No. _____

IN THE
Supreme Court of the United States

MICHAEL NEWBERRY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Michael Newberry was a teenager when he was convicted of capital murder on the theory that he and his co-defendant, Lilton Deon Moore, murdered the victim in the course of committing a robbery. Nearly thirty years into Mr. Newberry's life sentence, the State of Texas—*for the first time*—produced the testimony Moore gave to the grand jury that the state habeas court determined "removes the aggravating element of robbery." The court found that the trial prosecutor knowingly withheld Moore's testimony and police statement, and that the evidence was favorable and material. Joining in Petitioner's request for relief, the State admitted that its conduct violated *Brady v. Maryland*, 373 U.S. 83 (1963), and deprived Mr. Newberry of a fair trial.

Despite the agreement of the Petitioner, the prosecution, and the habeas court, the Texas Court of Criminal Appeals (TCCA) denied relief, with one judge dissenting. The TCCA's unsigned order contains no reasoning, fails to acknowledge the State's confession of error, and does not even cite the relevant legal standards. The questions presented are:

> 1. Where the Petitioner, the State, and the habeas court all agree that a conviction is unconstitutional and must be reversed, does it violate due process for a state superior court to summarily deny relief without explanation?
>
> 2. Did the prosecution violate *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing evidence contradicting its proof

of the aggravating element distinguishing capital murder from non-capital homicide?

RELATED PROCEEDINGS

State of Texas v. Newberry, No. 96-088, 235th District Court, Cooke County, Texas. Judgment of conviction entered July 11, 1997.

Newberry v. State of Texas, No. 02-97-00486-CR, Second Court of Appeals of Texas. Judgment entered May 7, 1998.

Ex parte Newberry, No. 96-088A, 235th District Court, Cooke County, Texas. Order entered August 8, 2005.

Ex parte Newberry, WR-62,159-01, Texas Court of Criminal Appeals. Order entered August 31, 2005.

Ex parte Newberry, No. 96-088B, 235th District Court, Cooke County, Texas. Order entered July 3, 2008.

Ex parte Newberry, No. WR-62,159-02, Texas Court of Criminal Appeals. Order entered August 13, 2008.

Ex parte Newberry, No. 96-088C, 235th District Court, Cooke County, Texas. Order entered April 10, 2025.

Ex parte Newberry, No. WR-62,159-03, Texas Court of Criminal Appeals. Order entered September 17, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that the Court grant a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

RELEVANT OPINIONS

The Texas Court of Criminal Appeals' unpublished *per curiam* order denying habeas corpus relief (Pet. App. 1a-2a) is available at 2025 WL 2658230. The district court's findings of fact and conclusions of law recommending that relief be granted (Pet. App. 3a-47a) are unreported.

JURISDICTION

The Texas Court of Criminal Appeals' order denying relief was entered on September 17, 2025. On January 5, 2026, Justice Alito extended the time to file this petition until January 15, 2026. No. 25A761. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

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; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a conceded due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny, where the prosecutor who knowingly withheld the evidence now sits as the elected judge of the convicting court. The case also involves the TCCA's extraordinary action of summarily rejecting the habeas court's recommendation for relief from a capital murder conviction with no explanation whatsoever.

I. FACTUAL BACKGROUND

In the late-night hours of May 28, 1996, a group of five teenagers—Sidney Perry, Louis Ray "Duke" Sheppard, Douglas "Cotton" Wilson, Lilton Deon Moore, and seventeen-year-old Petitioner Michael Newberry—were driving around their Gainesville, Texas neighborhood when they encountered an older man named Granville Hanks, whose car was stalled in the road. Pet. App. 9a.[1] Hanks asked the group if they had any "crack" he could buy and for help pushing his car. *Id.* The teenagers refused both requests and kept driving. *Id.* A short while later, Hanks was found dead in his car, around the corner from where the group had seen him. *Id.* He had a single gunshot wound in his neck, later determined to be from a .22 caliber bullet. *Id.*; 6 Trial R.R. 13-14, 27-28, 41-42.

