

IN THE
Supreme Court of the United States

ARTHUR BROWN, JR.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Arthur Brown, Jr. was convicted and sentenced to death for his involvement in a quadruple homicide, along with Marion Dudley and Anthony Dunson. The jury was permitted to convict Brown as a party to the offense. At trial, the State presented evidence through a ballistics expert, Charles Anderson, that several bullets found at the crime scene were fired from a revolver associated with Brown. In the state courts below—Brown’s second state habeas proceeding—Brown alleged that the State presented false testimony via Anderson, in violation of due process. Brown presented evidence from other ballistics experts undermining Anderson’s testimony. The trial court believed Brown demonstrated a due process violation and recommended habeas relief. It is not necessary under Texas law, as it is under federal precedent, to show that the State *knowingly* presented false testimony. Ultimately, the Texas Court of Criminal Appeals (CCA) denied relief holding that Anderson’s testimony was not material in light of Brown’s clear participation in the offense and the parties charge.

In finding that Anderson’s testimony was material, the state trial court considered not only the ballistics evidence and eyewitness testimony, but also testimony that one surviving eyewitness, Nicholas Cortez, provided in the subsequent trials of Brown’s accomplices. Cortez’s testimony at those trials was allegedly ambiguous regarding his identification of Brown as a perpetrator. Brown now claims that the CCA did not account for this new evidence and that, had the court done so along with the remaining evidence, he would have been entitled to relief. Brown requests certiorari review arguing that this Court should clarify its precedent and hold that newly discovered postconviction evidence should be considered in resolving the materiality of alleged false evidence. This history gives rise to three questions:

Can a petitioner demonstrate a violation of federal due process without showing the State knowingly presented false evidence?

Are state and federal courts obligated to consider newly discovered evidence not available at trial in assessing materiality, even where federal precedent does not support this proposition?

Even if the Court could consider Cortez’s post-trial testimony, would that render Anderson’s testimony material in light of the clear evidence of Brown’s participation in the offense?

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BRIEF IN OPPOSITION

Brown was found guilty of and sentenced to death for the murders of Jessica Quinones, Jose Tovar, Frank Farias, and Audrey Brown. Brown had two accomplices, Dudley and Dunson. Two survivors of the murders, Rachel Tovar and Cortez, identified Brown as a major participant. Brown's conviction and sentence were affirmed on direct appeal, and his state and federal habeas applications—which included a claim that the prosecution knowingly presented false evidence via ballistics expert Anderson—were denied. An execution date was set but withdrawn at the agreement of the parties.

Eventually, the case was remanded to the trial court by the CCA to address whether Anderson testified falsely or in a materially misleading manner, in violation of due process. In this proceeding, Brown presented evidence from other ballistics experts who disputed Anderson's conclusions. As a result, the trial court recommended that Brown be granted habeas relief. In finding that Anderson's allegedly false testimony was material, the trial court relied not only on the additional trial evidence, which it found to be weak, but also on testimony that surviving eyewitness Cortez provided in the subsequent trials of Dudley and Dunson, where Cortez was supposedly ambiguous about his identification of Brown. The CCA declined to adopt the trial court's recommendation and denied habeas relief. The CCA held that Brown was

charged as a party to the offense and there was never any question about his involvement due to the remaining evidence. Moreover, the trial evidence was unclear regarding who fired the weapons; thus, it was not necessary to identify the murder weapon or its connection to Brown. Consequently, Anderson's testimony was not material.

Brown now argues that the CCA failed to take into consideration Cortez's testimony in the subsequent trials of Dudley and Dunson, claiming that this testimony undermines Cortez's testimony at Brown's trial. Brown claims that this evidence combined with Anderson's refuted testimony and the weakness of the remaining evidence—namely Tovar's testimony—demonstrates the false testimony was material. He asks this Court for certiorari review to resolve whether post-verdict evidence can be considered in assessing materiality.

Brown's petition should be denied. First, under this Court's settled precedent, due process requires Brown to demonstrate that the State *knowingly* presented false testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959). Brown not only fails to do so, he sidesteps this issue altogether. Second, Brown asks this Court to consider Cortez's post-trial testimony for impeachment purposes even though his original trial testimony was not the subject of Brown's due process *Napue* claim. Brown cites no precedent in support of his novel argument. Third, the case law demonstrates that courts

are not required to consider post-verdict evidence in these circumstances and that they generally decline to do so. Fourth, this case presents a poor vehicle for consideration of this issue because there is no doubt that Brown was a party to this offense and both Anderson's trial testimony and Cortez's subsequent testimony in Dudley's and Dunson's trials were not material. Finally, Brown's claim is barred under the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). Thus, certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts of the crime as follows:

On the evening of June 20, 1992, at the Houston home of Rachel Tovar, six people were shot, four of whom died. Rachel Tovar was one of the survivors of the assault. In the hospital immediately after the incident, Tovar gave a recorded oral statement in which she stated that "Squirt" was one of the perpetrators and described the van he and his friends were driving. She subsequently identified [Brown] in a photospread. At trial Tovar identified [Brown] as the man she had referred to as "Squirt." Others also testified that [Brown] was known as "Squirt." Tovar further testified that she and her husband had sold marijuana and cocaine to [Brown] on several occasions. Tovar testified that on the day of the offense [Brown] and his friends came to her house about 2:00 or 3:00 in the afternoon to discuss the purchase of some cocaine and that they were driving a beige minivan. They left and returned around 6:00 p.m., and then left again only to return to the house a couple of hours later, at which time the shootings took place. Tovar testified that [Brown] bound her and five others who were in the house with strips of bedsheets [Brown] cut with a knife. The bound individuals were then placed in various rooms throughout the house. She heard gunshots from the other rooms

and then she was shot. Tovar testified that she did not know who shot her, although she saw each of the three perpetrators with a gun at various times during the assault.

