 3–4. After two hearings on Calvert's request, including expert examination and testimony, *see generally* 12 RR; 13 RR; 14 RR, and based on the expert's report, the judge's own communications with Calvert, and defense counsel's representations, the trial judge concluded that Calvert was competent to waive his right to counsel and represent himself. *See* 14 RR 80-83. The trial court appointed Haas and Cassel as standby counsel. 14 RR 81.

For security reasons, Calvert wore a leg brace that limited his mobility during some of the pretrial proceedings. *See* 38 RR 56-57. At a hearing on October 2, 2014, Calvert requested that the trial court utilize a shock cuff at trial instead of the leg brace. 38 RR 142–45. The trial court agreed to his request, 38 RR 143; 124 RR 28, but left security concerns up to the sheriff's department, 38 RR 148-49.

On one occasion prior to trial, Calvert refused to be handcuffed when it was time to return to jail, grabbing counsel table and stiffening his arms. *See* 162 RR 103–04, 122–23, 134–35. Unable to move his arms, officers activated his shock cuff, which finally allowed them to place handcuffs on Calvert. 164 RR 206-07. On another occasion, Calvert goaded one of the deputies about activating the shock cuff during the trial, saying: "I hope wearing this shock bracelet that I don't do anything in court to make you shock me." 164 RR 172.

During trial Calvert persistently behaved disruptively. In an effort to drag the trial out, *see* 146 RR 194–99, Calvert made constant objections to disrupt the State's presentation of evidence. *E.g.*, 148 RR; 149 RR; 150 RR. He repeatedly re-urged motions and reasserted

objections that the court had clearly denied and overruled and clearly denied and overruled again. *E.g.*, 151 RR 9–11; 154 RR 27-30, 39–40; 155 RR 43, 140, 145, 149

Calvert intended to introduce error into the proceedings. *See, e.g.*, 25 RR 119; 169 RR 92–93, 99. When the State agreed to withdraw evidence based on Calvert's motions to exclude, he turned around and attempted to introduce that very evidence to suggest that the State was hiding it. *E.g.*, 152 RR 77–78, 112–16; 153 RR 10–11; 155 RR 64–85. He raised issues in front of the jury after explicitly being ordered not to. *E.g.*, 146 RR 196–201; 154 RR 41–43; 155 RR 149. He disregarded the court when it sustained the State's objections. 152 RR 77; 155 RR 66–67. He misrepresented what the evidence he had would show to suggest the State had tampered with it. *E.g.*, 155 RR 11–13, 171–72. He falsely asserted that the court reporters were "under investigation." 154 RR 29–30. He falsely accused a witness of planting evidence. 155 RR 51, 189. He repeatedly misrepresented that he had not received discovery when the record showed he had. *E.g.*, 151 RR 81–82; 152 RR 132–33; 153 RR 110-20; 154 RR 9–19, 34, 36-39; 155 RR 183.

Calvert exhibited persistent disrespect for the trial court. He refused to answer the court's questions. 147 RR 74–80. He refused to stand when the court instructed him to do so. 147 RR 45, 73; 151 RR 104, 119, 143; 152 RR 60; 155 RR 145, 148, 163, 178, 221. He told the trial court that it did not do what it explicitly said that it just did. 151 RR 47; 154 RR 39–41. And he

repeatedly argued with and interrupted the court. 151 RR 89; 154 RR 15–16.

After about three weeks of enduring Calvert's trial behavior, the judge conducted a hearing outside of the jury's presence. The judge asked Calvert where he was going in his last cross-examination. 155 RR 221. Despite repeated admonishments to stand up when addressing the court, Calvert responded from his chair. The court instructed Calvert to stand up, and three times, deputies urged him to follow the court's order. 155 RR 221. When Calvert refused, a bailiff activated the shock cuff on his ankle, after which Calvert responded, "I'm sure the Court very much enjoyed that." 155 RR 221.

