No. 21-151

IN THE
Supreme Court of the United States

FEANYICHI EZEKWESI UVUKANSI,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, Feanyichi Ezekwesi Uvukansi (Uvukansi), contends that the Texas Court of Criminal Appeals (TCCA) erred during state postconviction proceedings when it denied his false evidence claim under *Giglio v. United States*, 405 U.S. 150 (1972). He argues that the TCCA applied the wrong legal standard by placing the burden on him to prove by a preponderance of the evidence that the false testimony affected the verdict, instead of requiring the prosecution to prove beyond a reasonable doubt that the false testimony did not impact the trial. Uvukansi also alleges that the TCCA erred when it held that a witness's false testimony was immaterial.

Respondent (the "State") objects to Uvukansi's Questions Presented and suggests the following instead:

> Should the Court grant certiorari to review whether the TCCA erred in failing to utilize Uvukansi's burden shifting test for materiality, where his proposed rule misconstrues this Court's precedent regarding the postconviction standard of review for false evidence claims; when the supposed conflict he suggests is illusory; when the TCCA did not rest its unpublished denial of his due process claims on the state habeas trial court's findings or recommendations; when the matter is ripe for federal habeas review and is currently pending before a U.S. District Court.

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INTRODUCTION

Uvukansi was convicted of capital murder in Harris County, Texas, and sentenced to life imprisonment. In the instant petition for certiorari review of the TCCA's denial of state habeas relief, he argues that the court applied the wrong legal standard for materiality when, during postconviction proceedings, it required that he prove by a preponderance of the evidence that he was prejudiced by the false testimony of Oscar Jeresano, who identified Uvukansi as the shooter. Instead, Uvukansi contends the prosecution should have to prove beyond a reasonable doubt that the false testimony did not affect the outcome of the trial. Pet. Cert. at 25–29. In other words, Uvukansi faults the TCCA for purportedly failing to use the prejudice standard applicable to review of constitutional violations on *direct appeal*—during a state postconviction proceeding. Uvukansi also contends that the TCCA erred when it concluded that Jeresano's false testimony that he had not been promised anything in exchange for his cooperation was immaterial to the outcome of the trial because it concerned his motive to testify rather than his positive identification of the defendant. Pet. Cert. at 25, 29–35. At base, Uvukansi complains that the state courts misapplied this Court's holdings in *Giglio* and that the TCCA's factual findings were erroneous. Such complaints do not warrant certiorari review. Sup. Ct. R. 10.

Indeed, Uvukansi's suggestion that the TCCA's unreasoned denial is in tension with the Court's precedent is illusory—there is no conflict. The TCCA rejected the relevant constitutional claims in a

summary, unreasoned, unpublished, single-sentence order, and did not adopt the state habeas trial court's findings. *See* Pet. Cert. App. 1. Whatever this Court's precedent may hold regarding the proper standard to review *Giglio* materiality in a postconviction proceeding, Uvukansi necessarily fails to establish the TCCA's summary denial was premised on the misapplication of federal law in postconviction proceedings or was even incorrect. And moreover, Uvukansi has a federal habeas petition pending in the United States District for the Southern District of Texas (Houston Division), which contains the same issues presented here and more. Therefore, the Court should deny Uvukansi's petition for a writ of certiorari.

OPINIONS BELOW

The TCCA's denial of Uvukansi's state habeas application without written order (located at Pet. Cert. App. 1) is not reported. Likewise, the state habeas trial court's recommended findings and conclusions (located at Pet. Cert. App. 2–59) are also unreported.

JURISDICTION

The Court has jurisdiction to review the state court's denial of Uvukansi's due process claims under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Question Presented involves application of the Due Process Clause in Section I of Fourteenth Amendment.

STATEMENT OF THE CASE

Oscar Jeresano witnessed Uvukansi murder Carlos Dorsey and Coy Thompson. Pet. Cert. App. 4–6, 62–64. At Uvukansi's trial, Jeresano identified Uvukansi as one of two men who fired shots into a crowd leaving a club after a rap concert in June 2012. *See id*.

