



No. 09-DCR-053051 HC1

EX PARTE

EDWARD GEORGE MCGREGOR

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IN THE 434th JUDICIAL

DISTRICT COURT OF

FORT BEND COUNTY

FINDINGS OF FACT & CONCLUSIONS OF LAW

On March 31, 2016, Applicant filed an Application for Writ of Habeas Corpus. This Court held a hearing on Applicant's application and pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court hereby enters the following Findings of Fact & Conclusions of Law:

FINDINGS OF FACT

(1) On September 3, 2010, a jury found Applicant guilty of the offense of Capital murder and the Court assessed an automatic sentence of life in prison. TEX. PENAL CODE § 19.03; TEX. PENAL CODE § 12.31(a)(1).

Applicant's Claims

(2) In his writ application, Applicant raises the following claims:

(a) The State suppressed evidence and used false testimony regarding the benefits provided to its witnesses;

(b) The State used false testimony that Applicant confessed to Delores Lee Gable;

(c) Applicant was denied the effective assistance of counsel at the guilt-innocence phase of trial;

(d) The cumulative effect of the prejudice of the prosecutorial misconduct and the deficient performance of counsel requires relief; and

(e) Counsel was ineffective for failing to insure Applicant received all of his pre-trial jail time credit.

### Relevant Trial Testimony

- (3) At trial, Delores Gable<sup>1</sup> testified that she witnessed Applicant confess to a man she claimed was her husband, Brian Gable, that he (Applicant) killed the victim in this case. (HCRR6: Exhibit 23).
- (4) Delores Gable testified at trial that she did not receive a benefit for her testimony and that she was testifying to clear her conscious because she was suffering from cancer. (HCRR6: Exhibit 23).
- (5) Gable testified that on the night the murder in this case occurred, Applicant had a fresh cut on his lip, that she lived on the street where the murder occurred, that she was married to Brian Gable, and that Applicant's father was present when Applicant allegedly confessed. (HCRR6: Exhibit 23).
- (6) Marvin Roy Paxton testified that while he was incarcerated in the Harris County Jail, he had an altercation with Applicant. (HCRR6: Exhibit 24).
- (7) According to Paxton, during the altercation, Applicant directed Paxton to shut his mouth or he (Applicant) would kill him like he had killed "those two bitches." (HCRR6: Exhibit 24).
- (8) Paxton testified that Applicant later apologized, but affirmed that he had killed two women. (HCRR6: Exhibit 24).
- (9) Paxton testified that he was not promised anything for his testimony and that his cases in Harris County were still pending. (HCRR6: Exhibit 24).
- (10) Adam Osani testified that while he was incarcerated in the Harris County Jail, he witnessed and exchange between Applicant and Paxton in which Applicant said he would kill Paxton like "those other two bitches." (HCRR6: Exhibit 25).
- (11) Osani testified that he was not promised anything for his testimony. (HCRR6: Exhibit 25).

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<sup>1</sup> Gable's name has now been proven to be Delores Lee, but the Court will refer to her as Gable since that is how she is identified in the Reporter's Record of the trial in this case.

### Habeas Corpus Hearing

(12) Sonia McGregor testified at the habeas corpus hearing that on the night of the offense in this case, April 17, 1990, Applicant's father was in prison and could not have been present out on the neighborhood street as Gable testified to. (HCRR2: 57).

(13) Doris Lee testified that Delores Lee is her daughter and that Delores was never Delores Gable. (HCRR: 66).

(14) Doris Lee testified that Delores Lee was never married to Brian Gable and has always gone by the name of Delores Lee, even on her prison paperwork. (HCRR2: 66).

(15) Doris Lee testified that Delores Lee has never had cancer. (HCRR2: 67).

(16) Doris Lee testified that in 1990, Delores Lee lived in Houston with her. (HCRR2: 68-69).

(17) Terrance Gaiser testified that he is an attorney and represented Adam Osani on a felony charge of assault family violence in the 230<sup>th</sup> District Court of Harris County in 2007 and 2008. (HCRR2: 94).

(18) The State and Osani originally agreed to a sentence of six years' deferred adjudication, but the plea was rejected by the trial court. (HCRR2: 94-95).

(19) Osani contacted Gaiser approximately one week prior to his trial and related that he had information regarding Applicant's case. (HCRR2: 96).

(20) Osani wanted Gaiser to use the information to obtain a plea agreement. (HCRR2: 99).

