

NO. \_\_\_\_\_

---

---

In The  
**Supreme Court of the United States**

---

In re  
**RICHARD ALLEN MASTERSON,**  
**Petitioner.**

---

**PETITION FOR A WRIT OF HABEAS CORPUS**

---

**CAPITAL CASE**

**Pending Execution Date:**  
**January 20, 2016**

---

Gregory W. Gardner  
LAW OFFICE OF GREGORY W.  
GARDNER, PLLC  
641 S Street, N.W.  
Third Floor  
Washington, D.C. 20001  
O: (202) 684-6331  
F: (202) 747-2986  
gardnerlegal@gmail.com  
*Pro Bono Counsel*

January 19, 2016

---

---

### Questions Presented in a Capital Case

Mr. Masterson's case presents a perfect storm of attorney incompetence and neglect combined with a severely mentally ill, suicidal defendant who did not kill anyone. Since Mr. Masterson's capital murder conviction, he has discovered that the State's medical examiner was a fraud who was unqualified to opine on the decedent's cause of death. After consulting qualified medical experts, Mr. Masterson learned that the decedent did not die from strangulation as the State theorized at trial. Instead, he died from a heart attack caused by a pre-existing heart condition. Mr. Masterson's prior attorneys did not discover this information before filing his initial state habeas application, initial federal habeas petition, second state habeas application under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), or first amended federal habeas petition, despite the information being readily available to all his attorneys.

The questions presented are:

1. Whether the Eighth and Fourteenth Amendments prohibit the execution of a person who can show a substantial case of actual innocence.
2. Whether actual innocence in a capital case defeats any statutory procedural technicalities that would otherwise prohibit consideration of the innocence claims.

**PARTIES TO THE PROCEEDINGS**

This petition challenges Mr. Masterson's conviction and death sentence in a Texas state court. Therefore, Williams Stephens, the Director of the Texas Department of Criminal Justice's Correctional Institutions Division, is the Respondent here. Mr. Stephens's attorney is the Texas Office of the Attorney General:

W. Erich Dryden  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711  
[Erich.dryden@texasattorneygeneral.gov](mailto:Erich.dryden@texasattorneygeneral.gov)

## TABLE OF CONTENTS

Questions Presented in a Capital Case.....	i
PARTIES TO THE PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	iv
TABLE OF APPENDICES .....	vi
TABLE OF EXHIBITS .....	vii
PETITION FOR A WRIT OF HABEAS CORPUS.....	1
OPINION BELOW.....	1
STATEMENT OF JURISDICTION.....	1
RELEVANT CONSTITUTIONAL AND .....	1
STATUTORY PROVISIONS .....	1
STATEMENT OF FACTS .....	2
I. Mr. Masterson’s infancy was filled with terror and violence at the hands of the people who should have protected him. ....	2
II. The decedent died from a heart attack – not strangulation as the State theorized. ....	3
III. When Mr. Masterson was in jail, his brain malformation and acute drug withdrawal caused him to become severely depressed and suicidal, which led to a false confession and antagonistic behavior aimed at accomplishing his suicidal desires. ....	5
IV. Mr. Masterson’s brain anomalies caused him to behave bizarrely and to continue his suicidal behavior during the trial and post-conviction litigation. ....	6
REASONS FOR GRANTING THE WRIT.....	8
I. Mr. Masterson presents exceptional circumstances for this Court’s intervention. ....	8
a. Mr. Masterson is actually innocent. ....	8
b. Mr. Masterson’s attorneys were so incompetent that they failed to notice widely reported evidence that would have supported habeas relief. ....	16
II. Mr. Masterson’s Petition is presented in a procedurally proper manner. ....	30
a. This Petition cannot be presented to any other court. ....	30
b. Mr. Masterson exhausted the factual bases of his constitutional claims, but the state court’s improper appointment of counsel interfered with his state court representation.....	32
CONCLUSION.....	34
VERIFICATION.....	35
CERTIFICATE OF SERVICE .....	36

## TABLE OF AUTHORITIES

### Supreme Court Cases

<i>Alcorta v. Texas</i> , 355 U.S. 28 (1957).....	21
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	25, 27
<i>Bullcoming v. New Mexico</i> , 131 S. Ct. 2705 (2011).....	26
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	23
<i>Cone v. Bell</i> , 556 U.S. 449 (2009) .....	28
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	26
<i>Davis v. Alabama</i> , 415 U.S. 308 (1974) .....	26
<i>Giglio v. United States</i> , 405 U.S. 150 (1972) .....	21, 23, 25, 28
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993) .....	8
<i>In re Davis</i> , 557 U.S. 952 (2009).....	8, 29, 33
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	25, 27, 28
<i>Martinez v. Ryan</i> , 132 S. Ct. 1309 (2012) .....	i
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009) .....	26
<i>Miller v. Pate</i> , 386 U.S. 1 (1967).....	21
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935) .....	21
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959) .....	21
<i>Olden v. Kentucky</i> , 488 U.S. 227 (1988) .....	26
<i>United States v. Bagley</i> , 473 U.S. 667 (1985) .....	22, 23, 24, 25, 28
<i>Youngblood v. West Virginia</i> , 547 U.S. 867 (2006).....	27

### Federal Cases

<i>Blackmon v. Scott</i> , 22 F.3d 560 (5th Cir. 1994), <i>cert. denied</i> , 513 U.S. 1060 (1994).....	25
<i>Blankenship v. Estelle</i> , 545 F.2d 510 (5th Cir. 1977).....	21, 22
<i>Boone v. Paderick</i> , 541 F.2d 447 (4th Cir. 1976), <i>cert. denied</i> , 430 U.S. 959 (1977) .....	21, 22
<i>Dupart v. United States</i> , 541 F.2d 1148 (5th Cir. 1976).....	21, 22
<i>In re Masterson</i> , No. 16-20031 (5th Cir. Jan. 15, 2016).....	29, 30, 31
<i>Pondexter v. Quarterman</i> , 537 F.3d 511 (5th Cir. 2008) .....	26
<i>United States v. Harris</i> , 498 F.2d 1164, 1169 (3rd Cir.), <i>cert denied</i> , 419 U.S. 1069 (1974) .....	21, 22
<i>United States v. Hsu</i> , 669 F.3d 112 (2d Cir. 2012).....	26
<i>United States v. McClintic</i> , 570 F.2d 685 (8th Cir. 1978) .....	21, 22
<i>United States v. O’Keefe</i> , 128 F.3d 885 (5th Cir. 1979).....	21
<i>United States v. Reyerros</i> , 537 F.3d 270 (3d Cir. 2008) .....	26

### State Cases

<i>Ex parte Adams</i> , 768 S.W.2d 281 (Tex. Crim. App. 1989).....	21, 25
<i>Ex parte Gallo</i> , 448 S.W.3d 1 (Tex. Crim. App. 2014) .....	32
<i>Masterson v. Thaler</i> , Case No. 4:09-cv-02731, ECF No. 5 (Oct. 12, 2010) .....	20
<i>Ohio v. Nields</i> , 752 N.E.2d 859 (Ohio 2001).....	17

### Constitutional Provisions

U.S. Const. art. III.....	1
U.S. Const. amend. VI .....	26
U.S. Const. amend. XIV .....	25

**Federal Statues**

28 U.S.C. § 2241 (2008) ..... 1  
28 U.S.C. § 2241(a) (2008)..... 1  
28 U.S.C. § 2254 (1996)..... 1

**State Statues**

Tex. Code Crim. Proc. Ann. art. 11.071 § 5 (West 2015) ..... 31  
Tex. Code Crim. Proc. Ann. art. 49.25 [989a] (West 2013)..... 27

**Rules**

Tex. Disc. R. Prof. Cond. 1.15(a)(3)..... 32

**TABLE OF APPENDICES**

Appendix A

State Habeas Application

Appendix B

Texas State Habeas Opinion Denying Relief

Appendix C

U.S. Court of Appeals for the Fifth Circuit's Opinion Denying Relief

Appendix D

Relevant Statutory and Constitutional Provisions

**TABLE OF EXHIBITS**

Ex. 1, TYC Records.....	1
Ex. 2, Dr. Williams-Anderson’s Report .....	82
Ex. 3, Dr. Wilson’s Report .....	89
Ex. 4, Mr. Shrode’s Employment Application .....	96
Ex. 5, Mr. Shrode’s Reprimand.....	101
Ex. 6, Mr. Shrode’s Reprimand.....	103
Ex. 7, Mr. Nield’s Clemency Recommendation.....	105
Ex. 8, Shrode Testimony in CPS Case .....	129
Ex. 9, Newspaper Article on Shrode’s Lies .....	140
Ex. 10, Newspaper Article on Shrode Being Fired .....	143
Ex. 11, Shrode’s Autopsy Report.....	147
Ex. 12, Dr. Radelat’s Report .....	165
Ex. 13, Dr. Roberts’ Report.....	168
Ex. 14, Miranda Dore’s Affidavit on State Habeas Counsel.....	179
Ex. 15, Trial Counsel’s Affidavit .....	183
Ex. 16, Counsel’s Affidavit.....	186
Ex. 17, Retainer Agreement .....	189
Ex. 18, Counsel’s Motion to Appear in State Court.....	191
Ex. 19, Petitioner’s Letters to District Court.....	226



---

**PETITION FOR A WRIT OF HABEAS CORPUS**

**CAPITAL CASE**

---

Petitioner Richard Allen Masterson respectfully asks this Honorable Court to exercise its original jurisdiction under 28 U.S.C. §§ 2241 and 2254 and Article III of the United States Constitution, stay Mr. Masterson's pending execution date, and transfer this matter to the district court for a hearing on the constitutional allegations in this Petition.

