

No. _____

In The
Supreme Court of the United States

BRANDON DANIEL,
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

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

Here, although Texas state law provided mandatory procedures to permit Mr. Daniel to prove his alleged constitutional violations, the ability to confront adverse evidence against him, and to have fact-finding conducted by a neutral fact-finder, the state courts failed to comply with the mandatory statutory procedures. Mr. Daniel's post-conviction Application included claims that the trial judge in his case was a necessary fact witness in his post-conviction proceedings due to her off-the-record communications with the jury. Mr. Daniel's motion to recuse the judge, however, was denied, and Mr. Daniel's habeas petition was adjudicated by the very judge whose conduct was at issue. He also raised a claim that he received ineffective assistance of counsel at trial in violation of the Sixth Amendment, in part because his trial attorneys failed to investigate evidence that he suffers from Autism Spectrum Disorder. Despite meeting the pleading burden for his legal claims in state post-conviction proceedings, Mr. Daniel was denied any opportunity to prove his case and introduce evidence in support of his claims. The State, by contrast, was allowed to submit controverting evidence that was never subjected to adversarial testing. The state habeas court adopted the State's proposed findings and conclusions nearly verbatim, denying Mr. Daniel relief on the merits of his claims. The Texas Court of Criminal Appeals rubberstamped the process, presumptively overruling all of Mr. Daniel's objections to the state habeas court process and violations of due process, summarily affirming the state habeas court's facially inadequate findings and conclusions, and failing to rule on the issue of the denial of Mr. Daniel's recusal motion. Thus, this case presents the following question:

In a death penalty case, where a state provides a post-conviction procedure for challenging the constitutional violations that occurred at a capital trial, and where the state court violated the mandatory state procedures, do the minimal due process protections of having a neutral fact-finder, the opportunity to be provided with notice, and the opportunity to present evidence and challenge adverse evidence apply?

PARTIES TO THE PROCEEDINGS BELOW

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

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

OPINIONS BELOW

The unpublished order of the Texas Court of Criminal Appeals (“CCA”) denying the habeas corpus application is attached as Appendix A. The habeas court’s unpublished order denying Mr. Daniel’s motion to recuse the trial judge is attached as Appendix B. The habeas court’s November 30, 2016 findings of fact and conclusions of law, which were later adopted by the CCA, are attached as Appendix C. The habeas court’s order denying Mr. Daniel’s *Motion Requesting this Court Comply*

with Basic Due Process Principles by Providing Mr. Daniel an Opportunity to Challenge Adverse Evidence is attached as Appendix D. The CCA order denying Mr. Daniel's *Motion for Leave a Petition for Writ of Mandamus* is attached as Appendix E.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texas Rule of Civil Procedure 18b(b), which governs recusals in both civil and criminal cases, states:

(b) Grounds for Recusal. A judge must recuse in any proceeding in which:

- (1) the judge's impartiality might reasonably be questioned;
- (2) the judge has a personal bias or prejudice concerning the subject matter or a party;
- (3) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
- (4) the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding[.]

TEX. R. CIV. P. 18b (b)(1)-(4).

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

Sec. 8. (a) Not later than the 20th day after the last date the state answers the [habeas] application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

[...]

Sec. 9. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later

than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

[...]

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

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

TEX. CODE CRIM. PROC. art. 11.071 §§8-11.

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

STATEMENT OF THE CASE

I. INTRODUCTION

In his state post-conviction application for a writ of habeas corpus, Brandon Daniel met his pleading burden under Texas law of pleading sufficient facts, which if true, might entitle him to relief. *Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011) (“Texas law has long required all post-conviction applicants for writs of

habeas corpus to plead specific facts which, if proven to be true, might call for relief.”).¹ Among the claims raised by Mr. Daniel, he alleged judicial misconduct based on the fact that his trial judge, Judge Brenda Kennedy, secretly communicated with jurors off-the-record, a communication that has yet to be disclosed. He argued that because she had become a material fact witness with knowledge of the substance of the off-the-record communication—the judge should be recused from presiding over the post-conviction proceedings. Mr. Daniel also alleged a claim of ineffective assistance of his trial counsel for failing to investigate the numerous red flags that he suffered from a pervasive developmental disorder, Autism Spectrum Disorder, which would have had tremendous explanatory and mitigating effect during both the guilt and punishment phases of Mr. Daniel’s trial, had it been presented.

Although Judge Kennedy was charged with resolving allegations regarding her own judicial misconduct, she refused to recuse herself from adjudicating Mr. Daniel’s post-conviction Application. Mr. Daniel appealed this decision to the regional administrative judge, but his motion to recuse the trial judge as the habeas fact-finder was denied. SHR930. Mr. Daniel next sought to file a petition for writ of *mandamus* in the CCA to force recusal and the appointment of a neutral fact finder,

¹ In Texas capital post-conviction proceedings, applications for writs of habeas corpus are filed in the convicting court, *see* TEX. CODE CRIM. PROC. art. 11.071 § 4, which then makes recommended findings of fact and conclusions of law to the Court of Criminal Appeals. *See id.* at §§ 8-9.

but the CCA denied leave file. App.E.² Judge Kennedy thus continued to preside over the post-conviction proceedings as the habeas judge.