(21) The State filed a motion for continuance in Osani's case so that he could testify before the grand jury before his case was disposed of. (HCRR2: 99-100).

(22) After Osani testified at the Grand Jury, Gaiser was informed that Osani would receive a misdemeanor. (HCRR2: 101).

(23) Gaiser believed the reduction of Osani's charges was a reward for testifying at the Grand Jury. (HCRR2: 101).

(24) It was Gaiser's understanding that the prosecutor who made the plea offer was directed to make that offer by Beth Shipley, the trial prosecutor in the present case. (HCRR2: 102-03).

(25) Gaiser related that Osani's charge was reduced to a misdemeanor on January 31, 2008 and he received credit for time served. He was released days after testifying before the Grand Jury. (HCRR6: 103).

(26) Gaiser told Osani that he would receive consideration if he cooperated with the State and testified at the Grand Jury. (HCRR6: 105).

(27) Gaiser related that he did not disclose Osani's deal with the State to Applicant's trial attorney because that was the prosecutor's role. (HCRR2: 113).

(28) Gaiser testified that it was his experience that prosecutors in Harris County do not disclose "deals" with witnesses so the deal will not be revealed to a jury. (HCRR2: 158).

(29) Ryan Mitchell testified that he is an attorney who was employed with the Harris County District Attorney's Office for approximately six years. (HCRR2: 160).

(30) Mitchell was assigned to the 339<sup>th</sup> District Court in Harris County and was present when Paxton entered a guilty plea to the aggravated robbery charges against him. (HCRR2: 169).

(31) Paxton's original plea agreement was an "open plea" with a "cap" of forty-five years in prison. (HCRR2: 166).

(32) At the time of Paxton's plea, someone crossed out the original agreement on the plea papers previously filed with the Court. In place of the original agreement, someone wrote in "seven years' TDCJ." (HCRR2: 170).

(33) Mitchell testified that he did not alter Paxton's plea papers. (HCRR2: 171).

(34) The same date that Paxton was sentenced pursuant to the new agreement for seven years, Shipley filed a motion to keep Paxton and Applicant separate at the Harris County Jail. (HCRR2: 172).

(35) Carvana Hicks Cloud testified that she was previously employed at the Harris County District Attorney's Office and was assigned to Osani's case. (HCRR2: 185-86).

(36) A plea bargain of six years' deferred adjudication was reached in Osani's case, but the trial judge rejected the agreement. (HCRR2: 186).

(37) Prior to Osani's trial, Cloud filed a motion for continuance because Osani was set to be a witness in a capital murder trial. (HCRR2: 186-87).

(38) Cloud learned that Osani would be a witness in Applicant's trial from Shipley and included in her motion that Osani was a "critical witness in a capital murder against [Applicant]." (HCRR2: 188).

(39) After Osani testified at the Grand Jury, Shipley sent an email to Cloud indicating his testimony was completed and he testified truthfully. (HCRR2: 191).

(40) Shipley told Cloud she could do what she wished with the case. (HCRR2: 192).

(41) Cloud reduced Osani's case to a misdemeanor because of his cooperation in testifying against Applicant. (HCRR2: 193).

(42) Cloud testified that Osani received a benefit in exchange for his cooperation and that she would have disclosed that benefit to Applicant's defense counsel. (HCRR2: 194).

(43) Cloud testified that Shipley put into motion a scenario in which Osani was allowed to go home after he testified before the Grand Jury. (HCRR2: 203).

(44) Elizabeth Shipley Exley<sup>2</sup> testified that she is employed at the Harris County District Attorney's Office and served as a prosecutor in the trial of the present case. (HCRR3: 10).

(45) Shipley stated that at the time the trial was had in this case, it was her understanding that *Brady*<sup>3</sup> evidence was required to be disclosed, including evidence to show the defendant was not guilty, impeachment evidence of a witness, and any special consideration given to a witness. (HCRR3: 11).

(46) When asked if she would disclose the fact that a witness, who had pending charges, was to receive some assistance in his case, although that assistance had not yet been determined at the time of trial, Shipley answered, "Probably." (HCRR3: 13).

(47) Shipley clarified that if the jury was told the witness had pending cases, she did not have to disclose to the defense that she planned to tell a Judge or prosecutor that the witness cooperated, even if she expected that fact could be considered in regards to a lighter sentence for the witness. (HCRR3: 14-15).

