Appendix A –

Per Curiam Opinion of the Court of Criminal Appeals of Texas,
Ex parte Arthur Brown, Jr., No. WR-26,178-03,
Slip Op. (Tex. Crim. App. Oct. 18, 2017).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-26,178-03

EX PARTE ARTHUR BROWN, JR.

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 636535-B IN THE 351ST JUDICIAL DISTRICT COURT
HARRIS COUNTY

Per curiam. **ALCALA, J.,** ***filed a dissenting opinion.***

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was convicted of murdering more than one person during the same criminal transaction. The evidence at his 1993 trial showed that six people were shot at the Houston home of Rachel Tovar in June 1992. Four of those people – Jose Tovar, Frank Farias, Jessica

Quinones, and Audrey Brown – died. The two survivors, Rachel Tovar and "Nico" Cortez, identified Applicant and Marion Dudley as their attackers. The State presented evidence that a Smith & Wesson .357 Magnum revolver and a Charter Arms .38 revolver were used in the commission of the offense. Firearms examiner Charlie E. Anderson testified for the State that these guns fired bullets that were recovered from the bodies of the victims. Based on the witness testimony and the ballistics evidence, the State argued that Applicant shot Farias, Quinones, and Brown with the Charter Arms.

Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. December 18, 1996)(not designated for publication). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008)(not designated for publication).[1]

In his -03 application, Applicant alleges within Claim A that prosecutorial misconduct occurred at his trial when:

- State's witness Charlie E. Anderson "testified falsely or in a materially misleading manner when he expressed his unequivocal opinion that the evidence bullets were fired from the two guns that the State recovered in Alabama and tied to [Applicant]."

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[1] *Ex parte Brown,* No. WR-26,178-01, was an application for writ of mandamus, which this Court denied leave to file on March 23, 1994.

- The State "presented false identification testimony through its witness Nicholas Cortez Anzures."

- The State "failed to turn over favorable exculpatory evidence that four armed black males driving a similar van with Alabama license plates were boasting, only days after the murders in this case, of committing murders in Houston."

In Claim B, Applicant alleges that his trial counsel were ineffective because they "failed to investigate or unreasonably narrowed the scope of their investigation into substantial and compelling mitigating evidence that would have given the jury a reason to spare [his] life."

On October 28, 2015, we remanded the cause for the trial court to consider one claim: Applicant's allegation that Anderson gave false or misleading testimony at his trial. When the ballistics evidence was re-tested by two other firearms examiners, Ed Love, Jr. and Donna Eudaley, they did not identify the Smith & Wesson and the Charter Arms as the guns used in the commission of this offense. Love eliminated the Charter Arms and was inconclusive about the Smith & Wesson. Eudaley was inconclusive about both of the guns. After holding a hearing in which Anderson, Love, and Eudaley testified, the trial court adopted Applicant's proposed findings of fact and conclusions of law and recommended that relief be granted on the remanded claim. We disagree.

In order to be entitled to post-conviction habeas relief on the basis of false evidence, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. *See Ex parte De La Cruz,* 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein,*

421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." *See Weinstein,* 421 S.W.3d at 664.

We note at the outset that none of the experts were certain what type of ammunition was used in the shootings, and both Love and Eudaley acknowledged the possibility that different ammunition could lead to different results. But even if we assume the falsity of Anderson's testimony about his ballistics testing results, which were confirmed prior to trial by secondary examiners Donald Davis and Raymond Klien, Applicant has not shown that this evidence was material at guilt/innocence or punishment.[2] 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 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 told police that Applicant admitted to her that he had shot and killed "six Mexicans." She 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

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[2] Davis and Klien signed affidavits that were admitted as exhibits at the habeas hearing.

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.

We have also reviewed Applicant's remaining claims of prosecutorial misconduct (contained within Claim A) and ineffective assistance of counsel (Claim B). With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss these claims as an abuse of the writ without reviewing the merits.

IT IS SO ORDERED THIS THE 18TH DAY OF OCTOBER, 2017.

Do Not Publish

Appendix B –

Dissenting Opinion by Alcala, J., *Ex parte Arthur Brown, Jr.*, No. WR-26,178-03, Slip Op. (Tex. Crim. App. Oct 18, 2017).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-26,178-03

EX PARTE ARTHUR BROWN, JR., Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 636535-B IN THE 351ST DISTRICT COURT HARRIS COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

I would adopt the portion of the trial court's findings of fact and conclusions of law recommending that Arthur Brown, applicant, be granted habeas relief from his conviction or, alternatively, his punishment. This Court's majority order appears to accept as correct the trial court's findings and conclusions that the firearms evidence introduced at applicant's trial was false, or at least, misleading, but it nonetheless denies habeas relief on the basis that this evidence was not material. In contrast, I agree with the habeas court's determination that this evidence was not only false or misleading but also material. I, therefore, respectfully

dissent from this Court's order disregarding the habeas court's findings and conclusions. Because this Court's majority order and I agree that the firearms evidence was false or misleading, my dissenting opinion focuses on the dispute over whether the evidence was material to applicant's conviction or punishment.

I briefly review the firearms evidence that was introduced at applicant's trial and at the habeas hearing, and the habeas court's relevant findings of fact and conclusions of law. At trial, firearms expert C.E. Anderson testified that bullets, identified as EB1 through EB8, were recovered from six victims and that those bullets were matched to two guns linked to applicant. Anderson testified that he could "say absolutely" that EB1 and EB3 were fired from the Smith & Wesson and that EB2, EB5, EB6, and EB8 were fired from the Charter Arms. At the habeas hearing, evidence was presented and the habeas court determined that no evidence supports these conclusions made by Anderson. The habeas court found that Anderson's determination was "plainly wrong and false" with respect to his testimony that the Smith & Wesson had fired EB1 and EB3. The habeas court also found that Anderson's determination was "plainly false" with respect to his testimony that the Charter Arms fired EB2, EB5, EB6, and EB8. Given these conclusions by the habeas court, there is no firearms evidence showing that applicant was the shooter, and there appears to be no dispute that Anderson's trial testimony was false or misleading.

The dispute in this case concerns whether the false or misleading evidence was material to applicant's conviction or punishment. This Court's majority order surmises that

even if applicant was not a shooter during the offense, the jury charge permitted the jury to convict him as a party to the offense, and thus the firearms evidence was immaterial to his conviction and punishment. This Court's majority order discusses the evidence showing applicant's role in the commission of the offense that would establish his guilt even in the absence of evidence that he was a shooter by noting that, for example, "the surviving witness observed Applicant holding victims at gunpoint, tying them up with bedsheets [sic], and verbally threatening to kill them." But that analysis oversimplifies this case by failing to consider the weakness of the remaining evidence of guilt. Although it is correct to say that some evidence other than the firearms evidence shows applicant's guilt as a party to this offense, it is also true, as found by the trial court's findings of fact and conclusions of law, that this other evidence of guilt was exceedingly weak when examined without the support of the erroneous firearms evidence.

As the trial court's findings and conclusions observe, the credibility of the State's witnesses was vigorously challenged at trial. Eyewitness and complainant Rachel Tovar provided conflicting accounts of the events to the police. Eyewitness and complainant Nico Cortez was unable to identify applicant in a photo spread when police visited him in the hospital. Additionally, Cortez identified applicant at applicant's trial, but he was unable to describe or identify applicant at the trials of the co-defendants. An eyewitness, Daniel Leija, said that he had been at Tovar's house earlier in the evening and had seen applicant there, but he initially picked someone other than applicant in a photo spread and identified applicant

only after a police officer told him to look again. Another witness, Candelario Hernandez, could not identify applicant. Witness Bervis Ned changed details of his story at trial. Applicant's sisters each reported that they were pressured by police to make statements that conformed with the police officers' theory of the case. Applicant's sister, Carolyn Momoh, claimed that her statements that applicant confessed that he shot and killed six people and that she had owned a Charter Arms .38 revolver that was missing after the offense were false and products of coercion. I also note here that, even if applicant's sister's statement could connect applicant to a Charter Arms revolver, the firearms evidence, when properly considered in light of the habeas evidence, did not show that this type of revolver was used during this offense.

Given the importance of the firearms evidence that has now been proven to be false or misleading, the habeas court made a conclusion of law that the erroneous firearms evidence materially impacted the outcome of the guilt or innocence portion of the trial. I agree with the habeas court's conclusion that applicant is entitled to habeas relief on this basis. The habeas court stated that, given that the defense subjected the State's case to considerable challenge with respect to the credibility of these witnesses, there is a reasonable likelihood that the false firearms evidence and the State's emphasis on this evidence at trial and during closing argument affected the jury's deliberations and, ultimately, its verdict. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (false testimony is material if there is a reasonable likelihood that it affected the judgment of the jury). 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 applicant's guilt either as the shooter or as a party to this offense. I, therefore, respectfully disagree with this Court's majority order's determination that the firearms evidence is immaterial under the theory that applicant was guilty as a party to this offense.

This Court's majority order does not separately analyze this case with respect to whether applicant should obtain a new punishment hearing due to the false or misleading evidence in the event that he does not receive a new guilt or innocence trial. Alternatively, therefore, I conclude that, even if applicant's guilt could be sustained as a party to this capital murder, a jury could have rationally answered the special issues differently depending on whether applicant was guilty as a shooter or only as a party. Because a defendant's role as a shooter or as a party would likely affect the sentence that a jury may determine as appropriate for capital murder, the false or misleading evidence that suggested that applicant was a shooter requires a new sentencing hearing. Thus, as an alternative to granting an entirely new trial, I would grant relief in the form of a new punishment hearing.

I respectfully disagree with this Court's denial of habeas relief in all respects. I would either grant habeas relief in the guilt phase of trial, or I would grant relief in the form of a new trial on punishment. Alternatively, I would file and set this case for a more detailed review of the evidence. For these reasons, I respectfully dissent.

Filed: October 18, 2017
Publish

Appendix C –

Findings of Fact and Conclusions of Law Recommended by Mark Kent Ellis, Presiding Judge, 351st Judicial District Court, Harris County, Texas, *Ex parte Brown*, No. 636535-B (December 19, 2016).

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

December 28, 2016

PAUL E. MANSUR
ATTORNEY OF LAW
P.O. BOX 1300
DENVER CITY, TEXAS 79323

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 636535-B in the 351st District Court.

☐ State's Original Answer Filed ,

☐ Affidavit ,

☐ Court Order Dated ,

☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.

☐ Respondent's Proposed Findings of Fact and Order ,

☒ Other

Sincerely,

Roxana Garcia, Deputy
Criminal Post Trial

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Enclosure(s) – APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER

MAIL DATE 1-3-201~~6~~/FROM

IN THE 351ST JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

FILED
Chris Daniel
District Clerk
DEC 05 2016
Time:
Harris County, Texas
By
Deputy

Ex parte Arthur Brown, Jr.,
Applicant

Cause No. 636,535-B

APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Applicant, Arthur Brown, Jr. ("Mr. Brown"), and files his proposed findings of fact and conclusions of law. In support, Mr. Brown would show the following:

I. Background

Mr. Brown was convicted of capital murder and sentenced to death on November 22, 1993. The Texas Court of Criminal Appeals affirmed the conviction and sentence on December 18, 1996. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. Dec. 18, 1996) (not designated for publication). The Supreme Court of the United States, over the dissent of four justices, denied certiorari on October 20, 1997. *Brown v. Texas*, 522 U.S. 940 (1997). Mr. Brown filed his initial state habeas application, raising numerous constitutional challenges to his conviction

and sentence. This Court recommended that relief be denied, and the Court of Criminal Appeals adopted the Court's findings and denied relief on June 18, 2008. *Ex parte Arthur Brown, Jr.*, No. WR-25,178-02 (Tex. Crim. App. Jun. 18, 2008). Mr. Brown then sought relief in federal court. The United States District Court for the Southern District of Texas, Houston Division, denied relief on February 28, 2011. *Brown v. Thaler*, No. 4:09-cv-74 (S.D. Tex. Feb. 28, 2011). The Fifth Circuit refused to issue a certificate of appealability, thereby denying Mr. Brown leave to appeal. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012). The Supreme Court denied certiorari on February 19, 2013. *Brown v. Thaler*, 133 U.S. 1244 (2013).

On July 2, 2013, this Court scheduled an execution date for October 29, 2013. Mr. Brown sought to reexamine firearms evidence, relying in part on the newly enacted procedure for challenging scientific evidence under Article 11.073 of the Texas Code of Criminal Procedure, and based on an agreement of the parties, the Court withdrew the execution date in order to allow retesting of this evidence.

On October 29, 2014, Mr. Brown filed the instant writ application, raising the following claims: (1) a due process, false-evidence claim that the State's firearms expert at trial, C.E. Anderson, provided false or misleading evidence that the bullets recovered from the autopsies and the crime scene matched two guns that the State attributed to Mr. Brown and his co-defendants; (2) a due process, false-

evidence claim that an eyewitness for the State, Nicholas Cortez, provided false or misleading evidence that he could identify Mr. Brown as one of the perpetrators; (3) a *Brady*[1] claim contending that the State withheld favorable and material evidence consisting of a police report that indicated alternative perpetrators; and (4) a *Wiggins*[2] claim alleging that Mr. Brown's trial counsel failed to conduct a proper and comprehensive investigation into his background and life history. On October 28, 2015, the Court of Criminal Appeals found that the false evidence claim relating to C.E. Anderson satisfied the standard under Article 11.071, § 5, and remanded it to this Court for consideration. The Court of Criminal Appeals did not dismiss the remaining claims as an abuse of the writ, and they remain pending before it.