Under Texas law, the habeas court is required to give notice of the controverted factual issues it is designating for resolution. TEX. CODE CRIM. PROC. art. 11.071 §9(a). However, during the proceedings in this case, Judge Kennedy denied Mr. Daniel notice of which of the factual allegations raised by the Application the court would resolve. Consequently, the habeas court denied Mr. Daniel a meaningful opportunity to present evidence to prove the constitutional claims he had pleaded, including his claim that trial counsel was ineffective for failing to investigate the evidence that Mr. Daniel suffers Autism Spectrum Disorder and that Judge Kennedy engaged in misconduct when she communicated off-the-record with jurors with no notice to Mr. Daniel's counsel. In deciding the merits of the claims raised in Mr. Daniel's Application, the habeas court only accepted evidence procured by the State in the form of affidavits from trial counsel addressing Mr. Daniel's ineffectiveness claim. The court also relied upon Judge Kennedy's personal recollections, to which Mr. Daniel was not privy, in denying relief on his claims, which included a claim pertaining to the court's own misconduct to which the judge was a fact witness, but denied Mr. Daniel a meaningful opportunity to confront adverse witnesses presented by the State in its response. Over Mr. Daniel's repeated objections to the

² The CCA considered Mr. Daniel's *mandamus* proceedings as a separate case from his Application for Writ of Habeas Corpus. *See In re Daniel*, No. WR-83,459-02 (Tex. Crim. App. 2016) (not designated for publication). Those proceedings are therefore not included in the state habeas record.

violation of his due process rights, Judge Kennedy made her findings of fact and conclusions of law, which the CCA adopted wholesale.

II. PROCEDURAL HISTORY

A. Trial

On June 27, 2012, a grand jury indicted Mr. Daniel with capital murder for intentionally causing the death of Officer Jaime Padron while he was acting in the lawful discharge of an official duty. CR98. The trial court appointed an experienced local first-chair attorney to represent Mr. Daniel, and second-chair counsel who was not on the capital appointments list. CR14. Lead counsel moved for the appointment of a mitigation specialist and fact investigator. However, within several months, counsel got into a dispute over the trial court's refusal to recognize the relevance of the American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003), and the State Bar of Texas *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966 (2006), and the court's denial of funding requests to conduct an adequate mitigation investigation. Mr. Daniel's lead counsel, mitigation specialist, and fact investigator all withdrew from the case. CR103.

The trial court appointed new lead counsel, CR103, who did not challenge the court's refusal to provide the defense team reasonably necessary auxiliary services in line with the professional guidelines governing capital representation. Mr. Daniel's trial counsel also failed to investigate leads that Mr. Daniel suffered from Autism Spectrum Disorder, a neurodevelopmental disability or otherwise present

available mitigation evidence that might have allowed the jury to make an individualized sentencing determination that Mr. Daniel was deserving of a sentence less than death. *See Lockett v. Ohio*, 438 U.S. 586 (1978); TEX. CODE CRIM. PROC. art. 37.071 § 2(b).

During the guilt phase, the State presented evidence that Mr. Daniel had entered a Walmart Superstore in the early morning hours on April 6, 2012. Walmart surveillance video showed Mr. Daniel, clearly intoxicated, wandering around the store and filling produce bags and his backpack with groceries. A Walmart employee called 311 to alert the police before Mr. Daniel could leave and endanger himself and others. 18RR54, 77, 129. Officer Jaime Padron responded to the call, *see* 18RR94, and encountered Mr. Daniel at the exit, *see id.* at 79-81. Video showed Officer Padron tackle Mr. Daniel from behind, and three shots were fired while Mr. Daniel and Officer Padron were tangled on the floor, one of which hit Officer Padron in the neck. *Id.* at 30, 134; 20RR123-25. Mr. Daniel was arrested immediately, interrogated later that night, and made inculpatory statements before and after his arrest. *See* 18RR64, 249; State's Exh. 15; State's Exh. 59. Though Mr. Daniel's initial counsel filed motions to challenge Mr. Daniel's statements to police on the basis that they were obtained illegally, because new counsel failed to seek their suppression, they were admitted at trial. CR24-26, 30-33, 78-80.

Mr. Daniel's ex-girlfriend testified at the guilt phase about his drug use and untreated depression. 20RR189-91, 193, 195, 198-99. A physician testified that Mr.

Daniel was intoxicated on Xanax at the time of the offense and when he made statements to the police, and he described the effects of Xanax and addiction. 21RR10-31.

At the punishment phase, the State presented almost no evidence of prior violent conduct by Mr. Daniel. It argued that Mr. Daniel showed a lack remorse, and presented evidence that Mr. Daniel believed he would be at the top of the pecking order in prison;” planned to profit from his fame; took a bow when his case came on the news; and pumped his fist when an inmate yelled “F*** the police!” 23RR36, 81, 113, 84-85, 200-30. The State’s presentation of Mr. Daniel’s prior bad acts included testimony of a girl that Mr. Daniel had threatened in the sixth grade, and evidence that Mr. Daniel had been in a fight in high school. 23RR22-23; 24RR159. Witnesses testified that Mr. Daniel had bragged about running from the police on his motorcycle; was charged with possession of marijuana; and was charged with driving while intoxicated. 22RR19-20, 169; 23RR9-10; 24RR66-67. Mr. Daniel’s roommate testified that on the evening before the offense, Mr. Daniel talked about robbing a convenience store together. 22RR127-28. Jail correctional officers testified that Mr. Daniel made “hooch” and hoarded pills. 22RR65-66; 22RR151; 24RR30. A jail guard testified that Mr. Daniel had kept a list of the guards’ schedules, 23 RR36-37; an inmate testified that Mr. Daniel and another inmate had been planning an escape from jail, 22RR81; and a detective testified that Mr. Daniel sent coded messages by mail while he was detained in jail, *see, e.g.*, 22RR161-62. Finally, a TDCJ

classifications expert testified to the freedoms Mr. Daniel would experience if he was sentenced to life in prison without parole. 23RR122-65.