The other survivor, Nicholas Cortez Anzures, testified that he had gone to visit the Tovars' at about 10:00 p.m. on the evening of the murders. He stated that he drove to the Tovars' house with some friends who waited for him in the car outside. He knocked on the door and was forced inside by [Brown] who was pointing a gun at the head of one of the victims. Cortez was taken to a back room by [Brown] and one of his cohorts, where he was bound and gagged. Cortez testified he heard a woman scream and shots from the front of the house. Then "the man with the chrome gun" and [Brown] came into the room and the man with the gun shot Cortez and another victim.

Candelario Hernandez testified that he drove with Cortez to the Tovars' house and waited in the car, expecting Cortez to return to the car quickly so that they could proceed to a party they planned to attend. Shortly after Cortez went inside Hernandez heard two sets of shots coming from the house and observed two black men exit the front door, get into a minivan, and drive away.

Rachel Tovar's neighbor testified that he was sitting in his front yard the night of the offense. He observed a van parked outside the Tovars' house and saw a black man going back and forth between the van and the house and putting something in the van. He further testified he heard three "popping sounds" and then the van left.¹ Shortly thereafter Rachel Tovar emerged from the house injured and calling for help.

Still another person, Daniel Leija, testified to having been at the Tovars' house earlier in the evening and seeing [Brown] there. He also testified that he had seen a van parked in front of the house.

¹ His statement given to police following the offense stated that the van pulled away and then he heard the popping sounds. At trial he stated that was not correct, that he had heard the pops before the van left.

[Brown's] three sisters, Serisa Brown, Grace Brown and Carolyn Momoh, were all called as witnesses for the State. At the time of the offense, Serisa and her child and Carolyn and her two children were living with Grace at Grace's house in Houston. The sisters all testified that [Brown] and three of his friends, Marion Dudley, Tony Dunson, and Maliek Travis, came to Grace's house in the early morning hours of June 20th. [Brown] and his friends were driving a tan minivan with Alabama plates. They left and returned several times that day and evening. Sometime after midnight that night [Brown] asked Serisa and Carolyn to drive the van back to Tuscaloosa, Alabama for him the next morning.² He agreed to pay each of them \$1,000 in return for driving the van.³ Serisa and Carolyn took [Brown] to the airport the morning of June 21st and then the two women and their children left for Tuscaloosa in the van. Upon arrival in Tuscaloosa, Carolyn spoke with Grace by phone who informed Carolyn of a news report she had seen pertaining to the murder of several persons and stating that a van with Alabama plates was identified as having been at the scene. Carolyn and Serisa turned the van over to [Brown] and his friends in Tuscaloosa and collected their money. Carolyn and Serisa eventually gave statements to Alabama authorities, and all three of the sisters gave statements to the Houston police on June 26th.

Brown v. State, No. 71,817, slip op. at 31–33 (Tex. Crim. App. 1996) (emphasis and footnotes in original).

II. Trial, Direct Appeal, and Postconviction Proceedings

Brown was convicted and sentenced to death for the murders of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias during the

² [Brown's] residence was in Tuscaloosa and his parents also lived there.

³ Serisa testified that the money was payment for delivering cocaine that was in the van. Carolyn testified that she had no knowledge of drugs in the van.

same criminal transaction. CR 7, 485, 520–22, 526–27.⁴ The CCA affirmed Brown’s conviction and sentence in an unpublished opinion, *Brown v. State*, No. 71,817 (Tex. Crim. App.), and this Court denied Brown certiorari review. *Brown v. Texas*, 522 U.S. 940 (1997).

Brown filed a state application for writ of habeas corpus in the trial court on March 26, 1998. SHCR 2. The trial court submitted findings of fact and conclusions of law recommending that Brown be denied relief. *Id.* at 281–307. The CCA adopted the trial court’s findings and conclusions and denied Brown habeas relief. *Ex parte Brown*, No. 26,178-02 at cover and Order.⁵

Brown then filed a federal petition for writ of habeas corpus in the federal district court. *Brown v. Thaler*, No. 4:09-CV-00074 (S.D. Tex.), Docket Entry (DE) 1. The Director filed an answer and motion for summary judgment. DE 23. The district court issued a memorandum and order granting the Director’s motion for summary judgment, denying Brown’s petition, and denying Brown a certificate of appealability (COA). DE 31 & 32.

⁴ “CR” refers to the clerk’s record of pleadings and documents filed with the court during trial, followed by page number(s). “RR” refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number(s). “SHCR” refers to the state habeas clerk’s record of Brown’s first state habeas proceeding, followed by page number(s).

⁵ Brown’s first postconviction filing was a petition for writ of mandamus. *Ex parte Brown*, No. 26,178-01.

