IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEANYICHI E. UVUKANSI TDCJ-CID No. 1939267, Petitioner, v. BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:21CV1624 (Magistrate Judge Peter Bray)

RESPONDENT LUMPKIN'S ANSWER WITH BRIEF IN SUPPORT

(Filed Oct. 7, 2021)

A jury found Feanyichi Uvukansi guilty of capital murder and assessed punishment at life imprisonment without parole. He now seeks habeas corpus relief in this Court pursuant to 28 U.S.C. §§ 2241, 2254. However, Uvukansi's federal petition should be dismissed with prejudice because it is without merit.

JURISDICTION

Uvukan.si's judgment arises out of Harris County, Texas, which is within the jurisdiction of this Court. *See* 28 U.S.C. §§ 2241(d), 2254(a).

* * *

Accordingly, the state habeas court entered the following factual findings:

> 117. The Court finds that although the jury did not hear evidence that if Jeresano testified in the State's case, Flader would write a letter to the federal judge in order to help Jeresano get a reduced sentence, there was other evidence that the jury heard that impeached Jeresano's credibility or that showed he had a motive to testify untruthfully—Wassertein's testimony on cross-examination by Flader was such impeachment evidence, and on direct examination by King.
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> 118. The Court finds that Jeresano was also thoroughly impeached with the following: (a) he pleaded guilty to a federal multi-kilo narcotics case and was awaiting sentencing, (b) he was subject to a punishment of 10 years to life, (c) he was subject to deportation if convicted,(d) his conditions of bond had been modified for his benefit, (e) his case had been continually reset for approximately two years so that he could testify in the applicant's trial, (f) Wasserstein planned to notify the federal prosecutors of Jeresano's testimony in the applicant's trial and request that the government file a 5K1.1 motion to reduce his sentence based upon his cooperation, and (g) rather than immediately report his eyewitness account to the police he informed his attorney of his account and several days later gave a statement to law enforcement. *See Weinstein*, 421 S.W.3d at 667-68. *See* RR Vol 8 p. 44, lines 13-19.

119. The Court finds that Jeresano's testimony was necessary as he was the only witness called by the State to prove Appellant was the shooter who killed the complainants.

120. The Court finds that although Jeresano was not further impeached with evidence of the letter that Flader would write to the federal judge, it's impeachment value or weight could be considered very similar to the impeachment value and weight the jury was able to give to the evidence that Jeresano did in fact know that he could possibly get a sentence reduction in his federal case.

121. The Court concludes the Applicant must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury. *Ex parte Weinstein*, 421 S.W.3d 656 at 665.

122. The Court finds that although the letter could have been considered to have a cumulative effect with the other impeachment evidence whereby the jury may have determined that Jeresano was not credible as to his relevant testimony identifying the shooter, the Appellant has not established by a preponderance of the evidence that the false statement of "Nope." He had not been promised anything for his testimony (specifically, he had not been promised a letter would be written to the federal judge if he testified) was

> reasonably likely to influence the judgment of the jury.

SHCR-02 at 426.

These state habeas findings are entitled to deference. But even if they are flawed—here the state court found favorably only on the materiality prong of *Napue/Giglio* when arguably,[2] Uvukansi can satisfy none of the *Napue/Giglio* requirements—the Fifth Circuit has held that it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *see Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (holding that a federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (applying AEDPA deferential standard of review where state habeas writ was denied

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other prong. *Strickland*, 466 U.S. at 697; *Black v. Collins*, 962 F.2d 394, 401 (5th Cir. 1992).

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[2] The Director does not waive the first two prongs of *Napue*, 360 U.S. 264 and *Giglio*, 405 U.S. 150: 1) that the testimony in question was actually false; and 2) that the prosecutor was aware of the perjury,

Here, Uvukansi asserts that he received ineffective assistance of trial counsel when his attorney failed to elicit testimony that the prosecutor agreed to write a letter to the federal judge in exchange for Jeresano's testimony. ECF 2 at 40. He argues that the state habeas court and CCA unreasonably determined the facts. *Id.* at 39. But, as explained by the Court below, Uvukansi fails to meet his burden of proof under *Strickland* and AEDPA.