At that point, the judge, exasperated with Calvert's behavior, terminated Calvert's pro se status and reappointed Haas and Cassell as counsel. 155 RR 222–224; 156 RR 7-8. At a subsequent hearing outside the presence of the jury, trial counsel moved for a mistrial, citing a violation of Calvert's right to due process, and based in part upon the unnecessary shocking of Calvert and the possibility that the jury may have heard him scream. 157 RR 16-17. The trial court denied the motion, noting that the jury was out of the courtroom during the incident, the door was shut behind them, and there was no evidence in the record to reflect that the jury heard anything. 157 RR 24-26.

IV. PROCEDURAL HISTORY

Calvert challenged his conviction on direct appeal. Pertinent to the issue raised here, he asserted that the trial court violated due process when it allowed

him to be shocked during trial for his failure to maintain proper decorum. The CCA agreed that, under the circumstances, the activation of the shock cuff when he did not present an immediate security concern violated Calvert's right to due process. *Calvert v. State,* No. AP-77,063, 2019 WL 5057268, at *7-11 (Tex. Crim. App. Oct. 9, 2019), *reh'g. denied* June 17, 2020; Petition Appendix C, at 146-57a. However, the CCA nevertheless denied relief, concluding the error was neither structural nor harmful. Petition Appendix C, at 153-57a. This Court denied certiorari review. *Calvert v. Texas,* 141 S. Ct. 1605 (2021).

The CCA also denied relief on Calvert's state habeas application. The state court adopted the findings of fact and conclusions of law of the state trial court, *see* Petition Appendix B, at 5-130a, and, based upon those findings and conclusions and its own review, the court denied relief on all claims. *Ex parte Calvert,* No. WR-85,283-01, 2021 WL 4564314, at *2 (Tex. Crim. App. Oct. 6, 2021); Petition Appendix A, at 1-5a.

REASONS TO DENY THE PETITION

I. CALVERT FAILS TO JUSTIFY A GRANT OF WRIT OF CERTIORARI.

The question that Calvert presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." As shown below, no compelling reason exists to review this case.

And even if the Court was inclined to grant review, it need not do so in the instant proceeding

because Calvert has yet to seek federal habeas corpus relief. As Justice Stevens noted:

> Because the scope of the State's obligation to provide collateral review is shrouded in so much uncertainty, . . . this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

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

And while it will be more difficult for him to prevail during federal habeas review as a result of Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), such difficulty is not a compelling reason for granting certiorari review. AEDPA standards are "'difficult to meet[]' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to [. . .] to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Granting Calvert's request

would thus frustrate this clear purpose. This Court should therefore decline to allow Calvert to circumvent the AEDPA by granting his petition at this premature juncture—especially since Calvert's petition presents no important questions of law to justify the exercise of certiorari jurisdiction in the first place.

II. CALVERT HAS NO DUE PROCESS RIGHT TO STATE COLLATERAL PROCEEDINGS.

While recognizing that "state courts are not constitutionally required to provide a mechanism for postconviction review of a capital case," Calvert nevertheless insists that when a state court does provide a mechanism, those proceedings must comport with due process. Petition at 15.

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

And because Calvert has no due process right to the proceeding itself, he also has no due process right to the appointment of counsel during those proceedings. *Finley*, 481 U.S. at 555. Therefore, it stands to reason that, if Calvert has no constitutional right to collateral

review or to the effective assistance of counsel in those collateral proceedings, the state court's alleged failure to follow state statutory procedures in his collateral proceeding should also implicate no due process right.

More importantly, where a State allows for postconviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief). Indeed, as the Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

This is quite a different position from those situations involving the right to counsel on first appeal and the right to be free from cruel and unusual punishment, e.g., competency to be executed and intellectual disability. Because these rights are firmly grounded in the Constitution, any measures taken by the States to allow vindication of them will necessarily implicate due process. *See Brumfield v. Cain*, 576 U.S. 305 (2015); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Evitts v. Lucy*, 469 U.S. 387 (1985). But state court collateral proceedings do not implicate the constitution. For these reasons, Calvert's reliance on *Ford v. Wainwright,* 477 U.S. 399 (1986), and *Panetti* in this context is misplaced. *See* Petition at 15, 19-22.

