[LOGO]

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

**NO. WR-73,203-03**

**EX PARTE KEVIN EDWARD CONNORS, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 937946-B IN THE 339TH DISTRICT COURT FROM HARRIS COUNTY**

***Per curiam. Yeary, J., concurred.***

**ORDER**

(Filed Apr. 1, 2020)

A jury convicted Applicant of murder, and the trial court assessed a forty-five year prison sentence. The Fourteenth Court of Appeals affirmed the conviction. *Connors v. State*, No. 14-05-00126-CR (Tex. App.—Houston [14th Dist.] del Aug. 10, 2006). Applicant filed a *pro se* application for a writ of habeas corpus that this Court denied on September 14, 2011. Applicant later filed, through habeas counsel, this subsequent application for a writ of habeas corpus. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends that the State failed to disclose exculpatory evidence regarding the victim's bad character—several police reports—and that the State presented evidence of the victim's good character—his attending a Christian school—that left a false impression. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Ex parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014); *Ex parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011) *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). The trial court conducted an evidentiary hearing. It has entered findings and recommends that habeas relief be granted on both grounds. The State objects.

This Court has independently reviewed the trial and habeas records, including the reporter's record of Applicant's trial. The trial court's habeas findings and recommendation are not supported by the record. Regarding the State's alleged failure to disclose exculpatory evidence, Applicant fails to show materiality. There is not a reasonable probability, considering the totality of the evidence, that the result of proceeding, either at guilt-innocence or at punishment, would have been different had the allegedly suppressed evidence been disclosed. This claim is denied.

Regarding the State's presentation of evidence that allegedly left a false impression, Applicant fails to show that the State presented any false or misleading testimony or that the State presented any evidence that created a false impression. To the extent that the claim is based on the "newly discovered" police reports,

it lacks merit and is denied. Otherwise, this claim is dismissed as subsequent. *See* TEX. CODE CRIM. PROC. art. 11.07 § 4; *Ex parte Whiteside*, 12 S.W.3d 819 (Tex. Crim. App. 2000); *Ex parte Brooks*, 219 S.W.3d 396 (Tex. Crim. App. 2007).

Filed: April 1, 2020
Do not publish

IN THE 339th DISTRICT COURT
OF HARRIS COUNTY, TEXAS

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| | § | CAUSE NO. 937946-B |
| KEVIN CONNORS | § | |

**APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(Filed May 22, 2019)

The Court, having considered the application for a writ of habeas corpus, the supporting brief and exhibits, and the official court records from the trial court proceeding and the habeas corpus proceeding, makes the following findings of fact and conclusions of law:

**PROCEDURAL AND FACTUAL BACKGROUND**

1. Applicant was indicted for murder in cause number 937946 in the 339th District Court of Harris County on April 17, 2003. He pled not guilty before the Honorable Caprice Cosper.

2. The indictment alleged that on or about January 30, 2003, applicant intentionally and knowingly caused the death of Adrian Heyne by driving his motor vehicle towards Heyne and causing it to collide with him, and that, intending to cause serious bodily injury, applicant caused Heyne's death by intentionally and knowingly committing an act clearly dangerous to human life (C.R. 15). It also

alleged in an enhancement paragraph that he was a second offender.

3. Jones W. Roach, Jr., and Jeffrey Hale represented applicant at trial.

### A. The State's Case

4. Applicant, Frank Lucero, and Sara Alexander had dinner and drinks on January 29, 2003 (5 R.R. 115-16, 121, 123, 127). Applicant drove them in an SUV (5 R.R. 121-22). After dinner they continued to drink at several bars, including Rick's, a topless club, and Sam's Boat, where applicant saw his ex-girlfriend, Heather Brauninger (5 R.R. 124-25, 129-31).

5. Brauninger, who was under 21, was a bartender at Sam's Boat, and applicant was a customer (4 R.R. 159-60, 164, 232). She socialized with him but denied dating him (4 R.R. 165-66, 231). She socialized with Adrian Heyne daily and reluctantly admitted that they were intimate (4 R.R. 168, 230). Heyne was an unemployed, 34-year-old bouncer (4 R.R. 168-70, 179).

6. Brauninger had finished her shift at Sam's when applicant, Lucero, and Alexander entered (4 R.R. 172-73). She joined them at Rick's next door, where they drank for about an hour while she waited for Heyne to finish his bouncer shift (4 R.R. 175, 178-79).

7. Brauninger walked back to Sam's; applicant's group drove (4 R.R. 180). They saw Heyne outside Sam's (5 R.R. 132-33).

8. An off-duty Harris County Sheriff's Office detective who was working an extra, private security job at Sam's had kicked Heyne out of the bar, followed him outside, and saw him remove his shirt and approach an SUV in the parking lot (3 R.R. 22-28). Heyne had a heated argument with applicant, who was in the SUV (3 R.R. 27-28, 34, 76). Heyne was large, muscular, aggressive, and spoke in a loud, confrontational voice (3 R.R. 46-47, 64-67; 5 R.R. 138). He confronted applicant, was pissed off, and they argued; Heyne tried to start a fight with applicant, punched him in the jaw, and slammed the car door into him (5 R.R. 135-39, 185-86).

9. Brauninger admitted that Heyne, who was intoxicated, was the aggressor and provoked applicant (4 R.R. 229-30).

10. Applicant feared Heyne and did not want to fight him (5 R.R. 141).

11. Applicant, Lucero, and Alexander left in applicant's SUV; Heyne left in his car (3 R.R. 29-30; 5 R.R. 140). Brauninger and Heyne went to Jaxx, another bar across the street from Sam's (4 R.R. 170-71, 188- 89). Applicant did not follow them (4 R.R. 235).

12. Brauninger and Heyne continued to drink for an hour (4 R.R. 190-91). He was a danger to himself and to her (4 R.R. 240).

13. Applicant, Lucero, and Alexander drove to a friend's house, got stuck in the mud, were pulled out by a tow truck, and then went to Jaxx (5 R.R. 142-44). Lucero was the front passenger, and Alexander was in the back seat (5 R.R. 147-48).

14. Applicant entered the driveway to Jaxx and immediately stopped when he unexpectedly saw Heyne and Heyne's car (5 R.R. 145, 147, 198). Applicant had not been looking for Heyne (5 R.R. 176).

15. Heyne exited Jaxx and vomited in the bushes; Brauninger entered the driver's seat of his car (4 R.R. 192-93). She saw applicant's SUV enter the parking lot driveway (4 R.R. 193-96).

16. Heyne took off his shirt, revealing a large tattoo covering his entire back, and stretched as if preparing to fight (5 R.R. 148, 199). He looked pissed off (5 R.R. 210). Only 10-15 feet away, he began running towards the driver's side of the SUV; and Lucero yelled at applicant to leave (5 R.R. 150-55, 200, 204, 232-33).

17. Brauninger yelled at Heyne to get in his car because she knew that he would cause trouble, but he continued towards the driver's side of the SUV (4 R.R. 205-06, 226; 5 R.R. 24). She thought there would be a fight if he knew that she had been with applicant earlier that night (5 R.R. 25-26).

18. Daniel Garza patronized Jaxx on the night of the incident (5 R.R. 34-36). He met Heyne that night but did not know applicant (5 R.R. 33). He drank eight beers and four shots in four hours and was waiting in the parking lot for a taxi when he heard Heyne and Brauninger argue as she begged him to enter the car (5 R.R. 38-44). Heyne was watching an SUV on a side street, appeared afraid, and asked Garza to request help from the bouncer (5 R.R. 45-49). Garza saw the SUV in the driveway not moving (5 R.R. 52). Heyne stood still in the parking lot and did not run towards it, but gestured with machismo as if he was not going to back down (5 R.R. 54-55, 89, 100-01).

19. Brauninger testified that Heyne approached the SUV with "swagger" but did not run (4 R.R. 207, 224, 241). She admitted that he was intoxicated and mad and was the first aggressor (5 R.R. 22, 24).

