

No. _____

In The
Supreme Court of the United States

JUAN EDWARD CASTILLO,
Petitioner,

vs.

TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mr. Castillo is scheduled to be executed on May 16, 2017 after 6:00 p.m.

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CAPITAL CASE

QUESTIONS PRESENTED

1. What process is due a prisoner who invokes a state post-conviction statute sounding in the nature of habeas corpus?
2. Did the state court violate fundamental due process in the course of adjudicating the petitioner's habeas corpus claim?

PARTIES TO THE PROCEEDINGS BELOW

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

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PETITION FOR A WRIT OF CERTIORARI

Juan Castillo petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case.

OPINIONS BELOW

The unpublished order of the Court of Criminal Appeals of Texas (“CCA”) denying the habeas corpus application is attached as Appendix 1. The unpublished findings of fact and conclusions of law entered by the trial court and adopted by the CCA in its order denying relief is attached as Appendix 2. The unpublished order of the CCA authorizing the application to be considered on the merits is attached as Appendix 3.

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 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

This case arises from the filing and adjudication of a “subsequent” habeas corpus application in state court.

A. The Habeas Corpus Framework in Texas

In Texas, habeas corpus in capital cases are governed exclusively by Texas Code of Criminal Procedure, Article 11.071. *Ex parte Davis*, 947 S.W.2d 216, 222 (Tex. Crim. App. 1996). Although habeas corpus is considered a civil action in federal court, in Texas the proceeding is designated criminal in nature. Nevertheless, the proceeding is collateral—it is the prisoner who must initiate it by filing a habeas corpus application and prosecute it—and the prisoner has the burden of proof to establish the unlawfulness of his or her confinement. *See Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004).

Habeas corpus proceedings in Texas are original to Texas’s highest criminal court, the Court of Criminal Appeals (“CCA”), but the statute directs that they be filed initially in the convicting trial court. *Id.* § 4. This is because the CCA, as an appellate court, does not hear evidence, and most habeas applications raise claims that require the resolution of disputed factual allegations to adjudicate. *See Ex parte Carlile*, 244 S.W. 611, 612 (Tex. Crim. App. 1922); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (“It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.”).

Any habeas corpus application filed in state court after an “initial” habeas application is considered “subsequent.” Tex. Code Crim. Proc. art. 11.071 § 5. As in federal law, in Texas there is a general statutory prohibition on the consideration of the merits of claims raised in a subsequent application, but there are statutory exceptions. *Id.* If an application is a “subsequent” application, as was this one, the statute directs the district clerk of the county in which it was filed to immediately transmit the application to the CCA. *Id.* art. 11.071 § 5(b). Once the CCA receives a subsequent application, the statute directs the CCA to determine whether any of the statutory exceptions allowing the consideration of claims raised in the application are present. *Id.* art. 11.071 § 5(c). The trial court is prohibited from taking any action on the application until this determination is made. *Id.*

One exception to the bar on the consideration of claims raised in a subsequent application is that the claim could not have been presented in a previously considered application because the factual or legal basis for the claim was unavailable on the

date the previous application was filed. *Id.* art. 11.071§ 5(a)(1). This was the exception invoked in this case. The CCA has interpreted this provision to require a showing on two fronts: (1) that the legal or factual basis of the claim was previously unavailable; and (2) that the allegations in the application, if proved, constitute a constitutional violation that would require relief from either the conviction or sentence. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). If the CCA authorizes claims in a subsequent application to be considered, the CCA will remand the application back to the trial court and the case proceeds like an initial application.

Although Texas guarantees indigent, death-sentenced prisoners a right to representation on an initial habeas application, the state does not provide a right to appointed counsel to prepare and file a subsequent habeas corpus application. If a subsequent application is filed and authorized to be considered by the CCA, however, the Texas statute guarantees appointment of counsel to litigate the authorized application. Article 11.071 directs that when the trial court receives notice from the CCA that the requirements for consideration of a subsequent application have been met, the trial court “shall appoint, in order of priority”: (1) the attorney who filed the application; (2) the Office of Capital and Forensic Writs (a state defender agency), if it accepts the appointment; or (3) other qualified private counsel. Tex. Code Crim. Proc. art. 11.071 § 6(b-1).

