

NO. \_\_\_\_\_ (CAPITAL CASE)

---

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

ARTHUR BROWN, JR.,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

---

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

---

**PETITION FOR A WRIT OF CERTIORARI**

---

PAUL E. MANSUR\*  
Attorney at Law  
Box 1300  
Denver City, TX 79323  
(806) 215-1025  
[paul@paulmansurlaw.com](mailto:paul@paulmansurlaw.com)

DAVID R. DOW  
JEFFREY R. NEWBERRY  
INGRID NORBERGS  
University of Houston Law Center  
4606 Calhoun Rd.  
Houston, TX 77204-6060

*Attorneys for Petitioner*

\*Counsel of Record

---

---

## **QUESTION PRESENTED (CAPITAL CASE)**

Arthur Brown, Jr. was convicted of the capital murder of four individuals and sentenced to death in 1993. The State's three main witnesses at trial were: 1) a firearms expert who testified that four of the bullets recovered from the scene were fired from a gun other witnesses placed in Mr. Brown's hands; 2) Mr. Brown's sister, who testified that she owned a gun of this type and that it had gone missing soon after Mr. Brown visited her and that Brown had confessed to committing the murders to her; and 3) a surviving witness who testified that Mr. Brown was at the scene of the murder carrying a similar gun.

In post-conviction proceedings, Mr. Brown presented unequivocal testimony that the trial firearms expert had testified falsely. In determining whether the false testimony was material, the trial court considered the entire record, including evidence developed post-trial. This post-trial evidence included evidence that suggested both the surviving witness and Mr. Brown's sister had testified falsely at his trial. Based upon its consideration of the entire record, the trial court found the false testimony was material and that Mr. Brown should therefore receive a new trial.

The court below, however, refused to take into consideration the new evidence that suggested trial testimony from the surviving witness and Mr. Brown's sister was false. Because it refused to consider the entire record, the court below found the false testimony was not material, and that Mr. Brown was therefore not entitled to relief.

This Petition therefore presents the following questions for review:

**When deciding whether the State's presentation of false evidence, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, is material, must the reviewing court consider the entire record, including evidence developed post-trial that calls into question trial testimony?**

**If the Due Process Clause does not require a court to consider evidence developed post-trial in a non-capital case, does the Eighth Amendment nonetheless require the consideration evidence developed post-trial in capital cases?**

**PARTIES TO THE PROCEEDINGS BELOW**

This petition arises from a habeas corpus proceeding in which petitioner, Arthur Brown, Jr., was the Petitioner before the Court of Criminal Appeals of Texas. The State of Texas was the Respondent in those proceedings.

Mr. Brown asks that the Court issue a Writ of Certiorari to the Court of Criminal Appeals of Texas.

**RULE 29.6 STATEMENT**

Petitioner is not a corporate entity.

# TABLE OF CONTENTS

|                                                                                                                                                                                                                       | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| QUESTION PRESENTED (CAPITAL CASE) .....                                                                                                                                                                               | i    |
| PARTIES TO THE PROCEEDINGS BELOW .....                                                                                                                                                                                | iii  |
| RULE 29.6 STATEMENT .....                                                                                                                                                                                             | iii  |
| TABLE OF AUTHORITIES .....                                                                                                                                                                                            | vi   |
| OPINIONS BELOW .....                                                                                                                                                                                                  | 1    |
| STATEMENT OF JURISDICTION .....                                                                                                                                                                                       | 1    |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....                                                                                                                                                                | 1    |
| STATEMENT OF THE CASE.....                                                                                                                                                                                            | 2    |
| A.    Proceedings leading up to the subsequent state post-conviction proceedings .....                                                                                                                                | 2    |
| B.    The subsequent state post-conviction proceedings .....                                                                                                                                                          | 4    |
| 1.    Subsequent testing and evidence supporting Mr. Brown’s state habeas claim.....                                                                                                                                  | 4    |
| 2.    Proceedings before the trial court.....                                                                                                                                                                         | 10   |
| 3.    The decision of the Texas Court of Criminal Appeals .....                                                                                                                                                       | 13   |
| REASONS FOR GRANTING RELIEF .....                                                                                                                                                                                     | 15   |
| I.    WHEN ASSESSING THE MATERIALITY OF A DUE PROCESS FALSE EVIDENCE CLAIM, THE REVIEWING COURT SHOULD CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE, INCLUDING EVIDENCE OUTSIDE THE ORIGINAL TRIAL RECORD. .... | 15   |
| A.    This Court’s jurisprudence related to claims premised on the State withholding evidence spring from the due process concerns to secure the integrity of the criminal justice system and ensure fairness. ....   | 15   |
| B.    Given the focus on fairness and the integrity of the criminal judicial system, a reviewing court considering materiality should consider all evidence relevant to the materiality determination. ....           | 17   |
| II.   THIS CASE IS AN IDEAL VEHICLE FOR ASSESSING WHETHER COURTS REVIEWING STATE MISCONDUCT                                                                                                                           |      |

