No. _____

In The
Supreme Court of the United States

AMOS WELLS,
Petitioner,

v.

TEXAS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At Amos Wells's trial, his counsel presented racist, eugenic pseudo-science to argue that he was more dangerous because he carried the "warrior gene," thereby ensuring he be found a future danger and sentenced to death. Yet Texas courts prohibited Mr. Wells from presenting any evidence to prove his Sixth Amendment post-conviction claim.

As this Court has long held, "when 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). In Texas, when death-sentenced persons allege facts that, if true, raise a constitutional violation that would result in a new trial, and the State disputes those facts, the state court must conduct post-conviction fact-finding to resolve the disputed allegations. Mr. Wells easily met that low threshold to receive the benefit of Texas's post-conviction procedures. This case presents the following important question:

When a state provides a mandatory procedure for fact-finding in post-conviction death penalty cases where a constitutional violation is pleaded, does the state court's refusal to engage in the state's mandatory fact-finding procedures deny the applicant due process of law in violation of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Amos Wells
Petitioner

Texas Office of Capital and Forensic Writs
State Habeas Counsel for Amos Wells

State of Texas
Respondent

Sharen Wilson, Tarrant County Criminal District Attorney
Counsel for Respondent

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PETITION FOR WRIT OF CERTIORARI

Amos Wells respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA") in this case.

OPINIONS BELOW

The unpublished order of the TCCA denying the habeas corpus application is attached as Appendix A. The trial court's August 10, 2021, findings of fact and conclusions of law, later adopted by the TCCA, are attached as Appendix B.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Texas Code of Criminal Procedure, Article 11.071, is included as Appendix E.

STATEMENT OF THE CASE

I. INTRODUCTION

Mr. Wells's trial counsel presented racist junk science at the penalty phase of his trial to tell the jury that Mr. Wells—an African American man—was predisposed to violent behavior because of his genetics. Despite trial counsel's inexplicable concession during the sentencing trial that genetics predestined their client to be a danger to society, the state court denied Mr. Wells any opportunity to prove that his trial counsel were ineffective by presenting evidence in support of his claim. Instead, it denied Mr. Wells his day in court and adopted nearly wholesale the State's recommended findings of fact and conclusions of law.

II. TRIAL PROCEEDINGS

Amos Wells was tried for capital murder in 2016. On November 3, the jury found him guilty. 36 RR 59. In the sentencing trial, the prosecution had the burden to prove beyond a reasonable doubt that Mr. Wells was a future danger to society. But rather than counteracting the prosecution's case, Mr. Wells's own defense counsel conceded it.

Counsel searched the globe for someone who would support the idea that their African American client's "warrior gene"[1] made him incurably violent. Counsel located a married couple in Italy and a psychiatrist from Florida to support their theory of eugenics. The first spouse, Italian biologist Dr. Silvia Pellegrini, performed genetic testing on Mr. Wells and several of his family members. *See generally* 43 RR 20-52. Pellegrini's husband, Pietro Pietrini, interpreted his wife's testing. *See id.* at 30; 42 RR 111-12. Dr. William Bernet relied on the testing to show that Mr. Wells had a low-activity variant of the MAOA gene. 43 RR 72-73.

Dr. Bernet testified at length about the purported links between the MAOA variant and an individual's increased risk for perpetrating violence. *See e.g., id.* at 74. Dr. Bernet, a psychiatrist—not a behavioral geneticist—testified about his beliefs regarding "the genetic makeup of people who . . . tend to be violent." *Id.* at 58. He testified that because Mr. Wells had a rough childhood and low-activity MAOA, he was "four and a half times" more likely to be violent than the average person. *Id.* at 119-37. Moreover, he testified that while he could not make any predictions about Mr. Wells specifically, since he had never done a risk assessment on, or even met, Mr. Wells, he could say that "his risks indicate that he is more likely to be violent than an average person." *Id.* at 137.

[1] This genetic variant—a low-activity marker on Mr. Wells's Monoamine Oxidase A ("MAOA") gene—is referred to by its believers as the "warrior gene." *See* Ann Gibbons, *Tracking the Evolutionary History of a "Warrior" Gene*, 304 SCI. 818 (2004) (hereafter "Gibbons, *'Warrior' Gene*").

Dr. Bernet claimed that the research supporting his testimony about Mr. Wells's increased risk of violence was "very valid," *id.* at 106, and even told the jury that there was a link between low-activity MAOA genes and people in a prison setting who had been extremely violent, *id.* Dr. Bernet asserted that the low-activity MAOA variant "is one of the most well-supported biological risk factors for antisocial behaviors such as aggression and conduct problems." *Id.* at 109-10. He further concluded that "early adversity predicted or presaged antisocial outcome more likely, more strongly with the low-activity MAOA." *Id.* at 106.