From this point forward, the case proceeds as if the application were an initial application. First, the State is required to answer it. Tex. Code Crim. Proc. art. 11.071 § 7(a). Matters alleged in the application not admitted by the State in its answer are

deemed denied. *Id.* art. 11.071, § 7(b). Next, the trial court must 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.” *Id.* art. 11.071, § 8(a). The court “shall issue a written order of the determination.” *Id.* When the State denies allegations, these factual issues are “controverted.” *Ex Parte Carnes*, 579 S.W.2d 249 (Tex. Crim. App. 1979).

Section 8 of Article 11.071, entitled “Findings of Fact Without Evidentiary Hearing,” governs the trial court proceeding when the court determines that no controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the statute directs the parties to file proposed findings of fact and conclusions of law for the court’s consideration within thirty days of that determination. Tex. Code Crim. Proc. art. 11.071 § 8(b). The trial court must then make “appropriate” written findings of fact and conclusions of law. *Id.* art. 11.071 § 8(c). Because there are no material facts in dispute, evidence is neither required nor received, and the trial court’s findings and recommendations are based on the pleadings and as a matter of law.

Section 9 of article 11.071, entitled “Hearing,” governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement do exist. In that circumstance, the court’s order must designate the issues of fact that are to be resolved and the manner by which those issues will be resolved. *Id.* art. 11.071 § 9(a). To resolve the issues, the statute authorizes the court to require affidavits, depositions, and interrogatories and to hold

evidentiary hearings. *Id.* The Texas Rules of Evidence apply at the hearing. *Id.* art. 11.071 § 10. A transcript of the hearing must be prepared, and the 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.* art. 11.071 § 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.* art. 11.071 § 9(e).

The trial court’s findings of fact and conclusions of law are thereafter transmitted to the CCA, along with the rest of the record compiled in the trial court. The CCA thereafter decides the case, often adopting the trial court’s fact findings and legal conclusions.

B. Proceedings Below

The Texas Defender Service (“TDS”), a non-profit legal services corporation in Texas, agreed to prepare and file a habeas application on Juan Castillo’s behalf. Because Castillo had filed a habeas application previously, Texas law as described above required that, to be considered on the merits and for Castillo to be entitled to appointed counsel, the application first had to receive authorization from the CCA. Thus, while TDS agreed to prepare and file an application for Castillo pro bono, if the application were authorized, Castillo would be entitled to have TDS appointed and paid by the court to represent him throughout the litigation of the application,¹

¹ TDS would also be entitled to compensation for its time and effort preparing the subsequent application.

On November 2, 2017, TDS filed on Castillo's behalf a subsequent habeas application in state court alleging that Castillo's custody was unlawful because the capital judgment was procured in violation of due process. Specifically, the application alleged that the government relied on false testimony by State's witness Gerardo Gutierrez, who testified that Castillo confessed committing the capital murder to him while the two were held in jail together. An evidentiary proffer in the form of an affidavit by Gutierrez admitting his testimony was fabricated was attached to the application. Gutierrez's testimony against Mr. Castillo was central to the State's case. He was the State's only witness who was not either a charged accomplice or related by family to an accomplice to provide any material evidence of Castillo's alleged role in the offense.

On November 28, 2017, the CCA authorized consideration of the claim's merit. It remanded the application to the trial court to find facts and render legal conclusions. App. 3. In authorizing the claim, the CCA necessarily concluded, *inter alia*, that the allegations in the application, if proven, were likely to entitle Castillo to relief. *Campbell, supra*.

Two days after the CCA remanded the application, on November 30, 2017, the State filed in the trial court a document entitled *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*. App. 4. The document requested the trial court to "enter an ORDER that Applicant's subsequent application for a writ of habeas corpus be DENIED." The document also contained a proposed order. The proposed order recited

findings of fact and conclusions of law. The findings speculated that Gutierrez was motivated to falsely recant his trial testimony due to fear from other prisoners as a consequence of his having testified against Castillo and that his affidavit “could be an attempt to protect himself from further attacks.”² App. 4 at 11. The proposed order found that “there is no reason to find Gutierrez’s 2013 affidavit to be credible,” and concluded that “Applicant has not met his burden to prove his claim.” *Id.* at 11-12. The proposed order directed the district clerk to prepare and forward a copy of the record to the CCA.