On October 11, 2016, this Court held a hearing on the false testimony claim. Mr. Brown's firearms expert, Edard W. Love, Jr.; Houston Police Department Crime Lab ("HPD Crime Lab") firearms analyst, Donna Eudaley; and C.E. Anderson each testified. Since the hearing, the parties have filed affidavits of two additional HPD Crime Lab firearms analysts, Donald R. Davis and Raymond W. Klien, who also analyzed the evidence at the time Anderson conducted his examination. On December 5, 2016, the parties presented proposed findings of fact and conclusions of law and argument to the Court.

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1 *Brady v. Maryland*, 373 U.S. 83 (1963).

2 *Wiggins v. Smith*, 539 U.S. 510 (2003).

Based on the pleadings filed by the parties, the evidence presented, and the arguments of the parties, the Court enters the following findings of fact and conclusions of law:

II. Findings of Fact

A. C.E. Anderson's testimony at trial.

1. Anderson received eight evidence bullets, which were designated as EB1 through EB8. *33R. 284.* Detective J.R. Davis submitted this evidence to the crime lab for analysis. *33R. 283.*

2. Anderson received a Smith & Wesson, Model 686, .357 Magnum from authorities in Alabama, which was designated as W2. Anderson created test fire bullets from this weapon that he used to compare to the evidence bullets. *33R. 289.*

3. A Charter Arms .38 Special was designated as W3, but because authorities in Alabama retained the gun as evidence in another case, it was not submitted to the HPD crime lab and was not admitted into evidence. Rather, Anderson received test fire bullets from the state crime lab in Alabama that had been fired from the Charter Arms .38 Special. *33R. 290-91, 314.*

4. Anderson testified that he used a dual stage microscope to compare the evidence bullets with the test bullets. *33R. 292.* He explained that as a bullet travels through the gun barrel, information will be imparted that can be used to

make an identification. *33R. 294, 297-98.* Gun manufacturers cut into the bore of a weapon in order to stabilize the flight of the bullet to the target; the raised areas that remain are known as "lands" while the excavated areas are known as "grooves." A bullet obtains information from the impressions made by the lands and grooves as it travels down the barrel. *33R. 297-98.* Anderson characterized the markings imparted to a bullet from a particular weapon as the weapon's fingerprint. *33R. 322.*

5. In this case, the bullets at issue contained copper jackets surrounding a lead core. Anderson explained that because the copper jacket was the portion of the bullet that came into contact with the bore of the weapon, it obtained the information needed for comparison purposes. EB4 and EB7 were only lead cores, without the copper jacket, so he was unable to examine them. *33R. 293.* The remaining evidence bullets—EB1, EB2, EB3, EB5, EB6, and EB8—were either jacket fragments or jacketed bullets, and he was able to make comparisons to them. *33R. 300-01.*

6. Anderson testified that he identified EB2, EB5, EB6, and EB8 as having been fired from W3, the Charter Arms .38 Special. *33R. 291-92.*

7. Anderson testified that he identified EB1 and EB3 as having been fired from W2, the Smith & Wesson .357 Magnum. *33R. 289, 304.*

8. Anderson testified that he could "say absolutely" that the evidence bullets came from these respective weapons; that they did not come from any other weapon. *33R. 323.*

B. C.E. Anderson's Testimony at the Post-Conviction Writ Hearing and Other Evidence Relating to the HPD Crime Lab's Reports from 1992 and 1993.

9. Anderson testified at the post-conviction writ hearing held on October 11, 2016. He did not remember this case, the trial in 1995 or his testimony at trial, 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.*

10. 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.*

11. As at trial, Anderson again described the process he applied in examining firearms evidence. *SHWH. 78-84.* First, he would make a determination concerning the ammunition. *SHWH. 78.* He would then look at class characteristics—number of lands and grooves, width of lands and grooves, direction of twist, and so forth—to determine if the weapon could have fired the evidence bullets. *SHWH. 81-82.* Then he would look at the individual

characteristics to determine whether he could match the evidence bullets to a particular weapon. *SHWH. 82.*

12. Anderson explained that he typically compared test bullets to other test bullets to make sure the weapon made good marks, both class and individual, for comparison purposes. *SHWH. 83.* He would then conduct the evidence to test comparison. *Id.* Anderson agreed that he would first look at the class characteristics to make sure they corresponded before looking at individual characteristics. *SHWH. 83, 85-86.*

13. Anderson agreed that the lands and grooves would have to match up under the microscope before he would proceed to look at individual characteristics. *33R. 89-90.* He stated that he would not go any further with his examination if the class characteristics did not match. *33R. 90.* Anderson also agreed that the individual stria would have to match up before he could conclude that a particular weapon fired an evidence bullet. *33R. 90-91.* Though a firearm may change over time, which might affect class and individual characteristics, Anderson agreed that "[y]ou're going to have to have the consistency of the striation that – and consistency of the lands and grooves" before he could find a match between gun and evidence bullet. *33R. 91.*

14. Anderson indicated that in certain situations a bullet might not track through the lands and grooves and that there could be slippage that could affect the

land and groove signatures on the weapon. *33R. 92-94.* In such a situation, it might be appropriate to look at individual characteristics to determine if the weapon fired an evidence bullet. *Id.* Anderson stated that he did not know if this happened in this case or if it affected his analyses or opinions. *33R. 95.* "I don't know exactly everything I would do in this case or what this case pertains to or how that happened or if it did happen in this case." *Id.*

15. Anderson testified that Donald R. Davis, another firearms analyst with the HPD Crime Lab in the early 90's, conducted an independent examination of the evidence submitted in this case—"an investigation individually for himself"—and arrived at the same conclusions that Anderson did. *33R. 94, 98-99.*

16. Donald R. Davis worked as a firearms analyst for the HPD Crime Lab in 1992-93 and examined the evidence in Mr. Brown's case. *Affidavit of Donald R. Davis*, at 1. Like Anderson, Davis did not remember this case or his work on it. *Id.* He described the HPD Crime Lab protocol in the 1990's. Typically, a primary analyst would examine the evidence, and then important conclusions, such as an identification or an elimination, would be confirmed by another analyst in one of two ways. *Id.* The first method involved a two-stage microscope that allowed the primary analyst to examine evidence with one set of eyepieces and the secondary analyst to observe through another set of eyepieces. *Id.* The primary and secondary analyst would discuss what they were observing during the examination process.

Id. If the secondary analyst agreed with the primary, this agreement would be reflected in the primary analyst's report. *Id.* The second confirmation method required the secondary analyst to reexamine the evidence independently after the primary analyst finished. *Id.* Again, if the secondary analyst agreed with the primary analyst, this agreement would be reflected in the primary analyst's report. *Id.*

17. Though Davis did not recall working on this case, he stated in his affidavit that his initials on the report indicated that he agreed with Anderson that EB1 and EB3 were fired from the Smith & Wesson .357 Magnum (W2). *Id.* He did not remember which of the two confirmation methods he used to arrive at that conclusion. *Id.*

18. Raymond W. Klien also worked as a firearms analyst at the HPD Crime Lab during this time and acted as a secondary analyst for Anderson. *Affidavit of Raymond W. Klien*, at 1. He likewise did not remember working on this case, but he confirmed Davis's statements concerning the HPD Crime Lab protocol during this time. *Id.* at 1-2.

19. Klien was the secondary examiner when Anderson examined test fired bullets from the Charter Arms .38 Special (W3). *Id.* at 2. Though Klien did not recall working on this case, he stated in his affidavit that his initials on the report indicated that he agreed with Anderson that EB2, EB5, EB6, and EB8 were fired

from the Charter Arms .38 Special. *Id.* He did not remember which of the two confirmation methods he used to arrive at that conclusion. *Id.*

C. *Two firearms experts—Edard W. Love, Jr., and Donna Eudaley—Clearly Demonstrate that Anderson's Testimony at Trial was False or, at Best, Manifestly Misleading and that the Conclusions of the HPD Crime Lab in 1992-93 were Clearly Wrong.*

20. Mr. Brown retained the services of a firearms expert, Edard W. Love, Jr., who independently examined the evidence in this case. Love received the following evidence from the Harris County District Attorney's Office: (1) three guns consisting of a Taurus .357 Magnum (W1), a Smith & Wesson .357 Magnum (W2), and a Charter Arms .38 Special (W3); (2) eight evidence bullets designated as EB1 through EB8; (3) test fired bullets that Anderson used for comparison purposes; (4) various reports created by Anderson and the HPD Crime Lab in 1992-93 relating to the evaluation of the firearms evidence; (5) Anderson's trial testimony; and (6) the HPD Crime Lab reports relating to the new evaluation of the firearms evidence in 2013-14 by Donna Eudaley and Chandler Bassett. *SHWH. 21-25; Exhibits 1-5.* Love conducted examinations of this evidence, reported his conclusions, and testified at the hearing.

21. Prior to Love's initial evaluation, the State submitted the firearms evidence in this case to the HPD Crime Lab for new testing and evaluation. *SHWH. 122-23, 148.* Firearms analyst, Donna Eudaley, conducted the

examinations, reported her conclusions, and testified at the hearing. *SHWH. 118.* Though Bassett confirmed her findings, he did not testify.

22. The primary job of a firearms analyst is the "identification of firearms, [. . .] bullets and cartridge cases back to the guns that fired them." *SHWH. 8.*

23. A firearms evaluation typically starts with the evidence bullets—typically bullets uncovered in the course of an investigation that came from an unknown source. An examiner will first attempt to determine the caliber and other class characteristics, such as the number of lands and grooves, the measurements of widths of the lands and grooves, the direction of the twist, of the evidence bullets. From this examination, an examiner may then draw some conclusion concerning the type of weapon that fired the bullets. *SHWH. 9-10.* An examiner will also examine any firearm submitted to determine if it is in working order and whether it could have fired the bullets based on the general rifling characteristics. *Id.* The examiner will then conduct test fires to create test bullets that may be compared to the evidence bullets under a microscope. *Id.*

24. Individual characteristics are imperfections in the barrel of a gun that are ancillary to the manufacturing process or that could be imparted to the gun through ordinary wear and tear. *SHWH. 11.* These imperfections are unique to a particular firearm and a negative impression will be imparted to a bullet as it passes through the barrel. *SHWH. 11-13.* Under the Theory of Uniqueness, it is

possible for a firearms examiner to view the class and individual characteristics through a microscope, to compare the markings on different bullets, and to make a determination whether a bullet was or was not fired from a particular weapon. *SHWH. 12-13, 16-17.*

25. Subclass characteristics or subclass carryover are imperfections created in a gun barrel during the manufacturing process that may repeat through a series of guns during a particular manufacturing run. *SHWH. 14-15.* They are incidental to the manufacturing process and are not part of the design of the particular gun model. *Id.*

26. In conducting a firearms examination, a firearms examiner uses a comparison microscope to compare bullets from an unknown source to bullets known to have been fired from a particular firearm. The examiner will first look for a consistency in class characteristics and, if consistency is noted, then proceed to look for consistency in individual characteristics. *SHWH. 119.*

27. 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.*

28. Sufficient agreement is required before a firearms examiner may identify a particular firearm as having fired evidence bullets in question. *SHWH. 19.* Eudaley discussed the current standard governing firearms examinations: First, the agreement observed must be consistent with the marks known to have been created by the same firearm. Second, the agreement observed must exceed the best known agreement of marks made by different firearms. For instance, Eudaley explained that consecutively manufactured barrels would be expected to produce the greatest degree of consistency. Thus, an identification must exceed the best known agreement between barrels manufactured one after the other. *SHWH. 119-20.*

29. Similarly, Love explained that sufficient agreement requires a significantly close degree of correspondence of class and individual characteristics such that it is practically impossible for another firearm to have produced similar marks as those appearing on the evidence bullets. *SHWH. 19-20.*

W3 – The Charter Arms .38 Special

30. Both Love and Eudaley disagreed with Anderson's conclusion identifying the Charter Arms .38 Special (W3) as having fired EB2, EB5, EB6, and EB8. *SHWH. 25, 54-55, 113-14, 145.* The fact that another firearm's examiner at

the HPD Crime Lab may have confirmed Anderson's results did not alter their opinion that the Anderson's result was erroneous. *SHWH. 113-14, 147.* Love and Eudaley found no objective evidence from their comparisons of the evidence bullets EB2, EB5, EB6, and EB8 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.*

31. First, both Love and Eudaley found a noticeable difference in the widths of the lands and grooves when the evidence bullets EB2, EB5, EB6, and EB8 were compared with the test bullets. *SHWH. 25, 35-41, 106, 138-39, 144; Exhibit 8, Slides 16-19.* Love compared each of the evidence bullets, EB2, EB5, EB6, and EB8, to the old test bullets that Anderson relied upon and the new test bullets that Love created, and he noticed the same difference in the widths of the land and groove indications in each comparison he did. *SHWH. 35-36, 42-43.* He stated, "I was seeing this class difference. Whether it be the old test or whether it was my test, the new test, it didn't make any difference. The class difference was still the same." *SHWH. 36.*

32. Love agreed with Anderson's statement that when there is a difference in class characteristics, there should be an elimination. *SHWH. 108.* Though Love also agreed that sometimes slippage as the bullet travels through the barrel may obliterate or obscure the class characteristics, he did not observe any evidence of

slippage or damage to the class characteristics in any of the test bullets that were fired from the Charter Arms .38 Special or in the evidence bullets EB2, EB5, EB6, and EB8. *SHWH. 108-11.* He stated, "I don't think slippage had really any – as far as what I'm seeing here, any [e]ffect on much of any of it, whether it be tests or whether it be the evidence, because it just wasn't . . . present on any of these bullets, at least not to the point where it's going to obscure, you know, anything. . . . It really doesn't play a part in it." *SHWH. 110-11.*

33. Second, Love and Eudaley found no correspondence in individual characteristics when EB2, EB5, EB6, and EB8 were compared with old and new test bullets. *SHWH. 25-26, 44-45, 111-12, 116, 139.* Eudaley stated, "I didn't observe any agreement in individual characteristics beyond what might be considered random." *SHWH. 139.*

34. The paucity of correspondence in the evidence to test comparisons starkly contrasted with what both Love and Eudaley observed in test to test comparisons and evidence to evidence comparisons, which demonstrated a very high degree of correspondence in both class and individual characteristics.