Dr. Bernet expressed his belief that the low-activity MAOA variant in African Americans, like Mr. Wells, was associated with violence and delinquency. 42 RR 230. Dr. Bernet relied on a study by criminologist Kevin Beaver to state "that African-American subjects who have this genetic risk were more likely to get in trouble later through some kind of violent activity." *Id*. at 232. (referencing Kevin M. Beaver et al., *Genetic Risk, Parent-Child Relations, and Antisocial Phenotypes in a Sample of African-American Males*, 175 PSYCHIATRY RES. 160 (2009)).

To cement the defense's presentation of their own client's future dangerousness, a fourth defense expert, Dr. Jeffrey Lewine testified that Mr. Wells's brain is "statistically different" from that of a "neurotypical" person, 44 RR 26, and that he was born this way and will always be this way, 44 RR 64. He opined that imaging of Mr. Wells's brain suggested that Mr. Wells "had difficulties in the emotional regulation of his behavior" and "also in his impulse control system." 44 RR 37-38.

The entirety of trial counsel's penalty phase *mitigation* presentation centered on the "warrior gene" theory. Trial counsel also called several lay witnesses, a neuropsychologist, and a second psychologist to bolster the idea that their client was born with the propensity for violence and to show the childhood adversity they claimed activated it. Taken together, the picture Mr. Wells's own defense counsel painted during the penalty phase of his trial was an aggravating one.

The prosecution's burden was to prove that Mr. Wells was likely to be a future danger to society beyond a reasonable doubt. In closing argument, the State embraced the eugenics presented by the defense, arguing that defense counsel's argument that Mr. Wells's immutable genetics made him an incurable future danger meant that the defense had "conceded" the issue. 45 RR 74. Jurors unanimously answered the future dangerousness special question affirmatively. 2 CR 756. Left with meager mitigating information, the jury's answers to the special issue questions required Mr. Wells be sentenced to death. *See* 46 RR 105.

III. STATE POST-CONVICTION PROCEEDINGS

A. Mr. Wells's Application for Writ of Habeas Corpus

On December 27, 2016, the trial court[2] appointed the Office of Capital and Forensic Writs to represent Mr. Wells in post-conviction proceedings. 2 CR 843. Mr.

[2] The trial court reviews and submits findings of fact and conclusions of law in constitutional challenges to Texas death sentences, acting as a magistrate to the TCCA, which has the ultimate authority over the application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. art. 11.071, § 4; *see also Manzi v. State*, 88 S.W.3d 240, 254 (Tex. Crim. App. 2002) (Cochran, J., concurring) (explaining that "the rea-

Wells filed his Initial Application for Writ of Habeas Corpus ("Application") on April 18, 2019.[3]

Mr. Wells attached affidavits, declarations, and other forms of evidentiary proffers to meet his pleading burden to show that trial counsel failed to uncover the plethora of strong mitigating evidence that diminished his culpability. Post-conviction investigation revealed that trial counsel's "warrior gene" theory that Mr. Wells was genetically predisposed to violent crime was not only unsupported but also firmly rooted in race-based eugenics. Mr. Wells pleaded, *inter alia*, that his attorneys were ineffective for advancing a racist theory of genetic violence during his capital sentencing trial. In support of his claim, Mr. Wells attached an affidavit from highly qualified behavioral geneticist, Dr. Kathryn Harden, who detailed the racist, eugenic history of "warrior gene" pseudo-science. By arguing that Mr. Wells was genetically predisposed to violent crime on the basis of his MAOA genetics, the defense advanced an argument rooted in scientific racism and eugenics.

Mr. Wells also attached affidavits from a psychologist and numerous witnesses who detailed Mr. Wells's long struggles with Post-Traumatic Stress Disorder ("PTSD"), symptoms of severe mental illness, and active psychosis that diminished his culpability at the time of the crime. Mr. Wells's severe mental illness, combined

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son that reviewing courts defer to the trial court's factual determinations is precisely because the judge is "Johnny-on-the-spot," personally able to see and hear the witnesses testify.")

[3] While Mr. Wells's state post-conviction proceedings were pending, the TCCA affirmed his direct appeal in a published opinion. *Wells v. State*, 611 S.W.2d 396 (Tex. Crim. App. 2020).

with his PTSD symptoms from his profoundly traumatic childhood, would have undermined Mr. Wells's culpability for the capital incident and constituted mitigating circumstances relevant to the jury's sentencing decision.