**OPINION BELOW**

Because this Petition is an original filing in this Court, there are technically no opinions below. The related Texas Court of Criminal Appeals and federal court opinions, however, are attached at Appendix D.

**STATEMENT OF JURISDICTION**

Mr. Masterson invokes this Court's jurisdiction under 28 U.S.C. § 2241(a), 28 U.S.C. § 2254, and Article III of the United States Constitution.

**RELEVANT CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

The relevant constitutional and statutory provisions are

- U.S. Constitution amendments V, VI, VIII, and XIV; and
- 28 U.S.C. §§ 2241, 2242, and 2254.

Each are attached in Appendix D.

## STATEMENT OF FACTS

### **I. Mr. Masterson's infancy was filled with terror and violence at the hands of the people who should have protected him.**

Mr. Masterson's childhood can only be characterized as violent, abusive, and traumatic. Since infancy, Mr. Masterson's entire family inflicted horrific abuse on him. Ex. 1 at 42. Mr. Masterson's father would often strike his head violently and repeatedly to the extent that his head would swell to two or three times its normal size.

In addition to this physical abuse, Mr. Masterson's older brother sexually abused him beginning when he was around seven or eight years old. Ex. 2 at 3. His brother most likely learned the predatory behavior from their father, who sexually abused this brother and at least one of his sisters. *Id.*

At age thirteen, Mr. Masterson hit rock bottom and felt hopeless and defeated. He dropped out of school, left his abusive home, and found himself homeless and living on the streets. Ex. 2 at 4. The desperate need for money to survive led him to prostitution and selling drugs at that tender age. *Id.*

During these desperate early-teenage years, Mr. Masterson began using cocaine daily and developed an addiction "at the most vulnerable time for human addiction, during adolescence." Ex. 3. He would continue to indulge in daily drug binges, including intravenous cocaine, for the rest of his life. Ex. 2, 3.

Due to years of drug abuse, Mr. Masterson developed a host of medical issues, including further aggravated brain damage. Ex 3 at 3. He was previously diagnosed with Hepatitis C, attributed to his intravenous drug use. *Id.* In addition, he has a history of seizures because of his crack use. Ex. 2, 3. Mr. Masterson reported experiencing as many as three seizures a day during

the time he used crack. Ex. 2. Mr. Masterson's recent symptoms include daily migraines, a deep "heaviness inside" his cranium, and pain that shoots from the front of his head to the back. *Id.*

During the federal habeas neuropsychological exam to assess brain function, Dr. Williams-Anderson found multiple deficits, particularly with cognitive processing speed and abstract reasoning. *Id.* at 4. She concluded that his results were typical of a "person with a history of substance abuse and subtle brain dysfunction." *Id.* at 5.

## **II. The decedent died from a heart attack – not strangulation as the State theorized.**

The central issue in Mr. Masterson's trial was what caused Mr. Honeycutt's death. Mr. Masterson maintained that the death was accidental. The State argued that Mr. Masterson intentionally killed him to rob him. Mr. Masterson did not dispute that he went to Mr. Honeycutt's apartment that night. But he forcefully avowed that he had no intent to kill Mr. Honeycutt.

Mr. Masterson and Mr. Honeycutt left a bar together in the early morning hours of Friday, January 26, 2001. They were drinking, and Mr. Masterson was, as usual, using cocaine. Mr. Masterson and Mr. Honeycutt went to Mr. Honeycutt's apartment to have consensual sex with each other. Once inside the apartment, the pair engaged in sexual relations.

Mr. Honeycutt requested that Mr. Masterson perform sexual asphyxiation on him. Sexual asphyxiation is a sexual technique that heightens an individual's climax by temporarily depriving the brain of oxygen. The technique is fraught with danger, and many famous people have died attempting it, including David Carradine, Albert Dekker, and Stephen Milligan. To accomplish the sexual technique, Mr. Masterson applied pressure to Mr. Honeycutt's neck, temporarily cutting oxygen for the heightened climax. And Mr. Honeycutt did climax. The State later tested DNA found in semen on Mr. Honeycutt's thigh; the semen was Mr. Honeycutt's.

After this sexual act, Mr. Honeycutt fell off his bed and onto the floor. Mr. Masterson thought he was still alive, but unconscious. After a little more time had passed, Mr. Masterson realized that Mr. Honeycutt had died. He panicked. He believed no one would accept that the death was accidental given his history. He also feared that homophobia would become a factor contributing to hostility against him. Mr. Masterson remembered that others knew he went to Mr. Honeycutt's apartment, so he tried to make the apartment look like it had been burglarized in a misguided attempt to deflect suspicion away from him.

Mr. Masterson was ultimately correct about Mr. Honeycutt's cause of death. While his efforts to cut oxygen to Mr. Honeycutt's brain may have contributed to Mr. Honeycutt's death, Mr. Masterson did not strangle him to death. The State's expert pathologist at trial was Assistant Medical Examiner Paul Shrode. Mr. Shrode had lied about his qualifications to work as a medical examiner. Ex. 4, 8, 9, 10. In fact, Mr. Shrode was not qualified to give an expert opinion about Mr. Honeycutt's cause of death, *see id.*, and was dismissed from his post in 2010 after an Ohio death row prisoner received clemency on the basis of Mr. Shrode's fraudulent testimony, Ex. 7. Shrode's lack of qualification was no mere technicality. Mr. Shrode made fundamental errors when testifying to his "expert opinion" in Mr. Masterson's trial. Because Mr. Shrode did not understand basic medical principles of pulmonary pathology, he could not understand the physiological signs that Mr. Honeycutt suffered a heart attack. Ex. 13. This medical conclusion has been confirmed by two expert pathologists who have looked at Mr. Honeycutt's autopsy file in the time since Mr. Masterson was sentenced to death. The most recent expert pathologist to look at the case, Christena Roberts, M.D., properly reviewed Mr. Honeycutt's autopsy and gave a qualified medical expert opinion, the only expert opinion available to this Court. Dr. Roberts concluded that no evidence exists making it more likely that Mr. Honeycutt died from

strangulation than that he died from a tragic but unplanned cardiac arrhythmia. *Id.* Based in part on the autopsy records and in part on Mr. Masterson's trial testimony and evidence of Mr. Honeycutt's lifestyle, Dr. Roberts opined that Mr. Honeycutt most likely died from a heart attack triggered by Mr. Honeycutt's pre-existing severe coronary artery disease. *Id.*

Given Mr. Shrode's lack of qualification to render an opinion in this case, there is no cause to doubt Dr. Roberts expert medical opinion.

**III. When Mr. Masterson was in jail, his brain malformation and acute drug withdrawal caused him to become severely depressed and suicidal, which led to a false confession and antagonistic behavior aimed at accomplishing his suicidal desires.**

After Mr. Masterson's arrest, he suffered from drug withdrawal and severe depression. Mr. Masterson had used cocaine intravenously all day at the time of Mr. Honeycutt's death, and he consistently used methamphetamines until two days before his arrest. Mr. Masterson's withdrawal after this prolonged drug use made him feel vulnerable, extremely depressed, and with no desire to live. This suicidal depression led Mr. Masterson to commit suicide by confession when Officer David S. Null confronted him in a Florida jail on February 9, 2001.

At trial, Mr. Masterson testified that he voluntarily confessed to capital murder because he wanted the death penalty rather than a life in prison. Unfortunately, the jury did not believe him because his trial attorneys did not consult with experts about Mr. Honeycutt's cause of death, or Mr. Masterson's trauma, depression, PTSD, and other mental illnesses. But besides that readily available scientific evidence, Mr. Masterson was also suffering other serious brain-chemistry problems that science had not yet recognized.