After processing the crime scene and speaking with nearby residents, police assumed that the crime

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[1] The statement largely cites to the habeas court's Findings and Conclusions and Order, Pet. App. 3a-47a. None of the other related proceedings has produced a recitation of facts. Where necessary, citations to the record are added.

was "drug-related." TCCA C.R. 238-39. Although no drugs were found in the vehicle, police found a "bent Coke can" next to a pair of scissors on his rear passenger-side floorboard. *Id.* at 826. There were coins in his right hand, and over seventy-five dollars in his front left pants pocket.[2] *Id.* Though no neighbors saw the shooting, one witness said he saw three males standing next to Hanks's vehicle shortly beforehand. *See id.* at 238-39, 759-66. Police did not find any physical or forensic evidence from the crime scene to help identify a suspect.

Two days later, a local man walked into the police department to report that he "heard on the street" that Doug Wilson, Deon Moore, and Petitioner were involved. Pet. App. 9a. The next day, that same man brought Moore to the police station, and Moore gave the case detective a recorded statement accusing Petitioner of attempting to rob Hanks and shooting him. *Id.* Hours later, Wilson did the same. TCCA C.R. at 286-87. He then voluntarily led the detective to the alleged murder weapon, which he said he saw Petitioner "plant" behind Wilson's uncle's house. *Id.* at 305. Three days later, Petitioner was arrested and charged with capital murder.

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[2] The precise amount of cash recovered from his pocket, $76.01, is equivalent to $153.88 in November of 2025. CPI Inflation Calculator, Bureau Lab. Stat., https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Jan. 5, 2026).

II. PROCEDURAL HISTORY

A. Grand Jury and Pre-trial Proceedings

Less than a month later, the elected District Attorney of Cooke County, Janelle Haverkamp, presented the case to the grand jury. Both the detective and Deon Moore testified.

1. The transcript of Moore's testimony spans 124 pages. Pet. App. 15a; *see* TCCA C.R. 379-506. While under oath, Moore gave a very different story from the one he originally told the detective. The habeas court would later find that, in his testimony, Moore gave "both consistent and inconsistent answers," but that he was consistent regarding a key fact—no one ever discussed robbing Hanks. Rather, it was *Moore* who decided to re-approach Hanks to sell him crack cocaine, and Petitioner came along for the same reason. *See* Pet. App. 14a-16a.

Moore also offered inconsistent testimony about the murder weapon. At one point, Moore testified that Petitioner took the gun with him when he walked up to Hanks to sell drugs. Just minutes later, he testified that Applicant did *not* have the gun when they tried to complete the drug transaction. Pet. App. 16a. Moore denied that the gun was his, but said that someone he knew had tried to sell it to him. He testified that, after the shooting, that same person (whom he refused to identify) actually came to Moore's house looking for the gun. *Id.*; TCCA C.R. 489-92. He admitted to being familiar with how the gun worked, agreeing that it was a double-action revolver, and also said he "played" with it minutes before the shooting. Pet. App. 16a.

Finally, Moore's testimony illustrated his capacity for the specific violence he was accusing Petitioner of having committed against Hanks. For example, he admitted to robbing "dope fiends" with a gun—so many that he lost count. *See id.* He testified that it would "make [his] day when [he] was doing robberies." TCCA C.R. 504. He also admitted to committing a drive-by shooting at the age of fifteen in Oklahoma to earn his "second stripe" in the Five Deuce Hoover Crip gang. Pet. App. 16a.

The grand jury returned separate indictments against Petitioner and Moore for capital murder, containing identical allegations.