20. Lucero testified that applicant accelerated, swerved to the right and away from Heyne, and did not hit him (5 R.R. 154-56, 176, 205). Heyne "pushed off' the front center of the hood and was on it a couple seconds (5 R.R. 156-59, 166). While Heyne was on it, applicant turned left to avoid hitting a fence (5 R.R. 216-17).

21. Lucero believed that Heyne was trying to remove applicant from the SUV (5 R.R. 177). The SUV was not driving fast, and Heyne did not fly over it (5 R.R. 166-67, 208). Applicant

said, "He's coming after us," and did not stop or exit the SUV (5 R.R. 167-68). Lucero replied, "Go. Go. Go."

22. Brauninger testified that, when Heyne was within four feet of the SUV, it accelerated towards him and hit him, he went on the hood, and he "flew off" (4 R.R. 206-10, 223, 225, 245). She saw him on the ground bleeding (4 R.R. 210). He did not try to avoid applicant, and she did not know if applicant turned the SUV (4 R.R. 245-48). It drove away without stopping (4 R.R. 214-15).

23. Brauninger did not see how the SUV struck Heyne because it happened so fast (5 R.R. 21). She did not remember the SUV slamming on the breaks, nor did she know how fast it was driving (4 R.R. 256, 259).

24. Garza heard tires peel out, turned around, and saw the front hood of the SUV hit Heyne (5 R.R. 56, 93). Heyne went over the hood, landed on the ground, and hit his head on the concrete (5 R.R. 57, 9394). He did not ride on the hood, but flipped up in the air and over it (5 R.R. 104). The driver did not appear to try to avoid hitting Heyne and did not stop (5 R.R. 57, 64-65, 94). Garza could not identify the driver (5 R.R. 101-02). The event lasted ten seconds (5 R.R. 58).

25. Garza called 911 (5 R.R. 57, 59). He panicked because he had been drinking and left before the police arrived (5 R.R. 67, 110, 113).

26. Applicant drove to his ex-girlfriend Marie Farrell's house (5 R.R. 168). They arrived about 2:15 a.m., stayed about 35-40 minutes, and drove home (5 R.R. 168-72). They did not call the police because they did not know that Heyne was injured and thought that they had avoided a fight (5 R.R. 172).

27. I.M. Labdi, a Houston Police Department (HPD) accident investigator, inspected the scene and saw blood, tire tracks, and acceleration marks at the parking lot entrance and skid marks at the fence (3 R.R. 79-80, 94). The marks curved to the right; were made by the same car; and were consistent with a car accelerating, hitting and carrying a person, turning to the right, and slamming on the brakes (4 R.R. 14, 21-22, 72). They were not consistent with a person being hit and pushing off the car (4 R.R. 22-23). He concluded that the marks and location of the body were from the same incident (4 R.R. 23-24).

28. A car traveling less than 14 miles per hour will not cause fractures to a person hit by it (4 R.R. 67). A car with a low front end traveling between 14 and 25 miles per hour will flip him onto it upon impact (4 R.R. 67-68). An SUV has a higher front end, will knock him back or on the ground, but will not flip him onto the hood (4 R.R. 68). Traveling more than 35 miles per hour, it will knock him onto the hood (4 R.R. 69). He will have fractures if impacted at more than 14 or 25 miles per hour (4 R.R. 69-70, 80). To end up on the hood of an SUV traveling at a lower speed, he

would have to lift himself onto it (4 R.R. 71-72). If he approached a car as it accelerated and turned to the right, the collision likely would knock him back and to the driver's side (4 R.R. 81-82). If he put his arms up to resist the impact, it could cause him to be lifted onto the hood and carried (4 R.R. 88). It is possible for a person to confront an accelerating car, the car to turn to avoid a collision, the person to move in front of it and be carried along, the car to stop, and the person to be thrown from it (4 R.R. 89).

29. A set of tire marks at the scene was 22 feet long and curved continuously (4 R.R. 92, 97, 117-19).

30. Brauninger gave applicant's name to police on January 30, 2003, and identified him in a photospread (5 R.R. 286, 290-91).

31. HPD homicide sergeant C.E. Elliott went to applicant's mother's residence and told her that he needed to talk to applicant (5 R.R. 29394). She made a phone call and gave Elliott the phone (5 R.R. 295). Applicant identified himself and said that he had been at home with his friends Frank and Sara but did not know how to contact them (5 R.R. 296-97). Applicant agreed to meet Elliott that night but did not appear (5 R.R. 299, 301).

32. Applicant was charged with murder that night based on Brauninger's statement and identification (5 R.R. 303; 6 R.R. 19).

33. Elliott went to applicant's apartment the next day and saw an SUV in the parking lot (5 R.R. 304-05).

34. Brauninger initially lied about her relationship with Heyne because she did not want her mother to know that she had dated applicant and was at the center of the fatal argument (6 R.R. 16-19).

35. Dr. Brad Thomas, a neurosurgeon at Ben Taub hospital, examined Heyne, who had skull fractures and a subdural hematoma (4 R.R. 128- 29, 133-34, 137-38). Ninety-five percent of his injuries were to his head; he had no other fractures to his body (4 R.R. 155-57).

36. Thomas operated to remove the hematoma (4 R.R. 140-41). Heyne died several hours later from a severe closed head injury, probably the result of his head hitting the pavement (4 R.R. 146).

37. The autopsy revealed that Heyne died from blunt impact trauma to his head (6 R.R. 51).

38. Heyne's blood alcohol content was 0.271, which was "stuporous" (4 R.R. 150-51; 6 R.R. 96). A blood alcohol content of 0.27 is high and can be dangerous (6 R.R. 28).

39. A medical examiner testified that bone fractures in auto-pedestrian accidents begin to occur when the car is traveling more than 14 miles per hour and become severe at more than 25 miles per hour (6 R.R. 52, 73-74). Heyne had no leg or pelvis fractures, but he

had a large abrasion on the back of his left shoulder blade and abrasions and contusions on the backside of his body (6 R.R. 53, 75, 81).

40. Heyne's injuries were consistent with falling to the ground from the SUV or rolling off the SUV, landing on the ground, and hitting his head (6 R.R. 62, 82-83). A person hit by an SUV would be thrown backward or to the side (6 R.R. 71).

41. The SUV likely was traveling less than 14 miles per hour because Heyne had no body fractures (6 R.R. 87). The head injury was his only serious bodily injury (6 R.R. 91).

### B. The Defense

42. Marie Farrell talked to applicant on the phone on January 30, 2003 (6 R.R. 114-18). Lucero, Alexander, and he arrived at her home around 2:30 or 3:00 a.m. and stayed about two hours (6 R.R. 118-19, 132). He had mud on his pants and shoes; his jaw was swollen; and he was embarrassed (6 R.R. 119-22).

43. Applicant did not testify (6 R.R. 113).

## C. The Jury Charge, Arguments, And Verdict

44. The court instructed the jury in the charge on murder, the lesser included offenses of manslaughter and negligent homicide, and that voluntary intoxication is not a defense (C.R. 149-51, 153).

45. The prosecutor argued that the jury could not know what applicant was thinking during the incident (7 R.R. 31-32). He was upset by the first argument with Heyne at Sam's, which showed his intent at Jaxx (7 R.R. 34, 37-38). Garza saw the SUV on a side street, which showed that applicant was waiting for Heyne to leave Jaxx (7 R.R. 39-40). Applicant taunted and lured Heyne (7 R.R. 41). Hitting Heyne with the front center of his SUV demonstrated intent (7 R.R. 43). Heyne's head only hit the pavement because he was hit by the SUV, which was traveling under 14 miles per hour (7 R.R. 45-46). Applicant made evasive, false statements to Elliott (7 R.R. 53-54).