B. State Habeas Adjudication

Despite alleging a Sixth Amendment violation of his right to effective assistance of counsel by showing that no reasonable counsel would have presented the genetic pseudo-science to prove their own client's future dangerousness, Mr. Wells was denied any opportunity to present evidence to prove his claims.

After Mr. Wells filed his Application for Writ of Habeas Corpus ("Application") in the trial court, the State filed its Answer on October 15, 2019, denying all of the factual allegations pleaded in Mr. Wells's Application and attaching trial counsel affidavits as evidentiary proffers. Former counsel's self-serving affidavits denied Mr. Wells's allegations of ineffective assistance. Despite having submitted and relied upon trial counsel's affidavits to dispute Mr. Wells's claim of ineffective assistance of counsel, the State asked the court to deny Mr. Wells the opportunity to present any evidence in support of his claims.

On October 29, 2019, Mr. Wells asked the court to grant an evidentiary hearing to resolve disputed factual issues related to Mr. Wells's nine claims of unconstitutional confinement in his Reply to State's Answer and Motion to Designate Issues of Fact to be Resolved at an Evidentiary Hearing. Article 11.071 mandates that "[n]ot later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted previously unresolved factual issues material to the confinement exist and shall issue a written order of

the determination." TEX. CODE. CRIM. PROC. art. 11.071, § 8 (a). If the court determines that controverted issues exist, "the court shall enter and order, not later than the 20th day after" the State's answer. *Id.* at § 9 (a). The Court did not issue an Order Designating Issues and did not rule on Mr. Wells's motion for an evidentiary hearing, despite hearing argument on that motion. On June 24, 2021, after waiting for a ruling from the Court for a year and a half, Mr. Wells asked the trial court to rule on his request for an evidentiary hearing or grant another means of presenting evidence to prove his allegations. Mr. Wells also moved to admit the exhibits to his Application as evidence, in addition to more exhibits he obtained since filing his Application. The following day, on June 25, 2021, despite the numerous factual disputes between Mr. Wells's allegations and the State's blanket denial, the Court found that no controverted issues of material fact existed, denied Mr. Wells's request to enter his Application exhibits into evidence, and denied all requests for fact-finding. *See* App.C.

The court denied Mr. Wells the ability to prove his Sixth Amendment claim. The trial court did not designate any of the factual allegations raised in Mr. Wells's application for resolution. And, over repeated objections from Mr. Wells, the court denied him any opportunity to prove his claims and meet his burden of proof. Although the State relied on Mr. Wells's former counsel's affidavits to deny his allegations, Mr. Wells was unable to cross-examine his former counsel and confront their responses to his allegations and was denied the opportunity to enter any evidentiary proffers into evidence. The trial court adopted, with only two minor corrections, the

State's Proposed Findings of Fact and Conclusions of Law wholesale. App.B. Mr. Wells submitted objections pursuant to Texas Rule of Appellate Procedure 73.4(b)(2) on August 20, 2021, arguing that the trial court's findings violated his right to due process and requesting that the trial court vacate its findings or submit his objections to the TCCA.

On December 15, 2021, the TCCA adopted the trial court's findings and conclusions and denied relief to Mr. Wells. App.A. In its order denying relief, the TCCA reasoned that it was denying relief on the claims of ineffective assistance of counsel because "Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that the result of the proceedings would have been different but for counsel's deficient performance." App.A2. In its opinion, the TCCA held Mr. Wells to a standard he could not meet because he was denied the opportunity to prove his claims.

REASONS FOR GRANTING THE WRIT

Although Texas law provided Mr. Wells a mechanism to challenge his death sentence, in practice, he was deprived of the most basic guarantees of due process. Mr. Wells pleaded his case: the attorneys who were supposed to advocate for him and argue that he should not be sentenced to death instead presented racist pseudoscience that Mr. Wells was dangerous because of his immutable characteristics. The state habeas statute, Article 11.071, required the habeas court to provide him with

the opportunity to prove his case. Because the court denied any such opportunity, Mr. Wells was denied due process.

Certiorari should be granted to ensure that Mr. Wells and others similarly situated receive meaningful review of unconstitutional death sentences. Without review by this Court, Mr. Wells's Sixth Amendment claim regarding his attorneys' failure to perform effectively by challenging—rather than conceding—the State's future dangerousness case will not be fairly assessed. Mr. Wells was entitled to submit evidence to support his pleading. He was deprived of that right and had no means of remedying it. The state court disposed of Mr. Wells's Sixth Amendment claim based solely on the pleadings and the trial attorneys' self-serving affidavits. The state court's shortcuts deviated substantially from the statutory process governing the adjudication of habeas corpus applications in Texas and did not satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. The resulting denial was fundamentally unreliable because Mr. Wells has no opportunity to present evidence in support of his claim of an unconstitutional death sentence.