Nor did *Martinez v. Ryan,* 566 U.S. 1 (2012), and *Trevino v. Thaler,* 569 U.S. 413 (2013), create any new due process right during collateral proceedings. *See* Petition 3, 15-16. Rather, *Martinez* carved out an equitable exception to the procedural bar of an unexhausted but substantial ineffective-assistance-of-trial-counsel claim in federal court where state habeas counsel failed to preserve the claim in the only available forum. *See Martinez,* 566 U.S. at 13-16. This problem does not exist here, as the claim was raised and adjudicated. For these reasons, Calvert is not entitled to certiorari review.

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

III. THE STATE COURT COMPLIED WITH TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.071 AND THE FOURTEENTH AMENDMENT.

Calvert argues that, because the CCA found constitutional error on direct appeal from the activation of a shock cuff but found the record insufficient to show harm, due process required that the state habeas court afford him the opportunity to present evidence in support his Sixth Amendment ineffective assistance of trial counsel (IATC) claim. Calvert argues that the state habeas court denied him his right to due process by

(1) failing to provide an opportunity to present evidence in support of his postconviction IATC claims; (2) denying him the opportunity to challenge adverse evidence against him; and (3) following a process on state habeas that was "unhinged" from the Texas Code of Criminal Procedure article 11.071 and which denied Calvert the opportunity to support his application for relief. Petition at 16-17, 22-28.

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

Regardless, the procedures utilized in Calvert's state habeas proceedings more than adequately complied with both due process and article 11.071. Indeed, article 11.071 does not mandate any method of collecting evidence and does not even require that an evidentiary hearing be held to allow evidentiary development. The habeas court's procedures thus did not deviate from the statutory requirements.

A. PROCEDURAL HISTORY OF THIS ISSUE.

On direct appeal, Calvert alleged that the trial court violated his rights to substantive and procedural due process by unnecessarily subjecting him to an electric shock during trial, but outside the presence of the jury. *See* Petition Appendix C, at 146-47a. The CCA

agreed that, under the circumstances, the activation of the shock cuff when Calvert did not present an immediate security concern violated his right to due process. *Id.* at 148a. However, the CCA concluded the error was neither structural nor harmful, in part because it was not done in front of the jury. *Id.* The CCA reasoned the error was harmless beyond a reasonable doubt and did not contribute to the conviction or punishment, *see* Tex. R. App. Proc. 44.2, because there was "no evidence that the shock cuff's activation had a negative effect on the jurors' impartiality or the presumption of innocence. The jurors were not present. Absent evidence in the record that jurors heard [Calvert] scream, we will not speculate that they did." Petition Appendix C, at 154-55a (internal footnotes omitted).

On state habeas review, Calvert complained that trial counsel were ineffective for failing to develop the record at trial to demonstrate that "the jury was aware of, and detrimentally affected by, the court's use of a stun belt." Petitioner's Appendix A, at 23a, #1 (citing Petitioner's Initial Application for Writ of Habeas Corpus, at 51). In support, Calvert offered the "Declaration of Kathryn Kennedy[12] Hopkins" who

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[12] The declaration was signed by "Kathryn Hopkins," with the name "Kennedy" crossed out and "Hopkins" written in. In fact, throughout the declaration and the state-habeas-court findings of fact and conclusions of law, the name "Kennedy" has a line through it. But, as noted by the state habeas court, no "Kathryn Hopkins" sat on Calvert's jury. The court assumed her to be Kathryn Kennedy, the alternate juror, but noted neither a Kennedy nor Hopkins took part in any deliberations during either phase of trial. Petition Appendix B, at 25a, #6.

served as an alternate juror in Calvert's trial. *See* 1 SHCR 173. Of relevance, Hopkins stated: "At one point during the trial, the other members of the jury and I were dismissed from the courtroom. We exited and went into the hallway. We then heard [Calvert] yelling loud enough for us to hear, although typically we could not hear what was going on in the courtroom while outside in the hallway." *Id.* Hopkins signed the statement, declaring it was "true to the best of [her] knowledge," but the statement is not sworn or notarized. *Id.* at 174.