When the brain is repeatedly exposed to drugs, it naturally adjusts its chemistry to tolerate the effects of the drugs and achieve stimulation. Ex. 3. Because stimulant drugs release dopamine and stimulate the brain to anticipate pleasurable events, Mr. Masterson became

profoundly energized and euphoric. So when Mr. Masterson discontinued the stimulant drug use at the time of his arrest, his brain developed symptoms of hyperactivity and craved more drugs to maintain normality. *Id.*

At the time of Mr. Masterson's interrogation, he was suffering a major-depression episode because of stimulant withdrawal, known as "transient stimulant withdrawal depression." Ex. 3. His confession was a desperate attempt to commit suicide. *Id.* When the depression subsided, Mr. Masterson no longer wanted the State to put him to death. He testified on his own behalf in a doomed attempt to convince the jury that he was not guilty of capital murder. Without neuropsychological evidence to explain why Mr. Masterson would make a false confession to capital murder, the jury rejected Mr. Masterson's pleas of innocence.

After the jury convicted Mr. Masterson of capital murder, he sank into his depressed, suicidal shell again. To further his suicidal goal, Mr. Masterson once again took the stand during the sentencing phase and pled for a death sentence. 22 R.R. 100. His suicidal urges won that day; the jury obliged.

#### **IV. Mr. Masterson's brain anomalies caused him to behave bizarrely and to continue his suicidal behavior during the trial and post-conviction litigation.**

Mr. Masterson Masterson remained suicidal while housed on death row. His *pro se* filings started somewhat benignly; they were more bizarre than suicidal. But Mr. Masterson was exhibiting disorganized and paranoid thinking that displayed his severe mental illness and brain anomaly. On October 20, 2011, Mr. Masterson wrote a letter to the Clerk of the United States District Court for the Southern District of Texas, warning the court that another death-row inmate would write to sabotage his case. Pet. Letter, ECF No. 23. The other inmate had no interest in writing the court about Mr. Masterson's case. This bizarre paranoia, however, revealed that Mr. Masterson's brain was not functioning correctly.

After he realized that his federal attorney would not be responding to his attempts to communicate, *see* Ex. 19, Mr. Masterson sank into another deep, suicidal depression. Over a period of eight months, Mr. Masterson wrote the federal district court three times asking to drop his legal challenges. On August 10, 2012, Mr. Masterson wrote to the court saying that he wanted to be executed because his lawyers, family, and friends had abandoned him. He no longer had the will to live after everyone who was supposed to care for his fate abandoned him and lied to him. *Id.* at ECF No. 39. When the court did not respond to that request, Mr. Masterson wrote again on March 15, 2013. *Id.* at ECF No. 52. In that letter, Mr. Masterson knew that his habeas petition would fail without any additional amendments, so he asked the court to set his execution date as soon as the petition would be denied. And less than a month later, Mr. Masterson directly expressed his ultimate desire: to waive any further legal challenges and be put to death. *Id.* at ECF No. 61. Mr. Masterson's state of mind appeared to flip-flop almost every two to three months. He was conflicted by a will to live and a desire to end his suffering. Due to stress and want of a fair trial, Mr. Masterson's depression worsened to include frequent headaches and unmanageable pain.

After Mr. Masterson's final letter asking the court to expedite his death, prison officials prescribed him Zoloft, a common anti-depressant. This common remedy alleviated the severity of Mr. Masterson's crushing depression and he filed a motion in the district court withdrawing his three previous letters volunteering for execution. *Id.* at ECF No. 64. He realized that he had been so deeply depressed that he had been attempting to commit suicide. *Id.* After receiving a simple anti-depression treatment, Mr. Masterson wanted once again to fight for his life.

## REASONS FOR GRANTING THE WRIT

### I. Mr. Masterson presents exceptional circumstances for this Court's intervention.

Mr. Masterson presents compelling, exceptional circumstances for this Court to intervene. First, Mr. Masterson is actually innocent of any murder, including capital murder. Second, newly developed science shows that Mr. Masterson falsely confessed to murder and acted suicidally while attempting to volunteer for the death penalty. Finally, Mr. Masterson's attorneys failed him at every step of his litigation, virtually foreclosing any chance for relief despite his meritorious habeas claims.

#### a. Mr. Masterson is actually innocent.

The State relied on two crucial pieces of evidence to prove that Mr. Masterson committed a premeditated, heinous murder: (1) an expert witness, Assistant Medical Examiner Paul Shrode, who opined that Mr. Masterson intentionally and cruelly strangled Mr. Honeycutt to death and (2) Mr. Masterson's confession that he intended to kill Mr. Honeycutt. Reliable science now shows that both of these foundations are incorrect and that Mr. Honeycutt's death was not a homicide. Mr. Masterson is actually innocent. And his innocence is a freestanding constitutional bar to his continued incarceration and pending execution. *See In re Davis*, 557 U.S. 952, 953 (2009); *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, without deciding, that a "persuasive demonstration of 'actual innocence' made after trial would . . . warrant habeas relief").

#### i. The decedent died from a heart attack – not strangulation.

The State's expert witness who performed Mr. Honeycutt's autopsy was a fraud; he botched the autopsy, and he fabricated testimony to bolster the State's case without having a valid scientific basis for that testimony. Mr. Masterson retained two medical experts who



exposed Mr. Shrode's mistakes. Mr. Shrode's testimony was the only expert evidence that Mr. Honeycutt's cause of death was homicide. As every pathologist to look at the autopsy report since Mr. Masterson's conviction and sentence has pointed out, Mr. Shrode's opinion was incorrect because he did not understand elementary medical concepts. Instead, he simply conformed his opinion to the prosecution's theory of the case and testified falsely that it was based on his autopsy findings. Ex. 13 at 9.

Mr. Shrode opined that Mr. Honeycutt's death was a homicide and that the cause of death was external neck compression. He noted that Mr. Honeycutt had a critical artery with more than 90% blockage, but discounted that as a contributor to the death, testifying that his opinion, based solely on his autopsy findings, was that Mr. Honeycutt was intentionally strangled to death. In 2015, Mr. Masterson's qualified medical expert reviewed Mr. Shrode's work and exposed his errors. Ex. 13. In addition, Mr. Masterson's other medical expert, Dr. Paul B. Radelat, opined that Mr. Honeycutt's autopsy results were consistent with Mr. Masterson's trial testimony. Ex. 12.

Dr. Christena Roberts directly contradicts Mr. Shrode's findings. As an initial matter, she notes that Mr. Shrode did not properly review his work and that he did not follow all necessary protocols to allow his work to be reviewed. Ex. 13.

First, Dr. Roberts noted that the decedent was found with his face lower than the rest of his body. She correctly identified that the petechial hemorrhages on the face are often caused by increased pressure on blood vessels caused by gravity *after death*. Dr. Roberts noted that she had personally seen cases with much worse hemorrhaging just from the gravity of a face being lower than the rest of the body. *Id.* Therefore, Mr. Shrode testified falsely when he asserted the petechial hemorrhages were indicative of strangulation.

Second, Dr. Roberts exposed Mr. Shrode's false testimony regarding defensive wounds on the decedent. She reviewed the autopsy photos, finding one that showed the left hand. Mr. Shrode swore that he noted defensive wounds on this hand. Dr. Roberts correctly noted that the hand had no defensive wounds. And even if the decedent had bruises that were undetectable in the photos, scientific evidence cannot date them without histological sections, which Mr. Shrode did not perform. *Id.*

Third, Dr. Roberts exposed Mr. Shrode's incorrect assumption that the decedent had suffered blunt force trauma. Mr. Shrode emphasized an abrasion over the decedent's right eye and three abrasions on his upper right buttock. But these superficial marks have no medical or forensic significance despite Mr. Shrode's testimony. The mark above Mr. Honeycutt's eye is consistent with a common "rug burn" easily explained by the face resting on the floor. And the linear, superficial scratches on Mr. Honeycutt's buttocks are consistent with consensual sex as Mr. Masterson described. *Id.*

Most importantly, Dr. Roberts explained why Mr. Shrode's expert opinion that Mr. Honeycutt died from external neck compression was incorrect. *Id.* She started by noting that "there is no documentation in the autopsy report of evidence of external neck compression." She destroyed the basis for Mr. Shrode's erroneous findings:

"[H]emorrhagic sclera" (white part of the eye) and congestion of the conjunctivae lining the eye (bulbar) and the eyelids (palpebral). There is no documentation of petechial hemorrhages of the conjunctivae. There is no description of distribution or size of the petechiae. There is no description of confluence of petechiae (larger pools). The only place this is listed is under "pathologic findings" simply as a diagnosis of "bilateral bulbar and palpebral petechial hemorrhages".

