No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The state courts found that the trial prosecutor knowingly presented and failed to correct perjured testimony that the only eyewitness to identify petitioner as one of the shooters in a capital murder had not been promised anything for his testimony. Yet the courts concluded that petitioner had failed to prove by a preponderance of the evidence that the perjured testimony was "material," as it concerned the witness's credibility rather than his identification. On federal habeas corpus review, the Fifth Circuit concluded that this Court has not clearly established which party has the burden of proof on the materiality of perjured testimony and thus held that the state court decision was not contrary to and did not involve an unreasonable application of this Court's precedent. The questions presented are:

I. Whether the state courts—by requiring petitioner to prove by a preponderance of the evidence that the prosecution's knowing presentation of and failure to correct perjured testimony affected the verdict—rendered a decision that was contrary to and unreasonably applied this Court's clearly established precedent, which requires that the prosecution prove beyond a reasonable doubt that the perjured testimony did not affect the verdict.

II. Whether the state courts—by concluding that the prosecution's knowing presentation of and failure to correct perjured testimony was not material because the jury could

have believed the witness's testimony about the identification even if it had known that he lied about the deal—disregarded this Court's clearly established precedent 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, Texas. 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, Texas. 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 Texas*, No. 21-151, United States Supreme Court. Certiorari denied June 13, 2022.

- *Uvukansi v. Lumpkin*, No. 4:21CV1624, United States District Court for the Southern District of Texas. Judgment entered August 18, 2023.

- *Uvukansi v. Guerrero*, No. 23-20435, United States Court of Appeals for the Fifth Circuit. Judgment entered February 19, 2025.

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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 United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion affirming the district court's denial of habeas corpus relief is reported at 126 F.4th 382 (App. 1a-18a). The Fifth Circuit's final judgment (App. 19a-20a) and order denying rehearing (App. 21) are unreported. The Fifth Circuit's order granting a Certificate of Appealability (COA) (App. 22a-23a) is unreported. The federal district court's order denying habeas corpus relief and a COA (App. 24a-26a) is unreported. The federal magistrate judge's report and recommendation to deny relief (App. 27a-73a) is unreported. The order of this Court denying certiorari in the state habeas corpus proceeding is reported at 142 S.Ct. 2811 (App. 74a). The order of the Texas Court of Criminal Appeals (TCCA) denying habeas corpus relief (App. 75a) is unreported. The 174th District Court's findings of fact and conclusions of law (App. 76a-136a) is unreported. The order of the TCCA refusing discretionary review on direct appeal (App. 137a) is unreported. The Texas Court of Appeals's unpublished opinion affirming the conviction on direct appeal (App. 138a-67a) is available at 2016 WL 3162166. The judgment of the 174th District Court (App. 168a-73a) is unreported.

JURISDICTION

The Fifth Circuit issued its opinion on January 17, 2025, and denied rehearing on February 11, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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 (App. 168a-73a).

The Texas Court of Appeals affirmed petitioner's conviction in an unpublished opinion issued on June 2, 2016 (App. 138a-67a). The TCCA refused discretionary review on October 19, 2016 (App. 137a). *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 district court, after conducting an evidentiary hearing, recommended that relief be denied on April 2, 2019 (App. 76a-136a). The TCCA denied relief without written order on April 14, 2021 (App. 75a). *Ex parte Uvukansi*, No. WR-88,493-02 (Tex. Crim. App. Apr. 14, 2021).

Petitioner filed a petition for a writ of certiorari on July 30, 2021. This Court ordered the State to respond and, thereafter, conferenced on the petition 16 times

before denying certiorari on June 13, 2022. *Uvukansi v. Texas*, __ U.S. __, 142 S.Ct. 2811 (2022) (App. 74a).

Petitioner filed a federal habeas corpus petition in the Houston Division of the Southern District of Texas in No. 4:21-CV-1624 on May 17, 2021. The federal magistrate judge recommended that relief and a COA be denied on July 27, 2023 (App. 27a-73a). Petitioner filed timely objections. The district court overruled the objections and denied both habeas corpus relief and a COA on August 18, 2023 (App. 24a-26a).

The Fifth Circuit granted a COA on January 12, 2024 (App. 22a-23a). Following briefing and oral argument, the Fifth Circuit affirmed the denial of relief on January 17, 2025 (App. 1a-18a); denied rehearing on February 11, 2025 (App. 21a); and entered its judgment on February 19, 2025 (App. 19a-20a).