46. The defense argued that applicant was not guilty of murder because there was no evidence that he intended to cause Heyne's death or serious bodily injury, and that he was not guilty of manslaughter and criminally negligent homicide because driving under 14 miles per hour and turning the SUV away from Heyne were neither reckless nor negligent (7 R.R. 7, 26-28). Had he intended to cause death or serious bodily injury, he would have driven as fast as possible (7 R.R. 22-23). Heyne was grossly intoxicated, acting crazy and ready to fight, and was the first aggressor in both incidents; and Brauninger begged him to enter the car because she knew that he was capable of extreme violence (7 R.R. 8, 11-12, 16). Applicant feared him and accelerated to escape him (7 R.R. 7, 10). Had applicant intended to kill Heyne, he

would not have done so in front of witnesses who knew him and in a busy area of bars populated by police officers (7 R.R. 13).

47. The defense tried to discredit Brauninger and Garza, the only witnesses whose testimony damaged applicant. Brauninger did not remember that night and relied on her written statements (7 R.R. 16). She lied to the police about her relationships with Heyne and applicant (7 R.R. 17). She lied about the SUV driving straight toward Heyne when, in fact, the skid marks curved continuously (7 R.R. 1718). She lied about applicant "gunning" the SUV when, in fact, it was driving under 14 miles per hour at impact (7 R.R. 18). She lied about identifying applicant as the driver when, in fact, she did not see the driver (7 R.R. 20-21). Yet, the police charged applicant with murder based only on her false statement and identification and without completing the investigation (7 R.R. 21).

48. The defense also discredited Garza, who was intoxicated and fled the scene before the police arrived (7 R.R. 14-15). Jaxx's owner/manager encouraged him to contact the police two weeks after the incident to protect Jaxx from civil liability by blaming applicant for causing Heyne's death. Moreover, he lied about Heyne's body flipping over the SUV, which was impossible given its speed, the absence of body fractures, and the body's location in relation to the skid marks.

49. Finally, the defense argued that the medical and police testimony established that the evidence was consistent with Heyne charging at the SUV, grabbing the hood, riding on it, falling off, and sustaining fatal head injuries (7 R.R. 21-22).

50. The jury sent two notes. It disagreed about Lucero's testimony regarding the SUV's location before entering the parking lot, and it wanted to see the evidence (C.R. 160-61, 164).

51. The jury convicted applicant of murder (C.R. 157; 7 R.R. 57).

### D. The Sentencing Hearing

52. Applicant elected the court for punishment (C.R. 101).The Honorable Caprice Cosper conducted a pre-sentence investigation and a sentencing hearing five months after the trial.

53. Applicant pled true to the enhancement paragraph alleging a prior conviction for aggravated assault (8 R.R. 4-5).

54. The State rested without presenting evidence.

55. Applicant presented a case in mitigation of punishment. Several witnesses testified to their opinions that Heyne's death was an accident (8 R.R. 14, 37, 47, 54, 66). Lucero testified that applicant was intoxicated (8 R.R. 22-23). Farrell testified that applicant was

upset when he learned that Heyne died (8 R.R. 45-46).

56. A jail chaplain testified that applicant was an immature child in a man's body (8 R.R. 64). The prosecutor elicited on cross-examination that applicant was segregated from the general jail population because of a dispute with another inmate (8 R.R. 72). However, the State did not present any evidence of disciplinary problems in jail.

57. Applicant's mother raised him alone, and he did not know his father (8 R.R. 51-52). He began using drugs as a teenager, and they were his biggest problem (8 R.R. 52-53, 55). He tried a drug rehab program in 1985 (8 R.R. 56). His mother did not know until now that he suffered from bi-polar disorder (8 R.R. 53).

58. Applicant testified that he drank alcohol and used cocaine that night and went to Jaxx for another drink because he is an alcoholic (8 R.R. 76-79, 90-91). He did not retaliate when Heyne attacked him at Sam's (8 R.R. 85-87). When Heyne charged his SUV at Jaxx, he turned it to leave and avoid hitting Heyne, who jumped in front of the SUV and pushed off it (8 R.R. 94, 97, 105). Heyne fell and landed on his head (8 R.R. 99). Applicant was scared for his life and did not intend to kill Heyne (8 R.R. 98, 105). He would not have left the scene had he known that Heyne was hurt badly (8 R.R. 102).

59. The defense asked the court to find that applicant acted in sudden passion arising from

an adequate cause because Heyne provoked the incident and both were intoxicated (8 R.R. 113-15). Applicant made a quick decision that went the wrong way but did not act with premeditation (8 R.R. 118-20).

60. The prosecutor requested at least a 50-year sentence (8 R.R. 129). Applicant had juvenile criminal history and adult convictions for aggravated assault and burglary (8 R.R. 121-22). Sudden passion did not apply because applicant asserted that Heyne's death was an accident (8 R.R. 126).

61. The court found that applicant did not act in sudden passion and assessed punishment at 45 years in prison (8 R.R. 132-34).

### E. The Appeal

62. The Fourteenth Court of Appeals affirmed the judgment in an unpublished opinion issued on August 10, 2006. The Court of Criminal Appeals (CCA) refused discretionary review on February 7, 2007. Connors v. State, No. 14-05-00126-CR (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

### F. The First Habeas Corpus Proceeding

63. Applicant filed a *pro se* habeas corpus application on March 28, 2008. The CCA denied relief without written order on September 14, 2011. Ex parte Connors, No. WR-73,203-02 (Tex. Crim. App. 2011).

**CONSIDERATION OF THE MERITS IN A SUSEQUENT APPLICATION**

64. The CCA may not consider the merits of a subsequent habeas corpus application unless it contains sufficient specific facts establishing that either (1) the legal or factual basis of the claims was unavailable when the previous application was filed or, (2) by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. See TEX. CRIM. PROC. CODE art. 11.07, §4(a) (West 2016).

65. The legal and factual basis of applicant's claims was unavailable when he filed his first habeas corpus application. The State suppressed offense reports reflecting that Heyne previously engaged in violent, aggressive, threatening, and suicidal behavior, including as recently as a few weeks before the incident that resulted in his death. The offense reports also would have rebutted the false impression created by the State that Heyne had good character. The State did not disclose the reports to the defense before or during the trial, appeal, or first habeas corpus proceeding.

66. Only after applicant could afford to hire present counsel to investigate whether there was a basis to file a subsequent application did counsel discover the reports in a "work product" folder in the State's file. Applicant

is incarcerated and could not review the State's "work product" folder when he filed the first habeas application *pro se*.

67. Applicant's claims are not procedurally barred under article 11.07, § 4, because their legal or factual basis did not exist when he filed the first application. See Ex parte William Owens, No. WR-81,480-02 (Tex. Crim. App. Nov. 7, 2018) (unpublished order) (suppressed police report constitutes newly discovered evidence that may be considered in subsequent habeas application under article 11.07, § 4).

68. The court recommends that the CCA consider the merits of this application. To dismiss it would allow the State to benefit from successfully suppressing evidence beyond the first habeas proceeding. It would send an improper message to prosecutors that, as long as they suppress evidence beyond the initial habeas proceeding, there are no consequences for such misconduct. That should not be the law.

## GROUND ONE

**THE STATE'S SUPPRESSION OF POLICE OFFENSE REPORTS REFLECTING THAT THE COMPLAINANT PREVIOUSLY ENGAGED IN VIOLENT, AGGRESSIVE, THREATENING, AND SUICIDAL BEHAVIOR, INCLUDING AS RECENTLY AS A FEW WEEKS BEFORE THE INCIDENT THAT RESULTED IN HIS DEATH, DENIED APPLICANT DUE PROCESS OF LAW AND A FAIR TRIAL AT BOTH THE GUILT-INNOCENCE AND THE PUNISHMENT STAGES.**

### A. The Standard Of Review

69. Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87 (1963); U.S. CONST. amends. V and XIV.

70. The prosecution has a duty to disclose favorable evidence, even if it was not requested or was requested only in a general way, if it 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). 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).