## TABLE OF CONTENTS (cont.)

|                                                                                                                                                                                                                             | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| CLAIMS MUST CONSIDER EVIDENCE RELEVANT TO MATERIALITY BEYOND THE CONFINES OF THE TRIAL RECORD.....                                                                                                                          | 19   |
| III. AT A MINIMUM, THIS COURT SHOULD FIND THAT IN CAPITAL CASES, THE EIGHTH AMENDMENT REQUIRES A REVIEWING COURT TO CONSIDER EVIDENCE DEVELOPED POST-TRIAL DURING ITS ASSESSMENT OF MATERIALITY.....                        | 23   |
| CONCLUSION AND PRAYER FOR RELIEF .....                                                                                                                                                                                      | 24   |
| CERTIFICATE OF SERVICE .....                                                                                                                                                                                                | 25   |
| <b>INDEX OF APPENDICES</b>                                                                                                                                                                                                  |      |
| <b>Appendix A</b> – <i>Per Curiam</i> Opinion of the Court of Criminal Appeals of Texas, <i>Ex parte Arthur Brown, Jr.</i> , No. WR-26,178-03, Slip Op. (Tex. Crim. App. Oct. 18, 2017).                                    |      |
| <b>Appendix B</b> – Dissenting Opinion by Alcala, J., <i>Ex parte Arthur Brown, Jr.</i> , No. WR-26,178-03, Slip Op. (Tex. Crim. App. Oct 18, 2017).                                                                        |      |
| <b>Appendix C</b> – Findings of Fact and Conclusions of Law Recommended by Mark Kent Ellis, Presiding Judge, 351st Judicial District Court, Harris County, Texas, <i>Ex parte Brown</i> , No. 636535-B (December 19, 2016). |      |
| <b>Appendix D</b> – Excerpts of Trial Testimony of Nicholas Cortez Anzures, <i>Marion Butler Dudley v. The State of Texas</i> (Exhibit K of Brown’s State habeas application).                                              |      |
| <b>Appendix E</b> – Excerpts of Trial Testimony of Nicholas Cortez Anzures, <i>Antonia Lamone Dunson v. The State of Texas</i> (Exhibit L of Brown’s State habeas application).                                             |      |
| <b>Appendix F</b> – Affidavit of Grace Brown (Exhibit N of Brown’s State habeas application)                                                                                                                                |      |

## TABLE OF AUTHORITIES

|                                                                                                      | <b>Page(s)</b> |
|------------------------------------------------------------------------------------------------------|----------------|
| <b>CASES</b>                                                                                         |                |
| <i>Banks v. Dretke</i> , 540 U.S. 668 (2004).....                                                    | 18             |
| <i>Brown v. State</i> , No. AP-71,817, slip op. (Tex. Crim. App. Dec. 18, 1996).....                 | 2              |
| <i>Brown v. Texas</i> , 522 U.S. 940 (1997).....                                                     | 2              |
| <i>Brown v. Thaler</i> , 133 S. Ct. 1244 (2013).....                                                 | 3              |
| <i>Brown v. Thaler</i> , 684 F.3d 482 (5th Cir. 2012).....                                           | 3              |
| <i>Brown v. Thaler</i> , No. 4-09-cv-74, slip op. (S.D. Tex. Feb. 28, 2011) .....                    | 3              |
| <i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....                                            | 23             |
| <i>Chapman v. California</i> , 386 U.S. 18 (1967).....                                               | 16             |
| <i>Ex parte Arthur Brown, Jr.</i> , No. WR-26,178-02, slip op. (Tex. Crim. App. Jun. 18, 2008) ..... | 3              |
| <i>Ex parte Arthur Brown, Jr.</i> , No. WR-26,178-03, slip op. (Tex. Crim. App. Oct. 8, 2017) .....  | 1              |
| <i>Giglio v. United States</i> , 405 U.S. 150 (1972) .....                                           | 4, 13, 16      |
| <i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....                                                   | 16, 17         |
| <i>Makiel v. Butler</i> , 782 F.3d 882 (7th Cir. 2015) .....                                         | 19             |
| <i>Mooney v. Holohan</i> , 294 U.S. 103 (1935) .....                                                 | 15             |
| <i>Napue v. Illinois</i> , 360 U.S. 264 (1959) .....                                                 | 4, 15, 16      |
| <i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994) .....                                         | 23             |
| <i>Stickler v. Greene</i> , 527 U.S. 263 (1999).....                                                 | 17             |
| <i>United States v. Agurs</i> , 427 U.S. 97 (1976).....                                              | 16, 17         |
| <i>United States v. Bagley</i> , 473 U.S. 667 (1985) .....                                           | 16             |

## TABLE OF AUTHORITIES (cont.)

|                                                                | <b>Page</b> |
|----------------------------------------------------------------|-------------|
| <i>Walker v. Lockhart</i> , 763 F.2d 942 (8th Cir. 1985) ..... | 19          |
| <i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....   | 23          |
| <b>RULES</b>                                                   |             |
| 28 U.S.C. § 1257 .....                                         | 1           |
| TEX. CODE CRIM. PROC. art. 11.073 .....                        | 3, 4        |

## PETITION FOR A WRIT OF CERTIORARI

---

Arthur Brown, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case.

### OPINIONS BELOW

The unpublished Opinion of the Texas Court of Criminal Appeals in *Ex parte Arthur Brown, Jr.*, No. WR-26,178-03, Slip Op. (Tex. Crim. App. Oct. 18, 2017), is attached as Appendix A. The unpublished Dissenting Opinion of Judge Alcala in *Ex parte Arthur Brown, Jr.*, No. WR-26,178-03, Slip Op. (Tex. Crim. App. Oct. 18, 2017), is attached as Appendix B. The Findings of Fact and Conclusions of Law with Recommendation that Relief be Granted, signed by Judge Mark Kent Ellis on December 19, 2016, is attached as Appendix C.

### STATEMENT OF JURISDICTION

This Court has jurisdiction to review the opinion of the highest court of a State under 28 U.S.C. § 1257.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that: “No person shall be ... deprived of life, liberty, or property, without due process of law.”