Next, Brown filed an application for a COA in the Fifth Circuit Court of Appeals, but the Fifth Circuit denied Brown a COA. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012). Brown then filed a petition for writ of certiorari in this Court, which this Court denied. *Brown v. Thaler*, 568 U.S. 1164 (2013).

On July 2, 2013, the convicting court entered an order scheduling Brown's execution for October 29, 2013. By agreement of the parties, the convicting court withdrew Brown's execution date to allow for the retesting of ballistics evidence.⁶

Brown then filed a subsequent habeas application alleging multiple grounds of prosecutorial misconduct and ineffective assistance of counsel. The CCA determined that only one of Brown's claims satisfied the requirements of Texas Code of Criminal Procedure, Article 11.071, Section 5(a), and remanded the case to the trial court for consideration of the following allegation: whether the State's ballistics expert Anderson "testified falsely or in a materially misleading manner when he expressed his unequivocal opinion that the

⁶ While the execution date was pending, Brown filed a motion in the federal district court for authorization of funding and appointment of a mitigation investigator to assist in clemency proceedings. See DE 49. The district court denied the motion. DE 51. Brown then appealed the district court's ruling to the Fifth Circuit. The appellate court affirmed the district court's decision in a published opinion. *Brown v. Stephens*, 762 F.3d 454 (5th Cir. 2014). This Court subsequently denied Brown certiorari review. *Brown v. Stephens*, 135 S. Ct. 1733 (2015).

evidence bullets were fired from the two guns that the State recovered in Alabama and tied to [Brown].” *Ex parte Brown*, No. WR-26,178-03, 2015 WL 6522854 (Tex. Crim. App. October 28, 2015) (order).

Following a hearing, the state trial court adopted Brown’s proposed findings of fact and conclusions of law and recommended that Brown be granted habeas relief. *Ex parte Brown*, No. 636535-B (351st Dist. Ct., Harris County, Texas); Petitioner’s Appendix C. On October 18, 2017, the CCA declined to adopt the trial court’s recommendation and denied Brown habeas relief. *Ex parte Brown*, No. 26,178-03, 2017 WL 4675396 (Tex. Crim. App. 2017); Petitioner’s Appendix A. In this opinion, the CCA held as follows:

[Brown] 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 [Brown] 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 [Brown] shot Farias, Quinones, and Brown with the Charter Arms.

In his –03 application, [Brown] 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 [Brown].”
- 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, [Brown] 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: [Brown’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 [Brown’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, [Brown] 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, [Brown] has not shown that this evidence was material at guilt/innocence or punishment. The jury was authorized to convict [Brown] of capital murder as a party to the offense. And the State presented evidence that [Brown], at the very least, intended to kill the victims or anticipated that a human life would be taken. For example, the surviving witnesses observed [Brown] holding victims at gunpoint, tying them up with bedsheets, and verbally threatening to kill them. After the offense, [Brown] quickly left Houston on a plane and paid his sisters to drive his van back to Alabama. One of his sisters told police that [Brown] 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 [Brown] had been in Houston.

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

We have also reviewed [Brown'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 [Brown] 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.

Petition, Appendix A at 1–5 (footnote omitted).

REASONS FOR DENYING CERTIORARI REVIEW

The questions Brown presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." Brown advances no such special or important reason in this case, and none exists. Brown's claims were thoroughly adjudicated by the state court, and the CCA properly denied relief. Brown presents no compelling reason to reconsider that decision. Indeed, the certiorari jurisdiction provided by Rule 10 is primarily concerned with resolving issues implicating federal law. Sup. Ct. R. 10(b) & (c). Brown's petition fails in that regard because he is contesting the CCA's application of state law to the facts of his case, which is inadequate to warrant certiorari review. Indeed, as explained below, Brown attempts to sidestep federal law—*Napue's* requirement that a petitioner show the prosecution *knowingly* presented false evidence—in requesting certiorari review.

Ultimately, Brown's complaint about the manner in which the CCA resolved his habeas proceeding does not warrant review because states are not constitutionally required to provide collateral proceedings, nor "to follow any particular federal role model in these proceedings." *Murray v. Girratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*,

481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). And where a State allows for postconviction proceedings, “the Federal Constitution [does not] dictate[] the exact form such assistance must assume.” *Finley*, 481 U.S. at 555, 557, 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“federal habeas corpus relief does not lie for errors of state law”) (internal quotation marks and citation omitted). As this Court has explained, “Federal courts may upset a State’s postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

The state court proceedings in Brown’s case were more than adequate; he is merely displeased with the final result. Certiorari review is not merited on this basis. And although Brown contends that a circuit split exists regarding the consideration of evidence discovered after trial when assessing materiality, an examination of the cases he cites demonstrates Brown’s argument is at best misleading. Thus, Brown’s petition should be denied.

I. Certiorari Review Should Be Denied due to Brown’s Attempt to Circumvent Federal Precedent.

Fatal to Brown’s underlying *Napue* claim is his attempt to sidestep a requirement under federal law: that he show the prosecution obtained his conviction via false evidence “*known to be such* by representatives of the State.” *Napue*, 360 U.S. at 268 (emphasis added). Texas law does not require a

petitioner to make this showing. *See Ex parte Chabot*, 300 S.W.3d 768, 771–72 (Tex. Crim. App. 2009). But to invoke a federal issue, Brown must do so.

