No. ________

In The

Supreme Court of the United States

KEVIN EDWARD CONNORS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioner sought state habeas corpus relief from his murder conviction based on prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The state trial court conducted an evidentiary hearing with live testimony, made fact findings and legal conclusions, and recommended a new trial or sentencing hearing. Yet, the Texas Court of Criminal Appeals (TCCA) rejected the trial court's fact findings *in toto* even though many turned on assessments of witness credibility and demeanor and others were uncontroverted. The TCCA substituted its own implicit fact findings based on a cold record and denied relief in a perfunctory order. This Court has cautioned that a superior court's rejection of an inferior court's favorable dispositive fact findings based on witness credibility and substitution of its own unfavorable findings based on a cold record would "give rise to serious [constitutional] questions." *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980). The questions presented are:

I. Whether it violates due process for a superior court to substitute its own unfavorable fact findings based on a cold record for an inferior court's favorable dispositive fact findings that were based on witness credibility and demeanor.

II. Whether the TCCA's one-sentence, summary materiality analysis misapplied this Court's *Brady v. Maryland* jurisprudence in view of the evidence that six

QUESTIONS PRESENTED—Continued

undisclosed police reports demonstrating the complainant's recent history of violence and suicidal ideation were material to petitioner's conviction and sentence.

RELATED CASES

- *State v. Connors*, No. 937946, 339th District Court of Harris County, Texas. Judgment entered January 28, 2005.
- *Connors v. State*, No. 14-05-00126-CR, Fourteenth Court of Appeals of Texas. Judgment entered August 10, 2006.
- *Connors v. State*, No. PD-1847-06, Texas Court of Criminal Appeals. Order entered February 7, 2007.
- *Ex parte Connors*, No. 937946-A, 339th District Court of Harris County, Texas. Order entered April 11, 2011.
- *Ex parte Connors*, No. WR-73,203-02, Texas Court of Criminal Appeals. Order entered September 14, 2011.
- *Ex parte Connors*, No. 937946-B, 339th District Court of Harris County, Texas. Order entered May 22, 2019.
- *Ex parte Connors*, No. WR-73,203-03, Texas Court of Criminal Appeals. Order entered April 1, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kevin Edward Connors, respectfully petitions for a writ of certiorari to review the order of the Texas Court of Criminal Appeals (TCCA) denying habeas corpus relief.

OPINIONS BELOW

The TCCA's unpublished *per curiam* order denying habeas corpus relief (App. 1-3) is available at 2020 WL 1542424. The district court's findings of fact and conclusions of law recommending that relief be granted (App. 4-50) are unreported. The TCCA's unpublished notice denying petitioner's suggestion for reconsideration (App. 51) is unreported.

JURISDICTION

The TCCA issued its order denying habeas corpus relief on April 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a). Pursuant to this Court's order of March 19, 2020, regarding filing deadlines during the COVID-19 pandemic, this petition is due 150 days after the TCCA issued its order denying relief.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Procedural History

A grand jury indicted petitioner for murder, in violation of § 19.02(b)(2) of the Texas Penal Code, in cause number 937946 in the 339th District Court of Harris County, Texas, on April 17, 2003. The indictment alleged that petitioner intentionally and knowingly caused the death of Adrian Heyne by driving his motor vehicle towards Heyne and causing it to collide with him, and that, intending to cause serious bodily injury, petitioner caused Heyne's death by intentionally and knowingly committing an act clearly dangerous to human life on or about January 30, 2003 (C.R. 15).[1]

A jury convicted petitioner of murder, and the trial court assessed punishment at 45 years in prison.

B. The Jury Trial

1. The First Confrontation Between Heyne and Petitioner

Petitioner and two friends, Frank Lucero and his girlfriend Sara Alexander, had dinner and drinks in

[1] Petitioner cites to the clerk's record as "C.R." and to the court reporter's record as "R.R."

Houston, Texas, on January 29, 2003 (5 R.R. 115-16, 121, 123, 127). Petitioner drove them in a rented sports utility vehicle (SUV) (4 R.R. 180, 5 R.R. 121-22). After dinner, they went to multiple bars, including Sam's Boat, where petitioner saw Heather Brauninger, a 20-year-old woman in whom he was romantically interested (4 R.R. 166-67; 5 R.R. 124-25, 129-31). Brauninger had been dating the 34-year-old complainant, Adrian "Ace" Heyne, for three months (4 R.R. 168, 230). Heyne worked as a bouncer at the Hurricane Hut (4 R.R. 168-70, 179).

After seeing petitioner and his friends at Sam's Boat, Brauninger joined them at Rick's Cabaret, a nearby topless bar, where they drank for about an hour while she waited for Heyne to finish his shift at the Hurricane Hut (4 R.R. 175, 178-79). Brauninger walked back to Sam's Boat, and petitioner's group later drove back there, where they saw Brauninger and Heyne outside the bar (4 R.R. 180, 5 R.R. 132-33).

Kenneth Thomas, an off-duty police officer working a private security job at Sam's Boat, saw Heyne—whom Thomas described as a muscular "big guy"—remove his shirt and aggressively approach petitioner's SUV in the parking lot (3 R.R. 22-28, 64-67). Heyne had a heated argument with petitioner; spoke in a loud, confrontational voice; and eventually punched petitioner in the jaw and slammed the car door into him (3 R.R. 27-28, 34, 46-47, 64-67, 76; 5 R.R. 135-39, 185-86). Brauninger admitted that Heyne, who was intoxicated, was the aggressor (4 R.R. 229-30). Petitioner feared Heyne and did not want to fight him (5 R.R. 141).

2. The Second Confrontation Between Heyne and Petitioner

After Heyne's assault, petitioner and his friends left Sam's Boat in the SUV; and Brauninger and Heyne left separately (3 R.R. 29-30; 5 R.R. 140). Brauninger and Heyne went to Jaxx, a bar across the street from Sam's Boat, where they continued to drink for another hour (4 R.R. 170-71, 188-91). Brauniger considered Heyne to be a danger to himself because of his high level of intoxication (4 R.R. 240). The autopsy revealed that Heyne's blood-alcohol content was 0.27, more than three times the legal limit (4 R.R. 150-51; 6 R.R. 96).