The Eighth Amendment to the United States Constitution provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment to the United States Constitution provides that: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”

## STATEMENT OF THE CASE

### A. Proceedings leading up to the subsequent state post-conviction proceedings.

Mr. Brown was sentenced to death in the 351st Judicial District Court in Harris County, Texas, on November 22, 1993 for the 1992 murders of four individuals. *40R. 150-55*.<sup>1</sup> At trial, the State presented the testimony of C.E. Anderson, who was the chief firearms analyst for the Houston Police Department Crime Lab (“HPD Crime Lab”). Anderson testified with unflinching certainty that bullets recovered from the autopsies of the four individuals matched two guns—*i.e.*, a Smith & Wesson .357 Magnum and a Charter Arms .38 Special—that law enforcement had linked to Mr. Brown and his two codefendants, Marion Dudley and Antonio Dunson. Armed with this testimony, the State was able to argue during closing arguments that Mr. Brown shot and killed three of the four individuals.

The CCA affirmed Mr. Brown’s conviction and sentence on December 18, 1996. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. Dec. 18, 1996) (not designated for publication). This Court, over the dissent of four Justices, denied certiorari on October 20, 1997. *Brown v. Texas*, 522 U.S. 940 (1997).

Mr. Brown timely filed an application for state post-conviction writ of habeas corpus. Prior to filing this application, Mr. Brown requested access to the firearms evidence that the State used to obtain the conviction and which was

---

<sup>1</sup> In this Petition, the reporter’s record of the original trial is referred to as “R.” preceded by the volume number and followed by the page number. The state habeas record is referred to as “SHR.” followed by the page number. The state habeas writ hearing on the subsequent habeas application is referred to as “SHWH.” followed by the page number. Items in the appendix are referred to

then in the State's sole custody. The State refused Mr. Brown's request to access the evidence for retesting, and the CCA denied Mr. Brown's discovery requests seeking the same. *SHR*. 31-32, 153-59, 246, 253-55. Nevertheless, Mr. Brown still raised a due process false evidence claim, though it lacked the supporting evidence retesting would have provided. The CCA accepted the trial court's findings of fact and denied relief on June 18, 2008. *Ex parte Arthur Brown, Jr.*, No. WR-25,178-02 (Tex. Crim. App. Jun. 18, 2008) (not designated for publication).

Mr. Brown timely filed a petition for writ of habeas corpus in federal court raising the due process false evidence claim. He asserted that he had been denied adequate fact-finding procedures in the state court to discover the evidence and develop and plead the claim fully. He again requested discovery of the firearms evidence in order to conduct testing on it. The district court denied Mr. Brown's requests and ultimately denied relief. *Brown v. Thaler*, No. 4-09-cv-74, Slip Op. (S.D. Tex. Feb. 28, 2011) (PACER Doc. No. 31). The United States Court of Appeals for the Fifth Circuit denied relief on June 12, 2012. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012). This Court denied certiorari on February 19, 2013. *Brown v. Thaler*, 133 S. Ct. 1244 (2013).

On July 2, 2013, the trial court scheduled Mr. Brown's execution for October 29, 2013. Relying on a recently enacted mechanism that allows inmates to challenge their convictions if they were based on false or discredited scientific testimony, Mr. Brown again sought access to the firearms evidence. *See TEX.*

---

by appendix designation followed by the page number. All other documents are referenced by the

CODE CRIM. PROC. art. 11.073. Based on this motion, the State agreed to withdraw the execution date, release the evidence, and allow retesting.

**B. The subsequent state post-conviction proceedings.**

**1. Subsequent testing and evidence supporting Mr. Brown's state habeas claim**

Both Mr. Brown's firearms expert, Edard "Ed" W. Love, Jr., and the State's expert, a current firearms analyst with the HPD Crime Lab, Donna Eudaley, retested the firearms evidence that the State released. The results of their testing revealed in unequivocal terms that Anderson testified falsely when he told the jury that he was 100 percent certain that the two handguns in question fired the evidence bullets recovered from the autopsies and the crime scenes. Based on this newly available evidence, Mr. Brown filed a subsequent application for writ of habeas corpus in the state court.

In this application, Mr. Brown raised a due process false evidence claim under *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). With respect to falsity, Mr. Brown presented considerable evidence that Anderson testified falsely at trial. The retesting of the firearms evidence revealed Anderson's trial testimony—*i.e.*, that he could with 100% certainty conclude the bullets had been fired from two of the recovered guns—could not possibly be true. The HPD Crime Lab, through its firearms examiner Donna Eudaley, testified she was unable to match the evidentiary bullets to any of the weapons submitted. Love, for the most part, agreed with Eudaley. Unlike Anderson, both Love and Eudaley

---

title followed by the page number.

were unable to find sufficient correspondence between evidence and test bullets that would allow either of them to conclude, much less conclude with absolute certainty, that the recovered guns were the murder weapons.

Mr. Brown also presented considerable evidence to the court relating to the false testimony's materiality. Specifically, Mr. Brown presented evidence that called into question the credibility of the State's other two star witnesses at his trial. Mr. Brown's sister, Carolyn Momoh, testified that she owned a Charter Arms .38 Special and that it turned up missing shortly after Mr. Brown, Dunson, and Dudley stayed at her house on June 20, 1992. *36R. 148; 37R. 101-02*. She confirmed that it was still missing at the time of trial. *37R. 101-02*. During the police interrogation, the police detectives told her that it was the murder weapon and that she could go to jail for a long time because her gun had been used to kill some of the four victims. *37R. 48*. Momoh told the officers that the morning after the murders, Mr. Brown admitted that he had "killed six Mexicans" and that he needed to get away for a while. *36R. 145-48*. Momoh also told the officers that her sister, Grace Brown, overheard Mr. Brown make this admission; however, the police did not question Grace about whether she heard this, and the State failed to question her about it during her testimony.

During post-conviction proceedings, counsel for Mr. Brown obtained an affidavit from Grace. In it, she unequivocally stated that Mr. Brown did not admit to any murders in her presence. *Appendix F, at 3-5*. Furthermore, Grace explained that because of Momoh's fragile psychological condition at the time, she was suscep-

tible to the extreme pressure inflicted on her by police officers and would have said anything to make the interrogation stop. *Id.* Grace’s affidavit was presented to the state habeas court in support of Mr. Brown’s claim.