In exercising its authority under 28 U.S.C. § 1257(a), the Court has made clear that it holds “no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Here, that necessarily requires a showing that the State knowingly presented false testimony under *Napue*. Brown’s petition, however, focuses exclusively on materiality and merely assumes that he has met the remaining prongs of *Napue*. The evidence clearly shows otherwise. Anderson’s ballistics testimony may have ultimately proven to be inaccurate—at least in the eyes of the trial court—but that alone fails to demonstrate that the prosecution *knowingly* presented false testimony. And it is evident the State could not or should not have known the evidence was false or misleading given that two other ballistics experts verified Anderson’s results prior to trial. Brown presents no evidence to the contrary. Consequently, there was no error of constitutional dimension.

Brown does not address this critical issue in his petition, apparently hoping that exclusive focus on a new method for assessing materiality will suffice. Although the CCA resolved the matter on that prong, Brown is not permitted to leapfrog constitutional requirements now that he is before this

Court. And to the extent he is asking the Court to provide supervisory guidance over the state courts to assist them in analyzing due process claims involving false evidence, the Court cannot accept his invitation. *Phillips*, 455 U.S. at 221.

II. In Assessing Materiality, Courts Generally Cannot Consider Evidence Not in Existence at the Time a Defendant Was Tried, and Brown Presents No Legal Precedent Requiring Courts to Do So.

Brown seeks certiorari review claiming that the CCA failed to take into consideration evidence developed post-trial—Cortez’s subsequent testimony in the trials of Brown’s accomplices—in resolving the materiality issue. Brown states:

While this Court, in *Agurs*,^[7] cautioned that materiality “must be evaluated in the context of the *entire record*,” the Court did not address what constituted the record a reviewing court is obligated to review—whether it is limited to the trial record or if it extends to the record developed in post-conviction proceedings.

Petition at 18 (emphasis in original). Brown then asserts: “This Court should grant a writ of certiorari in this case to clarify what it meant by the ‘entire record’ in *Agurs*.” *Id.* at 19.

An initial fault with Brown’s claim is that the evidence he states was not considered—Cortez’s subsequent testimony when compared with his trial

⁷ *United States v. Agurs*, 427 U.S. 97 (1976).

testimony—was not even the subject of his *Napue* claim. Instead, Brown argued that Anderson, the ballistics expert, provided false testimony and the falsity was material.⁸ Thus, Brown is now claiming that the CCA’s failure to consider evidence not subject to a constitutional challenge—indeed, evidence completely outside the state court record and unavailable when Brown was tried—nonetheless warrants certiorari review due to its alleged impact on the materiality question. Brown cites no precedent for this novel proposition.

At any rate, courts have rejected the argument that post-verdict evidence should be considered in assessing materiality, at least in the context of *Brady*⁹ allegations. In *Osborne*, this Court declined to extend *Brady* to the postconviction context, holding that “*Brady* is the wrong framework” for assessing a petitioner’s “limited interest in postconviction relief.” 557 U.S. at 69.

Instead, the question is whether consideration of [petitioner’s] claim within the framework of the State’s procedures for postconviction relief “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or “transgresses any recognized principle of fundamental fairness in operation.” Federal courts may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

⁸ As stated, Brown has never argued, and does not argue here, that Cortez provided false testimony at trial.

⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

Id. (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)) (additional citations omitted).

Since *Osborne*, federal appellate courts have routinely declined to consider evidence that came to light after conviction and was not available prior to or during trial. *In re Bolin*, 811 F.3d 403, 409 (11th Cir. 2016) (rejecting *Brady* claim under *Osborne* where the supposed violation occurred years after defendant was convicted); *Estrada v. Healey*, 647 F. App'x 335, 338 (5th Cir.) (“*Estrada* cites no case law establishing a due process right to the timely disclosure of exculpatory evidence discovered after his conviction, i.e., Salvador’s misconduct. Instead, he relies exclusively on the rule announced in *Brady* that due process requires a prosecutor to disclose material, exculpatory evidence to a defendant before trial. His argument is undercut by the Supreme Court’s decision in [] *Osborne*, which explicitly declined to extend *Brady*’s pre-trial protections to the post-conviction context.”) (citing *Brady* and *Osborne*), *cert. denied*, 137 S. Ct. 226 (2016); *In re Masterson*, 638 F. App'x 320, 327–28 (5th Cir. 2016) (“*Masterson* points to no authority for the proposition that a prosecutor has a duty to turn over subsequently discovered information about a witness related to events that *had not yet occurred* at the time of trial but would nevertheless, if a time machine were available, be useful to impeach the witness’s credibility.”) (emphasis in

original) (citing *Osborne*); *Jones v. Ryan*, 733 F.3d 825, 837 (9th Cir. 2013) (“even if the evidence Jones seeks were assumed to be material, the *Brady* right of pretrial disclosure available to defendants at trial does not extend to habeas corpus petitioners seeking post-conviction relief”). For instance, in *Browning v. Trammell*, the Tenth Circuit explained:

In the *Brady* context . . . it is inappropriate to consider evidence developed post-verdict. To do otherwise would contradict Supreme Court cases applying *Brady* by analyzing how withheld evidence might have affected the jury in light of all other evidence it heard. . . .If (as *Osborne* made clear) one’s *Brady* right is a pre-trial right, then our analysis necessarily looks to what might have changed had the *Brady* evidence been disclosed before trial—or at least disclosed soon enough to give the defendant an opportunity to use it at trial effectively. And if our analysis necessarily looks to what might have changed had the *Brady* evidence been disclosed before trial, then it would make no sense to account for evidence that was *not* available before trial.