I. THE STATE COURT PROCESS VIOLATED DUE PROCESS AND WAS INADEQUATE TO RELIABLY RESOLVE MR. WELLS'S CLAIMS

A. Mr. Wells Alleged that His Attorneys Were Ineffective for Presenting Eugenic Pseudo-Science that Guaranteed He Would Be Sentenced to Death

Rather than fulfilling their adversarial role as his advocate, Mr. Wells's trial counsel conceded that he would be dangerous in the future based on his genetics, invoking the racist history of eugenic pseudo-science. Despite the abundance of red

flags showing Mr. Wells's clear symptoms of psychosis and thought disorder at the time of the incident and his extreme symptoms of post-traumatic stress disorder, counsel did not investigate this evidence and did not present it to the jury. Instead, the jury was left with damning, racist pseudo-science, purporting to show Mr. Wells's future dangerousness. In this way, defense counsel effectively relieved the prosecution of its burden to prove Mr. Wells's future dangerousness beyond a reasonable doubt. As the State pointed out in its closing argument, "Their own expert tells you he is going to be dangerous." 46 RR 72. It was entirely unreasonable and contrary to professional norms for trial counsel to concede this crucial issue in a capital case—let alone to do so based on bias, eugenics, and junk science. Trial counsel's unreasonable actions were prejudicial. Counsel's concession and presentation that Mr. Wells was dangerous made the difference between a life or a death verdict.

At the time of Mr. Wells's trial in October and November of 2016, scientific criticism of trial counsel's "warrior gene" theory was serious, widespread, and well-publicized. Trial counsel and their experts knew or should have known that the theory was not generally accepted by the scientific community. The MAOA gene-variant that counsel's theory centered around is more common in people of African ancestry than those of European ancestry. *See* Gibbons, *'Warrior Gene,'* 304 SCI. 818. However, the prevalence of the MAOA low-variant gene in ancestry groups of African descent is not scientifically valid evidence of a genetic basis for racial differences in an outcome, such as rates of criminal conviction. *Id.*

Research about the "warrior gene" has nevertheless been used to advocate for racial hierarchies. White supremacist groups use the "warrior gene" to perpetuate stereotypes of African American men as violent—much like the stereotype presented in *Buck v. Davis*, 137 S. Ct. 759 (2017). Dr. Beaver's work, which Dr. Bernet relied on in his testimony, is lauded in White nationalist and racist circles. Dr. Beaver does not have any professional training in genetics or any science. Instead, his degrees are in sociology and criminal justice. *See* Kevin M. Beaver, *Curriculum Vitae*, Florida State University College of Criminology and Criminal Justice, https://criminology.fsu.edu/sites/g/files/upcbnu3076/files/2021-06/Beaver_CV_2018.pdf. For example, a White supremacist blog called *The Unsilenced Silence*, which covers race and genetics, praised Dr. Beaver for his study of violence and the "warrior gene" in African Americans. *Dr. Kevin Beaver the Apostle*, UNSILENCED SCIENCE (Dec. 23, 2013), http://theunsilencedscience.blogspot.com/2013/12/dr-kevin-beaver-apostle.html. The same blog wrote that African Americans are more likely to have the "warrior gene" or a similar variant and hypothesized that Trayvon Martin—a Black teenager who was killed by a neighborhood watch volunteer—had the "warrior gene," concluding that "[t]he right to fight back against an individual who is warrior-gene positive" makes common sense. *Just Say No Limit: Trayvon, Dextromethorphan, Marijuana, and MAOA*, UNSILENCED SCIENCE (Jul. 5, 2012), http://theunsilencedscience.blogspot.com/2012/07/just-say-no-limit-trayvon.html. Dr. Beaver himself appeared on self-proclaimed White nationalist Stefan Molyneux's podcast to discuss the relationship between genetics

and crime. *See* Jared Holt, *Stefan Molyneux Says His Trip to Poland Sold Him on White Nationalism*, Right Wing Watch (Dec. 21, 2018), http://www.rightwingwatch.org/post/stefan-molyneux-says-his-trip-to-poland-sold-him-on-white-nationalism; Stefan Molyneux, *Genetics and Crime | Kevin M. Beaver and Stefan Molyneux* (May 26, 2016), https://soundcloud.com/stefan-molyneux/fdr-3303-genetics-and-crime-kevin-m-beaver-and-stefan-molyneux.

