No. 19-685

IN THE

Supreme Court of the United States

EDWARD GEORGE MCGREGOR,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S APPENDICES

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Attorney General
of Texas

JEFFREY C. MATEER
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Attorney General

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for Criminal Justice

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Attorneys for Respondent

Respondent's Appendix A

Case No. 09-DCR-053051 HC1
(The clerk of the convicting court will fill in this blank.)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE ARTICLE 11.07

NAME: **Edward George McGregor**

DATE OF BIRTH: **3/29/73**

PLACE OF CONFINEMENT: McConnell Unit

TDCJ-CID NUMBER: **1695586**

SID NUMBER: **5357635**

(1) This application concerns (check all that apply)**:**

√ **a conviction** □ **parole**

□ **a sentence** □ **mandatory supervision**

√ **time credit** □ **out-of-time appeal or petition for discretionary review**

(2) Which district court entered the judgment of the conviction you want relief from?

434th District Court of Fort Bend County

(3) What was the case number in the trial court?

09-DCR-053051

(4) What was the name of the trial judge?

James Shoemake

(5) Were you represented by counsel? If yes, provide the attorney's name:

Don Bankston

(6) What was the date that the judgment was entered?

9/3/10

(7) For what offense were you convicted and what was the sentence?

Capital Murder - Life

(8) If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you

convicted of and what was the sentence in each count?

_____

_____

(9) What was the plea you entered? (Check one.)

□ **guilty-open plea** □ **guilty-plea bargain**
√ **not guilty** □ ***nolo contendere*/no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

_____

_____

(10) What kind of trial did you have?

□ **no jury** □ **jury for guilt and punishment**

√ **jury for guilt, judge for Punishment**

(11) Did you testify at trial? If yes, at what phase of the trial did you testify?

Guilt-Innocence

(12) Did you appeal from the judgment of conviction?

√ yes □ no

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? First

(B) What was the case number?
01-10-01085-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Don Bankston

(D) What was the decision and the date of the decision? Affirmed 8/9/12

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

√ yes □ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number?
PD-0150-13

(B) What was the decision and the date of the decision?
Refused 4/17/13

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

□ yes √ no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number?

(B) What was the decision and the date of the decision?

(C) Please the reason that the current claims were not presented and could not have been presented in your previous application.

(15) Do you currently have any petition or appeal pending in any other state or federal court?

□ **yes** √ **no**

If you answered yes, please provide the name of the court and the case number:

(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies.)

□ **yes** √ **no**

If you answered yes, answer the following questions:

What date did you present the claim to the time credit resolution system?

(B) Did you receive a decision and, if yes, what was the date of the decision?

If you answered no, please explain why you have not submitted your claim:

Not required under *Ex parte Molina*, No. WR-83,799-01 (Tex. Crim. App Feb. 10, 2016). Also, the issue is framed as ineffective of assistance of trial counsel.

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.* If you have more than four grounds, use pages 14 and 15 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence. The recitation of the facts supporting each ground must be no longer than the two pages provided for the ground in the form.

You may include with the form a memorandum of law if you want to present legal authorities, but the Court will *not* consider grounds for relief set out in a memorandum of law that were not raised on the form. The citations and argument must be in a memorandum that complies with Texas Rules of Appellate Procedure 73 and does not exceed 15,000 words if computer-generated or 50 pages if not. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE:

THE STATE SUPPRESSED EVIDENCE AND USED FALSE TESTIMONY REGARDING THE BENEFITS PROVIDED TO ITS WITNESSES.

FACTS SUPPORTING GROUND ONE:

Delores Lee Gable was serving sentences of 90 years for solicitation of capital murder, 75 years for delivery of cocaine, 40 years for credit card abuse, and 25 years for escape when she wrote a letter to a prosecutor in 2006 generously offering to testify against applicant. The State readily accepted her offer without trying to confirm whether her information was true. She testified that she overheard applicant confess the murder to her husband while the police were outside the deceased's home in 1990. She denied any promises in exchange for her testimony. She specifically denied that she asked prosecutor

Beth Shipley to help her with parole, such as by writing a letter or making a recommendation. This testimony was false, as Shipley told Gable before trial that she would write a letter to the parole board if Gable helped her in applicant's case. Gable wrote a letter to Shipley during the trial setting forth what her parole lawyer wanted in that letter. Shipley wrote the letter to the parole board five days after the verdict. Gable wrote a letter in 2015 complaining that Shipley did not keep her promise, as she was still in prison. Shipley responded by letter that she promised to "tell people" that Gable helped and she did "exactly that."

Marvin Paxton and Adam Osani testified that, while they were confined with applicant in

the Harris County jail, he threatened to kill Paxton "like he did those other two bitches." Thereafter, he told Paxton, that he "fucked them," "lost his cool," and killed them. Paxton testified that he pled guilty to two aggravated robbery charges without an agreed recommendation on punishment and a cap of 45 years. Shipley told him that, if he provided good information and helped with applicant's case, it was "possible" that this would be brought to the attention of his prosecutor and the judge. Osani testified that he was charged with felony assault family violence, pled guilty to a misdemeanor, was sentenced to six months in jail, and went home. He denied that he received this favorable plea bargain in exchange for his testimony. In fact, Shipley arranged for Paxton to receive

seven year sentences in exchange for his testimony. She told Osani's lawyer that she would notify the trial court prosecutor of his cooperation after he testified in the grand jury. She honored her agreement, and the State reduced the felony to a misdemeanor and allowed him to plead guilty for time served eight days after he testified in the grand jury.