2. Petitioner's attorneys filed several pre-trial discovery motions, including specific requests for a copy of any statement by Deon Moore and a transcript of his grand jury testimony. TCCA C.R. 636-39. The court's discovery order only required the State to produce Moore's statements if he testified at Petitioner's trial. *See* Pet. App. 18a. However, the defense filed a motion for disclosure of favorable evidence, which included a specific request for the "[s]tatements of any witness interviewed by the prosecution who identified any other individual other than [Petitioner] who . . . possessed a firearm in this case." The court granted that motion and added: "Ms. Haverkamp, if you have anything that's exculpatory you know you've got to give it to them. And if there's anything that you have a question about, you need to submit it to the Court for an in-camera inspection." *Id.* Yet, Haverkamp never turned over Moore's police statement or testimony to the defense. *Id.* at 32a.

3. The defense was provided with copies of two self-inculpatory statements made by Petitioner. The recorded statements were taken during a custodial interview of Petitioner just minutes after the seventeen-year-old's arrest for capital murder. In the first statement, Petitioner told the detective that it was Moore who shot Hanks, and that Moore indirectly threatened him to take the charge and not tell the truth. *See id.* at 11a-12a. The second recording begins thirty-seven minutes later. The detective would later testify that Petitioner eventually agreed to give another statement after the detective told him that he "didn't believe him." In his second statement, Petitioner said that he was the one who shot Hanks. *See id.*

The defense unsuccessfully sought pre-trial suppression of the statements, but challenged their voluntariness (as well as their veracity) again at trial.[3] *See id.*

B. Petitioner's Jury Trial and Initial Post-Conviction Review

Petitioner's trial took place in July of 1997. At the time, Deon Moore was awaiting trial for the same charge. The State did not seek the death penalty.

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[3] The jury was instructed that it could only consider Petitioner's confession as evidence if it believed beyond a reasonable doubt that it was "freely and voluntarily made by the defendant without compulsion or persuasion." TCCA C.R. 8. In its order recommending relief, the habeas court emphasized that the defense moved to suppress the confession and cross-examined the detective about "the unrecorded 37-minute gap between the two statements."

1. In her opening statement, District Attorney Haverkamp presented the State's version of facts and how they "add[ed] up to the crime of capital murder." *Id.* at 18a. She told the jury that, after the teenagers' first encounter with Hanks, Petitioner and Moore arrived at a plan to "rob" or "jack" Hanks. *Id.* at 18a-19a. She told the jury that Moore and Petitioner then got out of the car, with Moore carrying the gun. *Id.* Hanks "wouldn't come off the money," so Petitioner took possession of the gun and shot Hanks. *Id.* In her closing argument, the prosecutor told the jury, "We have to prove that they were in the course of committing or attempting to commit a robbery. The robbery is the whole reason why we're in the courtroom today." *Id.* at 19a. She asserted that "the sole and exclusive reason why [Petitioner] and Moore got out of the car was to rob Granville Hanks." 8 Trial R.R. 21.

Because the physical evidence did not support the existence of a completed or attempted robbery, the State relied upon the conflicting accounts of the teenagers who were in the car that night to prove the necessary intent. The testimonies of Doug Wilson and Louis Ray Sheppard supported the State's version of events, as did the recorded statements made by Petitioner that were played for the jury.[4] *See* Pet. App. 36a.

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[4] The recorded statements were taken during a custodial interview of Petitioner just minutes after the seventeen-year-old's arrest for capital murder. The defense unsuccessfully sought their suppression before trial, but cross-examined the detective at trial about the forty-five (45) unrecorded minutes of the interview that preceded Petitioner's first statement and the thirty-seven (37)

2. The defense argued and presented evidence that it was Moore, not Petitioner, who shot Hanks. *Id.* at 19a-20a. The State did not put forth any eyewitnesses to the shooting or forensic evidence to prove that Petitioner was indeed the shooter. The firearms expert was not able to *definitively* link the firearm retrieved from Wilson's uncle's backyard to the bullet recovered during the victim's autopsy, but testified that the size of the bullet matched the .22 caliber revolver. The expert also explained to the jury that the recovered gun was unique because it was "double-action," meaning it did not have to be cocked before firing. *See* 7 Trial R.R. 7-23.

