No. _____

In The

Supreme Court of the United States

FEANYICHI E. UVUKANSI,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of capital murder and sentenced to life without parole based on the identification testimony of a single eyewitness who was to be sentenced in federal court for possession with intent to distribute ten kilograms of cocaine. The state prosecutor, who had agreed to write a letter to the federal judge on the witness's behalf, elicited his false testimony that no one had promised him anything or told him that his punishment range would be reduced or that he would receive a lower sentence. After petitioner was convicted, the prosecutor wrote a letter to the federal judge that the witness's testimony "alone convinced the jury of the [petitioner's] guilt," and the witness received probation. The state habeas trial court found that the prosecutor had knowingly elicited and failed to correct the witness's false testimony, but that petitioner failed to prove by a preponderance of the evidence that the false testimony affected the verdict, as it did not impeach the witness's identification. The Texas Court of Criminal Appeals (TCCA) denied relief without written order, which requires this Court to "look through" that denial to the trial court's findings of fact and conclusions of law as the basis for the denial. The questions presented are:

I. Did the state courts—by requiring petitioner to prove by a preponderance of the evidence that the prosecution's knowing use of and failure to correct false testimony affected the verdict—disregard this

QUESTIONS PRESENTED—Continued

Court's precedent requiring that the prosecution prove beyond a reasonable doubt that the false testimony did not affect the verdict?

II. Did the state courts—by concluding that an eyewitness's false testimony that he had not been promised consideration was immaterial because impeaching his motive to testify would not impeach his identification of petitioner—disregard this Court's precedent holding that impeachment evidence and exculpatory evidence are the same for purposes of a materiality analysis?

RELATED CASES

- *State v. Uvukansi*, No. 1353181, 174th District Court of Harris County. Judgment entered June 20, 2014.
- *Uvukansi v. State*, No. 01-14-00527-CR, First Court of Appeals of Texas. Judgment entered June 2, 2016.
- *Uvukansi v. State*, No. PD-0727-16, Texas Court of Criminal Appeals. Judgment entered October 19, 2016.
- *Ex parte Uvukansi*, No. 1353181-A, 174th District Court of Harris County. Judgment entered April 2, 2019.
- *Ex parte Uvukansi*, No. WR-88,493-02, Texas Court of Criminal Appeals. Judgment entered April 14, 2021.
- *Uvukansi v. Lumpkin*, No. 4:21CV1624, United States District Court for the Southern District of Texas. Pending.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Feanyichi E. Uvukansi, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's denial of habeas corpus relief without written order (App. 1) is unreported. The state district court's findings of fact and conclusions of law (App. 2) is unreported. The TCCA's refusal of discretionary review on direct appeal (App. 60) is unreported. The Texas Court of Appeals' unpublished opinion affirming the conviction on direct appeal (App. 61) is available at 2016 WL 3162166. The judgment of conviction of the state district court (App. 91) is unreported.

JURISDICTION

The TCCA denied relief on April 14, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State

shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT

A. Procedural History

Petitioner pled not guilty to capital murder in the 174th District Court of Harris County, Texas. The jury convicted him, and the court assessed punishment at life imprisonment on June 20, 2014.

The Texas Court of Appeals affirmed petitioner's conviction in an unpublished opinion issued on June 2, 2016. The TCCA refused discretionary review on October 19, 2016. *Uvukansi v. State*, No. 01-14-00527-CR, 2016 WL 3162166 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

Petitioner filed a state habeas corpus application on November 14, 2017. The trial court, after conducting an evidentiary hearing, recommended that relief be denied on April 2, 2019. The TCCA denied relief without written order on April 14, 2021. *Ex parte Uvukansi*, No. WR-88,493-02 (Tex. Crim. App. Apr. 14, 2021).

Petitioner filed a federal habeas corpus petition in *Uvukansi v. Lumpkin*, No. 4:21CV1624 in the United States District Court for the Southern District of Texas on May 17, 2021. That case is pending.[1]

[1] Petitioner's pending federal habeas petition should not deter this Court from reviewing the TCCA's judgment. Petitioner

B. Factual Statement

1. The Trial

Two men fired 28 shots across a parking lot into a crowd leaving a club after a concert on June 20, 2012, killing three persons and wounding a fourth (7 R.R. 28-29, 34-35, 84, 129; 9 R.R. 53-54, 61-62, 65-66, 69, 75, 77-78). The police recovered 18 spent shell casings at the scene; ten were fired from one gun, and eight from a different gun (7 R.R. 116, 168-70).

The police determined that the wounded man, a member of the Crips, reportedly had orchestrated the murder of members of the Bloods in January 2012 (8 R.R. 167-70). The police theorized that the Bloods had retaliated by committing the murders at the club (8 R.R. 179-80).

Houston Police Department Sergeant Chris Cegielski obtained petitioner's name as a possible suspect on June 25, 2012 (8 R.R. 184, 187-88). On June 28, 2012, Sgt. Cegielski showed a photospread containing petitioner's photo to Dedrick Foster, who "confirm[ed]

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faces substantive and procedural hurdles on federal habeas review under the Antiterrorism and Effective Death Penalty Act which he does not face on state habeas review. A commentator has observed that, for this reason, this Court recently has granted certiorari to review state court post-conviction decisions addressing substantial constitutional issues. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 160, 184 (2021) ("Faced with the decisions of Congress in passing AEDPA . . . , the Court has seized on the only means available to it for the robust development of doctrine pertaining to collateral review: direct collateral review."). This Court should follow that course in petitioner's case.

the information" that Sgt. Cegielski had received from other sources (8 R.R. 196, 198-99).[2] Sgt. Cegielski contacted the district attorney's office to obtain an arrest warrant (8 R.R. 199-200).