The defense's theory at punishment was that Mr. Daniel had suffered from depression and addiction for most of his life, both of which got worse after he broke up with his girlfriend, and that Mr. Daniel would not constitute a future danger in prison. Mr. Daniel's former coworkers and supervisors testified that Mr. Daniel was introverted and a promising computer programmer. 24RR48-54, 177-83; 25RR5-19. Defense experts testified that Mr. Daniel had experienced traumatic brain injuries, which could have contributed to his drug use and depression, 24RR23-40; that he showed signs of frontal lobe damage, *id.* at 244-48; that Mr. Daniel was likely to do well in a structured prison environment, *id.* at 263-70; about Mr. Daniel's attempted suicide while incarcerated before trial by overdosing on Haldol, an anti-psychotic drug, 25RR145-75; and that Mr. Daniel suffered from Major Depression and Avoidant Personality Disorder, *id.* at 175-82, 194-96, 200-04, 219-22. One jail guard testified to impeach the State's version of the escape plan. 24RR at 215-18. Additionally, jail guards testified that Mr. Daniel was respectful and compliant while awaiting trial in jail. 24RR11, 22, 35. Neither Mr. Daniel's mother, father, nor sole sibling were asked to testify. The only family member presented on Mr. Daniel's behalf was his aunt who he had lived with for a few months during high school. 27RR21-60.

In rebuttal, the State presented the testimony of a psychologist who found Mr. Daniel to be unreliable and disputed the defense expert's diagnoses. 26RR15-

36. The State's expert also listed the definition and criteria for psychopathy, though she testified that she had been prohibited from administering future dangerousness testing. *Id.* at 36-38.

Finally, in surrebuttal, Mr. Daniel's ex-girlfriend and her mother testified that Mr. Daniel sent a letter expressing his remorse for the offense. *Id.* at 71-86.

B. State Post-Conviction Proceedings

On February 28, 2014, the trial court appointed the Office of Capital and Forensic Writs to represent Mr. Daniel in post-conviction proceedings. CR192. While Mr. Daniel's state post-conviction proceedings were pending, his direct appeal was affirmed by the CCA in a published opinion. *Daniel v. State*, 485 S.W.3d 24 (Tex. Crim. App. 2016). Mr. Daniel filed his Initial Application for Writ of Habeas Corpus ("Application") on February 12, 2016. SHR431-776.

1. Mr. Daniel's Allegations

Post-conviction investigation uncovered new information that undermined the reliability of Mr. Daniel's conviction and condemnation to death. Critically, evidence developed during this investigation revealed that Mr. Daniel suffers from Autism Spectrum Disorder ("Autism"), a pervasive neurodevelopmental disability, which impacted and impaired nearly every aspect of his life. Autism, which is characterized by significant impairments in social communication with profound behavioral implications, impaired Mr. Daniel's brain functioning. The investigation also revealed that the trial court had communicated with jurors off-the-record without the knowledge of Mr. Daniel and his counsel.

On February 12, 2016, Mr. Daniel filed his Application, which raised eleven claims of unconstitutional confinement, SHR431. The Application alleged in Claim One that trial counsel's failure to conduct a reasonable investigation into Mr. Daniel's background prevented his jury from appreciating the impact of his disability on the offense itself, his post-offense conduct and statements, and the course of his life. By contrast, the State used aspects attributable to Mr. Daniel's disability as a reason to execute him. The State exhorted the jurors to condemn Mr. Daniel for his purported lack of remorse by improperly characterizing his demeanor, trivializing his suicide attempts, and blaming him for self-medicating the symptoms of his disability.

Trial counsel failed to uncover Mr. Daniel's pervasive developmental disability, and other strong mitigating evidence due to their truncated, narrow, and last minute investigation. Trial counsel spent barely one-fourth the amount of time investigating mitigating evidence than was needed, according to the assessment of a highly experienced mitigation specialist. SHR452. Moreover, despite nearly every important mitigation witness being located in different states, the trial mitigation specialist took just a single trip outside of Texas—and waited until the eve of trial to do so. *Id.*

Mr. Daniel also alleged that the trial court's parsimony with respect to the resources needed to investigate Mr. Daniel's background and mount a proper defense contributed to the deficient performance of trial counsel. In fact, the trial

court's failure to provide the necessary resources to the defense cause three members of Mr. Daniel's defense team to withdraw from representation. *Id.*

In Claim Two, on the basis of a sworn juror affidavit, Mr. Daniel alleged judicial misconduct in violation of his right to due process. SHR679-86. Post-conviction investigation revealed that Mr. Daniel's jury sent out a note to the trial court, to which the court responded off-the-record, and without consulting Mr. Daniel's counsel. *Id.* at 453. Neither the jury note nor the Court's communication was made part of the trial record. The contents of the court's communication with the jurors remains unknown, and Judge Kennedy continues to be a necessary and material witness as to its substance. Thus, the actions of the trial judge were squarely at issue in this claim.

Similarly, the trial judge's conduct was also at issue in Claim Five. Mr. Daniel alleged that the trial court's refusal to properly fund defense team's reasonably necessary auxiliary services in line with the professional guidelines governing capital representation violated his Eighth Amendment rights, his right to due process, and his Sixth Amendment right to counsel. SHR707-26.

In Claims Three and Four, Mr. Daniel alleged that his due process rights were violated when the State presented false and misleading testimony at his trial. SHR686-706. The false and misleading testimony consisted of misrepresentations about the conditions in which prisoners sentenced to life without parole live in Texas prisons; the reason that Mr. Daniel had kept track of the names of jail cor-

rectional officers while awaiting trial; and the undisclosed fact that a jailhouse informant had received a deal in exchange for his testimony against Mr. Daniel. In Claim Six, Mr. Daniel alleged that the prosecution failed to disclose benefits given to a key State witness, a jailhouse informant, in exchange for his testimony that Mr. Daniel planned an escape from jail with another inmate, in violation of Mr. Daniel's due process rights under *Giglio v. United States*, 405 U.S. 150 (1972). SHR727-37.

In Claim Seven, Mr. Daniel challenged Texas's voluntary intoxication statute as violating the Due Process Clause and the Eighth Amendment. SHR737-41. Finally, Claims Eight, Nine, Ten, and Eleven alleged that aspects of the death penalty sentencing statute, Texas Code of Criminal Procedure Article 37.071, violate the Eighth Amendment. SHR742-73.