Accordingly, we confine our analysis of favorability and materiality to the record before the state trial court. We therefore cannot consider [accomplice’s] confession and guilty plea, nor can we consider evidence Browning developed in post-conviction proceedings that he believes favors his theory of the case.

717 F.3d 1092, 1104–05 (10th Cir. 2013) (emphasis in original).

The precedent Brown cites in support of his argument is unavailing. First, he addresses *Banks v. Dretke*, 540 U.S. 668 (2004). In *Banks*, a pre-*Osborne* case, this Court held that the prosecution violated *Brady* by failing to disclose to the defense that a State’s witness was coached by the prosecution, despite the witness’s denials that he had talked to anyone prior to trial, and

that another witness was a paid informant. *Id.* at 675–705. In a footnote, this Court mentioned that Vetrano Jefferson, a prosecution witness who testified at the punishment phase that Banks struck him in the face with a pistol, omitted that he appeared to have initiated the fight with Banks that led to his injury. *Id.* at 699 n.17. This information came to light when Jefferson testified on postconviction review. *Id.* Brown states: “[T]his Court took this information into consideration in its assessment of materiality of the wrongfully withheld evidence pertaining to [the paid informant] [Richard] Farr.” Petition at 18. Brown’s statement is misleading. Jefferson’s omission was mentioned only in the footnote, and in the materiality portion of the opinion, this Court focused exclusively on the importance of Farr’s punishment phase testimony. 540 U.S. at 698–703. Farr’s informant status was well-known to the authorities before trial but was not disclosed. *Banks* does not stand for the proposition that evidence that comes to light after trial but was unknown to the State may result in a constitutional violation. Moreover, as discussed below, Cortez’s subsequent testimony in the trials of Dudley and Dunson did not reveal that he omitted details when he testified at Brown’s trial, only that his memory appeared to fade over time.

The second case Brown cites is *Makiel v. Butler*, 782 F.3d 882 (7th Cir. 2015). This case is also not on point. There, the petitioner alleged that he was

denied compulsory process because the trial court refused to permit a witness, Anderson, to testify that three other boys were responsible for a robbery and murder. *Id.* at 908. However, the court acknowledged this was an unusual case because, following trial, Anderson recanted his proffered trial testimony at a hearing and said that he made up the story about the other boys in retaliation for them bullying him. *Id.* Further, the police attempted to corroborate Anderson's original story before Makiel's trial but were unable to do so. *Id.* As a result, the state court held that Anderson's testimony was not material to the verdict. *Id.*

In federal court, Makiel claimed that the state court unreasonably applied clearly established federal law when it rejected his compulsory process claim. Makiel argued that the state court should have ignored Anderson's recantation and focused only on the materiality of the original proffer. *Id.* The Seventh Circuit stated:

The question presented by these unusual facts is whether the state court unreasonably applied clearly established federal law when it measured materiality in light of the entire record rather than looking only at the trial record. In other words, when a court determines whether the excluded testimony is material, is it free to consider post-trial developments that bear directly on the reliability of the testimony, or must it confine its review to the record at the time the trial court excluded the evidence?

Id. at 908-09. The court did not resolve this question. Rather, the Seventh Circuit held that "because no Supreme Court decisions clearly establish that a

court considering materiality is barred from considering post-trial developments that bear directly on the reliability of the excluded testimony,” Makiel could not satisfy the deferential standard of 28 U.S.C. § 2254. *Id.* at 909. Although the court addressed *Agurs* in support of its holding, the court explained:

Agurs instructed courts to evaluate the omission of the evidence “in the context of the entire record.” *Agurs* said this in a case where there had been no significant post-trial developments bearing on the reliability of the omitted evidence. It is possible, then, that the Court meant “the entire *trial record* but nothing beyond that” when it said “entire record.” But this possibility does not clearly establish that a court should never consider post-trial developments that bear directly on the reliability of the excluded evidence in measuring materiality.

Id. More importantly, the court’s reasoning for considering Anderson’s recantation was tied to the “interest of justice” and “countervailing public interests.” *Id.* Specifically:

Consider for a moment the extraordinary scenario that Makiel contends would be mandated by the federal Constitution. He says the state or federal courts should have vacated his conviction and ordered a new trial so that he could call Anderson to testify about the story he told back in 1990, which is (1) uncorroborated by any other evidence, (2) disavowed by Anderson himself as a troubled boy’s misguided effort to get back at other boys who had bullied him, and (3) implausible on its face. Even if Anderson’s original statements might somehow have been squeezed into evidence after the recantation, a new trial for that purpose would have been a strange farce, at least if the truth is supposed to remain important in a criminal trial.

Id. at 909–10. The court concluded that the state court’s decision was not unreasonable where the petitioner’s claim rested on “a partial presentation of the facts.” *Id.* at 910.

