No. 21-151

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE "LOOK THROUGH" PRESUMPTION APPLIES BECAUSE THE TEXAS COURT OF CRIMINAL APPEALS (TCCA) DID NOT REJECT THE STATE HABEAS TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN DENYING RELIEF WITHOUT WRITTEN ORDER.

Respondent initially contends that this Court should not assume that the TCCA adopted the same reasoning as the state habeas trial court, which placed the burden on petitioner to prove by a preponderance of the evidence that the perjured testimony harmed him. *See* Respondent's Brief in Opposition at 7-8. Respondent's argument is not supported by this Court's decisions concerning federal review of state habeas corpus proceedings. *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 higher court."); *see also 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.").

Respondent's argument that the state habeas trial court's findings and conclusions are irrelevant in this Court in view of "the TCCA's parochial postconviction

procedures"[1] is ***diametrically opposed to respondent's argument in petitioner's pending federal habeas proceeding***. *See* Respondent Lumpkin's Answer With Brief in Support, *Uvukansi v. Lumpkin*, No. 4:21CV1624 (filed Oct. 7, 2021) (excerpt attached as Appendix A), at 15-16 ("[T]he state habeas trial court entered the following factual findings [listing Findings 117-122]. . . . These state habeas findings are entitled to deference."); *id.* at 20, 28 ("The state habeas [trial] court entered the following very thorough findings of fact . . . [listing Findings 70-74]. . . . Thus, Uvukansi cannot overcome the state habeas court's proper deference to defense counsel's strategic reasoning."). Respondent's position in the federal district court proceedings is consistent with the holdings of federal courts in the Fifth Circuit reviewing habeas corpus petitions filed by Texas prisoners.[2]

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[1] Respondent's Brief in Opposition at 7.

[2] *See, e.g.*, *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir. 1989) ("In the state habeas corpus proceeding, the trial court held that Ellis had not preserved properly his claims for review. . . . The Court of Criminal Appeals denied relief without written order. Ellis made no effort either in this court or in the court below to avoid imposition of the procedural default doctrine by showing that good cause existed for his failure to comply with the state rules and that actual prejudice resulted."); *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); *Raymer v. Stephens*, Civil Action No. H-13-1338, 2014 WL 4734971, at *9 (S.D. Tex. Sept. 23, 2014) ("The Texas Court of Criminal Appeals denied without written order Raymer's state habeas application raising this claim. Because the state habeas court issued the last reasoned opinion on this

Therefore, this Court should assume that the TCCA denied petitioner's perjury claim for the same reason as the state habeas trial court rather than for some unstated reason. For this reason, the Court should reject respondent's reliance on *Harrington Richter*, 562 U.S. 86 (2011), which does not apply to this Court's review of an unreasoned state court decision under 28 U.S.C. § 1257(a). *See Harrington*, 562 U.S. at 92 ("*Under 28 U.S.C. § 2254(d)*, the availability of federal habeas relief is limited with respect to claims previously 'adjudicated on the merits' in state-court proceedings. The first inquiry this case presents is whether that provision applies when state-court relief is denied without an accompanying statement of reasons.") (emphasis added).

II. RESPONDENT'S SPECULATIVE ASSERTION THAT THE TCCA MAY HAVE APPLIED THE HARMLESS-ERROR STANDARD OF *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993), SUPPORTS GRANTING CERTIORARI.

In asking this Court to speculate that the TCCA may have denied petitioner's perjury claim by applying the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), rather than *Chapman v.*

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matter, this court 'looks through' the Texas Court of Criminal Appeals order to the state habeas court's decision.").

California, 386 U.S. 18 (1967),[3] respondent unintentionally offers another reason to grant certiorari.

A widespread circuit split exists concerning whether a federal habeas court should apply *Chapman* or *Brecht* in determining whether perjured testimony was "material." *See Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 148 (3d Cir. 2017) ("Our sister Circuits are split on the question. . . . [T]he Ninth Circuit has rejected application of *Brecht* to perjured-testimony cases. . . . The First, Sixth, Eighth, and Eleventh Circuits have disagreed, applying *Brecht* to habeas petitions raising perjured testimony claims.") (citing cases). The Third Circuit, in a well-reasoned decision, held that *Brecht* does not apply to a meritorious due process perjury claim under the rationale of *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995) (refusing to apply *Brecht* to a due process suppression-of-evidence claim that has its own "materiality" standard).