Attributing violence and criminality—particularly criminal behavior by people of color—to genetic or "innate" causes is an idea rooted in eugenics. During the twentieth century, thirty-two states passed eugenic laws that permitted the forcible sterilization of people. Approximately 20,000 people in California "were sterilized under an act that was publicized as a model for Nazi Germany." Tom Abate, *State's Little-Known History of Shameful Science/California's role in Nazis' goal of 'purification'*, SFGATE (2003), https://www.sfgate.com/business/article/State-slittle-known-history-of-shameful-science-2663925.php.). In the American South, "these sterilization laws were originally preoccupied with maintaining the purity of the so-called White race, but over time, forcible sterilization became increasingly targeted to the African-American population, particularly as the civil rights movement began to dismantle other forms of social control." EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1996). Historian Alexandra Stern writes:

> Such legislation was motivated by crude theories of human heredity that posited the wholesale inheritance of traits associated with a panoply of feared conditions such as criminality, feeblemindedness, and sexual deviance. Many sterilization advocates viewed reproductive surgery as a necessary public health intervention that would protect

> society from deleterious genes and the social and economic costs of managing 'degenerate stock'.

ALEXANDRA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005).

Although forced sterilization largely ceased after the 1960s, the idea that Black people were inherently prone to criminal behavior for genetic reasons lived on as a racist trope. Indeed, there is a unique potential for behavioral genetic research, when placed in the context of criminal law, to stigmatize racial and ethnic minority groups. *See* Karen Rothenberg & Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 69 LAW & CONTEMP. PROBS. 343-366 (2006). Courts and legal scholars warn that the proliferation of genetics evidence in criminal trials could lead to "heightened surveillance" of certain groups just because of their DNA. *See United States v. Kreisel*, 720 F.3d 1137, 1160 (9th Cir. 2013) (Reinhardt, J., dissenting) (citing Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 876-77 (2006)).

Moreover, the "research" Dr. Bernet relied on was plagued by small sample size, inapplicable populations, and difficulty extrapolating. For example, one study purported to extrapolate from a study of 442 White men from New Zealand, thirteen of whom had both the *MAOA* variant and were classified as having experienced "severe maltreatment," and four of those thirteen were convicted of a violent crime. *See* 42 RR 205; Avshalom Caspi, et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, SCI. 297, 851-54 (2002). The researchers "could not have a

high degree of confidence that the result was not entirely due to random chance." *Id.*

Mr. Wells argued that his attorneys were deficient for basing their sentencing trial theory on a "science" deemed unreliable and biased by the scientific community. Factfinding procedures in a death penalty case are subject to a "heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion). This is because "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion). This principle "requires a mechanism that enables judicial enforcement of [a] sentence to evolve with the science that serves as the basis for imposition of that sentence." *Ex parte Henderson*, 384 S.W.3d 833, 852 (Tex. Crim. App. 2012) (Alcala, J., concurring). Courts must be particularly protective of the defendant's right to fundamental fairness when, without relief, they "will be executed for a conviction that we now know was premised largely on faulty science." *Id.* Especially considering this requisite heightened standard of reliability, Mr. Wells's counsel's reliance on pseudo-science rendered them constitutionally ineffective. But Texas locked the courtroom doors, barring Mr. Wells from proving it.

B. Due Process Requires Fairness in Adjudicating Post-Conviction Challenges to Death Sentences

Although states are not required to provide mechanisms to collaterally attack sentences, *see Murray v. Giarratano*, 492 U.S. 1 (1989), when a state nevertheless does, the procedures employed must comport with due process. The Constitution forbids states from depriving any person of life or liberty without due process of law.

U.S. CONST. XIV. Due process 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). Here, due process merely required following Texas's mandatory statutory procedure.

The Due Process Clause does not cease to apply post-conviction, even though "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). While a "state . . . has more flexibility in deciding what procedures are needed in the context of postconviction relief," *id*. at 69, due process nonetheless requires that 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) (The availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence."); *see also Ford*, 477 U.S. at 413 (noting that the "fundamental requisite of due process of law is the opportunity to be heard."); *id*. at 424 ("It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a 'fair hearing.'"). Thus, when the judiciary acts, the relevant question is not *whether* process is due, but *what* process is due.

Although this Court has asserted that some process is due in post-conviction death sentence challenges, it has yet to announce exactly *how much* process is due. *See Osborne*, 557 U.S. at 68 (finding due process applied to state law that permitted post-conviction DNA testing procedure where liberty was at stake); *Ford*, 477 U.S.

at 414 (applying due process protections to post-conviction competency to be executed assessment). *Some* process must be owed to post-conviction challenges to unconstitutional death sentences. In the context of post-conviction challenges to unconstitutional death sentences, the minimum threshold for procedural due process protections has certainly been met. It would be inexplicable if this Court were to find that the same due process protections that apply in less serious circumstances do not apply in death penalty cases. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (utility services discontinuation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce filing fee); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license suspensions); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of public assistance); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (wage garnishment); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96 (1963) (exclusion from practicing law).