After they left Sam's Boat, petitioner's group drove to a friend's house, became stuck in mud, were pulled out by a tow truck, and then drove to Jaxx (5 R.R. 142-44). As petitioner entered the parking lot, he saw Heyne's car (5 R.R. 145, 147, 198). Petitioner and his friends did not expect to see Heyne there (5 R.R. 176). Heyne exited Jaxx and vomited in the bushes, while Brauninger entered the driver's seat of Heyne's car (4 R.R. 192-93). Heyne saw petitioner's SUV; removed his shirt, revealing a large tattoo covering his back; and stretched as if preparing to fight (4 R.R. 193-96; 5 R.R. 148, 199). He approached the SUV as petitioner sat in the driver's seat (5 R.R. 148, 150-55, 199-200, 204, 232-33).

What occurred next was hotly disputed at trial. The prosecution's three fact witnesses—Lucero, Brauninger, and a patron at Jaxx named Daniel Garza—offered three significantly different versions. Lucero's version was exculpatory. The other two, while inculpatory, contradicted each other in important respects.

a. Lucero's Version of Events

According to Lucero, as Heyne ran towards the driver's side of the SUV, petitioner said, "He's coming after us," and Lucero replied, "Go. Go. Go." (5 R.R. 167-68). Petitioner accelerated, swerved away from Heyne, and did not hit him (5 R.R. 154-56, 176, 205). Heyne "pushed off" the front center of the SUV and jumped onto the hood for a couple seconds (5 R.R. 156-59, 166). While Heyne was on the hood, petitioner turned left to avoid hitting a fence (5 R.R. 216-17). Heyne was trying to remove petitioner from the SUV (5 R.R. 177). Petitioner was not driving fast, and Heyne did not fly over the SUV (5 R.R. 166-67, 208). But he fell off it.

Petitioner and his friends drove to Marie Farrell's house (5 R.R. 168). They arrived about 2:15 a.m., stayed 35 to 40 minutes, and went home (5 R.R. 168-72). Petitioner's group did not call the police after the incident because they thought that they had avoided a fight and did not realize that Heyne had been injured (5 R.R. 172).

b. Brauninger's Version of Events

According to Brauninger, as Heyne approached the SUV, she yelled at him to get in his car because she knew that he would cause trouble; but he ignored her (4 R.R. 205-06, 226; 5 R.R. 24). She feared that he would attack petitioner because Heyne was angry that she went with petitioner to a bar earlier that night (5 R.R. 25-26). Heyne approached the SUV with "swagger" (4 R.R. 207, 224, 241). He was intoxicated, angry, and the aggressor, just as he had been earlier at Sam's Boat (5 R.R. 22, 24).

Brauninger testified that petitioner accelerated towards Heyne and hit him when he was within four feet of the "front" of the SUV (4 R.R. 206-10, 223, 225, 245). Heyne "was on the hood" and then "flew off" the SUV and hit the ground (4 R.R. 208-10). Petitioner drove away without stopping after Heyne fell off the hood (4 R.R. 214-15). Brauninger did not see how the SUV struck Heyne because it happened so quickly (5 R.R. 21). She did not remember how fast the SUV was driving when it hit him (4 R.R. 256, 259). But she contradicted Lucero by asserting that Heyne did not jump on the hood; rather, the SUV "hit" and threw him up on the hood (4 R.R. 207, 247-49).

c. Garza's Version of Events

Daniel Garza, a highly intoxicated patron at Jaxx who had consumed 12 alcoholic beverages during the prior four hours, was waiting for a taxi in the parking lot when he heard Heyne and Brauninger argue as she begged him to enter his car (5 R.R. 33-44). According to Garza, who knew Heyne but not petitioner, Heyne had been watching an SUV on a side street, appeared afraid, and asked Garza to request help from the bar's bouncer (5 R.R. 45-49). The SUV entered the parking lot and stopped (5 R.R. 52). Heyne stood still in the parking lot and gestured with machismo as if he would not back down when the SUV drove up (5 R.R. 54-55, 89, 100-01).

Garza then heard tires screech, turned around, and saw the front of the SUV hit Heyne (5 R.R. 56, 93). Heyne flew over the hood, landed on the ground, and hit his head on the concrete (5 R.R. 57, 93-94). Heyne did not ride on the hood briefly and fall off but, instead, actually flew in the air over the SUV (5 R.R. 104). The driver, whom Garza did not know, did not appear to try to avoid hitting Heyne and did not stop after Heyne fell to the ground (5 R.R. 57, 64-65, 94). Garza could not identify the driver (5 R.R. 101-02). He estimated that the event lasted ten seconds (5 R.R. 58). He called 911 after the SUV left (5 R.R. 57, 59). He panicked because he was intoxicated and fled before the police arrived (5 R.R. 67, 110, 113).

3. Expert Testimony of the Crime-Scene Investigator and Medical Examiner About the Speed of the SUV at the Moment of Impact

Two key prosecution expert witnesses supported Lucero's version of events and undermined the versions of Brauninger and Garza.

I.M. Labdi, a Houston Police Department (HPD) accident investigator, testified that a car traveling less than 14 miles per hour will not cause bone fractures to a person hit by it; rather, only speeds over 14 miles per hour will cause fractures (4 R.R. 67). Defense counsel asked Labdi what happens when a person is hit by an SUV, which has a high front end (as opposed to a regular car, which has a front end that slopes downward). Labdi responded that, for a person to end up on the hood of an SUV traveling below 14 miles per hour, a person who is hit head-on would have to lift himself onto the hood because the impact of the collision would not lift him onto the hood (4 R.R. 69-72). Labdi testified:

Q. [Assume that a] person is . . . 4 to 10 feet away from an SUV. The SUV comes at the person. Based on what you've just said, the tendency would be for the SUV to hit the person and knock him backwards or to the side; is that correct?