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 (ROA.1781-82, 1787-88, 1837, 1882, 2365-66, 2373-74, 2377-78, 2382, 2387, 2389-90). The police determined that the wounded man, a member of the Crips, reportedly had orchestrated the murders of members of the Bloods in January 2012 (ROA.2153-56). The police theorized that the Bloods retaliated by committing the murders at the club (ROA.2165-66).

Sergeant Chris Cegielski of the Houston Police Department developed petitioner as a possible suspect on January 25, 2012 (ROA.2170, 2173-74). Attorney Brent Wasserstein called Cegielski and said that a client, Oscar Jeresano, had information about the murders (ROA.2187). Jeresano gave a statement to Cegielski and identified petitioner in a photospread as one of the shooters on June 29, 2012 (ROA.2021-25, 2187, 2192).

The police arrested petitioner on July 3, 2012 (ROA.2207). He gave a statement that he left the club, heard shots, and was pulled back inside by Michael Rhone (ROA.2207-10).

Sergeant Cegielski interviewed Rhone on July 5, 2012 (ROA.2219). Rhone did not confirm petitioner's story, causing Cegielski to believe that petitioner had lied.[1]

Rhone testified that he had known petitioner for about ten years, heard about the shooting on the news, and told the police that he was at a friend's house rather than at the club with petitioner (ROA.2101-03).

Jeresano testified that he was working as a valet at the club on the night of the concert (ROA.1991, 1993). After the concert ended, he heard shots, turned around, and saw a man shooting a gun (ROA.2000, 2004-05). He ducked behind a car and saw people running and bodies falling (ROA.2013, 2015). He ran into the club after the shooting stopped (ROA.2017). He did not initially tell the

1. Apparently, it did not occur to Sergeant Cegielski that Rhone might have lied to him to avoid involvement in a capital murder case involving the Crips and the Bloods.

police that he saw the shooting because he had a pending federal criminal 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 (ROA.2017-18).

Jeresano testified that he told attorney 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 (ROA.2019-20). Two days later, he met with Sergeant Cegielski at Wasserstein's office, gave a statement, and identified petitioner in a photospread (ROA.2021-25).[2] He also identified petitioner in court (ROA.2025).

Jeresano testified that he was indicted for 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 (ROA.2021, 2030-33). The range of punishment for his federal offense was ten years to life imprisonment (ROA.2021). No one had promised him anything or told him that his punishment range would be reduced or that he would receive a lower sentence as a result of his cooperation (ROA.2021, 2035). He did not know, and his attorney did not tell him, whether his plea agreement provided that, if he cooperated, he might receive a reduced sentence under Section 5K1.1 of the United States Sentencing Guidelines (ROA.2034). He was testifying to help the victims' families rather than himself (ROA.2035).

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2. Jeresano described the shooter as a Black male dressed in black with a "fade" hairstyle (ROA.2057-59).

The defense called Wasserstein to testify. Wasserstein 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 (ROA.2353-54). Jeresano was released on bond on January 3, 2012, and ordered to remain at home and wear a GPS monitor (ROA.2354-55).[3] 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 (ROA.2355-56, 2358-59). Wasserstein arranged the interview and notified the federal prosecutor that Jeresano was cooperating in the state prosecution (ROA.2356). Jeresano pled guilty in federal court in July 2012 and was supposed to be sentenced in November 2012 (ROA.2355). Wasserstein repeatedly reset the sentencing so Jeresano could testify against petitioner (ROA.2357, 2361). Wasserstein explained that, after Jeresano testified, Wasserstein would notify the federal prosecutor so she could file a Section 5K1.1 motion, which would permit the federal judge to decide whether to reduce the sentence (ROA.2357). Wasserstein did not explain this motion to Jeresano but told him that testifying against petitioner probably would help him at his federal sentencing (ROA.2359-60).