After filing his Application, the resolution of which would require Judge Kennedy to testify as a material fact witness and adjudicate her own conduct, Mr. Daniel filed a motion to recuse Judge Kennedy from proceeding over his post-conviction proceedings on February 16, 2016. SHR778-836. Judge Kennedy declined to recuse herself on March 3, 2016. SHR864. Before a hearing could be held on the motion, counsel for Mr. Daniel discovered that Judge Kennedy had engaged in multiple *ex parte* communications with the State, both during trial and during post-conviction proceedings, including informing the State of her opinions about Mr. Daniel's post-conviction legal claims. *See* SHR866-67. Thus, Mr. Daniel additionally alleged that the appearance of Judge Kennedy's impartiality might reasonably be questioned, and

that the *ex parte* communications evidenced an actual bias or prejudice. SHR873-84. Mr. Daniel’s recusal motion was denied. *See* App.B.

Mr. Daniel filed a motion for leave to file a petition for original writ of *mandamus* to the CCA on May 5, 2016, seeking review of the denial of his recusal motion.³ Mr. Daniel’s motion for leave to file, however, was denied in an unpublished order by the CCA. *See* App.E.

The State filed its answer to the application on August 10, 2016. SHR948. The Answer “generally and specially denie[d] each and every allegation of fact made by applicant except that respondent has custody of applicant.” SRR9533. In addition, the State proffered controverting affidavits as exhibits to its answer from lead counsel, a court reporter, a bailiff, one of the prosecutors, and the jury foreman. The proffers disputed Mr. Daniel’s allegations about his trial representation and allegations regarding the off-the-record communication between Judge Kennedy and the jury.

2. State Habeas Adjudication

Mr. Daniel pleaded a *prima facie* case of unconstitutional confinement and supported his allegations with affidavits and other evidentiary proffers. Upon meeting the pleading burden, Texas law provides for the mandatory procedure for the

³ To be entitled to a writ of *mandamus*, the relator must demonstrate that he (1) has no adequate remedy at law and (2) is clearly entitled to the relief sought. *See, e.g., State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 499 (Tex. Crim. App. 2011).

habeas court to resolve an applicant's legal claims. *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8-9. The habeas court, however, failed to follow this mandatory procedure.

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

Section 9 of Article 11.071, entitled "Hearing," governs the proceeding when the habeas court determines that controverted, previously unresolved factual issues exist material to the legality of confinement. In that circumstance, the habeas court must designate by written order the issues of fact that are to be resolved and the manner by which the court will consider evidence to resolve those issues. *Id.* § 9(a). To resolve the issues, the court can hold a hearing appropriate to the case; the statute authorizes the court to receive evidence via affidavits, depositions, interrogatories, live witnesses, and personal recollection. *Id.* Thereafter, a transcript of the hearing must be prepared, and the habeas court must order the parties to file proposed findings of fact and conclusions of law for it to consider no later than thirty days after the transcript of the hearing is filed. *Id.* § 9(d)-(e). The court must then make written findings of fact that are necessary to resolve the controverted facts and make conclusions of law based on those fact-findings. *Id.* § 9(e).

On August 26, 2016, Mr. Daniel filed a *Motion to Designate Issues of Fact to be Resolved and Request for Evidentiary Hearing Under Article 11.071, Section 9(A)*. SHR1083-1103. In his motion, Mr. Daniel argued that, in particular, his ineffective assistance of counsel claim required an evidentiary hearing to resolve the disputed factual issues between the proffers attached to his Application and those attached to the State's Answer. SHR1088-98. Additionally, he argued that his claim of judicial misconduct, in violation of due process, required resolution at an evidentiary hearing. *Id.* at 1098-1101. The State filed *State's Reply to Applicant's Motion to Designate Issues and Request for an Evidentiary Hearing* on August 30, 2016, SHR1104-11, and a *Proposed Order Designating Issues and Order for Filing Affidavits* on September 7, 2016, SHR1112-13. In its filings, the State requested the habeas court to order the submission of trial counsel affidavits.

In derogation of its clear statutory duty, the habeas court failed to designate the controverted, previously unresolved factual issues material to the legality of Mr. Daniel's confinement. *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8(a). The court signed the State's proposed order the day after it was filed, without argument, on September 8, 2016, designating only a legal claim, rather than factual issues, for resolution: "Whether the applicant's trial counsel rendered ineffective assistance of counsel[.]" SHR1114. The habeas court indicated it would conduct fact-finding by relying solely on the affidavits of Mr. Daniel's trial counsel, rather than any of the

evidentiary proffers made by either Mr. Daniel or the State, or the court's own personal recollections, *id.*,—or any evidence that Mr. Daniel might have sought to introduce.

The court's September 8, 2016, order also required Mr. Daniel and the State to submit proposed findings of fact and conclusions of law within 30 days of the order. SHR1115. Arguing that the habeas court's September 8 order violated due process, Mr. Daniel filed a notice of his inability to comply with the court's order and a motion to rescind the September 8 order. SHR1123-36. The habeas court denied Mr. Daniel's motion on October 11, 2016. SHR1544. In its order, the habeas court changed the manner of fact-finding:

This Court gives notice to Applicant and the State that it will resolve the issue described in the Order Designating Issues through the affidavits of trial counsel, Applicant's application and attached exhibits, the State's Answer and attached exhibits, and the court's personal recollection.

Id. Without setting a hearing at which the parties could move for their exhibits to be admitted—or to object to exhibits being admitted—as substantive evidence for the habeas court to review, *but see* TEX. CODE CRIM. PROC. art. 11.071 § 10 (applying the Texas Rules of Evidence to post-conviction proceedings), the court set the date for filing proposed findings of fact and conclusions of law. *Id.*

In response, Mr. Daniel filed a *Motion Requesting this Court Comply with Basic Due Process Principles by Providing Mr. Daniel an Opportunity to Challenge Adverse Evidence* on November 10, 2016. SHR1594-1615. In the motion, counsel objected to the inability to challenge the adverse evidence, the court preventing him

from presenting evidence to meet his burden of proof, and the habeas court's reliance on personal recollection without providing Mr. Daniel notice of what those recollections contained. *Id.* The habeas court denied Mr. Daniel's motion for due process on November 30, 2016. App.D.