71. Impeachment evidence must be disclosed under Brady. Strickler v. Greene, 527 U.S. 262, 281-82 (1999); Giglio v. United States, 405

U.S. 150, 153-54 (1972). Impeachment evidence is offered to dispute, disparage, deny, or contradict. Thomas v. State, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992). "[I]f disclosed and used effectively," impeachment evidence is favorable if "it may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985).

72. The prosecution also must disclose evidence that could mitigate punishment. See Jones v. State, 850 S.W.2d 223, 228 (Tex. App.—Fort Worth 1993, pet. ref d) (new trial required where State suppressed victim impact statement in which deceased's wife described shooting as accident).

73. 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." Bagley, 473 U.S. at 682.

74. A showing of materiality does not require the defendant to prove that disclosure of the suppressed evidence 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 he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

### B. The Undisclosed Evidence

75. Jennifer Varela, a Harris County District Attorney's Office (HCDAO) employee, sent a facsimile to the HPD records division on January 31, 2003, requesting four HPD offense reports involving Heyne (AX 4). A handwritten note on the facsimile reflects that Varela sent the offense reports to HCDAO assistant district attorney Terese Buess on February 6, 2003.

76. Located in the State's file in 2012 was a folder labeled, "Work Product—HPD Record," which contained Varela's facsimile and memorandum and HPD offense reports regarding six unadjudicated incidents involving Heyne between March of 1998 and December of 2002 (AX 5-10, 11; Oct. 2, 2018 R.R. 14-15). They collectively demonstrate that he was violent, aggressive, impulsive, threatening, and suicidal, including as recently as a few weeks before the incident with applicant.

77. Because these incidents were unadjudicated, the reports were not available to defense counsel or applicant through public records searches and were discoverable only through production by the State.

78. HCDAO assistant general counsel Brian Rose produced the unadjudicated offense reports to applicant's habeas counsel in July of 2012 pursuant to counsel's Texas Public Information Act request to review the State's file (Oct. 2, 2018 R.R. 4-6, 15-16). He

produced the reports as public information because they did not constitute privileged attorney work product (Oct. 2, 2018 R.R. 8, 17, 27).

79. Rose memorialized his production of the offense reports to habeas counsel, but nothing in the file reflected that the reports had been produced to any prior counsel for applicant (Oct. 2, 2018 R.R. 16-18).

80. Less than two months before Heyne's death, on December 11, 2002, his ex-girlfriend, Tina Horne, called the police to report that he threatened to kill her (AX 5). They had dated for a year-and-a half and lived together for a year. She ended the relationship a month earlier and told him to move out. He called her the night of December 11 and told her that she was a "dead bitch" and he was going to kill her. She told police that he had been violent with her in the past and she wanted to file a charge of terroristic threat, but she did not pursue the complaint.

81. Less than three months before Heyne's death, about 3:30 a.m. on November 6, 2002, his then-girlfriend Horne called the police to report that he had threatened to kill himself (AX 6). She had ended the relationship that night, and his car was stolen earlier that day. He talked about hurting himself and appeared very depressed. He put a gun in his mouth and threatened to kill himself. She convinced him to give her the gun before the police arrived. He told police that he was

upset about the theft of his car and was talking nonsense to Horne but denied being suicidal. The police took no further action.

82. Heyne attended a Halloween party at a residence on October 29, 2000 (AX 7). Michael Gibbons called the police to report an assault. Heyne lunged at him, knocked him to the ground, grabbed his neck, and bit his ear and finger. A crowd of people had to pull Heyne off Gibbons. Gibbons received medical treatment from paramedics, and the police observed abrasions to his ear and a bandage on his finger. No arrest was made, and no charge was filed against Heyne.

83. Less than two weeks before the assault on Gibbons, Heyne was arrested for public intoxication and open Class C warrants on October 16, 2000. He tried to buy beer from a store after hours; when the clerk refused to sell it, he tried to steal it (AX 8). He yelled at an off-duty police officer who confronted him in the parking lot. He was angry, loud, argumentative, combative, vulgar, intoxicated, and claimed to be a Navy SEAL with "27 confirmed kills to his name." He yelled, "Fuck you, cop," and threatened to sue the city and officers and to "have their badges."

84. Off-duty HPD officers working private security at a nightclub viewed a physical and verbal altercation between Heyne, who was the bouncer, and a female patron on June 17, 2000 (AX 9). The woman said that he grabbed her by the arm twice and caused

pain. She initially wanted to press charges for assault but changed her mind. He denied touching her, and no charge was filed.

85. Lori Schultz, Heyne's then-girlfriend, called police to report an assault on March 1, 1998 (AX 10). They argued at her apartment, and he pushed her. She told him to leave, and he threw objects through two of her windows as he left. No charge was filed.

### C. The State Suppressed The Offense Reports

86. Jeffrey Hale represented applicant at trial along with Roach (AX 2 at 1). Kevin Petroff represented the State until four months before trial, when Jimmy Ortiz was assigned to the trial court and to the case. Ultimately, Ortiz represented the State at trial and at sentencing.

87. Roach died in 2011 (AX 2 at 5). However, both Hale and Ortiz remember applicant's case because of the unusual facts; and both were able to refresh their recollections by reviewing relevant records before providing affidavits and testifying at the evidentiary hearing (Oct. 2, 2018 R.R. 32-33; Nov. 26, 2018 R.R. 11, 35).

88. Hale was responsible for pretrial investigation, trial preparation, discovery, and was more familiar with the evidence than Roach (Nov. 26, 2018 R.R. 9-10, 27-28, 32). The case was set for trial, and the State had produced

discovery to Hale, before Ortiz was assigned to handle it (Nov. 26, 2018 R.R. 13-14).

89. Ortiz tried five other serious felony cases to a jury verdict in the four months between his assignment to the court in April of 2004 and applicant's trial in August of 2004 (Oct. 2, 2018 R.R. 30-31). He obtained a verdict in another murder case on August 6, 2004, ten days before applicant's trial began (Oct. 2, 2018 R.R. 31-32). He does not recall how much time he devoted to applicant's case before August of 2004 (Oct. 2, 2018 R.R. 32).

90. Hale did not have access to law enforcement criminal history databases and had to rely on public databases to investigate Heyne's criminal history (Nov. 26, 2018 R.R. 14). Uncharged conduct is not available through clerks' offices (Nov. 26, 2018 R.R. 19).

91. If Hale knows about a criminal incident, he can have a private investigator try to interview the witnesses to obtain more information and potentially present evidence of the incident at trial. However, he cannot investigate an incident if he does not know about it (Nov. 26, 2018 R.R. 14-15).

92. A public criminal history background check of Heyne with the Harris County District Clerk's Office revealed that he had been charged with five minor offenses before he died (AX 2 at 1). He was convicted of misdemeanor DWIs in 1995 and 1998, misdemeanor possession of marijuana in 1999, and driving while his license was suspended in

2001. Another charge of driving while his license was suspended was dismissed in 1995 (AX 2 at 1-2).

93. Heyne's public criminal history did not demonstrate that he had a background of being violent, aggressive, threatening, or suicidal. At most, it suggested that he had a potential alcohol problem, used marijuana, and had problems maintaining a valid driver's license. None of his public, charged offenses would have led the defense to discover any of his unadjudicated offenses.

94. Hale reviewed the State's file numerous times while the case was pending (AX 2 at 2; Nov. 26, 2018 R.R. 16-19). He was not allowed to review any of the State's "work product." He did not know if the State was withholding any information as "work product." He did not see anything in the State's file—including regarding unadjudicated offenses—reflecting that Heyne had engaged in violent, aggressive, threatening, or suicidal conduct.