At closing, the prosecutor argued that it was obvious that Petitioner, rather than Moore, was the shooter, because he "knew that this gun does not have to be cocked, and this gun can be shot double-action. And that's exactly the truth." Pet. App. 19a. She also countered the defense's emphasis that there were no fingerprints on the gun with the argument that "this is not [Petitioner]'s first rodeo. . . . [H]e's got enough common sense to wipe fingerprints off the gun." *Id.*

3. After both the State and the defense rested on guilt or innocence, defense counsel requested the court to include a charge on the lesser-included offense of murder, arguing that "a jury could rationally find that the Defendant was a party to a murder that

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unrecorded minutes between the two statements. Pet. App. 11a-12a & n.6. The jury was also instructed that it could only consider Petitioner's confession as evidence if it believed beyond a reasonable doubt that it was "freely and voluntarily made by the defendant without compulsion or persuasion." TCCA C.R. 8.

was not committed during the course or in the attempt to commit a robbery." The trial court denied the requested charge by overruling the objection. *Id.* at 22a.

The jury was ultimately instructed that it could convict Petitioner of capital murder as either the primary actor, if he intentionally caused Hanks's death by shooting him in the course of attempting to rob him, or if he "solicited, encouraged, directed, aided, or attempted to aid" Moore in intentionally causing Hanks's death and in committing or attempting to commit robbery. TCCA C.R. 7-8; *see* Tex. Penal Code § 7.02(a)(2).

The jury found Petitioner guilty of capital murder, and the court automatically sentenced him to life imprisonment, as required by statute.[5] Pet. App. 3a.

4. Petitioner's conviction was affirmed on direct appeal. *Newberry v. State,* No. 02-97-00486-CR (Tex. App.—Fort Worth May 7, 1998, no pet) (unpublished). He unsuccessfully sought state habeas relief on claims of ineffective assistance of counsel in applications filed in 2005 and 2008. *Ex parte Newberry,* No. WR-62,159-01 (Tex. Crim. App. Aug. 31, 2005) (denying application); *Ex parte Newberry,* No. WR-62,159-02 (Tex. Crim. App. Aug. 13, 2008) (dismissing application as unauthorized subsequent writ).

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[5] At that time in Texas, a capital murder conviction not involving the death penalty carried an automatic indeterminate life sentence. *See* Tex. Penal Code § 12.31(a) (1994) (current version at Tex. Penal Code § 12.31(a)(1)). Thus, there was no punishment phase at trial. By contrast, a conviction for first-degree murder carried a minimum penalty of five years' imprisonment and a maximum penalty of life. *See* Tex. Penal Code § 12.32 (1994).

C. The Habeas Court's Recommendation for Relief

Decades after his conviction, Petitioner was allowed access to the prosecution's files for the first time, which revealed a host of witness statements, police reports, and the transcript of Moore's grand jury testimony. In response, Petitioner filed his third state application, contending that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose witness statements and Moore's grand jury testimony before trial.

i. The court found that the State's conduct violated Brady *and required a new trial.*

Because the elected judge of the convicting court was Hon. Janelle Haverkamp, who prosecuted the case against Petitioner and was the subject of the application's misconduct allegations, she was recused from hearing the petition and the case was re-assigned to another judge. Pet. App. 5a n.3.

After conducting a lengthy evidentiary hearing with several live witnesses—including the trial prosecutor—and reviewing the entire record of Petitioner's trial, the state habeas trial court made extensive, independent findings of fact and conclusions of law, concluding that the State suppressed evidence that was both favorable and material under *Brady*. *See* Pet. App. 3a-47a.

1. First, the court found that the prosecutor failed to disclose to the defense Moore's initial statement to the detective as well as his later grand jury testimony.

