No. 21-1090

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

REPLY BRIEF FOR PETITIONER

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CAPITAL CASE

Where a state purports to offer capital habeas procedures, certain minimum due process is required in the adjudication of those claims. That is particularly true where state habeas presents the first opportunity for a capital defendant to raise a constitutional claim. Mr. Calvert's petition asks this Court to resolve what level of due process is constitutionally required in state capital habeas proceedings.

The Brief in Opposition ("BIO") confirms the need for certiorari review. In response, Texas disclaims any obligation to give any due process during its adjudication of constitutional claims raised in state capital habeas proceedings while acknowledging that federal courts must, under AEDPA, give effect to that same process to the full extent possible. The untenability of Texas' position has implications throughout the State of Texas and beyond. And in Mr. Calvert's particular case, Texas' stance was enormously prejudicial.

I. This Court Should Resolve The Important Question Of The Minimum Due Process Required In Capital State Postconviction Proceedings

A. State habeas proceedings are subject to minimum due process protections

"[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." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

This Court has held certain minimum due process protections apply in state post-conviction procedures where those state procedures purport to determine a prisoner's constitutional rights. For example, in *Ford v. Wainwright*, 477 U.S. 399, 416 (1986), this Court held that Florida's procedures for determining the sanity of a death row prisoner (and therefore his competency to be executed for Eighth Amendment purposes) were inadequate. *See also Panetti v. Quarterman*, 551 U.S. 930, 952 (2007) (finding that Texas failed to provide due process protections announced in *Ford*). Similarly, in *Evitts*, 469 U.S. at 401, this Court held that Due Process requires the effective assistance of appellate counsel when the state provides an appellate procedure.

Ford emphasized the importance of "the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination… [i]t is all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Ford*, 477 U.S. at 417. This Court concluded, "Fidelity to these principles is the solemn obligation of a civilized society." *Id.*

Texas argues, in contrast, 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." BIO 12-

13; *see also* BIO 15 ("[S]tate 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."). Texas cites no authority for such a sweeping proposition and, indeed, it is at odds with a clearly established precedent that *some* level of due process is required where a state offers post-conviction proceedings.

Texas' attempt to distinguish the above precedents is incoherent. Texas argues that "[b]ecause th[o]se rights are firmly grounded in the Constitution, any measures taken by the States to allow vindication of them will necessarily implicate due process." BIO 13. But just as a death-sentenced prisoner has a constitutional right to be executed while competent, he has a right to effective assistance of counsel at trial. This is precisely the point made in Mr. Calvert's petition for writ of certiorari: where a state offers capital habeas proceedings that purport to allow for vindication of constitutional rights, those proceedings must comply with Due Process. Texas' argument that "state court collateral proceedings do not implicate the constitution," BIO 13, is plainly incorrect.

Texas' position is radical and should be rejected: it maintains that state capital habeas proceedings cannot implicate due process—a position which this Court has never accepted and for which Texas offers no authority in support. *See supra* at 2-4; *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (rejecting "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'"); *Wolff v. McDonnell*, 418

U.S. 539, 556-58 (1974) (finding due process applies to state procedures which determine whether to award "good time" to prisoners and thereby shortening their term of incarceration). Instead, the question is what level of due process is required in state capital habeas proceedings where a state purports to act.

B. At minimum, Due Process requires the opportunity to present evidence of harm following a state high court's finding of federal constitutional error on direct appeal.

The need for reliable *capital* state postconviction procedures is important for at least two reasons: (1) the allocation of adjudicatory responsibility enshrined in AEDPA and (2) certain post-conviction claims can only be meaningfully raised on collateral review.

As this Court has stated, 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 v. Richter*, 562 U.S. 86, 102-03 (2011). 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 v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992), *superseded by statute*, 28 U.S.C. § 2254 *as recognized in Williams v. Taylor*, 529 U.S. 420, 434 (2000).

Texas acknowledges that "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.'" BIO 11 (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (alteration omitted)).

Texas then suggests that the Federal Constitution does not dictate the exact form of state postconviction proceedings, BIO 13, but nevertheless recognizes that the federal courts "may upset a State's postconviction procedures" where those procedures "are fundamentally inadequate to vindicate the substantive rights provided." BIO 13 (quoting *Dist. Att'ys Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009)). Texas appears to recognize that, having provided for capital habeas review, it must afford petitioners a minimum level of Due Process.

This is all the more important because, in Texas, the first meaningful opportunity for a prisoner to raise and obtain review of an ineffective assistance of counsel claim is in state post-conviction proceedings. *Trevino v. Thaler*, 569 U.S. 413, 428 (2013). This includes the first meaningful opportunity to obtain and present evidence in support of such a claim, which by its nature will be unavailable in the original record.

Texas does not dispute those authorities cited in the Petition from other postconviction contexts hold that 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." Pet. 20 (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Hall v. Quarterman*, 534 F.3d 365, 389 (5th Cir.

2008)). Indeed, in the federal postconviction context, "In 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).

At minimum, Due Process in the capital state habeas context requires the opportunity to be heard, to present evidence, and to develop a claim before a neutral factfinder. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Ford*, 477 U.S. at 413; *Goldberg*, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *see also Blue v. Thaler*, 665 F.3d 647, 656-57 (5th Cir. 2011); *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….").

C. Texas' argument that Mr. Calvert received due process is plainly flawed and confirms he was denied the opportunity to present evidence.

Texas seeks to execute Mr. Calvert based on the lack of record evidence concerning the consequences of an admitted constitutional violation by the trial court, Pet. App. 154a-155a, while having at every stage denied Mr. Calvert the opportunity to present that very evidence. Moreover, Texas declares this is "a very common practice across [the] State." HR3 226.