Notably, the habeas court limited Mr. Daniel to the evidence proffers attached to his Application to meet his pleading burden, and in so doing failed to provide Mr. Daniel the opportunity to present *any* evidence post-filing. The habeas court adopted the State's proposed findings nearly verbatim, changing just seven words. *Compare* SHR1545-74 *with* SHR1806-35. In its findings, the habeas court relied upon the unfronted affidavits of Mr. Daniel's trial counsel, but none of Mr. Daniel's own proffers. *Compare, e.g.,* SHR1807 *with* SHR1062. The habeas court recommended denying relief, App.C, transferred the case to the CCA on December 2, 2016. Mr. Daniel filed objections to both the substance of the habeas court's findings and the process the court followed. *See Applicant's Objections to the Findings of Fact and Conclusions of Law Entered by the Trial Court and Request for Remand Based on the Necessity of the Trial Court's Recusal, Inadequate Fact Finding, and Procedures that Violated Mr. Daniel's Due Process Rights, Ex parte Daniel*, No. WR-459-01 (Tex. Crim. App. Jan. 20, 2017). Specifically, he argued that his rights to due process had been violated by the failure to recuse Judge Kennedy, the habeas court's failure to give notice of which factual issues it would resolve, his inability to prove his allegations, and the denial of the ability to challenge the State's adverse evidence. *Id.*

On October 18, 2017, the CCA denied relief to Mr. Daniel. App.A. In its order, the CCA reasoned that it was denying relief on the claims of ineffective assistance of counsel because “Applicant fail[ed] to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). He fail[ed] to show by a preponderance of the evidence that his counsel’s representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.” App.A3. With respect to Mr. Daniel’s due process claim concerning the off-the-record communication between the jury and the trial judge, the CCA mischaracterized this claim as one based on statutory rather than constitutional basis, and declined to adjudicate it under the theory that “statutory violations are not cognizable on habeas review.” App.A2. Rehearing was not sought, because it is unavailable in habeas corpus cases as a matter of Texas law. *See* TEX. R. APP. P. 79.2.

Additionally, after the habeas court recommended denying relief, Mr. Daniel included the denial of his recusal motion in an appeal to the CCA. *See* Applicant’s Objections to the Findings of Fact and Conclusions of Law Entered by the Trial Court and Request for Remand Based on the Necessity of the Trial Court’s Recusal, Inadequate Fact Finding, and Procedures that Violated Mr. Daniel’s Due Process Rights, *Ex parte Daniel*, No. WR-459-01 (Tex. Crim. App. Jan. 20, 2017), Mr. Daniel raised the due process violation arising from his deprivation of a neutral judge. *Id.* Yet, in its denial, the CCA failed to address the appellate issues Mr. Daniel raised regarding the recusal, or whether his due process rights had been violated. *See* App.A.

REASONS FOR GRANTING THE WRIT

Some amount of process is due to Mr. Daniel in the adjudication of his state post-conviction proceedings under the Due Process Clause; that much is clear. However, this Court has not reached the question of *how much* process must be afforded in a state habeas applicant’s “one bite at the apple”—*i.e.*, the one opportunity to present constitutional claims for relief—to comply with the Due Process Clause. In this case, Mr. Daniel was not even afforded the statutory process mandated by Texas state law. Certiorari should therefore be granted to establish that, at least in Mr. Daniel’s case, the state court violated the bare minimal protections of due process in adjudicating his constitutional claims for relief.

Texas law provides for capital post-conviction review, and the meaningful opportunity to prove claims of unconstitutional confinement before neutral fact-finders. Mr. Daniel, however, was denied even that opportunity. Mr. Daniel pleaded a *prima facie* basis for relief on the basis of eleven claims, but was denied the opportunity to prove his claims before a neutral fact-finder. While state courts are not constitutionally required to provide a mechanism for post-conviction review of a capital case, when a state provides one, those proceedings must comport with the Due Process Clause. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Contrary to the requisites of procedural due process and fundamental fairness, the habeas court failed to 1) provide notice of the factual issues in dispute, 2)

deprived Mr. Daniel of any opportunity to present evidence in support of the allegations he raised, 3) deprived him of a neutral fact-finder who was not also a material fact witness, and 4) denied him the ability to confront adverse evidence. Instead, the court only designated a legal issue to be resolved. The only evidence adduced and considered in connection with Mr. Daniel's claims were the un-confronted affidavits of trial counsel, whose performance was at issue. Compounding these due process errors, the habeas court refused to recuse itself—and Texas courts steadfastly condoned this refusal—from the adjudication of this case, including the judicial misconduct claim, and, in fact, proceeded to recommend that relief be denied based on the court's own "personal recollection" of its alleged impropriety.

Thus, certiorari should be granted to ensure that Mr. Daniel receives meaningful review of his constitutional legal claims, including his allegations of judicial misconduct and the violation of his Sixth Amendment right to the effective assistance of counsel. In deviating substantially from the mandatory statutory process governing habeas corpus applications in Texas, the state court proceedings adjudicating Mr. Daniel's claims below failed to satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause.

The result was unreliable fact-finding made without Mr. Daniel having had any opportunity to present evidence in support of his allegations, to challenge trial counsel's affidavits submitted on the State's request, or to determine what the habeas court's recollections were.