Pet. App. 32a. It explained that "the prosecutor knew" about both the statement and the testimony because she took notes and recorded her own impressions of his statements and because she "called him as a witness" to the grand jury and "did the majority of the questioning." *Id.*

The court noted that "Haverkamp knew Moore had claimed that there was no intent to commit a robbery, that all occupants of the car knew that, and capital murder required proof of that element," yet she still failed to turn them over. *Id.*

2. The court then found that the materials contained favorable information, including information that "removes the aggravating element of an intent to commit robbery." *Id.* at 33a. It then noted that Moore's statements show "Moore's possession of the murder weapon and Moore's detailed history of crimes, including a drive-by shooting." *Id.* It found that, because "Moore's involvement in this offense was a pivotal point in dispute," "[k]nowledge of Moore's intentions, possession of and experience with the type of gun used to kill Hanks, and his propensities for violence could have provided [defense counsel] with relevant, strong cross-examination material." *Id.* It further found that the defense was "denied the ability to impeach the State's witnesses by the failure of the prosecutor to provide the information in her possession." *Id.*

Finally, the habeas court determined that, based on the entire trial record, the evidence was material under *Brady* because Petitioner "needed merely a scintilla of evidence showing he was guilty only of the lesser-included offense of murder to entitle him to the

lesser charge, which was requested at trial." *Id.* at 33a. It found, in particular, that the State suppressed evidence "incompatible with its own theory of the case." *Id.* The court also explicitly explained that it found the evidence material despite the admission of Petitioner's statements at trial. *Id.* at 34a n.18.

Applying this Court's prejudice standard, the habeas court recommended relief Petitioner's *Brady* claim:

> [Petitioner] sustained his burden of proof and showed by a preponderance of the evidence that (1) the prosecutor failed to disclose evidence; (2) the evidence is favorable to the [Petitioner]; and (3) the evidence is material. This Court also finds that there is a reasonable likelihood that, had it been disclosed, the suppressed evidence could have affected the judgment of the jury. While not ignoring the other evidence in the case, this court finds that the undisclosed favorable evidence could reasonably have put the whole case in a different light so as to undermine confidence in the verdict.
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> . . .
>
> Based on these findings and conclusions, the Court RECOMMENDS that [Petitioner]'s request for relief be GRANTED on the sole ground that the State withheld exculpatory evidence and that [Petitioner] be granted a new trial for the charged offense of capital murder.

Pet. App. 34a, 46a (citations omitted).

ii. The State agreed that Petitioner is entitled to habeas relief.

After conducting its own investigation, the State acknowledged that its actions violated Petitioner's due process rights and joined in his request for relief. TCCA C.R. 220-21. At the close of the evidentiary hearings, the State reiterated its position while also noting, "it is a hard decision to admit that someone who held your position once withheld evidence and the defendant, the applicant, did not receive a fair trial under the 14th Amendment of the Constitution." 3 TCCA R.R. 127.

After the habeas court entered its order recommending relief, the State joined the Petitioner in reiterating the parties' joint position that relief was warranted on the *Brady* claim and making limited objections to some of the court's unfavorable fact-findings. *See* Joint Objections, *Ex parte Newberry*, No. WR-62,159-03 (Tex. Crim. App. May 2, 2025).

D. The TCCA's Unreasoned Decision Denying Relief

Months later, in a skeletal, *per curiam* order, the TCCA summarily rejected the habeas court's recommendation and denied Petitioner's application without any explanation whatsoever:

> The trial court has determined that Applicant is entitled to relief on the basis that the State withheld exculpatory evidence. The trial court recommends granting Applicant a new trial. However,

> based on our independent review of the entire record, this Court finds that Applicant has not met his burden to prove that he is entitled to relief. We deny relief.

Pet. App. 1a-2a. One judge dissented from the decision, but did not issue a written dissent. *See id.*

1. Notably, the court did not dispute the habeas court's extensive findings of fact and conclusions of law, nor did it make any of its own findings. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) ("[I]n most circumstances, we will defer to and accept a judge's findings of fact and conclusions of law when they are supported by the record. When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions.").