During her closing arguments, prosecutor Gretchen Flader argued that Jeresano identified petitioner as one of the shooters and came forward to help the victims rather than to get a "good deal" in his own federal criminal case (ROA.2540-41), and that Rhone's testimony that he was not at the club established that petitioner had provided

3. Jeresano apparently violated his bond conditions by being at the club at 2:00 a.m.

a false alibi to the police (ROA.2519). Defense counsel, Vivian King, responded that Jeresano claimed that he saw the shooting in an effort to reduce his sentence in his federal drug-trafficking case and that he was at the club selling drugs instead of parking cars (ROA.2521-22).[4]

2. The State Habeas Corpus Proceeding

Petitioner hired undersigned counsel in 2017 to conduct a habeas corpus investigation. Counsel checked the docket sheet in Jeresano's federal case and learned that the key documents had been sealed (ROA.6019-23). 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 he should receive a lower sentence as a result of his cooperation.

Although Jeresano testified at trial that he did not know, and Wasserstein did not tell him, that his plea agreement provided for a sentence reduction (ROA.2034), he 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 sentence . . . " (ROA.6024). Jeresano acknowledged during the plea proceeding that he had read the plea agreement, discussed it with Wasserstein, and understood it (ROA. 6034-35). Thus, Jeresano testified falsely at petitioner's trial that he did not know whether his plea agreement

4. There was no evidence to support King's argument that Jeresano was selling drugs at the club.

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 and 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 (ROA.6048-50).[5] After he pled guilty, the federal prosecutor, Patti 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 (ROA.6052). Booth said, "I know it's extraordinary, but we're asking under extraordinary circumstances that he be allowed to stay out on bond." (ROA.6052). Jeresano was allowed to remain on bond.

The federal presentence investigation report reflected that Jeresano was subject to a mandatory minimum term of imprisonment of ten years and was subject to removal from the United States as a result of his conviction (ROA.6061, 6063).

Petitioner was sentenced on June 20, 2014 (ROA.1354-55). Flader wrote a letter to United States District Judge John Rainey on August 15, 2014, regarding Jeresano's cooperation (ROA.6067-68). She asserted that Jeresano

5. Jeresano denied knowing that he had almost ten kilograms of cocaine (ROA.6048).

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. (ROA.6067-68).

Judge Rainey sentenced Jeresano on January 5, 2015 (ROA.6069-90). Booth asked for a downward departure to "one-third of the lowest end of the guidelines" under Section 5K1.1 based on Jeresano's cooperation (ROA.6071-72). Judge Rainey observed that "a triple homicide . . . was going nowhere" until Jeresano "stepped up" and solved it by identifying the shooter (ROA.6073). 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" (ROA.6076).[6] 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 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" (ROA.6078). 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."[7] Jeresano then sought to

6. Wasserstein overlooked that Jeresano had ten kilograms of cocaine in his vehicle.

7. The record of petitioner's trial does not reflect that he "threw gang signs" or made "throat-slashing signs" while

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" (ROA.6080).

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" (ROA.6083). Jeresano provided "as much cooperation and assistance" as he had ever seen (ROA.6084).[8] Judge Rainey stated that the "letter from the assistant district attorney in Harris County is unbelievable. You made her case." (ROA. 6084). Acknowledging that he had never before done this, he placed Jeresano on probation for 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 (ROA.6091-93). He asserted, in pertinent part:

Jeresano testified. If petitioner had done so, 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.

8. Booth parroted that she agreed (ROA.6084).

> 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. [9]

(ROA.6091-92) (emphasis added).

Armed with this new evidence, petitioner filed a state habeas corpus application alleging that he was denied due process of law because Jeresano had 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

9. Wasserstein did not know why Jeresano had not been deported (ROA.6092).

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 asserting to the court that he did not know about it, and failed to correct his false testimony on redirect examination.[10]

Flader and Wasserstein testified at the evidentiary hearing 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 (ROA.5244, 5385). Flader understood that the purpose of the letter would be to persuade the judge to be lenient (ROA.5245). Wasserstein believed that Flader's letter would "go a long way" in helping Jeresano obtain a reduced sentence (ROA.5390). Wasserstein considered Flader's promise to him that she would write the letter as the functional equivalent of a promise to Jeresano (ROA.5461-62). He and Booth agreed that, if Flader wrote the letter, the Government would file a Section 5K1.1 motion asking the court to sentence Jeresano below the statutory mandatory minimum of ten years in prison (ROA.5385).

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 acknowledge it; if he had denied it, she would have a duty to correct his false testimony (ROA.5251-52). Although she did not tell Jeresano about the letter, she assumed (correctly) that Wasserstein did (ROA.5251, 5257).