Uvukansi was convicted of capital murder for killing Dorsey and Thompson and sentenced to life imprisonment. Pet. Cert. App. 91–95. An intermediate Texas appellate court affirmed Uvukansi's conviction and sentence. Pet. Cert. App. 61–90. Uvukansi filed a petition for discretionary review in the TCCA, but that court refused it on October 19, 2016. Pet. Cert. App. 60. Uvukansi did not file a petition for certiorari in this Court, so the direct appeal process ended, and his conviction became final.

Uvukansi initiated postconviction proceedings by filing a state habeas application alleging, among other things, that the prosecutor used false evidence and failed to correct false testimony in violation of his rights to due process. *See* Pet. Cert. App. 14–55. Specifically, he argued that the state prosecutor, Gretchen Flader, failed to elicit testimony from Jeresano, who had a pending drug charge in federal court, that she promised to write a letter to the federal judge requesting that he receive a reduced sentence under section 5K1.1 of the federal sentencing guidelines. Pet. Cert. App. 39.

At the time of his testimony, Jeresano had pled guilty to the drug charge in federal court and was awaiting sentencing. Pet. Cert. App. 6, 12–13. He

testified to the jury that he did not immediately come forward as a witness to the shootings because he was on bond for the federal drug offense at the time of the shooting. *Id*. Instead, he told his federal criminal defense attorney, Brent Wasserstein, what he saw. Pet. Cert. App. 6. Wasserstein arranged for him to be interviewed by the Houston Police Department. Pet. Cert. App. 6, 12. Wasserstein subsequently entered into an agreement with the federal prosecutor overseeing Jeresano's case wherein the federal government would file a motion for a possible downward departure of Jeresano's sentence based on his cooperation in Uvukansi's state trial. Pet. Cert. App. 13. To assist with his request for a possible downward departure, Wasserstein asked the state prosecutor Flader for a character letter to the federal judge responsible for Jeresano's sentence to inform the court of his cooperation. Pet. Cert. App. 40–41. Flader agreed to write the letter. *Id*. At trial, Flader asked Jeresano whether he had "been made any promises for testifying in court today" to which Jeresano responded "Nope." Pet. Cert. App. 42.

After holding a live evidentiary hearing, where prosecutor Flader, Uvukansi's defense attorney, Vivian King, and Wasserstein all testified, the state habeas trial court made recommended findings that Jeresano's response, i.e., "nope," to the prosecutor's question was false, but not material to the jury's verdict. *See* Pet. Cert. App. 39–57. The TCCA ultimately denied the claim in a summary order

without adopting the trial court's findings. Pet. Cert. App. 1. Uvukansi now seeks certiorari.[1]

ARGUMENT

I. The Court Should Deny Certiorari with Respect to the First Question Presented Because the Supposed Conflict Between the TCCA's Unreasoned Order Denying His *Giglio* Claims and this Court's Precedent is Illusory.

In search of a conflict to justify certiorari, Uvukansi boldly asserts that the TCCA unequivocally misapplied the Court's settled precedent regarding the test for materiality for false evidence claims under *Giglio*. *See* Pet. Cert. at 26–29. To set up this supposed conflict, Uvukansi begins with this Court's precedent. He cites *United States v. Agurs*, in which the Court held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Cert. Pet. at 27 (citing 427 U.S. 97, 103 (1976)). Uvukansi then observes that the Court has recognized "little, if any, difference" between the materiality standard of *Giglio*, as described in *Agurs*, and the harmless error analysis used for federal constitutional violations announced in *Chapman v. California*, 386 U.S. 18, 24 (1967). Pet. Cert. at 26–27 (citing *United*

[1] Uvukansi has simultaneously filed a federal petition seeking habeas corpus relief in which he raises the issues pressed here. *See* Pet. Writ,, *Uvukansi v. Lumpkin*, No. 4:21-CV-1624 (S.D. Tex. May 17, 2021), ECF No. 1.