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

This Court has recognized that the Due Process Clause does not cease to apply, 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), *overruled on other ground by Keeney v. Tamyayo-Reyes*, 504 U.S. 1, 5 (1992) (The availability of habeas corpus relief “presupposes the opportunity to be heard, to argue and present evidence.”); *see also Ford v. Wainwright*, 477 U.S. 399, 413 (1986) (noting that the “fundamental requisite of due process of law is the opportunity to be heard”). Thus, when the judiciary acts, the relevant question is not *whether* process is due, but *what* process is due.

Texas law provides a mandatory statutory procedure for resolving constitutional claims alleged in an application for writ of habeas corpus. Accordingly, the Due Process Clause applies, and the Constitution demands that Texas’s post-conviction procedures be applied fairly. In Mr. Daniel’s case, however, the habeas court failed to follow Texas’s mandatory procedures. The habeas court failed to give notice of the factual allegations it would resolve, it denied Mr. Daniel the opportunity to prove his allegations, it accepted evidence from the State but not Mr. Daniel, did

not allow Mr. Daniel to confront statements by adverse witnesses presented by the State in its response, and relied upon its own undisclosed personal recollection to resolve disputed facts pertaining to an issue to which the habeas judge was a witness. The CCA summarily adopted the habeas court's findings, making a premature merits determination based solely on the pleadings. Consequently, Mr. Daniel was deprived of a fair hearing and denied the due process protections this Court has previously recognized.

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

While a state is not required to provide a mechanism for a habeas applicant to collaterally attack a criminal conviction, when it does, the procedures employed must comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”). Due process, at a minimum, requires notice and the opportunity to be heard in a manner appropriate to the nature of a case. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). This Court has repeatedly recognized that, “[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.” *Ford*, 477 U.S. at 411 (Marshall, J., concurring) (plurality opinion).

A fair hearing requires the opportunity to present evidence in support of constitutional claims and controvert adverse evidence. *See, e.g., Ford*, 477 U.S. at 413 (the state process that did not permit a death-sentenced person to present evidence

relevant to his competence to be executed violated due process) (Marshall, J., concurring) (plurality opinion); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

This is particularly important in post-conviction cases because “[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.” *Townsend*, 372 U.S. at 312. Resolutions of disputed factual questions must be based on evidence that is admitted at a hearing before a judge. *Morgan v. United States*, 298 U.S. 468, 480-81 (1936). *See also Ford*, 477 U.S. at 413; *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Thus, while a hearing in the criminal post-conviction context may be less formal than a trial, *Ford*, 477 U.S. at 427 (Powell, J., concurring), and may not even require live testimony, a “hearing” at least requires that there be a formal process for admitting, objecting to, and challenging the substance of evidence offered by a party. *See Goldberg*, 397 U.S. at 267 (“The hearing must be ‘at a meaningful time and in a meaningful manner.’”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *Cf.* 28 U.S.C. § 2246 (“On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”). Due process also requires that the parties are given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve.

See Goldberg, 397 U.S. at 268 (“rudimentary due process” requires “an effective opportunity” to present one’s case, including “by confronting adverse witnesses”).

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

Similarly, minimal due process protections, such as the opportunity to be heard, to present evidence, and to develop a claim before a neutral fact-finding, apply when a death-sentenced prisoner raises a claim of ineligibility for the death penalty. *See Blue v. Thaler*, 665 F.3d 647, 656-57 (5th Cir. 2011) (in proceedings on Eighth Amendment claim of ineligibility for death penalty on basis of intellectual disability, habeas petitioner is entitled to “a set of core procedural due process protections: the opportunity to develop and be heard on his claim that he is ineligible for the death penalty”); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (“there is no sound basis for concluding that such [due process] protections do not extend to other instances, such as [a] *Roper* claim” of ineligibility for the death penalty due to

age). Even in the context of clemency, this Court acknowledged that “some minimal procedural safeguards apply to clemency proceedings.” *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272 (1998); *see also Wolff v. McDonnell*, 418 U.S. 539 (1974) (extending due process protections to civil rights actions raising basic constitutional rights).

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

B. The State Court Adjudication Did Not Comply With the Due Process Previously Recognized by this Court.

Although the Texas statute governing the adjudication of habeas corpus applications filed by death-sentenced prisoners in Texas may comply with the requirements of due process, the state court adjudication of Mr. Daniel’s constitutional claims deviated substantially from the statutory process and certainly did not satisfy the minimum procedural requirements of the Fourteenth Amendment’s due

process clause. Where a state provides for a post-conviction process, it has to apply the rules fairly. *See Evitts*, 469 U.S. at 401. Texas, here, did not.

1. The State Court Failed to Designate Controverted, Material Fact Issues as Required by Statute, Depriving Mr. Daniel of Adequate Notice.

The conflicted habeas court failed to provide notice of which factual disputes it was going to resolve. In violation of Texas Code of Criminal Procedure Article 11.071, Section 9, the conflicted court did not designate the disputed issues of fact material to Mr. Daniel's claims of unconstitutional confinement, but rather designated only a single legal issue. The habeas court then short-circuited the requisite process by purporting to resolve facts against Mr. Daniel without admitting any evidence and accepting solely on evidentiary proffers procured by the State and on its own private personal recollections.

Mr. Daniel's only burden at the pleading stage was to allege specific facts, which, if true, might entitle him to relief. *See, e.g., Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011) ("Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief."); *Ex parte Armstrong*, No. WR-78,106-01, 2015 WL 7354084, at *2 (Tex. Crim. App. Nov. 18, 2015) (noting that the applicant had "alleged facts that, if true, might entitle him to relief"). There is no requirement that habeas applicants adduce "evidence." *See Medina*, 361 S.W.3d at 639.⁴ The State

⁴ 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

may then answer or rely on a general denial. *See* TEX. CODE CRIM. PROC. art. 11.071 § 7.