2. The TCCA's unsigned order also fails to acknowledge the State's concession. *C.f. Escobar v. Texas*, 143 S. Ct. 557 (Jan. 9, 2023) (mem.) (remanding "for further consideration in light of the confession of error by Texas").

3. Perhaps most extraordinary is the fact that the order fails to even reference the relevant federal standard. *See* Pet. App. 1a-2a (containing no citation to *Brady v. Maryland* or language referencing its elements). Even in the TCCA's recent unpublished decisions later summarily reversed by this Court, the court at least cited the correct burden. *See Ex parte Andrus,* No. WR-84,438-01, 2019 WL 622783 (Tex. Crim. App. Feb. 13, 2019), *cert. granted*, *judgment*

vacated sub nom. Andrus v. Texas, 590 U.S. 806 (2020); *Ex parte Escobar*, No. WR-81,574-02, 2022 WL 221497 (Tex. Crim. App. Jan. 26, 2022), *cert. granted*, *judgment vacated sub nom. Escobar v. Texas*, 143 S. Ct. 557.

REASONS TO GRANT THE PETITION

I. SUMMARY REVERSAL IS WARRANTED BECAUSE THE DECISION BELOW IS PATENTLY WRONG.

1. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. Indeed, this Court has recognized the fair-trial right is "the most fundamental of all freedoms," *Estes v. Texas*, 381 U.S. 532, 540 (1965), and has taken special care to ensure that the requirements it set forth over sixty years ago in *Brady* are faithfully applied—including in state courts. "This Court, of course, has jurisdiction over the final judgments of state postconviction courts," and "exercises that jurisdiction in appropriate circumstances," including when a state court's denial of a *Brady* claim "runs up against settled constitutional principles." *Wearry v. Cain*, 577 U.S. 385, 392, 395-96 (2016) (*per curiam*); *see Smith v. Cain*, 565 U.S. 73, 75-76 (2012).

To be sure, whether newly revealed evidence is material under *Brady* is a "fact-intensive" issue. *Wearry*, 577 U.S. at 392, 394-95. But this "Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Id.* at 395 (collecting cases); *see also Glossip v. Oklahoma*, 604 U.S. 226, 258

(2025) ("This court has not required an evidentiary record free of doubt to find a *Napue* violation in any case, much less when an attorney general confesses that his own office erroneously obtained a capital conviction.").

In *Wearry*, for example, the Court summarily reversed a state court's determination that the evidence withheld by the State, which cast doubt on the State's witnesses, was immaterial to the petitioner's capital murder conviction. *Wearry*, 577 U.S. at 394-95. That was because "*any* juror," according to this Court, "might have thought differently" about the credibility of the State's witnesses had they heard the withheld evidence. *Id.* at 393-94 (emphasis added). "Even if the jury—armed with all of this new evidence—*could* have voted to convict" anyway, this Court summarily reversed because it had "no confidence that [the jury] *would* have done so." *Id.* at 394 (quotation marks omitted). Moreover, this Court reversed despite evidence of the defendant's participation in a lesser crime. *See id.* at 393 ("Louisiana might have charged Wearry as an accessory after the fact. But Louisiana instead charged Wearry with capital murder . . . .").

The same is true here, and the same result should follow.

2. The TCCA said Petitioner "has not met his burden to prove that he is entitled to relief." That decision fails to adhere to this Court's long line of *Brady* jurisprudence. This Court has emphasized that all a state habeas applicant must do to meet his *Brady* prejudice burden is demonstrate a "reasonable probability" that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different. *Wearry*, U.S. at 392; *Smith*, 565 U.S. at 75-76. By design, that is not a herculean burden; it is a purposefully, qualitatively lower standard than the "preponderance of the evidence" or "more likely than not" standard. *See Chinn v. Shoop*, 143 S. Ct. 28 (Nov. 7, 2022) (Jackson, J., dissenting from denial of cert.) (citing *Kyles v. Whitley*, 514 U.S. 419, 434-40 (1995)). So long as the State's suppression suffices to "undermines confidence" in the outcome, it does not matter whether there was still evidence to support the verdict actually chosen by the jury. *Kyles*, 514 U.S. at 434 & n.8 ("This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone.").