The State failed to disclose this information to defense counsel. Shipley elicited and failed to correct the witnesses' false testimony denying or minimizing these benefits.

GROUND TWO:

THE STATE USED FALSE TESTIMONY THAT APPLICANT CONFESSED TO DELORES LEE GABLE

FACTS SUPPORTING GROUND TWO:

Gable testified that she overheard applicant confess the murder to her husband while the police were outside the deceased's home in Missouri City. She saw a fresh cut over applicant's lip in the same location as his scar. She saw his father outside while he was talking to her husband. She provided seemingly trivial information about applicant and his family. She asserted that she came forward out of concern for the deceased's elderly parents, who lived out of state. The prosecutors argued during summation that, if she were lying, she would not

know these details about applicant, his family, and the deceased's parents. The defense did not answer these arguments.

Every aspect of Gable's testimony was fabricated. She knew about applicant, his family, and the deceased's parents because she was confined in prison with his former fiancée, Alisha Parker. Her mother and daughter provided affidavits that she lived with them in Houston at the time in question and never lived in Missouri City. Hospital records reflect that applicant received the scar over his lip more than two years after the murder. TDCJ records reflect that Mr. McGregor was in prison on the night of the murder. If Gable did not live in applicant's neighborhood that night, she lied

about hearing him confess to her husband in the driveway of their home.

GROUND THREE:

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE STAGE

FACTS SUPPORTING GROUND THREE:

Counsel knew about but failed to elicit testimony regarding Gable's relationship with Parker to explain how she acquired information about applicant, his family, and the deceased's parents. He failed to interview Gable's mother and daughter and call them to testify that she lived with them in southeast Houston at the time of the murder and never lived in Missouri City. He failed to offer the hospital records to demonstrate that applicant received the scar over his lip more than two years after the murder. And, he failed to ask the State to

stipulate that Mr. McGregor was not at his family's home on the night of the murder or introduce uncontrovertible evidence of same.

Counsel also failed to request an instruction in the charge pursuant to article 38.075 of the Code of Criminal Procedure that the jury could not convict applicant on the uncorroborated testimony of Paxton and Osani, his fellow jail inmates.

GROUND FOUR:

THE CUMULATIVE PREJUDICE OF THE PROSECUTORIAL MISCONDUCT AND THE DEFICIENT PERFORMANCE OF COUNSEL REQUIRES RELIEF.

FACTS SUPPORTING GROUND FOUR:

The jury convicted applicant of capital murder without knowing that Shipley agreed to write a letter informing the parole board of Gable's cooperation in exchange for her testimony; arranged with Paxton's lawyer and the trial court prosecutor for Paxton to receive seven-year sentences after he testified; and informed the trial court prosecutor of Osani's cooperation, which resulted in a plea bargain for time served on a misdemeanor.

The jury did not know that Gable was

confined in prison with applicant's former fiancée, who was the source of her information about applicant, his family, and the deceased's parents; that Gable lived with her mother and daughter in southeast Houston at the time of the murder and never lived in Missouri City; that Gable lied about seeing a cut over applicant's lip on the night of the murder, as he received the injury that left the scar more than two years later; and that Gable lied about seeing applicant's father outside on the night of the murder, as he was in prison. Finally, the jury did not know that it could not convict applicant on the uncorroborated testimony of Paxton and Osani.

The cumulative effect of the prejudice

resulting from the prosecutorial misconduct and the deficient performance of counsel is overwhelming. The remaining evidence was weak and circumstantial.

GROUND FIVE:

COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THAT APPLICANT RECEIVED ALL OF HIS PRETRIAL JAIL TIME CREDIT.

FACTS SUPPORTING GROUND:

Applicant posted bond on the primary case on May 11, 2006. He was charged in a Harris County capital murder case on December I, 2006. He has been confined since that date. The primary case was re indicted on October 26, 2009. He was convicted on September 3, 2010. The court gave him 306 days of pretrial jail time credit in the judgment. He did not receive jail time credit from December 1, 2006, to October 26, 2009.

The only apparent basis for denying applicant almost three years of jail time credit is

that, theoretically, he was on bond on the initial indictment in the primary case while he was confined on the Harris County case. Assuming arguendo that was the basis for the court's decision, counsel performed deficiently in failing to have the bondsman surrender the bond in the primary case once applicant was confined in the Harris County case. Applicant would have been entitled to jail time credit from the date the bondsman surrendered the bond had counsel performed this simple task. Accordingly, the court should correct the judgment nunc pro tune to give applicant additional jail time credit from December 1, 2006, through October 26, 2009.

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

This application must be verified or it will be dismissed for non-compliance. For verification purposes, an applicant is a person filing the application on his or her own behalf. A petitioner is a person filing the application on behalf of an applicant, for example, an applicant's attorney. An inmate is a person who is in custody.