Also at trial, the State presented testimony from the two surviving witnesses, Rachel Tovar and Nicholas Cortez. Tovar and Cortez were the only eyewitnesses who directly implicated Mr. Brown in the murders. At trial, defense counsel was able successfully to discredit Tovar’s testimony by highlighting the inconsistencies between her testimony at trial and previous statements. Tovar testified that she knew Mr. Brown from past drug dealings and recalled seeing him at her house on June 20, 1992, attempting to purchase cocaine from her husband. *31R. 133-36, 141-45, 236-44, 356-67; 32R. 30-31.* She also testified that she saw Mr. Brown in her house with Dudley and Dunson at the time leading up to the murders. *31R. 185-87, 196-98.* Tovar, however, provided conflicting accounts to the police of what happened:

- At the hospital, she told officers that two men referred to as “Squirt” and “Dud” committed the crimes and she described the assailants as follows: (i) Squirt—22-year-old black male, 5’6” to 5’7”, 140-145 pounds, medium brown complexion, green eyes, short-cut afro, no accent, dark shirt, blue jeans; (ii) Dud—21- to 22-year-old black male, 5’1” to 5’2”, 120 pounds, medium brown complexion, green eyes, short afro, white t-shirt, green shorts, small black gun; (iii) remaining suspect—21- to 22-year-old black male, 5’1” to 5’2”, 120 pounds, dark brown eyes, short afro, white print shirt, yellow shorts, wearing gloves.
- A detective visited Tovar at the hospital, and she named “Squirt” and “Red” as the suspects.
- Tovar identified Mr. Brown and Dudley from a photo spread at a later time while still hospitalized.
- Two detectives interviewed Tovar at the hospital on June 21, 1992, and Tovar informed them that she did not know who committed the crime, but that she

recalled seeing her husband talk to two individuals she did not know earlier in the evening, and she recalled hearing them referred to as “Red” and “Squirt.”

- On July 7, 1992, detectives interrogated Tovar at the police station for 10 to 11 hours until she again implicated Mr. Brown and his co-defendants.

*27R. 85-86, 306-08; 31R. 224-27; 32R. 84-87; 119-20, 123-24; 35R. 73-74, 104-06.*

Cortez came off at trial as being much more credible than Tovar. At the hospital, Cortez was unable to identify Mr. Brown from a photo spread. However, during trial, Cortez identified Mr. Brown as having been present at the time of the murders. *31R. 18-24.* The State informed the court that it only learned that morning that Mr. Cortez could make an identification. *31R. 35.* Cortez stated that he remembered Mr. Brown because he thought it was the “last face that I was going to see.” *31R. 38.* Though police reported that Cortez could not identify Mr. Brown from the photo spread while at the hospital, Cortez insisted that he did identify Mr. Brown when the officers showed him the photo spread, but not “with assurance.” *31R. 88-90.* Though he had to look at the photo spread for a considerable amount of time, he insisted that he was able to make an identification; however, he could not explain why he did not initial or sign after making this identification. *31R. 91-92.*

Because of the shifting nature of Tovar’s identification and the considerable impeachment the defense subjected her to, Cortez’s identification was crucial to the State’s case, particularly because he confirmed Tovar’s trial testimony that Mr. Brown and his co-defendants committed the crime. Moreover, Cortez’s testimony was important because none of the other State’s witnesses—in particular, Daniel Leiya, Candelario Hernandez, and Bervis Ned—identified Mr. Brown as being in the

house at the time of the murders. 29R. 325-27, 352-53; 30R. 193, 238-39, 245; 32R. 159-60, 165, 173-74, 180-81.

New developments presented during the state post-conviction proceedings cast serious doubt on Cortez's credibility. During Mr. Brown's trial, Cortez explained that there was sufficient lighting in the room for him to see Mr. Brown and Dudley and he testified that he turned his head toward them and looked at them for two to three minutes. 31R. 52, 99. However, after Brown's trial, Cortez testified for the State at the trials of Brown's two co-defendants, Dudley and Dunson. *Appendix D (excerpts from State of Texas v. Marion Dudley)*; *Appendix E (excerpts from State of Texas v. Antonia Lamone Dunson)*. At Dudley's trial, Cortez's testimony departed materially from the manner in which he testified in Mr. Brown's trial. He testified that it was dark inside the room and that he did not look at the assailants because they had told him to look away; all he could make out was the figure of a black male holding a chrome gun. *Appendix D, at 399-401, 404-08, 424*. He also recalled a taller black male with a black gun but was unable to identify Mr. Brown when presented with the photo spread. *Id. at 439*. At Dunson's trial, Cortez was called as a defense witness and was again unable to identify Mr. Brown from the photo spread. *Appendix E, at 151*. The excerpts from Cortez's testimony at Dudley's and Dunson's trials were presented to the state habeas court.

Finally, the firearms evidence was a prominent feature in the State's case, and the State used the evidence both to tie Mr. Brown to the crime and to show that he was an active shooter. The State presented considerable evidence that the two

guns were tied to Mr. Brown and his co-defendants and to no other individual, and it emphasized this evidence vigorously in closing arguments. John Steele, a homicide detective with the Tuscaloosa Sheriff's Department, connected the guns to Mr. Brown and his co-defendants through their associations with other drug dealers in Tuscaloosa. *33R. 186-90, 208-09, 224*. The State also presented evidence that other people who potentially had access to the guns could not have committed the murders. *28R. 107-13, 158-65; 36R. 105-13; 38R. 69-72, 103-14, 126-31*. Finally, the State strongly emphasized this evidence in closing arguments. The State reminded the jury that Anderson had matched the bullets recovered during the autopsies to the Charter Arms .38 and the Smith & Wesson .357. *39R. 130-31*. The State argued that because the bullets recovered from three of the victims were identified as having been fired from the Charter Arms .38 and because Cortez, a surviving witness, testified that Mr. Brown was holding a black gun like the Charter Arms, "[t]his means that Arthur Brown shot those three people." *39R. 131-32*.