A. Yes, sir.

Q. The tendency would not be to knock him up onto the hood?

A. Okay. . . . That's assuming that the car hit the pedestrian head-on front end. Yes, sir. . . . I'm going to say it depends on how fast the vehicle—whether it's an SUV—if it's going at a greater speed, it might knock him into the hood and the windshield.

Q. What's a greater speed?

A. Thirty-five [miles per hour] plus.

(4 R.R. 69).

Q. Ok. So a person getting up onto the hood [of an SUV] that way [when it is traveling at a lesser speed], it would be more consistent to say that he is lifting himself up onto the hood than to say he was struck by the vehicle if he lands on the hood?

A. Yes, sir.

(4 R.R. 72).

The medical examiner and the doctor who treated Heyne in the hospital before he died opined that Heyne's cause of death was a "blunt impact" injury to his head, likely from hitting it on the pavement (4 R.R. 146; 6 R.R. 51). As did Labdi, the medical examiner testified that bone fractures in auto-pedestrian accidents occur when a car is traveling greater than 14 miles per hour (6 R.R. 52, 73-74). He concluded that the SUV likely was traveling less than 14 miles per hour at the time of impact *because Heyne had no bone fractures* (6 R.R. 87). Heyne's injuries were consistent with falling to the ground from the SUV or rolling off the SUV, landing on the ground, and hitting his head (6 R.R. 62, 82-83). Unlike Heyne, whose injuries were caused by falling off the SUV, a person hit by the front of an SUV would be thrown backward or to the side (6 R.R. 71).

4. The Defense Theory

In closing arguments, defense counsel emphasized the testimony of Lucero and the prosecution's expert witnesses, whose opinions supported Lucero's version. Counsel argued that petitioner was not guilty of murder because he did not intend to cause Heyne's death or serious bodily injury, and he was not guilty of the lesser-included offenses of manslaughter and criminally negligent homicide because driving under 14 miles per hour and turning the SUV away from Heyne were neither reckless nor negligent acts (7 R.R. 7, 26-28). Counsel emphasized that, had petitioner intended to cause death or serious bodily injury, he would have driven as fast as possible, not less than 14 miles per hour (7 R.R. 22-23). Heyne was grossly intoxicated, clearly wanted to physically assault petitioner, and was the aggressor in both incidents (7 R.R. 8, 11-12, 16). Petitioner feared Heyne and accelerated the SUV to escape (7 R.R. 7, 10). Finally, the testimony of the prosecution's experts was consistent with Heyne charging the SUV, grabbing and mounting the hood, riding on it, falling off, and causing his own fatal head injuries (7 R.R. 21-22).[2]

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[2] Defense counsel sought to discredit Brauninger and Garza, the only witnesses whose testimony damaged the defense theory.

The jury convicted petitioner of murder (C.R. 157; 7 R.R. 57).

C. Sentencing

Petitioner elected the trial court to assess punishment. He testified that he had consumed alcohol and cocaine that night and went to Jaxx for another drink because he is an alcoholic (8 R.R. 76-79, 90-91). When Heyne charged the SUV at Jaxx, petitioner did not try to hit him; Heyne ran in front of the SUV and jumped on the hood (8 R.R. 94, 97, 105). Heyne fell off and landed on his head (8 R.R. 99). Petitioner was scared for his life, did not intend to hurt Heyne, and would not have left had he known that Heyne was injured badly (8 R.R. 98, 102, 105).

Defense counsel asked the court to find that petitioner had acted in "sudden passion" arising from an adequate cause because Heyne provoked the incident (8 R.R. 113-15). *See* TEX. PENAL CODE § 19.02(d).[3] Such

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Counsel noted that Brauninger admitted that she did not remember everything that night and relied on her prior written statements (prepared when the police interviewed her) to refresh her recollection during her testimony (4 R.R. 231, 256; 7 R.R. 16). Counsel argued that she lied about petitioner "gunning" the SUV at Heyne because the experts agreed that it was traveling less than 14 miles per hour at impact (4 R.R. 245; 7 R.R. 18). Counsel argued that Garza lied about Heyne's body flipping over the SUV, which the experts said was impossible because he had no body fractures (7 R.R. 14-16).

[3] Section 19.02(d) provides: "At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion

a finding would have reduced the offense to a second-degree felony with a statutory maximum sentence of 20 years in prison. *Id.* § 12.33(a). The court found that petitioner did not act in sudden passion and assessed punishment at 45 years in prison, only five years less than what the prosecutor had requested (8 R.R. 132-34).

D. Direct Appeal

The Fourteenth Court of Appeals of Texas affirmed petitioner's conviction. He argued that the evidence was legally insufficient to sustain the conviction, specifically contending that the prosecution experts' testimony that the SUV was traveling less than 14 miles per hour established that he did not intend to kill Heyne and supported Lucero's testimony that Heyne was the aggressor and that petitioner was trying to evade him. The court rejected that argument but acknowledged that the prosecution experts' testimony supported the defense theory:

> Because Heyne did not sustain bone fractures from the collision, *the experts agreed that the vehicle was traveling less than fourteen miles per hour at the time of impact—a speed insufficient to flip Heyne onto the hood.* However, when presented with hypothetical scenarios by the State, both experts agreed that it was possible for a pedestrian struck by a vehicle

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arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree."

> traveling at less than fourteen miles per hour to push up onto the hood to avoid greater impact, be carried along by the vehicle for a few seconds, and then be thrown off the hood when the driver turns sharply or slams on the brakes. *When presented with hypothetical scenarios by appellant, the experts also agreed that the same result could occur if the pedestrian was not struck but aggressively leapt onto the hood of the vehicle. Thus, the scientific evidence is consistent with both the State's and appellant's [theories].*

Connors v. State, 2006 WL 2290909, at *2 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (emphasis added).

E. State Habeas Corpus Proceeding

Nearly a decade after his direct appeal concluded, petitioner first learned that the prosecution had suppressed six police reports from unadjudicated incidents demonstrating that Heyne had been extremely violent and suicidal for several years leading up to the fatal incident.