In response, in its Preliminary Answer in Opposition to Application for Writ of Habeas Corpus and Designation of Issues, the State asked the trial court to "order a hearing by way of affidavits from [trial] attorneys Jeff Haas and Jason Cassel, responding to [Calvert's] allegations that he received ineffective assistance of trial counsel and **DESIGNATE** [Calvert's] Grounds for Relief 1-4 for future resolution." 2 SHCR at 243. The state habeas court thus ordered: "To determine the merits of [Calvert's claims that he received ineffective assistance of trial counsel], a hearing will be granted **by way of affidavit only** from [Calvert's] trial attorneys, Hon. Jeff Haas and Hon. Jason Cassel, addressing the claims of deficient conduct." 2 SHCR 320. The court designated the four IATC claims for future resolution, ordered Haas and Cassel to submit affidavits by a designated date, and ordered copies of the affidavits to be forwarded to Calvert, his counsel, and the State. 2 SHCR 320-21.

Ultimately, the state habeas court recommended denial of relief, finding Calvert failed to demonstrate that trial counsel acted unreasonably or that he suffered

prejudice. Petition Appendix B at 29a, #15; *see id.* at 23-29a, ##1-15. Despite Hopkins's declaration being unsworn, the court assumed it to be true but nevertheless concluded that it failed to establish that any other juror actually heard Calvert yelling, understood why he was yelling, or that allegedly hearing him yell "'detrimentally' impacted" the jury's deliberations. Petition Appendix B, at 24-25a, #5. At best, Hopkins heard him "yell" for unknown reasons, but Calvert had yelled on other occasions in court. Petition Appendix B, at 25a, #5; 168 RR 100-01. The court found that Hopkins does not claim that hearing Calvert yell "would have had a detrimental impact on her own verdict if she had deliberated[, and] there still remains no evidence that the second shock incident had any effect, much less a detrimental effect, upon the jury's deliberations or their guilty verdict." Petition Appendix B, at 25a, #7.

Relying on the CCA's finding of no structural or harmful error on direct appeal, the state habeas court concluded that the record did not support the *Strickland*[13] prejudice prong, noting that the "record

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[13] *Strickland v. Washington,* 466 U.S. 668, 687 (1984) (To prove a Sixth Amendment violation, petitioner must show (1) that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment," and (2) counsel's deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."); *Id.* at 694 (to prove prejudice, applicant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.)

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 and that it detrimentally impacted upon their verdict." Petition Appendix B at 28a, ##13-14.

Additionally, the state habeas court found "no evidence that trial counsel acted unreasonably after the second shock incident," as required by the first prong of the *Strickland*[14] analysis. Petition Appendix B at 26a, #8. Rather, both attorneys "faced a difficult strategic decision about whether to poll the jury and risk informing them about a negative incident that they may otherwise be unaware of before deciding guilt." *Id.*; *see also* 3 SHCR 15 (Affidavit of Jeff Haas); 3 SHCR 25 (Affidavit of Jason Cassel). The court concluded that counsel expressed a reasonable concern that polling the jury would negatively portray Calvert on an issue they were previously unaware of, and "Counsel made a conscious and strategic decision to not run that risk on the firmly rooted fact that the jury was not in the courtroom when the shock incident took place." Petition Appendix B at 27a, #10; *see also* 28a, #12. Instead, counsel made an unsuccessful motion for a mistrial based upon the incident. *Id.* Calvert failed to show trial counsel acted unreasonably. *Id.* at 29a, #15.

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[14] *Strickland,* 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (internal citation omitted).

B. CALVERT RECEIVED DUE PROCESS.

Calvert acknowledges that a state is not required to provide a specific mechanism to collaterally attack his conviction but argues that, when it does, that mechanism must comport with due process. At a minimum this requires notice and an opportunity to be heard. Petition at 19. To support this proposition, Calvert cites to this Court's "fair hearing" requirements for competency-to-be-executed claims under *Ford* and *Panetti*, and the "minimum procedural safeguards" applicable to clemency proceedings under *Ohio Adult Parole Auth. V. Woodard,* 523 U.S. 272 2389 (1998) (O'Connor, J., concurring). Petition at 20-22.