The inmate applicant must sign either the "Oath Before a Notary Public" before a notary public or the "Inmate's Declaration" without a notary public. If the inmate is represented by a licensed attorney, the attorney may sign the "Oath Before a Notary Public" as petitioner and then complete "Petitioner's Information." A non-inmate applicant must sign the "Oath Before a Notary Public" before a notary public unless he is represented by a licensed attorney, in which case the attorney may sign the verification as petitioner.

A non-inmate non-attorney petitioner must sign the "Oath Before a Notary Public" before a notary public and must also complete "Petitioner's Information." An inmate petitioner must sign either the "Oath Before a Notary Public" before a notary public or the "Inmate's Declaration" without a notary

public and must also complete the appropriate "Petitioner's Information."

OATH BEFORE A NOTARY PUBLIC

STATE OF TEXAS
COUNTY OF _____

_____, being duly sworn, under oath says: "I am the applicant / petitioner (circle one) in this action and know the contents of the above application for a writ of habeas corpus and, according to my belief, the facts stated in the application form are true."

[Blank]
Signature of Applicant / Petitioner (circle one)

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____, 20_____.

[Blank]
Signature of Notary Public

PETITIONER'S INFORMATION

Petitioner's printed name: **Randy Schaffer**

State bar number, if applicable: **17724500**

Address: **1021 Main**

Suite 1440

Houston 77002

Telephone: **713-951-9555**

Fax: **713-951-9854**
noguilt@swbell.net

INMATE'S DECLARATION

I, Edward McGregor, am the applicant / ~~petitioner~~ (circle one) and being presently incarcerated in McConnell Unit, declare under penalty of perjury that, and according to my belief, the facts stated above in the above application are true and correct.

Signed on January 26, 2016

[Signature – Edward McGregor]
Signature of Applicant / Petitioner (circle one)

PETITIONER'S INFORMATION

Petitioner's printed name: **Randy Schaffer**

Address: **1021 Main, Suite 1440**

Houston, Texas 77002

noguilt@swbell.net

Telephone: **713-951-9555**

Fax: **713-951-9854**

Signed on January 26, 2016

[Signature – Randy Schaffer]
Signature Petitioner

Respondent's Appendix B

[*What follows includes only McGregor's legal arguments regarding "materiality" under* Napue]

GROUND ONE

THE STATE'S FAILURE TO DISCLOSE TO THE DEFENSE THAT ITS THREE KEY WITNESSES WOULD RECEIVE OR HAD RECEIVED CONSIDERATION IN EXCHANGE FOR THEIR TESTIMONY, AND ITS USE OF THEIR FALSE TESTIMONY TO THE CONTRARY, DENIED APPLICANT DUE PROCESS OF LAW AND A FAIR TRIAL.

A. The Standard of Review

Suppression by the prosecution of evidence favorable to the accused violates due process where. the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); U.S. Const. amends. V and XIV. The prosecution has a duty to disclose favorable evidence, even it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Impeachment evidence must be disclosed under *Brady*. *Strickler v. Greene*, 527 U.S. 262, 281-82 (1999). All information known to law

enforcement agencies is imputed to the prosecution. *Ex parte Adams*, 768 S.W. 2d 281, 292 (Tex. Crim. App. 1989).

Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The use of false testimony by the prosecution violates due process. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (prosecution used false testimony that key witness would not receive leniency for testimony); *Adams*, 768 S. W.2d at 288-89 (prosecution used false testimony that witness identified defendant in lineup). The prosecutor cannot knowingly allow a witness to create a false impression of the facts. *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (prosecutor told witness not to volunteer his sexual relationship with defendant's wife); *Davis v. State*, 831 S.W.2d 426, 439 (Tex. App.—Austin 1992, pet. ref'd) (prosecutor privately threatened witness with perjury and, after witness changed testimony, created false impression that witness did so on her own initiative). The defendant must show that the testimony was false or misleading and was material. He need not show that the prosecutor knew that the testimony was false in order to obtain relief. *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (new trial required where accomplice witness testified falsely, without

prosecutor's knowledge, that he did not sexually assault or harm victim, that he acted under duress, and that he was in another room when she was sexually assaulted and murdered).

A showing of materiality does not require the defendant to prove that disclosure of the suppressed evidence or impeachment of the false testimony would have resulted in an acquittal or a lesser sentence. The question is not whether he more likely than not would have received a different verdict, but whether be received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419,434 (1995).

* * *

C. Materiality

The State needed the testimony of Gable, Paxton, and Osani that applicant "confessed" to them to avoid an instructed verdict. Otherwise, it could prove only that applicant's semen was found in Wildman and, four years later, in a condom in the sheets of Barnum's bed. Evidence that applicant had sexual intercourse with two women who were murdered, although undoubtedly suspicious, would not be legally sufficient to prove beyond a reasonable doubt that he killed either or both of them. The State knew this when it bought the false testimony of three career criminals that applicant "confessed" to them.