(48) Shipley stated that her plan in Paxton's case was to inform the Judge and the prosecutor about his cooperation as a witness, and that that plan was not a possibility, but something she intended to do. (HCRR3: 17).

(49) Shipley testified that if it was her intent to reduce a witness's sentence from thirty years to seven years, after they testified for the State, she was not required to disclose that fact. (HCRR3:18-19).

(50) Shipley agreed that defense counsel filed a *Brady* motion prior to trial in which he requested the disclosure of any consideration that had been given to any witness in this case. (HCRR3: 30-31).

(51) Shipley agreed that her co-counsel, Jeff Strange told defense counsel that there was no consideration given to any witness in this case. (HCRR3: 31).

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<sup>2</sup> The Court will refer to Elizabeth Shipley Exley, the trial prosecutor in this case as "Shipley," the name she used during the prosecution of this case, to avoid confusion.

<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

(52) Shipley testified that she had not agreed to write a letter to the parole board for Gable before she testified, but then stated, "I told her the most that I could possibly do is write a letter to the parole board explaining to them that she had cooperated. I didn't say specifically that I would do it, it wasn't a promise." (HCRR3: 35).

(53) Shipley testified that she does not remember what she told Strange regarding any *Brady* disclosures in this case. (HCRR3: 37).

(54) Shipley testified that she did not know Gable was not married to Brian Gable and did not investigate any of her factual assertions regarding her address or whether she had cancer. (HCRR3: 57, 59).

(55) Shipley was aware that Gable was confined with Applicant's ex-fiance in the same unit. (HCRR3: 59).

(56) Shipley did not inform the jury, through questioning of Gable, that Gable had been confined in the same unit as Applicant's ex-fiance. (HCRR3: 62):

(57) Shipley agreed that when she interviewed Gable, she did not record the interview even though she recorded all of the interviews with the other witnesses in this case. (HCRR3: 65-66).

(58) Shipley testified that when she interviewed Gable at the TDCJ Hobby Unit, which was prior to trial, she told Gable that the only thing she could do to help her was to write a letter to the parole board. (HCRR3: 66-67, 69).

(59) Shipley testified that during an interview in December of 2015, she stated, "I didn't promise her anything more than I'll tell the parole board what you've done." (HCRR3: 70).

(60) Shipley repeatedly insisted her words were not a promise. (HCRR3: 70-83).

(61) Shipley then testified that she made the decision to write the letter to the parole board on Gable's behalf during the trial. (HCRR3: 84).

(62) Shipley agreed that when Gable was asked at trial if she knew the prosecution could assist her with the parole board, she answered, "No, I don't know that sir." (HCRR3: 86-87).

(63) Shipley agreed that she asked Gable at trial on direct examination whether Gable had asked for a parole recommendation and Gable answered, "No, ma'am." (HCRR3: 88).

(64) When asked why she did not clarify that she and Gable had a conversation in which Shipley told Gable she could write a letter to the parole board if Gable assisted the prosecution, Shipley answered, "I think I forgot." (HCRR3: 90).

(65) Shipley agreed that while the trial was still under way, Gable sent her a letter instructing her on what to include in the letter Shipley agreed to write to the parole board on Gable's behalf. (HCRR3: 96). Gable's instructions came from Lori Redmon, Gable's parole attorney. (HCRR3: 97).

(66) Shipley wrote a letter to the parole board on Gable's behalf on September 8, 2013, five days after the conclusion of the trial in this case. (HCRR3: 97).

(67) Shipley did not disclose to Strange or defense counsel that she wrote the letter to the parole board. (HCRR3: 98-99).

(68) Shipley testified that Gable was a critical witness in the trial and the only witness who testified that Applicant confessed to the murder in this case. (HCRR3: 101).

(69) Shipley wrote another letter to the parole board on August 6, 2014. (HCRR3: 114).

(70) The First Assistant District Attorney of Harris County sent an e-mail to Shipley and asked "is the letter of support for Delores Lee part of an agreement you made with Ms. Lee?" To which Shipley responded, "Yes, I told her that I would let the parole board know that she helped with the prosecution. I told her that was no guarantee she would be paroled but that I would notify them of her cooperation." (HCRR3: 115)(HCRR6: Exhibit 173).

(71) Shipley stated that if the case were tried today, she would "probably" disclose her agreement with Gable because of the Michael Morton Act. (HCRR3: 116-17).