After conducting a lengthy evidentiary hearing, the state habeas corpus trial court made fact findings concerning the six undisclosed police reports:

> 76. Located in the [prosecution's] file [and not disclosed to petitioner before or during trial] were . . . HPD offense reports regarding six unadjudicated incidents involving Heyne between March of 1998 and

December of 2002. . . . ***They collectively demonstrate that he was violent, aggressive, impulsive, threatening, and suicidal, including as recently as a few weeks before the incident with [petitioner].***

77. Because these incidents were unadjudicated, the reports were not available to defense counsel or [petitioner] through public records searches [before trial] and were discoverable only through production by the State.

80. Less than two months before Heyne's death, on December 11, 2002, his ex-girlfriend, Tina Horne, called the police to report that he threatened to kill her (AX 5). They had dated for a year-and-a-half and lived together for a year. She ended the relationship a month earlier and told him to move out. He called her the night of December 11 and told her that she was a "dead bitch" and he was going to kill her. She told police that he had been violent with her in the past and she wanted to file a charge of terroristic threat, but she did not pursue the complaint.

81. Less than three months before Heyne's death, about 3:30 a.m. on November 6, 2002, his then-girlfriend Horne called the police to report that he had threatened to kill himself (AX 6). She had ended the relationship that night. . . . He talked about hurting himself and appeared very

depressed. He put a gun in his mouth and threatened to kill himself. She convinced him to give her the gun before the police arrived.

82. Heyne attended a Halloween party at a residence on October 29, 2000 (AX 7). Michael Gibbons called the police to report an assault. Heyne lunged at him, knocked him to the ground, grabbed his neck, and bit his ear and finger. A crowd of people had to pull Heyne off Gibbons. Gibbons received medical treatment from paramedics, and the police observed abrasions to his ear and a bandage on his finger. No arrest was made, and no charge was filed against Heyne.

83. Less than two weeks before the assault on Gibbons, Heyne was arrested for public intoxication and open Class C warrants on October 16, 2000. He tried to buy beer from a store after hours; when the clerk refused to sell it, he tried to steal it (AX 8). He yelled at an off-duty police officer who confronted him in the parking lot. He was angry, loud, argumentative, combative, vulgar, intoxicated, and claimed to be a Navy SEAL with "27 confirmed kills to his name." He yelled, "Fuck you, cop," and threatened to sue the city and officers and to "have their badges."

84. Off-duty HPD officers working private security at a nightclub viewed a physical and verbal altercation between Heyne,

who was the bouncer, and a female patron on June 17, 2000 (AX 9). The woman said that he grabbed her by the arm twice and caused pain. She initially wanted to press charges for assault but changed her mind. He denied touching her, and no charge was filed.

85. Lori Schultz, Heyne's then-girlfriend, called police to report an assault on March 1, 1998 (AX 10). They argued at her apartment, and he pushed her. She told him to leave, and he threw objects through two of her windows as he left. No charge was filed.

(App. 23-26) (emphasis added).

After discovering the suppressed evidence, petitioner filed a state habeas corpus application, contending that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose these police reports before or during trial.

1. The Trial Court's Findings of Fact and Conclusions of Law

After conducting an evidentiary hearing with several witnesses, the trial court recommended that the TCCA grant a new trial or, alternatively, a new sentencing hearing. The trial court made extensive fact findings and legal conclusions, concluding that the suppressed evidence was favorable and material under *Brady* with respect to the guilt-innocence phase:

> 97. The information contained in the undisclosed offense reports—including that Heyne was suicidal in the weeks before the incident—was consistent with the defensive theory that he was mad at [petitioner], ran at the car, and jumped on the hood to attack [petitioner]. . . . It would have rebutted the State's theory that Heyne was not aggressive, merely walked towards [petitioner's] car, and was a good person because he attended Christian schools. . . . It also would have supported [petitioner's] request for sudden passion at the punishment stage . . . .
>
> 138. The suppressed evidence would have put the case in an entirely different light with the jury because it would have corroborated Lucero's testimony and the defense's theory that Heyne aggressively ran towards the SUV, jumped on the hood to attack [petitioner], and pushed off as [petitioner] drove away.

(App. 29, 41).

The trial court found credible the testimony of petitioner's trial counsel at the habeas corpus evidentiary hearing that, had he known about the six undisclosed police reports, he "would have argued that evidence of Heyne's aggression, violence, threats, and suicidal ideation was admissible through opinion and reputation testimony as pertinent character traits under Rule of Evidence 404(a)(2) to show Heyne's reckless disregard for his own life" (App. 30). The trial court specifically found:

- "The suppressed evidence would have been admissible at the guilt-innocence stage to prove [Heyne's] character traits that were consistent with charging [petitioner's] SUV and jumping on the hood to attack [petitioner]" (App. 34).

- "[Petitioner] could have called the police officers and lay witnesses referenced in the suppressed offense reports to testify to Heyne's violent, aggressive, impulsive, threatening, and suicidal character traits from March of 1998 to December of 2002, including only a few weeks before the incident that resulted in his death" (App. 35-36).

- "Evidence of the most recent incidents in November and December of 2002 was admissible to show Heyne's suicidal and impulsive tendencies, which would have been admissible to explain why he ran towards and jumped on a moving SUV" (App. 36-37).

- "There is a reasonable probability that, had the State disclosed the offense reports, the jury would have acquitted applicant or convicted him of [the lesser-included offenses of] manslaughter or negligent homicide" (App. 42).