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10. When a newly-elected District Attorney took office in January 2017, she fired Flader for suppressing evidence and violating discovery rules in another capital murder case (ROA.2773-75).

Wasserstein testified that he told Jeresano before trial about his agreements with Flader and Booth (ROA.5403-04). With the cooperation of both prosecutors, he was able to reset the sentencing for over two years so Jeresano could testify against petitioner (ROA.5392). 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 motion to reduce his sentence (ROA.5392-94). He also reminded Jeresano of these agreements during a break in Jeresano's testimony at petitioner's trial (ROA.5386-89).

Flader acknowledged that she did not ask Jeresano about the letter on direct examination (ROA.5249). 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 (ROA.2034-35). Flader did not correct this testimony by eliciting that she would write a letter and Booth would file a Section 5K1.1 motion.

Flader testified that she did not disclose to the jury that she would write a letter to the federal judge requesting leniency for Jeresano because it was not her obligation to do so and she did not consider it to be important (ROA.5249).[11] Wasserstein testified that he did not mention the letter during his testimony at trial because the lawyers did not ask him about it (ROA.5414).

11. 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 because, when King tried to ask Jeresano about consideration for his testimony, Flader successfully objected on the basis that she made the agreement with Wasserstein (ROA.2073-74).

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 (ROA.5476-77). 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 (ROA.5292). Flader acknowledged 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 (ROA.5266-68). 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 that she would file a Section 5K1.1 motion (ROA.5401-04).

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 (ROA.2540-41). Remarkably, Flader testified that she did not consider her agreement with Wasserstein to write a letter to the federal judge to constitute a "promise" (ROA.5293).

Flader also testified that she did not verify that Jeresano's uncle had been murdered before she elicited that testimony (ROA.5265-66). King testified that she could not investigate whether Jeresano's uncle had been murdered because she first heard about it when Jeresano testified (ROA.5454-56). 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 (ROA.5399-5400).

The state habeas trial court found that Flader knowingly elicited or failed to correct 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. 119a—Finding 87);

- Jeresano did not know before trial that the federal judge could consider his cooperation and sentence him below the statutory minimum (App. 119a—Finding 89);

- Jeresano did not know that, if he cooperated, the federal prosecutor would notify the federal judge so he could decide whether to reduce Jeresano's sentence (App. 119a—Finding 90); and

- Jeresano 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 Section 5K1.1 sentence reduction (App. 121a—Finding 98; App. 126a—Finding 110).

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. 120a—Findings 92-95);

- Wasserstein told Jeresano at a recess during his testimony that the federal judge could sentence him below the statutory minimum if a motion were filed (App. 123a—Finding 100); and

- Flader and Booth made these promises to Jeresano and Wasserstein (App. 120a—Finding 96).

Finally, the state habeas trial court found that:

- Flader elicited testimony that "gave the jury a false impression when the testimony is examined as a whole" (App. 126a—Finding 110);

- Jeresano's false testimony misled the jury (App. 126a—Finding 110); and

- Jeresano's testimony was necessary as he was the only witness called by the State to prove that petitioner was the shooter (App. 129a—Finding 119).

Although the state habeas trial court found that Flader knowingly elicited and failed to correct Jeresano's false testimony, it recommended that relief be denied because petitioner did not prove by a preponderance of the evidence that the false testimony was "material"—that is, that it affected the verdict (App. 129a-30a—Findings 121, 122; App. 132a—Finding 131) (citing *Ex parte Weinstein*,

421 S.W.3d 656, 665 (Tex. Crim. App. 2014).[12] The trial court's rationale was that, "because the jury can believe some, none, or all of a witness's testimony, the jury could have determined that Jeresano gave false testimony but . . . still believed he properly identified the shooter" if it had known about the letter (App. 131a-32a—Findings 127, 128).

The TCCA, by summarily denying relief "without written order," presumptively adopted the state habeas trial court's findings of fact and conclusions of law, including its "materiality" analysis (App. 9a-13a); *See Wilson v. Sellers*, 584 U.S. 122, 125 (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.").[13]

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12. In *Weinstein*, the TCCA stated: "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." *Weinstein*, 421 S.W.3d at 665 (emphasis in original); *see also Ex parte Barnby*, 475 S.W.3d 316, 324 (Tex. Crim. App. 2015) ("The burden of persuasion with respect to materiality [concerning false testimony] remains with the applicant.").