(72) Shipley testified that she did not investigate where Gable lived, who she was married to, or whether Applicant received a scar above his lip prior to trial. (HCRR3: 126-28).

(73) Shipley testified that she knew Applicant's father was in prison on the night of the offense in this case, but that Gable testified he was present and outside the victim's home on the night of the offense. (HCRR3: 131).

(74) Shipley testified that as for Paxton, she agreed to tell the Court and that prosecutor that he had cooperated if he testified. (HCRR3: 140).

(75) After Paxton testified at the grand jury, he pled guilty to two aggravated robberies and three others were dismissed. (HCRR3: 141). The plea agreement was a "cap" of forty-five years. (HCRR3: 142).

(76) Shipley told the prosecutor in Paxton's case to delay his sentencing until after he testified, which delayed his sentencing for almost a year. (HCRR3: 144).

(77) Shipley did not remember telling defense counsel that Gable lied to him that she did not know Applicant's ex-fiance when he visited Gable in prison. (HCRR3: 149).

(78) The State was on notice that Gable was incarcerated with Applicant's ex-fiance and had lied about that fact to defense counsel on December 1, 2009, and July 1, 2010, respectively. (HCRR6: Exhibits 174 & 175).

(79) Shipley testified that she told Paxton that if he testified against Applicant she "would tell people that he gave information." (HCRR3: 157).

(80) Shipley stated that specifically, she would tell the Court in which he would be sentenced that Paxton cooperated and that that would be a benefit to him. (HCRR3: 158).

(81) After Paxton testified, Shipley agreed with the trial prosecutor and Paxton's defense attorney to a term of seven years on a robbery, not an aggravated robbery. (HCRR3: 171).

(82) Paxton was not sentenced until after the time for filing a motion for new trial in Applicant's case. (HCRR3: 172).

(83) Shipley testified that after Osani testified at the grand jury, she told Cloud she could do whatever she wanted to on his case because he cooperated and helped the State. (HCRR3: 197-98).

(84) Shipley testified that she did not tell Strange or defense counsel about the benefit Osani received prior to trial. (HCRR3: 198).

(85) Robert Vernier, a former Harris County District Attorney investigator, testified that he accompanied Shipley to a TDCJ Unit to interview Gable. (HCRR3: 224).

(86) The interview was not recorded, but Vernier recalled that Gable wanted Shipley to write a letter to the parole board and specify that Gable was cooperative in this case. (HCRR3: 226).

(87) Vernier testified that Shipley told Gable she could write the letter. (HCRR3: 226).

(88) Vernier testified that it was the common practice of prosecutors at the Harris County District Attorney's Office to state to a witness that they could not promise anything in return for their testimony, but could write a letter on the witness's behalf if the prosecutor chose to do so. (HCRR3: 232).

(89) Jeff Strange testified that he was formerly employed at the Fort Bend County District Attorney's Office and was the lead prosecutor in this case. (HCRR4: 6).

(90) Strange testified that it was his understanding that at the time of the trial in this case, the law required the State to disclose any assistance a witness received in exchange for their testimony. (HCRR4: 7).

(91) Strange testified that anything a witness might believe could be a benefit as a result of his or her testimony was required to be disclosed to the defense. (HCRR4: 9-10).

(92) Strange testified that it was his practice to put any agreement with a witness in writing or recite the agreement into the record and to disclose that agreement to the jury. (HCRR4: 9).

(93) Strange testified that the State's duty to disclose an agreement with a witness extends after the witness testifies and after the trial is over. (HCRR4: 10-11).

(94) Strange testified that if, during trial, a state's witness testified falsely, he would stop the proceedings, approach the bench, try to resolve the issue with the witness, and notify defense counsel of the issue. (HCRR4: 13).

(95) Strange testified that the DNA evidence in this case was not sufficient to prove Applicant's guilt and that is why the State called Gable, Paxton, and Osani to testify. (HCRR4: 16).

(96) Strange agreed that defense counsel in this case filed a *Brady* motion requesting the disclosure of any consideration any of the witnesses who supplied information to the State, and specifically, witnesses at the Grand Jury and the trial. (HCRR4: 20-21).

(97) Strange testified that the State's response to defense counsel's request for disclosure of any consideration to witnesses was that there was nothing responsive to his request. (HCRR4: 21).

(98) Strange testified that he and Shipley agreed that she would handle Gable, Paxton, and Osani as witnesses. (HCRR4: 22-23).