When an applicant pleads facts that, if true, might call for relief, and the State denies those allegations, these factual issues are “controverted.” *See, e.g., Ex parte Carnes*, 579 S.W.2d 249 (Tex. Crim. App. 1979) (holding the finding of the absence of controverted, previously unresolved facts material to the legality of confinement to be an abuse of discretion where applicant pleaded a cognizable claim and the State admitted none of the facts alleged). *See also Ex parte Ramirez*, No. WR-64076-01, 2006 WL 1173437 (Tex. Crim. App. May 3, 2006) (holding applicant alleged unresolved factual issues material to confinement requiring resolution where applicant alleged ineffective assistance of counsel due to a conflict of interest).

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

does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief.”)

What the habeas court here did instead was “designate” a claim, rather than facts, for resolution. SHR1114. This was contrary to the clear requirements of the statute. Under 11.071, Section 8(a), the habeas court was required to provide *notice* to Mr. Daniel of the disputed issues of fact material to the claims that he was raising—in other words, notice of what facts the habeas court thought were disputed and what factual disputes the habeas court intended to resolve.

The habeas court’s refusal to follow the statute and designate factual issues for resolution is striking because the State *conceded* the existence of disputed factual issues material to the constitutionality of confinement between Mr. Daniel’s Application and the State’s Answer. *See* SHR953 (“Respondent generally and specially denies each and every allegation made by applicant except that respondent has custody of applicant.”). Indeed, the State moved the habeas court to order that trial counsel respond to Mr. Daniel’s claims of ineffective assistance of counsel. SHR1112-13 (moving the habeas court for affidavits from trial counsel). Such post-filing evidentiary development regarding these claims would have been entirely superfluous were there no disputed issues of material fact regarding these claims or had the claims not met a *prima facie* threshold.

The habeas court’s failure to designate the factual issues it believed to be controverted and in need of factual development and resolution—contrary to the procedure clearly outlined by Texas Code of Criminal Procedure Article 11.071—deprived Mr. Daniel of notice of the factual issues that the habeas court would be determining.

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

In state post-conviction, Mr. Daniel bore the burden of proof. To be granted relief on, for example, his claim of ineffective assistance of counsel, his burden was to prove, by a preponderance of the evidence, that trial counsel's performance was deficient and that he was prejudiced as a result. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). Despite having the burden of proof, Mr. Daniel was denied any opportunity to meet that burden; instead, the habeas court constrained him to factual allegations and evidentiary proffers attached to his habeas application. The habeas court's refusal to permit Mr. Daniel to prove the allegations he made, contrary to the mandatory statutory procedure, violated due process. *Ford*, 477 U.S. at 413; *Panetti*, 551 U.S. at 952.

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

Here, only one party, the State, was permitted to procure evidence related to the claims that Mr. Daniel had raised. Mr. Daniel was left with just the allegations asserted in his habeas application and the evidentiary proffers attached to it, while

the State was permitted to introduce the self-serving affidavits of trial counsel defending their work and Mr. Daniel's death sentence.⁵ The habeas court deprived Mr. Daniel of agency over how evidence might be presented in support of his claims by limiting the evidence presented to only the self-serving evidence supplied by trial counsel who were not subjected to cross-examination. Thus, in connection with his claim that trial counsel performed ineffectively for failing to investigate the his neurodevelopmental disability, Mr. Daniel was prevented from meeting his burden of proof with expert testimony regarding the fact that Mr. Daniel's Autism Spectrum Disorder explains much of his post-arrest behavior, provides additional grounds on which to challenge the illegally-obtained statements that the State relied on to obtain a conviction, and demonstrates why Mr. Daniel was not the "worst of the worst" but rather someone whose mitigating circumstances would have convinced a jury to spare his life.

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

⁵ Trial counsel in Texas capital cases possess an inherent conflict of interest after a capital conviction. Texas Code of Criminal Procedure, Article 26.052(d)(1)(C) requires that capital counsel who are found to have rendered ineffective assistance must be removed from the list of capital-qualified counsel and are ineligible for capital appointments.

3. The Habeas Court Denied Mr. Daniel's Request for Notice of the Personal Recollections it Used to Resolve His Claims and Provided No Opportunity to Challenge Them.

Due process requires that an applicant be afforded notice of the evidence against him and be given an opportunity to rebut it. See, e.g., *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Mr. Daniel had no notice of the conflicted habeas court's recollections it used to resolve his claims. Initially, the conflicted habeas court only provided notice that it would resolve Mr. Daniel's disputed factual allegations through the affidavits of trial counsel, on September 8, 2016. See SHR1114. Later, the habeas court changed its method of fact-finding to include "the affidavits of trial counsel, Applicant's application and attached exhibits, the State's Answer and attached exhibits, and the court's personal recollection." SHR1544. The habeas court's new order came too late to provide meaningful notice. The new order was issued at the same time that the habeas court concluded its fact-finding. On November 10, 2016, Mr. Daniel filed his *Motion Requesting this Court Comply with Basic Due Process Principles by Providing Mr. Daniel an Opportunity to Challenge Adverse Evidence*, requesting, *inter alia*, his due process right to notice of the trial court's personal recollections and an opportunity to challenge them and the State's adverse evidence. SHR1594-1615. The habeas court denied the motion, App.D., and Mr. Daniel was never given notice of the state habeas court's personal recollections or any opportunity to challenge them. Nor was he given an opportunity to challenge any of the State's adverse evidence.

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

Mr. Daniel pleaded specific facts that, if true, entitled him to relief. Thereafter, Texas law mandated a particular procedure for adjudicating Mr. Daniel's legal claims. Yet the habeas court and the CCA refused to follow Texas law and failed to provide him with the required due process protections, in violation of his rights under the Fourteenth Amendment. This case never progressed beyond the pleading stage, and Mr. Daniel had indisputably satisfied his pleading burden. *See Ex parte Medina*, 361 S.W.3d at 637. Consequently, the state courts made a premature determination of the merits of his constitutional post-conviction claims without providing him the evidentiary proceedings required by state law.