In sum, Mr. Brown's application presented the state habeas court not only with irrefutable evidence that Anderson had testified falsely at his 1993 trial but that the State's other main witnesses were not credible. Because these two witnesses—*i.e.*, Momoh and Cortez—were not credible, the falsity of Anderson's testimony was material in that his trial testimony provided essential unimpeached evidence that directly linked Mr. Brown to the crime.

On October 28, 2015, the CCA remanded the false evidence claim relating to Anderson’s testimony to the trial court in accordance with Article 11.071, § 5(a) of the Texas Code of Criminal Procedure. *Appendix A, at 3.*

## **2. Proceedings before the trial court.**

The trial court held a hearing on October 11, 2016, in which Love, Eudaley, and Anderson testified. Two additional firearms analysts, Donald R. Davis and Raymond W. Klien, each of whom worked with the HPD crime lab in the 1990’s, provided affidavits.

Love testified about the process of firearms analysis. There are three basic conclusions a firearms examiner can make from an examination: (1) identification—which is a determination that a particular firearm fired the evidence bullets being examined; (2) exclusion—which is a determination that the particular firearm did not fire the evidence bullets being examined; and (3) inconclusive—which is a determination that the evidence is insufficient to include or exclude a particular firearm as the source of the evidence bullets being examined. *SHWH. 20-21.* Sufficient agreement is required before a firearms examiner may identify a particular firearm as having fired evidence bullets in question. *SHWH. 19.*

With respect to the Charter Arms .38—the gun that Cortez apparently placed in Mr. Brown’s hands and that the State forcefully argued that Mr. Brown used to kill three people, both Love and Eudaley uniformly disagreed with Anderson’s conclusion that it could be “identified” as having fired the four bullets Anderson claimed it had, and the fact that Anderson’s opinions had been verified by other

HPD Crime Lab analysts did not alter their opinion that Anderson's testimony was false. *SHWH*. 25, 54-55, 113-14, 145, 147. Love and Eudaley found no objective evidence from their comparisons of the evidence bullets to the various sets of test bullets that could reasonably support Anderson's conclusions and testimony, and, for this reason, his testimony at trial was plainly wrong. *SHWH*. 54-55.

As with the Charter Arms .38, Love and Eudaley both disagreed with Anderson that two of the bullets could be identified as having been fired from the Smith & Wesson .357. *SHWH*. 55-57, 64. Love and Eudaley agreed that they were unable to include or exclude the Smith & Wesson .357 as the source of the evidence bullets, both reaching an inconclusive determination with respect to this weapon. *SHWH*. 58, 58-59, 63, 127-28.

Anderson did not remember this case, his testimony in the trial in 1995, or his work on the evidence submitted to the HPD Crime Lab. *SHWH*. 71. He stated, "I don't remember anything about this case. I read the report and I saw where I testified back then but as far as that, I don't remember it." *Id*. He reviewed his testimony and his reports, but they did nothing to refresh his memory. *Id*. Notwithstanding his lack of memory of the events, Anderson stood by his testimony. *SHWH*. 71-72. "[M]y testimony is not any different today than it was when I testified then." *SHWH*. 71. Anderson testified that two other firearms examiners, Davis and Klien, had signed off on portions of his report, indicating that they had conducted an inde-

pendent examination of the evidence submitted in this case and arrived at the same conclusions that Anderson did.<sup>2</sup> 33R. 94, 98-99.

The trial court found Love's and Eudaley's testimony credible and further found that the cumulative effect of their testimony clearly demonstrated that Anderson's identifications matching four of the bullets to the Charter Arms .38 and two of the bullets to the Smith & Wesson .357 were false. *Appendix C, at 33-35*. The court found that Anderson testified falsely or in a manifestly misleading manner when he concluded unequivocally that these guns fired the evidence bullets. *Id. at 35*. The court further found that there was no evidence of any sufficient agreement between the evidence bullets and the various sets of test bullets fired from these weapons and that Anderson's identifications, which implied he did find sufficient agreement, were unsupported by any objective evidence. *Id. at 37, 39-40*. Based on the evidence before it, the court concluded that Anderson either knew or should have known that he was providing false or materially misleading testimony to the jury. *Id. at 40-41*. As a result, the court found that Mr. Brown satisfied the first *Napue* prong.

The court also found that Anderson's false testimony was material because there was a reasonable likelihood that it affected the judgment of the jury. *Appendix*

---

<sup>2</sup> Davis and Klien both confirmed Anderson's conclusions through their affidavits admitted in the writ proceedings. Like Anderson, Davis did not remember this case or his work on it. Nevertheless, he stated in his affidavit that his initials on the report indicated that he agreed with Anderson that two of the bullets were fired from the Smith & Wesson .357 Magnum. Klien likewise did not remember working on this case. Klien was the secondary examiner when Anderson examined the test bullets from the Charter Arms .38 Special and stated in his affidavit that his initials on the report indicated that he agreed with Anderson that four of the bullets were fired from the Charter Arms .38 Special.

*C*, at 42 (quoting *Napue*, 360 U.S. at 271). The court considered all of the evidence in making this determination, which included the manner in which Anderson testified, the State’s use of that evidence to tie Mr. Brown to the murders of three individuals, the fact that the State emphasized the false evidence during closing argument, and the considerable impeachment of the State’s remaining witnesses. *Id.* at 21-31, 43-44.