Also on November 30, 2017, District Court Judge Jefferson Moore entered an order voluntarily recusing himself from the case on the ground that he previously represented a witness in the case. App. 5. That same day, the Presiding Judge of the Fourth Administrative Judicial Region appointed Maria Teresa Herr to preside over the habeas proceeding. App. 6. The very next day, on December 1, 2017, Judge Herr signed the State’s proposed order without any substantive alteration.³ App. 2. Counsel for Castillo did not receive service of the order (via United States Mail) until December 8, 2017.

Although the affidavit that was attached as an exhibit to the application was never admitted into evidence at any hearing, the trial court’s findings stated that

² There were neither allegations nor evidentiary proffers of any attacks against Gutierrez in the record.

³ The Court’s order changed the signature line to reflect Judge Herr’s assignment, rather than Judge Jefferson Moore, as was reflected in the State’s proposed orders.

“Applicant’s claim rests on whether Gutierrez’s 2013 affidavit can be considered credible.” App. 2 at 9. It concluded that “[u]nder the circumstances there is no reason to find Gutierrez’s 2013 affidavit to be credible,” and therefore “Applicant has not met his burden to prove his claim.” App. 2 at 11-12.

On December 4, 2017, the Bexar County District Clerk forwarded the record to the CCA as directed by the trial court’s order. On December 12, 2017, Mr. Castillo filed a motion in the trial court requesting that the court vacate its December 1, 2017, order; that it direct the State to file a proper answer; and that it adhere to the mandatory procedures established by the Legislature and set forth in art. 11.071 for adjudicating his habeas application. App. 7. The objections were timely pursuant to Texas Rule of Appellate Procedure 73.4(b)(2). Mr. Castillo also filed a motion for appointment of counsel pursuant to Article 11.071 § 6(b-1). App. 8. On December 18, 2017, Castillo filed a motion in the district court requesting that it direct the district clerk to prepare a supplemental record and to forward it to the CCA. App. 9.

The trial court ignored all Castillo’s filings, including the motion to appoint counsel and to send a supplemental record. Notwithstanding the directive of Texas Rule of Appellate Procedure 73.4(b)(4) that the district clerk “shall also include in the record transmitted to the Court of Criminal Appeals . . . any objections to the court’s findings of fact and conclusions of law filed by either party,” the docket of the CCA never reflected that any supplemental record was prepared and transmitted by the clerk.

Also on December 18, 2017, Castillo electronically transmitted for filing in the CCA his *Objections to the Trial Court's Findings of Fact and Conclusions of Law*. App.

10. The objections requested that the CCA reject the trial court's findings and remand the application back to the trial court because the trial court violated mandatory statutory procedures governing the proceeding and also violated fundamental due process, in myriad ways. Specifically, Mr. Castillo objected to:

- the trial court's failure to afford Mr. Castillo any opportunity to be heard on the State's motion and proposed order before granting it (the court signed the proposed order one day after it was filed);
- the trial court's failure to comply with the mandated statutory procedure for adjudicating habeas corpus applications set forth in Article 11.071 (including its failure to appoint counsel, to require the State to file an appropriate answer, and to issue an order determining whether controverted fact issues existed based on the application and answer, and to direct the parties to file proposed findings of fact and conclusions of law); and
- the trial court's adjudication of facts against him without affording him any opportunity to be heard or to present evidence to meet his burden of proof.