States v. Bagley, 473 U.S. 667, 679–80 & n.9 (1985)). Thus, in Uvukansi's view, the test for *Giglio* materiality to be used in *postconviction* proceedings is the *Chapman* standard for harmless error, which requires "the beneficiary of the error . . . to prove" that the constitutional error "was harmless beyond a reasonable doubt." *Chapman*, 336 U.S. at 24.[2]

As he must, Uvukansi attempts to frame the TCCA's rationale in denying his *Giglio* claim as being in unambiguous conflict with *Chapman*. But the TCCA rejected Uvukansi's postconviction *Giglio* contentions in a summary, unreasoned, unpublished, single-sentence order. Pet. Cert. App. 1 ("This is to advise that the Court has denied without written order the application for writ of habeas corpus."). Notably, the TCCA's summary denial, issued without further explanation, will require the federal "habeas court . . . [to] determine what arguments or theories supported or, as here, *could* have supported, the state court's decision . . . ." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (emphasis added). Hence, in his pending federal habeas proceeding, Uvukansi will have to contend with—and to overcome—the hypothetical reasons the TCCA *could* have denied his *Giglio* claims that are *not* in tension with this Court's precedent. *Id*. Uvukansi fails even to recognize, let alone to argue, that *Richter*'s summary disposition rule should not apply to his

[2] Uvukansi neglects to mention the intervening effect of the Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619, 632–38 (1993), which characterized *Chapman*'s harm analysis as relevant to review of constitutional error on *direct* review, and promulgated a less demanding standard for harm analysis for cases on collateral review.

certiorari petition challenging the same postcard denial.

Recognizing that the TCCA's summary denial belies any effort to create a conflict with the Court's precedent, Uvukansi shifts his entire argument to the state habeas trial court's recommendations to the TCCA regarding the *Giglio* issues. Pet. Cert. at 24–25 (citing *Foster v. Chatman*, 578 U.S. 488, 498 n.3 (2016) and *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). Specifically, Uvukansi contends that "[b]ecause 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." *Id*.

It bears repeating, however, that the TCCA denied his claims on their merits and in doing so, did not adopt the trial court's recommendations. Pet. Cert. App. 1. Under the TCCA's parochial postconviction procedures, however, it was not required to have explicitly rejected the trial court's recommended findings and conclusions to signify that it had not adopted them. *See, e.g., Ex parte Reed*, 271 S.W.3d 698, 728 (Tex. Crim. App. 2008) ("[W]hen we determine that the trial judge's findings and conclusions that are supported by the record require clarification or supplementation, we may exercise our judgment and make findings and conclusions that the record supports and that are necessary to our independent review and ultimate disposition. However, where a given finding or conclusion is immaterial to the issue or is irrelevant to our disposition, we may decline to enter an alternative or contrary finding or conclusion."). This approach makes sense because

under Texas procedure, "[j]urisdiction to grant postconviction habeas corpus relief on a final felony conviction rests *exclusively* with [the TCCA]. *Bd. of Pardons & Paroles ex rel. Keene v. Ct. of Appeals for Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (emphasis added). Given that the state habeas trial court was something like a special master, subject to the TCCA's original jurisdiction over Uvukansi's state habeas application, it is impossible to determine whether any of the trial court's findings or recommendations survived the TCCA's summary denial.

By way of example, the legal rationale upon which the TCCA denied these claims may have been any of the following. First, the TCCA may have agreed with Uvukansi and utilized the *Chapman* harmless error standard to measure materiality, but nevertheless, denied his *Giglio* claims under the *Chapman* test. Second, the TCCA may have rejected application of the *Chapman* standard for Texas postconviction proceedings, opting instead to use the harmlessness standard for constitutional error found in *Brecht v. Abrahamson*, 507 U.S. at 638. Third, the TCCA may have reconsidered its materiality determination by measuring the outcome at trial had the jury known that Jeresano testified. Any of these rationales would vitiate Uvukansi's perceived conflict—whether or not the TCCA's decision was correct.

In sum, the summary denial of Uvukansi's state habeas application—without written order, without reference to the state habeas trial court's recommendations, and unaccompanied by an explanation—signals nothing about the status of the

trial court's recommendations and does not support Uvukansi's argument that those recommendations necessarily survived the TCCA's unreasoned order. *See Reed*, 271 S.W.3d at 728. The Court should deny certiorari because the supposed conflict between the TCCA's postcard denial and this Court's precedent is illusory.

II. The Court Should Deny Certiorari with Respect to the First Question Presented Because There Are Serious Justiciability Concerns, Which Suggest Judicial Restraint.

Resolution of Uvukansi's first Question Presented in his favor is unlikely to benefit him—and such an opinion would also be advisory. Absent an objective and concrete understanding of the TCCA's rationale for denying Uvukansi's *Giglio* claims, it is impossible to know whether he will ever benefit from resolution of the first question in his favor. In other words, if the TCCA utilized the *Chapman* standard when it denied his claims, any decision by this Court directing the TCCA to again utilize the *Chapman* standard on remand might never result in relief. Uvukansi would possess no interest in the outcome of this appeal.