Brent Wasserstein, a lawyer, called Sgt. Cegielski and said that a client, Oscar Jeresano, had information about the murders (8 R.R. 201).[3] Jeresano gave a statement to Sgt. Cegielski and identified petitioner in a photospread on June 29, 2012 (8 R.R. 35-39, 201, 206).

The police arrested petitioner on July 3, 2012 (8 R.R. 221). He said in a recorded interview that he left the club, heard shots, and was pulled back inside by Michael Rhone (8 R.R. 221-24; SX 58).

Sgt. Cegielski interviewed Rhone on July 5, 2012 (8 R.R. 233). Rhone did not confirm petitioner's story, causing Sgt. Cegielski to believe that petitioner had lied.[4]

Rhone testified that he knew petitioner, heard about the shooting on the news, and told the police that he was at a friend's house instead of at the club with petitioner (8 R.R. 115-17).

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[2] Foster was murdered on July 11, 2012 (8 R.R. 239). Petitioner was in custody on that date. Foster's murder remains unsolved.

[3] Jeresano's full name is Oscar Armando Jeresano Betancourth (8 R.R. 43).

[4] Apparently, it did not occur to Sgt. Cegielski that Rhone might have lied to avoid being involved in a capital murder case involving the Crips and the Bloods.

Jeresano testified that he was working as a valet at the club on the night of the concert (8 R.R. 5, 7). After the concert ended, he heard shots, turned around, and saw a man shooting a gun (8 R.R. 14, 18-19).[5] He ducked behind a car and saw people running and bodies falling (8 R.R. 27, 29). He ran into the club after the shooting stopped (8 R.R. 31). He did not tell the police that he saw the shooting because he had a pending federal case, was scared that he would get in trouble, did not think that the police would believe him because of his record, and wanted to talk to his lawyer first (8 R.R. 31-32).

Jeresano testified that he told Wasserstein that he wanted to talk to the police because his uncle had been murdered in this manner when he was six or seven years old and he wanted the victims' families to have closure and not suffer like his family did (8 R.R. 33-34). Two days later, he met with an officer at Wasserstein's office, gave a statement, and identified petitioner in a photospread (8 R.R. 35-39).[6] He also identified petitioner in court (8 R.R. 39).

Jeresano testified that he had been arrested and charged with possession with intent to distribute ten kilograms of cocaine in 2011, pled guilty in federal court in Victoria, Texas, in July 2012 and was to be sentenced after he testified at petitioner's trial (8 R.R. 35).

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[5] Jeresano did not know whether the man shot anyone (8 R.R. 100-02).

[6] Jeresano described the shooter to the police as a black male dressed in black with a "fade" hairstyle (8 R.R. 71, 73).

The range of punishment for his federal offense was ten years to life imprisonment. He asserted that no one had promised him anything for his testimony or told him that his punishment range would be reduced or that he would receive a lower sentence as a result of his cooperation.[7]

King elicited on cross-examination that Jeresano was facing deportation as a result of his federal conviction (8 R.R. 44-45). He asserted that he did not know, and that his attorney, Wasserstein, had not informed him, that his plea agreement provided that, if he cooperated, he might receive a reduced sentence under § 5K1.1 of the federal sentencing guidelines (8 R.R. 48).[8] He elaborated, "Nobody has ever, ever told me that I am going to get less time for helping this case, nobody . . . I'm here by my own will, not to help myself. I'm here to help the family's (sic) of the people that died, nothing else" (8 R.R. 49).

The trial court conducted a hearing outside the presence of the jury at King's request (8 R.R. 80-81). King asserted that the federal prosecutor, Patti Booth, informed her by e-mail that Jeresano's plea agreement

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[7] Lead prosecutor Gretchen Flader informed petitioner's lead counsel, Vivian King, at a pretrial hearing that she would write a letter to the federal judge regarding Jeresano's cooperation before he was sentenced (3 R.R. 5-6). Flader did not elicit testimony about the letter on direct examination of Jeresano.

[8] Section 5K1.1 of the United States Sentencing Guidelines provides that, upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

provided that the government would recommend a § 5K1.1 sentence reduction if he provided substantial assistance (8 R.R. 83-84). Flader responded she had "zero knowledge of any . . . potential sentencing reduction"; that she had not been informed that it "was possible, or in any way going to happen in this case"; and that, "I just want to put it on the record so that it doesn't look like I committed a prosecutorial misconduct by not telling you something that's in the discovery record" (8 R.R. 84-85). Flader objected to King asking Jeresano about the letter that Flader had agreed to write on his behalf because she had informed Wasserstein rather than Jeresano (8 R.R. 87-88). The court observed that "the problem is unless somebody told him something, he didn't know anything about it" (8 R.R. 88). King then became emotional and had a breakdown (8 R.R. 89):

> And the way y'all are coming at me, I can't even think. So may I start thinking all over again? I've got so many—I've got to fight you, I've got to fight her, I've got to fight Wasserstein, I've got to fight everybody in the damn courthouse. Let me just figure it out, okay, please.