The State portrayed Gable as a prison inmate

suffering from cancer who came forward (16 years later) to "do the right thing" and "clear her conscience."[FN34] It portrayed Paxton as a jail inmate who came forward because he "has a mother." It portrayed Osani as a jail inmate who did not come forward at all and reluctantly became involved after Paxton disclosed his name to the State. It presented and failed to correct Gable's false testimony that she did not request and would not receive assistance with parole in exchange for her testimony. It presented Osani's false testimony that he did not receive any consideration for his cooperation. It presented no testimony regarding the extent of the consideration that Paxton would receive. Bankston elicited that Paxton pled guilty to two aggravated robbery charges for a presentence investigation without an agreed recommendation on punishment and a cap of 45 years and that, if he provided good information and helped with applicant's case, "it was possible" that this would be brought to the attention of the trial court prosecutor and the judge. In fact, Shipley agreed to write and did write a letter informing the parole board of Gable's cooperation; arranged with Paxton's lawyer and the trial court prosecutor for Paxton to receive seven-year sentences after he testified; and informed the trial court prosecutor of Osani's grand jury testimony, which resulted in a plea bargain for time served on a misdemeanor.

The State's conduct in this case insults the integrity of the criminal justice system. The undisclosed agreements and benefits and the false testimony were material to the credibility of all three

key prosecution witnesses. *See Chabot*, 300 S.W.3d at 772. This evidence reasonably could be considered to put the case in such a different light as to undermine confidence in the verdict. *See Kyles*, 514 U.S. at 435. Applicant is entitled to a new trial. Shipley should be criminally prosecuted and disbarred for suborning perjury and failing to correct false testimony.

* * *

GROUND TWO

THE STATE'S USE OF' FALSE TESTIMONY THAT APPLICANT CONFESSED TO DELORES LEE GABLE DENIED HIM DUE PROCESS OF LAW AND A FAIR TRIAL.

* * *

B. Materiality

Gable was the key prosecution witness, as she knew details about applicant and his family (not to mention Wildman) that arguably could not be explained unless she knew them and lived in the neighborhood on the night of the murder. The State vigorously argued that she lived there that night. She did not.

Parker told Gable about applicant, his family, and the information reported in the press about the Wildman murder. Gable lived with her mother and daughter in southeast Houston in April of 1990 and never lived in Missouri City. Applicant received the

scar over his lip more than two years after the murder. Gable did not see Mr. McGregor on the night of the murder, as he was in prison. Thus, Gable testified falsely that she overheard applicant confess to her husband in the driveway of their home on the night of the murder, that he had a fresh cut over his lip, and that she saw Mr. McGregor that night.

Had the jury known that Gable was lying about applicant's "confession," it would have viewed the testimony of Paxton and Osani with greater skepticism especially had the court provided the instruction required by article 38.075 of the Code of Criminal Procedure that it could not convict applicant on the uncorroborated testimony of fellow jail inmates regarding a statement against his interest. *See* Tex. Crim. Proc. Code art. 38.075(a) (West 2010). Gable's false testimony reasonably could be considered to put the case in such a different light as to undermine confidence in the verdict. *See Kyles*, 514 U.S. at 435. Accordingly, applicant is entitled to a new trial.

* * *

Respondent's Appendix C

Case No. 09-DCR-053051 HC1
(The clerk of the convicting courtwill fill in this blank.)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Supplement To APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE ARTICLE 11.07

NAME: Edward George McGregor

DATE OF BIRTH: 3/29/73

PLACE OF CONFINEMENT: McConnell Unit

TDCJ-CID NUMBER: 1695586

SID NUMBER: 5357635

(1) This application concerns (check all that apply)**:**

√ **a conviction** □ **parole**

□ **a sentence** □ **mandatory supervision**

√ **time credit** □ **out-of-time appeal or petition for discretionary review**

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434th District Court of Fort Bend County

(3) What was the case number in the trial court?

09-DCR-053051

(4) What was the name of the trial judge?

James Shoemake

(5) Were you represented by counsel? If yes, provide the attorney's name:

Don Bankston

(6) What was the date that the judgment was entered?

9/3/10

(7) For what offense were you convicted and what was the sentence?

Capital Murder - Life

(8) If you were sentenced on more than one count of an indictment in the same court at

the same time, what counts were you convicted of and what was the sentence in each count?

_____

_____

(9) What was the plea you entered? (Check one.)

□ **guilty-open plea** □ **guilty-plea bargain**
√ **not guilty** □ ***nolo contendere*/no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

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(10) What kind of trial did you have?

□ **no jury** □ **jury for guilt and punishment**

√ **jury for guilt, judge for punishment**

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Guilt-Innocence

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If you did appeal, answer the following questions:

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If you did file a petition for discretionary review, answer the following questions:

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PD-0150-13

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□ yes √ no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number?

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(C) Please the reason that the current claims were not presented and could not have been presented in your previous application.

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(15) Do you currently have any petition or appeal pending in any other state or federal court?

□ yes √ no

If you answered yes, please provide the name of the court and the case number:

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(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies.)

□ yes √ no

If you answered yes, answer the following questions:

What date did you present the claim to the time credit resolution system?

_____

(B) Did you receive a decision and, if yes, what was the date of the decision?

