

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to this Court.

I. THIS COURT HAS JURISDICTION TO ADDRESS MR. DANIEL'S DUE PROCESS ISSUE BECAUSE IT WAS PROPERLY PRESENTED TO THE COURTS BELOW

In its Brief in Opposition, the State contends that this Court lacks jurisdiction to address the question presented in Mr. Daniel's petition for a writ of certiorari because his due process argument was not presented in his state post-conviction application for writ of habeas corpus as a claim for relief. Opp. at 14. This Court has held that it has jurisdiction to review state court judgments under 28 U.S.C. § 1257 when the arguments have either been "addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Roberston*, 520 U.S. 83, 86 (1997). Here, Mr. Daniel has met his burden of establishing that his due process argument was properly presented to the state courts. *See id.*

Furthermore, the State's assertions about the manner in which Mr. Daniel should have presented his argument are not correct under state law for two reasons. First, Mr. Daniel's argument pertains to *how* the state courts adjudicated his claims challenging the legality of his confinement. It is not itself a claim about the legality of his confinement and is therefore not cognizable as a claim for relief in state habeas. TEX. CODE CRIM. PROC. art. 11.071. §§ 8, 9.

Second, the State confuses the requirements of amending or supplementing state habeas applications in Article 11.07 of the Texas Code of Criminal Procedure, which applies to non-capital cases, and Article 11.071, which applies to cases, like Mr. Daniel's, in which the death penalty has been imposed. Under the provisions of Article 11.071, it would not have been possible for Mr. Daniel to have amended or supplemented his state habeas application to include his due process arguments, even if it were a cognizable claim under that provision.

A. Mr. Daniel presented his due process issue to the habeas court and to the Texas Court of Criminal Appeals

The State does not dispute that the substance of Mr. Daniel's due process issue was contained in motions filed in the habeas court and objections filed in the Texas Court of Criminal Appeals ("CCA"). Indeed, the State acknowledges that the writ record contains Mr. Daniel's *Motion Requesting This Court Comply with Basic Due Process Principles by Providing Mr. Daniel an Opportunity to Challenge Adverse Evidence*, which was filed with the habeas court on November 10, 2016. Opp. at 12; SHR1594-1615. This motion was denied by the habeas court and ultimately transmitted to the CCA along with Mr. Daniel's application for writ of habeas corpus. SHR1805. Mr. Daniel also raised his due process argument before the habeas court in a motion asking the court to rescind its order for proposed findings of fact and conclusions of law. SHR1123-36.

Finally, Mr. Daniel filed objections raising the due process violations directly with the CCA, asking the CCA to vacate the habeas court's rulings, remand his writ application back to the lower court, and "[o]rder that further proceedings be held

consistent with due process and the requirements of [Article] 11.071”. *Ex parte Daniel*, No. WR-83,459-01, *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*, at *61-62 (Tex. Crim. App. Jan. 20, 2017). The State acknowledges to this Court that Mr. Daniel filed these objections with the CCA. Opp. at 13.

Despite the State’s insistence, the Texas capital habeas statute does not provide a mechanism for raising due process violations that occur through a habeas court’s handling of an applicant’s post-conviction claims through the writ application itself. Opp. at 11, 14, 20. Nor does the State identify a mechanism for properly presenting his due process argument that is viable under state law. *See* Sec.I.B., *infra*.

Mr. Daniel presented his due process objections to the procedures in his case through the mechanisms available: through motions in the habeas court and through objections the CCA.¹ The CCA has the discretion to enter any “appropriate order required by the law and the nature of the case,” TEX. R. APP. P. 78.3, and possesses the jurisdiction over the writ proceedings to “issue such other instructions or orders

¹ Although presented in the context of federal habeas, the procedural history of, *Panetti v. Quarterman*, 551 U.S. 930 (2007), is instructive. In *Panetti*, petitioner raised a of incompetency-to-be-executed. *Id.* at 938. He then filed motions in the state trial court, objecting to the lack of procedural due process in adjudicating his claim. This Court reviewed the merits of Mr. Panetti’s due process objections as properly presented in state court and found that the Mr. Panetti’s due process argument to the state court had merit. *Id.* at 952.

as may be appropriate,” TEX. R. APP. P. 73.6. The CCA may also modify the lower court’s judgment, reverse the judgment of the habeas court in whole or in part, or reverse and remand back to the habeas court. TEX. R. APP. P. 78.1. In fact, the CCA regularly acts on applicants’ motions to remand. *See, e.g., Ex parte Armstrong*, No. WR-78,106-01, 2015 WL 7354084, at *5 (Tex. Crim. App. Nov. 18, 2015) (not designated for publication).