35. When comparing test bullets that Anderson used to test bullets that Love created, there was a high degree of correspondence in the class characteristics—widths of the lands and grooves—as well as a high degree of correspondence in individual characteristics. *SHWH. 27-31, 126-27; Exhibit 8,*

Slides 3-7. Love reported that the individual characteristics he noted in the old test to new test comparisons exhibited "excellent matching areas that repeat on all tests." *Exhibit-Love Report dated October 20, 2014, at 5; Exhibit 8, Slides 3-7. See also SHWH. 31.* These areas of correspondence were "absent from all of the evidence bullets and jacket." *Exhibit-Love Report dated October 20, 2014, at 5.*

36. Eudaley confirmed Love's observations concerning the test to test comparisons. *SHWH. 46, 126-27.*

37. Both Love and Eudaley concluded that the old test bullets that Anderson used and the new test bullets that Love and Eudaley created were fired from the same weapon, namely the Charter Arms .38 Special. *SHWH. 32, 46, 126-27, 143-44.*

38. Love and Eudaley compared the evidence bullets, EB2, EB5, EB6, and EB8, with one another and determined that they were fired from the same weapon. *SHWH. 25, 46, 137-38.*

39. Love found a very close correspondence between the widths of the lands and groove signatures of EB2, EB5, EB6, and EB8. *SHWH. 32; Exhibit 8, Slides 8-15; Exhibit-Love Report dated October 20, 2014, at 4.* Likewise, he found a very close correspondence in the individual characteristics in the evidence to evidence comparisons. *SHWH. 34-35; Exhibit 8, Slides 8-15.* He reported that the individual characteristics he observed were "very repetitive and appear[ed] on all

the questioned items (EB-2, 5, 6, 8) fired in the same firearm." *Exhibit-Love Report dated October 20, 2014, at 5.* However, this area did not appear on any of the tests. *Id.*

40. Like Love, Eudaley found a very close correspondence in the widths of the lands and grooves in EB2, EB5, EB6, and EB8, and a very close correspondence in the individual characteristics of these bullets. *SHWH. 46, 137.*

41. Love was able to eliminate the Charter Arms .38 Special as the weapon that fired EB2, EB5, EB6, and EB8. He explained that the class difference that both he and Eudaley noted and the lack of any correspondence in individual characteristics led him to a conclusion that elimination was warranted. *SHWH. 25-26, 41-45, 149.* Eudaley, on the other hand, concluded that she could not identify or eliminate the Charter Arms .38 Special as having fired EB2, EB5, EB6, and EB8. *SHWH. 47, 138-44, 149.* Because she did not know what ammunition was used in EB2, EB5, EB6, and EB8, she could not eliminate the possibility that a difference in ammunition type could have caused the difference in the widths of the lands and grooves between the evidence bullets and the various sets of test bullets. *SHWH. 47-49, 142, 149-50.*

42. Because a number of different types of ammunition were used to create the various sets of test bullets and because all of the test to test comparisons consistently revealed a very close correspondence in class characteristics, Love

believed that possibility that a different ammunition could have caused the difference in class characteristics between EB2, EB5, EB6, and EB8 and the various sets of test bullets was very remote. *SHWH. 49-50.* Consequently, he felt comfortable excluding the Charter Arms .38 Special. *Id.*

43. The difference in opinion between Love and Eudaley concerning whether to exclude the Charter Arms .38 Special is not material to the issue of whether Anderson testified falsely when he identified this gun as having fired EB2, EB5, EB6, and EB8. Love and Eudaley observed essentially the same gross differences in class characteristics between EB2, EB5, EB6, and EB8 and the various sets of test bullets, and they both found no degree of correspondence in individual characteristics that would permit them to find an identification. *SHWH. 48, 105-06, 111-12, 116, 139.* From this standpoint, the conclusions that Love and Eudaley drew from the evidence were very close to one another, and because of the virtual absence of any indication that could support an identification, their findings were very different from the conclusion that Anderson drew. *SHWH. 52-55, 116-17, 141-42, 146, 154.*

44. In sum, there is no evidence that supports Anderson's opinion that the Charter Arms .38 Special fired EB2, EB5, EB6, and EB8.

W2 – The Smith & Wesson .357 Magnum

45. Both Love and Eudaley disagreed with Anderson that EB1 and EB3 could be identified as having been fired from the Smith & Wesson .357 Magnum (W2). *SHWH. 55-67, 64.*

46. Love and Eudaley agreed that they were unable to include or exclude the Smith & Wesson .357 Magnum as the source of the evidence bullets. *SHWH. 58, 58-59, 63, 127-28.* Thus, they reached an inconclusive determination. *SHWH. 63, 127-28.*

47. Love explained that class characteristics do not change as the weapon is used, but individual characteristics can change over time. *SHWH. 59.* Because individual characteristics can change over time, it is difficult for an examiner to exclude a particular firearm based solely on the lack of correspondence in individual characteristics. *SHWH. 59.* For instance, though the evidence and test comparisons may not match currently, it may have matched years previously. *Id.* With respect to the evidence in this case, Love stated: "The only thing I can say is at this particular juncture, there's not enough there for me to be able to say these are fired out of the same gun. And I can certainly not eliminate them because they have the same class." *Id.*

48. Both Love and Eudaley found sufficient agreement between the old test bullets that Anderson used for comparison purposes and the test bullets they

created to identify the Smith & Wesson .357 Magnum as having fired them. *SHWH. 55-57, 62-63, 66-67, 126-27, 130-31; Exhibit 8, Slides 20-22.*

49. Moreover, both Love and Eudaley found similarities in the comparisons of EB1 and EB3. *SHWH. 61, 128-29.* Love believed these corresponding individual characteristics were sufficient to identify these two bullets as having been fired from the same weapon. *SHWH. 61-63, 65-66; State's Exhibit 8, Slides 25-27.* Eudaley also observed the same markings, but she could not exclude the possibility that they were caused by subclass carryover. *SHWH. 65, 128-30, 134.* In other words, these markings could have been produced by a limited number of guns created during a particular manufacturing run rather than being unique to a particular weapon. *Id.*

50. Notwithstanding their inconclusive position on the Smith & Wesson .357 Magnum, neither Love nor Eudaley found sufficient agreement in individual characteristics between the old test bullets that Anderson used for comparison purposes or the test bullets they created and EB1 and EB3. *SHWH. 58, 66-67, 128-29; Exhibit 8, Slides 23-24.* In other words, there was no correspondence in individual characteristics present in the various sets of test bullets when compared to EB1 and EB3 to permit an identification. *SHWH. 129* ("If I had seen some agreement to either of those weapons [W1 and W2], I would have done more to try

and determine if it was one of those weapons, but I didn't see enough correspondence to go further with an examination.").

51. Notably, the difference in opinion between Love and Eudaley concerning whether EB1 and EB3 could be identified as having been fired from the same weapon represents a reasonable disagreement between experts. *SHWH. 129-30* (Eudaley stated: "I don't have a problem with [Love's] identification. It's just not a conclusion that I would have come to."). Both observed the same phenomena—essentially, objective indications of stria on both bullets, but they reached different explanations concerning the markings and their potential significance. *Id.* Because there were no corresponding indications of individual characteristics between the various sets of test bullets and EB1 and EB3, the difference between Anderson's identification and Love's and Eudaley's inconclusive determination is not a mere reasonable disagreement between experts. Rather, Anderson's identification of the Smith & Wesson .357 Magnum is plainly wrong and false.

D. Evidence Relating to Materiality.

52. The State introduced the firearms evidence in this case during its case in chief. John Steele, a homicide detective with the Tuscaloosa Sheriff's Department, testified that the Smith & Wesson .357 Magnum (W2) had been recovered from DeAndrea Dunn on July 11, 1992, during a traffic stop. *33R. 178-*

80. Alabama authorities recovered the Charter Arms .38 Special (W3) on December 17, 1992, during a murder investigation into the shooting death of Terrill Hill. *33R. 205.* Steele found the gun lying next to Hill's body. *33R. 222, 259-61.*

53. Steele connected the guns to Mr. Brown and his co-defendants, Antonio Dunson and Marion Dudley. He stated that Brown, Dunson, and Dudley associated with other drug dealers in the Tuscaloosa area, particularly with Dunn and Hill, as well as with LaCedric Jones, Jasper Finney, Joe Winter, and DeeDee Watson. *33R. 183-86, 224.* Steele knew that guns were traded between these people in the Tuscaloosa area—sometimes for money, other guns, and drugs. *33R. 186-90, 208-09.*

54. The defense tried blame the murders on other drug dealers from Tuscaloosa—namely LaCedric Jones and Terrill Hill—who happened to be in Houston around the time of the murders. *27R. 32-33, 41-45; 28R. 224-70; 39R. 95-100.* However, the State presented evidence that Jones and Hill both had alibis and could not have been in Houston at the time the murders occurred.

55. Jones arrived at the Tovar house with Raylon Johnson around 10:00 a.m. on the morning after the murders, while police officers were conducting an investigation. *35R. 33-34, 42-43.* When officers questioned them, they were nervous and provided false identification. *35R. 35-36, 44.* They later admitted that

they intended to buy drugs from the Tovars. *35R. 43, 46.* On the way to Houston the day before, Jones and Johnson had been detained in Lauderdale County, Mississippi, by Mississippi Highway Safety Patrol, and were not released until around 8:00 p.m. on June 20, 1992. They did not arrive in Houston until around 6:00 a.m. on June 21, 1992, well after the murders had occurred. *28R. 107-08.*

56. Hill's cousin, LaTonya Hill, rented a car in Tuscaloosa, Alabama, on June 18, 1992, and Hill, LaTonya, and her friend, Denise Rutledge, drove to Houston. *38R. 107-08, 112.* They arrived in Houston the next morning on June 19, ate breakfast, and hung out at a mall. *38R. 109-111.* When they could not get a hotel room, they returned to Tuscaloosa later on June 19 and arrived back in Tuscaloosa around 6:00 a.m. on June 20, 1992. LaTonya returned the car that afternoon, and she, Rutledge and Hill watched television at her house until around 4:00 p.m. *38R. 114, 126-31.*

57. Mr. Brown's sister, Carolyn Momoh, testified that she owned a Charter Arms .38 Special and that she noticed it was 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. *37R. 48.* Momoh later testified that she purchased her gun from a sporting goods store in Houston sometime in the

early 80's, but she did not retain any proof of the purchase and she could not recall the serial number for the gun. *39R. 18-20.* The Charter Arms .38 Special that Anderson testified was a murder weapon in this case had been transferred a number of times in the late 70's—(1) a dealer, Otasco F. Warehouse on September 29, 1978; (2) a dealer, Wood Square Shopping Center on November 10, 1978; and (3) an individual, Willie Wilson on June 20, 1979. *39R. 15.* Momoh and Mr. Brown's sister, Serisa Brown, testified that Mr. Brown often visited them in Houston, and he sometimes brought many of the same people, such as Jasper Finney, Raylon Johnson, and LaCedric Jones, that the State established had access to the Charter Arms .38 Special in this case. *29R. 95-97, 108; 37R. 80.*

58. Thus, the jury heard that two guns—the Charter Arms .38 Special (W3) and the Smith & Wesson .357 Magnum (W2)—were the murder weapons used to kill four people at the Tovar residence on June 20, 1992; that these guns were recovered in Tuscaloosa, Alabama, where Mr. Brown was from; that they were tied to Mr. Brown and his co-defendants, Dunson and Dudley, through fellow drug dealers, who were also from Tuscaloosa, Alabama; that Mr. Brown's sister owned a Charter Arms .38 Special that turned up missing around the time of the murders; that some of the same associates the State asserted had access to the weapons stayed at Momoh's house in Houston; and that other people in Alabama

who were tied to the guns could not have been in Houston at the time of the murders

59. 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 Special (W3) and the Smith & Wesson .357 Magnum (W2). *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 Special and because a surviving witness, Nicholas Cortez, 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.* Also, the State emphasized that Mr. Brown and his co-defendants must have used the weapons to kill the people at the Tovar residence on June 20, 1992, because no other potential suspect could have been in Houston at the time of the murders. *39R. 133-34.*

60. Though the State presented other evidence implicating Mr. Brown and his co-defendants, the credibility of each of the witnesses the State presented in guilt-innocence was vigorously challenged. The possibility that the State's presentation of false testimony through Anderson, particularly in light of the manner in which the State made use of it during trial and the emphasis it made of this testimony in closing argument, affected the competing credibility

determinations that the State and the defense asked the jury to resolve is apparent when considered in light of the substantial challenges to the State's case that the defense presented throughout the trial.