(99) Strange testified that Shipley never told him she had agreed to write a letter to the parole board on behalf of Gable. (HCRR4: 25).

(100) Strange testified that had he known Shipley had a conversation with Gable about Shipley writing a letter to the parole board on her behalf, he would have disclosed that fact to defense counsel. (HCRR4: 33).

(101) Strange testified that Shipley never told him prior to trial that she would go to the judge and prosecutor in Paxton's case in which he was awaiting sentencing and inform them that he cooperated with the State. (HCRR4: 26).

(102) Strange testified that Shipley never told him after the trial in this case that she notified the prosecutor in Paxton's case that he cooperated and that she (Shipley) agreed to a seven-year prison sentence in an aggravated robbery case. (HCRR4: 27).

(103) Strange testified that he learned that the sentencing in Paxton's case had been reset so he asked Shipley if there was a deal where the trial judge in Paxton's case was going to consider Paxton's testimony in this case at his sentencing. (HCRR5: 7).

(104) Shipley led Strange to believe that Paxton's case had already been worked out and that the reset had nothing to do with the present case. (HCRR5: 7-8, 9).

(105) Based on Shipley's assertion, Strange did not believe she would have any input on Paxton's sentencing. (HCRR5: 9).

(106) Strange testified that had he known of Shipley's actions in Paxton's case, he would have disclosed that information to defense counsel. (HCRR4: 27).

(107) Strange testified that Shipley never told him that she arranged for Osani's case to be continued so that he could testify before the Grand Jury or that she notified the trial prosecutor in Osani's case that Osani cooperated with the State and that the prosecutor could take that into account in resolving Osani's case, which was ultimately reduced to a misdemeanor with credit for time served. (HCRR4: 27-28).

(108) Strange testified that had he known of Shipley's actions in Osani's case, he would have disclosed that to defense counsel because it was *Brady* information that required disclosure. (HCRR4: 28-29).

(109) Strange testified that any agreements made between Shipley and the witnesses in this case were done without his knowledge. (HCRR4: 31).

(110) Strange testified that he had no knowledge that Shipley wrote a letter on behalf of Gable to the parole board or had any correspondence with Gable's parole attorney. (HCRR4: 35-36).

(111) Strange testified that had he known about the letter Shipley wrote to the parole board, he would have disclosed that fact to defense counsel during the time for filing a motion for new trial. (HCRR4: 36).

(112) Strange testified that he anticipated that defense counsel would have filed a motion for new trial had he known about the letter Shipley wrote to the parole board. (HCRR4: 36).

(113) Strange testified that Shipley should have told him about the letter she wrote to the parole board because he was the lead prosecutor in the case. (HCRR4: 37).

(114) Based on Shipley's assertion in an email to the First Assistant District Attorney in Harris County regarding a letter Shipley wrote to the parole board on Gable's behalf in 2014, Strange testified that it seemed as if Shipley had an agreement with Gable to write a letter for her. (HCRR4: 38-39).

(115) Strange testified that had the agreement between Shipley and Gable been disclosed to him, he would have approached the bench at trial and attempted to correct Gable's testimony that she was not promised anything for her testimony. (HCRR4: 39).

(116) Strange testified that had the agreement between Shipley and Gable been disclosed to him, he would have approached the bench at trial and attempted to correct Gable's testimony that she did not know the State could help her by making a recommendation to the parole board. (HCRR4: 39-40).

(117) Strange testified that, as a prosecutor, he has written a letter to the parole board on behalf of a witness in the past, but disclosed that fact to the jury and defense counsel because it is required by law. (HCRR4: 41-42).

(118) Strange testified that had he known Gable lied to defense counsel when she stated she did not know Applicant's ex-fiance, he would have disclosed that fact to defense counsel because it indicated deception on Gable's part. (HCRR4: 84).

(119) Strange testified that specifically, Gable's lie to defense counsel was *Brady* material as impeachment evidence. (HCRR4: 86-87).

(120) Don Bankston testified that he is a criminal defense attorney and represented Applicant in the trial of this case. (HCRR4: 94).

(121) Prior to trial, Bankston filed a *Brady* motion requesting the disclosure of any consideration given to a witness for the witness's trial or grand jury testimony. (HCRR4: 94-95).

(122) Prior to trial, Bankston asked Shipley whether there had been any consideration given to any prosecution witness in exchange for grand jury testimony or trial testimony and she said, "None." (HCRR4: 106).