King made an offer of proof that she wanted to ask Jeresano about Booth's e-mail that the government will file a motion to reduce his sentence if he cooperates against petitioner (8 R.R. 92-93). The court ruled that, because no one ever told Jeresano about the

agreement, "I'm not going to let you do it through him" (8 R.R. 93-94).[9]

King called Wasserstein to testify before the jury. He testified that Jeresano was arrested on December 4, 2011, and charged with possession of ten kilograms of cocaine that were found in a hidden compartment in a vehicle that he was driving (9 R.R. 41-42). Jeresano was released on bond on January 3, 2012, and ordered to remain at home and wear a GPS monitor (9 R.R. 42-43).[10] Wasserstein testified that Jeresano wanted to talk to the police about the murders because it was the right thing to do and did not ask whether his cooperation would help him in his federal case (9 R.R. 43-44, 46-47). Wasserstein arranged the interview and notified the federal prosecutor that Jeresano was cooperating in the state prosecution (9 R.R. 44). Jeresano pled guilty in federal court on July 24, 2012, and was scheduled to be sentenced on November 5, 2012 (9 R.R. 43). Wasserstein filed a motion to modify the bond conditions to remove the home confinement and GPS monitor on August 23, 2012, which the federal court granted

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[9] The court ignored the controlling precedent in allowing Flader to protect Jeresano from cross-examination regarding the leniency that she would request that he receive in exchange for his testimony. *See Burkhalter v. State*, 493 S.W.2d 214, 218 (Tex. Crim. App. 1973) (prosecutor cannot prevent jury from learning of deal by making it with lawyer instead of witness).

[10] Jeresano violated his bond conditions by being at the club at 2:00 a.m.

on August 28, 2012.[11] Wasserstein repeatedly reset the sentencing so Jeresano could testify against petitioner (9 R.R. 45, 49). Wasserstein explained that, after Jeresano testified, Wasserstein would notify the federal prosecutor so she could file a § 5K1.1 motion, which would permit the federal judge to decide whether to reduce the sentence (9 R.R. 45). King did not elicit that Flader had agreed to write a letter informing the federal judge of Jeresano's cooperation.

Flader elicited on cross-examination of Wasserstein that Jeresano wanted to talk to the police because it was the right thing to do (9 R.R. 46-47). Wasserstein testified that he did not explain the § 5K1.1 motion to Jeresano but told him that testifying against petitioner probably would help at his federal sentencing (9 R.R. 47-48).

During their closing arguments, the prosecutors argued that the police had no leads until Foster came forward and said that petitioner was involved in the shooting, but Foster could not testify because he was dead (10 R.R. 31, 35); that Jeresano identified petitioner as a gunman and came forward to help the victims rather than to get a "good deal" (10 R.R. 32-33); and, that Rhone's testimony that he was not at the club established that petitioner provided a false alibi to the police (10 R.R. 11).

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[11] Wasserstein testified that the removal of these bond conditions was unrelated to Jeresano's cooperation in the capital murder case (9 R.R. 48-49).

King argued that petitioner told the police that he was at the club but did not shoot anyone (10 R.R. 19); and, that Jeresano claimed that he saw the shooting in order to receive a reduced sentence in his federal case and that he was at the club dealing dope instead of parking cars as he had testified (10 R.R. 13-14).[12]

2. Discovery Of The False Testimony

Petitioner hired undersigned counsel in 2017. Counsel checked the docket sheet in Jeresano's federal case and determined that the key documents had been sealed (1 H.C.R. 32-36). Counsel filed a motion to unseal these documents, which the federal court granted. These documents, and information provided by Wasserstein, demonstrated that Jeresano testified falsely that no one had promised him anything for his testimony or told him that his punishment range would be reduced or that he would receive a lower sentence as a result of his cooperation.

Although Jeresano testified that he did not know, and Wasserstein did not tell him, that his plea agreement provided for a sentence reduction (8 R.R. 48), he had signed a plea agreement almost two years before petitioner's trial which stated that, if he provided substantial assistance, "the Government would recommend to the Court a reduction in the Defendant's

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[12] There was no evidence to support King's argument that Jeresano was dealing drugs at the club. Her co-counsel argued that Jeresano was not at the club at all (10 R.R. 25-26). Clearly, defense counsel were not on the same page.

sentence. . . ." (1 H.C.R. 37). Thus, Jeresano testified falsely at petitioner's trial that he did not know whether his plea agreement provided for a sentence reduction and that he was testifying simply to help the victims' families.

The events that transpired after Jeresano signed the plea agreement demonstrate a carefully orchestrated attempt by Flader, with Wasserstein's cooperation, to ensure that Jeresano would receive consideration for his testimony without disclosing that information to the defense or the jury or leaving a paper trail.

Jeresano acknowledged during the federal guilty plea proceeding that he had knowingly transported drugs in his vehicle for $1,000 (1 H.C.R. 61-63).[13] After he pled guilty, the federal prosecutor, Booth, asked the court to allow him to remain on bond because "he is cooperating with the state authorities" as a witness to a homicide in Houston (1 H.C.R. 65). Booth said, "I know it's extraordinary, but we're asking under extraordinary circumstances that he be allowed to stay out on bond." Jeresano was allowed to remain on bond.

The Presentence Investigation Report reflected that Jeresano was subject to a mandatory minimum term of imprisonment of ten years and that he was subject to removal from the United States as a result of his conviction (1 H.C.R. 74, 76).

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[13] Jeresano denied knowing that the quantity of the cocaine was 9.85 kilograms (1 H.C.R. 61).

Petitioner was sentenced on June 20, 2014 (C.R. 1092-93). Flader wrote a letter to United States District Judge John Rainey on August 15, 2014, regarding Jeresano's cooperation (1 H.C.R. 80-81). She asserted that Jeresano was "an exceptional human being" who "did not expect anything for his cooperation, but only came forward for the families of the victims" and, while testifying, "was not only honest, but spoke with such conviction **his testimony alone convinced the jury of the Defendant's guilt**" (emphasis added). She described Jeresano as "brave, loyal, polite and kind hearted" and stated that she and the families of the victims will always be in his debt.