61. Rachel Tovar and Nicholas Cortez presented the only eye-witness testimony that directly implicated Mr. Brown in the murders. However, the defense subjected their testimony to considerable impeachment at trial, and the manner in which Cortez testified in the co-defendants' trials reveals that he overstated the certainty of his identification of Mr. Brown as a perpetrator during this case. The remaining eyewitness who testified at trial—Daniel Leija, Candelario Hernandez, and Bervis Ned—did not see Mr. Brown commit these murders and were also subjected to impeachment.

62. Tovar testified that she knew Mr. Brown from past drug dealing, and she 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 of the murders. *31R. 185-87, 196-98.* Tovar, however, provided conflicting accounts to the police of what happened:

a. At the hospital, she told officers that 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.

b. A detective visited Tovar at the hospital, and she named Squirt and Red as the suspects.

c. Tovar identified Mr. Brown and Dudley from a photo spread at a later time while still hospitalized.

d. 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 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.

e. 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. Consequently, Tovar left the jury with competing versions of what she saw, or recalled seeing, the night of the murders.

63. The defense also subjected the credibility of Cortez's identification of Mr. Brown as a perpetrator to considerable challenge. When the detectives visited him at the hospital, he was unable to identify Mr. Brown from a photo spread. *See Exhibit G, attached to Petitioner's Subsequent Application for Writ of Habeas Corpus Riled in Accordance with Article 11.071, Section 5, Texas Code of Criminal Procedure* [hereinafter *Subsequent Writ Application*]. During trial, when asked if he saw anyone who was at the Tovar residence at the time of the murders,

Cortez responded, "a little bit, yes." *31R. 18.* He then pointed at Mr. Brown. *31R. 18-24.* Leading up to trial, the defense and the State did not anticipate that Cortez would be able to identify Mr. Brown given that he failed to pick him out in the photo spread. At trial, the State informed the Court that it only learned that morning that Mr. Cortez could make an identification. *31R. 35.* Cortez insisted 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 also insisted that he did identify Mr. Brown when the officers showed him the photo spread, but not "with assurance." *31R. 88-90.* He had to look at the photo spread for a considerable amount of time, and he could not explain why he did not initial or sign after making an identification. *31R. 91-92.* Mr. Brown was the only African American male sitting at the defense table. *31R. 41-45.*

64. 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.* At Dudley's trial, however, Cortez testified that it was dark inside the room, and he did not look at the assailants because they had told him to look away. *Exhibit K at 399-401, 405-08, attached to Subsequent Writ Application.* All he could make out was the figure of a black male holding a chrome gun. *Id.* at 404, 424. He also recalled a taller

black male with a black gun, but he was unable to describe Mr. Brown even though he was again shown the photo spread. *Id.* at 439. At Dunson's trial, Cortez was called as a defense witness, and he was unable to identify Mr. Brown from the photo spread. *Exhibit L at 151, attached to Subsequent Writ Application.*

65. Daniel Leija, who testified that he saw Mr. Brown at the Tovar house earlier in the evening of the murders, also viewed a photo spread. *30R. 193.* After looking at it for 30 minutes, he picked someone other than Mr. Brown, but at the officers' urging, he studied it for an additional 15 minutes and picked another picture. *30R. 193, 238-39, 245.* This time, the officers told him he picked the right person. *Id.* Candelario Hernandez was with Cortez and waited in the car while Cortez went into the Tovar residence. *32R. 159-60, 173-74.* He heard popping sounds and then saw several black males, both about the same height, leave the house. *32R. 165, 180-81.* He could not identify Mr. Brown. Finally, Bervis Ned lived next door. He saw several men, who he thought were black, loading stuff into a van. *29R. 325.* Ned informed the police that a man moved the van down the street before he heard shots, but then he changed his testimony at trial to say that he heard shots first and then the men drove off from the house. *29R. 326-27, 352-53.* As a result, Ned's testimony conflicted with Hernandez's recollection and ventured from the State's theory of the case.

66. Mr. Brown's sisters, Serisa Brown, Carolyn Momoh, and Grace Brown, each reported considerable pressure from the police to provide statements that conformed to what the police were looking for. *29R. 79-87 (Serisa); 29R. 232, 268, 280-81, Exhibit N, attached to Subsequent Writ Application (Grace); 37R. passim (Carolyn).* The fact that Rachel Tovar, a victim in this crime, also reported similar harsh treatment until she revised her statement to reflect the police theory of the case lends considerable credence to the recollections of Mr. Brown's sisters concerning the interrogation tactics the police employed.

67. Momoh stated in her police statement that Mr. Brown told her the morning after the murders that he had killed six Mexicans and that he needed to get away for a while. *36R. 145-48.* After telling the jury that she was subjected to harsh police treatment to provide a statement consistent with what the police wanted to hear, she testified that Mr. Brown never made this statement to her. *37R. 73-74, 85-86, 89-90, 119-20.* Momoh also stated in her police statement that her sister, Grace, overheard Mr. Brown make this admission; however, the police did not question Grace about whether she heard Mr. Brown's supposed admission, and the State failed to question Grace about it during her testimony. Grace denied overhearing Mr. Brown make any admissions about killing six Mexicans to Carolyn. *Exhibit N, attached to Subsequent Writ Application.*

68. Finally, the jury was presented evidence about a bloody crime committed at close range. However, law enforcement found no evidence of blood or other evidence of the crime in the van or in Grace's house. *29R. 111-12, 223-24; 33R. 134-35.*

III. Conclusions of Law

1. On October 28, 2015, the Court of Criminal Appeals found that the false evidence claim relating to C.E. Anderson's testimony satisfied the standard under Article 11.071, § 5, of the Texas Code of Criminal Procedure and remanded it to this Court for consideration. This is the only claim before this Court.

2. The Court of Criminal Appeals did not dismiss the remaining claims raised as an abuse of the writ; as such, they remain pending.

3. No claim arising under Texas Code of Criminal Procedure, Article 11.073, is currently before this Court.

4. It is a violation of the Due Process Clause to the United States Constitution for the State to use false evidence to obtain a conviction. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015); *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009).

5. The elements of a due process false-evidence claim are (1) the State's use of false evidence during trial and (2) the evidence was material to the jury's

verdict of guilt. *Ex parte De La Cruz*, 466 S.W.3d at 866; *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). In *De La Cruz*, the Court of Criminal Appeals held:

> With respect to the substantive analysis of a due-process false-evidence claim, this Court has recognized that the use of material false evidence to procure a conviction violates a defendant's due-process rights under the Fifth and Fourteenth Amendments to the United States Constitution. A conviction based on such materially false evidence results in a due-process violation, regardless of whether the falsity of the evidence is known to the State at the time of trial.

466 S.W.3d at 866 (citations omitted).

6. "Testimony need not be perjured to constitute a due-process violation; rather 'it is sufficient that the testimony was "false."'" *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) (quoting *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011)). As a result, a witness's intent to provide false or inaccurate testimony is not relevant to a false evidence claim. *Id.* Rather, the relevant inquiry is "whether the particular testimony, taken as a whole, 'gives the jury a false impression.'" *Ex parte Weinstein*, 421 S.W.3d at 666 (quoting *Chavez*, 371 S.W.3d at 208). *See also Ex parte De La Cruz*, 466 S.W.3d at 866. *See generally Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (holding that witness's testimony that left the jury with a false impression was sufficient to make out a due process violation). "Improper suggestions, insinuations and, especially, assertions of personal knowledge constitute false evidence." *Robbins*, 360 S.W.3d at 460.

The focus on falsity, rather than on the witness's intent, is "designed to ensure that the defendant is convicted and sentenced on truthful testimony." *Weinstein*, 421 S.W.3d at 666. *See also De La Cruz*, 466 S.W.3d at 866.

7. With respect to EB2, EB5, EB6, and EB8, both Love and Eudaley found noticeable differences in class characteristics (specifically, the widths of the lands and grooves) between these evidence bullets and both (1) the Charter Arms .38 Special (W3) test fired bullets that Anderson used for comparison purposes and (2) the Charter Arms .38 Special test fired bullets that both Love and Eudaley created. In addition, both Eudaley and Love found a virtually complete absence of individual characteristics (the individual markings created by microscopic imperfections in the barrels of the guns that impart stria to the bullets as they travel through the barrel and that allow sufficient individualization to justify an identification between bullet and gun) between the evidence bullets and the various sets of Charter Arms .38 Special test fired bullets. As a result of these findings, both Love and Eudaley could not identify the Charter Arms .38 Special (W3) to EB2, EB5, EB6, and EB8. Love's and Eudaley's conclusions with respect to this evidence are credible and are adopted by the Court.

8. With respect to EB1 and EB3, both Love and Eudaley found an insufficient agreement of individual characteristics between these evidence bullets and both (1) the Smith & Wesson Magnum (W2) test fired bullets that Anderson

used for comparison purposes and (2) the Smith & Wesson .357 Magnum test fired bullets that both Love and Eudaley created. Although both Love and Eudaley could not exclude the Smith & Wesson .357 Magnum as the source of EB1 and EB3, both Love and Eudaley could not identify this weapon as having fired these bullets. Love's and Eudaley's conclusions with respect to this evidence are credible and are adopted by the Court.

9. Both Love and Eudaley created test fired bullets from the Smith & Wesson .357 Magnum (W2) and Charter Arms .38 Special (W3). Both Love and Eudaley were able to identify the Smith & Wesson .357 Magnum and Charter Arms .38 Special test fired bullets that Anderson used for comparison purposes and the Smith & Wesson .357 Magnum and Charter Arms .38 Special test fired bullets that they created as having been fired from the same respective weapons. As a result of these findings, both Love and Eudaley were able to determine that the test fired bullets that Anderson used for comparison purposes were fired from the Charter Arms .38 Special and the Smith & Wesson .357 Magnum, respectively. Love's and Eudaley's conclusions with respect to this evidence are credible and are adopted by the Court.

10. Both Love and Eudaley were able to identify EB2, EB5, EB6, and EB8 as having been fired from the same weapon. Love's and Eudaley's conclusions with respect to this evidence are credible and are adopted by the Court.

11. These findings by Love and Eudaley clearly demonstrate that Anderson's identifications of (1) evidence bullets EB2, EB5, EB6, and EB8 as having been fired from the Charter Arms .38 Special (W3) and (2) evidence bullets EB1 and EB3 as having been fired from the Smith & Wesson .357 Magnum (W2) were false.

12. Consequently, Anderson testified falsely or, at least, in a manifestly misleading manner when he testified that the Charter Arms .38 Special (W3) fired evidence bullets EB2, EB5, EB6, and EB8. He also testified falsely or, at least, in a manifestly misleading manner when he testified that the Smith & Wesson .357 Magnum (W2) fired evidence bullets EB1 and EB3.

13. Based on the credible evidence provided by both Love and Eudaley, it can be established that Anderson's identifications of evidence bullets EB2, EB5, EB6, and EB8 to the Charter Arms .38 Special (W3) and evidence bullets EB1 and EB3 to the Smith & Wesson .357 Magnum (W2) were false because:

a. First, with respect to the Charter Arms .38 Special (W3), there was a noticeable difference in the class characteristics between evidence bullets EB2, EB5, EB6, and EB8 and the both test fired bullets that Anderson used for comparison purposes and the test fired bullets that Love and Eudaley created. This noticeable difference in class characteristics would have been sufficient, standing alone, to preclude an identification of the evidence bullets with the Charter Arms .38 Special.

b. Second, with respect to the Charter Arms .38 Special (W3) and the Smith & Wesson .357 Magnum (W2) when evidence bullets EB1, EB2, EB3, EB5, EB6, and EB8 are compared with the test fired

bullets that Anderson used for comparison purposes and the test fired bullets that Love and Eudaley created, there is a virtually complete absence of individual characteristics to support Anderson's conclusions. The virtually complete absence of individual characteristics would have been sufficient, standing alone, to preclude an identification of the evidence bullets with the Charter Arms .38 Special and the Smith & Wesson .357 Magnum.

14. The noticeable difference in class characteristics with respect to EB2, EB5, EB6, and EB8 and the virtually complete absence of individual characteristics with respect to all of the evidence bullets demonstrates that there is virtually no agreement, much less sufficient agreement, between the evidence bullets and the various sets of test bullets used for comparison purposes by Anderson, Love, and Eudaley. Anderson's testimony that there was a match between the evidence bullets and the Charter Arms .38 Special (W3) and the Smith & Wesson .357 Magnum (W2) failed to comport with any standard governing firearms analysis, whether it was the industry standard that applied at the time Anderson conducted his analysis in 1992-93, the heightened standard that Anderson personally applied to his analyses requiring at least eight points of correspondence in individual characteristics, or the standard adopted by the Association of Firearm and Toolmark Examiners ("AFTE") that is applied today.

15. Firearms analysis requires "sufficient agreement" before an identification between a bullet to a particular gun may be declared. AFTE defines sufficient agreement as follows: "The theory of identification as it pertains to the

comparison of toolmarks enables opinions of common origin to be made when unique surface contours of two toolmarks are in 'sufficient agreement.' Agreement is significant when the agreement in individual characteristics exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool."