Alternatively, the trial court found that the suppressed evidence was material to petitioner's punishment under *Brady*:

- "Additionally, the suppressed evidence was favorable because it also would have been admissible at the punishment stage. In a non-capital felony trial, evidence is admissible during the punishment stage if 'the court deems [it] relevant to sentencing.' TEX. CRIM. PROC. CODE art. 37.03, § 3(a)(1). . . . Evidence of Heyne's violent, aggressive, impulsive, threatening, and suicidal background was admissible at the punishment stage because it was relevant to whether [petitioner] acted in sudden passion arising from adequate cause; and, even if he did not, it was relevant to [petitioner's] personal responsibility and moral blameworthiness given the specific facts of the case . . . " (App. 39-40).[4]

- "Even had the jury convicted [petitioner] of murder, the suppressed evidence was material to punishment because it probably would have resulted in a lesser sentence. Had the court known about Heyne's recent history of behavior, it

[4] In that regard, the trial court cited *Hayden v. State*, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009) ("Victim character and victim impact evidence, *both good and bad*, are admissible during the punishment phase if the factfinder may rationally attribute the evidence to the accused's 'personal responsibility and moral culpability.' ") (emphasis added).

> probably would have found that [petitioner] acted in sudden passion arising from adequate cause. Such a finding would have reduced the offense of conviction to a second degree felony. . . . [The trial court] probably would have assessed a sentence less than 45 years" (App. 43).

- "Even had the court not found that [petitioner] acted in sudden passion, the suppressed evidence probably would have resulted in a lesser sentence because it would have made [petitioner] less personally responsible and morally blameworthy under the circumstances" (App. 43).

2. The TCCA's Order Denying Habeas Corpus Relief

Without hearing oral argument or requesting additional briefing, the TCCA denied habeas corpus relief in a brief, unpublished, *per curiam* order that rejected the habeas trial court's findings and conclusions *in their entirety*:

> This Court has independently reviewed the trial and habeas records, including the reporter's record of [petitioner's] trial. *The trial court's habeas findings and recommendation are not supported by the record*. Regarding the State's alleged failure to disclose exculpatory evidence, [petitioner] fails to show materiality. There is not a reasonable probability, considering the totality of the evidence, that the

> result of proceeding, either at guilt-innocence or at punishment, would have been different had the allegedly suppressed evidence been disclosed. This claim is denied.

Ex parte Connors, 2020 WL 1542424, at *1 (Tex. Crim. App. Apr. 1, 2020) (emphasis added) (App. 2).

3. The Suggestion for Reconsideration

Petitioner filed a suggestion that the TCCA reconsider its decision on its own motion.[5] Petitioner contended:

> This Court's wholesale rejection of the trial court's many predicate fact findings and its own independent factfinding based on a cold record were inconsistent with the proper appellate court function. The Court also violated [petitioner's] constitutional right to due process under the Fourteenth Amendment. By usurping the role of a trial judge, who listens to witnesses and assesses their demeanor to make credibility determinations and weigh evidence—and, instead, substituting this Court's own fact findings based on a cold record—this Court denied [petitioner, who prevailed in the

[5] The Texas Rules of Appellate Procedure do not permit a motion for rehearing when the TCCA denies habeas corpus relief in a written order. *See* TEX. R. APP. P. 79.2(d) ("A motion for rehearing an order that denies habeas corpus relief . . . under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.").

> court below] the process that he is constitutionally due.

(App. 58) (citing *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) ("The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious [constitutional] questions which we do not reach.")).

The TCCA denied petitioner's suggestion for reconsideration without issuing a written order on July 17, 2020 (App. 51).

REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari to address the question reserved in *United States v. Raddatz*, 447 U.S. 667 (1980): whether it violates due process in a criminal case where a defendant has raised a substantial constitutional claim for a superior court to reject an inferior court's favorable, dispositive fact findings—including findings based on credibility determinations—and to substitute its own fact findings based on a cold record. Alternatively, the Court should review whether the TCCA's perfunctory materiality analysis conflicts with this Court's *Brady* jurisprudence.

I.

The TCCA Violated Due Process When It Rejected the Trial Court's Favorable Fact Findings *In Toto* and Substituted Its Own Implicit Fact Findings Based on a Cold Record to Deny Habeas Corpus Relief.

A. Due Process Prohibits a Superior Court from Rejecting an Inferior Court's Dispositive Fact Findings that Were Based on Credibility Determinations and Substituting its Own Fact Findings Based on a Cold Record.

It is nearly universally established in American jurisprudence that, if a superior court rejects an inferior court's fact findings, the superior court should not make *de novo* fact findings based on a cold record when the inferior court's findings were based on determinations of witness credibility. Instead, the superior court should remand the case to the inferior court to make additional fact findings. Four decades ago, this Court recognized that, in a criminal case where a defendant has raised a substantial constitutional claim, a superior court's rejection of an inferior court's favorable, dispositive fact findings based on credibility determinations and substitution of its own fact findings based on a cold record to deny relief would "give rise to serious [constitutional] questions." *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980).

This Court held in *Raddatz* that a federal district court's adoption of a federal magistrate judge's proposed *unfavorable* fact findings to *deny* a defendant's pretrial motion to suppress evidence—without rehearing the witnesses testify in person—did not violate due process. *Id.* at 683-84. The Court considered the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interests implicated; (2) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs that the additional procedures would involve. The Court concluded that a district court could adopt a magistrate judge's recommended findings to deny a pretrial motion to suppress evidence because this practice "strikes the proper balance" between the *Mathews* factors. *Raddatz*, 447 U.S. at 683.

However, the Court carefully distinguished the converse situation—*i.e.*, if a district court *rejected* a magistrate judge's proposed *favorable* fact findings in support of *granting* a defendant's motion and then denied the motion without receiving testimony from the witnesses heard by the magistrate judge. Concerning that scenario, the Court observed:

> The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question

> could well give rise to serious [constitutional] questions which we do not reach.

Id. at 681 n.7; *see also id.* at 684 (Blackmun, J., concurring) ("In testing the challenged procedure against that criterion [the Due Process Clause], I would distinguish between instances where the District Court rejects the credibility based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed results.").