In Petitioner's case, the touchstone of materiality is a reasonable probability that his trial would have ended in either a hung jury, a conviction on a lesser charge, or an outright acquittal. Put plainly, the question is whether there was a reasonable probability that, had the Moore transcripts been disclosed, a single juror would have entertained a reasonable doubt about one of the elements of capital murder. *See Cone v. Bell*, 556 U.S. 449, 452 (2009).

Answering that question requires careful consideration of the jury instructions as they were written, and how they might have been affected by the State's evidentiary suppression. *See id.* at 473-75; *c.f. Brady*, 373 U.S. at 88-90. During jury selection in this case, both the defense and the prosecution *voir dired* extensively on the possibility of a lesser-included charge on first-degree murder and a punishment phase. *See, e.g.*, 5 Trial R.R. 58-59, 132-133. Petitioner requested

that charge on the theory that there was evidence to support his guilt of a murder not committed during a robbery, but was denied. He needed merely a "scintilla of evidence" to earn that instruction—but the State withheld a *trove* of statements by Moore supporting that theory. *See* Pet. App. 33a-34a.

Petitioner's conviction for capital murder required the State to prove, beyond a reasonable doubt, that Newberry—as a principal or party—attempted to rob Granville Hanks. Had he been able to conjure any reasonable doubt in the minds of the jurors that there was not an attempted robbery, or that he did not have a part in it, the jury would have been required to acquit him of capital murder—the sole charge before it. Thus, evidence showing the victim was killed during a *drug deal* initiated by Deon Moore—not in the course of an attempted robbery, "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419.

In *Brady* itself—also a robbery-murder case involving two separately-tried co-defendants—the question was whether the defendant should have received a new guilt-innocence trial in addition to a punishment hearing. The Court declined to order a new trial, but only because it believed the co-defendant's statements were inadmissible at the guilt-innocence stage under Maryland state law. *See Brady*, 373 U.S. 89-90.

That is not the case here. Here, unlike in *Brady*, the substance of Moore's statements would have been admissible in some form or another. First, had the defense been made aware of Moore's grand jury testimony, it could have called him as a witness to

establish that there was never a plan to rob the victim. *See Washington v. State*, 388 U.S 14, 23 (1967) (striking down Texas procedural statute prohibiting coparticipants from testifying for one another); *Palomo v. State*, 925 S.W.2d 329, 334 (Tex. App.—Corpus Christi-Edinburg 1996, no pet.) ("It is an undisputed rule of law that a defendant has a right to call a co-defendant as a witness."). Though Moore likely would have refused to testify on the advice of counsel, the law makes clear that most of his grand jury testimony would have been admissible as substantive evidence under the hearsay exception for former testimony. *See* Tex. R. Crim. Evid. 804(b)(1) (effective until Mar. 1, 1998), *codified as amended,* Tex. R. Evid. 804(b)(1)(B).[6]

Under either scenario, Moore's testimony would have upended the State's theory that Petitioner and Moore exited the car that night with an intent to rob

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[6] In the event Moore asserted his privilege against self-incrimination, he would have been "unavailable" as a witness to Newberry. *See Jones v. State*, 843 S.W.2d 487, 490 (Tex. Crim. App. 1992) ("A witness is rendered unavailable when she invokes her Fifth Amendment privilege not to testify."), *abrogated on other grounds by Maxwell v. State*, 48 S.W.3d 196 (Tex. Crim. App. 2001). Given that "[g]rand jury proceedings are hearings on the allegation brought against a criminal defendant" and the State "has the same motive and opportunity to question the witness when it brought him before the grand jury as it does at trial," Moore's testimony would have been admissible for its truth. *Id.* at 490-91; *see also Reyes v. State*, 845 S.W.2d 328, 332-33 (Tex. App.—El Paso 1992, no pet.) (deeming it "irrelevant" that the witness would have elected not to testify in prior proceeding if he had opportunity to consult counsel and understood his right to remain silent).