16. There is no evidence of sufficient agreement between the Charter Arms .38 Special (W3) and evidence bullets EB2, EB5, EB6, and EB8. Likewise, there is no evidence of sufficient agreement between the Smith & Wesson .357 Magnum (W2) and evidence bullets EB1 and EB3. Anderson's testimony at trial is not supported by the evidence; his declaration of a match between the evidence bullets and the Charter Arms .38 Special and the Smith & Wesson .357 Magnum is not credible. Moreover, the reports prepared by the HPD Crime Lab in 1992-93 by Anderson, Davis, and Klien finding a match between the evidence bullets and the Charter Arms .38 Special and the Smith & Wesson .357 Magnum are not credible. Rather, the evidence before the Court credibly demonstrates that these conclusions by Anderson and the HPD Crime Lab in 1992-93 were false and, as such, gave the jury a false impression of the evidence.

17. The two respects in which Love's and Eudaley's opinions differed do not affect the disposition of this claim.

18. First, the fact that Love was able to eliminate the Charter Arms .38 Special (W3) as having fired evidence bullets EB2, EB5, EB6, and EB8, whereas Eudaley could not identify or eliminate this weapon as having fired these bullets, is not material to this due process, false-evidence claim. Love explained that both he and Eudaley noticed the difference in class characteristics and that Eudaley's conclusion was very close to his, with the main difference being that she favored a more conservative approach, based on the possibility of that an ammunition difference accounted for the inconsistencies. Both Love's and Eudaley's conclusions—one finding an elimination and the other stopping just short of finding an elimination—were radically different from Anderson's testimony or the conclusions drawn by the HPD Crime Lab in 1992-93 through Anderson, Davis, and Klien. The difference in class characteristics and the paucity of correspondence in individual characteristics between the evidence bullets and the various sets of test bullets precludes an identification; this is particularly true given the very close correspondence in class and individual characteristics when the evidence bullets are compared with other evidence bullets and the various test fired bullets are compared with other test fired bullets.

19. Second, the fact that Eudaley could not identify EB1 as having been fired from the same weapon as EB3, whereas Love concluded that there was sufficient agreement in individual characteristics to declare a match, is not material

to this due process, false-evidence claim. Both Love and Eudaley were able to identify the various test fired bullets as having been fired from the Smith & Wesson .357 Magnum (W2), which was based upon their conclusions that the individual characteristics produced by this weapon on the test fired bullets matched closely. Also, the individual characteristics present in the test fired bullets were replicated when old test fired bullets that Anderson used for comparison purposes were compared with the new test fired bullets created by Love and Eudaley more than 20 year later. Both Love and Eudaley testified that this close correspondence did not exist when the various sets of test fired bullets were compared with evidence bullets EB1 and EB3. Moreover, the correspondence in stria between evidence bulelts EB1 and EB3 that both Love and Eudaley noted did not exist when these bullets were compared with the various sets of test fired bullets. In other words, there was scant indication in the comparisons to support Anderson's conclusion that the Smith & Wesson .357 Magnum fired evidence bullets EB1 and EB3.

20. The differences between Love's and Eudaley's opinions are an example of a reasonable disagreement between experts. The same cannot be said when comparing the Love's and Eudaley's opinions with those of Anderson and the HPD Crime Lab reports from 1992-93. Because there is virtually no evidence to support the conclusions that the Charter Arms .38 Special (W3) fired evidence

bullets EB2, EB5, EB6, and EB8 and that the Smith & Wesson .357 Magnum (W2) fired evidence bullets EB1 and EB3, the reasoning and results that Anderson and the HPD Crime Lab derived are not reasonable or credible and are, simply put, false.

21. Because of the obvious difference in class characteristics between evidence bullets EB2, EB5, EB6, and EB8 and the various sets of test fired bullets from the Charter Arms .38 Special (W3) and because of the virtual absence of any corresponding individual characteristics between these evidence bullets and test fired bullets, Anderson either knew or should have known that his conclusion that there was a match and that the Charter Arms .38 Special (W3) fired the evidence bullets was wrong. Even if he did not know that his testimony was wrong, his testimony demonstrates a manifest and reckless disregard for the truth. Also, given the lack of corresponding individual characteristics between evidence bullets EB1 and EB3 and the various sets of test fired bullets, Anderson knew or should have known that his testimony that the Smith & Wesson .357 Magnum (W2) fired these bullets was wrong or, at best, overstated and misleading. *See Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (holding that knowledge of falsity is irrelevant so long as the prosecutor or witness "should have known" about it). Anderson's knowledge of the falsity of his testimony is imputed to the State and is sufficient to establish a due process violation. *Giglio v. United States*, 405 U.S. at

154 (holding that a promise made by one attorney in the prosecutor's office is attributed to other attorneys in the same office); *Ex parte Castellano*, 863 S.W.2d 476, 480-81 (Tex. Crim. App. 1993) (holding that the prosecution team includes different agencies in the same government).

22. Regardless of whether Anderson knew or should have known that his testimony was false, it is not necessary to prove such knowledge to establish a due process violation. *Ex parte De La Cruz*, 466 S.W.3d at 866 ("A conviction based on such materially false evidence results in a due-process violation, regardless of whether the falsity of the evidence is known to the State at the time of trial."). Anderson's intent in testifying in the manner in which he did, or, in other words, whether he intended to provide false testimony or to commit perjury, is immaterial to this due process, false-evidence claim. The fact that Anderson does currently not remember the case, his testimony, or the bases for that testimony is likewise irrelevant. It is legally sufficient that the evidence has been established as false and that it gave the jury a false impression. *See Ex parte Weinstein*, 421 S.W.3d at 666; *Ex parte Chavez*, 371 S.W.3d at 208.

23. In sum, Mr. Brown has proved, by a preponderance of the evidence, the first element of his false evidence, due-process claim relating to the presentation of false evidence to the jury.

24. To constitute a due process violation, a showing of materiality is required. Because the use of false evidence to obtain a conviction involves a corruption of the truth-seeking function of the criminal trial process, *United States v. Agurs*, 427 U.S. 97, 104 (1976), a strict standard of materiality is applied. *United States v. Bagley*, 473 U.S. 667, 680 (1985). A new trial is required when false evidence is used at trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue v. Illinois*, 360 U.S. at 271. *See also Giglio v. United States*, 405 U.S. at 154; *Ex parte Weinstein*, 421 S.W.3d at 665.

25. Under this standard, the focus is not on whether the remaining evidence, without the error, is sufficient to sustain the conviction; rather the focus is on the impact of the error on the jury's verdict. *Scott v. State*, 227 S.W.3d 670, 690-91 (Tex. Crim. App. 2007) ("[T]he question for the reviewing court is not whether the jury verdict was supported by the evidence. Instead, the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected the integrity of the process leading to the conviction.").

26. In this case, the State presented false testimony from Anderson, who was a law enforcement officer and the chief firearms examiner for the HPD Crime Lab. He informed the jury that he could determine the identify of a murder weapon

with flawless certainty. He then informed the jury that the Charter Arms .38 Special (W3) and the Smith & Wesson .357 Magnum (W2) were the murder weapons used in this case. He was one-hundred percent certain in his identification. But as the evidence before the Court in this post-conviction proceeding clearly demonstrates, there is no factual support for Anderson's conclusions, and his testimony was plainly false.

27. The State presented this false testimony as part of its attempt to tie these guns to Mr. Brown and his co-defendants. The State recovered the guns in Tuscaloosa, Alabama, where Mr. Brown lived at the time; it tied the guns to Mr. Brown through his associations; and it excluded the possibility that other people who had access to the guns could have committed the murders. Most importantly, the State emphasized the firearms evidence during closing argument, stating emphatically that Mr. Brown used the Charter Arms .38 Special to kill three people.

28. The jury was required to resolve important credibility determinations with respect to most of the State's remaining witnesses. Given that the defense subjected the State's case to considerable challenge with respect to the credibility of these witnesses, there is a reasonable likelihood that the false firearms evidence and the State's emphasis of this evidence at trial and during closing argument affected the jury's deliberations and, ultimately, its verdict.

29. The State's use of false evidence in this case was "incompatible with 'rudimentary demands of justice'" and undermined the integrity of adversary process that is essential to a fair trial. *Giglio v. United States*, 405 U.S. at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

30. Thus, Mr. Brown has proved, by a preponderance of the evidence, the second element of his false evidence claim relating to materiality.

IV. Recommendation Concerning Relief

Because Mr. Brown has established by a preponderance of the evidence that he is entitled to relief on the due process, false-testimony claim remanded to this Court for consideration, this Court recommends that the Court of Criminal Appeals grant relief to Mr. Brown.

WHEREFORE, PREMISES CONSIDERED, Applicant, Arthur Brown, Jr., requests that this Court enter an order adopting the foregoing findings of fact and conclusions of law and recommend that he be granted relief on the claim remanded to it. Mr. Brown also requests any and all other relief to which he may be entitled.

Respectfully submitted,

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By: 
Paul E. Mansur

Certificate of Service

I, the undersigned, declare and certify that on December 5, 2016, I served the foregoing pleading on:

Harris County District Clerk
1201 Franklin Street, 3rd Floor
Suite 3180
Houston, TX 77002

Harris County District Attorney
Attn.: Josh Reiss, Esq.
1201 Franklin
Suite 600
Houston, TX 77002



Paul E. Mansur

IN THE 351ST JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Ex parte Arthur Brown, Jr., **Applicant**	**Cause No. 636,535-B**

ORDER

ON THIS DATE came on to be heard Applicant's Proposed Findings of Fact and Conclusions of Law. After considering Applicant's subsequent application for writ of habeas corpus, the State's answer, the record before the Court, all of the evidence presented in the case, and the argument of the parties, the Court is of the opinion that the motion should be granted.

IT IS THEREFORE ORDERED in accordance with Article 11.071 of the Texas Code of Criminal Procedure that Applicant's Proposed Findings of Fact and Conclusions of Law are adopted by the Court and are considered the findings of this Court. Moreover, this Court finds that Applicant has established his due process, false-testimony claim by a preponderance of evidence and recommends that the Texas Court of Criminal Appeals grant relief on this claim.

SIGNED this 19 day of December, 2016.

JUDGE PRESIDING

IN THE 351ST JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

FILED
Chris Daniel
District Clerk
DEC 22 2016
Time: 3:30
Harris County, Texas
By
Deputy

Ex parte Arthur Brown, Jr.,
Applicant

Cause No. 636,535-B

ORDER

By Order signed on the 19th day of December, 2016, this Court approved and adopted Applicant's Proposed Findings of Fact and Conclusions of Law, which were filed with the clerk of this Court on December 5, 2016. The Court also recommended that the Texas Court of Criminal Appeals grant relief to Applicant.

In accordance with Article 11.071, § 9(e) & (f), the Clerk is ORDERED to prepare a transcript of all papers in Cause No. 636,535-B and transmit the same to the Texas Court of Criminal Appeals. The transcript shall include certified copies of the following documents:

1. All of Applicant's pleadings filed in Cause No. 636,535-B, including the subsequent application for writ of habeas corpus and all exhibits attached to and incorporated within it;

2. All of the State's pleadings in Cause No. 636,535-B, including the Respondent's original answer;

3. All other affidavits and exhibits filed in Cause No. 636,535-B;

71988

4. This Court's Findings of Fact and Conclusions of Law, including the Order adopting Applicant's proposed findings of fact and conclusions of law and recommending that relief be granted;
5. Any proposed findings of fact and conclusions of law submitted by either party;

6. Objections to the Court's findings of fact and conclusion of law filed by the State;

7. The record and all exhibits from this Court's evidentiary hearing held on October 11, 2016, and any continuation of that hearing by the Court;

8. The record of the argument of counsel for the parties held on December 5, 2016, including any exhibits submitted by either party and admitted into evidence by this Court;

9. The indictment, judgment, sentence, docket sheet, and appellate record in Cause No. 636,535, unless they have been previously forwarded to the Texas Court of Criminal Appeals;

The Clerk is FURHER ORDERED to send a copy of the Court's Findings of Fact and Conclusions of Law, including the order adopting the same and this Order, to the following Counsel:

1. Paul E. Mansur
Attorney at Law
P.O. Box 1300
Denver City, Texas 79323

2. Ingrid Norbergs
Texas Innocence Network
100 Law Center
Houston, Texas 77204-6060

3. Joshua A. Reiss
Harris County District Attorney's Office
Post Conviction Writs Division
1201 Franklin Street
Suite 600
Houston, Texas 77002

SIGNED this 22 day of December, 2016.

DISTRICT COURT OF HARRIS COUNTY, TEXAS

JUDGE PRESIDING

Appendix D –

Excerpts of Trial Testimony of Nicholas Cortez Anzures, *Marion Butler Dudley v. The State of Texas* (Exhibit K of Brown's State habeas application).

Copied from the holdings of the TX State Archives

72091

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

MARION BUTLER DUDLEY,

Appellant,

VS.

THE STATE OF TEXAS

Appellee.

APPEAL FROM 180TH DISTRICT COURT OF HARRIS COUNTY

TEXAS

Judge Patricia R. Lykos, Presiding

TRIAL

STATEMENT OF FACTS

VOLUME XXIII OF XXXIX

Mark Tod Kislingbury
Deputy Official Court Reporter
301 San Jacinto
Houston, Texas 77002

FILED IN
COURT OF CRIMINAL APPEALS
OCT 6 1995
Troy C. Bennett, Jr., Clerk

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NICOLAS CORTES ANZURES,

was called as a witness and after being duly sworn testifies on their oath, through an interpreter, as follows:

DIRECT EXAMINATION

BY MS. BROWN:

Q. Sir, would you state your full name for the jury, please.

THE COURT: And let the record reflect before we proceed, excuse me, that there is an interpreter present.

Sir, would you identify yourself for the record and introduce yourself to the jury, and also inform The Court as to whether or not you've been sworn.