It should be noted that petechial hemorrhages when found with other findings in the neck are "supportive" of a diagnosis of strangulation and are not "diagnostic" of strangulation. Petechial hemorrhages are caused by increased pressure in the vessels in the eyes which results in rupture of the tiny capillaries. This can occur in various types of manual strangulation (see discussion below) but can also be

seen in natural disease processes such as fatal heart disease. Petechial hemorrhages can be found in positional asphyxia (upside down position) secondary to pooling of the blood, increased pressure and rupture of the vessels.

Hemorrhages in the eyes can also be seen when the head is in a lower position than the body after death (or when just face down) and the blood pools in the facial tissues by gravity. The vessels eventually rupture causing petechial hemorrhages that may become large. This is called dependent lividity as would be expected with the body position in this case. It is quite easy to find textbook references in Forensic literature showing extensive facial, periorbital and conjunctival hemorrhages in people who die of heart disease and are found in the prone position (face down).

*As noted above, review of the photographs from the court records clearly show congestion that is consistent with dependent lividity. There are a few scattered large petechial hemorrhages that could be from the extreme dependent position of the body or could be from antemortem increased pressure. There is no scientific reliable way to separate the two as petechial hemorrhages are a non-specific finding that only indicates increased pressure with rupture of the tiny vessels and pooling. In addition, there were early decompositional changes of the face and some of the red discoloration in the eyes would be from decomposition. These changes also can't be reliably separated from dependent lividity.*

Ex. 13 at 4 (emphasis in original). And to drive home Mr. Shrode's egregious errors, Dr. Roberts noted that even Mr. Shrode admitted that Mr. Honeycutt's body showed no physical signs of strangulation. The body had no external bruising on the neck, and it had no internal evidence of trauma. The lack of injuries on the inside or outside of Mr. Honeycutt's neck should have ruled out strangulation. Specifically, Dr. Roberts explained that strangulation leaves discoloration of the soft tissues inside the neck, which is not present here. Without this discoloration, there could be no hemorrhaging in the anterior neck structures. So Mr. Honeycutt was not strangled to death, as Mr. Shrode opined. Furthermore, other normally present physical signs of strangulation were missing. The sensitive hyoid bone and thyroid cartilage were intact and had no fractures as qualified medical professionals would normally expect to see in strangulation deaths. There was not even blood around the structures. Critically, the autopsy did not note any petechiae of the larynx or trachea. And finally, Mr. Honeycutt's neck had no signs of defensive wounds or a

struggle as normally seen in manual-strangulation cases. Dr. Roberts would expect to see these scratches in a case of manual strangulation. Ex. 13.

Dr. Roberts specifically rebutted Mr. Shrode's testimony that Mr. Honeycutt must have died during manual strangulation, and once again highlighted Mr. Shrode's clinically unacceptable practices:

Mr. Shrode testified that the victim could not have survived the external neck compression. Victims often lose consciousness from manual strangulation and suffer anoxic brain injury and die at a later time. He states during his testimony that this was not present at autopsy as evidenced by "no cerebral edema." The autopsy report has a blank space where the brain weight should have been documented so it is unknown is [*sic*] the brain was swollen and heavier than it should have been. The standard of Forensic Pathology would be to submit sections of brain for microscopic examination and look for ischemic changes. As no microscopic sections were taken of the brain Mr. Shrode or another pathologist can't rule out the presence of ischemic changes. As no microscopic sections were taken of the brain and no brain weight was recorded, no independent evaluation can be made.

Ex. 13 at 5. Mr. Shrode's disregard for this important procedure ensures that no other professional can determine if the heart muscle had signs of being ischemic, medical jargon for a heart attack. After reviewing all available evidence, Dr. Roberts opined that Mr. Honeycutt died of a heart attack – not strangulation. This expert opinion supports Mr. Masterson's testimony that Mr. Honeycutt died accidentally after the two engaged in sexual asphyxiation.

Dr. Roberts' review of the available evidence showed the most critical problem with the State's case: "there is no evidence of this neck compression at autopsy but only relayed by the defendant." She gave her qualified, expert opinion:

There is no independent scientific evidence of external neck compression or any other type of manual strangulation in the autopsy of Darrin Honeycutt. There is no external bruising of the neck, hemorrhage in the strap muscles or soft tissues of the neck or fractures of neck structures. The "petechial hemorrhages" that were listed as a diagnosis in the autopsy report and testified to as evidence of external neck compression are non-specific. The hemorrhages in the eyes are simply from increased pressure and rupture of tiny capillaries. This could have occurred from

a fatal cardiac event, antemortem compression of the neck or dependent lividity from blood pooling after death. There is no accurate scientific method to distinguish between them. In addition, there were early decompositional changes of the face with some degree of red discoloration further complicating interpretation.

Even in the event that one could separate out antemortem petechial hemorrhages they are “supportive” of but not “diagnostic” of a manual compression event. The pathologist appears to have relied on the “confession” and not any independent scientific observation.

In his trial Mr. Masterson Masterson testified that during a sexual act Darrin Honeycutt asked him to perform erotic asphyxiation. During this act his body weight was pressing on the torso of the decedent and when they both fell to the floor they were in a dependent position. The decreased oxygenation could have created stress on the heart. Darrin Honeycutt had severe coronary artery disease which easily could have triggered an ischemic event with resultant fatal ventricular arrhythmia and death following the increased stress on the heart.

The pathologist in this case inaccurately ruled out that Darrin Honeycutt died from an acute ischemic event of the heart followed by a lethal arrhythmia based on the absence of hemorrhaging in the heart muscle. As noted above there would be no visual findings in the heart tissue if one died immediately from that event.

Ex. 13 at 8-9.

The weight of the available scientific medical evidence now shows the truth about Mr. Honeycutt’s death. Mr. Honeycutt was a seriously ill man before his death. He suffered from AIDS and took the harsh medicines necessary to combat that terrible virus. Those harsh medicines have serious adverse side effects that impact the liver. In addition to those awful ailments, Mr. Honeycutt had severe coronary artery disease. His heart was significantly weakened, and his main artery was already over 90% closed by what is commonly called ‘The Widow Maker.’ 18 R.R. 222. And Mr. Honeycutt did not maintain a calm lifestyle to protect his failing health. Instead, he regularly went to bars, drank alcohol, and stayed out until establishments closed in the early morning hours. His close friends warned him about his lifestyle, but he did not listen.

In the early morning hours of January 26, 2001, Mr. Honeycutt pushed his ailing body to extremes for physical pleasure. He drank alcohol while taking harsh medications that adversely affected his liver. He stayed at a bar until it closed around 2:00 AM. He took a stranger home for near-anonymous sex. And to further heighten his sexual pleasure, he asked Mr. Masterson to perform a risky sexual practice known as sexual asphyxiation. Mr. Honeycutt's already failing health simply could not handle that extra stress. The lack of oxygen, abundance of carbon dioxide, added stress, and weight of Mr. Masterson's body was finally too much for his severely diseased heart. Mr. Honeycutt had a fatal heart attack. *See* Ex. 13. He did not die from strangulation. *See id.*

**ii. Newly developed neuropsychological science shows why Mr. Masterson falsely confessed to police, asked the jury to sentence him to death, and repeatedly tried to volunteer for the death penalty.**

Florida police incarcerated Mr. Masterson as soon as they found him. That incarceration ended Mr. Masterson's drug binge, causing him to descend into extreme, suicidal depression.

Mr. Masterson began using drugs as a young teenager. He had run away from home to escape horrific physical and sexual abuse at the hands of his father and older brother. After he left, no one came to look for him; he was on his own. So he turned to the coping mechanisms that teenage runaways often use to survive: drugs and prostitution. His drug use quickly became drug addictions. And a drug addiction during adolescence severely damages brain development during one of the most critical times for that development. *See* Ex. 3.

At the time of Mr. Honeycutt's death and Mr. Masterson's subsequent arrest, Mr. Masterson was shooting cocaine, smoking crack cocaine, shooting methamphetamine, and drinking alcohol on a daily basis. He had been abusing those drugs every day for at least a year. In fact, Mr. Masterson smoked so much crack for so long that he started having seizures. When

Mr. Masterson was arrested and incarcerated, he no longer received his daily drugs, causing him to experience acute withdrawals. Unfortunately, neuropsychological research did not completely explain the significance of this withdrawal until after Mr. Masterson's trial and sentencing. *See id.*

In 2010, the National Institute of Alcohol Abuse and Alcoholism first recognized the need for further research in this area. As a result, it funded the first Consortium on the Neurobiology of Adolescent Drinking in Adulthood. Mr. Masterson retained an expert neurobiologist who is part of that consortium – Dr. Wilkie A. Wilson.