The impeachment evidence considered by the court included evidence presented for the first time in post-conviction proceedings. This included an affidavit from Mr. Brown’s sister, Grace, that indicted that—contrary to her sister’s testimony—she did not hear Mr. Brown confess to the murders. *Appendix C* at 35-36; *Appendix F*, at 3-4. Grace stated she believed the police coerced Momoh’s false testimony. *Id.* The Court also considered Cortez’s testimony from Dudley’s and Dunson’s trials in which he was not able to identify Mr. Brown as having been present at the scene of the murders. *Appendix C*, at 33-35; *Appendix D*, at 399-401, 424, 439; *Appendix E*, at 151.

The court concluded that the State’s presentation of false evidence in the case was incompatible with the rudimentary demands of justice and undermined the integrity of the adversary process essential to a fair trial. *Id.* at 44 (quoting *Giglio*, 405 U.S. at 153).

### **3. The decision of the Texas Court of Criminal Appeals.**

The CCA rejected the trial court’s recommendation that Mr. Brown receive relief. The court noted that the jury could have convicted Mr. Brown as a party to capital murder and not just as a principal. *Appendix A*, at 4. Based on this premise,

the court focused exclusively on the presence of evidence in the trial record that indicated Mr. Brown “intended to kill the victims or anticipated that a human life would be taken.” *Id.* The court then listed the following evidence supporting this premise: (1) Tovar and Cortez, who were the only eyewitnesses, observed Mr. Brown holding victims at gunpoint, tying them up with bedsheets, and verbally threatening to kill them; (2) Mr. Brown and his codefendants quickly left Houston by airplane and paid his sisters to drive their van back to Alabama; (3) Momoh told police that Mr. Brown admitted to her that he had “shot and killed ‘six Mexicans’”; and (4) Momoh testified that she owned a Charter Arms .38 that went missing after Mr. Brown visited her in Houston. *Id.* Based on these circumstances, the court held that Mr. Brown was “not entitled to relief on the remanded claim.” *Id. at 4-5.* In reaching this determination, the court ignored the post-trial evidence that called into question the credibility of Momoh and Cortez.

Judge Alcala dissented. She chastised the court for narrowly considering only evidence that supported its chosen theory of guilt. *Appendix B, at 3.* In other words, the false firearms evidence did not merely elevate Mr. Brown from a participant in the crime to a shooter, it provided the jury with a compelling and unimpeached means to link Mr. Brown to the crime itself. According to Alcala, to assess the harm of the firearms evidence, the court should have considered the fact that the State’s remaining “evidence of guilt was exceedingly weak when examined without the support of the erroneous firearms evidence.” *Id.* Alcala detailed the thorough impeachment that the defense subjected each defense witness to. *Id. at 3-4.* In doing

so, Alcala reached beyond the trial record and considered all of the evidence of harm that Mr. Brown presented in the state habeas proceedings. Specifically, she noted that Cortez, the other eyewitness who provided testimony cited by the majority but who was not subjected to the same vigorous impeachment as Tovar, “was unable to describe or identify [Mr. Brown] at the trials of the co-defendants.” *Id. at 3*. Alcala concluded: “Given the weaknesses in the State’s case when viewed in the absence of the firearms evidence, the habeas court would not be irrational in determining that the erroneous firearms evidence likely tainted the jury’s view of the otherwise weak and conflicting evidence of [Mr. Brown’s] guilt either as the shooter or as a party to this offense.” *Id. at 5*.

## **REASONS FOR GRANTING RELIEF**

### **I. WHEN ASSESSING THE MATERIALITY OF A DUE PROCESS FALSE EVIDENCE CLAIM, THE REVIEWING COURT SHOULD CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE, INCLUDING EVIDENCE OUTSIDE THE ORIGINAL TRIAL RECORD.**

#### **A. This Court’s jurisprudence related to claims premised on the State withholding evidence spring from the due process concerns to secure the integrity of the criminal judicial system and ensure fairness.**

In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court held that a defendant’s right to due process is violated when the State secures a conviction against the defendant by knowingly sponsoring false testimony. 294 U.S. 103, 112 (1935). In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court expanded *Mooney* and held that a due process violation also results if the State did not solicit the false testimony but subsequently failed to correct it. 360 U.S. 264, 269 (1959).

To constitute a violation of due process, the false testimony at issue must be material. A trial in which the State obtains a conviction through the knowing use of false testimony is fundamentally unfair. *Kyles v. Whitley*, 514 U.S. 419, 432-33 & n.7 (1995); *United States v. Agurs*, 427 U.S. 97, 103 (1976). Thus, a new trial is required when the State knowingly uses false or misleading testimony under *Napue* and *Giglio* “if ‘the false testimony could . . . in *any reasonable likelihood* have affected the judgment of the jury . . . .’” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. at 271) (emphasis added). See also *Napue*, 360 U.S. at 272 (“[O]ur own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had *an effect on the outcome* of trial.” (emphasis added)). In *United States v. Bagley*, the Court noted that this standard was equivalent to the *Chapman* harmless error standard.<sup>3</sup> 473 U.S. 667, 679-80 & n.9 (1985). This “strict standard of materiality [is required in the false evidence context], not just because [it] involve[s] prosecutorial misconduct, but more importantly because [it] involve[s] a corruption of the truth-seeking function of the trial process.” *Agurs*, 427 U.S. at 104; see also *Bagley*, 473 U.S. at 680.

Mr. Brown’s case exemplifies the scenario at issue in *Mooney*: the State solicited false testimony that the prosecution team knew, or should have known, was false. A conviction arising from a trial in which the State presented false evidence is

---

<sup>3</sup> *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt”).

“fundamentally unfair” and “must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Agurs*, 427 U.S. at 103. This standard of materiality is premised not only on the existence of prosecutorial misconduct but on the fact that the use of false evidence to secure a conviction involves “a corruption of the truth-seeking function of the trial process.” *Id.* at 104.