Texas cannot reasonably argue that Mr. Calvert's post-conviction procedure complied with Due Process or even Texas' own Code of Criminal Procedure.

Texas begins by noting that the relevant provision of the state Code, art. 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." BIO 15.

If correct, this would only confirm the inadequacy of Texas' postconviction procedures and the need for this Court to address the minimum level of Due Process required in post-conviction proceedings. The statute would be inconsistent with, *inter alia*, the right to present evidence and challenge the evidence relied on by the state. *See, e.g.*, *Ford*, 447 U.S. at 413; *Panetti*, 551 U.S. at 952 ("[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."); *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.").

Contrary to Texas' statements, Mr. Calvert was given no opportunity to do either. In making his initial application for habeas corpus, alleging at the first opportunity the ineffective assistance of trial counsel, Mr. Calvert included a proffer of the evidence he could provide in support of his claim, in the form of a declaration from an alternate juror concerning the effect of Mr. Calvert's electrocution on the jury. HR1 173. Proffers, of course, are not evidence and indeed, there is

no requirement in Texas law that any proffer or evidence be supplied in submitting one's initial application for habeas relief. *See* TEX. CODE. CRIM. PROC. art. 11.071. Indeed, the state Code prescribes that disputed and unresolved factual issues are to be resolved through an "evidentiary hearing." *Id.* § 9.

It should also be obvious that Mr. Calvert, in the absence of an evidentiary hearing or other ongoing proceeding, lacks the power to compel any witness to give evidence. The State's suggestion that Mr. Calvert was "free" to obtain whatever evidence he wished prior to filing his application for habeas relief not only ignores the text of art. 11.071 (which contains no requirement for the presentation of evidence at that initial stage) but ignores the reality that material evidence could only be obtained after beginning proceedings.

The state court found, as it must, that such disputed and unresolved factual issues material to Mr. Calvert's constitutional claims of ineffective assistance existed. HR2 320-21. But it then ordered an asymmetric process in which the court solicited affidavits from trial counsel—no longer participants in the proceedings—which Mr. Calvert was given no opportunity to confront or rebut with other evidence. Nor could Mr. Calvert introduce evidence of his own, by way of affidavit or otherwise. The court's "paper hearing" was conducted wholly without giving Mr. Calvert an opportunity to be heard, despite the facial inadequacy of those affidavits. Pet. 12-13. Even if Texas were correct that such a "paper hearing" were generally permissible, the asymmetric nature which denied Mr. Calvert any opportunity to introduce

affidavits of his own or test those relied on by the state was certainly not permissible.

Texas suggests that Mr. Calvert obtained due process in part by referring to his repeatedly moving the court over a multi-year period—to hold an evidentiary hearing, permit discovery, allow him to file his own affidavits, or at least obtain a ruling on *any* of the motions he filed. BIO 21. Texas does not tell this Court that the state court *ignored* every such motion and never ruled on any of them.

Instead, the state court unilaterally solicited affidavits from trial counsel on the question of ineffective assistance and entered, verbatim, the unsolicited proposed findings of fact and conclusions of law submitted by the state. Pet. 13-14. It did so despite facial inadequacies in trial counsel's affidavits. Pet. 12-13. Perversely, those findings relied on the lack of evidence that Mr. Calvert's electrocution (in the same court, at trial) had any effect upon the jury's deliberations or their guilty verdict in order to deny Mr. Calvert's habeas claim. HR3 301; *see also* BIO 16, 18-19.

Mr. Calvert received no process whatsoever in connection with his initial application for habeas relief, which stated seven constitutional claims. In its defense, Texas says that Mr. Calvert's experience is "a very common practice across [the] State." HR3 226.

II. Federal Habeas Review Cannot Correct The Lack Of Due Process In Capital Habeas Proceedings.

Seeking certiorari to the state high court following judgment denying the writ of habeas corpus is the only opportunity for constitutional review of a state's capital habeas procedures.

Texas' argument that the issue presented is premature and properly addressed following federal habeas review misunderstands the nature of the question presented. The issue is not one of any of the seven Constitutional claims raised in Mr. Calvert's initial petition for writ of habeas corpus. The authority Texas relies on, *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) relating to the denial for stay of execution prior to the initiation of federal habeas corpus proceedings, is irrelevant for that reason alone and separately in light of the different procedural posture of the cases.

Instead, the question presented comes from Texas' unconstitutional adjudication of such petitions. Specifically, it arises from Texas' denial in capital habeas proceedings of the opportunity to present evidence in support of the consequences of a conceded Constitutional violation which is then adjudged against the petitioner.

At most, in a federal habeas corpus proceeding pursuant to 28 U.S.C. § 2254(e), a habeas petitioner claiming he was denied due process in state postconviction proceedings would be entitled to a new evidentiary hearing in federal court on the claims raised. By

arguing its state capital procedures should not be subjected to direct review at this stage, Texas is inviting the federal courts to assume responsibility for holding an evidentiary hearing which complies with due process. This is contrary to the purpose of AEDPA and principles of federalism.

Indeed, as Texas acknowledges, there is no free-standing habeas corpus remedy for violations of state habeas procedure. BIO 13 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003)). For Mr. Calvert and similarly situated capital habeas petitioners, recourse to the federal courts for a full evidentiary hearing will be necessary if the constitutional inadequacy of Texas' post-conviction procedures goes unaddressed.

The question of the minimum due process required in capital state habeas proceedings is therefore properly before this Court.

CONCLUSION

Due process demands a meaningful opportunity for a death-sentenced prisoner to put on evidence and confront the evidence against him during his state 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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