Dr. Wilson interviewed Mr. Masterson and reviewed the trial transcripts and expert reports. He noted the importance of one particular study that demonstrated a remarkable correlation between the symptoms of major depressive disorder and the effects of withdrawal from stimulants. The biological effects of stimulant withdrawal drastically decrease dopamine levels in the brain. Dopamine is the pleasure neurotransmitter in the brain. So without dopamine, Mr. Masterson was severely depressed. Dr. Wilson noted that these major depressive symptoms often include suicidal ideation. And that is exactly what happened to Mr. Masterson when he was incarcerated in Florida. *See id.*

After Dr. Wilson personally evaluated Mr. Masterson and reviewed all relevant scientific literature and case documents, he formed an expert opinion: Mr. Masterson was suicidal when Officer Null visited him in the Florida jail. *See id.* Mr. Masterson attempted to commit suicide by confession. *Id.* After Mr. Masterson spoke with Officer Null without being recorded, he gave a rehearsed confession that fit the evidence and statutory aggravator for the death penalty perfectly.

And how do we know that Mr. Masterson falsely confessed? We know he falsely confessed the way people often discover undeniable false confessions: the scientific evidence exonerates him. Mr. Honeycutt's death was not a homicide. He did not die from strangulation. His death was a natural one. Mr. Honeycutt died from a heart attack after putting too much stress on his severely diseased heart.

Mr. Masterson is an innocent man.

**b. Mr. Masterson's attorneys were so incompetent that they failed to notice widely reported evidence that would have supported habeas relief.**

Mr. Masterson's attorneys did not notice or investigate widely reported news that the State's expert witness and attending medical examiner, Mr. Shrode, lied to secure employment, performed below acceptable standards in multiple medical examiner offices, and incorrectly performed autopsies in other cases, including conforming his expert opinions to theories of prosecution without any scientific support. Ex. 5, 6, 7, 8, 9, 10. Had any of Mr. Masterson's attorneys investigated Mr. Shrode, they would have asserted his actual-innocence claim and two claims based on prosecutorial misconduct. All three claims would have resulted in habeas relief. But Mr. Masterson's appointed attorneys did not take these basic steps expected of post-conviction attorneys for even minor cases.

Mr. Masterson seeks to litigate these claims now. His actual-innocence claim is discussed above. His *Napue* and *Brady* claims are discussed below.

**iii. Texas repeatedly violated Mr. Masterson's Fourteenth Amendment right when it concealed evidence that its expert pathologist at trial perjured himself about his qualifications to give expert testimony on the decedent's cause of death.**

The State affirmatively suppressed evidence that its most critical guilt phase witness, Paul Shrode, falsified his credentials and gave false testimony in at least two other criminal



trials. The State continues to suppress evidence related to Mr. Shrode's firing from the El Paso County Medical Examiner's Office based on his fraud. Indeed, it never disclosed Shrode's fraud or its knowledge of the circumstances surrounding his firing to Mr. Masterson. The State furthermore elicited false testimony from Mr. Shrode at the guilt phase of Mr. Masterson's trial.

The State's misconduct violated Mr. Masterson's constitutional rights, entitling him to guilt-phase and sentencing-phase relief. Yet his original federal habeas counsel never raised a claim related to Mr. Shrode's false testimony or the State's suppression of material exculpatory evidence related to Mr. Shrode's falsified credentials and errors in other trials.

**1. The State suppressed and continues to suppress evidence that Paul Shrode falsified his credentials, was unqualified to give an expert opinion on Mr. Honeycutt's cause of death, and had given material, false testimony in other capital murder trials.**

Mr. Shrode is a prolific, habitual liar who does not care about oaths or the penalties of perjury. His courtroom lies and incorrect conclusions started before he moved to Texas. Before Texas, Mr. Shrode was a medical examiner in Ohio. There, he botched another autopsy in a capital case with eerily similar facts. *See Ex. 7*. In 1997 in *Ohio v. Nields*, Mr. Shrode provided the critical testimony that raised a murder to a capital murder. For Mr. Nields' clemency application filed in 2010, Mr. Shrode's former supervisor, Dr. Robert Pfalzgraf, reviewed Mr. Shrode's work and conclusions. The new doctor found serious flaws in Mr. Shrode's work. Specifically, Mr. Shrode gave false testimony in five crucial aspects:

1. Mr. Shrode opined that injuries on the decedent's head were inflicted between fifteen minutes and six hours before death. This opinion allowed the State to argue that Mr. Nields viciously attacked the decedent with premeditation, fitting its theory for capital murder. A qualified review of Mr. Shrode's medical conclusion, however, showed that it was inaccurate. Bruising can only be estimated by the healing process. The decedent had

no signs of healing, so there was no evidence that the injuries were inflicted any period of time before death.

2. In another effort to age injuries on the decedent's head, Mr. Shrode relied on rigor mortis to date bruising. But Dr. Pfalzgraf corrected this fundamental misunderstanding of medical science. Rigor mortis has no relevance to dating trauma or bruises.
3. *Disturbingly similar to his testimony in Mr. Masterson's case*, Mr. Shrode also opined that the decedent's injuries indicated that she sustained a concussion and lost consciousness before death. The State's argument based on this evidence was that Mr. Nields must have intended to kill the victim because she was unconscious before she was strangled to death. Dr. Pfalzgraf rectified Mr. Shrode's erroneous conclusion. Injuries cannot indicate a loss of consciousness; Mr. Shrode had no scientific basis to opine that the decedent lost consciousness before dying from the strangulation.
4. Mr. Shrode testified that the lack of DNA evidence under the decedent's fingernails indicates that she lost consciousness before dying from strangulation. But Dr. Pfalzgraf fixed this incorrect testimony. He informed the parole board that it is actually rare for fingernails to collect evidence during a crime.
5. Finally, Mr. Shrode used the presence of petechial to scientifically determine the time of death. And Dr. Pfalzgraf corrected this fundamental medical error. Petechial is not relevant to a time-of-death determination.

Ex. 17. Mr. Shrode's work was the basis for the State's theory that Mr. Nields killed the decedent with premeditation and prolonged viciousness. The State of Ohio also relied on Mr. Shrode's false testimony to argue to the jury that Mr. Nields continued to choke the decedent after she lost consciousness to ensure that she was dead, just as the State of Texas did in Mr.

Masterson's case. Mr. Nields received clemency on the basis of Mr. Shrode's flawed scientific testimony. *See id.*

And Mr. Shrode's lies and biased, shoddy work did not end when he moved to Texas. His first job in Texas was with the Harris County Medical Examiner's Office. He applied to that office on May 27, 1997. In his application, Mr. Shrode claimed to receive a degree from Southwest Texas State University that he did not receive. Ex. 4, 9. He did not earn any degree from Southwest Texas State University. Ex. 9.

Mr. Shrode's lies still continued afterward, becoming more brazen and distinguished. On his application for employment with the El Paso County Medical Examiner's Office, Mr. Shrode improved his degree significantly, declaring that he had obtained a graduate law degree from Southwest Texas State University. Ex. 9. He testified to this false degree under oath. Ex. 8 at 217. Incredibly, he then falsely asserted that he was a member of the State Bar of Texas from 1979 to 1983. *Id.* at 219-220. Mr. Shrode lied under oath and lied on his employment applications. He attended Southwest Texas State University for one semester in 1979. He took only political science courses. Ex. 9. He did not earn any degree, and certainly not a graduate law degree.

Eventually, Mr. Shrode's lack of qualification and lies caught up with him. Before Mr. Masterson's trial, the Harris County Medical Examiner's Office reprimanded Mr. Shrode for his "defective and improper work." Ex. 5. Specifically, Mr. Shrode incorrectly classified a death as a homicide when it was a drug overdose. *Id.* But Mr. Shrode's work did not improve afterward. In 2003, the Harris County Medical Examiner's Office again reprimanded Mr. Shrode. Ex. 6. Then, in 2007, Mr. Shrode was partially exposed as a fraud during a jury trial regarding Child

Protective Services and parents of a protected child. There, attorneys revealed that Mr. Shrode had lied on his employment applications, as discussed above. Ex. 8.

Mr. Shrode's charade culminated in 2010 when the Ohio governor commuted Mr. Nields' death sentence to a life sentence based on Mr. Shrode's incorrect and biased work in the case. Ex. 7. That same year, an El Paso County judge publicly declared that he had "lost confidence in Mr. Shrode." He predicted more revelations: "As time goes on, I believe a lot more is going to come to light regarding him." Ex. 10. After much pressure from politicians and others, the El Paso Chief Medical Examiner's Office finally fired Mr. Shrode. *See* Ex. 10.

Mr. Masterson remains ignorant of many of the facts related to Mr. Shrode's fraud on the States of Texas and Ohio, instances of his botched autopsy reports and findings, instances of his false testimony, and the circumstances surrounding his censure by the courts and the State of Texas. The State never notified Mr. Masterson when it learned it had presented patently false expert testimony at his trial, by a patently unreliable expert. It has not turned over any discovery for Mr. Masterson to rely upon for exculpatory and impeachment purposes. Instead, the State kept all information regarding Mr. Shrode's fraud hidden from Mr. Masterson, despite that Mr. Masterson cannot independently access much of this information.