The Constitution demands that because Texas provides a post-conviction procedure for incarcerated people to challenge their sentences, it must do so in a way that comports with the Due Process Clause. In *Evitts v. Lucey*, this Court explained:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause.

469 U.S. at 400-01 (1985) (internal citations omitted). "In short, when 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." *Id.* at 401. A state's post-conviction procedure, if one is provided, must afford adequate and effective review to indigent defendants. *Smith v. Robbins*, 528 U.S. 259, 276 (2000); *see also Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (plurality opinion).

In Texas, when a post-conviction applicant pleads sufficient specific facts that, if true, might entitle him to relief, and the State disputes the allegations, the court must permit the applicant to submit evidence to prove his pleadings. *See Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011); *see also* TEX. CODE CRIM. PROC. art. 11.071, § 9(a). Because Texas provides a state habeas procedure, the courts must apply it fairly.

C. The State Habeas Court Bypassed Texas's Mandatory Fact-Finding Process, Depriving Mr. Wells of Due Process

The state habeas court was obligated to resolve Mr. Wells's controverted allegations, but instead, it bypassed all procedural protections and denied Mr. Wells's claims without allowing him to present any evidence to prove them. Mr. Wells alleged facts that, if true, would entitle him to relief. The State denied Mr. Wells's allegations, thereby creating controverted facts. Then, despite state law demanding that Mr. Wells be allowed to submit evidence, either in the form of testimony, affidavit, deposition, or interrogatory, the courts refused.

1. Texas Provides a Mandatory Fact-Finding Procedure for Applicants to Prove their Unconstitutional Death Sentences

Texas provides a post-conviction mechanism to review death sentences. First, an applicant must meet the low threshold of pleading sufficient specific facts which if true might entitle him to relief. *See Medina,* 361 S.W.3d at 637 ("Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief."); *cf.* Rules Governing § 2254 Cases in the United States District Courts, Rule 2 (petitioner must "specify all the grounds for relief available" and "state the facts supporting each ground."); FED. R. CIV. P. 12 (b)(6).

The pleading threshold is distinguishable from and lower than the applicant's *burden of proof.* There is no requirement that habeas applicants attach evidence in support of their Application claims. In fact, the opposite is true. *See Medina*, 361 S.W.3d at 639 (holding that a habeas application (1) must allege specific facts that entitle an applicant to relief and (ii) has not burden to allege evidence). *Medina* expressly held that "applicants should not be required to plead 'evidence.'" When applicants attach affidavits and other documentary proffers to pleadings, it is not for the purposes of seeking to have such "evidence" considered under Article 11.071, Section 9; rather, it is a prudential step to meet the pleading burden of alleging specific facts. *See id*. at 637-38 ("The application may, and frequently does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief."); *see also Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009) ("[P]ost-trial motions . . . are not self-proving

and any allegations made in support of them by way of affidavit or otherwise must be offered into evidence at a hearing."). The sworn allegations in a habeas application and related evidentiary proffers are, quite simply, not evidence, and a habeas applicant cannot meet his burden of proof through mere allegations. *See, e.g.*, *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988) ("Even sworn allegations are not alone sufficient proof."); *Ex parte Evans*, 964 S.W.2d 643 (Tex. Crim. App. 1998) (same).

By contrast, evidence is the proof submitted at a hearing opened pursuant to Texas Code of Criminal Procedure Article 11.071, Section 9(a). *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)) (emphasis added)). Moreover, under the Texas post-conviction statutory scheme, it is only after the court designates controverted issues of material fact that there may be evidentiary development. *See* TEX. CODE CRIM. PROC. art. 11.071, § 9 ("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.").

After an applicant alleges facts in the application, the State may agree with the factual allegations, dispute them, or rely on a general denial. *See* TEX. CODE CRIM. PROC. art. 11.071, §7.

Following the State's Answer, Texas law mandates that the trial court determine, based on the Application and the State's Answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exists" and then "issue a written order of the determination." TEX. CODE CRIM. PROC. art. 11.071, § 8(a). Facts that, if true, might call for relief, which are also denied by the State are "controverted." *See, e.g.*, *Ex parte Carnes*, 579 S.W.2d 249 (Tex. Crim. App. 1979) (holding the finding of the absence of controverted, previously unresolved facts material to the legality of confinement to be an abuse of discretion where applicant pleaded a cognizable claim and the State admitted none of the facts alleged)*; see also Ex parte Karlson*, 282 S.W.3d 118, 130 (Tex. App.—Ft. Worth 2009, pet. ref'd) ("When faced with conflicting evidence . . . the trial court was required to resolve the conflict.").