Therefore, this Court can resolve the circuit split while addressing the related issue of whether *Chapman* or *Brecht* applies to a perjury claim raised in a *state* post-conviction proceeding. Although *Kyles* seemingly compels the conclusion that the *Chapman* standard, rather than the *Brecht* standard, applies to a perjury claim in any habeas proceeding,[4] this Court can resolve the issue, once and for all.

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[3] *See* Respondent's Brief in Opposition, at 5-6 & n.2, 10-11.

[4] *See United States v. Bagley*, 473 U.S. 667, 679-80 & n.9 (1985).

III. AT THE VERY LEAST, THIS COURT SHOULD VACATE THE TCCA'S JUDGMENT AND REMAND WITH INSTRUCTIONS TO ADDRESS THE MATERIALITY ISSUE IN A MEANINGFUL WAY.

At the very least, this Court should vacate the TCCA's judgment and remand with instructions to address the materiality issue in view of the TCCA's failure to do so in a meaningful way. This Court has vacated judgments and remanded for further proceedings in other state post-conviction cases in which the state courts failed to provide a meaningful analysis of a constitutional claim. *Cf. Sears v. Upton*, 561 U.S. 945, 946 (2010) (per curiam) ("For the reasons that follow, it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim. We therefore grant the petition for writ of certiorari, vacate the judgment, and remand for further proceedings not inconsistent with this opinion."); *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (per curiam) ("We conclude . . . that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed in forma pauperis, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.").

IV. THIS COURT SHOULD NOT DENY CERTIORARI SIMPLY BECAUSE PETITIONER HAS A HABEAS CORPUS PETITION PENDING IN THE FEDERAL DISTRICT COURT.

Respondent asks this Court to deny certiorari because petitioner also has raised his perjury claim in a habeas petition filed in the United States District Court for the Southern District of Texas. *See* Respondent's Brief in Opposition at 13. Citing Justice Stevens' opinion respecting the denial of certiorari in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990), respondent contends that the federal habeas proceeding is "the more appropriate avenue" for raising the perjury claim.[5]

Respondent's position is untenable for two reasons. First, Justice Stevens' statement was made before the Antiterrorism and Effective Death Penalty Act was enacted in 1996 to limit a federal habeas court's ability to grant relief from a state conviction. For this reason, this Court has shown a greater willingness to grant review to decide federal constitutional issues raised in state post-conviction proceedings during the past decade. *See* Z. Payvand Ahdouta, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163-64 (2021) ("Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed course and exhibited the exact opposite preference: a

[5] Should respondent get his way, petitioner's perjury claim probably will not be resolved for another two or three years.

propensity for granting cases from state collateral review as against federal habeas review.") (discussing several of this Court's recent cases).

Second, this Court should not penalize a state prisoner who did precisely what 28 U.S.C. § 2254 requires in order to seek federal habeas corpus relief—he exhausted his state court remedies and filed a federal petition within the one-year period required by the AEDPA's statute of limitations. At the same time, he also exercised his statutory right to seek this Court's review of the TCCA's flawed judgment under 28 U.S.C. § 1257(a). Respondent's position effectively would nullify § 1257(a) for state prisoners who must comply with the post-AEDPA requirements of § 2254. In order to meet the deadlines for filing a certiorari petition in this Court and a habeas corpus petition in the district court, a state prisoner often must file both petitions simultaneously. In the pre-AEDPA era, it made sense for this Court to deny certiorari, as the lower federal courts could review habeas claims *de novo* and rectify any constitutional errors as easily as this Court could on certiorari review of a state court's judgment. Now that it is more difficult for a federal habeas petitioner to prevail under the onerous AEDPA standard of deferential review, this Court's previous rationale is no longer valid.

This Court should grant certiorari to resolve these important issues. At the very least, this Court, via summary disposition, should remand to the TCCA to reconsider the materiality issue. If this Court grants certiorari and orders plenary review or remands to the

TCCA, the federal district court can stay further proceedings for the time being.

CONCLUSION

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

Respectfully submitted,

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