But no case specifically holds that the procedure applied by the state habeas court to Calvert's claims fails to satisfy due process requirements. In fact, the record plainly shows that Calvert was afforded due process's core protections. *Ford*, 477 U.S at 413 ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (federal habeas case extending core procedural due process protections to inmates seeking to prove that they are ineligible for the death penalty due to being underage, but noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted). In this case, Calvert had more than sufficient notice and the opportunity to be heard.

The statute applicable to state habeas applications by capital defendants provides for appointment of counsel and anticipates investigation and presentation of extra-record evidence on collateral review. *See* Tex. Code. Crim. Proc. art. 11.071, §3 (Investigation of Grounds for Application). In compliance with statutory requirements, attorney Katherine Treistman was appointed state habeas counsel, who, along with co-counsel James Stengel and Kristin Fournier, filed an initial writ of habeas corpus raising seven claims for relief, including the issue at hand. *See* 1 SHCR at 4-102. The application was supported by twenty-one exhibits, including the declaration of alternate juror Kathryn Hopkins. 1 SHCR 103-240. The state habeas court designated four issues for further review, as permitted by article 11.071, §9, and ordered affidavits from trial counsel addressing these claims. 2 SHCR at 320-21. Additionally, Calvert filed numerous motions for discovery and an evidentiary hearing, *see* 2 SHCR 381-418; *see also* 3 SHCR 19-20 (Motion for Ruling on Applicant's Motions for Evidentiary Hearing and Discovery), as well as motions objecting to the state habeas court's procedures, *see* 3 SHCR 210-24; and submitted his own proposed findings and fact and conclusions of law for consideration by the court, 3 SHCR 230-82. The CCA, based on its own review as well as the findings and conclusions of the trial court, denied relief in a reasoned opinion that specifically addressed the claim at hand. *See* Petition Appendix A, at 1-4a.

The Texas habeas system thus gave Calvert the means and opportunity to make claims, marshal evidence in support, and address the adverse evidence

adduced against him through his proposed findings of fact. Calvert now suggests that additional evidence might exist from "more jurors" to support his claim, had he been given the opportunity to develop it. Petition at 12. However, as noted, the applicable statute anticipates investigation and presentation of extra-record evidence on collateral review. *See* Tex. Code. Crim. Proc. art. 11.071, §3(a) ("On appointment, counsel shall investigate expeditiously . . . the factual and legal grounds for the filing of an application for a writ of habeas corpus."); §3(b)-(d) (providing payment for expenses, including expert fees, to investigate and present potential habeas claims). Habeas counsel was free to interview and obtain statements from the sitting jurors to be proffered in support of his initial application, just as they did with alternate juror Hopkins. The failure to do so is not the result of the state habeas court's refusal to hold a live hearing. Indeed, §3 anticipates that counsel will perform such investigations *before* the habeas application is filed. *See* Tex. Code. Crim. Proc. art. 11.071, §3(a), (b).

Regardless, the state habeas court assumed the truth of Hopkins's unsworn statement but found it insufficient proof than anyone else heard Calvert yelling, understood why he was yelling, or that the yelling had a detrimental impact on jury deliberations that began three weeks later. Petition Appendix B, at 24-25a. Evidence that a sitting juror also heard Calvert yell loudly, without any context, is no more compelling—the juror would also have no knowledge of why Calvert was yelling, nor should the isolated incident have impacted deliberations. Furthermore, additional evidence from jurors would only bear upon the prejudice

prong. As noted, the court also found no deficient performance based upon the affidavits of trial counsel explaining strategic reasons for not developing the record on this matter.

Calvert's inability to develop and present this evidence on his own does not demonstrate that he was denied notice or an opportunity to be heard. His right to due process was not violated.