Instead of informing Mr. Masterson that he was convicted on the basis of fraudulent expert testimony, the State attempted to preemptively avoid any legal challenges based on Mr. Shrode's dishonesty by arguing in its Answer and Motion for Summary Judgment in the initial federal proceedings that "Mr. Shrode opined that the crime was intentional rather than accidental because Honeycutt would have survived autoerotic asphyxiation. Mr. Shrode's conclusion was premised more on logic than medical opinion[]." Respondent Thaler's Answer and Motion for Summary Judgment with Brief in Support at p. 18, *Masterson v. Thaler*, Case No. 4:09-cv-

02731, ECF No. 5 (Oct. 12, 2010). The State's attempt to avoid this issue by disclaiming Mr. Shrode's expert status at Mr. Masterson's trial should not prevail. Mr. Shrode provided the jury with an expert pathological opinion, under oath, that Mr. Masterson intentionally killed Mr. Honeycutt based on a botched autopsy and false, scientifically unsupportable conclusions. The State is now seeking to execute Mr. Masterson without any court of law reviewing the validity of his conviction and sentence in light of Mr. Shrode's fraud on the court.

Mr. Masterson will seek discovery from the State to fully develop the claims he presents in this Petition.

**2. The State's concealment violated Mr. Masterson's constitutional right to not be convicted with false evidence.**

In *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court held that the prosecution's knowing use of false testimony violates a defendant's due process rights because "a deliberate deception of the court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.* at 112. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court condemned the State's knowing use of perjured testimony as a violation of the Fourteenth Amendment's due process guarantee. The Supreme Court has further held that a prosecutor has a constitutional obligation to correct his witness's perjured testimony, even if he did not know that the witness was going to lie. *Giglio v. United States*, 405 U.S. 150 (1972). Moreover, the prosecutor has a duty to correct false impressions created by its witnesses even without committing perjury. *Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States v. O'Keefe*, 128 F.3d 885, 897 (5th Cir. 1979).

To implicate a defendant's due-process rights, the testimony need not be "technically false, but merely leave the jury with a false impression." See *Blankenship v. Estelle*, 545 F.2d

510, 513 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) (per curiam); see *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *United States v. Harris*, 498 F.2d 1164, 1169 (3rd Cir.), *cert. denied*, 419 U.S. 1069 (1974).

A petitioner is entitled to relief for a due process violation under *Napue* if: (1) the testimony was false; (2) the State knew the testimony was false; and (3) “there is any reasonable likelihood that the false testimony could have affected the jury’s verdict.” *Napue*, 360 U.S. at 269-72; see *Ex parte Adams*, 768 S.W.2d 281, 289 (Tex. Crim. App. 1989). The knowing use of false testimony renders the result of a proceeding “fundamentally unfair, and [the verdict] must be set aside if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury.” *United States v. Bagley*, 473 U.S. 667, 679 (1985) (emphasis added).

***a. Mr. Shrode’s testimony was false and misleading.***

To qualify as false testimony, the testimony need not be technically false, but merely leave the jury with a false impression. See e.g. *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) (per curiam); see *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).

When testimony misleads the jury, it is false testimony for due-process purposes. Here, Mr. Shrode materially misled the jury when he testified falsely that, based on his autopsy, he formed the expert medical opinion that Mr. Honeycutt died of external neck compression, that the autopsy showed signs of a struggle, that his opinion was based solely on his autopsy findings, that he could rule out cerebral edema, and that he could rule out an accidental death caused by a

heart attack brought on by Mr. Honeycutt's blocked artery and consensual engagement in sexual asphyxiation. As Dr. Roberts reports, based on her expert review of Mr. Shrode's botched autopsy, Mr. Shrode did not testify based on scientific opinion. Instead, he "appears to have relied on the 'confession' and not any independent scientific observation." Ex. 13 at 9.

***b. Knowledge of Mr. Shrode's false and misleading testimony is imputable to the State because Mr. Shrode was part of the State's investigation team.***

The actual prosecutor assigned to a case need not know that the witness's testimony is false or misleading to establish a due process violation under *Napue*. Knowledge of false or misleading testimony must be imputed to the prosecution when any member of the prosecutor's team, including prosecutorial and investigative functions, is aware of the false testimony. *See Giglio*, 405 U.S. at 152-55.

Mr. Shrode was an arm of the prosecution's team, and, therefore, his knowledge that he testified falsely is imputable to the State. When Mr. Shrode performed Mr. Honeycutt's autopsy, he was participating in the investigation into a potential murder and was assisting the police and prosecution. Moreover, at some point, the State became aware of Mr. Shrode's lack of qualifications, and that he had repeatedly testified falsely. Even if the State can argue it had no way of discovering Mr. Shrode's false testimony at the time of trial, the State has no excuse for failing to correct this testimony after it was put on notice that Mr. Shrode had a long history of testifying falsely in a manner strikingly similar to the manner in which he testified in Mr. Masterson's case. At that point, the State had a duty to independently investigate whether it had presented false testimony against Mr. Masterson, and to inform Mr. Masterson and the courts when it discovered it had done so.

*c. There is a reasonable likelihood that Mr. Shrode's false testimony could have affected the jury's verdict.*

To evaluate *Napue* prejudice, courts use a lower standard than in *Brady* violations because it “involves a corruption of the truth-seeking function of the trial process.” *Bagley*, 473 U.S. at 681 (internal quotation marks omitted). Courts are called upon to determine whether the false testimony *could have* affected the jury’s verdict. *Id.* at 679. When reviewing whether the testimony could have affected the jury’s verdict, courts reverse convictions if they find “any reasonable likelihood” that it had an impact. *Id.* This standard is equivalent to the familiar *Chapman* harmless-beyond-a-reasonable-doubt standard. *Chapman v. California*, 386 U.S. 18 (1967). *See Bagley*, 473 U.S. at 679 n.9. The *Chapman* standard requires the State “to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Bagley*, 473 U.S. at 679 n.9.

Here, the State relied on the false statements of its expert medical examiner, Mr. Shrode, to convict Mr. Masterson. Mr. Shrode falsified information on his employment application, and without the necessary qualifications, he performed autopsies and testified about expert matters, ultimately rendering a false and misleading opinion that Mr. Honeycutt’s death was an intentional homicide caused by external neck compression. Ex. 4, 5, 6, 7, 8, 9, 10, 12, 13. After Mr. Masterson’s trial, the Harris County Medical Examiner’s Office reprimanded Shrode for deficient work in another case, namely identifying the incorrect cause of death. Ex. 5. In Mr. Masterson’s case, Shrode merely conformed his opinions to the prosecution’s theory, and testified falsely that his opinions were based on valid scientific evidence. Two expert pathologists later reviewed the autopsy results and concluded that Mr. Honeycutt died from a heart attack, consistent with Mr. Masterson’s testimony at trial.



The State filed a motion for summary judgment in Mr. Masterson's federal habeas case after it learned that Mr. Shrode falsified his credentials and made an incorrect determination of cause of death in at least two other capital cases. However, the State never informed Mr. Masterson's counsel or the court that Mr. Shrode had provided false and misleading testimony in this case, instead opting to anticipate and attempt to avoid a challenge to Shrode's expertise and credibility. The State's purposeful concealment of evidence, which directly addressed Shrode's credibility as an expert, clearly causes *Napue* prejudice.

**3. The State's concealment violated Mr. Masterson's constitutional entitlement to exculpatory evidence in the State's possession.**

The State must disclose exculpatory evidence to criminal defendants. U.S. Const. amend. XIV; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This constitutional obligation exists regardless of whether the defendant requests the information. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion). Exculpatory evidence is evidence favorable to the defendant that is material to either guilt or punishment. *Id.* And *Brady* evidence includes evidence that can be used by the defense to impeach State witnesses. *See, e.g., United States v. Bagley*, 473 U.S. 667, 677 (1985) (rejecting any distinction between impeachment and exculpatory evidence for *Brady* purposes); *Giglio v. U.S.*, 405 U.S. 150, 154 (1972). Under *Brady* and its progeny, a petitioner seeking relief must demonstrate: (1) the prosecution suppressed favorable evidence; and (2) the evidence was material to either the guilt or punishment. *Brady*, 272 U.S. at 373. *See Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Bagley*, 473 U.S. at 683; *Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir. 1994), *cert. denied*, 513 U.S. 1060 (1994); *Ex parte Adams*, 768 S.W.2d at 290.