95. Neither Hale nor Roach saw any of the suppressed offense reports regarding Heyne's unadjudicated offenses before or during the trial (Nov. 26, 2018 R.R. 28). Hale did not see them until applicant's habeas counsel showed them to him in 2014 (Nov. 26, 2018 R.R. 20). They did not know about any of this information when they tried the case, as the State did not disclose it to them (AX 2 at 4). The criminal history background check of

Heyne that they conducted with the district clerk's office did not reveal any of this information, and they did not have any way of knowing about these incidents without the State disclosing them, which did not occur.

96. Hale would have had a private investigator interview the witnesses referenced in the offense reports and would have tried to present as much evidence as possible related to Heyne's unadjudicated conduct (Nov. 26, 2018 R.R. 20). He would have subpoenaed the witnesses to testify at trial; would have tried to present their testimony at the guilt-innocence stage and, if necessary, at punishment; would have made a bill of exception had the court excluded any of their testimony; and would have argued that this evidence corroborated the defense (Nov. 26, 2018 R.R. 24-26).

97. The information contained in the undisclosed offense reports—including that Heyne was suicidal in the weeks before the incident—was consistent with the defensive theory that he was mad at applicant, ran at the car, and jumped on the hood to attack applicant (Nov. 26, 2018 R.R. 22-23, 68, 72-73). It would have rebutted the State's theory that Heyne was not aggressive, merely walked towards applicant's car, and was a good person because he attended Christian schools (Nov. 26, 2018 R.R. 24, 70-71, 74, 83). It also would have supported applicant's request for sudden passion at the punishment stage (Nov. 26, 2018 R.R. 26-27).

98. Had the State disclosed the offense reports to the defense, Hale would have researched different theories of admissibility of the information contained in the reports (Nov. 26, 2018 R.R. 75). He would have argued that evidence of Heyne's aggression, violence, threats, and suicidal ideation was admissible through opinion and reputation testimony as pertinent character traits under Rule of Evidence 404(a)(2) to show Heyne's reckless disregard for his own life (Nov. 26, 2018 R.R. 84-86, 89-90, 99). Hale would have argued that, even if the evidence otherwise was inadmissible, the State opened the door to it when it elicited that Heyne attended Christian schools (Nov. 26, 2018 R.R. 83). He also would have argued that evidence of these character traits would have allowed the State to offer rebuttal evidence that Heyne did not possess those traits, but it would not have opened the door to otherwise inadmissible evidence of applicant's criminal history or that applicant possessed the same traits (Nov. 26, 2018 R.R. 86-89).

99. The State would not have disclosed information about the unadjudicated offenses only to Roach but not to Hale (AX 2 at 5; Nov. 26, 2018 R.R. 28). Even had the State disclosed the information to Roach, he would have shared the information with Hale because Hale was in charge of all pretrial discovery, investigation, and preparation. That the State never disclosed the information to Hale indicates that it did not disclose the information to Roach (AX 2 at 6).

100. The case had been pending for a long time before Ortiz was assigned to try it, and other prosecutors previously had possession of the State's file before he inherited the case (AX 3 at 1). Kevin Petroff and Terese Buess worked on the case before he did. Petroff filed several notices with the court in February and March of 2004, and Buess received at least two memoranda in 2003.

101. Ortiz reviewed the State's file in late 2013 and saw a folder labeled, "work product" (AX 3 at 1). He did not create the folder, nor were the words "work product" written in his handwriting; and the prior prosecutors on the case organized the file (AX 3 at 1-2; Oct. 2, 2018 R.R. 34-36).

102. Inside the "work product" folder was an inter-office memorandum regarding the case from Varela to Buess dated January 31, 2003 (AX 3 at 2). Varela discovered that there were HPD offense reports involving Heyne and wrote that she would send Buess the reports when she received them. She noted that Heyne's ex-girlfriend had made a terroristic threat report against him in December of 2002.

103. The "work product" folder contained another memorandum dated January 31, 2003, from Varela to the HPD Records Division requesting offense reports related to four incidents (AX 3 at 2). That memorandum had a handwritten notation in the margin reflecting that Varela sent the offense reports to Buess

on February 6, 2003. Attached to the memorandum were offense reports involving Heyne as a suspect. Some of them alleged that he engaged in violent, aggressive, threatening, and suicidal conduct.

104. Ortiz does not know if these offense reports were in the State's file when he handled the case, but he has no reason to believe that they were not there (AX 3 at 3; Oct. 2, 2018 R.R. 40-41).

105. Nothing in the State's file, including the "work product" folder, indicates that any prosecutor disclosed these offense reports to the defense (AX 3 at 3; Oct. 2, 2018 R.R. 41).

106. Ortiz expected that Hale and Roach would not review any portion of the State's file labeled "work product" (Oct. 2, 2018 R.R. 42-43).

107. Ortiz does not remember if he disclosed the offense reports to the defense, but his standard procedure would have been to disclose any "work product" that he was aware of if he believed that it constituted Brady material or was mitigating in nature (AX 3 at 3; Oct. 2, 2018 R.R. 41). Having reviewed the reports, he believes that, if they were not disclosed to the defense, they should have been because they were favorable to applicant.

108. Ortiz had to know about the information contained in the offense reports before he could

disclose it to the defense. He possibly did not know about the contents of the "work product" folder before trial (Oct. 2, 2018 R.R. 44-45).

109. The court ordered the State to produce to the defense arrests and convictions of prosecution witnesses for felonies and crimes of moral turpitude ten days before trial (Oct. 2, 2018 R.R. 57-58).

110. Heyne was not a prosecution witness, and he was not arrested for or convicted of any felonies or crimes of moral turpitude (Oct. 2, 2018 R.R. 66-70).

111. Ortiz did not file any notice with the district clerk that he had produced the unadjudicated offense reports to the defense before trial, nor did he state on the record that he had done so.

### D. The Suppressed Evidence Was Favorable To Applicant

112. Had the State disclosed the offense reports before trial, the defense would have tried to locate and call the witnesses who had personal knowledge of these incidents at the guilt-innocence stage (AX 2 at 5; Nov. 26, 2018 R.R. 20, 24-26).

113. The defense would have argued that Heyne's background of violent, aggressive, threatening, and suicidal conduct corroborated that he ran towards applicant's SUV, jumped on

the hood in an attempt to attack applicant, and pushed himself off as applicant tried to drive away. They would have argued that this evidence undermined the State's theory that Heyne merely walked towards the SUV and applicant intentionally hit him with the front of it.

114. They also would have argued that Heyne's threat to commit suicide in November of 2002, less than two months before he died, was consistent with his erratic, self-destructive conduct on this occasion.

115. The suppressed evidence would have been admissible at the guilt-innocence stage to prove character traits that were consistent with charging applicant's SUV and jumping on the hood to attack him. Through testimony from Brauninger and Garza, the State disputed whether Heyne aggressively ran towards the SUV.

116. Evidence of a complainant's pertinent character trait is admissible when offered by the accused in a criminal case to prove action in conformity therewith on a particular occasion. TEX. R. EVID. 404(a)(2). The prosecution then may offer rebuttal evidence to show that the complainant does not possess the pertinent character trait. Id.

117. Under this theory of admissibility, it does not matter whether the defendant is aware of the character trait at the time of the incident. Ex parte Miller, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). "The chain of logic is

as follows: a witness testifies that the victim made an aggressive move against the defendant; another witness then testifies about the victim's character for violence, but he may do so *only* through reputation and opinion testimony under Rule 405(a)." Id. The defendant may not offer evidence of specific instances of the complainant's conduct but may offer evidence of the character trait through general reputation or opinion testimony. Tate v. State, 981 S.W.2d 189, 192-93 (Tex. Crim. App. 1998).

118. Additionally, a defendant charged with an assaultive offense, as applicant was, may offer evidence concerning the complainant's character for violence or aggression. Miller, 330 S.W.3d at 618. First, the defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the complainant to show the "reasonableness of the defendant's claim of apprehension of danger" from the complainant. Id. Applicant knew Heyne and his character for violence and aggression, as Heyne argued with and assaulted applicant earlier that night at Sam's Boat.