On February 7, 2018, the CCA denied Castillo's application without any mention or discussion of Castillo's objections to the trial court's flagrant statutory and constitutional violations. With two immaterial corrections, it adopted the trial court's findings and conclusions that Castillo "had not met his burden to prove his claim." App. 1 at 4-5. The next day, February 8, 2018, the 186th District Court signed an order setting Castillo's execution date for May 16, 2018.⁴

⁴ On February 23, 2018, Castillo filed in the CCA a suggestion that the court *sua sponte* reconsider its decision denying his application. Texas law does not provide for rehearing in habeas corpus cases, but the CCA has recognized its own power to reopen and reconsider orders disposing of habeas corpus applications. *See Ex parte Moreno*, 245 S.W.3d 419, 427 (Tex. Crim. App. 2008). The suggestion expressed that

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE PROCESS DUE A PRISONER WHO INVOKES A STATE POST-CONVICTION STATUTE SOUNDING IN HABEAS CORPUS

Judicial adjudications of rights must always comport with due process. This includes criminal post-conviction proceedings, 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 prisoners be afforded certain procedural rights in post-conviction procedures that implicate protected liberty interests. Whenever the judiciary adjudicates rights, the relevant question is never whether process is due, but what process is due.

“There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose

Castillo had reason to believe that his objections that he had filed in the trial court and in the CCA were not part of the case materials considered by the court when it disposed of his application, because the objections he timely filed in the trial court did not appear to ever have been transferred to the CCA as required by the Texas Rules of Appellate Procedure, and because of an apparent docketing irregularity regarding the objections he filed directly in the CCA. Castillo requested that the CCA, on its motion, reopen the proceeding so that it could (1) direct that the record be supplemented as required by Texas Rule of Appellate Procedure 73.4(b)(4); and (2) consider the objections Mr. Castillo raised to the trial court’s adjudication of his application. To date, the CCA has not taken any action on the suggestion. As there is no mechanism for requesting rehearing, the court need not ever acknowledge the suggestion.

has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law,” *Harris v. Nelson*, 394 U.S. 286, 292 (1969). Despite this, only a handful of this Court’s cases have touched on the process a state owes a prisoner who has invoked a post-conviction statute sounding in habeas corpus. Especially in light of modern developments in federal habeas corpus which make state courts the principal—and usually *only*—forum for asserting constitutional challenges to state convictions, the Court should give further guidance.

A. This Court’s Decisions Only Tangentially Touch Upon the Process Due a Prisoner Who Has Invoked a State Statute Providing Habeas Corpus Review in a State Judicial Forum

Since 1986, the Court has considered the process owed by a state in post-conviction proceedings in a handful of cases, but none that meaningfully illuminated the process owed a prisoner who invokes a post-conviction statute sounding in the nature of habeas corpus. As the facts of this case reflect, such guidance is needed.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court addressed what process a state court owes to a prisoner who alleges in a post-conviction context that the Eighth Amendment precludes his execution because he is not mentally competent to be executed. After recognizing that the Eighth Amendment precludes the execution of condemned prisoners who were unaware of their execution or did not understand the reason for it, Justice Powell, in an opinion deemed to be controlling, laid out the process due by a state to a prisoner making such a claim. Justice Powell concluded that in this context a state “should have substantial leeway to determine what pro-

cess best balances the various interests at stake” once it has met the “basic requirements” required by due process. *Id.* at 427. The “basic requirements” included an opportunity to submit “evidence and argument from the prisoner’s counsel, including expert psychiatric evidence.” *Id.*

Justice Powell offered three reasons why due process in this context would not require the state to afford a “full-scale ‘sanity trial’” of the sort Justice Marshall’s opinion in the case proposed. *Id.* at 425. First, execution competency could arise as an issue “only after the prisoner has been validly convicted of a capital crime and sentenced to death,” and therefore the State’s interest in taking the prisoner’s life as punishment for his crime “is not called into question by” the prisoner’s claim. *Id.* The only question presented in such a context is “not *whether*, but *when*, his execution may take place.” *Id.* Second, the claim did not arise “against a neutral background,” because, having been validly convicted, the prisoner “must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court.” *Id.* at 425-26. Thus, the State could presume the prisoner’s continued competence. *Id.* at 426. Third, the competency issue did not resemble the basic issues at trial or sentencing that present “issues of historical fact,” but instead called “for a basically subjective judgment.” *Id.*

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court applied *Ford*’s prescriptions to find a state court’s adjudication of a post-conviction prisoner’s execution-incompetency claim violated due process. The Court identified several deficiencies:

- the state court refused to transcribe its proceedings, notwithstanding the multiple motions petitioner filed requesting this process;

- the state court on repeated occasions conveyed information to petitioner’s counsel that turned out not to be true;
- the state court provided at least one significant update to the State without providing the same notice to petitioner;
- the state court failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case;
- the state court’s determination of petitioner’s competency was made solely on the basis of the examinations performed by the psychiatrists it had appointed; and
- the state court arguably violated state law requiring it to hold a hearing;

Id. at 950-51. Additionally, the state court’s “violation of the procedural framework Texas has mandated for the adjudication of incompetency claims” undermined reliance on the State’s “substantial leeway” to determine suitable process. *Id.* at 950.