Granville Hanks. Because there were no neutral eyewitnesses to the encounter and no physical findings supporting a theft, the State banked on the jury believing the statements Wilson, Sheppard, and Petitioner originally made to the police that there was a plan hatched in the car to "jack" the victim. Moore's account would have directly impeached that thin, crucial evidence, thereby radically damaging the State's case for capital murder. *C.f. Wearry*, U.S. at 392.

As the district court acknowledged, Moore also made inconsistent and inculpatory statements regarding the gun, his own actions the night of the murder, and his propensity for violence. Though Moore claimed that Petitioner suddenly transformed the drug deal into a robbery and then shot the victim, the defense could have easily demonstrated that it was *Moore* who turned the encounter violent and pulled the trigger. There was already significant evidence that Moore was the sole aggressor: Moore took off his shirt—which could have been bloodied by a close-range gunshot—before approaching Hanks; Petitioner did not. Moore covered his face with a bandana when he exited the vehicle; Petitioner did not. Moore had a gun in his hand; Petitioner did not. Moore ran away from the scene; Petitioner walked. *See* Pet. App. 12a, 22a.

In the end, disclosure could have changed the ultimate outcome of trial in several ways. Had the jury instructions remained the same—creating an "all or nothing" dilemma—it is reasonably probable that the

jury may have chosen "nothing."[7] But it is more likely the jury would *not* have faced a binary choice. Had Petitioner been able to present the evidence negating his participation in a robbery, the judge would have been required to grant his request for a jury instruction on murder. Then—even if *most* jurors believed all elements of capital murder were met—if others harbored a reasonable doubt as to whether there was a robbery, or whether Petitioner knew about it, or even whether Petitioner qualified as a party to the *murder* despite being a party to a robbery, the jury very well could have reached a compromise verdict on murder.[8] *See Langley v. Prince*, 926 F.3d 145, 166-67 (5th Cir. 2019) (recognizing that jury probably reached a compromise verdict in murder trial). Under either likely scenario, Petitioner would have been acquitted of capital murder. When considering them in combination, all confidence in the verdict is shattered. *C.f. Kyles*, 514 U.S. at 453 (holding that the Court's confidence in the jury's verdict "cannot survive a recap of the suppressed evidence and its significance for the prosecution"). In any event, Petitioner easily clears the "reasonable probability" hurdle.

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[7] *See generally Tolbert v. State*, 306 S.W.3d 776, 778-82 (Tex. Crim. App. 2010) (describing "all or nothing" strategy in a Texas capital murder case).

[8] Taken a step further—though it is unnecessary for relief here—the State also could have had trouble securing a murder conviction without proof of a robbery conspiracy. *See Nova v. State*, 379 S.W.3d 396, 416 (Tex. App.—Houston [14th Dist.] 2012) (holding that accomplice liability for another's felony murder under Tex. Penal Code § 7.02(a)(2) requires aiding the underlying felony *and* an act clearly dangerous to human life).

3. The TCCA's decision demonstrates that it did not meaningfully engage with any of this, despite seemingly leaving the district court's fact-findings intact. The TCCA provided no adequate and independent state-law ground for its denial; it provided no reason at all. This Court has recently acknowledged that, when the facts are clear and no state-law ground supports the disposition of the federal due process claim, summary reversal is warranted. *See Glossip*, 604 U.S. at 257-58.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the judgment below and remand or, alternatively, grant the petition and set the case for argument.

Respectfully submitted,

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