Judge Rainey sentenced Jeresano on January 5, 2015 (1 H.C.R. 82-103). Booth asked for a downward departure to "one-third off of the lowest end of the guidelines" under § 5K1.1 based on Jeresano's cooperation (1 H.C.R. 84-85). Judge Rainey observed that this "was a triple homicide that was going nowhere" until Jeresano "stepped up" and solved it by identifying the shooter (1 H.C.R. 86). Jeresano humbly observed that God wanted him to help because "nobody else stepped forward." Wasserstein praised Jeresano as "the bravest and most heroic client I've ever represented" and gushed, "I've never had the opportunity to speak on someone's behalf with the character that Oscar has" (1 H.C.R. 89).[14] Wasserstein added that the bravest conduct he had ever seen in a courtroom was the way that Jeresano "stood up to defense counsel" after he "was

[14] Wasserstein apparently forgot about the ten kilograms of cocaine hidden in Jeresano's vehicle.

badgered for almost a day about being a liar, about being somebody who was just doing this because of a motive to help with sentencing" (1 H.C.R. 91). Wasserstein then gilded the lily by embellishing that Jeresano "stood up to a defendant that was throwing gang signs at him, throat-slashing type of signs towards him."[15] Jeresano then sought to distance himself from the ten kilograms of cocaine that he so readily acknowledged that he possessed when he pled guilty by asserting that he did not know what was in the back of the vehicle and that he was "guilty of trusting somebody I shouldn't have trusted" (1 H.C.R 93).

Judge Rainey—like petitioner's jury—bought Jeresano's act hook, line, and sinker. He said, "I've been at this a long time, and I don't believe I've ever seen anyone that had the courage that you've shown in solving a triple homicide. . . . And your crime doesn't even compare to someone killing three people all at the same time, wounding, I think, two or three more (1 H.C.R. 96). Jeresano provided "as much cooperation and assistance" as he had ever seen (1 H.C.R. 97).[16] Judge Rainey stated that the "letter from the assistant district attorney in Harris County is unbelievable. You made her case." Acknowledging that he had never before done this, he placed Jeresano on probation for

[15] The record of petitioner's trial does not reflect that he "threw gang signs" or made "throat-slashing signs" while Jeresano testified. If petitioner had done so, the prosecutor, a court official, or Wasserstein surely would have notified the court so it could take appropriate action. Wasserstein clearly misrepresented what happened in an effort to obtain leniency for Jeresano.

[16] Booth parroted that she agreed (1 H.C.R. 97).

three years "in recognition of the extraordinary cooperation in solving that triple homicide."

All of this was a sham.

Wasserstein provided an affidavit in petitioner's state habeas proceeding explaining what really happened (1 H.C.R. 104-06). He asserted, in pertinent part:

> I had agreements with Harris County assistant district attorney Gretchen Flader and assistant United States attorney Patty Booth that Jeresano-Betancourth would receive consideration in exchange for his cooperation and, if necessary, his testimony. Flader agreed to write a letter advising the federal district court of his cooperation. Booth agreed to file a 5K1.1 motion asking the court to sentence him below the statutory minimum of ten years. The filing of this motion gave the court discretion to sentence him to less than ten years.
>
> I informed Jeresano-Betancourth of the arrangement that I made with the respective prosecutors. Although he knew at the time of his testimony against Uvukansi that the state prosecutor would write a letter of cooperation and the federal prosecutor would file a motion requesting a sentence below the statutory minimum, he did not know that he would receive probation.[17]

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[17] Wasserstein did not know why Jeresano had not been deported (1 H.C.R. 105).

Armed with this new evidence, petitioner filed a state habeas corpus application alleging that Jeresano testified falsely that no one had promised him anything for his testimony or told him that his punishment range would be reduced or that he would receive a lower sentence as a result of his cooperation. Petitioner specified that Flader had elicited false testimony from Jeresano on direct examination, successfully objected to King's attempt to cross-examine him about the arrangement by falsely claiming that he did not know about it, and failed to correct his false testimony to that effect on cross-examination. Undersigned counsel also investigated what became of Flader after petitioner's trial.

Harris County District Attorney-elect Kim Ogg sent an e-mail to First Assistant District Attorney Belinda Hill on December 20, 2016, stating that, when she took office on January 1, 2017, she intended to investigate whether Flader had misinformed a capital murder victim's mother about the status of the case and made false statements about Ogg (2 H.C.R. 315). Ogg requested that the Harris County District Attorney's Office (HCDAO) preserve all of Flader's records, including her e-mails.

On February 27, 2017, Gary Zallar, the HCDAO's director of information systems and technological services, sent a memo to Ogg that Flader may have deleted

her e-mails (2 H.C.R. 290-91).[18] The HCDAO subsequently determined that Flader deleted all of her e-mails regarding petitioner's case (3 H.R.R. 152-54). The e-mails were obtained from a back-up system after undersigned counsel issued a subpoena for them (3 H.R.R. 158-59).