THE INTERPRETER: My name is David Farrow, and I have been sworn, Your Honor.

THE COURT: Thank you. I'm sorry.

Q. Mr. Cortes, would you state your full name for the jury, please.

A. Nicolas Cortes Anzures.

Q. And how old are you, Mr. Cortes?

A. Twenty-seven.

Q. And do you live here in the Houston area?

A. Yes.

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A. Did I know her?
Q. Yes.
A. Yes. Yes.
Q. Did she live there with the Tovars?
A. It seems that at that time, yes.
Q. When Jessica opened the door, was she alone?
A. It was just dark. She wasn't alone.
Q. Could you tell who was with her?
A. As it was dark -- Well, I saw later.
Q. Okay. When Jessica opened the door, you could tell that someone was with her. Is that right?
A. Yes.
Q. All right. Where was that person standing?
A. Behind Jessica's back.
Q. Were they on the side where the door opened, or on the other side from Jessica?
A. Where the doors opened, both of them were where the door opens.
Q. All right. So the door -- Was that person standing between Jessica and the door?
A. First the door, then Jessica, and then the other person, behind Jessica.
Q. All right. So Jessica was in the middle between the door and the other person?

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A. First the door, then Jessica, and then the other person.
Q. Okay. Could you tell if the other person was a man, or a woman?
A. Yes.
Q. Was it a man, or woman?
A. Man.
Q. And could you tell what race that person was?
A. Yes.
Q. What race was that person?
A. The black race.
Q. When Jessica opened the door and you saw Jessica and the black man standing there, what happened?
A. Well, they obliged me -- they forced me to enter, and --
Q. Who forced you to enter?
A. That person had a pistol pointing at Jessica.
Q. And did that person tell you to come in the house?
A. Yes.
Q. Did they speak to you in English, or in Spanish?
A. Jessica translated, Spanish.
Q. All right. So that person said something, and

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Jessica translated to you?
A. Yes.
Q. What kind of a gun was this person pointing at Jessica?
A. I don't know what kind, exactly. But it was a -- it was a black pistol.
Q. When Jessica told you to come in the house, did you come in the house?
A. Yes.
Q. After you got in the house, where did you go?
A. I went almost in the living room, when I could see another man with a pistol pointing to the floor through another door.
Q. Okay. So you go into the house; where is Jessica?
A. Right there next to me.
Q. Where is the man with the gun?
A. Next to her, with her.
Q. What is he doing with the gun?
A. Just pointing it at Jessica.
Q. Is he saying anything?
A. Yes. When --
Q. When he's walking with you and Jessica into the den.
A. Lupe was there. They already told me, "If you

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don't pay attention to us," they were going to kill him.

Q. They were going to kill you, or kill Lupe?

A. Lupe.

Q. So you went in the room with Jessica and the man with the black gun, and what happens?

A. They took me to the other bedroom.

MS. BROWN: May I approach, Your Honor?

THE COURT: You may.

Q. (BY MS. BROWN) Mr. Cortes, let me have you look up here at State's Exhibit Number 29. Does this look like the layout of Lupe and Rachel's house? If this is the street, and this is the front door.

A. Yes.

Q. All right. When you walked into the house, where did you walk, into what room? Can you use that and point?

A. I came in here. I stopped here -- We stopped here.

Q. Okay, and stop for a minute. You're pointing to the end of the hallway that empties out

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Q. Okay. And where did you go -- is this where the man told you to pay attention or he would kill Lupe?
A. Yes. Here I was, and here was the other person, and I could -- I could see two.
Q. All right, you could see two what?
A. Two persons.
Q. All right.
A. With a pistol.
Q. Two people with pistols?
A. Yes.
Q. All right. You've got one here that's next to you; is that right?
A. Yes.
Q. And where is the other person with the gun?
A. The other one was here.
Q. Okay. And you're indicating the doorway to the northeast bedroom; is that right?
A. Well, that one, yes.
Q. Okay, the one where there's a little person laying on the floor?
A. (Witness nods head.)
Q. All right. Now, the person who was standing down here at that doorway, what did he look like?

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A. How -- How did he look?
Q. What did he look like?
A. Well, since it was a little dark, I don't remember very well. I just remember that -- that he had a pistol, a chromed pistol like this.
Q. Okay. You said it was a man, right?
A. Yes.
Q. What race was he?
A. Black.
Q. Do you remember -- and I know that it's been almost three years -- was he taller or shorter than the man who met you at the door?
A. The other person was shorter.
Q. The man down here, or the man with you?
A. The one who was over there.
Q. Okay, and "over there" means down in the doorway?
A. Yes.
Q. Okay. Just wanted to be clear. All right. After the man with the black gun brought you into the den, where did you go after that?
A. They took me here.
Q. Okay. And you're indicating down the hallway?

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A. Yes. And they stuck me -- they put me in this room.
Q. And you're indicating the bedroom?
A. Yes.
Q. Who was in the bedroom?
A. Lupe.
Q. Was anybody else in the bedroom?
A. When I arrived? No. Just Lupe was here, on the floor, in the door.
Q. Okay. And if Lupe was on the floor, how was he on the floor?
A. Laid out, face down.
Q. Okay. Could you tell at that point whether or not he was tied up in any way?
A. When I got there, he was not tied up.
Q. All right. Where did the man with the -- Where was the man with the chrome gun when you went into that bedroom?
A. When I went in, they took me to a bed that was over here.
Q. Okay, when you say "they," who do you mean?
A. The two persons that -- that were there.
Q. The two men with the gun?
A. Yes.
Q. And what did they do once they took you to

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that bed?

THE INTERPRETER: To that bedroom? Sorry.

MS. BROWN: To that bed.

A. (BY MS. BROWN) Well, they tied my hands.

Q. What did they tie your hands with, could you tell?

A. Some rags. I don't know.

Q. And after they tied your hands, what did they do?

A. They tied up my hands and my mouth, and they left me on the bed, like this, face down. They tied up -- They tied up Lupe at that time also.

Q. During the time from the time you came into the hallway and walked down into the bedroom, did they say anything else to you?

A. Well, they just asked me about pistols and money.

Q. And how did you know that's what they were asking about?

A. Jessica was telling me.

Q. Now, when you went into that bedroom where Lupe was, where was Jessica?

A. For a moment she was there with us.

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Q. Did she just leave on her own?
A. No. They took her out. Those people, they asked me if I was alone, and then I told them that I had two friends, and when they left the room, they said they were going to put them in there.
Q. Do you know whether or not they went out and got your friends?
A. That's what they were saying, but they left, and, afterwards, shots were heard.
Q. All right. So they leave you in there laying on the bed, and do both of them leave the room?
A. Yes. With Jessica.
Q. And do they leave Jose in the room?
A. Yes.
Q. And what's the next thing that you either see or hear?
A. See or hear? Just that they asked Lupe for money.
Q. And is that before they left the room?
A. Yes. They took $20 from me that I had in my pocket.
Q. All right. Which one took the $20, the man with the chrome gun, or the man with the black

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gun?
A. I couldn't see because they told me not to look at them otherwise they'd kill me.
Q. All right. After they left the room, did you hear anything?
A. Just -- I heard a woman's shout.
Q. Could you tell where the shout came from?
A. Like from the living room, like that.
Q. Did you hear anything else?
A. Just the yell and several shots.
Q. Could you tell where the shots were coming from?
A. Yes.
Q. Where did you think the shots were coming from?
A. First, I heard them in the living room. Afterwards, I heard them closer, a little bit closer like in the next -- the front room. And then last, in my room, in the other bedroom.
Q. When you heard the shots in the living room and the bedroom, what did you think?
A. I thought that I was going to die.
Q. At that point did you try to get up and run away?

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Q. Before they grabbed the bag and pennies, did they do anything to anybody in the room?
A. After they grabbed -- No, well, they left.
Q. Okay. I think we've miscommunicated here. When they first came back into the room, the two men with the guns, you're on the bed; is that right?
A. Yes.
Q. And Jose is on the floor -- Lupe is on the floor?
A. Yes.
Q. When they come back into the room, what's the first thing that happens?
A. The first thing that happens, they shot Lupe.
Q. When you say "they," could you tell which one shot Lupe?
A. Yes.
Q. Which one?
A. I just saw the gun, the one like this, chromed.
Q. The one holding the chrome gun?
A. Yes, with a glove on his hand.
Q. All right. The one holding the chrome gun and the glove on his hand is the one that shot Lupe?

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A. Yes.
Q. Where did he shoot Lupe?
A. In the head, like this, the back.
Q. Okay, in the back of his head?
A. Yes.
Q. After that, what's the very next thing that happened?
A. Afterward?
Q. After Lupe was shot, what's the next thing that happened?
A. The next thing? After they shot Lupe, they shot me.
Q. Okay. Who shot you?
A. I just saw the chromed gun --
THE INTERPRETER: Excuse me --
A. Chromed pistol.
Q. (BY MS. BROWN) When you say you "saw the chromed pistol," earlier you saw a man with a chromed gun, right?
A. Yes.
Q. Was that same man holding the chrome gun when they came back into the room?
A. Yes.
Q. Now, when you say the man with the chrome gun shot you, where did you get shot?

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A. In the back.
Q. In the back? And did the bullet exit somewhere?
A. I spit it out, the bullet.
Q. Could you tell where the person was standing when they shot you?
A. From the door.
Q. Can you show the jury how it was that they shot you while standing at the door?
A. I don't understand.
Q. Can you just kind of demonstrate for the jury how they were standing and how they were holding the gun when they shot you, the man with the chrome gun.
A. Well, I saw him when -- when they hit Lupe in the head, and right away they shot me.
Q. I guess what I'm trying to find out is, where was the man standing when he shot you?
A. Right there almost next to the door.
Q. And did he just hold the gun up and shoot you?
A. I saw when he shot Lupe. When he shot me, I couldn't see well.
Q. Okay, how come?
A. It was fast.

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Q. So how did you know it was the same man that shot you that shot Lupe?
A. The color of the pistol.
Q. After you were shot, did the men leave?
A. They left, and they came back.
Q. When did they come back?
A. Right away.
Q. And what happened when they came back?
A. They just grabbed some things from there, I don't know what.
Q. Okay. I just want to be clear for the jury. They come in, and they shoot Lupe, and they shoot you; is that right?
A. Yes.
Q. Then they leave?
A. Yes.
Q. Then they come back, and they grab some stuff?
A. Yes.
Q. Okay. Do they leave after they grab the stuff?
A. Yes.
Q. And after that, do you see them again?
A. No.
Q. All right. After they leave the second time,

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Q. Did you have some sort of identification with his name on it?
A. At that time, yes.
Q. Mr. Cortes, do you remember how long you stayed in the hospital?
A. Not exactly, but --
Q. Was it a while?
A. Maybe 15 days or -- 15 or 20 days; I don't know.
Q. And while you were at the hospital, did some officers from the Houston Police Department come and talk to you?
A. Yes.
Q. And at the time they came and talked to you, were you able to talk to them?
A. No, not talk.
Q. All right. Did you communicate with them by pointing or something?
A. Yes.
Q. And when they came and talked to you, did they bring anything with them?
A. Yes.
Q. What did they bring with them?
A. Just a bunch of photographs.

MS. BROWN: May I approach the

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witness, Your Honor?

THE COURT: You may.

Q. (BY MS. BROWN) Mr. Cortes, let me show you what's been marked as State's Exhibit 30 and 31. Does this appear to be the photographs that they brought to you at the hospital?

A. Yes.

Q. And when they brought you these photographs at the hospital, did they ask you if you could recognize anybody in these photographs?

A. I don't remember very well, but it seems so, yes.

Q. All right. And in fact, did you identify the person who shot you, from these photographs?

A. I pointed out some photos, I remember.

Q. All right. And let me just ask you, in looking at State's Exhibit Number 31, is that your signature contained in State's Exhibit Number 31?

A. Yes.

Q. And what is the date -- Can you read the date where you signed that?

A. The 22nd -- The 22nd day of the sixth month of '92.

Q. Okay. And the sixth month would be June?

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A. Yes.
Q. And the person that you identified in State's Exhibit Number 31, is that the man with the chrome gun?
A. I don't remember very well right now. If I pointed it out, I think so.
Q. All right. Let me ask you this. I know that it's been almost three years since this happened, and you remember back in November of 1993 coming to court to testify; is that right?
A. '93? Well, I came to a court. I don't remember -- I don't remember the year or the date.
Q. All right. And the trial that you came to was the State of Texas vs. Arthur Brown.

MR. GOLDSMITH: Your Honor, objection. May I approach the bench?

THE COURT: Yes.

(WHEREUPON, there was a discussion held at sidebar, outside the hearing of the court reporter.)

THE COURT: Jury may stand up and

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A JUROR: I hope that it is on the six.

THE COURT: Testing? I think that is a really appropriate time to adjourn. You all drive carefully, have a very pleasant evening, we'll see you all in the morning.

(WHEREUPON, the following proceedings were had outside the presence and hearing of the jury:)

Thank you. You may be seated, ladies and gentlemen.

You may be seated, sir.

Let the record reflect that this proceeding is being conducted outside the presence of the jury. State may proceed.

Q. (BY MS. BROWN) Mr. Cortes, do you recall testifying in a prior hear in the State of Texas vs. Arthur Brown?

A. Excuse me?

Q. Do you recall coming down to court and testifying during another hearing about this case?

A. Yes.

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Q. And I was the prosecutor?
A. Yes.
Q. And the person charged in that case was named Arthur Brown; do you remember that?
A. I don't remember the name.
Q. All right. In the last trial that you came and testified during, do you remember the man who was the Defendant in that case, or who was charged in that case?
A. Yes.
Q. Was he the man who shot you?
A. He was not the one who had the chromed pistol.