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If you answered no, please explain why you have not submitted your claim:

Not required under *Ex parte Molina*, No. WR-83,799-01 (Tex. Crim. App Feb. 10, 2016). Also, the issue is framed as ineffective of assistance of trial counsel.

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GROUND ONE:

THE STATE SUPPRESSED EVIDENCE AND USED FALSE TESTIMONY REGARDING THE BENEFITS PROVIDED TO' ITS WITNESSES.

FACTS SUPPORTING GROUND ONE:

The State introduced a letter that Delores Gable wrote to Mike Elliott asserting that she had colon cancer and was "seeking some relief from (sic) testifying" or she would "just leave well enough alone." Beth Shipley told the court that "maybe the relief that Gable is seeking is clearing her conscience" because she has cancer rather than "anything about a deal." The State presented false evidence that Gable had colon cancer. TDCJ records reflect that she was not treated for cancer during the 14 years that she was incarcerated before she wrote the letter.

Donald Bankston interviewed Gable in prison in July of 2010. Gable told Bankston that she did not know Alicia Parker and was not aware of Parker's relationship with applicant. As a result, Bankston made a strategic decision not to elicit testimony that Gable was confined with Parker, applicant's former fiancée, for six months before she wrote the letter to Elliott offering to testify against applicant. The State failed to disclose to Bankston a letter that Gable wrote to FBI agent Glenn Gregory after she met with Bankston, in which she acknowledged that she falsely told him that she did not know Parker and was not aware of Parker's relationship with applicant. Had the State disclosed this letter, Bankston would have elicited testimony that Gable was confined with Parker and argued

during summation that Parker was the source of Gable's information about applicant and his family.

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

This application must be verified or it will be dismissed for non-compliance. For verification purposes, an applicant is a person filing the application on his or her own behalf. A petitioner is a person filing the application on behalf of an applicant, for example, an applicant's attorney. An inmate is a person who is in custody.

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A non-inmate non-attorney petitioner must sign the "Oath Before a Notary Public" before a notary public and must also complete "Petitioner's Information." An inmate petitioner must sign either the "Oath Before a Notary Public" before a notary public or the "Inmate's Declaration" without a notary

public and must also complete the appropriate "Petitioner's Information."

OATH BEFORE A NOTARY PUBLIC

STATE OF TEXAS
COUNTY OF HARRIS

Randy Schaffer, being duly sworn, under oath says: "I am the ~~applicant~~ / petitioner (circle one) in this action and know the contents of the above application for a writ of habeas corpus and, according to my belief, the facts stated in the application form are true."

[Signature – Randy Schaffer]
Signature of Applicant / Petitioner (circle one)

SUBSCRIBED AND SWORN TO BEFORE ME THIS **11 DAY OF Aug. 2016**.

[Signature – Loren Donalson, Norary]
Signature of Notary Public

PETITIONER'S INFORMATION

Petitioner's printed name: **Randy Schaffer**

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INMATE'S DECLARATION

I, _____, am the applicant / petitioner (circle one) and being presently incarcerated in _____, declare under penalty of perjury that, and according to my belief, the facts stated above in the above application are true and correct.

Signed on _____

[Blank]

Signature of Applicant / Petitioner (circle one)

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Signed on August 11, 2016

[Signature – Randy Schaffer]
Signature Petitioner

Respondent's Appendix D

No. WR-85,833-01

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE EDWARD GEORGE McGREGOR

On Application For A Writ Of Habeas Corpus From The 434th District Court Of Fort Bend County, Texas Cause Number 09-DCA-053051-A

APPLICANT'S MOTION FOR REHEARING

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PROCEDURAL HISTORY

Applicant was convicted of capital murder and sentenced to life in prison in 2010. The conviction was affirmed on appeal. McGregor v. State, 394 S.W.3d 90 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

Applicant filed a habeas corpus application in 2016. The trial court conducted an extensive evidentiary hearing and recommended that relief be granted because the State suppressed favorable impeachment evidence and used false testimony. This Court unanimously denied relief in an unpublished opinion issued on June 12, 2019. Applicant moves for rehearing pursuant to Rule of Appellate Procedure 79.1.

GROUNDS FOR REHEARING

1. The Court Failed To Accord The Appropriate Deference To The Trial Court's Findings Of Fact.

2. The Court Erred In Holding That The False Testimony Was Not Material.

REASONS FOR REHEARING

THE COURT ERRED IN HOLDING THAT THE FALSE TESTIMONY WAS NOT MATERIAL.

A. The Court's Opinion Will Encourage Prosecutors To Continue To Suppress Favorable Evidence and Use False Testimony.

The Court found that the record supports the trial court's findings that lead prosecutor Elizabeth Shipley promised Adam Osani that she would report his cooperation to his prosecutor; that she failed to disclose this promise to defense counsel Don Bankston; and that Osani testified falsely that he received no benefit from the State. Slip Op. at 16. The Court also held that the record supports the trial court's findings that Shipley offered a parole letter to Delores Lee Gable for her testimony; that she failed to disclose this promise to Bankston; and that Gable testified falsely that there was no such promise. Slip Op. at 20. The Court implicitly found—without saying so—that Shipley was a party to aggravated perjury or perjury.[1]

The Court recites Shipley's criminal and unethical conduct dispassionately, as if it were discussing just another day at the Harris County Criminal Courthouse. There is no hint that the Court is outraged, upset, or even a little miffed at her conduct. It did not even scold her by saying, "bad girl."