(123) Prior to trial, Bankston asked Shipley whether there would be any consideration given in the future to any prosecution witness and Shipley said she would not be offering anything to any of the witnesses. (HCRR4: 106-07).

(124) Bankston was never informed that Gable wrote a letter to Shipley telling her what to include in the letter she was going to write to the parole board. (HCRR4: 118-20).

(125) Bankston testified that had he known about the letter Gable wrote to Shipley telling her what to include in the letter to the parole board, he would have filed a motion for new trial. (HCRR4: 120).

(126) When shown the letter Shipley wrote to the parole board, Bankston deemed it a request for special review and a recommendation for parole. (HCRR5: 40-41).

(127) Bankston testified he was never given a copy of the letter Shipley wrote to the parole board on Gable's behalf and that had he been given a copy of the letter he would have filed a motion for new trial. (HCRR5: 41).

(128) Bankston cross-examined Gable about whether the State had promised her anything because he suspected the State planned to write a parole letter for her. (HCRR5: 42).

(129) Bankston testified that he has since learned that Gable had a parole attorney at the time she testified in the trial of this case. (HCRR5: 49).

(130) Defense Exhibit 168 reflects that Gable wrote a letter to her parole attorney on August 18, 2010, two days before she testified in this case, informing her parole attorney that Shipley was going to write a letter to the parole board on her behalf for testifying in the present case. (HCRR6: State's Exhibit 168).

(131) Bankston testified that he was never shown a copy of a letter sent by Gable to the FBI in which she stated she lied to Bankston about not knowing Applicant's ex-fiance. (HCRR5: 55).

(132) Bankston testified that the first time Gable related that she saw a cut on Applicant's lip the night of the murder in this case was during the middle of trial so he did not obtain the hospital records prior to trial showing the injury happened later. (HCRR5: 57-58).

(133) Bankston decided not to elicit testimony from Alicia Parker because he was concerned her testimony would open the door to other damaging testimony. (HCRR5: 55-57).

(134) Bankston decided not to elicit testimony that Applicant's father was in prison on the night of the offense in this case because he was concerned that information would reflect poorly on Applicant. (HCRR5: 59-60).

(135) Bankston testified that he was never informed that Shipley arranged a continuance in Osani's case and that fact was not discoverable because the motion was not filed with the Court. (HCRR5: 75).

(136) Bankston was never informed that Osani's charge was reduced to a misdemeanor with credit for time served after he testified at the Grand Jury in this case. (HCRR5: 79-80).

(137) Gable testified that her TDCJ paperwork, her Harris County criminal paperwork and her correspondence to Shipley all reflect that her name is actually Delores Lee. (HCRR5: 95).

(138) Gable testified that she wrote a letter to Applicant's writ counsel stating that Shipley had promised to get her a special parole review and that Shipley instructed Gable to testify that she had not promised Gable anything. (HCRR5: 126). Gable continued that the statement that she did not receive anything from Shipley was a lie. (HCRR5: 126).

(139) The record reflects that on April 2, 2013, Bankston filed a Motion for Judgment Nunc Pro Tunc seeking jail time credit for Applicant for the time he spent in the Harris County Jail while on bond in Fort Bend County from December 1, 2006 until November 2009. The motion reflects that the reason Applicant's bond was not surrendered in the Fort Bend County case was because the owner of the Bail Bond company on Applicant's Fort Bend County bond had died and the company had gone out of business.

## CONCLUSIONS OF LAW

- (1) To prevail upon a post-conviction petition for a writ of habeas corpus, an Applicant bears the burden of proving, by a preponderance of the evidence, facts that entitle him to relief. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997).
- (2) In *Brady v. Maryland*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
- (3) A *Brady* violation occurs when a prosecutor fails to disclose an understanding or agreement between a witness and the State. *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).
- (4) The Court of Criminal Appeals has held that it is “judicially imprudent to attempt to distinguish express agreements between the State and a testifying accomplice from those agreements which are merely implied, suggested, insinuated or inferred.” *Duggan v. State*, 778 S.W.2d 465, 468 (1989), citing *Burkhalter v. State*, 493 S.W.2d 214, 216-17 (Tex. Crim. App. 1973).
- (5) The Court of Criminal Appeals has adopted the standard set forth in *Giglio v. United States*, 405 U.S. 150 (1972), to determine whether an agreement exists between a witness and the State. *Burkhalter*, 493 S.W.2d at 217, n.1.
- (6) Under *Giglio*, it makes no difference whether the understanding is “consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal.” *Duggan*, 778 S.W.2d at 468.
- (7) A conviction procured through the use of false testimony is a denial of the due process guaranteed by the Federal Constitution. *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).
- (8) The knowing use of false testimony violates due process when there is a “reasonable likelihood” that the false testimony affected the outcome. In other words, the false testimony must have been material. *Ex parte Fierro*, 934 S.W.2d 370, 373 (Tex. Crim. App. 1996).