Makiel does not support Brown’s request for an extension of *Agurs*. First, the decision was confined to the unusual facts of the case. The court did not hold that consideration of post-verdict evidence is required under this Court’s precedent, only that the state court’s decision was not unreasonable given this particular set of circumstances. Second, Anderson’s proffered testimony was the subject of Makiel’s compulsory process claim. On the other hand, Brown’s *Napue* claim was directed at Charles Anderson, the ballistics expert, not Cortez’s testimony. *Makiel* does not hold that consideration of the entire record includes new evidence unavailable at trial and not subject to constitutional challenge. Third, Cortez testified at Brown’s trial and identified him as a perpetrator. And as discussed below, Cortez did not recant his testimony in the subsequent trials or completely fail to identify Brown; rather, his recall was less than ideal. In this regard, Brown’s claim is misleading. Fourth, for the reasons addressed below, Cortez’s testimony was not material.

The final case Brown cites is *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985). But this case, involving Walker’s conviction for murdering a police officer, is not on point because it involved the State’s suppression of a

transcript where an accomplice, Kumpe, indicated that he might have been the one to shoot the officer. *Id.* at 945–46, 955–61. Although the evidence was not turned over to the defense until years after Walker was convicted, the transcript had been in the State’s possession for decades and before Walker was tried. In other words, the case involved a typical *Brady* claim, not an allegation that newly discovered evidence elicited post-trial was material.

In sum, the precedent does not support Brown’s allegation that Cortez’s subsequent trial testimony can be considered in resolving materiality pertaining to his *Napue* claim. Therefore, certiorari review should be denied.

III. In Any Event, Brown Fails to Demonstrate that the Evidence in Question Is Material.

A. Brown was guilty as a party to the offense; ballistics evidence is irrelevant.

Ultimately, Brown’s claim fails because, as the CCA determined, the flaws in the ballistics evidence are not material. *Napue*, 360 U.S. at 269 (in order to violate due process, false testimony must be material to the outcome). The lack of identification of Brown as a triggerman does not alter his role in the crime because he was charged as a party to the offense. And it was clear he was a party.

Brown’s sister, Carolyn Momoh, testified that a Charter Arms .38 was missing from her home after Brown last visited her. 36 RR 148. Tovar testified

that she saw both Dunson and Brown brandishing a .38 revolver at different points during the crime. 31 RR 196–97. And Anderson testified that a Charter Arms .38 matching several of the bullets recovered from the victims was found in Alabama. 33 RR 198–206. But this evidence was merely circumstantial. There was no testimony that Momoh’s missing gun was in fact the murder weapon. Brown was not in possession of the gun at the time it was located in Alabama; it was found near the body of Marcus Hill, who was murdered in Alabama, and the gun remained in Alabama in connection with that murder case. 33 RR 198–206. Further, Anderson testified that there are many thousands of Charter Arms .38 revolvers in the United States. 33 RR 315.

Moreover, although Cortez identified Dudley as the man who shot him and Jose Tovar, 31 RR 80–82, no one was able to identify who shot the remaining victims. Because this issue was not crystal clear, and because there were several perpetrators, the jury was instructed that it could find Brown guilty of capital murder as a party to the offense if he acted “with intent to promote or assist the commission of the offense.” CR 473–74. Thus, although the State argued that Brown shot three of the victims, 39 RR 132, it was not necessary for the jury to reach that conclusion to return a verdict of “guilty.” And even if the jury believed the State’s argument that Brown shot three of the victims, that belief would have been based primarily on deductions from

the eyewitness testimony. Regardless of the State's argument, 39 RR 130–32, matching bullets to a particular gun did not conclusively establish who pulled the trigger, particularly considering that the assailants were passing the weapons around.

Thus, ballistics results do not obviate Brown's role. There was no question that Brown was a major participant in the crime because he was identified as such by three people, including two of the wounded victims. Tovar testified that Brown tied up several of the victims and that she saw each of the perpetrators brandishing a gun at various points during the crime. Cortez also testified that he saw Brown pointing a gun at the head of one of the victims. Further, as the Court of Criminal Appeals noted, Tovar had known Brown for some time, *Brown v. State*, slip op. at 34; thus, this is not a case of mistaken identity. Consequently, there was no question that Brown was a party to the offense and could have anticipated that a human life would be taken. Any evidence demonstrating that Anderson's testimony was false would not have impacted the jury's verdict. *See Knox v. Johnson*, 224 F.3d 470, 478 (5th Cir. 2000) (even assuming witness lied about an issue, it had no bearing on the defendant's participation in the crime and, thus, was not material). In fact, on direct appeal, the CCA conducted a harmless error analysis with respect to an unrelated claim and did not mention Anderson's testimony or the ballistics

evidence. *Brown v. State*, slip op. at 28–35. Simply put, this evidence was not critical to the outcome.

The issue of materiality was litigated on both state and federal habeas review when Brown previously claimed that Anderson’s testimony was false. In rejecting Brown’s claim, the federal district court held as follows:

Even without the evidence connecting Brown to that particular weapon, the trial testimony amply confirmed his role in the crime. True, one victim pointed to Brown’s co-defendant as a shooter, but the police were never able to identify who fired all of the shots. Testimony from three individuals—including a surviving victim who saw Brown hold a pistol to the head of another—confirmed that Brown was a major participant in the robbery/murders. There was no serious question about Brown’s identity as a party to the offense. Given the law-of-the-parties instruction, the evidence amply allowed for Brown’s conviction without linking him to the recovered firearms. Eyewitness testimony confirmed that Brown intended that the victims be killed. Proving the ballistics testimony false would not measurably alter the jury’s consideration of Brown’s role in the murder.