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[1] Shipley knowingly misled the jury that Marvin Paxton would not receive a benefit in exchange for his testimony. Applicant will discuss infra that the Court erred in misconstruing his argument and in refusing to defer to the trial court's findings regarding Paxton.

It is disconcerting that the highest criminal court in the state is so accustomed to prosecutors suppressing evidence and using false testimony that it does not consider such conduct to be worthy of reproach. Furthermore, the Court did not refer Shipley to the Chief Disciplinary Counsel for the State Bar of Texas or sanction her, as it has done to defense attorneys who draw its ire.[2] Prosecutors will continue to suppress favorable evidence and use false testimony unless there are adverse consequences. Wrongful convictions will recur unless this Court grants relief and imposes disciplinary sanctions.

It is troubling that the Court unanimously agreed to deny relief, despite the trial court's recommendation to grant it, where Shipley repeatedly

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[2] See Cannon v. State, 252 S.W.3d 342, 352 (Tex. Crim. App. 2008) (referring defense counsel to State Bar for refusing to participate in trial after trial court denied motion for continuance); Ex parte Medina, 361 S.W.3d 633, 643 (Tex. Crim. App. 2011) (holding habeas counsel in contempt and denying him compensation for filing "skeleton writ" in death penalty case); In re Dow, Nos. WR-61,939-01 and WR-61,939-02 (Tex. Crim. App. Jan. 14, 2015) (not designated for publication) (suspending habeas counsel from practicing before Court for one year for filing untimely subsequent application in death penalty case); Ex parte Stoneman, No. WR-86,966-01 (Tex. Crim. App. May 9, 2018) (not designated for publication) (referring habeas counsel to Chief Disciplinary Counsel for State Bar for representing in motion that State did not file objections or oppose relief in this Court in case where State did not file objections or any other document opposing relief after trial court entered findings recommending relief—which this Court granted based on those findings one week later).

engaged in criminal and unethical conduct to obtain a capital murder conviction. That she knowingly engaged in this despicable conduct demonstrates her belief that it was necessary to deceive the jury about the credibility of the convict witnesses because the remaining evidence demonstrated that applicant had sex with the complainant but not that he killed her.

B. The Court Did Not Accord The Appropriate Deference To The Trial Court's Findings Of Fact.

1. If The Trial Court's Findings Of Fact Are Inadequate, The Remedy Is To Remand For Additional Findings.

The Court found that the trial court "did not specify the nature of the promises or make specific credibility findings" and failed to make any findings regarding whether Delores Lee Gable lied about hearing applicant confess the murder to her husband.[3] 3 Slip Op. at 15, 20-21. If the findings are inadequate, the remedy is to remand the case to the trial court to make specific findings instead of this Court making those findings in the first instance.

2. The Court Erroneously Substituted

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[3] The Court observed that applicant proposed a finding of fact that Gable lied about hearing him confess the murder to her husband, but the trial court did not adopt it; instead, it found that she lied about other matters, which implies that she lied about the confession. Slip Op. at 20-21.

Its Judgment For The Trial Court's.

The Court disagreed with the trial court's recommendation and rejected some of its fact findings to justify denying relief. The Court readily adopts trial court findings to deny relief but rejects findings that would require it to grant relief. See Ex parte Bowman, 533 S.W.3d 337, 350-51 (Tex. Crim. App. 2017) (rejecting trial court's finding that defense counsel failed to obtain arresting officer's overtime pay records before trial where counsel testified that he did not remember).

"Trial judges, unlike their appellate court counterparts, are uniquely situated to 'observe firsthand the demeanor and appearance of a witness.'" Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). "Consequently, a trial judge 'is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony ….'" Id. at 24-25. "Just as a jury may 'believe all, some, or none of the testimony,' so may a trial judge believe all, some, or none" of it. Charles v. State, 146 S.W.3d 204, 213 (Tex. Crim. App. 2004). An appellate court typically must defer to trial court findings that are supported by the record, especially where they are based on credibility and demeanor. See State v. Guerrero, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

This Court has recognized that the legislative framework of the habeas statute "contemplates that the habeas judge is 'Johnny-on-the-Spot.'" Ex parte Simpson, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004).

The trial judge is "… the factfinder who resolves disputed factual issues, … applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief. This Court then has the statutory duty to review the trial court's factual findings and legal conclusions to ensure that they are supported by the record and are in accordance with the law. We are not the convicting trial court, and we are not the original factfinders." Id. at 668-69.

This Court can reject a trial court's finding that is clearly erroneous. However, the Supreme Court has cautioned, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). This Court's rejection of some of the trial court's key fact findings is clearly erroneous and undermines its ultimate holding. Judge Keasler said it best: "Dealing with the fact-bound intricacies of every case as it comes to us may be a 'tedious, hair-splitting' endeavor; it may occasionally produce 'bottom line' outcomes that we find unpalatable. But it is our duty as judges to earnestly grapple with the facts as settled in the courts below—and, having done so, to let the chips fall where they may." State v. Garcia, 569 S.W.3d 142, 159 (Tex. Crim. App. 2018). The Court did not adhere to this principle in applicant's case.