If fact issues are disputed, the trial court must provide notice of the issues it finds material to the applicant's confinement and determine the manner of resolving the factual disputes. Section 9 of Article 11.071, entitled "Hearing," permits the trial court to order evidentiary development via affidavits, depositions, interrogatories, and/or a hearing. TEX. CODE CRIM. PROC. art. 11.071, § 9(a).

The applicant then has the burden to prove those facts by a preponderance of the evidence. To prevail on a claim of unconstitutional confinement, an applicant must prove, by a preponderance of the evidence, the facts supporting his claim. *See e.g.*, *Ex parte Wolf*, 296 S.W.3d 160, 168 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) ("To establish ineffective assistance of counsel, [the petitioner] had to prove

by a preponderance of the evidence in the court below that . . . [trial counsel]'s deficient performance resulted in prejudice to the defense."). This is a higher burden than an applicant's pleading burden, which only requires an applicant to plead some facts, which, if proven true, might entitle an applicant to relief.

If, on the other hand, the court determines that no factual issues exist, the fact allegations must be taken as true because no evidence can be submitted to meet the applicant's burden of proof. *See* TEX. CODE CRIM. PROC. art. 11.071, §8. In short, where, as here, the applicant pleaded sufficient controverted facts, the court *must* take evidence; conversely, if it finds no material factual disputes, it *cannot* take or consider evidence such as self-serving, defensive affidavits of trial counsel.

2. The State Shut Mr. Wells Out of Court When it Bypassed its Mandatory Procedure to Review Mr. Wells's Unconstitutional Death Sentence

Mr. Wells met his low pleading burden by presenting facts that would establish his trial counsel performed ineffectively at his capital murder trial. The State, in its Answer, specifically "denies the allegations in the instant application for writ of habeas corpus." Indeed, the State repeatedly relied on trial counsel's statements vehemently denying Mr. Wells's claim. Were it the case that Mr. Wells did not meet his pleading burden, attaching his trial attorneys' affidavits responding to the allegations would have been superfluous.

Because the State disputed Mr. Wells's factual allegations, the trial court was required to designate the disputed material factual allegations at issue in a written order and permit Mr. Wells to present evidence to meet his burden of proof. *See id.* at §§ 8-9. The trial court engaged in none of these mandatory steps.

Mr. Wells's claim required evidentiary development because he pleaded a valid Sixth Amendment claim that the State disputed. In post-conviction cases, "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend*, 372 U.S. at 312. Resolutions of disputed factual questions must be based on evidence that is admitted at a hearing before a judge. *Morgan v. United States*, 298 U.S. 468, 480-81 (1936)*; see also Ford*, 477 U.S. at 413; *Goldberg*, 397 U.S. at 267. A hearing in the criminal post-conviction context may be less formal than a trial. *Ford*, 477 U.S. at 427 (Powell, J., concurring). It need not even require live testimony. But 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*, 380 U.S. at 552 (emphasis added)). The Article 11.071 mechanisms for the court to take evidence would have satisfied due process. No such hearing took place in Mr. Wells's case.

Although Mr. Wells bore the burden of proof, he was denied any opportunity to meet that burden. Even though the trial court never allowed Mr. Wells to submit evidence, it still relied on the State's evidentiary proffers of trial counsel's affidavits. The trial court and TCCA constrained Mr. Wells to the factual allegations and evidentiary proffers attached to his habeas application, making a recommendation of relief impossible.

The trial court's failure to designate disputed factual issues—contrary to the procedure clearly outlined by Article 11.071—deprived Mr. Wells of the ability to be heard. Mr. Wells pleaded specific facts which, if true, entitled him to relief. In support of his Application and to meet his pleading burden, Mr. Wells attached various sworn evidentiary proffers from potential witnesses. The State answered, controverting Mr. Wells's factual averments. The statute was clear about what should have happened at this point: a written designation of controverted issues of fact material to the legality of Mr. Wells's confinement and the opportunity to present evidence to prove his allegations in a hearing. This statutorily mandated procedure would have provided Mr. Wells notice and the opportunity to be heard, the touchstones of procedural due process. But the procedure came to a halt.