C. THE STATE HABEAS PROCEEDING COMPLIED WITH ARTICLE 11.071.

Because the State agreed to the existence of controverted facts in the IATC claims, *see* 2 SHCR at 243, the state habeas court designated those issues for factual development and ordered affidavits of counsel—a decision consistent with the requirements of Texas Code of Criminal Procedure article 11.071, §9.[15]

Calvert argues that the state habeas court denied him his right to procedural due process by (1) failing to provide an opportunity to present evidence in support of his claims; (2) denying him the opportunity to challenge

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[15] Pursuant to §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.

adverse evidence against him; and (3) following a process that was "unhinged" from the Texas Code of Criminal Procedure article 11.071 and which denied Calvert the opportunity to support his application for relief. Petition at 16-17, 22-28. But Calvert fails to demonstrate that the state habeas court did not follow the statutory requirements of article 11.071, §9.

Calvert primarily complains about the state habeas court's decision to hold a "paper hearing" by affidavit only, where he had no opportunity to present his own witnesses and evidence, and no opportunity to cross-examine the defense attorneys. Petition at 24-25. But article 11.071, §9 does not mandate any particular procedure. Section 9(a) permits the court to designate the issues to be resolved, and the manner in which those issues will be resolved, and explicitly permits trial judges to resolve controverted, previously unresolved material facts by "affidavits, depositions, interrogatories, and evidentiary hearings, and may use personal recollection."

Indeed, the CCA has held that "Article 11.071 makes the habeas judge 'the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.'" *In re Harris,* 491 S.W.3d 332, 335-36 (Tex. Crim. App. 2016) (citing *Ex parte Simpson,* 136 S.W.3d 660, 668 (Tex. Crim. App. 2004)). This precedent "allots the trial judge a measure of discretion in managing the process of fact-finding in a capital writ proceeding." *Id.* at 336.

The state habeas court is not required to hold an evidentiary hearing, especially where the record is sufficient to resolve the issues. *See, e.g., Ex parte Simpson,* 136 S.W.3d at 663 (although advisable to have evidentiary hearing on intellectual disability claims, it is not necessary where applicant relies primarily upon trial testimony, both sides had opportunity to fully develop pertinent facts at trial, and habeas judge had opportunity to assess credibility and demeanor of witnesses at trial); *Ex parte Hines,* No. WR–40,347–02, 2005 WL 3119030, *1 (Tex. Crim. App. Nov. 23, 2005) ("While we have said that the better practice is to conduct a live hearing in cases such as this, . . . the evidence before the trial court was extensive and we did not specify that a live hearing was necessary when we remanded the case."). This was certainly true in this case where the same judge presided over the trial and state habeas proceeding, the issue was thoroughly briefed, the record from trial details the shock-cuff incident in question,[16] Calvert submitted a declaration from an alternate juror describing what she—and presumably the other jurors—heard, and trial counsel submitted affidavits detailing their recollection of the shock-cuff incident and strategic discussions regarding how to handle the incident. *See* Petition Appendix B, at

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[16] As noted, the trial court stated on the record, when denying the motion for mistrial, that the jury was out of the courtroom during the incident, the door was shut behind them, and there was no evidence in the record to reflect that the jury heard anything. 157 RR 24-26.

114-15a, #7 (Affidavit of Jason Cassel); *Id.* at 126-27a (Affidavit of Jeff Haas).

Despite Calvert's argument to the contrary, Petition at 26-27, on federal habeas review, the Fifth Circuit has "repeatedly found that a paper hearing [in state court] is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims." *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *Hines v. Thaler*, 456 F. App'x 357, 363 (5th Cir. 2011) (unpublished) (noting that "while a live evidentiary hearing may be recommended in some *Atkins*[17] cases in Texas, a thorough presentation of evidence at the state habeas proceeding can obviate the need for such a hearing"); *Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004) (presumption of correctness applies to state court fact findings made after "paper hearing"); *Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994) (finding that a hearing by affidavit was adequate to allow pre-AEDPA presumption of correctness to attach to the state court's factual findings); *see also Strong v. Johnson*, 495 F.3d 134, 139 (4th Cir. 2007) ("[C]redibility determinations may sometimes be made on a written record without live testimony. Specifically, there is no prohibition against a court making credibility determinations based on competing affidavits in certain circumstances."); *Tanberg v. Sholtis*, 401 F.3d 1151, 1161 (10th Cir. 2005) (a trial court's "determination of credibility of affidavits [will not be disturbed on appeal] unless that determination is without support in the record, deviated from the appropriate legal standard, or followed a plainly erroneous reading of the record.").