Relatedly, because the purported conflict is premised on Uvukansi's hypothetical interpretation of the TCCA's order, any opinion would likely be advisory. *See e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to

publicly opine on every legal question."). The Court should deny certiorari.

III. The Court Cannot Resolve Uvukansi's First Question Presented in His Favor Without First Resolving an Antecedent Legal Issue, Which May Not Have Been Decided or Raised Below.

Uvukansi argues the TCCA misapplied this Court's precedent when, during postconviction proceedings, it required him to prove by a preponderance of the evidence that the false testimony affected the verdict, as opposed to requiring the prosecution to prove beyond a reasonable doubt that the false testimony did not impact the outcome at trial. Pet. Cert. at 25–29. However, Uvukansi makes no mention of *Brecht*, an opinion issued years after *Chapman*, *Agurs*, and *Bagley*. In *Brecht*, the Court recognized that the *Chapman* standard was "at odds with the historic meaning" and purpose of *postconviction* review of state court convictions. *See Brecht*, 507 U.S. at 637 ("*Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters."). In place of *Chapman*, the Court recognized "a less onerous standard on habeas review of constitutional error . . . of the trial type." *Id.* at 637–38.

Although Uvukansi's petition is not particularly clear on this point, if he means to obtain relief from the TCCA's judgment, he must necessarily be asking the Court to *assume* (1) that *Brecht* does not extend to the review *Giglio* claims on state postconviction review; (2) that the TCCA determined otherwise; and (3) to

reverse the TCCA on its hypothetical decision to apply *Brecht* below.

But it appears Uvukansi did not engage *Brecht* below, *see generally*, Pet. Cert. App.; moreover, it is impossible to determine whether the TCCA resolved the *Brecht* question. Where such wide-ranging issues are involved "there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Id.* Moreover, the "pressed or passed upon" rule also embodies a "due regard for the appropriate relationship of this Court to state courts." *Id.* at 221 (citation omitted). This is particularly problematic because, in failing to obtain resolution of the *Brecht* question below, Uvukansi has denied the Court a fair opportunity to determine whether the *Brecht* rationale extends to direct certiorari review of a state court's postconviction decision to deny a constitutional claim.

In sum, the First Question Presented is not mature for consideration, and this Court should exercise judicial restraint to decline Uvukansi's implicit invitation to answer such broad constitutional questions, by fiat. *See Blanchette, v. Connecticut General Ins. Corporations*, 419 U.S. 102, 138 (1977).

IV. The Court Should Deny Certiorari with Respect to the Second Question Presented Because It Is of Limited Import and Is Narrowly Focused on Non-Extensible, Fact-Intensive Analysis Performed Under Parochial State Procedures.

Uvukansi also alleges that the TCCA misapplied *Giglio* by concluding that he failed to show Jeresano's false testimony was material. Pet. Cert. at 25, 29–35. But this claim alleges nothing more than that the TCCA misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Moreover, the Court normally does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *accord* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"). This general limitation finds application here because the TCCA's materiality determination was necessarily premised upon a detailed analysis of the record at trial, conducted pursuant to the parochial manner in which the TCCA resolves such claims in state postconviction review. Indeed, given the TCCA's summary, unreasoned denial, it is difficult to imagine how the Court would conduct such fact-intensive analysis.

Consequently, Uvukansi identifies no error justifying this Court's review, and his *Giglio* claims do

not warrant this Court's attention. His petition should be denied.

V. The Questions Presented Are Premature and Are Ripe for Review in Federal Habeas.

Rule 10 provides that certiorari review is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *See* Sup. Ct. R. 10. Uvukansi advances no special or important reason in this case, and none exists. Certiorari review of state habeas decisions is generally inappropriate where a claim is ripe for federal habeas review. As Justice Stevens once noted:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J. concurring).

Indeed, on May 17, 2021, Uvukansi filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising the same claims raised herein, and more. *See Uvukansi v. Lumpkin*, No. 4:21-CV-1624 (S.D. Tex.). Thus, it appears that "the more appropriate avenue" is now available for the litigation of the instant claims.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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