Petitioner filed a motion for production of favorable evidence requesting disclosure of the reasons that Ogg did not renew Flader's contract when she became district attorney (1 H.C.R 219-20). On March 23, 2018, the habeas prosecutor informed the court and counsel at a hearing that Ogg told him that Flader was "let go" because she was "sleeping with" the prosecutor who prosecuted the "Jenny rape victim case that became the high point of the political season" and, as a result, could not be "part of her office" (2 H.R.R. 16-18). When the prosecutor made this representation, the HCDAO was withholding from petitioner a letter dated February 9, 2017, in which the HCDAO had represented to the Texas Workforce Commission, in response to Flader's unemployment compensation claim, that Ogg terminated Flader for *Brady* and discovery violations in a capital murder trial (2 H.C.R. 287-89).

Thus, the HCDAO fired Flader for suppressing evidence and violating discovery rules in another capital murder trial yet defended her conduct in eliciting and

[18] Flader testified at petitioner's habeas evidentiary hearing that she went to her office on the Saturday after she learned that she would be terminated and deleted her e-mails (3 H.R.R. 14-16).

failing to correct false testimony at petitioner's capital murder trial.

3. The State Court Evidentiary Hearing

a. The prosecutor had agreed to write a letter to the federal judge for Jeresano.

Flader and Wasserstein both testified that they had an agreement that, if Jeresano cooperated and testified, Flader would write a letter informing the federal judge of his cooperation before he was sentenced (3 H.R.R. 25, 166). Flader understood that the purpose of the letter would be to persuade the judge to be lenient (3 H.R.R. 26). Wasserstein believed that Flader's letter would "go a long way" in helping Jeresano obtain a reduced sentence (3 H.R.R. 171). He considered Flader's promise to him that she would write the letter as the functional equivalent of a promise to Jeresano (3 H.R.R. 242-43). He and Booth agreed that, if Flader wrote the letter, the government would file a § 5K1.1 motion asking the court to sentence Jeresano below the statutory minimum of ten years in prison (3 H.R.R. 166).

b. Jeresano knew that he would receive consideration for his testimony.

Flader testified that, if she had told Jeresano before he testified that she would write a letter to the federal judge, and King had asked him about it, he would have to admit it; if he had denied it, she would have a duty to correct his false testimony (3 H.R.R.

32-33). Although she did not tell Jeresano about the letter, she assumed (correctly) that Wasserstein did (3 H.R.R. 32, 38).

Wasserstein testified that he told Jeresano before trial about his agreements with Flader and Booth (3 H.R.R. 184-85). With the cooperation of both prosecutors, he was able to reset the sentencing for over two years so Jeresano could testify against petitioner (3 H.R.R. 173). He told Jeresano before petitioner's trial that his sentencing had been reset because he had to testify against petitioner to obtain Flader's letter and the government's § 5K1.1 motion (3 H.R.R. 173-75). He also reminded Jeresano of these agreements during a break in Jeresano's testimony at petitioner's trial (3 H.R.R. 167-70).

Flader acknowledged that she did not ask Jeresano about the letter on direct examination (3 H.R.R. 30). Jeresano had testified at petitioner's trial that he did not know that he would get less time for his cooperation and testimony and that he was testifying only to help the victims' families (8 H.R.R. 48-49). Flader did not correct this testimony by eliciting that she would write a letter and Booth would file a § 5K1.1 motion.

c. The jury did not know that the prosecutor had agreed to write a letter to the federal judge for Jeresano.

Flader testified that she did not disclose to the jury that she would write a letter to the federal judge for

Jeresano because it was not her obligation to do so and she did not consider it to be important (3 H.R.R. 30).[19] Flader acknowledged that King did not ask Jeresano about the letter on cross-examination and did not elicit from Wasserstein that Flader would write a letter or that he had told Jeresano about a letter (3 H.R.R. 67, 72-73). Wasserstein testified that he did not mention the letter during his testimony because the lawyers did not ask about it (3 H.R.R. 195). King testified that she did not ask Wasserstein about the letter because the court had sustained Flader's objection when she tried to ask Jeresano about consideration (3 H.R.R. 257-58). Flader acknowledged that the jury did not know that she would write a letter informing the federal judge of Jeresano's cooperation and testimony that could (and did) result in him receiving probation (3 H.R.R. 73).

d. Jeresano testified falsely that no promise had been made for his testimony.

Jeresano testified that he cooperated in the prosecution of petitioner because his uncle had been murdered when he was six or seven years old and he wanted the victims' families to have closure and not suffer like his family did (8 R.R. 33-34). He testified that no one had promised him anything for his

[19] Flader's testimony that she did not consider the letter to be important was incredible. Clearly, she did not want the jury to know that she would write a letter, as she successfully objected when King sought to ask Jeresano about consideration for his testimony on the basis that she made the agreement with Wasserstein (8 H.R.R. 87-88).

testimony or told him that his punishment range of ten years to life would be reduced as a result of his cooperation (8 R.R. 35). Flader testified that she did not verify that Jeresano's uncle had been murdered before she elicited this testimony (3 H.R.R. 46-47). King testified that she could not investigate whether Jeresano's uncle had been murdered because she first heard about it when Jeresano testified (3 H.R.R. 235-37). Wasserstein testified that he did not believe that there was any substance to Jeresano's claim that his uncle had been murdered and that Jeresano may have made it up (3 H.R.R. 180-81).

Flader testified that she elicited that no one had promised Jeresano anything for his testimony or told him that his punishment range would be reduced as a result of his cooperation even though she had promised Wasserstein that she would write a letter to the federal judge (3 H.R.R. 47-49). Wasserstein testified that a truthful answer from Jeresano would have been that Flader promised Wasserstein that she would write a letter to the federal judge after he testified, and Booth promised Wasserstein that she would file a § 5K1.1 motion (3 H.R.R. 182-85).

