No. 24-1089

IN THE

Supreme Court of the United States

FEANYICHI E. UVUKANSI,

Petitioner,

v.

ERIC GUERRERO, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The Fifth Circuit Correctly Held That The "Look-Through Presumption" Of *Wilson v. Sellers,* 584 U.S. 122 (2018) Applies.

Respondent initially contends in his Brief In Opposition (BIO) that the Court should deny certiorari because petitioner's threshold argument—that the Texas Court of Criminal Appeals' (TCCA) unreasoned order presumably adopted the state habeas trial court's reasoning (including its findings of fact and conclusions of law)—is erroneously premised on the "look-through presumption" established in *Wilson v. Sellers*, 584 U.S. 122 (2018). *See* BIO at 1, 15-21.[1] The Fifth Circuit correctly rejected this argument. *Uvukansi v. Guerrero*, 126 F.4th 382, 389-90 (5th Cir. 2025). This Court should do so for the same reasons.

II. The State Habeas Trial Court Did Not *Implicitly* Find That The Prosecutor Did Not *Knowingly* Elicit Or Fail To Correct Perjured Testimony.

Respondent asserts that petitioner's *Napue* perjury claim[2] is not cognizable because, although the state

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1. Significantly, respondent took the opposite position in his answer to petitioner's federal habeas corpus petition. Respondent there asserted that the district court had to defer to the state habeas trial court's findings of fact and conclusions of law under 28 U.S.C. § 2254. *See* Respondent Lumpkin's Answer with Brief in Support, *Uvukansi v. Lumpkin*, No. 4:21CV1624 (filed Oct. 7, 2021) (excerpt attached as *App.* 1-9 to Petitioner's Reply Brief in *Uvukansi v. Texas*, No. 21-151 (filed Dec. 3, 2021)).

2. *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that due process is violated when the prosecution "knowingly" elicited or failed to correct materially false testimony).

habeas trial court found that Oscar Jeresano testified falsely at trial, that court "implicitly" found that the prosecutor, Gretchen Flader, did not know at the time that Jeresano's testimony was false. BIO at 14, 17, 23-24. Respondent makes this argument for the first time in his BIO. Respondent did *not* make the argument in his BIO to petitioner's 2021 certiorari petition following the denial of state habeas corpus relief or in the lower federal courts. Thus, respondent has waived the argument. *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment *on any ground properly raised below*. . . .") (emphasis added).

Furthermore, the state habeas trial court clearly found that Flader *knowingly* elicited and failed to correct Jeresano's false testimony that he would not receive consideration for his testimony:

> 111. The Court finds that Flader told [defense counsel] King before trial that she promised [Jeresano's counsel] Wasserstein she would write a letter to the federal judge if Jeresano cooperated with the state's case and testified. . . .
>
> 113. . . . During Flader's presentation of Jeresano's testimony she elicited a sworn response from him that was false, that is, that he had not been made any promises for testifying in court. . . .
>
> 114. The Court finds that false testimony elicited on direct examination by Flader coupled with [Jeresano's] false and misleading

> testimony on cross examination by King left a false impression with the jury.

Pet. App. 127a.

No reasonable interpretation of the state habeas trial court's findings supports respondent's assertion that it "implicitly" found that Flader did not know that Jeresano testified falsely that he had not been promised anything for his cooperation. Flader absolutely knew, as she made the promise.

III. The Fifth Circuit Erred By Failing To Review *De Novo* Petitioner's Perjury Claim Because Deference Is Not Due To The Texas Court Of Criminal Appeals' Ruling Under 28 U.S.C. § 2254(d)(1).

Respondent alternatively contends that the Fifth Circuit correctly held that the TCCA's rejection of petitioner's perjury claim was neither contrary to nor an unreasonable application of this Court's clearly established precedent. BIO at 25-33. *See Uvukansi*, 126 F.4th at 390-92. The Fifth Circuit stated in pertinent part:

> The state [habeas trial] court . . . applied the traditional "reasonable likelihood" test, stating this: "False testimony is material only if there is a reasonable likelihood that the false testimony affected the judgment of the jury or affected the applicant's conviction or sentence." It was also proper for the court to refer to a need for a preponderance of evidence, as habeas applicants bear the burden of proving a constitutional violation to qualify for relief.

> The state court did not impose a standard higher than the Supreme Court's "reasonable likelihood" standard.

Id. at 390.