MS. BROWN: That's all I have, Judge.

THE COURT: And this hearing was conducted outside the presence of the jury at the request of the Defense.

Do you have any questions on this proffer?

MR. GOLDSMITH: Yes, I do, Your Honor.

THE COURT: You may proceed.

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CROSS-EXAMINATION

BY MR. GOLDSMITH:

Q. Mr. Cortes, at the time you were shot, you were tied up, and you were lying face down on the bed; is that correct?

MS. BROWN: Judge, I'm going to object. I don't think this has --

THE COURT: Okay, this is not cross-examination before the jury, only on this proffer regarding prior testimony in another trial. Now, if your questions are going to go to this proffer, then fine.

MR. GOLDSMITH: I think they are, Judge. I may need to have a couple loose questions to tie it up.

THE COURT: All right. The Court will grant you some latitude.

Q. (BY MR. GOLDSMITH) You were tied up and lying face down?

MS. BROWN: Judge, my problem with that is we're examining this witness on identification, and --

THE COURT: Overruled.

Q. (BY MR. GOLDSMITH) Sorry, sir, would you like me to repeat the question?

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A. Yes.
Q. At the time you were shot, you were lying face down?
A. Yes.
Q. You were tied up?
A. Yes.
Q. Did I understand you correctly that you could see only the gun?
A. Yes, because I just turned my head a little like this.
Q. So is it correct that all you can identify is the chromed gun?
A. I remember that; that's what I remember most.
Q. And you can't recall the person that had the chrome gun?

THE COURT: Could you rephrase that, please?

MR. GOLDSMITH: Okay.

Q. Did you see the face or any identifying features of the person holding the chrome gun?
A. I just -- I saw him just a little.
Q. You saw a person holding the chrome gun?
A. Yes. Yes, I put more attention on the weapon, on the gun.
Q. Are you sure that the person holding the

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chrome gun is the same man you saw with the chrome gun before?

A. I couldn't be sure of the person, but yes, the gun and the glove.

Q. But you're sure of the gun?

A. Yes.

Q. And you were focused --

THE COURT: Okay, excuse me, let me interrupt right now.

The proffer was to testimony elicited in another trial; is that correct?

MS. BROWN: Yes, Your Honor.

THE COURT: All right. Do you want to argue the admissibility or inadmissibility of the proffer?

MR. GOLDSMITH: Yes, ma'am.

THE COURT: Okay. Because evidence adduced at another trial is not probative unless you use it for impeachment purposes --

MS. BROWN: Judge, the only reason that --

THE COURT: -- or if there's a missing witness or -- but we have none of that present here today to --

MS. BROWN: Well -- And just by way

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DIRECT EXAMINATION

BY MS. BROWN:

Q. Mr. Cortes, just for the record, are you the same Nicolas Cortes that was testifying in this case yesterday?

A. Yes.

Q. Now, Mr. Cortes, I want to go back to the evening of June the 20th, 1992. When you got inside Rachel Tovar and Lupe Tovar's home, were you able to see both of the men with the guns?

A. Yes.

Q. And I believe you testified yesterday that one man had a black gun and one man had a chrome gun. Is that right?

A. Yes.

Q. The man with the black gun, did you get a pretty good look at him, what he looked like?

A. As I said, he was of the black race. That one was taller, taller than I am.

Q. And the man with the chrome gun, did you have an opportunity to see what he looked like?

A. Well, I just saw the weapon, and -- and the glove, and I noted that he was smaller -- shorter.

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Q. When he was standing at the bedroom door, before you were taken into the bedroom, did you get a chance to look at him?
A. A little, yes.
Q. And was it because of the time that you had before they tied you up and put you on the bed that you were able to identify the men in the photo spreads?

THE INTERPRETER: I'm not sure I understood that question, Ms. Brown.

MR. GOLDSMITH: Your Honor, we would object at this time to her leading the witness on this point.

THE COURT: The Court allows a certain amount of latitude with a non-English-speaking witness, but, ma'am, try to refrain from leading the witness.

MS. BROWN: Yes, ma'am.

Q. (BY MS. BROWN) You identified at the hospital a picture of a man in the photo spread, because that's where you signed your name; is that right?
A. Yes.
Q. And the picture that you identified, was that one of the men in the house that night?

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A. Well, yes.
Q. Was that man one of the men who was involved in the shooting?
MR. GOLDSMITH: Objection, Your Honor. May I approach?
THE COURT: Yes.

(WHEREUPON, there was a discussion held at sidebar, outside the hearing of the court reporter.)

Q. (BY MS. BROWN) The man that you identified in the photo spread, was that one of the men who had the gun in Rachel Tovar's house?
A. I pointed out some photos in which I found somebody similar. I don't remember how many pictures.
Q. Okay. I know that you are not clear about the photo spreads because it's been so long. But the person -- Let me ask you this.
Did you get --
MR. GOLDSMITH: Your Honor, we object to the side-bar comment. He said that the person he identified was similar in appearance to the person in the house.

Appendix E –

Excerpts of Trial Testimony of Nicholas Cortez Anzures, *Antonia Lamone Dunson v. The State of Texas* (Exhibit L of Brown's State habeas application).

APPELLATE COURT NO._____

IN THE COURT OF APPEALS

HOUSTON, TEXAS

FILED IN
COURT OF APPEALS
HOUSTON, TEXAS
95 DEC 15 AM 10:32
MARGIE THOMPSON
CLERK

ANTONIA LAMONE DUNSON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE.

APPEAL FROM THE 230TH DISTRICT COURT,

HARRIS COUNTY, TEXAS

JUDGE JOE KEGANS, PRESIDING

CAUSE NO. 685444

STATEMENT OF FACTS

VOLUME _____ OF _____

June 14, 1995

Trial

Jacqueline A. Mills
Certified Shorthand Reporter
230th District Court
Harris County, Texas

ORIGINAL

GLENN DODSON,

was sworn as an interpreter for the Spanish language.

MS. GARZA: May I proceed, Your Honor?

THE COURT: Yes, ma'am.

* * * * *

NICHOLAS CORTEZ,

was called as a witness by the Defendant, and, having first been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

By Ms. Garza:

Q. Would you please state your name?

A. Nicholas Cortez Anzures.

Q. And, Mr. Cortez, how old a man are you, sir?

A. Twenty-seven.

Q. And where do you live, Mr. Cortez?

A. I live in the southwest area. I don't know the exact address.

Q. Do you know Rachel Tovar?

A. Yes.

Q. And did you know Jose Guadalupe Tovar?

A. Yes.

Q. And when did you first come to meet Jose Guadalupe Tovar?

behind her.

Q. Did you go in the house?

A. Yes.

Q. What happened then?

A. Further inside the house I saw that they had a gun.

Q. Who had a gun, Mr. Cortez?

A. The person that opened the door along with Jessica.

Q. Can you tell us what happened after you saw that that man had a gun?

A. Whenever I saw that he had a gun, then I was able to see that there was another person in the hallway with another gun, also.

Q. Mr. Cortez, the person that you first saw with a gun by Jessica when you walked in the house, have you come to know that that person's name was Arthur Brown?

A. No.

Q. Do you recall testifying in his trial in the 351st District Court on November the 3rd, 1993?

A. I remember that I gave another testimony, but I don't know what date.

Q. Do you recall testifying in the 351st District Court in front of Judge Lupe Salinas?

A. Yes.

Q. Now, Mr. Cortez, when you saw the second man with a gun, what happened?

A. From there they asked me if I was alone or who was I with or if someone else was with me.

Q. Mr. Cortez, the second person that you saw with a gun, do you recall testifying against him the second time you came to court in the 180th District Court?

A. Yes, I believe so, yes.

Q. Aside from the man that you saw that you testified against in the first trial and the man that you saw that you testified against in the second trial, were there any other people in the house who you did not know?

A. Apart from those two people I didn't see -- I didn't see other people, only them.

Q. After you saw the second man with a gun, what happened?

A. They told me to mind them. They told me to go into a room and mind them or else they were going to kill Lupe.

Q. And did you do that?

A. Yes.

Q. Did they take you into a room with Lupe?

A. Yes.

Q. Was there any light in that room that they took you to?

A. Not electric light, just light from, well, the normal.

Q. So there wasn't any light turned on in the room, but there was light coming from the outside?

A. Yes.

Q. And can you tell us how long or can you tell us what the man did after they put you in the room with Lupe? Did they stay in the room?

A. They tied us, they tied our hands, Lupe and myself and they went out like to the living room.

Q. Mr. Cortez, when you walked into the back bedroom, Lupe was not tied up?

A. No.

Q. And did they tie you up first or did they tie Lupe up first?

A. I don't remember exactly who.

Q. But you remember that Lupe was not tied up when you walked in?

A. Yes, I do remember because -- because they had tied him with his belt and they weren't able to tie him.

Q. Okay. And so after these two men tied you

A. When they went out of the bedroom it must have been, you know, some five minutes.

Q. Could it have been longer?

A. Maybe, yes.

Q. At that time how long would you estimate that you had been in the house?

A. Until they went out?

Q. No, sir. Until the time that we're testifying about now, the time that you were hearing the conversations.

A. Maybe some 15 minutes or more.

Q. Could it be sometime between 15 and 20 minutes?

A. Well, yes.

Q. And after you heard the conversations in the other room, what happened next?

A. The conversations were in the living room and I just started hearing shots.

Q. Do you know how many shots you heard?

A. No, I'm not sure, but before the shots I heard a scream from a woman. I heard the shots in the living room and then, and then I heard them closer and then in the bedroom across the hall or in front.

Q. Mr. Cortez, was there any time that

separated the shots from each other?

A. It was like they were in a row or one after the other.

Q. After you heard the shots in the front bedroom, what happened next?

A. Someone came into the bedroom where I was and they shot at Lupe and at me.

Q. Were you the last person shot?

A. I think so.

Q. And did you see the person that shot you?

A. I was able to see a little bit in the darkness.

Q. And have you testified in the trial of the person that shot you?

A. I think so.

Q. And was that trial on November the 3rd, 1993, was that the first time you testified?

A. I don't think so. It seems like it was the second one.

Q. So the person that let you into the house the first time was the man in whose trial you testified on November 3rd, 1993, the first trial?

A. I think so.

Q. And the person who shot you is the person you testified against in the second trial in

January of 1995?

A. Yes, I believe so.

Q. Mr. Cortez, would you tell the jury where you were shot?

A. They shot me right here exactly where I have my finger and the bullet ended up in my mouth.

Q. After you were shot, Mr. Cortez, were you taken to the hospital?

A. Yes.

Q. And let me back up a little bit. After you were shot in the bedroom, what did you do?

A. Well, I was able to get my hands free and I waited a little bit, and then when I didn't hear noises anymore, I went out to see if they were gone.

Q. When they tied your hands behind your back, your hands were not tied so tightly that you couldn't -- that you weren't unable to untie yourself?

A. Well, they weren't too tight. I was --

Q. Were you able to untie your hands by slipping the piece of cloth off your hands?

A. Yes.

Q. And can you tell us how long you think it took you after you were shot to get out of having

A. Yes.

Q. And were you treated there?

A. Yes.

Q. Do you recall police officers coming over to talk to you?

A. Yes.

Q. Do you recall whether the police officers -- can you tell us how many times the police officers came to talk to you?

A. Not exactly, but it was several.

Q. The first time they came to talk to you, do you recall that?

A. Well, I remember that a little bit but I couldn't talk.

Q. The first time they came to speak to you, did they bring an interpreter to interpret for you?

A. It seems like it, the first time a Hispanic one came.

Q. And did they ask you how many people, how many men were in the house with guns?

A. Well, they asked me, they asked me what had happened.

Q. Were you able to tell them?

A. Not very well.

Q. Can you tell us what you told them?

A. Just that there were, that there had been two people.

Q. Mr. Cortez, I saw you use your hand to indicate two people. Did you use your hand to indicate two people when you were talking to the police the first time?

A. Yes, with my hands.

Q. Mr. Cortez, do you speak any English?

A. Very little.

Q. Are you able to understand English?

A. Very little.

Q. When they talked to you at the hospital, was there a time when they didn't bring an interpreter?

A. I believe so.

Q. And do you recall what they asked you at that time?

A. The same as -- the same as they had asked me.

Q. And at that time did you indicate to them how many people were in the house when you arrived?

A. Yes, I think so.

Q. And did you tell them how many men were

A. Yes.

Q. Until today?

A. Yes.

Q. When else did we talk?

A. I don't understand.

Q. How many times have we talked together before today?

A. Before today just once on the phone.

Q. Mr. Cortez, I want to ask you some more questions about the night all this happened. Do you remember after you knocked on the door whose voice answered you from the family inside the house?

A. I believe it was Frankie's.

Q. And after you heard Frank's voice, who opened the door?

A. Jessica.

Q. When you went inside the house, did Jessica translate to you what the men in the house were saying to her?

A. Yes.

Q. And was Jessica telling you that those men wanted you to do something?

A. Yes.

Q. At the time you were inside the house, were

A. I don't know.

Q. You don't know anything about all that happened in that room with everybody else, do you, sir?

A. No.

Q. And, Mr. Cortez, you don't know anything about what happened to all those other people before you knocked on the door at the house, do you?