There is “no doubt from the record” that Mr. Daniel’s due process objections to the adjudication of his habeas claims were “presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.” *Webb v. Webb*, 451 U.S. 493, 501 (1981). His arguments were presented to the right court, with fair precision, and in due time. *See Adams*, 520 U.S. at 88. Mr. Daniel’s filed his objections and request for remand with the state high court, plainly raising the federal constitutional concern that the habeas proceedings did not comply with due process. *See Applicant’s Objections*, No. WR-83,459-01 at 44-61 (“Mr. Daniel was Deprived of Due Process by the Procedures Used by the Trial Court,” citing, *inter alia*, *Townsend v. Sain*, 372 U.S. 293 (1963), *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Goldberg v. Kelly*, 397 U.S. 254 (1970)). Accordingly, Mr. Daniel properly presented his due process arguments to the state’s highest court, which gives this Court jurisdiction to address them. *See Adams*, 520 U.S. at 88.

B. The procedures that the State argues Mr. Daniel should have used to present his due process issue to the state courts are not viable under Texas law

In its Opposition, the State contends that Mr. Daniel should have amended his writ application to raise the due process violations committed by the habeas court. Opp. at 14, 20. These assertions by the State suggest to this Court that Mr. Daniel had the ability to amend or supplement his writ application, or to file a subsequent application, but the State is incorrect.

1. Mr. Daniel's due process objections would not be cognizable in a state application for writ of habeas corpus.

The due process concerns Mr. Daniel asks this Court to address in his petition for writ of certiorari stem from the habeas court's handling of his writ proceeding, which is distinct from the constitutional violations raised in his application challenging the legality of his confinement. *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8, 9 (setting out procedure to be followed regarding “factual issues material to the *legality of the applicant's confinement*”) (emphasis added). In that regard, Mr. Daniel was unable to amend or supplement his application because the due process concerns at hand did not qualify as factual or legal issues that were material to his confinement. The State cites to absolutely no authority to this Court, or to the Texas courts below, to support its argument that Mr. Daniel should have, or even could

have, amended his application for writ of habeas corpus or filed a subsequent application.²

2. The State conflates Texas’s separate statutory schemes for capital and noncapital habeas applicants

In Texas, the Code of Criminal Procedure distinguishes between an application for a writ of habeas corpus filed in a capital case and one filed in a noncapital case. *Compare* TEX. CODE CRIM. PROC. art. 11.07 with TEX. CODE CRIM. PROC. art. 11.071. The differences between Articles 11.071 (capital) and 11.07 (noncapital) are confirmed by every single case the State cites in its opposition brief, as each of them involved noncapital habeas cases that proceeded under Article 11.07. *Opp.* at 20.

The noncapital habeas statute, Article 11.07, permits an applicant to file an amended or supplemental brief. *See* TEX. CODE CRIM. PROC. art. 11.07 § 4. The practice is supported by CCA case law. *See Ex parte Saenz*, 491 S.W.3d 819, 825 (Tex. Crim. App. 2010) (“In general, when an applicant files amended or supplemental pleadings raising additional claims before we have disposed of his pending application, we consider the merits of his claims, so long as the pleadings comply with

² Similarly, Mr. Daniel was unable to amend or supplement his writ application to address the denial of his motion to recuse the trial judge. *Opp.* at 15. The State cites to a noncapital habeas case in which the CCA held that Texas’s recusal statute applies to writ proceedings and remanded the writ application back to the trial court in order for that court to hold a hearing on the motion to recuse. *Ex Parte Sinegar*, 324 S.W.3d 578, 579 (Tex. Crim. App. 2010) (“We hold that the requirements of [Texas Rule of Civil Procedure] 18a, regarding the recusal of judges, apply in habeas proceedings conducted at the trial level and that applicant satisfied those requirements here.”). The *Sinegar* case therefore does not address the appealability of the denial of a recusal motion in a writ proceeding, let alone a capital writ proceeding.

the rules and procedures in Article 11.07 and Rule of Appellate Procedure 73.1, and so long as the claims are otherwise cognizable and ripe for review.”)

Notably, a noncapital habeas applicant may file an amended or supplemental application at any time prior to the disposition of the proceeding. Critically, unlike in capital habeas proceedings, the noncapital statute does not set out a prescribed time limit in which a habeas application must be filed, and by extension, does not indicate a time in which an amended or supplemental application must be filed.