- a. The State suppressed favorable exculpatory and impeachment evidence by failing to disclose Paul Shrode's fraud, his lack of qualifications to testify as an expert pathologist, and other instances of him giving false, misleading and scientifically unsound testimony.***

Information is favorable for *Brady* purposes if it tends to negate guilt or impeaches a State witness. *Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. 676-77.

Here, the State suppressed favorable information that its critical expert guilt-phase witness, Paul Shrode, knowingly falsified his credentials to qualify for employment to conduct autopsies and gave scientifically unsupported testimony in numerous cases, including Mr. Masterson's. This information is clearly favorable for two reasons. First, it tends to negate Mr. Masterson's guilt. Mr. Shrode was unqualified to perform Mr. Honeycutt's autopsy. His lack of qualification caused him to commit serious and fundamental medical errors during that autopsy that falsely implicated Mr. Masterson as a murderer. Furthermore, Mr. Shrode was not qualified to testify as an expert witness about Mr. Honeycutt's autopsy. Because he performed the autopsy, he was required to testify about it. U.S. Const. amend. VI; *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004). Without his testimony, the State would have had no expert evidence related to Mr. Honeycutt's cause of death.

Second, the information obviously would have impeached Mr. Shrode. A witness's dishonesty and bias are always permissible areas of impeaching cross-examination. U.S. Const. amend. VI; *see also Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Davis v. Alabama*, 415 U.S. 308 (1974). Mr. Shrode's fraud would have attacked both areas. It demonstrates that Mr. Shrode is a habitual liar who has no regard for sworn oaths or the penalties of perjury. But it also would have exposed Mr. Shrode's bias toward the State, because his

unscientific testimony boiled down to a reiteration of the State's arguments. Moreover, Mr. Masterson could have used the information to impeach Mr. Shrode's quality of work because he was not qualified to conduct the autopsy, which is at the center of Mr. Masterson's wrongful conviction and innocence.

Under any of these theories, Mr. Shrode's fraud is favorable to Mr. Masterson under *Brady* and its progeny.

The State suppresses information when it does not disclose it to the defense. It has no duty to disclose exculpatory information that belongs to the defendant, *see, e.g., United States v. Hsu*, 669 F.3d 112, 117 n.2 (2d Cir. 2012), that the defendant already possesses, *see, e.g., Pondexter v. Quarterman*, 537 F.3d 511, 526 (5th Cir. 2008), or that is outside the State's prosecuting and investigating team, *see, e.g., United States v. Reyerros*, 537 F.3d 270, 281-85 (3d Cir. 2008). But the prosecutor has an affirmative duty to investigate, learn, and disclose information known to other government agents. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006); *Kyles*, 514 U.S. at 437. The prosecutor's intent when not disclosing the evidence is irrelevant. *Brady*, 373 U.S. at 87.

The State had constructive knowledge that Mr. Shrode falsified his credentials, was not qualified to perform Mr. Honeycutt's autopsy, had botched and cut corners on Mr. Honeycutt's autopsy, and had provided scientifically unfounded testimony against Mr. Masterson because, as noted above, Mr. Shrode was a member of the prosecutor's team. The State's medical examiner is part of the investigative arm of the prosecution. Tex. Code Crim. Proc. Ann. art. 49.25 [989a] (West 2013). The Texas legislature requires assistant medical examiners to be qualified and to participate in homicide investigations. The legislature requires examiners to "hold inquests" for death investigations. The circumstances under which the legislature requires inquests include

when people are killed, die from natural causes, or die from unexplained causes. During the inquest, the examiners can take testimony under oath or take affidavits. Importantly, the examiner must conduct an autopsy to determine the cause of death beyond a reasonable doubt. After determining that cause, the Texas legislature requires medical examiners to report their findings to the appropriate district attorney. To aid with any potential prosecution, examiners must provide certain information that would normally be required in criminal prosecutions.

In this case, Mr. Shrode testified that the autopsy he performed on Mr. Honeycutt was numbered ML01-307. 18 R.R. 193. He explained that the initials “ML” stood for “medical legal.” *Id.* Moreover, when testifying on cross-examination that it was impossible for Mr. Honeycutt’s death to be the result of accidental sexual asphyxiation, Mr. Shrode testified, “Well, I don’t think so, and we use other things other than, you know, autopsy. It’s police investigation – I mean, that’s why it’s a medical legal case.” 18 R.R. 238.

Because Mr. Shrode’s knowledge is imputable to the State, the State had a duty to disclose this evidence to Mr. Masterson’s trial defense team. Moreover, despite Mr. Shrode’s dishonesty, the State could have easily discovered his fraudulent credentials by simply verifying the information on his application for employment. The State had a duty to do so under *Brady*. In addition, Mr. Shrode was first reprimanded by the Harris County Medical Examiner’s Office for making the wrong cause of death determination in 2001 -- before Mr. Masterson’s trial. The State had a duty to disclose this information as soon as it became aware of it.

***b. The suppressed evidence related to Paul Shrode’s fraud, lack of qualifications, and other instances of false testimony, was material exculpatory and impeachment evidence.***

Favorable evidence is material if it reasonably could have changed the outcome of the trial or sentence. *See, e.g., Cone v. Bell*, 556 U.S. 449, 469-70 (2009). Evidence reasonably could

have changed the outcome if the probability is “sufficient to undermine confidence” in the verdict or sentence. *Bagley*, 473 U.S. at 678, 682. When evaluating materiality for *Brady* purposes, the court cannot look at the favorable evidence alone; it must consider the cumulative effect of the evidence in light of the other evidence at trial. *Kyles v. Whitley*, 514 U.S. at 436. Accordingly, a single piece of suppressed *Brady* evidence can be sufficient to undermine confidence in an outcome. *See, e.g., Giglio v. United States*, 405 U.S. at 154-55.

Here, both parties argued to Mr. Masterson’s jury that the only question before it was whether Mr. Masterson intended Mr. Honeycutt’s murder, as the State argued, or whether Mr. Honeycutt died accidentally during consensual sex involving sexual asphyxiation, as the defense argued. Mr. Shrode supplied the only expert medical testimony relative to Honeycutt’s cause of death, and testified that his medical opinion was that Mr. Honeycutt’s death was an intentional homicide. His testimony significantly undermined the credibility of Mr. Masterson’s defense that the death was accidental. The jury, without any medical training, would naturally accept Mr. Shrode’s testimony that the death was not intentional.

Information that Mr. Shrode was not qualified to conduct autopsies, had botched numerous prior autopsies, had falsified his credentials to get the job as an assistant medical examiner in Harris County, and had given false, unscientific testimony in other criminal cases would have discredited Mr. Shrode completely in the eyes of the jury. It would have also prompted the defense to consult with their own expert pathologist and present testimony like that now provided by Dr. Roberts. *See Ex. 15*. Without Mr. Shrode’s evidence, and with the opinion of a *qualified* pathologist to assist them, the jury would have no basis upon which to determine beyond a reasonable doubt that Mr. Masterson intended Mr. Honeycutt’s death.

**II. Mr. Masterson's Petition is presented in a procedurally proper manner.**

**a. This Petition cannot be presented to any other court.**

Mr. Masterson cannot present this petition to any other court. He attempted to litigate these issues in the district court, but the Fifth Circuit denied his motion to do so. *In re Masterson*, No. 16-20031 (unpublished) (attached at Appendix C).

The Fifth Circuit discounted Mr. Masterson's newly developed neuropsychological scientific evidence in a troubling manner. First, it held that the evidence was not newly discovered because Mr. Masterson's habeas attorney did not exercise due diligence to identify it before filing his amended habeas petition. *Id.* at \*8-9. But the evidence was not available at the time of Mr. Masterson's trial, the benchmark this Court set. *Davis*, 557 U.S. at 952. Then, in a disturbing disregard for the science, it relied heavily on Mr. Masterson's false confession to decide that the State presented overwhelming evidence of Mr. Masterson's guilt. *Masterson*, No. 16-20031 at \*7.

Compounding its error handling Dr. Wilson's new scientific evidence, the Fifth Circuit improperly discounted Mr. Masterson's newly discovered evidence about Mr. Shrode and his botched autopsy in this case. The Fifth Circuit also incorrectly determined that Dr. Roberts' opinion is simply a competing expert opinion that disagrees with Mr. Shrode's. First, Mr. Shrode's testimony did not qualify as an expert medical opinion. Mr. Shrode conforms his opinions to the theory of prosecution. He makes up medical theories to portray deaths as horrible murders, just like in Mr. Nields' case. And Mr. Shrode did exactly that in Mr. Masterson's case. He harped on nonexistent evidence that Mr. Masterson continued to strangle the decedent after he lost consciousness. But correct medical science shows that this opinion is simply incorrect. Strangulation victims just do not always lose consciousness before dying from strangulation. *See*

Ex. 13 at 5. Additionally, Mr. Shrode fabricated scientific principles to discount a heart attack. He told the jury that heart attack victims have hemorrhages and scarring in their hearts. But this “expert opinion” simply is a lie. Elementary medical textbooks prove that heart attack victims do not always have hemorrhages or scarring, especially when they suddenly die.