119. Under either theory of admissibility, applicant could have called the police officers and lay witnesses referenced in the suppressed offense reports to testify to Heyne's violent, aggressive, impulsive, threatening, and suicidal character traits from March of 1998 to December of 2002, including only a few

weeks before the incident that resulted in his death. This evidence was especially relevant where his blood-alcohol concentration was 0.27 because his intoxication may have resulted in lowered inhibitions, rash decisions, and an agitated state.

120. "The criminal provision [of Rule 404(a)(2)] is not limited to self-defense claims and violent character." Goode, Wellborn, & Sharlot, Courtroom Handbook on Texas Evidence, Texas Practice Series, vol. 2A, 2010 ed., Rule 404(a), Author's Comment (2) at 383.

121. A separate rationale supports the admission of evidence of Heyne's prior specific acts of violence when offered for a non-character purpose—such as his specific intent, motive for an attack on the defendant, or hostility—in the particular case. Miller, 330 S.W.2d at 620. This extraneous conduct evidence may be admissible under Rule of Evidence 404(b). See Torres v. State, 117 S.W.3d 891, 896-97 (Tex. Crim. App. 2003); Tate, 981 S.W.2d at 193 (evidence of complainant's prior specific acts may shed light on his intent or motive in confrontation with defendant).

122. The evidence established that Heyne was hostile towards applicant and motivated to attack him because Brauninger had socialized with him earlier that night, and Heyne assaulted applicant at Sam's.

123. Evidence of the most recent incidents in November and December of 2002 was admissible to show Heyne's suicidal and impulsive

tendencies, which would have been admissible to explain why he ran towards and jumped on a moving SUV.

124. Alternatively, even if the suppressed evidence would have been inadmissible in the first place, the State opened the door to it when it presented testimony from Claudio Heyne, Adrian's brother, that Adrian attended Christian schools (6 R.R. 106). This testimony, admitted during the guilt-innocence stage, created a false impression that Adrian had good character. Evidence of Heyne's violent, aggressive, impulsive, threatening, and suicidal background would have been admissible to rebut this false impression.

125. Otherwise inadmissible evidence may become admissible when a party opens the door to it. See, e.g. Renteria v. State, 206 S.W.3d 689, 697-98 (Tex. Crim. App. 2006). A party opens the door by leaving a false impression with the jury that invites a response. Daggett v. State, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005). A witness opens the door to rebuttal character evidence in a homicide case by placing the complainant's peaceable character at issue. TEX. R. EVID. 404(a)(2); Harrison v. State, 241 S.W.3d 23, 25-28 (Tex. Crim. App. 2007) (trial court did not abuse discretion by allowing rebuttal character evidence from State after defense witness testified defendant was "good" and "sweet"). Evidence of a complainant's specific bad acts is admissible to impeach a character

witness's testimony that he was peaceful. Miller, 330 S.W.3d at 620-21.

126. Had applicant offered evidence of Heyne's bad character, Rule 404(a)(2) would have allowed the State to offer rebuttal evidence of Heyne's peaceable character in the form of reputation or opinion testimony. Kolar v. State, 705 S.W.2d 794, 798 (Tex. App.—Houston [1st Dist.] 1986, no pet.). However, the Texas Rules of Evidence would not have permitted the State to admit evidence that applicant possessed the same bad character traits. Goode, Wellborn, & Sharlot, Courtroom Handbook on Texas Evidence, Texas Practice Series, Author's Comment (8) at 373.

127. The court finds that the suppressed evidence was favorable to applicant because it would have been admissible at the guilt-innocence stage under multiple theories.

128. Had the trial court excluded properly offered evidence regarding Heyne's pertinent character traits, an appellate court probably would have reversed any conviction.

129. Hale elicited from the off-duty detective who was working private security at Sam's that Heyne was aggressive during the encounter (Nov. 26, 2018 R.R. 93-98). The trial court did not rule that Hale had opened the door to evidence of applicant's prior criminal history, nor did the State offer such evidence or argue that he did.

130. Had the defense properly offered evidence regarding Heyne's pertinent character traits and provided the trial court with the applicable law, the trial court probably would have permitted applicant to present that evidence and ruled that he did not open the door to his bad character traits and criminal history.

131. Had the trial court admitted properly offered evidence regarding Heyne's pertinent character traits but also admitted evidence of applicant's bad character traits or criminal history over objection, an appellate court probably would have reversed any conviction.

132. Additionally, the suppressed evidence was favorable because it also would have been admissible at the punishment stage. In a non-capital felony trial, evidence is admissible during the punishment stage if "the court deems [it] relevant to sentencing." TEX. CRIM. PROC. CODE art. 37.03, §3(a)(1). Evidence is relevant to sentencing if it helps the factfinder decide what sentence is appropriate for a particular defendant given the facts of the case. Humaran v. State, 478 S.W.3d 887, 904 (Tex. App.—Houston [14th Dist.] 2015 pet. ref'd).

133. Evidence of Heyne's violent, aggressive, impulsive, threatening, and suicidal background was admissible at the punishment stage because it was relevant to whether applicant acted in sudden passion arising from adequate cause; and, even if he did not, it

was relevant to applicant's personal responsibility and moral blameworthiness given the specific facts of the case. See Hernandez v. State, 127 S.W.3d 206, 214 n.5 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (deceased's past conduct relevant to whether defendant acted in sudden passion because can help place deceased's provocation in context at time of offense); Hayden v. State, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009) ("Victim character and victim impact evidence, *both good and bad*, are admissible during the punishment phase if the factfinder may rationally attribute the evidence to the accused's 'personal responsibility and moral culpability.') (emphasis added).

134. Even had the jury convicted applicant of murder despite knowing the suppressed evidence, the defense would have argued that it mitigated his punishment (AX 2 at 5). He asked the court to make a sudden passion finding, but it refused. Evidence that Heyne commonly behaved in a violent, aggressive, impulsive, threatening, and suicidal manner would have been relevant to whether applicant acted in sudden passion with adequate cause and to his personal responsibility and moral blameworthiness under the circumstances.

135. Had the trial court excluded properly offered evidence regarding Heyne's pertinent character traits at the punishment stage, an appellate court probably would have vacated the sentence.

**E. Materiality At The Guilt-Innocence Stage**

136. The State presented evidence from Brauninger and Garza that Heyne walked towards applicant's SUV, but did not run; that he stood still in the parking lot; and that applicant hit him with the front of the SUV.

137. Heyne had a documented history of violent, aggressive, impulsive, threatening, and suicidal behavior, including within a few weeks of the incident.

138. The suppressed evidence would have put the case in an entirely different light with the jury because it would have corroborated Lucero's testimony and the defense's theory that Heyne aggressively ran towards the SUV, jumped on the hood to attack applicant, and pushed off as applicant drove away. This theory was consistent with the physical evidence and expert testimony. However, in the absence of the suppressed evidence, the jury rejected it and believed the testimony of Brauninger and Garza instead of Lucero regarding Heyne's conduct.

139. The State's suppression of the offense reports undermines the integrity of the criminal justice system. This evidence was material to whether Heyne ran towards applicant's SUV, jumped on the hood to attack applicant, and pushed off as applicant drove away, or whether Heyne merely walked toward the SUV, or stood still, and applicant intentionally hit him with the front of it. This evidence puts the case in such a different

light as to undermine confidence in the verdict. See Kyles, 514 U.S. at 435.

140. There is a reasonable probability that, had the State disclosed the offense reports, the jury would have acquitted applicant or convicted him of manslaughter or negligent homicide.

141. Applicant is entitled to a new trial.

**F. Materiality At The Punishment Stage**

142. Applicant asked the court to find that he acted in sudden passion arising from adequate cause (8 R.R. 113-15).

143. "Sudden passion" means passion directly caused by and arising out of provocation by the person killed, which passion arises at the time of the offense and is not solely the result of former provocation. TEX. PENAL CODE §19.02(a)(2).