(9) The “reasonable likelihood” standard is equivalent to the 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.*

(10) A due-process violation may arise not only through false testimony specifically elicited by the State, but also by the State’s failure to correct testimony it knows to be false. *Ex parte Ghahremani*, 332 S.W.3d at 477. “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.” *Id.*, citing *Duggan*, 778 S.W.2d at 468.

(11) There is no requirement that the false testimony be criminally perjurious. Rather, it is sufficient to establish a due process violation where the witness’s testimony gives the trier of fact a false impression. *Id.*, citing *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

(12) The duty of a prosecutor to correct known false evidence is both ethically and constitutionally required. *Duggan*, 778 S.W.2d at 468; see also *Mooney v. Holohan*, 294 U.S. 103 (1935).

(13) 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*, 778 S.W.2d at 468.

(14) The purpose in requiring a prosecutor to correct false testimony is to insure a fair trial. *Burkhalter*, 493 S.W.2d at 218.

(15) The record reflects, and this Court concludes that the State had, at the very least, understandings with Gable, Paxton, and Osani, that they would benefit from their cooperation in testifying in the instant case; and that those understandings were not disclosed to defense counsel or the jury. See *Duggan*, 778 S.W.2d at 468.

(16) Gable, Paxton and Osani all testified falsely that they did not have an understanding with the State that they would receive a benefit for their testimony and by the State’s own admission, all three witnesses were “critical” to the State’s case. See *Ex parte Ghahremani*, 332 S.W.3d at 477.

(17) When Gable, Paxton and Osani testified falsely, the prosecutor responsible for those witnesses did not correct their false testimony. *See Duggan*, 778 S.W.2d at 468; *see also Mooney v. Holohan*, 294 U.S. 103 (1935).

(18) Gable, the only witness to testify that Applicant confessed to the offense in this case, testified falsely about her real name, her address at the time of the murder in this case, who she was married to, that she observed Applicant's father at the scene on the night of the murder in this case, that Applicant had a fresh wound to his lip on the night of the offense, and that she had cancer, which was the reason for testifying.

(19) This Court concludes that Applicant suffered a *Brady* violation when the agreements with the State's witnesses in this case were not disclosed. *See Tassin v. Cain*, 517 F.3d at 778.

(20) This Court concludes that the false testimony in this case was material and that there is a reasonable likelihood that the false testimony in this case affected the outcome. *Ex parte Fierro*, 934 S.W.2d at 373.

(21) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(22) Applicant has not shown that the outcome of his trial would have been different but for his counsel's allegedly deficient performance. *See Id.*

(23) Applicant has not shown that his counsel's performance was deficient in failing to insure he received all of his pre-trial jail time credit because it was not the fault of counsel that the bail bondsman on Applicant's bond died and therefore, the bond could not be surrendered.<sup>4</sup> *See Id.*

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<sup>4</sup> Applicant may still be entitled to pre-trial jail time credit for the time he spent in the Harris County Jail awaiting trial in this case should he make a claim for such. However, in the present case, Applicant's claim is one of ineffective assistance of counsel which this Court does not find meritorious.

(24) Applicant has proven by a preponderance of the evidence that he is entitled to habeas corpus relief on his claim that the State suppressed evidence that witnesses received a benefit for their testimony. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997); *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

(25) Applicant is entitled to habeas corpus relief on his claim that the State used false testimony to obtain a conviction in this case. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).


RECOMMENDATION

This Court recommends that Applicant be granted habeas corpus relief with respect to the first and second claims included in his writ application.

The District Clerk shall immediately transmit to the Court of Criminal Appeals these findings and conclusions as provided by law.

The Clerk shall send a copy of this order to Applicant and the State of Texas.

Signed on this 7 day of November, 2016.

  
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Hon. James H. Shoemake  
434th Judicial District Court  
Fort Bend County, Texas

FILED

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CLERK DISTRICT COURT  
FORT BEND CO., TX