Instead, the State court deprived Mr. Wells of the ability to prove his claim by entering findings of fact and conclusions of law without taking any evidence. This failure to follow mandatory Texas law deprived Mr. Wells of adequate and effective review of his death sentence.

The TCCA then held Mr. Wells to an impossible standard. It did not remand Mr. Wells's case for evidentiary development but rather relied on the trial court's findings of fact and conclusions of law. *See generally* App.A. Because he had no ability to prove his claims, the state court prematurely denied the merits of Mr. Wells's Application. The trial court and the TCCA pretended that Mr. Wells had actually been provided a fair hearing and opportunity to prove his case and denied relief on the merits of his claims. After noting that Mr. Wells had been denied an evidentiary

hearing, *see id.* at 2, the TCCA purportedly denied relief to Mr. Wells because he failed to meet his burden of proving by a preponderance of the evidence that his trial counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* Yet the case had never progressed beyond the pleading stage, and Mr. Wells had indisputably satisfied his pleading burden. *See Medina,* 361 S.W.3d at 637; *cf.* FED. R. CIV. P. 12 (b)(6).

The state court adjudication of Mr. Wells's Sixth Amendment claim deviated substantially from the obligatory statutory process. When considered in the aggregate, these deviations from the statutorily mandated post-conviction procedure resulted in a fact-finding process that was arbitrary, inaccurate, and demonstrably unfair. The trial court's unreliable findings—and the TCCA's wholesale adoption of them—resulted directly from the trial court's denial of Mr. Wells due process rights. Mr. Wells was *at least* entitled to a fair opportunity to prove that he was deprived of his constitutional rights during his death penalty sentencing trial in an adjudication that complied with the mandated statutory procedure. Had Mr. Wells been afforded *some* opportunity to prove his case, he could have presented evidence and met his burden of proof.

Instead, Mr. Wells was given only a pretense of process, creating an illusion of fairness where none existed. Such a result cannot stand in a system that purports to uphold fairness in the administration of the death penalty.

D. Without Review, Mr. Wells—and Others—Will be Put to Death Without Process Despite Trials Poisoned by Racial Animus

Mr. Wells's constitutional claim deserves review. His attorneys used racist eugenic junk science in lieu of mitigating evidence to meet—rather than challenge—the State's burden to prove him a future danger. Racism in the determination of who deserves life or death cannot stand. As this Court opined, "Some toxins can be deadly in small doses." *Buck*, 580 U.S. at *19-20. This is so even when the defendant's own counsel introduces evidence of dangerousness on the basis of race. *See id.* at *20. In fact, "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id.*

The public's faith in the system of administering the death penalty suffers if viable constitutional claims go unscrutinized. This Court looks to the public's attitude toward a given sanction in assessing its constitutionality. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). While not determinative, the public's confidence in Texas's system of justice would surely be shaken where, as here, the law is seen to punish a defendant for who he is, rather than what he does. "Dispensing punishment on the basis of an immutable characteristic flatly contravenes" this Court's guiding and foundational principles. *See Buck*, 580 U.S. at *21. Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U. S. 257, 285 (2015). This Court guarantees that "[w]hen a defendant's life is

at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).[4]

Although Texas law guarantees adequate review of constitutional claims like those presented in Mr. Wells's Application, in this case, Mr. Wells received no more than an illusion of process. Mr. Wells's case went through the entirety of the state habeas review process without any court receiving evidence or reviewing the merits of his allegations. Mr. Wells's case leads to the inescapable conclusion that death-sentenced persons in Texas cannot rely on the fair application of the statutory post-conviction procedural rules. Consequently, Mr. Wells requires this Court's intervention as the only way to receive review of the merits of his claim.

This is a death penalty case. The consequences are too serious for this Court, or any other, to allow the issue of counsel's presentation of racist junk science to go un-reviewed at some level. In the era of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the merits of constitutional claims are often barred from consideration by federal courts due to the narrowed scope of federal habeas review. As this Court has recently explained, AEDPA imposes "a complete bar on federal court relitigation of claims already rejected in state proceedings" except where

[4] Mr. Wells's case was not the first time that defense counsel attempted to use the immutable characteristic of a Black client's genetics to prove his dangerousness. *See* Mitch Mitchell, *Researcher Says Convicted Murderer Predisposed to Violence*, Fort Worth Star-Telegram (May 15, 2014) (last visited Mar. 14, 2022), https://www.star-telegram.com/news/local/crime/article3857832.html. Nor will it be the last.

"there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Put simply, AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Id.* at 103. Here, the state court denied Mr. Wells his one opportunity to challenge the constitutionality of his death sentence, a result that cannot stand in a fair system of justice.

CONCLUSION

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

Respectfully submitted,

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