Most recently, in *District Attorney’s Office for Third Judicial Dist. v. Osborne*, *supra*, the Court addressed the process a state owed to a prisoner who invoked a state post-conviction statute bestowing a right to relief from his criminal judgment if he could prove his innocence by clear and convincing, newly discovered evidence. The Court recognized that such a statute created a protected liberty interest.⁵ 557 U.S. at 68. It held that, in the context of a state statute providing a post-conviction right to relief that did not implicate the fairness of the trial, due process would not be violated unless the state court procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” or “transgresses any recognized principle of fundamental fairness in operation.” *Id.* at 69. The

⁵ Relevant to capital cases, a majority of the Court has also recognized that prisoners under sentence of death maintain protected life interests until their execution. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) (O’Connor, J., concurring in part and concurring in the judgment, joined by Souter, J., Ginsburg, J., and Breyer, J.) (death-sentenced prisoners retain life interest); *id.* at 291 (Stevens, J., dissenting) (same).

Court reasoned that, given “a valid conviction” which constitutionally deprived the prisoner of his liberty interest, the State had more flexibility in deciding what procedures were adequate than it would in a criminal trial itself. *Id.*

None of these decisions have spoken meaningfully to what process a state court owes a prisoner in a post-conviction proceeding sounding in the nature of habeas corpus, *i.e.*, where the prisoner alleges that the underlying criminal judgment pursuant to which he is confined *was* obtained unfairly and in violation of the United States Constitution. In none of the post-conviction proceedings at issue in *Ford*, *Panetti*, and *Osborne* was the validity of the prisoner’s conviction or lawfulness of his custody being challenged. Hence, each presumed a fair trial and a prisoner who had been validly deprived of his liberty or life. Thus, the balance of the “interests at stake” is not the same as these cases as it would presumably be in a state post-conviction case that sounds in habeas corpus.

In the habeas corpus context, the Court has declined to hold that there is a constitutional obligation on the part of states under the due process or equal protection clauses to provide counsel to indigent prisoners seeking habeas relief. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). And the Court has also held that, in capital cases, the Eighth Amendment likewise does not require it. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). More recently, in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the Court held that due process compelled the recusal from a state-post-conviction case of a state Supreme Court Justice who had been the district at-

torney that officially authorized the decision to seek the death penalty in the prisoner's case. The case was handled entirely within the framework of the Court's jurisprudence concerning the "objective risk of [judicial] bias." *Id.* at 1905. These decisions have only touched tangentially on the constitutional responsibilities of states which permit prisoners to challenge the lawfulness of their confinement under the federal constitution in a state judicial forum.

The Court has, however, discussed process in general terms in the context of federal habeas corpus review. In *Townsend v. Sain*, 372 U.S. 293 (1963), the Court illuminated what rules would govern federal district courts when determining whether to hold an evidentiary hearing under the then-existing federal statutory framework. Observing that the function of habeas corpus is to test by way of an original proceeding "the very gravest allegations," the Court held that the opportunity for redress that habeas corpus presents "presupposes the opportunity to be heard, to argue and present evidence." *Id.* at 311-12. For "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id.* at 312. While the Court overruled *Townsend* in part in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and the Antiterrorism and Effective Death Penalty Act (AEDPA) altered the federal statutory framework for federal courts reviewing habeas corpus applications from prisoners challenging state court judgments, neither development affected *Townsend's* understanding of the nature and premises of habeas corpus proceedings in general.