During her closing argument, Flader asserted that Jeresano came forward to help the victims rather than "get a good deal" and that there had been no promise (10 R.R. 32-33). Remarkably, Flader testified that she did not consider her agreement with Wasserstein to write a letter to the federal judge to constitute a promise (3 H.R.R. 74).

Wasserstein testified that he was present in the courtroom when Jeresano testified on cross-examination that no one had told him that he could get a reduced sentence or less time for cooperating and, specifically, that Wasserstein had never told him this (3 H.R.R. 186, 188-90). Wasserstein acknowledged that he told Jeresano before and during trial that Jeresano could get a reduced sentence or less time for cooperating, and this information also was contained in the plea agreement that Jeresano signed (3 H.R.R. 167-70, 184-85, 187, 189-90).

Flader told the court outside the presence of the jury during Jeresano's testimony that she had "zero knowledge of any . . . potential sentencing reduction" and that she had not been informed that it "was possible or in any way going to happen in this case" (3 H.R.R. 84-85). Flader testified that she had no knowledge before trial of the possibility of a § 5K1.1 motion (3 H.R.R. 70-72). Both Wasserstein and King testified that they explained to Flader before trial how her letter would be used in an effort to obtain a reduced sentence for Jeresano (3 H.R.R. 192-93, 247). Wasserstein testified that it was up to Flader, rather than him, to correct any false testimony by Jeresano (3 H.R.R. 176).

4. The State Habeas Trial Court's Findings Of Fact

The state habeas trial court found that Flader knowingly elicited the following false testimony from Jeresano:

- Jeresano had not been promised anything for testifying in court, which misled the jury regarding the benefits that he might receive (App. 42; Finding 87);
- Jeresano did not know before trial that the federal judge could consider his cooperation and sentence him below the statutory minimum of ten years in prison (App. 43; Finding 89); and
- Jeresano did not know that, if he cooperated in the state prosecution, the federal prosecutor would notify the federal judge so he could decide whether to reduce Jeresano's sentence (App. 43; Finding 90).

The state habeas trial court also found that Wasserstein told Jeresano before trial that, if he testified, Flader would write a letter to the federal judge, and Booth would file a motion to reduce his sentence (App. 43-44; Findings 92-95); that Flader and Booth made these promises to Jeresano and Wasserstein (App. 44; Finding 96); and, that Flader elicited testimony that "gave the jury a false impression when the testimony is examined as a whole" (App. 44-49; Findings 97, 110).

Finally, the state habeas trial court found that:

- Jeresano testified falsely on cross-examination that he did not know, and Wasserstein did not tell him, that his plea agreement provided that, if he cooperated with the State, he might receive a § 5K1.1 sentence reduction (App. 44, 49; Findings 98, 110);
- Wasserstein told Jeresano at a recess during his testimony that the federal judge could sentence him below the statutory minimum if a § 5K1.1 motion were filed (App. 46; Finding 100);
- Jeresano's testimony was false because his plea agreement contained such a provision, as he acknowledged during the plea proceeding (App. 46; Finding 102); and,
- Jeresano's false testimony misled petitioner's jury (App. 50; Finding 114).

Most importantly, the state habeas trial court found that "Jeresano's testimony was **necessary** as he was the only witness called by the State to prove [petitioner] was the shooter who killed the complainants" (App. 52; Finding 119) (emphasis added). However, it concluded that the false testimony was not material (App. 50-52, 55; Findings 115-16, 120-22, 131).

The TCCA, after reviewing the trial court's findings of fact and conclusions of law, as required by

article 11.07 § 4 of the Texas Code of Criminal Procedure, summarily denied relief without explanation.[20]

REASONS FOR GRANTING REVIEW

The state habeas trial court erroneously placed the burden on petitioner to prove by a preponderance of the evidence that Jeresano's false testimony—which the prosecutor had knowingly elicited and failed to correct—"was reasonably likely to influence the judgment of the jury." It concluded that petitioner failed to prove that the false testimony affected the verdict because, even if the jury had known that Jeresano lied in denying that he had been promised consideration, it still could have believed his identification of petitioner. Because the TCCA denied relief without written order, this Court should "look through" that denial to the trial court's findings of fact and conclusions of law as the basis for the denial. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 n.3 (2016) ("[It] is perfectly consistent with this Court's past practices to review a lower court decision—in this case, that of the Georgia habeas court—in order to ascertain whether a federal question may be implicated in an unreasoned summary order from a

[20] Article 11.07, § 4 of the Texas Code of Criminal Procedure provides, "After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact."

higher court."); *cf. Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); *King v. Johnson*, 138 F.3d 951, 1998 WL 110056 (5th Cir. 1998) (unpublished) (reviewing the state habeas trial court's legal conclusion under the "look through" presumption when the TCCA denied habeas relief without written order).

The state courts misapplied this Court's false testimony jurisprudence in two ways. First, they erroneously placed the burden on petitioner to prove by a preponderance of the evidence that the false testimony affected the verdict, when this Court requires the prosecution to prove beyond a reasonable doubt that the false testimony did not affect the verdict. *See United States v. Bagley*, 473 U.S. 667, 679-80 & n.9 (1985). Second, they erroneously concluded that a key prosecution witness's false testimony that he had not been promised consideration is not material because it concerned his motive to testify rather than his positive identification of the defendant as the perpetrator. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Review is warranted because the TCCA's judgment directly conflicts with this Court's well-established precedent. SUP. CT. R. 10(c).