144. "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Id. at §19.02(a)(1).

145. If the defendant proves sudden passion by a preponderance of the evidence, the offense is reduced to a second degree felony. Id. at § 19.02(d).

146. The trial court found that applicant did not act in sudden passion (8 R.R. 132).

147. Even had the jury convicted applicant of murder, the suppressed evidence was material to punishment because it probably would have resulted in a lesser sentence. Had the court known about Heyne's recent history of behavior, it probably would have found that applicant acted in sudden passion arising from adequate cause. Such a finding would have reduced the offense of conviction to a second degree felony. Even had it found the enhancement paragraph true, it probably would have assessed a sentence less than 45 years.

148. Even had the court not found that applicant acted in sudden passion, the suppressed evidence probably would have resulted in a lesser sentence because it would have made applicant less personally responsible and morally blameworthy under the circumstances. See Hayden, 296 S.W.3d at 552.

149. Applicant is entitled to a new punishment hearing even if the suppressed evidence was immaterial to guilt-innocence.

## GROUND TWO

## THE STATE'S USE OF EVIDENCE THAT CREATED THE FALSE IMPRESSION THAT THE COMPLAINANT HAD GOOD CHARACTER DENIED APPLICANT DUE PROCESS OF LAW AND A FAIR TRIAL AT BOTH THE GUILT-INNOCENCE AND THE PUNISHMENT STAGES.

### A. The Standard Of Review

150. The use of false testimony by the prosecution violates due process. Giglio, 405 U.S. at 154; Adams, 768 S.W.2d at 288-89.

151. The testimony need not be criminally perjurious to violate due process. Ex parte Ghahremani, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). It is sufficient that the testimony was "false." Ex parte Robbins, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011).

152. A witness's intent in providing false or misleading testimony, and the State's intent in introducing that testimony, are not relevant to false-testimony due process analysis. Id.; Ex parte Chavez, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012). A prosecutor cannot knowingly allow a witness to create a false impression of the facts. Alcorta v. Texas, 355 U.S. 28, 31-32 (1957); Davis v. State, 831 S.W.2d 426, 439 (Tex. App.—Austin 1992, pet. ref'd); see also Ghahremani, 332 S.W.3d at 477 (where State suppressed offense report that demonstrated witness testified falsely, court addressed matter as false-testimony claim).

153. The defendant must show that the testimony was false or misleading and was material. He need not show that the prosecutor knew that it was false or misleading to obtain relief. Ex parte Chabot, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). "It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence." Duggan v. State, 778 S.W.2d 465, 468-69 (Tex. Crim. App. 1989).

154. Materiality exists when there is any "reasonable likelihood" that the false testimony affected the outcome. Agurs, 427 U.S. at 103; see also Napue v. Illinois, 360 U.S. 264, 271 (1959) (new trial required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury").

155. False testimony is "material unless failure to disclose it would be harmless beyond a reasonable doubt." Bagley, 473 U.S. at 680. Thus, the "reasonable likelihood" standard is equivalent to the harmless-error standard for constitutional error, which "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 680, n.9 (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

156. "When a habeas applicant has shown that the State knowingly used false, material testimony, and the applicant was unable to raise this claim at trial or on appeal, we will grant

relief from the judgment that was obtained by that use." Ghahremani, 332 S.W.3d at 482-83. This court must determine (1) whether testimony was false or misleading and, if so, (2) whether it was material; the court need not consider whether the constitutional violation was harmful once materiality is established. Ex parte Weinstein, 421 S.W.3d 656, 664-65 (Tex. Crim. App. 2014).

157. The use of false or misleading information by the prosecution that impacts the punishment assessed also violates due process. Estrada v. State, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010); Ghahremani, 332 S.W.3d at 480-81; Ex parte Tiede, 448 S.W.3d 456, 459-61 (Tex. Crim. App. 2014) (Alcala, J., concurring).

### B. The False Impression

158. The State presented testimony from Claudio Heyne, Adrian's brother, at the end of its guilt-innocence case (6 R.R. 106).

159. The purported reason for calling Claudio was to identify Adrian as the deceased in photographs (6 R.R. 108-10).

160. However, the State also elicited that Adrian attended Christian schools (6 R.R. 106).

161. This testimony created a false impression that Adrian had good character.

162. Evidence of Heyne's violent, aggressive, impulsive, threatening, and suicidal background would have been admissible to rebut or correct the false impression created by Claudio's testimony.

163. Otherwise inadmissible evidence may become admissible when a party opens the door to it. See, e.g. Renteria, 206 S.W.3d at 697-98. A party opens the door by leaving a false impression with the jury that invites a response. Daggett, 187 S.W.3d at 452. A witness opens the door to rebuttal character evidence in a homicide case by placing the complainant's peaceable character at issue. TEX. R. EVID. 404(a)(2); Harrison, 241 S.W.3d at 25-28.

164. Evidence of the complainant's specific bad acts is admissible to impeach a character witness's testimony that the complainant was peaceful. Miller, 330 S.W.3d at 620-21.

### C. Materiality

165. The State presented evidence at the guilt-innocence stage, which the court likely considered at punishment, that created the false impression that Heyne had good character because he attended Christian schools. In fact, he had a recent history of engaging in violent, aggressive, impulsive, threatening, and suicidal behavior.

166. The jury did not know the truth about Heyne when it convicted applicant, and the court

did not know the truth when it assessed punishment.

167. The materiality standard in a false evidence claim is different from, and less than, the materiality standard in a suppression-of-evidence claim. Instead of having to prove a "reasonable probability" of a different outcome, materiality exists when there is any "reasonable likelihood" that the false testimony affected the outcome. Agurs, 427 U.S. at 103; Napue, 360 U.S. at 271.

168. The State created the false impression that Heyne had good character because he attended Christian schools. Had the jury known that he serially engaged in violent, aggressive, impulsive, and threatening behavior, there is a reasonable likelihood that it would have acquitted applicant or convicted him of manslaughter or negligent homicide.

169. Applicant is entitled to a new trial.

170. Alternatively, even had the jury convicted applicant of murder, the false impression regarding Heyne's good character was material to punishment because there is a reasonable likelihood that the court would have assessed a lesser sentence.

171. Applicant is entitled to a new punishment hearing.

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IN THE 339th DISTRICT COURT
OF HARRIS COUNTY, TEXAS

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| EX PARTE | § | |
| | § | CAUSE NO. 937946-B |
| KEVIN CONNORS | § | |

**RECOMMENDATION AND ORDER**

The Court recommends a new trial or, in the alternative, a new punishment hearing.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send it to the Court of Criminal Appeals as provided by article 11.07 of the Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

a. the application for a writ of habeas corpus;

b. applicant's brief;

c. the exhibits;

d. the State's Answer;

e. applicant's proposed findings of fact and conclusions of law;

f. the State's proposed findings of fact and conclusions of law;

g. the Clerk's and Reporter's Records of the trial court proceeding;

h. the Reporter's Record of any habeas corpus proceedings; and

i. the court's findings of fact and conclusions of law.

The District Clerk shall send a copy of this order to applicant, his counsel, and counsel for the State.

Signed on _____, 2019.

Signed:
5/22/2019

Maria Jackson
Honorable Maria Jackson
Judge Presiding
339th District Court of
Harris County

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

**7/17/2020**
**CONNORS, KEVIN EDWARD Tr. Ct. No. 937946-B**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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| EX PARTE | § | |
| | § | NO. WR-73,203-03 |
| KEVIN EDWARD CONNORS | § | |

**APPLICANT'S SUGGESTION FOR RECONSIDERATION**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Kevin Edward Connors files Applicant's Suggestion For Reconsideration and would show as follows:

I.

**AUTHORITY FOR RECONSIDERATION**

This Court may on its own initiative reconsider the denial of habeas corpus relief. TEX. R. APP. PROC. 79.2(d); Ex parte Moussazadeh, 361 S.W.3d 684, 686 (Tex. Crim. App. 2012).