B. The AEDPA Has Made State Judicial Proceedings the Primary—and in Most Cases Only—Forum for Adjudicating Constitutional Challenges to State Convictions

Since the enactment of the AEDPA, the scope of federal habeas corpus review has been sharply narrowed. In the ordinary civil context, Congress requires federal courts to give preclusive effect to state court adjudications to the same extent as the courts of the state from which the judgments emerged would do so. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Habeas corpus in federal court, with its requirement of exhaustion of state remedies, has historically been exempt from this requirement. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 485 & n.27 (1982) (citing 28 U.S.C. § 2254 as exception to the “traditional rules of preclusion”). While habeas corpus is still exempt from the application of § 1738, Congress directly introduced preclusion for the first time in federal habeas corpus proceedings by way of § 2254(d) in the AEDPA. As this Court has recently explained, with only a couple of exceptions AEDPA’s § 2254(d) imposes “a complete bar on federal court relitigation of claims already rejected in state proceedings.” *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. That forum must, then, provide review that is meaningful.

This Court “has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme” and “has steadfastly insisted that ‘there is no higher duty than to maintain it unimpaired.’” *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U. S. 19, 26 (1939)). Because the

purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, “it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.” *Id.* Given the restructuring of federal habeas corpus review, this Court should ensure that the principal—and in most cases *only*—forum for adjudicating constitutional challenges to state convictions affords and enforces a post-conviction process that is adequate for obtaining results reliable enough to vindicate the important constitutional rights that habeas corpus safeguards.

II. THE COURT SHOULD GRANT *CERTIORARI*, SUMMARILY REVERSE THE COURT OF CRIMINAL APPEALS OF TEXAS, AND REMAND THE CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH FUNDAMENTAL DUE PROCESS

Whatever process is due, it is clear that the state court must observe fundamental due process in adjudicating Castillo’s right to post-conviction relief. “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). At a minimum, this Court should hold that the state violated fundamental due process and remand the case back to the state court with instructions to afford basic procedural protections in the adjudication of his state habeas corpus application.

The state court’s adjudication of Castillo’s application violated fundamental due process in at least three distinct ways. First, the state trial court granted the

State the totality of relief it had requested by written motion just one day earlier. In doing so, the trial court afforded no opportunity at all to be heard on the motion to Castillo. As this motion was a dispositive one in the trial court, it necessarily deprived Castillo of due process. Second, the state court adjudication wholly failed to comply—in any way—with the mandated statutory procedure for adjudicating habeas corpus applications set forth in Texas statutes, denying Castillo myriad procedural protections afforded by those statutes, including his right to appointed counsel. Third, the state court adjudicated disputed facts against Castillo without affording him any opportunity to be heard on them or to present evidence. Each violates the fundamental fairness mandated by the due process clause.

A. The Trial Court’s Failure to Afford Mr. Castillo Any Opportunity to Be Heard on the State’s Motion Before Granting It Violated Due Process

The Fourteenth Amendment of the United States Constitution protects against deprivation of life, liberty, or property by the State “without due process of law.” U.S. CONST. amend. XIV, § 1. “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’” *Fuentes v. Shiven*, 407 U.S. 67, 80 (1976) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)). “It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’” *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

On the day after Castillo's application was remanded to the trial court to be heard on its merits, the State filed a motion requesting that the trial court adopt certain factual and legal conclusions against Castillo; that it recommend that Castillo's habeas application be denied; and that it direct the district clerk to forward the record to the CCA for final decision. Fundamental due process entitled Castillo an opportunity to be heard on the State's request before the trial court acted on it; however, the state trial court signed the proposed order submitted by the State the very next day after they were filed. The record was transmitted to the CCA before Castillo even received service of it. By failing to afford Castillo any opportunity to be heard before granting the State the relief it sought, the trial court deprived Castillo of the fundamental requirement of due process, an opportunity to be heard. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) (failure to afford meaningful opportunity to respond to pleading violated due process); *Campbell v. Stucki*, 220 S.W.3d 562, 570 (Tex.App.—Tyler 2007, no pet.) (fundamental due process violated when trial court deprived respondent of any opportunity to respond to movant's motion before ruling on it).