**B. Given the focus on fairness and the integrity of the criminal judicial system, a reviewing court considering materiality should consider all evidence relevant to the materiality determination.**

In *Agurs*, this Court noted that because the overriding concern when the State withholds evidence from the defense is with the “justice of the finding of guilt,” a reviewing court must evaluate materiality “in the context of the entire record.” *Agurs*, 427 U.S. at 112. From this standpoint, State misconduct—whether through the presentation of false testimony or the withholding of favorable evidence—can be material to the outcome even if after “discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions.” *Stickler v. Greene*, 527 U.S. 263, 290 (1999). In other words, materiality should not be understood to be another means of measuring the sufficiency of the evidence supporting the jury’s verdict. *Kyles v. Whitley*, 514 U.S. at 434-35. Also, in *Kyles*, this Court held that materiality must be measured against the cumulative effect of all the suppressed evidence, rather than item by item. *Id.* at 437.

While this Court, in *Agurs*, cautioned that materiality “must be evaluated in the context of the *entire record*,” the Court did not address what constituted the record a reviewing court is obligated to review—whether it is limited to the trial record or if it extends to the record developed in post-conviction proceedings. 427 U.S. 97, 112 (1976) (emphasis added). Nearly two decades later, in *Banks v. Dretke*, this Court considered evidence developed for the first time in post-conviction proceedings in determining materiality. 540 U.S. 668, 699 n.17 (2004). In *Banks*, the Court addressed a claim in which a key prosecution witness, Robert Farr, withheld that he was a paid police informant and that he had misrepresented to the police that the defendant, rather than he, sought a gun to use in planned robberies. *Banks*, 540 U.S. at 698-99. The Court found this witness’s testimony particularly probative to the punishment special issue that asked whether the defendant would pose a risk to society of committing future crimes of violence. *Id.* at 698-701. The State’s other punishment witness, Vetrano Jefferson, testified that Banks had struck him with a pistol. *Id.* at 699 n.17. However, during post-conviction proceedings, this witness admitted that he had instigated the fight with Banks that led to his getting struck. *Id.* Jefferson had omitted this information from his testimony at Banks’ trial. Nonetheless, this Court took this information into consideration in its assessment of materiality of the wrongfully withheld evidence pertaining to Farr.

While, in *Banks*, this Court signaled the “entire record” which must be reviewed pursuant to *Agurs* includes evidence developed post-trial, the Court stopped short of fashioning a rule about what is meant by the “entire record” that a review-

ing court must consider in looking for sources of materiality, and clarification is needed in this important area. The United States Court of Appeals for the Seventh Circuit has observed what this Court means by “entire record” has not been defined but follows a rule that allows consideration of such evidence because this Court has not forbidden it. *See Makiel v. Butler*, 782 F.3d 882, 909 (7th Cir. 2015). The Eighth Circuit seems to similarly allow the consideration of evidence developed post-trial. *See Walker v. Lockhart*, 763 F.2d 942, 959-960 (8th Cir. 1985).

In Mr. Brown’s case, the trial court took evidence developed post-trial into consideration when determining whether Anderson’s false testimony was material, as did also Judge Alcala. The remaining eight judges of the CCA—in a practice inconsistent with the practice of both the Seventh and Eighth Circuits—ignored the evidence developed post-trial.

This Court should grant a writ of certiorari in this case to clarify what it meant by the “entire record” in *Agurs*. *See Markeil*, 782 F.3d at 909.

## **II. THIS CASE IS AN IDEAL VEHICLE FOR ASSESSING WHETHER COURTS REVIEWING STATE MISCONDUCT CLAIMS MUST CONSIDER EVIDENCE RELEVANT TO MATERIALITY BEYOND THE CONFINES OF THE TRIAL RECORD.**

In this case, there can be little doubt that Anderson provided false evidence when he testified that the evidence bullets recovered from the autopsies and the crime scene matched, with 100 percent accuracy, the Smith & Wesson .357 and the Charter Arms .38. The trial court found Love and Eudaley credible when they testified that there was no evidence that supported Anderson’s identification of the bullets to these guns. Though Love and Eudaley may have differed slightly in how they

interpreted what they saw under the microscope, they were uniformly in agreement that they saw nothing in the evidence that would allow them to even remotely declare an identification.

The CCA did not disrupt the trial court's credibility findings or other factual findings relating to the falsity of Anderson's testimony. *Appendix A, at 4*. Rather, the court determined *de novo* that Mr. Brown failed to demonstrate that the false evidence was material. *Id.* In doing so, the court grossly misapplied the *Napue/Giglio* standard and considered only a narrow set of facts, entirely drawn from the trial record and cast in the light most favorable to the jury's verdict. The court's sparse materiality analysis in its entirety follow:

The jury was authorized to convict Applicant of capital murder as a party to the offense. And the State presented evidence that Applicant, at the very least, intended to kill the victims or anticipated that a human life would be taken. For example, the surviving witnesses [Tovar and Cortez] observed Applicant holding victims at gunpoint, tying them up with bedsheets, and verbally threatening to kill them. After the offense, Applicant quickly left Houston on a plane and paid his sisters to drive his van back to Alabama. One of his sisters [Momoh] told police that Applicant admitted to her that he had shot and killed "six Mexicans." [Momoh] also testified at trial that she owned a Charter Arms .38 revolver that went missing after Applicant had been in Houston.

Under the circumstances presented in this case, Applicant is not entitled to relief on the remanded claim. Based upon our own review, we deny relief on Applicant's claim that the State engaged in prosecutorial misconduct by presenting Anderson's ballistics testimony at trial.