In sum, in support of his habeas application and to meet his pleading burden, Mr. Daniel attached various sworn evidentiary proffers from potential witnesses. The State answered, controverting Mr. Daniel'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. Daniel's confinement and the opportunity to present evidence to prove his allegations in a hearing. This would have provided notice and the opportunity to be heard, the touchstones of procedural due process. This did not happen. Instead:

- Despite the existence of a conflict—*i.e.*, that the trial and habeas judge was a witness in post-conviction proceedings—the judge failed to recuse herself;
- Mr. Daniel's meritorious motion to recuse the judge was denied;
- The CCA failed to address the denial of the recusal motion, though it had multiple opportunities to do so;
- The habeas court refused to follow Article 11.071, Sections 8(a) and 9(a) by refusing to designate controverted factual issues material to the legality of Mr. Daniel's confinement to be resolved;

- The habeas court refused to provide Mr. Daniel any meaningful opportunity to present evidence in support of his allegations;
- The habeas court deprived Mr. Daniel of notice of the “personal recollections” it used to resolve the disputed factual allegations in the Application;
- The habeas court and the CCA denied relief to Mr. Daniel based on findings and conclusions that were drafted almost entirely by the State in reliance on the self-interested predecessor counsel affidavits that were never even admitted into evidence during a hearing; and
- The habeas court and the CCA denied relief to Mr. Daniel on the merits, notwithstanding the fact that Mr. Daniel had been denied the opportunity to introduce evidence in support of his claims.

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

The habeas court’s unreliable findings flow directly from its deviations from mandatory statutory procedures for adjudicating habeas corpus applications in Texas. Had the habeas court afforded Mr. Daniel notice of which controverted fact issues it would resolve, as required by the statute, and had it afforded him *some* opportunity to prove his case before a court that was not operating under a disabling conflict of interest, Mr. Daniel could have presented evidence and met his burden of proof. *Cf.* App.A3.

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

sentenced persons in Texas cannot rely on the fair application of the statutory post-conviction procedural rules.

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

In the era of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), the merits of constitutional claims are often barred from consideration by federal courts due to the narrowed scope of federal habeas review. As this Court has recently explained, AEDPA imposes “a complete bar on federal court relitigation of claims already rejected in state proceedings” except where “there is no possibility 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.

Moreover, as this Court has held, it is “virtually impossible” for *Strickland* claims to be raised and meaningfully considered on direct review in Texas. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). The state post-conviction proceeding is therefore structured to be Mr. Daniel’s first meaningful opportunity to raise and obtain judicial consideration of Texas’s compliance with his right to effective counsel during his capital trial. *Id.* at 1920 (citing State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966, 977 (2006) (Guideline 12.2(B)(1)(d))). And because of AEDPA’s introduction of preclusion into initial federal habeas corpus proceedings, see 28 U.S.C. § 2254(d), the state court post-conviction proceeding is likely also to be the *last* forum in which the merits of Mr. Daniel’s

Sixth Amendment claim would be considered by any court. *See, e.g., Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam) (finding preclusion to apply in federal habeas proceeding and accordingly “express[ing] no view on the merits of the underlying Sixth Amendment principle the respondent urges”); *Woods v. Donald*, 135 S. Ct. 1372 (2015) (“Because we consider this case only in the narrow context of federal habeas review, we ‘expres[s] no view on the merits of the underlying Sixth Amendment principle’” (alteration in original) (quoting *Rodgers*, 133 S. Ct. at 1451)). *See also* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli (2015) (“Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a [federal] habeas petition as opposed to on direct appeal.”). It is therefore essential that state courts afford a post-conviction process that is adequate for obtaining results reliable enough to vindicate the important constitutional rights that habeas corpus is supposed to safeguard—particularly critical in a death-penalty case. Additionally, in the overwhelming majority of criminal cases, a *certiorari* proceeding following state post-conviction review is likely the only opportunity this Court will have to entertain the merits of Sixth Amendment claims.

Moreover, the possibility of having a biased judge who should have been recused is constitutionally impermissible. In Mr. Daniel’s case, the allegation of judicial misconduct has not yet received any meaningful review. As the Supreme Court states, “When a biased judge fails to recuse, . . . her participation in the consideration of a case calls into question the legitimacy of the court, which ‘ultimately

depends on its reputation for impartiality.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Moreover, “[n]ot only is a biased decision maker constitutionally unacceptable, but ‘our system of law has always endeavored to prevent even the probability of unfairness.’” *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

In Mr. Daniel’s case, the constitutionally unacceptable probability of a biased judge was a reality: his trial and habeas judge played the roles of both fact-finder and material witness. *Cf. Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (finding structural error when state supreme court justice had significant earlier involvement in the case and refused to recuse in violation of due process). Therefore, Mr. Daniel’s ability to appeal the improper denial of his recusal motion—and have a court review the issue—was of the utmost importance. If Judge Kennedy was a material fact witness at Mr. Daniel’s trial, he would have been able to appeal the denial of her recusal after his conviction became final. However, because the issue did not arise until after Mr. Daniel’s trial and appeal occurred—but still at a time when he should have received the constitutionally-mandated fair fact-finder to which he was entitled—no appellate court ever reviewed whether Mr. Daniel’s due process right had been violated, despite his requests.

Mr. Daniel’s is a death penalty case, in which the consequences are too serious for this Court, or any other, to allow the issue of a biased judge to go un-reviewed at some level. Mr. Daniel’s case went through the entirety of the state review process without any court reviewing the denial of his recusal motion. Consequently, a

biased judge was allowed to remain on a case in which Mr. Daniel's life and liberty were on the line. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Mr. Daniel has not received any review of the due process violations he suffered as a result of the denial of his recusal motion, and as such, his case lacks the increased reliability that his sentence requires by virtue of its finality.

CONCLUSION

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

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

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