Brown v. Thaler, 2011 WL 798391, *19 (S.D. Tex. 2011). The new habeas evidence undermining Anderson’s testimony is likewise not material.

B. Brown’s argument about new postconviction evidence calling into question his identity lacks merit.

Brown now alleges that Cortez’s trial testimony and identification of Brown is suspect given his testimony in the trials of Dudley and Dunson, both of which occurred over a year after Brown’s trial. Brown argues that this new factor, combined with the discrepancies in the ballistics evidence and the

weakness in the other evidence—specifically, Tovar’s testimony—warrants certiorari review. Petition at 19–23. In other words, Brown appears to now claim that this was essentially a case of mistaken identity. Even if this Court could consider Cortez’s subsequent testimony—and it cannot—Brown’s allegation fails for several reasons.

First, Brown’s argument that Tovar’s testimony lacked credibility because of certain inconsistencies is flawed. Brown points to testimony from Tovar where she initially said she did not know who the suspects were. 35 RR 104–05. But the fact remains that she identified both Brown and Dudley in the hospital and that they were driving a van with Alabama license plates. 27 RR 85–86. HPD officers testified that Tovar was capable of relating to them what happened. 35 RR 47–50, 73–74. Tovar described the crime in detail at trial, 31 RR 173–227, and, importantly, *she knew* Brown. Tovar testified that both Brown and Dudley had come over to her house six to seven times to buy drugs prior to the murders. 31 RR 132–36. The notion that Tovar identified the wrong person does not hold up to scrutiny.

Second, Tovar’s testimony was supported by additional trial evidence, apart from Cortez’s. Daniel Leija testified that he was at Tovar’s home the night of the offense but left before the crime. While he was there, he saw Brown talking to Tovar. 30 RR 176–83. On cross-examination, he stated that he initially identified someone else in a photo spread. 30 RR 238. But he did so

because Brown's hair was not the same in the photo as it was when he saw Brown. 30 RR 247. On re-direct examination, he testified that he was positive Brown was the man he saw at Tovar's house. 30 RR 248. Further, Serisa Brown, Brown's sister, testified that she lived with her sisters Carolyn and Grace and that all the defendants—Brown, Dudley, and Dunson—showed up at their house on the morning of June 20, 1992. Dudley had a stack of money, and they asked her to drive the van back to Alabama for \$3,000. 29 RR 29–72. Grace and Carolyn provided similar testimony, and Carolyn testified that Brown confessed to her that he “killed six Mexicans.” Additional testimony revealed that the three perpetrators—Brown, Dudley, and Dunson—were frequent associates.

Third, even if this Court could consider Cortez's subsequent testimony in the trials of Dudley and Dunson, this testimony does not actually benefit Brown. Brown has attached excerpts of the testimony to his petition as Appendices D and E, but they are unhelpful to him. In Dudley's trial, Cortez stated that when he came into the Tovar's house, he saw two black men with guns, one chrome and the other black. Appendix D at 400–04. When asked what the man he initially talked to looked like, Cortez said that it was dark and he remembered that the man (Dudley) had a chrome pistol. *Id.* at 404. The man with the chrome pistol shot him and another victim. *Id.* at 412. When asked if he identified any persons in photo spreads when he was in the hospital,

Cortez said that he did not remember very well but he did recall pointing out some photos and signing his name beneath them. *Id.* at 418. When asked if the man he identified in the photo spread was the man with the chrome gun (Dudley), Cortez said: “I don’t remember very well right now. If I pointed it out, I think so.” *Id.* at 419. Then, outside the jury’s presence, the prosecution asked Cortez if he remembered testifying at Brown’s trial. Cortez said he did and that the defendant in the prior case (Brown) was not the one with the chrome pistol. *Id.* at 421–22. Next, the defense questioned Cortez outside the jury’s presence and asked him whether he remembered the person or the gun when he was shot. Cortez said that he saw the person (Dudley) “just a little” but that he placed more attention on the weapon. *Id.* at 424. Specifically: “I couldn’t be sure of the person, but yes, the gun and the glove.” *Id.* at 425. When questioned again apparently before the jury, Cortez said the man with the black gun (Brown) was taller than him. And when asked about the man with the chrome gun (Dudley), Cortez stated that he mainly noticed the gun and the man’s glove and that the man was shorter, although he did look at him “[a] little.” *Id.* at 439–40.