After *Raddatz*, several federal circuit courts of appeals have addressed that very issue. "[I]t is [now] well established in [several circuits] that, if a district judge is inclined to depart from credibility findings of a magistrate judge that were favorable to the defendant, he may only do so after holding a *de novo* evidentiary hearing. . . . This right is grounded in the Due Process Clause." *United States v. Thoms*, 684 F.3d 893, 895 (9th Cir. 2012) (citing *United States v. Ridgway*, 300 F.3d 1153, 1155-56 (9th Cir. 2002)).[6]

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[6] *See*, *e.g.*, *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) ("Like the Supreme Court [in *Raddatz*] . . . , we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself. Accordingly, in a situation involving the constitutional rights of a criminal defendant, we hold that the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative."); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001) (citing *Louis*, 630 F.2d at 1109); *United States v. Hernández-Rodríguez*, 443 F.3d 138, 148 (1st Cir. 2006) (citing *Raddatz*); *Cullen v. United States*, 194 F.3d 401, 406-07 (2d Cir. 1999) (citing *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989)); *Hill v. Beyer*, 62 F.3d 474, 482 (3d Cir.

In a wide variety of other contexts, courts have wrestled with similar questions involving the rejection of fact findings that turn on credibility determinations based on a cold record. Many state and federal courts have held that it is fundamentally unfair for a court or a quasi-judicial administrative adjudicator to make dispositive fact findings based on a cold record without personally observing the testimony and demeanor of witnesses to assess credibility.[7]

1995) (noting " 'troubling questions of constitutional due process' " resulting from district court's rejection of magistrate judge's credibility determinations without *de novo* evidentiary hearing; reversing and remanding) (quoting *Grassia*, 892 F.2d at 19); *see generally* Pierce, *District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction*, 81 GEO. WASH. L. REV. 1236, 1238 (2013) ("Six circuits have held that a district judge cannot reject a magistrate's proposed outcome-determinative credibility-based finding without conducting a new evidentiary hearing. . . . All of those holdings were announced in the context of a criminal defendant's objection to a district judge's rejection of a magistrate's proposed finding that was favorable to the defendant. All were based on the theory that the district court's rejection of such findings, without a new hearing, violated the Due Process Clause.") (citing cases).

[7] *See*, *e.g.*, *Millar v. FCC*, 707 F.2d 1530, 1538 (D.C. 1983) (noting that provision in Administrative Procedures Act permitting administrative decision by replacement hearing officer who did not assess witnesses' credibility "has been widely interpreted to allow the agency, once the examiner who presided at the hearings becomes unavailable, to dispense with a rehearing of testimony before the new examiner *only when demeanor evidence is unnecessary or of little consequence in deciding the case*") (citing cases; emphasis added); *Pigrenet v. Boland Marine & Mfg. Co.*, 631 F.2d 1190, 1191 (5th Cir. 1980) (in administrative law appeal, "Normally, a proper credibility evaluation requires that the fact finder hear and observe the witness. Credibility is not readily

discernible by one who merely reads a cold record."), *rev'd on other grounds*, 656 F.2d 1091 (5th Cir. 1981) (*en banc*); *Gamble-Skogmo v. FTC*, 211 F.2d 106 (8th Cir. 1954) (when substitute hearing examiner made credibility evaluations based on cold record of hearing by original examiner who was unavailable to make findings, second examiner's order based on such decision, which was adopted by FTC, was invalid); *City of Salem v. Massachusetts Comm'n Against Discrimination*, 534 N.E.2d 283 (Mass. 1989) (disapproving of practice of appointing substitute hearing officer to issue decision based on cold record when credibility of witnesses at issue); *Quincy Country Club v. Human Rights Comm'n*, 498 N.E.2d 316, 318-19 (Ill. App. 1986) ("The constitution does not require that the ultimate decision-maker always hear the testimony relied upon for the decision. . . . However, where credibility is a determining factor in a case, we believe the presiding administrative law judge must participate in the decision. In the present case, the Commission could rely only upon the impressions of an administrative law judge who had not participated in the hearing itself. . . . We reverse the order of the Human Rights Commission and remand this cause for further proceedings consistent with this opinion."); *Adams v. Industrial Comm'n of Arizona*, 710 P.2d 1073, 1076 (Ariz. App. 1985) ("The function of the administrative law judge in the workers' compensation setting is akin to the function of the fact-finder in the civil arena. . . . Appellate courts have therefore consistently espoused the rule that the administrative law judge's assessment of the credibility of witnesses is generally binding upon the reviewing court."); *Matter of Pima County, Juvenile Action*, 631 P.2d 526 (Ariz. 1981) (juvenile court's reversal of referee's fact finding that juvenile had not committed delinquent act violated due process where court rejected referee's credibility assessments without personally hearing disputed testimony); *Shawley v. Industrial Comm'n*, 114 N.W.2d 872, 876 (Wisc. 1962) ("Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing."); *City of Asbury Park v. Department of Civil Service*, 111 A.2d 625, 627 (N.J. 1955) (maj. op. of William J. Brennan, J.) ("Fair play is plainly denied to litigants when a trier of fact who has not heard and evaluated

The prohibition against a superior court (or its quasi-judicial-agency equivalent) rejecting an inferior court's (or agency adjudicator's) favorable fact findings that were based on credibility determinations and substituting its own fact findings based on a cold record is sufficiently established throughout the federal and state judicial systems to amount to a basic requirement of due process. *See Medina v. California*, 505 U.S. 437, 445-46 (1992) (due process violation when judicial practice violates "principle of justice so rooted in the traditions and conscience of our people"). Alternatively, even if the practice is not established widely enough to be "rooted" in the American judicial system, it still qualifies as a requirement of due process under the three-part test announced in *Mathews*, as this Court suggested in footnote 7 in *Raddatz*. Either way, due process prohibits a superior court from rejecting an inferior court's dispositive fact findings that were based on credibility determinations and substituting its own fact findings based on a cold record.

all the testimony influences the decision by his participation in the deliberations by which it is reached. The members of the commission designated to hear and decide appeals of the instant class constitute the collective finder of fact and any one of those designated who has not heard all the testimony in a given case occupies no legal status as arbiter or judge to adjudicate upon the cause.").

B. The TCCA Violated Due Process in Rejecting the Trial Court's Fact Findings and Substituting its Own Fact Findings Based on a Cold Record.