3. The Court Misconstrued Applicant's Arguments Regarding Marvin Paxton.

The jury heard testimony that Marvin Paxton pled guilty to two aggravated robbery charges with a cap of 45 years and that Shipley "possibly" would bring his cooperation to the attention of his prosecutor and the sentencing judge. The jury did not know that she already had decided to inform his prosecutor that he cooperated and to recommend substantial leniency; indeed, the week after applicant's trial, she arranged for him to be sentenced to seven years in prison (which made him immediately eligible for parole).

The Court erroneously asserted, "Applicant maintained at habeas that the seven-year deal was made before Paxton testified at Applicant's trial." Slip Op. at 17. Applicant did not suggest that Shipley agreed to seven years before Paxton testified; rather, he proposed in Finding 107 that the trial court find as follows:

> The State suppressed favorable impeachment evidence that Shipley intended to arrange for Paxton to receive reduced sentences in exchange for his testimony, elicited his false testimony that she never promised him anything, and failed to correct his false testimony that it was only "possible" that his cooperation would be brought to the attention of the prosecutor and the court at sentencing.

Moreover, Shipley argued during summation that Paxton was credible and, although Bankston may have engaged in this "wink and trust me stuff" when he was a prosecutor, she did not know what he was talking about and does not operate that way (21 R.R. 75-78). She lied to the jury, as this is exactly how she operated in applicant's case.

The Court concluded, "Paxton's potential bias was fully revealed by his testimony, and the fact that his cases were still pending and that he had no deal more specific than a 45-year cap suggested a greater incentive to curry favor with the State than otherwise." Slip Op. at 18. Although his "potential bias" may have been revealed, the jury was entitled to know his "actual bias," which derived from Shipley's promise. For obvious reasons, Shipley did not want the jury to know that the State bought his testimony.

The trial court found that Shipley failed to disclose to the defense that she intended to inform the prosecutor and the sentencing judge of Paxton's cooperation in the belief that she did not have to disclose that she intended to reduce his sentence after he testified (Findings 48, 49). This Court avoided addressing applicant's arguments regarding Paxton by erroneously asserting that he maintained, but failed to prove, that "the seven-year deal" was made before Paxton testified.

4. The Court Erroneously Substituted Its Judgment For The Trial Court's With Regard To Delores Lee Gable.

The Court correctly observed that the trial court implicitly found that Delores Lee Gable testified falsely that she heard applicant confess the murder to Brian. Slip Op. at 20-21. The trial court saw Gable testify at the trial and the habeas hearing. He, rather than this Court, is the "Johnny-on-the-Spot" factfinder who must determine her credibility. He found that she lied throughout her testimony.

This Court simply substituted its judgment for the trial court's with regard to Gable's credibility. For example, it concluded that applicant failed to prove that Gable did not live in his neighborhood on the night of the murder. Slip Op. at 23-24. This is significant because, if she and Brian did not live in his neighborhood, she was not in a position to hear him confess the murder to Brian that night. Her mother testified at the habeas hearing that Gable lived with her—although Gable did not stay at home every night. If her mother's testimony did not prove that Gable lied when she testified that she lived with Brian in the same neighborhood as applicant, what would? More importantly, the trial court believed that Gable lied, and this Court cannot properly second-guess that credibility determination.

Another glaring example of this Court's substituting its judgment for the trial court's concerns the cut lip. Gable testified that she noticed a fresh cut

on applicant's lip on the night of the murder that she had never before seen.[4] She insisted that the cut was in the same location as the scar that was visible on his lip at trial. Applicant proved beyond dispute that the cut that resulted in the scar occurred two years after the murder and required plastic surgery to repair. The trial court found that Gable lied about applicant having a cut on his lip that night (Conclusion 18). This Court concluded that the medical records establishing that applicant "suffered a serious cutting wound to his lip in 1992 that required plastic surgery … did not prove that he did not suffer a superficial cut in 1990." Slip Op. at 26. The trial court believed that Gable lied about the cut lip; there is evidence to support that finding; and this Court must defer to it.

C. The Court Erred In Its Materiality Analysis.

The Court concluded that Adam Osani's false testimony that he did not receive a benefit in exchange for his cooperation was immaterial because the jury knew about his plea bargain, he no longer needed to please the State, and Paxton corroborated his testimony. Slip Op. at 30-31. The jury did not know that Osani received a plea bargain for time-served on a misdemeanor as consideration for his grand jury testimony against applicant; that Shipley elicited his

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[4] Gable's testimony supported the inference that applicant's lip was cut during a violent struggle with the complainant.

false testimony to the contrary; and that she failed to correct his false testimony that the plea bargain had nothing to do with his cooperation. Had the jury known that Osani lied about the benefit he received from the State, it easily could have disbelieved his testimony that he heard applicant confess and also believed that Paxton would receive a similar benefit.