By contrast, in a death penalty case, like Mr. Daniel’s, Article 11.071 applies. Here, the capital statute sets forth a clear timeline in which a habeas application must be filed. TEX. CODE CRIM. PROC. art. 11.071 § 4(a). Unlike the noncapital statute, Article 11.071 mandates that an “amended” or “supplemental” application must be filed within the same proscribed time limit as any initial application. *Id.* at § 5(f); *see also id.* at § 4(a). Accordingly, “[i]f an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.” *Id.* at § 5(f). A subsequent application can only be filed in certain limited, statutorily-enumerated circumstances that do not apply to Mr. Daniel’s case in these circumstances. *See id.* at § 5; *cf.* 28 U.S.C. § 2244(b)(2). Mr. Daniel’s concerns regarding the lack of process the habeas court employed in adjudicating his claims occurred well after the time to file an initial or amended application had expired. Therefore, even if his due process issue was cognizable as a state habeas claim, Mr. Daniel plainly did not have the

ability to simply amend his habeas application as the State has indicated to this Court.

II. THE AMOUNT OF PROCESS DUE TO A CAPITAL HABEAS APPLICANT IN A POST-CONVICTION PROCEEDING IS AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION THIS COURT SHOULD DECIDE

Mr. Daniel did not receive adequate due process in the adjudication of his habeas claims. Had the habeas court followed the proceedings prescribed by state law, Mr. Daniel would have likely have been provided with adequate notice of the habeas court's fact-finding procedures and the disputed fact issues to be resolved, he would have received an unbiased judge to adjudicate claims of judicial misconduct, and he would have received the opportunity to present evidence in support of his claims. But the state courts did not follow the procedure outlined in Article 11.071 and this Court should grant certiorari to determine what process is due in a state post-conviction proceeding. *See Evitts v. Lucey*, 469 U.S. 387, 405 (1985) ("Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated.") The State's Opposition claims that Mr. Daniel received process because the habeas court considered hundreds of pages of "documentary evidence," Opp. at 9, entered an order designating the factual issues to be resolved, Opp. at 12, and provided Mr. Daniel notice of the manner in which it would resolve those factual issues, *id.* On the contrary, the procedures listed by the State did not comport with Article 11.071's requirements, nor did they rise to the level of providing minimal due process requirements.

Although the State calls the proffers attached to Mr. Daniel's pleading "evidence," Opp. at 9, the exhibits to his pleading were never entered into evidence.³ Notably, the habeas record lacks any proceeding in which Mr. Daniel would have had the opportunity to move for the admission of his proffers—and any additional affirmative material to meet his burden of proof—into evidence. Additionally, the State acknowledges that the six exhibits it attached to its pleading were "in contravention to factual allegations" raised by Mr. Daniel, Opp. at 11, which should have required fact-finding to resolve the dispute.⁴ The habeas court failed to designate those controverted factual allegations for resolution, however, and failed to provide Mr. Daniel the opportunity to cross-examine trial counsel whose affidavits disputed Mr. Daniel's ineffective assistance of counsel claim. *See* SHR1114-15.

Furthermore, although the State claims that Mr. Daniel received "notice" of the manner in which the court would resolve the factual disputes, that "notice" was entered on the same day that the habeas court informed the parties that it had concluded all fact-finding and *after* it ordered the parties to file proposed findings of fact and conclusions of law. *See* SHR1544 (ordering that the habeas court would

³ Even sworn allegations are not evidence. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

⁴ Four of the State's six exhibits concerned the issue of whether the trial judge had communicated with jurors off-the-record. SHR1068-79. Those exhibits, which include affidavits from the court reporter, bailiff, prosecutor, and jury foreman, *support* the existence of the trial judge's communication with the jurors, *see id.*, contrary to the State's claim in its Opposition that "no competent evidence of an alleged jury note" was presented, *see* Opp. at 10. The allegation formed the basis for a judicial misconduct claim and Mr. Daniel's motion to recuse the trial judge from presiding over the habeas proceedings.

resolve factual disputes based on the pleadings, the trial lawyers' affidavits, and the court's personal recollection, and extending the time for the parties to file proposed findings of fact by seven days). Notice received after-the-fact cannot be adequate notice within the meaning of the Due Process Clause. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."). A "mere gesture," such as what the habeas court provided, "is not due process." *Id.*

Certainly, whatever Mr. Daniel received, it was not what the Due Process Clause required. Therefore, the habeas court's handling of Mr. Daniel's habeas claims implicates federal constitutional concerns, and is a proper question for this Court to address.

CONCLUSION

This Court should grant certiorari to delineate what basic process is generally due in the capital post-conviction context.

Respectfully submitted,

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