The TCCA rejected *all* of the habeas trial court's favorable fact findings in support of its legal conclusion that the prosecution violated *Brady* by suppressing six police reports concerning Heyne. The TCCA stated that it "independently reviewed the trial and habeas records" and determined that petitioner "fail[ed] to show materiality" under *Brady*,[8] *i.e.*, "[t]here is not a reasonable probability, considering the totality of the evidence, that the result of proceeding, either at guilt-innocence or at punishment, would have been different had the allegedly suppressed evidence been disclosed." *Ex parte Connors*, 2020 WL 1542424, at *1 (App. 2). The TCCA violated petitioner's right to due process by rejecting the trial court's favorable fact findings *in toto*, making its own implicit unfavorable fact findings based on only a cold record, and erroneously concluding that the suppressed evidence was immaterial.

1. The TCCA's Authority to Engage in *De Novo* Fact Finding Based on a Cold Record

The TCCA's practice of engaging in *de novo* fact-finding in habeas corpus cases filed under article 11.07 of the Texas Code of Criminal Procedure—the

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[8] *See Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995) (discussing *Brady* "materiality").

statutory provision for post-conviction habeas corpus proceedings to challenge non-capital felony convictions resulting in prison sentences—is not required by rule or statute. It is simply a policy that the TCCA adopted over time. *See*, *e.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008) (TCCA recognizing its authority in habeas corpus cases to serve as "ultimate factfinder" and "exercise [its] authority to make contrary or alternative findings" to those made by habeas trial court). In no other type of case does the TCCA embrace the role of the "ultimate fact-finder"—not when reviewing the sufficiency of the evidence to support a conviction,[9] not when reviewing a trial court's ruling on a pretrial motion to suppress evidence,[10] and not in other types of habeas corpus cases.[11] In those scenarios, the TCCA is highly deferential to a trial court's or a jury's fact findings and does not make its own substitute fact findings, particularly when they turned on witness credibility.

Only two months after denying relief to petitioner, the TCCA highlighted the gulf between the non-deferential way that it reviews habeas fact findings in non-capital felonies resulting in prison sentences, such as petitioner's case, and the deferential way that it

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[9] *See*, *e.g.*, *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

[10] *See*, *e.g.*, *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[11] *See*, *e.g.*, *Ex parte Peterson*, 117 S.W.3d 804 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007); *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011).

reviews fact findings in other habeas corpus cases. *See Diamond v. State*, ___ S.W.3d ___, 2020 WL 3067582 (Tex. Crim. App. June 10, 2020). Diamond filed a post-conviction habeas corpus application under the statutory provision to challenge misdemeanor convictions. The Texas court of appeals rejected the habeas trial court's unfavorable fact findings because they were not supported by the record and granted habeas corpus relief. The TCCA reversed the grant of relief and held that the trial court's fact findings, which were based on credibility determinations, were entitled to deference:

> We have previously addressed a significant distinction between the posture of article 11.07 habeas cases and article 11.072 habeas cases when it comes to the standard of review. In article 11.07 habeas cases, the habeas court is the original fact finder but this Court is the ultimate fact finder. The habeas court's findings are not automatically binding upon us, although *we usually accept them if they are supported by the record*. But in article 11.072 habeas cases, the trial judge is the sole fact finder. The court of appeals and this Court are truly appellate courts. We have less leeway in an article 11.072 context to disregard the habeas court's findings.

Id. at *7 (emphasis added). The TCCA has created different frameworks for reviewing fact findings made by inferior courts, not because the state legislature enacted different standards depending on the procedure in play, but because the TCCA promulgated a policy that it need not defer to a habeas trial court's fact findings in non-capital felonies that resulted in prison sentences.

2. The TCCA Violated Due Process in Exercising its "Ultimate Factfinding Authority" in Petitioner's Case.

The habeas trial court in petitioner's case conducted an evidentiary hearing at which numerous witnesses testified, including defense counsel and the prosecutor. The habeas trial court observed their testimony, assessed their credibility, and made extensive fact findings with record citations that supported its legal conclusion that the prosecution violated *Brady* and its recommendation that the TCCA grant either a new trial or a new sentencing hearing (App. 4-50).

The TCCA blithely cast aside *all* of the trial court's favorable fact findings and substituted its own implicit, unfavorable fact findings based on only the cold record. The TCCA's brief order does not explain why the habeas trial court's fact findings are not supported by the record, nor does it articulate why the cold record required the TCCA to make contrary fact findings regarding witness credibility. Rather, the TCCA made *implicit* fact findings in support of its legal conclusion that the prosecution did not violate *Brady*. *Cf. Townsend v. Sain*, 372 U.S. 293, 314 (1963) ("Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts."). Based on the TCCA's one-sentence conclusion that petitioner had "fail[ed] to show materiality" under *Brady* (App. 2), there is no way to know why the TCCA reached that result. *On what facts did it rely in reaching that conclusion*? There is simply no way to know based on the current state of the record. It appears that the TCCA summarily rejected the testimony of petitioner's witnesses wholesale to conclude that the record did not support the trial court's fact findings and legal conclusions. Otherwise, had the TCCA credited the testimony of those witnesses, it would have adopted the trial court's findings and granted a new trial or, at the very least, a new sentencing hearing.