The Court found that Gable's false testimony that Shipley did not promise her a parole letter was immaterial because the jury knew that Gable wrote a letter to prosecutor Mike Elliott indicating that she was seeking a benefit and admitted on cross-examination that she heard that the prosecutor could help her obtain parole, and Linda Christian testified that Gable told her that she expected a parole benefit. Slip Op. at 29-30. The jury did not know that Shipley agreed to write a letter informing the parole board of Gable's cooperation in exchange for her testimony and that Gable testified falsely that she would not receive any consideration and never requested help making parole. Had the jury known that Gable lied about the benefit that she sought and expected to receive from the State, it easily could have disbelieved her testimony that she heard applicant confess.

The Court concluded that the false testimony was immaterial because the jury would have convicted applicant even had it known that Osani and Gable lied about the benefits they received or expected to receive, as DNA evidence connected him to the charged murder and an extraneous murder; it was unlikely that he

innocently had sex with both women[5]—whom he knew but denied knowing[6]—shortly before they were murdered four years apart; and "the State's case was fairly strong." Slip Op. at 33.

The Court disregarded the emphasis that the prosecutors placed on the testimony of Gable, Osani, and Paxton during summation. They argued that Gable's testimony was credible because she knew details about applicant's family and had information that a stranger would not know; and that applicant confessed both murders to Paxton and Osani (21 R.R. 18-19, 33-35, 74, 76-78). The Court also disregarded the testimony of the other prosecutor, Jeff Strange, that Gable, Osani, and Paxton were critical witnesses (3 H.R.R. 100-01, 193-94); that there were problems with Gable's testimony, as she "came out of nowhere," "needed to be vetted better," and seemed "a little bit too good to be true" (4 H. R.R. 79-80); and that the State dismissed the Harris County case because the evidence was not strong enough to convict applicant and because Osani and Paxton were "bad witnesses" (4 H.R.R. 48-

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[5] The Court failed to mention that each woman subjected herself to an undue risk of harm by virtue of her chosen profession and could have been murdered by any of her sexual partners or by a random intruder.

[6] The Court failed to mention that applicant explained to the police that he did not remember Kim Wildman's name 16 years after the murder and that he initially did not recognize Edwina Barnum's name because he knew her as "Nina" (19 R.R. 73-77).

49).

Finally, the Court concluded that the false testimony was immaterial because it "did not relate to or refute the witnesses' substantive testimony." Slip Op. at 33. This is a dubious proposition. The Court improperly dissected the credibility determination by requiring that the false testimony, to be material, must relate directly to applicant's alleged confession rather than to the witnesses' motive to testify that he confessed. The Court did not cite any caselaw holding that false testimony is material only if it directly impeaches the incriminating aspect of the witness's testimony. It also disregarded the cherished legal maximum, "*Falsus in uno, falsus in omnibus*" ("False in one thing, false in everything"), which lawyers have relied on for centuries to argue that a witness who lies about one matter is not credible on any matter. If the State's knowing use of false testimony that these convicts were not promised benefits for their testimony is not material, in and of itself, the Court overruled *sub silentio* well-settled precedent.[7]

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[7] Following the Court's rationale, the precedential value of several suppression of evidence and false testimony cases is in doubt. See Davis v. State, 831 S.W.2d 426, 438-39 (Tex. App. —Austin 1992, pet. ref'd) (prosecutor threatened witness with perjury charge, causing him to change his testimony, and then created false impression that he recanted on his own); Yates v. State, 171 S.W.3d 215, 221 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (psychiatrist falsely testified that "Law and Order" episode with

The Court should consider why Shipley would call convicts to testify to applicant's alleged confessions and suppress the benefits that they received or would receive if she believed that the jury would convict him based on the DNA evidence. A witness' motive to testify is, by definition, relevant to the credibility of the subject matter of his testimony—whether it be an identification or a confession. The Court effectively gives the State carte blanche to promise a witness a benefit and elicit his false testimony denying any such promise without suffering adverse consequences. If the Court upholds a conviction obtained by a prosecutor who engaged in criminal conduct at trial, the criminal justice system in Texas truly is broken.

CONCLUSION

This case threatens the integrity of the criminal justice system. Although the State knowingly suppressed favorable impeachment evidence and elicited and failed to correct false testimony, the Court held that it was not material because the jury would have convicted applicant even had it known that the convicts lied under oath in denying selfish motives to

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plot of mother drowning her children, claiming postpartum depression, and being found not guilty by reason of insanity aired before defendant killed her children); Ex parte Ghahremani, 332 S.W.3d 470, 478-81 (Tex. Crim. App. 2011) (prosecution suppressed evidence that minor complainant had sexual relationship with adult drug dealer that led her parents to send her away for psychiatric treatment and created false impression that defendant was responsible for her problems).

testify that he confessed to them. Upholding this conviction will encourage prosecutors to elicit and fail to correct false testimony, and this issue will arise time and again. The Court should grant rehearing and make clear—unanimously, unequivocally, and forcefully—that a conviction obtained by false testimony lacks honor and has no value.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this document on the prosecution by efiling on June 25, 2019.

/s/ Randy Schaffer
Randy Schaffer

CERTIFICATE OF COMPLIANCE

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/s/ Randy Schaffer
Randy Schaffer