A. No.

Q. And you don't know how many other defendants or bad guys were in the house other than these two before you knocked on the door and came in the house, do you?

A. No.

Q. By the time you got there, there were only two left in the house?

A. Yes, I just saw two.

Q. So, if one of those men had left to go get the car ready to leave, you don't know?

A. No.

Q. Do you remember when you were in the hospital looking at some photo spreads?

A. Yes.

Q. Do you remember signing your name to some of

the photo spreads that you looked at?

A. Yes.

Q. And when you signed your name to the photo spreads, did you sign your name because you recognized or remembered those people specifically because you'd seen them before?

A. Yes, because I believe more or less they told me to sign to whom I thought I might recognize.

MS. SIEGLER: Judge, can I approach the court reporter?

THE COURT: Yes, ma'am.

Q. (By Ms. Siegler) Mr. Cortez, I'm going to show you State's Exhibit No. 78. Inside State's Exhibit No. 78 do you see your signature?

A. Yes.

Q. Let me show you State's Exhibit No. 76. Inside Exhibit No. 76 do you see your signature?

A. Yes.

Q. Under the name of which person?

A. Rachel Tovar.

Q. I'm sorry. Which number?

A. Under No. 3.

Q. In State's Exhibit No. 77 do you see your signature?

A. No.

Q. Do you recognize any of the pictures shown here in the front of Exhibit No. 77? It's taking you a while to look at these pictures, Mr. Cortez. Are you having a hard time recognizing somebody?

A. Yes, it is difficult.

Q. So it's kind of hard for you to remember which man did what in the house that night, isn't that true, Mr. Cortez?

A. Yes.

Q. But yet you signed your name in these other two photo spreads, didn't you, Mr. Cortez?

A. Yes.

Q. Mr. Cortez, when you were on the bed in that bedroom with Lupe and that person who shot y'all, whoever it was, came into the bedroom, what did you think was going to happen to you?

A. Well, that I was going to die.

Q. And you told the jury that the bullet that went through the back of you came out in your mouth; is that right?

A. Yes.

Q. Did it come out your tongue?

A. Yes.

Appendix F –

Affidavit of Grace Brown (Exhibit N of Brown's State habeas application)

AFFIDAVIT OF GRACE BROWN

State of Alabama]
]
County of Tuscaloosa]

Before me, the undersigned authority, personally appeared Grace Brown, who by me being duly sworn, stated as follows:

My name is Grace Brown. I am over the age of eighteen and am competent to give this affidavit. I am personally acquainted with the facts herein stated, which are true and correct to the best of my knowledge. My current address is 4336 Ridgewood Road, Tuscaloosa, Alabama 35404.

My interviews with Houston Police Department Officers:

1. On Friday, June 26, ~~1994~~ 1992 MB, I drove to the Houston Police Department, along with Kirk Royster and my sisters, Serisa Brown and Carolyn Momoh. When we arrived, sometime in the mid-afternoon, the detectives immediately placed us into separate rooms. I was in a small, interrogation-type room. The detective who questioned me was not hostile or threatening. However, I could hear another detective in the next room—I am not sure whether he was questioning Carolyn or Serisa—and he was particularly loud and hostile. When the detective questioning me would leave me alone, I could even hear spoken words in the next room. I heard things like "you are lying, because we know the truth," "you will lose your kids," "you will be locked up," "we already know what happened," and so forth. I heard this through the walls.

2. Though I did not feel threatened or harassed, the detective questioning me would sometimes say strange things. He would leave the room and upon returning he would talk about receiving a call from Alabama, and then for example, tell me about money that was left at my house and that some people would be coming to my house to get their money. I found this confusing and strange. I told him that I did not know of any money, and I did not see any money anywhere in my house.

3. After about three or four hours, the detective put me in another room; Carolyn was also placed in this room. Two detectives came in and acted very rude and confrontational. The detectives were most forceful to me during this session. One officer held a document in his hand, and said it was Serisa's partial statement. He said Serisa was already on page four, and insisted that we make our statements match Serisa's. However, the detectives never showed us her statements and they did not read any part of it to us. After about a half-hour, the detectives moved Carolyn and me back into our small interrogation rooms.

4. The detective interrogated me for about two more hours after this. This is when the statement was taken from me. Though I would not say the detective was threatening to me, the overall tenor became more serious and formal and the detective did not leave the room. He did not give me an opportunity to closely review his typed statement, and I just signed it. I was just happy to be done. I never saw a copy of the statement at any time until I was shown it on August 3, 2014. I DON'T BELIEVE THAT I SAW THIS STATEMENT IN COURT WHEN TESTIFYING, EITHER.

5. When the detective finished with me, Carolyn was still being interrogated. I do not recall whether Serisa was finished; however, I know that Carolyn was the last person released by the detectives. Carolyn was released about an hour after I finished my statement. We drove home once she came out.

6. We felt exhausted and traumatized after the interrogations. We drove back and did not talk about anything that night. The next day, however, we shared our experiences, but we never talked about the substance of our statements.

7. I remember Carolyn saying the next day that, in the end, "you just have to agree to whatever they want," because that's the only way to get out of the situation. I told her that you should not agree to go along with false information the cops are feeding you.

8. On August 3, 2014, I finally saw a copy of my June 26, 1992, statement. I AM FAIRLY SURE I DID NOT SEE ~~don't recall if I was shown~~ it at trial while testifying, ~~but if I did, it would have been brief~~. As I said earlier, the detective who interrogated me was generally not very hostile, and most of this statement is correct. There are a few details that need to be clarified.

9. My statement says (on page 2) that I did not open any garbage bags "because I did not want to look in them." This phrasing concerns me, because it sounds like I was afraid about what I might find if I opened them. In reality, I simply took the bags out because I was cleaning up the house, and I felt no particular reason to look in the bags. I would add that this was not the first time I had to take out garbage bags after Arthur and his friends spent the night. I had a huge closet—you could live in the closet—and after showering, Arthur would change his clothes in the closet. In Arthur's previous visits, he and his friends would go out and shop a lot, and he would stay in my room, and change in the closet. Sometimes, Arthur would put shoe boxes, food containers, and so forth, into garbage bags. They were typically reasonably full.

10. The house was particularly messy after this weekend. When Arthur and his three friends came that weekend, I was living with Serisa, Carolyn, Serisa's and Carolyn's daughters, and Carolyn's infant son, so ten people in all. When I talked to Carolyn on the phone after she made the drive to Tuscaloosa, I assumed that if there was anything incriminating at the house, the police would have already been here. Indeed, if I knew that there were drugs in my house, I would have called the police. I would probably be concerned that the police might think I might be responsible for contraband in my house, but I still think I would have contacted them.

11. I never smelled any marijuana when I cleaned the house, in general and specifically when handling the garbage bags. When I cleaned the house after everyone left, and after I got some rest, I did not encounter any drugs, guns, or anything illegal. I know how marijuana smells, although I never smoked it myself.

12. I would also like to add, as I believe I testified at trial, that it was not unusual for Arthur and his friends to come to my house. They've showed up in Houston several times before. I knew his friends Dud (Marion Dudley) through his mother, when I worked at the VA – I did not even know that he was friends with Arthur, it was a coincidence. I also knew Tony (Antonio Dunson) through his sister (who was married to my brother Johnny at the time, and who I knew as children through the neighborhood). I did not know Maleik but I trusted him because I knew he was a good friend of Arthur.

My Experience at Arthur Brown's Trial

13. I moved back to Tuscaloosa in the a few months later, in the fall of 1992. I did not feel safe where I lived anymore – it appeared like people entered my house on several occasions and moved things around – as I testified about at Arthur's trial. I also received obscene calls several times, with a person speaking Spanish in a threatening manner, close in time to when it seemed like my house was entered. I called the police about this, but they did not seem to care, and I did not feel safe.

14. When Arthur was on trial, I was flown to Houston and was given a hotel to stay at when I was supposed to testify. I think I stayed two or three nights at the hotel. While in court, I was placed in a room at the courthouse; I was not allowed to be in the hallway or in the courtroom. There was a court officer outside of this room. I only entered the courtroom when I was called to testify. Even at this time, I did not know what was written in Serisa's and Carolyn's statements; we never talked about the substance, only about the threats and abuse that we received from the officers.

Carolyn Momoh's statement to Houston Police Department:

15. On August 3, 2014, I was shown a copy of Carolyn's statement that she made on June 26, 1992, when we were all being interrogated. I've never seen this statement before. On page 3, it says that on the morning of June 21, 1992, Arthur told Carolyn—in my presence—that he killed six Mexicans, and that I heard what he said, and that I could not believe it and just walked off after hearing it. This is false. I never heard Arthur admit to killing Mexicans to anyone. If I heard Arthur say this, I absolutely would have remembered it.

16. No one ever told me anything about Arthur confessing in my presence, nor that I became upset and walked away. Carolyn never told me this, and no detective or attorney has ever asked me about it.

17. I do remember reading a newspaper article, sometime after the trial, noting that Carolyn was charged with perjury because of contradictions regarding Arthur telling her about killing people. I was shocked. "Where did this come from, I cannot believe this," I thought to myself. But that article did not state that I overheard Arthur admitting this.

18. Not only did Arthur not admit to any murders in my presence, I firmly believe Carolyn's statement about Arthur making this confession is dubious. I believe that Carolyn, under intense pressure by the detectives, agreed with the detectives or concocted the story in order to get herself out of a bad situation.

19. Carolyn has been seriously mentally ill since our childhood together. She dissociates and suffers from a mood disorder, from major anxiety disorder, a personality disorder, schizoaffective disorder, and from ADHD. She has suffered from major depression and exhibited psychotic features. When I moved to Houston in 1988, it was primarily to take care of Carolyn and to assist her in raising a child. She was mentally unstable from 1988 to 1992, and she was involved in on-again-off-again abusive relationship with her ~~ex~~ then husband during this time, which exacerbated her condition. She lived with me in Houston much of the time, at each of my four residences, except for short periods of time when she would reconcile with her husband. The trial took a terrible toll on Carolyn, and she has been committed three or four times since then, including once after the trial.

20. For all the time that I have known Carolyn, since our childhood in Alabama, Carolyn has had a weak disposition and has not handled confrontation with others well. Even though I am four years younger than her, when Carolyn was in junior high, she would wait for me to walk with her home, because she would often get picked on walking home alone.She has been prone to agreeing with others or to creating stories in order to extricate herself from bad situations. I believe this is what happened when she told the detectives that Arthur confessed to murder. Her psychological condition makes her very susceptible to suggestion.

21. My experience with Carolyn is supported by my training and experience in clinical psychiatry. I graduated with a Bachelor's of Science in Nursing from the University of Alabama in 1987, specializing in psychiatry.While in in college, I worked at the Veterans Affairs (VA) hospital, initially as a student nurse technician, and later had a preceptorship at the VA's psychiatric ICU. After graduating, I worked for the State of Alabama, at the Partlow Mental Health/Mental Retardation facility, from about 1987-1988, for just under one year. There I worked full time at the psychiatric infirmary. When I moved to Houston in 1988 to help Carolyn and her newborn baby, I got a job at the West Oak Psychiatric Hospital, and later from 1989-1992, I worked at the Charter Psychiatric Hospital, in Sugarland, Texas. I worked at Charter doing the night shift during the time that Arthur and his friends visited me. Finally, in the fall of 1992, when I moved back to Tuscaloosa, I worked at the psychiatric Life Management Unit, at the Druid City Hospital, an inpatient hospital. I then worked at the Bryce State Hospital from 1993-1994, handling chronic psychiatric commitments and long-term care. I returned to Texas in 1995 ~~and~~

GAB

With (new-born) ~~child~~ my daughter. I moved back to Alabama, and took a two year break, and finally, from 1998 until 2012, I worked outpatient care at Alabama Psychiatric Services.

22. Based on my experience with Carolyn and my professional training and experience, I am convinced that Arthur never told Carolyn that he killed anyone. If he did, I know she would have immediately told me, Serisa, and others about it. It would weigh on her mind, and she would not be able to keep it a secret. Further, it would not surprise me that Carolyn would relent to the threats she faced and give a false statement under pressure; in fact, I would be surprised if she could have stood her ground and resist giving false information in the face of these threats.

My Contact with Arthur Brown's Trial Lawyer

23. I remember meeting with Arthur's trial attorney before his trial. I recall she asked me questions about why Arthur was in Houston, about where I was, and about my statement to the police. She never asked me any questions about Arthur's childhood or social history.

24. I knew Arthur very well growing up, and he had a brutal and chaotic childhood, given that we were raised on the wrong side of the tracks in Tuscaloosa, Alabama. I could have provided information about his mother's alcoholism and her sister's homemade whiskey; about how he was affected by the divorce; and about his ADHD, suicide attempt, and depression. I could have also testified about Arthur's unique character traits – that he never did drugs or drink or smoke, and that he would not let others smoke cigarettes at his house, about how he was good to elderly people and to all those around him.

25. I remember that a young female investigator talked to me several years after Arthur's trial about some things in his background and upbringing. I was shown a January 1998 affidavit of Lisa Milstein, that investigator, and her description of her interview with me is generally correct. The only clarification I would make is that she overgeneralized the interrogations of "sisters" as being all hostile and threatening; but, as I said earlier, though this was true for Serisa and Carolyn, the detective who interviewed me usually was not hostile or abusive.

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Further, affiant sayeth naught.

Sworn to before me this 5th day of August, 2014.

Notary Public-State of Alabama
My commission expires: My Commission Expires 08-25-2014