The Fifth Circuit glossed over the fact that the state habeas trial court used an erroneous legal standard with regard to the "materiality" of the perjured testimony. The state habeas court found:

> 78. In order to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict of guilt. *Ex parte Weinstein*, 421 S.W.3d 656, 659-65 (Tex. Crim. App. 2014). An applicant must prove the two prongs of his false-evidence claim by a preponderance of the evidence.
>
> 121. The Court concludes the Applicant must . . . 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 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 [applicant] has not established by a preponderance of the evidence that the false statement . . . was reasonably likely to influence the judgment of the jury.

Pet. App. 116a, 129a-130a

The state court's ultimate conclusion of law regarding the "materiality" of the false testimony is similarly flawed:

> 3. The Court concludes that the [applicant] has demonstrated by a preponderance of the evidence that the State presented false testimony. . . .
>
> 4. However, the Court concludes that the applicant fails to demonstrate by a preponderance of the evidence a reasonable likelihood that the false testimony affected the judgment of the jury. *Weinstein*, 421 S.W.3d at 667-69.

Pet. App. 134a.

The state habeas trial court thus used a legal standard that was much less "defendant-friendly" than the correct standard. The court relied primarily on *Ex parte Weinstein*, in which the TCCA crafted an erroneous "materiality" standard. In *Weinstein*, the TCCA stated:

> Generally, . . . if a constitutional violation is shown, we determine whether the applicant was harmed by the error. An applicant demonstrates such harm with proof "by a

> preponderance of the evidence that the error contributed to his conviction or punishment." [citations omitted]. . . . However, habeas claims challenging the use of false testimony are reviewed under a slightly different analysis. . . . Only the use of material false testimony amounts to a due-process violation. And false testimony is material only if there is a "reasonable likelihood" that it affected the judgment of the jury. Thus, an applicant who proves, by a preponderance of the evidence, a due-process violation stemming from a use of material false testimony necessarily proves harm because a false statement is material only if there is a reasonable likelihood that the false testimony affected the judgment of the jury. 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.

Weinstein, 421 S.W.3d at 664-65 & n.20.

Weinstein erroneously placed the burden on a habeas applicant to prove by a preponderance of the evidence that there is a reasonable likelihood that the perjured testimony affected the judgment of the jury. The TCCA referred to this "materiality" standard as "slightly different" from the "harm" standard that it applies to other types of constitutional errors, in which the applicant must prove by a preponderance of the evidence that the error "contributed to his conviction or punishment." *Weinstein*, 421 S.W.3d at 664-65.

When the prosecution knowingly elicits or fails to correct perjured testimony, this Court's clearly established precedent does not require a habeas petitioner to prove "materiality" by a preponderance of the evidence. The "materiality" standard is more "defendant-friendly" when the prosecution elicited or failed to correct perjured testimony than when it merely failed to disclose favorable evidence. *See Glossip v. Oklahoma*, 145 S. Ct. 612, 651 (2025) (Thomas, J., dissenting) ("This Court applies a defendant-friendly standard of materiality to *Napue* claims 'because they involve a corruption of the truth-seeking function of the trial process.' *United States v. Agurs*, 427 U.S. 97, 104 . . . (1976)."). Even the less-defendant-friendly "materiality" standard governing a nondisclosure of evidence claim does not require that the defendant prove "materiality" by a preponderance of the evidence. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995).[3]

A fortiori, the state courts contravened this Court's clearly established precedent by placing the burden on petitioner to prove by a preponderance of the evidence a "reasonable likelihood" that the prosecution's eliciting and failing to correct perjured testimony affected the verdict. The Fifth Circuit thus erred by deferring to the state courts' rejection of petitioner's *Napue* claim under § 2254(d)(1).

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3. Respondent erroneously suggests that *Kyles* established the "materiality" standard for a perjury claim. BIO at 27, 29. *Kyles* addressed the "materiality" standard for a nondisclosure of evidence claim. *Kyles* recognized that a claim that the prosecution knowingly elicited or failed to correct perjured testimony is governed by a "strict[er]" standard. *See Kyles*, 514 U.S. at 433 n.7; *see also Agurs*, 427 U.S. at 104.

Therefore, at the very least, this Court should vacate the Fifth Circuit's judgment and remand with instructions to analyze petitioner's perjury claim *de novo* (without § 2254(d)(1) deference) using the correct "materiality" standard and placing the burden of proof on the prosecution.

IV. The State Court's "Materiality" Determination Was Contrary To And Involved An Unreasonable Application Of This Court's Clearly Established Precedent.