B. The Trial Court's Failure to Comply with the Mandated Statutory Procedure for Adjudicating Habeas Corpus Applications Set Forth in Article 11.071 Violated Due Process

As described above, Article 11.071 sets forth mandatory procedures governing the adjudication of habeas corpus applications in death penalty cases such as Castillo's. This statutory process is designed to satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause, including notice and an

opportunity to be heard. Castillo had liberty and life interests at stake in the proceeding. Accordingly, deviation from the statutory procedure designed to adjudicate these interests deprived Castillo of due process.

The state court adjudication contravened the clear and unambiguous statutory procedures. As an initial matter, Article 11.071 § 6 entitled Castillo to appointed counsel following the CCA's authorization of his subsequent application. The trial court failed to appoint counsel for Castillo, nor was Castillo given any opportunity even to move for the appointment. The case was ordered to be transferred back to the CCA—and was transferred back to the CCA—before Castillo even received notice of the trial court's ruling. Accordingly, Castillo was wholly deprived of a statutory right to appointed counsel in the trial court.

The state trial court also failed to adhere to any of the statutory provisions governing either the pleading stage or factual adjudication stage. After a subsequent application is remanded from the CCA, the statute requires the State to file an answer within 120 days. Tex. Code Crim. Proc. art. 11.071 § 7. The State did not file an answer. The document it filed purported, in part, to be a "response" to Castillo's application, but it did not respond to anything, nor did it deny the allegations in the application. Instead, it requested relief and asked the court to deny the application and proposed various factual and legal conclusions.

After an answer is filed, the statute requires that the trial court "shall" determine, based on the application and answer, 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.” *Id.* at art. 11.071 § 8(a). The purpose of this provision is to give notice to the parties whether the trial court will enter its recommendation as a matter of law based on the pleadings under § 8 or hold a hearing to resolve disputed facts under § 9. The trial court did not issue a written order of its determination regarding the existence of controverted, unresolved factual issues, as required by the statute.

The state trial court’s order—and ultimately the CCA’s order—plainly did adjudicate disputed facts against Castillo, without notice to him. The state courts found untrue Castillo’s allegation that a witness’s testimony was false. But in order to adjudicate facts against a habeas applicant, the statute required the trial court to (1) enter an order designating the issues of fact to be resolved and the manner in which the issues shall be resolved, *id.* art. 11.071 § 9(a); (2) hold an evidentiary hearing, *id.* art. 11.071 § 9(b); and (3) afford the parties an opportunity to submit proposed findings, *id.* art. 11.071 § 9(e). It did not do any of these.

After the state trial court ordered the record transmitted to the CCA, Castillo timely filed objections raising these problems with the trial court’s procedure. Although the Texas Rules of Appellate Procedure require it—and Castillo subsequently filed a motion asking for it—those objections were never transmitted to the CCA by the state trial court. Moreover, although Castillo filed his objections directly in the CCA itself, the CCA’s order denying Castillo’s application did not mention or discuss his due process objections. Instead, it simply adopted the trial court’s adjudication of fact against Castillo, implicitly denying the violation. The Texas courts’ adjudication

of Castillo's habeas corpus claim against him in complete defiance of the state statutory procedures governing the proceeding violated fundamental due process.

C. The Trial Court's Adjudication of Facts Against Castillo Without Affording Him Any Opportunity to Be Heard on Them or to Present Evidence in Support of His Allegations Violated Due Process

The state court also violated fundamental due process by adjudicating facts against Castillo without affording him any opportunity to present evidence in support of them. The availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence." *Townsend*, 372 U.S. at 293. Moreover, "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id.* Resolutions of disputed factual questions made by a judicial body must be based on evidence that is admitted at a hearing. *Morgan v. United States*, 298 U.S. 468, 480–81 (1936). *See also Goldberg v. Kelly*, 397 U.S. 254, 258 (1970) ("rudimentary due process" requires "an effective opportunity" to present one's case).

Article 11.071 is written so as to afford fundamental due process and, when properly followed, ensures that a hearing occurs when material facts are in dispute. As discussed, *supra*, § 9 of article 11.071 is entitled "Hearing" and governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement exist. The Texas Rules of Evidence apply to the hearing, and therefore the statute requires that the parties be given an opportunity to formally move to admit (and object to the admittance of) evidence as to the factual disputes that have been determined and announced by the trial court.