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17 *Atkins v. Virginia*, 536 U.S. 304 (2002).

Regarding Calvert's alleged inability to present evidence, as noted above, article 11.071, §3 anticipates that the applicant will provide evidence in support of his application for relief. The fact that he did not seek affidavits from the jurors who deliberated his sentence is not the fault of the state habeas court.

Calvert suggests that any evidentiary proffer offered at the pleading stage—such Kathryn Hopkins declaration—is not "evidence" for the purposes of article 11.071, §9, but serves only to show the existence of disputed factual issues requiring resolution at a hearing. Petition at 24. This argument finds no support in Texas law. *See Ex parte Campbell*, 226 S.W.3d 418, 423 (Tex. Crim. App. 2007) (noting that exhibits attached to the State's motion to dismiss "are as much a part of this habeas record as are applicant's attachments"); *Ex parte Fassi*, 388 S.W.3d 881, 887 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (finding that documents attached as exhibits to the defendant's article 11.072 habeas application and the State's response could be considered by the habeas court even though they were not introduced into evidence by any party); *Ex parte Reagan*, 549 S.W.2d 204, 205 (Tex. Crim. App. 1977) (relying on *Killion v. State* to affirm where court and parties treated governor's warrant in habeas corpus hearing as if admitted into evidence); *Killion v. State*, 503 S.W.2d 765, 765–66 (Tex. Crim. App. 1973) (court permitted to consider defendant's stipulations to charged offenses where considered by trial court in adjudicating guilt for theft and burglary, although written stipulations were not admitted into evidence). Indeed, the cases cited by Calvert in support of his argument—*Ex parte Empey,* 757 S.W.2d 771, 775

(Tex. Crim. App. 1988), and *Ex parte Evans,* 964 S.W.2d 643 (Tex. Crim. App. 1998)—stand for the proposition that sworn allegations from the applicants themselves are insufficient proof to meet their evidentiary burden. The cases do not suggest that these proffers are not evidence or are not part of the record.

Regardless, the record plainly indicates that the state habeas court did consider the unsworn statement of Kathryn Hopkins, "assum[ing it] to be true," but finding it failed to establish that any other juror heard Calvert, understood why he was yelling, or that hearing him yell detrimentally impacted their deliberations three weeks later. Petition Appendix B, at 23-29a. His argument that this proffer was not evidence falls short in this case.

In conclusion, the trial court did nothing improper, and violated no constitutional right, by limiting evidentiary development during the state habeas proceeding to affidavits of trial counsel and without allowing cross-examination. The state habeas proceedings comported with the requirements of article 11.071, and certiorari review of this claim should be denied.

D. THIS QUESTION PRESENTED DOES NOT WARRANT THE EXERCISE OF CERTIORARI JURISDICTION BY THIS COURT.

In his final argument, Calvert asserts that "his case presents an excellent vehicle for resolving the question presented"—whether due process requires that a state postconviction court afford a petitioner an opportunity to present evidence in support of an IATC claim where the State's highest found constitutional-but-harmless error on an underlying issue. Petition at 28-29. For the reasons discussed, the Court should deny his application.

Apart from the fact that Calvert has no due process right to the postconviction proceeding of which he complains, the state habeas court complied with statutory procedures for postconviction review of his claims and exercised permissible constraint over the development of evidence during postconviction review; the statute does not entitle Calvert to a live hearing or the opportunity to cross examine witnesses. Furthermore, Calvert was not constrained from presenting probative evidence in his initial application—indeed, he did present the declaration of an alternate juror which the state habeas court accepted as true. In short, Calvert was afforded due process's core protections, and he was entitled to nothing more in these proceedings. *Ford*, 477 U.S at 413 ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted). Therefore, this Court should deny certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Assistant Attorney General
Counsel of Record