I. The State Courts—By Requiring Petitioner To Prove By A Preponderance Of The Evidence That The Prosecution's Knowing Use Of And Failure To Correct False Testimony Affected The Verdict—Disregarded This Court's Precedent Requiring That The Prosecution Prove Beyond A Reasonable Doubt That The False Testimony Did Not Affect The Verdict.

A conviction must be set aside when the prosecutor knowingly elicited or failed to correct false testimony that was material to the conviction. *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *Giglio*, 405 U.S. at 154. This Court established almost a century ago that the prosecutor's knowing use of false testimony is "inconsistent with the rudimentary demands of justice. . . ." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

This Court's materiality standard governing the prosecution's use of false testimony is more lenient to a defendant than its materiality standard governing the prosecution's failure to disclose exculpatory or impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (defendant must show a reasonable probability that, if the favorable evidence had been disclosed, the result of the trial would have been different). *See Bagley*, 473 U.S. at 679-82. The determination of whether false testimony is material is governed by the harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires that the prosecution prove beyond a reasonable doubt that

a constitutional error did not contribute to the conviction. *Bagley*, 473 U.S. at 679-80 & n.9.

Under the *Chapman* standard, a reviewing court must determine "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id*. (emphasis in original). The *Bagley* standard governing the materiality of false testimony is more lenient to a defendant than the *Brady* standard governing the materiality of suppressed evidence because false testimony involves "a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

The state habeas trial court erroneously required petitioner to prove by a preponderance of the evidence that the false testimony affected the verdict (2 H.C.R. 420; Finding 78). Even this Court's more demanding materiality standard governing suppressed evidence does not require proof by a preponderance of the evidence. *See*, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted

ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)."). The state habeas trial court, by placing the burden on petitioner to prove that the false testimony was material, used a standard that was more onerous than the controlling *Bagley* standard. As noted, false testimony is "material unless failure to disclose it would be harmless beyond a reasonable doubt," and the burden of proof is on the prosecution rather than the defendant. *Bagley*, 473 U.S. at 679-80 & n.9.

The prosecution had the burden to prove beyond a reasonable doubt that Jeresano's false testimony did not affect the verdict. Because he was the only witness to identify petitioner, the prosecution cannot meet that burden. Notably, the TCCA did not reject the trial court's erroneous materiality analysis; it simply denied habeas relief without a written order. Thus, this Court should "look through" that denial to the trial court's findings of fact and conclusions of law as the basis for the denial. *Foster*, 136 S. Ct. at 1746 n.3; *cf. Wilson*, 138 S. Ct. at 1192. By that measure, the denial of relief conflicts with this Court's precedent.

This Court should apply the correct materiality standard and reverse the TCCA's judgment because the prosecution's use of and failure to correct Jeresano's false testimony violated petitioner's right to due process of law and a fair trial. At the very least, this Court should grant certiorari, vacate the judgment, and remand to the TCCA to reconsider the materiality of Jeresano's false testimony under the correct

standard. *Cf. Andrus v. Texas*, 140 S. Ct. 1875, 1886-87 (2020) (*per curiam*) (vacating judgment and remanding to the TCCA to address the prejudice prong of an ineffective assistance of trial counsel claim that the TCCA failed to address thoroughly).

II. The State Courts—By Concluding That Jeresano's False Testimony That He Had Not Been Promised Consideration Was Immaterial Because Impeaching His Motive To Testify Would Not Impeach His Identification Of Petitioner—Disregarded This Court's Precedent Holding That Impeachment Evidence And Exculpatory Evidence Are The Same For Purposes Of A Materiality Analysis.

The state habeas trial court correctly found that Jeresano's testimony was "necessary" to the prosecution's case because he was the only witness who identified petitioner (App. 52; Finding 119). However, the court erroneously found that Jeresano's false testimony was immaterial because Wasserstein testified at trial that he told Jeresano that his cooperation probably would help at sentencing (App. 50-51; Findings 115-16); and that, even if the jury had known that Flader would write a letter to the federal judge for Jeresano, that would not have impeached his identification of petitioner (App. 52, 55; Findings 120-22, 131).

The state habeas trial court disregarded this Court's precedent regarding the impeachment value of evidence that a key prosecution witness testified

falsely about a cooperation agreement. *See*, *e.g.*, *Giglio*, 405 U.S. at 154-55 ("Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.").

Although the jury knew that Wasserstein had told Jeresano that testifying against petitioner probably would help at sentencing, the jury did not know that Flader—contrary to her questions and closing argument—had agreed to help Jeresano receive a reduced sentence by writing a letter to the federal judge that, in turn, would cause Booth to file a § 5K1.1 motion. Flader argued that Jeresano was a good citizen who came forward to help the families of the victims rather than to "get a good deal" (10 R.R. 32-33). She deliberately misled the jury by eliciting that she had made no promise to Jeresano. Demonstrating that Jeresano's testimony about his motive to testify was false not only would have undermined his credibility, but also would have destroyed the credibility of the prosecution's case.