These provisions reflect the legislature’s intent to afford process congruent with judicial proceedings in any other context. *See United States v. Hayman*, 342 U.S. 205, 220 (1952) (interpreting the word “hearing” in analogous federal statute providing for collateral challenges to federal criminal judgments to have “obvious reference to the tradition of judicial proceedings”) (quoting *Morgan*, 298 U.S. at 480). Moreover, as the applicant has the burden of proof in a habeas corpus proceeding, factual allegations which are not flatly contradicted by or implausible in comparison to the record cannot be resolved against him before affording him an opportunity to prove them with evidence. *See, e.g.*, 28 U.S.C. § 2255(b) (providing, in analogous federal statute providing for collateral challenges to federal criminal judgments, that a court must grant a hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief”); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (a motion to vacate under § 2255 may not be denied without a hearing unless the court can conclude from the trial record and motion that “under no circumstances” could the petitioner establish facts warranting relief). *Cf. Machibroda v. United States*, 368 U.S. 487, 495-496 (1962) (a hearing on a motion to vacate under § 2255 may be denied only where the factual allegations are “vague, conclusory, or palpably incredible” when compared with the record).

When the Court of Criminal Appeals authorized and remanded Castillo’s application, it necessarily held that his allegations, if proved, would likely entitle him to relief. *Campbell*, 226 S.W.3d at 421. This is the same standard that federal courts use to determine whether a habeas applicant is entitled to an evidentiary hearing.

See Powers v. United States, 446 F.2d 22, 24 (5th Cir. 1971) (“[W]here petitioner’s allegations, if proven would entitle him to relief, he is entitled to an evidentiary hearing and an opportunity to prove the truth of the matters asserted.”). It was therefore critical, in light of this prior legal conclusion, that Castillo be given a meaningful opportunity to prove his allegations.

Although Castillo attached an evidentiary proffer to his application in the form of an affidavit, the attachment was never intended to be the totality of the evidence he would rely upon to establish the elements of his claim in a hearing. There is no requirement in Texas that a habeas applicant attach exhibits to or “plead evidence” in a habeas application. *Ex parte Medina*, 361 SW 3d 633, 639 (Tex. Crim. App. 2011). As in federal court, a state habeas application is a pleading that sets out allegations. A habeas applicant has no more burden to prove the allegations true in the application itself than the prosecution does to prove the allegations in an indictment true in the indictment itself, or a civil plaintiff has a burden to prove the allegations in a complaint true in the complaint itself. Yet, by short-circuiting the entirety of the statutory framework for adjudicating habeas corpus applications, the state courts imposed precisely such an obligation on Castillo. By dismissing the credibility of and rejecting the Gutierrez affidavit that was attached as a proffer to the application, the order adjudicated facts against Mr. Castillo. The trial court’s adjudication of these facts occurred without a hearing (in any form) and therefore was entirely arbitrary and deprived him of due process.

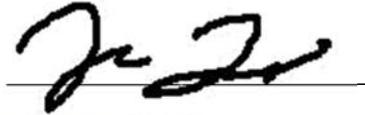
Besides having adjudicated facts in the absence of any hearing or evidence, the state court also did so without affording Castillo any notice it would do so. The court entered its order without determining or notifying the parties whether controverted, material fact issues existed and even before the State filed a proper answer. The court additionally failed to designate which (if any) controverted, material fact issues existed and to provide notice thereof to the parties before adjudicating facts against him as required by the statute. It additionally failed to designate the manner by which the court would hear evidence to resolve any designated controverted, material fact issues and to provide notice to the parties thereof as required by the statute. In adopting the state trial court's findings, the CCA adopted all these violations.

Had the court afforded Castillo an opportunity to be heard, as required by the statute, he could have presented evidence addressing the alleged deficiencies the court identified in the claim. Castillo's underlying due process claim may or may not ultimately entitle him to relief from his capital judgment. Regardless, he is at least entitled to a fair opportunity to prove he is unlawfully confined because he was deprived of this important constitutional right during his capital trial and to an adjudication which comports with the mandated statutory procedure for disposing of habeas corpus applications in Texas.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jared Tyler', is written over a horizontal line.

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