The Court should grant certiorari and address the issue reserved in *Raddatz*. If it concludes, as it indicated in *Raddatz*, that an appellate court violates due process when it denies relief on a constitutional claim by substituting its own dispositive fact findings based on a cold record for the favorable fact findings of a trial court that observed the witnesses testify, the Court should vacate the TCCA's order denying habeas relief and remand for the TCCA to reconsider the trial court's fact findings and recommendation to grant relief by applying proper appellate deference to those findings. On remand, the TCCA should either: (1) specify what implicit *de novo* fact findings it made in rejecting petitioner's *Brady* claim and articulate whether any of those implicit fact findings (a) turned on witness credibility and (b) were dispositive to the TCCA's decision to deny relief, or (2) remand to the habeas trial court with specific instructions to make new predicate fact findings to replace any clearly erroneous fact findings related to the *Brady* claim.[12]

Although petitioner's case is in a different procedural posture than *Raddatz*—which involved a federal district court's review of a magistrate judge's proposed fact findings concerning a pretrial motion to suppress evidence—it is sufficiently similar to present an appropriate vehicle for this Court to decide the issue reserved in *Raddatz*. *See Raddatz*, 447 U.S. at 677 ("The guarantees of due process call for a hearing appropriate to the nature of the case. The issue before us, therefore, is whether the nature of the issues presented and the interests implicated in a motion to suppress evidence require that the district court judge must actually hear the challenged testimony.") (citation and internal quotation marks omitted). The substantial volume of post-conviction habeas corpus cases, in both state and federal courts, warrants this Court's intervention now to resolve this important issue.

It is an open question whether the federal Constitution requires a state to provide a procedure for collateral review of a federal constitutional claim, at least when the state prisoner was unable to raise a claim on direct appeal.[13] Yet, Texas for many decades has

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[12] If the latter option prevails, a new evidentiary hearing may be necessary because the judge who presided over the first evidentiary hearing and made the original fact findings has retired, and a new judge presides over the habeas trial court.

[13] *See Case v. Nebraska*, 381 U.S. 336, 337 (1965) (*per curiam*) (noting that "[w]e granted certiorari to decide whether the Fourteenth Amendment requires that the States afford state

provided collateral review of non-capital felony convictions resulting in prison sentences in article 11.07 of the Texas Code of Criminal Procedure. Therefore, the federal Due Process Clause applies to Texas habeas proceedings just as it applies to state court direct appeals,[14] probation and parole revocation proceedings,[15] and even state driver's license revocation proceedings[16]—none of which is constitutionally required but, if provided by a state, must comport with due process.

Furthermore, the process constitutionally due to petitioner is equivalent to the process due to a federal criminal defendant who files a pretrial motion to suppress evidence under the Fourth or Fifth Amendments.

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prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees" but avoiding answering the question).

[14] *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (although "Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier [appellate] review").

[15] *See Gagnon v. Scarpelli*, 411 U.S. 778, 783-91 (1973) (extending federal due process protections to people facing probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972) (extending federal due process protections to people facing parole revocation).

[16] *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

Petitioner's state habeas corpus proceeding in which he raised the *Brady* claim—which he could not have raised in a motion for a new trial or on direct appeal because the State continued to withhold the relevant evidence during those proceedings—is functionally equivalent to a pretrial suppression hearing. Most important, petitioner's first opportunity to raise the constitutional *Brady* claim was in a state habeas corpus proceeding. *Cf. Martinez v. Ryan*, 566 U.S. 1 (2012) (allowing state prisoner to rely on ineffectiveness of state habeas corpus counsel as "cause" for procedural default on ineffectiveness claim related to trial counsel because state law did not allow him to raise ineffectiveness claim until state collateral proceedings); *Stone v. Powell*, 428 U.S. 465, 493-95 (1976) (prohibiting Fourth Amendment claim to be raised on habeas corpus review when inmate had "full and fair opportunity" to raise it during trial and on direct appeal). Petitioner did not have a "full and fair opportunity" to raise his *Brady* claim before the state habeas corpus proceeding. Therefore, his state habeas corpus proceeding was functionally analogous to a pretrial suppression hearing. For that reason, the "nature of the case" requires the same level of due process protections that apply to a pretrial suppression hearing. *See Raddatz*, 447 U.S. at 677.

The Court should grant certiorari because petitioner's case presents an appropriate vehicle for the Court to decide the due process issue reserved in *Raddatz*.

II.

The TCCA's *Brady* Materiality Analysis Conflicts with this Court's *Brady* Jurisprudence.

Although petitioner asks the Court to vacate the judgment and remand to the TCCA to (1) address the predicate fact findings in a manner consistent with due process or (2) remand to the habeas trial court for additional fact findings, this Court alternatively could address the merits of the *Brady* claim now based on the incontrovertible facts—the six undisclosed police reports. *Cf. Napue v. Illinois*, 360 U.S. 264, 271 (1959) ("The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate."); *id.* at 272 ("In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.") (citation and internal quotation marks omitted). The Court could find a constitutional violation without implicating *Raddatz* because it would not substitute fact findings on a cold record inconsistent with the trial court's favorable findings that supported the *Brady* violation.

The law is well-established that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Kyles*, 514 U.S. at 435). "In short, [a petitioner] must show a 'reasonable probability of a different result'" at his trial. *Id.* (quoting *Kyles*, 514 U.S. at 434). Significantly, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in" a more favorable verdict at the guilt phase or a lesser sentence. *Kyles*, 514 U.S. at 434.

The prosecution suppressed six police reports that collectively painted an entirely different picture of Heyne's mental and emotional states before his death than what the jury knew. Had the prosecution disclosed the reports before trial, petitioner could have presented evidence that "would have put the case in an entirely different light with the jury because it would have corroborated Lucero's testimony and the defense's theory that Heyne aggressively ran towards the SUV, jumped on the hood to attack [petitioner], and pushed off as [petitioner] drove away" (App. 41). At a minimum, as the habeas trial court found, "Even had the jury convicted [petitioner] of murder, the suppressed evidence was material to punishment because it probably would have resulted in a lesser sentence" (App. 43).

If the Court decides not to resolve the question reserved by *Raddatz*, it should grant certiorari because the TCCA has departed so dramatically from this Court's *Brady* jurisprudence as to justify intervention. *Cf. Andrus v. Texas*, 590 U.S. ___, 2020 WL 3146872 (2020) (where Texas habeas trial court made fact findings and recommended relief based on ineffective assistance of counsel, and TCCA summarily denied relief without explanation, vacating TCCA's judgment and remanding for proper consideration of prejudice in light of well-established standard in *Strickland v. Washington*, 466 U.S. 668 (1984)). The Court should conclude that the suppressed police reports were material to the jury's verdict or, alternatively, to the 45-year sentence.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

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