*Id. at 4-5*. The court found the eyewitness testimony particularly persuasive. There were only two eyewitnesses who could place Mr. Brown in the Tovar house at the time of the murders, and one, Tovar, was subjected to considerable impeachment at

trial. The remaining eyewitness, Cortez, testified in unequivocal terms that he saw Mr. Brown with a black gun, similar to the Charter Arms .38, and he remembered Mr. Brown because he thought it would be the last person he would see. Thus, Cortez's testimony was crucial to the State's case.

In the state post-conviction proceedings, Mr. Brown presented the transcripts of Cortez's testimony in the trials Dudley and Dunson. In Dudley's trial, Cortez was unable to identify either Dudley or Mr. Brown with the same degree of confidence that he had in Mr. Brown's trial, and he contradicted important aspects of his testimony, such as whether he was looking at the assailants at the time and how well the room was lit, in Mr. Brown's trial. *Appendix D, at 399-401, 424, 439.* The State did not call Cortez as a witness in Dunson's trial, given his poor performance in Dudley's trial, so the defense called him as a witness. *Appendix E, 151.* By this time, Cortez was completely incapable of identifying any of the assailants, particularly Mr. Brown. *Id.* The shifting nature of Cortez's identifications, when coupled with the severe impeachment the defense subjected Tovar to with respect to her identification, cast particular doubt on much of the evidence that the CCA found persuasive in holding that Anderson's false testimony was not material. However, the CCA, unlike the trial court, *see Appendix C, 33-36*, made no mention of it in its materiality analysis.

The court also found Momoh's testimony that Mr. Brown admitted to her the morning after the murders that he had killed six Mexicans persuasive in dispelling materiality. The defense subjected this admission to considerable impeachment.

The police subjected all three of Mr. Brown’s sisters to extremely harsh treatment, most particularly Momoh. In post-conviction proceedings, Mr. Brown presented the affidavit of his other sister, Grace, who was present when Mr. Brown had a conversation with Momoh. *Appendix F, at 3-5*. She stated that she never heard Mr. Brown make any sort of admission to killing anyone. *Id.* Though Momoh informed the police that Grace was present, no police officer asked her about Mr. Brown’s alleged admission. *Id.* She also confirmed the harsh interrogation tactics employed by the Houston police officers. *Id.* Finally, Grace stated that Momoh’s psychological condition was fragile at best, and she could easily succumb to pressure from police officers. *Id.*

The trial court considered the entire record, including the evidence developed post-trial – Cortez’s testimony in the co-defendants’ trials and Grace’s affidavit – in finding the false testimony material. In light of all the evidence, the trial court believed that there was a reasonable likelihood that the false firearms evidence affected the outcome.

The CCA, on the other hand, ignored the evidence developed post-trial. The edifice the CCA built around its singular theory of guilt—that Mr. Brown could nevertheless be convicted as a party to the offense, rather than a principal—relied upon evidence, namely Cortez’s eyewitness testimony and Momoh’s testimony that Mr. Brown admitted to shooting people, that was seriously undercut by evidence presented in post-conviction proceedings. This Court should grant certiorari in this case to clarify what it meant in *Agurs* by the “entire record,” and hold that a court

considering materiality in state misconduct claims under *Napue*, *Giglio*, and *Brady* must consider all of the evidence, including evidence developed and presented in post-conviction proceedings.

Anderson’s false testimony undermined the integrity of Mr. Brown’s trial and represented a corruption of the truth-seeking function that Mr. Brown and the greater society expects and deserves in our criminal justice system. The CCA not only tolerated this corruption; it compounded it when it refused to consider all of the evidence relevant to materiality and carved out narrow slices of evidence to justify its ruling. The manifest injustice represented in the CCA’s opinion demands a remedy—one that can only, at this stage, be provided by this Court.

**III. AT A MINIMUM, THIS COURT SHOULD FIND THAT IN CAPITAL CASES, THE EIGHTH AMENDMENT REQUIRES A REVIEWING COURT TO CONSIDER EVIDENCE DEVELOPED POST-TRIAL DURING ITS ASSESSMENT OF MATERIALITY.**

Since the very outset of its contemporary death penalty jurisprudence, this Court has recognized the Eighth Amendment “imposes a heightened standard ‘for reliability in the determination that death is the appropriate punishment in a specific case.’” *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280 305 (1976)). As this Court observed more than three decades ago, the requirement of heightened reliability “is as firmly established as any in our Eighth Amendment jurisprudence.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985). This requirement had long since been established by the time of Brown’s trial.

If this Court is not inclined to find petitioners who are not sentenced to death are entitled to have evidence developed post-trial taken into account when a reviewing court is considering whether false or withheld evidence is material, it should nonetheless grant certiorari to determine whether such is required by the Eighth Amendment in a capital case.

### **CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, Mr. Brown prays that this Court grant a writ of certiorari to resolve the Questions Presented.

February 26, 2018

Respectfully Submitted,

PAUL MANSUR  
*Counsel of Record*  
Attorney at Law  
Box 1300  
Denver City, TX 79323  
(806) 215-1025  
[paul@paulmansurlaw.com](mailto:paul@paulmansurlaw.com)

DAVID R. DOW  
JEFFREY R. NEWBERRY  
INGRID NORBERGS  
University of Houston Law Center  
4604 Calhoun Rd.  
Houston, TX 77204-60606

*Attorneys for Petitioner*

NO. \_\_\_\_\_ (CAPITAL CASE)

---

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

ARTHUR BROWN, JR.,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

---

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

---

**CERTIFICATE OF SERVICE**

---

I, Paul E. Mansur, hereby certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on February 26, 2018, via e-mail to:

Mr. Erich Dryden  
Office of the Attorney General  
Postconviction Litigation Division  
P.O. Box 12548  
Capitol Station  
Austin, TX 78711  
erich.dryden@oag.state.tx.us

/s/ Paul E. Mansur  
*Counsel for Petitioner*