The state habeas trial court also disregarded this Court's precedent in concluding that, if the jury had known that Jeresano had a selfish motive to testify, that would not have affected its perception of the reliability of his identification. It found that the jury could have believed that he accurately identified petitioner even though he lied in denying that he had been

promised consideration (App. 53-54; Findings 124-30). This Court has squarely rejected such a distinction. *See Napue*, 360 U.S. at 269-70 ("It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject. . . ."). The court also failed to consider that the jury's assessment of Jeresano's credibility ultimately would determine whether it believed his testimony regarding the identification; the jury's knowledge that he lied about his motive certainly could have affected whether it believed that his identification was reliable.[21]

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[21] Two of the state habeas trial court's key findings demonstrate that it does not understand this Court's relevant precedent (2 H.C.R. 427):

> 128. The Court finds that Jeresano's false testimony (*that he was not promised anything to testify in court*) is not closely tied to the veracity of his testimony identifying the shooter. Meaning, his false testimony does not permit a reasonable inference to be drawn that he had to be lying about the identity of the shooter; nor does the false testimony mean it was "reasonably likely" to influence the judgment (conviction/sentence) of the jury because the jury had a right to still believe Jeresano's testimony identifying the appellant as the shooter even though they may have believed he was impeached with evidence at trial, and even if they would have heard about the letter that was going to be written to the federal judge.
>
> 129. The Court concludes the purpose of impeachment is to attack the credibility of the witness; it does guarantee that the witness's credibility will be totally annihilated because, once again, the determination of the weight to be given a witness's testimony is solely within the province of the jury.

If Jeresano had not cooperated in the state prosecution and identified petitioner—the police suspect—Jeresano would have served from ten years to life in federal prison without parole. Identifying petitioner proved to be a "get out of jail free" card that enabled Jeresano to receive probation. The state court improperly dissected the credibility determination by requiring that the false testimony, to be material, must relate directly to the identification rather than to the witness's motive to make that identification. The court did not cite any caselaw holding that false testimony is not material unless it directly impeaches the incriminating aspect of the witness's testimony. And, it disregarded the time-honored legal maxim, "*Falsus in uno, falsus in omnibus*" ("False in one thing, false in everything"), which lawyers have relied on for centuries to argue that a witness who lies about one matter cannot be believed on any matter. Finally, the state court decision conflicts with *Napue*:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that the defendant's life or liberty might depend.

Napue, 360 U.S. at 269. The *Napue* Court concluded that, if the jury had known that the witness testified falsely that he had not been promised consideration, it could have concluded that he fabricated his testimony to curry favor with the prosecution in order to receive consideration. *Id*. at 270.

There is no distinction between impeachment evidence and exculpatory evidence for purposes of assessing the materiality of a prosecution witness's false testimony. *See Bagley*, 473 U.S. at 767. The lower courts—except for the TCCA—have long recognized this principle. *See Rosencrantz v. Lafler*, 568 F.3d 577, 588 (6th Cir. 2009) ("[T]urning to the impact on the jury had the prosecutor corrected Lasky, or the defense counsel confronted Lasky with her false denial, it is reasonable to infer that exposing Lasky as untruthful—thereby tipping the jury to another of Lasky's inconsistencies and her willingness to lie under oath—would have affected the jury's view of Lasky's credibility."); *United States v. Mazzanti*, 925 F.2d 1026, 1030 (7th Cir. 1991) (where prosecution witness testified falsely about an important matter, "an analysis that simply evaluates the effect of correcting the false testimony without evaluating the probable impact on the witness's credibility is too narrow," as it must extend to "the fact that the witness lied"); *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005) (*en banc*) (if the jury had known that the prosecutor elicited false testimony that a witness would not receive consideration, it "would have had a devastating effect on the credibility of the entire prosecution case"); *Jackson v. Brown*, 513

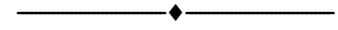
F.3d 1057, 1077 (9th Cir. 2008) (witness's "obvious willingness to lie under oath to keep his promises secret would cast doubt on his entire testimony"); *Adams v. Commissioner of Correction*, 71 A.3d 512, 528 (Conn. 2013) (if the jury had known that a prosecution witness lied about consideration, it probably would not have believed the substance of his testimony; calling his credibility into question is no substitute for demonstrating that he had lied about this agreement).

The state courts unreasonably concluded that Flader's knowing use of and failure to correct Jeresano's false testimony regarding his motive to identify petitioner was immaterial because it did not affect his identification. They ignored that, because Jeresano was the only witness who identified petitioner, if the jury had known that he had a selfish motive to testify and, as a result, doubted the reliability of his identification, **no other evidence established petitioner's guilt**. Flader told Wasserstein before trial that the State did not have a case without Jeresano's testimony (3 H.R.R. 165). She informed Judge Rainey in the letter that Jeresano's testimony alone convinced the jury of petitioner's guilt (1 H.C.R. 80-81). Judge Rainey placed Jeresano on probation because he "made [Flader's] case" (1 H.C.R. 97). Flader testified at petitioner's habeas evidentiary hearing that Jeresano's testimony was material (3 H.R.R. 88).

If the prosecution's knowing use of false testimony that its key witness had not been promised consideration for his testimony is immaterial, no conviction

could ever be reversed on this basis. A witness's denial of a selfish motive to testify is, by definition, collateral to the subject matter of his testimony—whether it concerns an identification or a defendant's incriminating statement. The state court decision gives prosecutors *carte blanche* to promise consideration to a witness and, thereafter, to elicit his false testimony denying such a promise, secure in the knowledge that the conviction will be upheld.

The state court decision is so contrary to this Court's precedent that it requires a summary reversal. This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (*per curiam*) (summary reversal where state habeas court erroneously denied relief on suppression of evidence claim); *see also Hinton v. Alabama*, 571 U.S. 263, 276 (2014) (*per curiam*) (summary reversal on Sixth Amendment ineffective assistance of counsel claim); *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (*per curiam*) (same); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (*per curiam*) (summary reversal on Fourth Amendment claim). The state court decision not only rewards a dishonest prosecutor for knowingly eliciting and failing to correct false testimony but also may encourage other prosecutors to engage in similar unethical, not to mention criminal, conduct. This Court must intervene.



CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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