The state courts' conclusion that Jeresano's perjured testimony was immaterial contravened this Court's clearly established precedent by failing to determine whether the perjury was *harmless beyond a reasonable doubt*. *See United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985). Justice Blackmun's opinion announcing the judgment of the Court in *Bagley* stated:

> The Court [in *Agurs*] noted the well-established rule 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." 427 U.S. at 103 . . . (footnote omitted). Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review,[9][4] it may as

4. Footnote nine in *Bagley* states:

> The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there

> easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id*., at 104.

Bagley, 473 U.S. at 678-80.

> is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue v. Illinois*, 360 U.S., at 271. . . . *Napue* antedated *Chapman v. California*, 386 U.S. 18 . . . (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and a rule "'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 386 U.S., at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 . . . (1963)). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36-38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.

473 U.S. at 680 n.9.

Respondent erroneously contends that Justice Blackmun's plurality opinion in *Bagley* does not constitute "clearly established" precedent for purposes of 28 U.S.C. § 2254(d)(1). BIO at 25-28. Although only Justice O'Connor joined his opinion, Justice Stevens' dissent agreed with footnote nine. *Bagley*, 473 U.S. at 713 n.6 (Stevens, J., dissenting). Justices Marshall and Brennan also concluded that the burden is on the prosecution to prove beyond a reasonable doubt that the nondisclosure of favorable evidence or failure to correct perjured testimony was harmless. *Id.* at 706 (Marshall, J., dissenting, joined by Brennan, J.). Therefore, five justices agreed that the prosecution has the burden to prove beyond a reasonable doubt that the perjured testimony did not affect or contribute to the verdict. *See United States v. Jackson*, 780 F.2d 1305, 1312 (7th Cir. 1986) (noting the common ground of these five justices in *Bagley*).

Furthermore, footnote nine in *Bagley* simply reiterated the Court's *existing* precedent regarding the "materiality" standard governing perjured testimony. Prior to *Bagley*, the Court had clearly established that: (1) a conviction must be reversed when there is any "reasonable likelihood" that the prosecution's failure to correct perjured testimony "affected" the verdict;[5] and (2) the "reasonable likelihood" standard governing perjury claims is synonymous with the "reasonable possibility" *harmless-error* standard,[6] which places the burden on the prosecution to prove beyond a reasonable doubt that

5. *Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103.

6. *Fahy*, 375 U.S. at 86-87; *cf. Francis v. Franklin*, 471 U.S. 307, 322 n.8 (1985) (using "reasonable likelihood" and "reasonably possibility" synonymously in a different context).

the violation did not "contribute" to the verdict.[7] *See also Glossip*, 145 S. Ct. at 626-27 (citing that precedent);[8] *Strickler v. Greene*, 527 U.S. 263, 299 (1999) (Souter, J., concurring in relevant part) (same). The Fifth Circuit thus erred in petitioner's case by stating:

> No majority of the Supreme Court has indicated that *Napue*'s materiality standard is the same as *Chapman*'s harmless error standard. . . . The Court came close in *Bagley*, but the footnote that purported to hold as much was in a portion of the opinion joined by only two Justices. *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (opinion of Blackmun, J.). We conclude that the Court has left ambiguous whether materiality is an element of a *Napue* violation, which Uvukansi would presumably have to prove, or a means of avoiding reversal, which Uvukansi might not have to prove.

Uvukansi, 126 F.4th at 390.

Furthermore, petitioner does not rely solely on footnote nine in *Bagley*. *Agurs* held that "a strict

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7. *Chapman*, 386 U.S. at 24 ("There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

8. Respondent erroneously refers to *Glossip's* discussion of the "materiality" standard governing perjury claims—based on *Napue*, *Chapman*, *Giglio*, and *Bagley*—as "*dictum*." BIO at 28.

standard of materiality" applies when the defendant proves that the prosecution elicited or failed to correct perjured testimony, and the prosecution has the burden to prove beyond a reasonable doubt that the perjury did not contribute to the verdict. This stricter standard does not place the burden on the defendant to prove by a preponderance of the evidence that there is a "reasonable likelihood" that the prosecution's use of or failure to correct perjured testimony contributed to the verdict. *Agurs*, 427 U.S. at 104.

CONCLUSION

The Fifth Circuit erroneously deferred to the state courts' rejection of petitioner's *Napue* perjury claim under § 2254(d)(1). This Court should grant certiorari and summarily reverse the judgment and order a new trial or, alternatively, remand for *de novo* review using the correct materiality standard and burden of proof.

Respectfully submitted,

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