Second, Mr. Shrode’s false testimony must be viewed in light of his repeated perjury and botched autopsies. Mr. Shrode was not just a doctor who made a simple mistake in Mr. Masterson’s case. Mr. Shrode is a fraud who lied to secure employment with at least three medical-examiner offices. He never paid attention to oaths requiring him to tell truth in courts of law. He lied about basic medical principles to make deaths look horrific – or perhaps he did not take basic medical classes. After transfer to the district court, Mr. Masterson will pursue discovery to uncover the depths and extent of Mr. Shrode’s fraud.

Dr. Roberts did not apply the same medical principles as Mr. Shrode and reach a different conclusion, as the Fifth Circuit decided. *Masterson*, No. 16-20031 at \*5. Dr. Roberts used accepted, long-established medical principles to reach sound, scientific conclusions. Mr. Shrode made up nonexistent medical principles to support his pre-existing conclusions based on police investigation. And that police investigation included Mr. Masterson’s false confession, which became Mr. Shrode’s starting point that science would never change.

Mr. Shrode was not just some hack with whom Dr. Roberts disagrees. He is either unqualified to understand basic medical principles or willing to lie about them to ensure the prosecution wins at trial – or perhaps both.

**b. Mr. Masterson exhausted the factual bases of his constitutional claims, but the state court's improper appointment of counsel interfered with his state court representation.**

Mr. Masterson's current state-habeas counsel, Mr. McCann, presented his newly discovered evidence to the state court. He did not, however, allege federal constitutional violations that could have been presented in a subsequent federal habeas petition. Instead, he raised federal constitutional violations that were previously litigated. Article 11.071 section 5 of the Texas Code of Criminal Procedure specifically and plainly forbids raising a previously litigated claim in a subsequent state habeas petition.

**iv. Good cause exists to forgive Mr. Masterson's failure to exhaust his claims in state court.**

**1. Mr. Masterson told his federal habeas counsel to investigate Mr. Shrode and his botched autopsy.**

Mr. Masterson wrote Mr. McCann many letters during his federal habeas representation. Mr. McCann ignored many of them. Mr. Masterson adamantly proclaims that he told Mr. McCann about Mr. Shrode's fraud and asked him to investigate it. Mr. McCann's negligence towards Mr. Masterson forced Mr. Masterson to file a bar complaint. When undersigned counsel asked for copies of Mr. Masterson's letters, Mr. McCann's office responded that it no longer had them. Ex. 16.

**2. Mr. Masterson's federal habeas counsel continued his representation in state court in violation of Texas Rules of Professional Conduct and clear state court precedent.**

Mr. Masterson has cause to excuse Mr. McCann's failure to raise the issues in this petition because he severed his attorney-client relationship with Mr. McCann. On July 17, 2015, the date that the trial court signed Mr. Masterson's death warrant, Mr. Masterson told Mr. McCann not to file anything on his behalf again. Mr. Masterson sent numerous letters confirming



that he had fired Mr. McCann. *See, e.g.*, Ex. 19. He then retained the services of undersigned counsel on a *pro bono* basis. He signed a retainer agreement. Ex. 17. In response, Mr. McCann had an *ex parte* conversation with the trial court judge to discuss the matter. The trial court judge told Mr. McCann that she would not replace him. Ex. 16. The Texas Board of Law Examiners granted undersigned counsel permission to appear on Mr. Masterson's behalf in his state-habeas litigation. Undersigned counsel then moved the trial court to appear *pro hac vice*. Ex. 18. The court would not docket the motion. Ex. 16. Mr. McCann acknowledged receipt of the motion but continued to represent Mr. Masterson despite Mr. Masterson's clear instruction to not do so.

Texas does not allow attorneys to represent clients after the client has fired them. Tex. Disc. R. Prof. Cond. 1.15(a)(3). In the habeas context, counsel cannot file any motions or application on an applicant's behalf if the applicant has not given the attorney permission to do so. *Ex parte Gallo*, 448 S.W.3d 1, 4 (Tex. Crim. App. 2014). Put simply, Mr. McCann was not allowed to file his deficient state-habeas application. And Mr. Masterson did everything in his power to stop Mr. McCann from doing so. Therefore, Mr. Masterson cannot be penalized for Mr. McCann's unauthorized filing.

### **3. Mr. Masterson is actually innocent.**

As discussed above, Mr. Masterson is actually innocent. His actual innocence excuses any failure to exhaust claims. *See Davis*, 557 U.S. at 953-54 (Stevens, J., concurring).

#### **v. Mr. Masterson is prejudiced because he has meritorious federal constitutional claims, including being actually innocent.**

Mr. Masterson's prior counsel's incompetence prejudiced him because he has meritorious federal constitutional claims, including claim of actual innocence and claims of prosecutorial misconduct.

**CONCLUSION**

Mr. Masterson has presented compelling, convincing evidence that he is actually innocent of murder and that the State violated his due-process rights by concealing exculpatory evidence and failing to correct false testimony. Therefore, Mr. Masterson respectfully asks this Honorable Court to grant him leave to proceed *in forma pauperis*, stay his pending execution, and transfer this case to the district court for discovery and factual findings.

Respectfully submitted,  
Richard Allen Masterson

By: \_\_\_\_\_  
Gregory W. Gardner<sup>1</sup>  
*Pro Bono Counsel for Petitioner*

---

<sup>1</sup> The author thanks and acknowledges Miranda Dore, Mark W. Hsen, Pam Ly, and Ryan S. Traegar, students at American University's Washington College of Law, and Erica Santamaria, a student at the Georgetown University Law Center.

**VERIFICATION**

I, Gregory W. Gardner, am the attorney for Richard Allen Masterson, Petitioner in this Petition for a Writ of Habeas Corpus. I have read the petition and am familiar with its contents. On behalf of Richard Allen Masterson and on information and belief, I verify, under the penalties of perjury, that the factual matters stated in the petition are true and correct to the best of my knowledge.

DATED: January 19, 2016

---

Gregory W. Gardner  
Attorney for Mr. Masterson

**CERTIFICATE OF SERVICE**

I certify that I delivered a copy of this Petition with all attachments, the Motion for Leave to Proceed *In Forma Pauperis*, and the Motion to Stay Execution to Assistant Attorney General W. Erich Dryden at erich.dryden@texasattorneygeneral.gov on this 19th day of January 2016. Mr. Dryden consented to this electronic service.

---

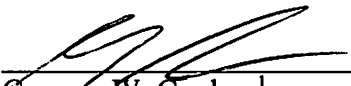
Gregory W. Gardner  
Attorney for Mr. Masterson

**CONCLUSION**

Mr. Masterson has presented compelling, convincing evidence that he is actually innocent of murder and that the State violated his due-process rights by concealing exculpatory evidence and failing to correct false testimony. Therefore, Mr. Masterson respectfully asks this Honorable Court to grant him leave to proceed *in forma pauperis*, stay his pending execution, and transfer this case to the district court for discovery and factual findings.

Respectfully submitted,  
Richard Allen Masterson

By:

  
\_\_\_\_\_  
Gregory W. Gardner<sup>1</sup>  
*Pro Bono Counsel for Petitioner*


---

<sup>1</sup> The author thanks and acknowledges Miranda Dore, Mark W. Hsen, Pam Ly, and Ryan S. Traegar, students at American University's Washington College of Law, and Erica Santamaria, a student at the Georgetown University Law Center.

**VERIFICATION**

I, Gregory W. Gardner, am the attorney for Richard Allen Masterson, Petitioner in this Petition for a Writ of Habeas Corpus. I have read the petition and am familiar with its contents. On behalf of Richard Allen Masterson and on information and belief, I verify, under the penalties of perjury, that the factual matters stated in the petition are true and correct to the best of my knowledge.

DATED: January 19, 2016



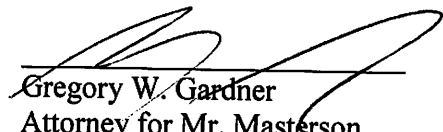
---

Gregory W. Gardner  
Attorney for Mr. Masterson

**CERTIFICATE OF SERVICE**

I certify that I delivered a copy of this Petition with all attachments, the Motion for Leave to Proceed *In Forma Pauperis*, and the Motion to Stay Execution to Assistant Attorney General W. Erich Dryden at erich.dryden@texasattorneygeneral.gov on this 19th day of January 2016.

Mr. Dryden consented to this electronic service.

  
Gregory W. Gardner  
Attorney for Mr. Masterson