Cortez’s testimony at Dunson’s trial was even less helpful, and, if anything, inculpatory. Cortez stated that he saw two black men with guns when he entered the home. Appendix E at 151. He did *not* recall seeing anyone else other than these two men. *Id.* at 152. When asked if he saw the man who

shot him, Cortez said: “I was able to see a little bit in the darkness.” *Id.* at 156. He then stated that the person who let him into the house was the person he testified against in the first trial (Brown), and the person who shot him was the person he testified against in the second trial (Dudley). *Id.* at 156-57. When asked what he told the police when they interviewed him, he stated: “Just that there were, that there had been two people.” *Id.* at 160. He further agreed that he used his hands to indicate two people because he speaks very little English. *Id.* When asked if he signed his name under any photos shown to him by the police and if he signed his name because he recognized them, Cortez said, “Yes, because I believe more or less they told me to sign to whom I thought I might recognize.” *Id.* at 169. When shown State’s Exhibit 76, a photo spread, he said that he recognized his signature under Tovar’s signature. *Id.* When shown State’s Exhibit 77, another photo spread, he stated that he did not see his signature. *Id.* at 169-70. When asked if he was having a hard time recognizing anyone, Cortez said “it is difficult.” *Id.* at 170. He then acknowledged that it was hard for him to remember “which man did what in the house that night” but that he did sign his name in both photo spreads. *Id.*

In sum, based on these excerpts, Cortez’s testimony at Dudley’s trial was just as ambiguous with regard to Dudley as it was to Brown. And at Dunson’s trial, Cortez seemed to identify the two men he saw in the house, Brown and Dudley, although his recollection was not perfect. But he plainly stated that

he saw only two men. More importantly, both Dudley and Dunson were convicted. *See Dudley v. Cockrell*, No. H-01-1506 (S.D. Tex. 2002), Docket Entry (DE) 26 (memorandum and order); *Dunson v. State*, No. 01-95-00821-CR, 1997 WL 732500 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (finding the evidence legally and factually sufficient to support Dunson's conviction). Dunson is serving a life sentence; Dudley was sentenced to death and executed in 2006. This Court denied Dudley certiorari review and a stay of execution shortly before his execution. *Dudley v. Texas*, 546 U.S. 1159 (Jan. 25 2006). Both Dudley and Dunson were convicted even though, according to these appendices, Cortez only vaguely recalled Dudley and did not identify Dunson at all. Thus, Cortez's testimony was not critical to these trials; likewise, it could not have been material to Brown's.¹⁰

Therefore, were this Court to adopt Brown's argument and review evidence elicited a year or more after Brown's trial, the Court would have to review *all* aspects of the evidence. In other words, if the Court considered that Cortez had some difficulty recalling Brown in the latter trials, it must also consider that Cortez had the same problem regarding Dudley and Dunson and,

¹⁰ One additional flaw with Brown's claim is that his trial was the first of the three. Dudley was tried more than a year after Brown, and Dunson was tried last. It stands to reason that if Cortez had trouble with recall, it would have been hazier in the latter two trials as more time elapsed since the crime. That does not render his testimony in Brown's trial necessarily suspect.

yet, they were both convicted. The Court would also have to take into account that at Dunson's trial, Cortez identified Dudley and Brown as the "two men" he saw. Consequently, consideration of Brown's new evidence not only fails to benefit him, but arguably operates against his interests.

Given these factors, this case presents a poor vehicle for consideration and adoption of the rule Brown seeks, contrary to his claim. As a result, certiorari review is not warranted.

IV. Brown's Claim Is Barred from Review.

Brown's conviction became final on October 20, 1997, when this Court denied certiorari from direct appeal. *Brown v. Texas*, 522 U.S. 940. Hence, the State's interest in the finality of its conviction outweighs Brown's interest in the retroactive application of any new rule of constitutional law. *See Teague*, 489 U.S. at 309–10.

Brown does not address *Teague* in his petition, even though he is asking this Court to adopt a new rule of constitutional law pertaining to the assessment of materiality. And arguably he is doing the same by claiming a violation of due process without demonstrating the State knowingly presented false evidence. The plurality's analysis in *Teague* is, however, plainly applicable to review of a state postconviction proceeding on certiorari; unless a new constitutional rule falls within a *Teague* exception, the "new constitutional rules . . . will not be applicable to cases which have become final before the new

rules are announced.” *Id.* at 310. And *Teague* defines a non-final case as one “pending on direct review or not yet final.” *Id.* at 305–06 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Brown’s conviction is final for purposes of *Teague*, hence, any new constitutional rule recognized by this Court should not be applicable to him.

Also, the rationale for *Teague* applies with equal force to this Court’s review of a state postconviction proceeding. The *Teague* plurality criticized earlier retroactivity implementations, noting that the “selective application of new [constitutional] rules violates the principle of treating similarly situated defendants the same.” *Id.* at 304 (quoting *Griffith*, 479 U.S. at 323–24). To avoid the inequity that disparate treatment engendered, the plurality determined that, with two exceptions, it would “simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.” *Id.* at 316 (emphasis added).

That limiting principle finds application here. The constitutional rule Brown seeks would not benefit all similarly situated petitioners, petitioners with final convictions who are pursuing state collateral review. Specifically, whether or not Brown benefits from the new rule, other similarly situated petitioners pursuing state postconviction review are unlikely to benefit because the state courts are free to deny retroactive application of new rules

in their own postconviction proceedings. *See Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (holding that state courts are not bound by *Teague* and may adopt their own nonretroactivity rules for postconviction proceedings).

Because a grant of certiorari in this Court would have the same impact upon the finality of Brown's conviction as a federal habeas appeal, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of October 20, 1997. As a result, certiorari review is not merited.

CONCLUSION

For these reasons, the Court should deny Brown certiorari review.

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