II.

**REASON FOR RECONSIDERATION**

**I. Introduction**

In its order denying habeas corpus relief, this Court engaged in a wholesale rejection of the trial court's findings of fact and conclusions of law. See Ex

parte Connors, WR-73,203-03, 2020 WL 1542424, at *1 (Tex. Crim. App. Apr. 1, 2020) (unpublished) ("This Court has independently reviewed the trial and habeas records, including the reporter's record of Applicant's trial. *The trial court's habeas findings and recommendation are not supported by the record*.") (emphasis added). This Court's wholesale rejection was highly unusual. "[I]t will be under only the rarest and most extraordinary of circumstances that [this Court] will refuse to accord any deference whatsoever to the findings and conclusions as a whole." Ex parte Reed, 271 S.W.3d 698, 728 (Tex. Crim. App. 2008). In such "rare" cases, this Court becomes the "ultimate factfinder" and "exercise[s] [its] authority to make contrary or alternative findings and conclusions." Id. at 727.

As Presiding Judge Keller recognizes, Texas law does not require this Court's practice of serving as the "ultimate factfinder" in habeas corpus cases. See Reed, 271 S.W.3d at 751-52 (Keller, P.J., concurring). Furthermore, the practice is inconsistent with this Court's role in other types of cases (and inconsistent with other appellate courts' practices) and should be discontinued. This Court's role as the "ultimate factfinder" violates due process, at least in a case such as applicant's—where the trial court heard live testimony at an evidentiary hearing and issued extensive, detailed predicate fact findings that supported the legal conclusion that the trial prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963).

## II. Procedural History

After conducting an evidentiary hearing with live testimony, the trial court recommended that this Court grant habeas relief on applicant's due process claims that the State suppressed material evidence and created a false impression about the evidence. The trial court issued extensive findings of fact and conclusions of law. This Court denied relief in a short order, stating in relevant part:

> This Court has independently reviewed the trial and habeas records, including the reporter's record of Applicant's trial. The trial court's habeas findings and recommendation are not supported by the record. Regarding the State's alleged failure to disclose exculpatory evidence, Applicant fails to show materiality. There is not a reasonable probability, considering the totality of the evidence, that the result of proceeding, either at guilt-innocence or at punishment, would have been different had the allegedly suppressed evidence been disclosed. This claim is denied.
>
> Regarding the State's presentation of evidence that allegedly left a false impression, Applicant fails to show that the State presented any false or misleading testimony or that the State presented any evidence that created a false impression. To the extent that the claim is based on the "newly discovered" police reports, it lacks merit and is denied.

Ex parte Connors, 2020 WL 1542424, at * 1.

## III. Texas Law Does Not Require this Court to Be the "Ultimate Factfinder" In a Habeas Corpus Case, and the Practice Is Inconsistent with this Court's Function in Other Types of Cases.

Neither article 11.07 of the Texas Code of Criminal Procedure nor any other rule or statute requires this Court's practice of engaging in *de novo* fact-finding in habeas cases. Rather, the Court simply has adopted this policy over the years. Contrary to this policy and consistent with the statutory scheme created by the Legislature, the Court has described the trial court's role in habeas corpus proceedings: "The legislative framework of article 11.071 [which is identical to article 11.07 in this regard] contemplates that the habeas judge is 'Johnny-on-the-Spot.' He is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who 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." Ex parte Simpson, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004).

In no other type of case does this Court assume the role of the "ultimate factfinder"—not when reviewing the sufficiency of the evidence supporting a conviction;[1]

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[1] See, e.g., Moreno v. State, 755 S.W.2d 866, 867 (Tex. Crim. App. (1988) ("[T]he reviewing court is not to position itself as a thirteenth juror in assessing the evidence. Rather, it is to position itself as a final, due process safeguard ensuring only the

not when reviewing a trial court's ruling on a pretrial motion to suppress evidence;[2] and not in other types of habeas corpus cases.[3] In all of these scenarios, this Court is highly deferential to a trial court's fact findings and does not make independent findings on

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rationality of the factfinder. The court is never to make its own myopic determination of guilt from reading the cold record. It is not the reviewing court's duty to disregard, realign or weigh evidence. This the factfinder has already done. The factfinder, best positioned to consider all the evidence firsthand, viewing the valuable and significant demeanor and expression of the witnesses, has reached a verdict beyond a reasonable doubt. Such a verdict must stand unless it is found to be irrational or unsupported by more than a 'mere modicum' of the evidence.").

[2] See, e.g., Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) ("[A]s a general rule, the appellate courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. . . . The appellate courts, including this Court, should afford the same amount of deference to trial courts' rulings on 'application of law to fact questions,' also known as 'mixed questions of law and fact,' if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor.").

[3] See, e.g., Ex parte Peterson, 117 S.W.3d 804 (Tex. Crim. App. 2003) (pretrial habeas corpus) ("In reviewing the trial court's decision, appellate courts review the facts in the light most favorable to the trial judge's ruling and should uphold it absent an abuse of discretion. Reviewing courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor.") (citation and internal quotation marks omitted), overruled on other grounds by Ex parte Lewis, 219 S.W.3d 335 (Tex. Crim. App. 2007); Ex parte Garcia, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011) (article 11.072 habeas corpus) (same).

appeal. Other courts, including federal appellate courts, take this same approach in a wide variety of contexts. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) ("In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.").

Appellate *review* of a trial court's fact findings is one thing. Independent factfinding by an appellate court based on a cold record is quite another. This Court should abandon its "ultimate factfinder" role in article 11.07 habeas corpus cases and apply its traditional deferential role. It should reanalyze the trial court's findings and conclusions on applicant's due process claims using the same standard of review that it employs in all other contexts. If, under that "highly deferential standard,"[4] it believes that any of the trial court's fact findings are not supported by the record when viewed in a light most favorable to applicant, then it should specify which ones are not supported by the record and remand for additional fact findings or, if necessary, for further evidentiary development if a significant fact issue remains unresolved. In no event should this Court make independent fact findings or simply engage in a wholesale rejection of the trial court's fact findings, many of which unquestionably are supported by the record in applicant's case.

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[4] State v. Guerrero, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

## IV. This Court's Wholesale Rejection of the Trial Court's Fact Findings and Its Independent Factfinding Based on a Cold Record Violated Due Process.

This Court's wholesale rejection of the trial court's many predicate fact findings and its own independent factfinding based on a cold record were inconsistent with the proper appellate court function. The Court also violated applicant's constitutional right to due process under the Fourteenth Amendment. By usurping the role of a trial judge, who listens to witnesses and assesses their demeanor to make credibility determinations and weigh evidence—and, instead, by substituting its own fact findings based on a cold record—this Court denied applicant the process that he is constitutionally due. Cf. United States v. Raddatz, 447 U.S. 667 (1980) (federal district court's reliance on fact findings made by magistrate judge in denying pretrial motion to suppress did not violate due process); id. at 681 n.7 ("The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; *to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious [constitutional] questions which we do not reach*.") (emphasis added); see also Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir. 1980) ("Like the Supreme Court [in Raddatz] . . . , we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself. Accordingly, in a

situation involving the constitutional rights of a criminal defendant, we hold that the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative."). This Court's "enter[ing] an order inconsistent with the credibility choices made by the [trial court] without personally hearing the live testimony of the witnesses whose testimony is determinative" violated due process. Louis, 630 F.2d at 1109.

## CONCLUSION

The Court should reconsider its denial of habeas corpus relief on its own motion; file and set this case for submission; reanalyze the trial court's findings and conclusions on the due process claims using the same deferential standard of appellate review that it employs in other contexts; and grant habeas corpus relief in the form of a new trial or, alternatively, a new punishment hearing.

Respectfully submitted,

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*/s/ Josh Schaffer*
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