The state habeas court entered the following very thorough findings of fact, citing both the trial record and defense counsel's testimony as to her trial strategy during the state habeas hearing.

> 70. The applicant avers that King was ineffective for failing to properly present impeachment evidence regarding Jeresano's agreement that Flader would write a letter to U.S. District Judge Rainey for his Consideration When he sentenced Jeresano. Applicant's Writ at 8; Applicant's Brief at 27-28.
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> 71. To support his claim for relief, the applicant asserts the following: Flader informed King at a pretrial hearing that she would write a letter to the federal judge regarding Jeresano's cooperation before he was sentenced (III R.R. at 5-6). Flader did not elicit on direct examination of Jeresano that she would write this letter. Jeresano denied on cross-examination that he might receive leniency in exchange for his cooperation and testimony (VIII R.R. at 48-49). Wasserstein testified that, after Jeresano testifies, he will notify

the federal prosecutor so she could file a 5K1.1 motion, and the judge would decide whether to reduce the sentence (IX R.R. at 45). King did not elicit that Flader had agreed to write a letter to the Judge on Jeresano's behalf. Applicant's Brief at 27-28.

72. The Court finds the record reflects Flader was appropriately forthcoming that-she intended to write a letter to Judge Rainey

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> night. I didn't get into the details that you're getting into because that's obviously what your trial strategy would have been. Mine was different.
>
> [BY MR. REISS] Q. But just so the record is absolutely clear.
>
> A. Okay.
>
> Q. – please explain your trial strategy as to why you did not ask Mr. Wasserstein the question about the letter.
>
> A. Okay. I knew, based on my federal experience and by talking to Mr. Wasserstein pretrial, that the prosecutor was going to give him a downward departure if he testified truthfully. I could not get him to say it exactly. I couldn't really get him to say it pretrial other than, "We talked to him. Yes, he's going to get something, I don't know what," which in

> actuality in federal cases is true. You don't know what you're going to get because the judge makes the final decision. But if I try to ask the question once or twice and they keep evading the answer, I'm just not going to keep asking. I try to get it another way. But I thought that when I talked to his lawyer, his lawyer gave me a lot of information that's, you know, unusual in a trial because I thought he basically admitted that his client had a deal.
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> 75. Considering the applicant's averment in the context of the trial record, the writ evidentiary hearing record, and well-established jurisprudence regarding deference to trial counsel's strategic decisions, the Court finds the applicant's claim to be unpersuasive; that King's performance was a reasonable, informed strategic choice and in accord with prevailing professional norms. *Strickland*, 466 U.S. at 698-700.

SHCR-02 at 415-420.

Thus, Uvukansi cannot overcome the state habeas court's proper deference to defense counsel's strategic reasoning. *Wilkerson*, 950 F.2d at 1065. Every effort must be made to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Even when faced with habeas counsel's intensive questioning about her trial strategy during the state habeas hearing, Ms. King explained that rather than repeatedly

ask questions that Uvukansi's attorney would not answer or that the trial court would not allow her to ask, she successfully got him to admit to the jury that Uvukansi made a deal with the federal prosecutor to testify for a reduced sentence. She was able to show the jury, through Mr. Wasserstein's testimony that Jeresano was possibly not being truthful in his motives to testify. Uvukan.si cannot establish deficiency or prejudice under *Strickland.*

The CCA denied this ineffective assistance claim when it denied Uvukansi's state writ. Uvukansi has failed to demonstrate any unreasonableness in this ruling as AEDPA requires.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Uvukansi's petition for writ of habeas corpus be dismissed with prejudice and that this Court *sua sponte* deny a certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was electronically served on this date, October 7, 2021, to petitioner's attorney Mr. Randy Schaffer by means of the Court's electronic filing system.

/s/ Susan San Miguel
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