13. The Fifth Circuit acknowledged this proposition in its opinion (App. 9a-13a).

Petitioner filed a certiorari petition in No. 21-151 seeking review on essentially the same issues presented here. The Court, after conferencing on the case 16 times, denied certiorari (App. 74a).

3. The Federal Habeas Corpus Proceeding

The magistrate judge concluded that state courts did not render a decision that was contrary to or unreasonably applied this Court's clearly established precedent by requiring petitioner to prove by a preponderance of the evidence that the false testimony was material (App. 73a). The district court adopted the report and denied relief (App. 24a-26a).

The Fifth Circuit, after granting a COA, agreed with the district court that the state court did not render a decision that was contrary to or unreasonably applied this Court's clearly established precedent. The Fifth Circuit deferred to the state courts' decision because petitioner "has identified no Supreme Court precedent resolved differently 'on a set of materially indistinguishable facts,' " nor shown how, in light of Supreme Court precedent, the state courts' decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (App. 15a).

REASONS FOR GRANTING REVIEW

Prosecutor Gretchen Flader knowingly suborned and failed to correct perjured testimony by Oscar Jeresano, the only person to identify petitioner as one of the shooters, that he had not been promised anything for his

testimony. The state courts, after erroneously placing the burden on petitioner to prove that the false testimony was material, denied relief because the perjured testimony concerned Jeresano's motive to cooperate—that is, his credibility—rather than his identification.

The Fifth Circuit asserted that it did not "condone" Flader's "reprehensible" conduct but was powerless to do anything about it under the AEDPA standard of review (App. 17a). By upholding this tainted conviction, the lower courts not only have rewarded a prosecutor who engaged in illegal and unethical conduct to obtain a conviction but also implicitly have empowered other state prosecutors to follow in her footsteps and flout this Court's decisions in *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972).

I. The State Courts—By Requiring Petitioner To Prove By A Preponderance Of The Evidence That The Prosecution's Knowing Presentation Of And Failure To Correct Perjured Testimony Affected The Verdict—Rendered A Decision That Was Contrary To And Unreasonably Applied This Court's Clearly Established Precedent, Which Requires That The Prosecution Prove Beyond A Reasonable Doubt That The Perjured Testimony Did Not Affect The Verdict.

A conviction must be set aside when the prosecutor knowingly presented or failed to correct false testimony that was "material" to the conviction. *Napue*, 360 U.S. at 271; *Giglio*, 405 U.S. at 154. The 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).

The Court's "materiality" standard governing the prosecution's presentation of or failure to correct false testimony is significantly more favorable 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 United States v. Bagley*, 473 U.S. 667, 679-82 (1985). 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 standard governing the materiality of false testimony is more favorable 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 courts erroneously required petitioner to prove by a preponderance of the evidence that the perjured testimony affected the verdict instead of requiring the State to prove beyond a reasonable doubt that it did not affect the verdict (App.116a—Finding 78). Even this Court's more demanding materiality standard governing suppressed evidence that places the burden on the defendant 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 courts, by placing the burden on petitioner to prove that the false testimony was material, used a standard that was more onerous than the standard required by this Court's precedent. Thus, the state courts' decision was contrary to and unreasonably applied this Court's precedent. *Cf. Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim on ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be [contrary] to our clearly established precedent because we held in *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.' *Id.* at 694").

The Fifth Circuit asserted that this Court has not clearly held that the *Napue* materiality standard is the same as the *Chapman* harmless error standard (App. 14a). The court observed that the *Bagley* footnote was in a portion of the opinion joined by only two Justices (App. 14a). The court concluded that this 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." (App. 14a). The Fifth Circuit misinterpreted this Court's clearly established precedent.

The Court recently reiterated the standard for determining the materiality of perjured testimony in *Glossip v. Oklahoma*, 604 U.S. __, 145 S.Ct. 612, 626-27 (2025):

> In *Napue v. Illinois*, this Court held that a conviction knowingly "obtained through use of false evidence" violates the Fourteenth Amendment's Due Process Clause. 360 U.S. at 269, 79 S.Ct. 1173. To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it "to go uncorrected when it appear[ed]." *Ibid*. If the defendant makes that showing, a new trial is warranted so long as the false testimony " 'may have had an effect on the outcome of the trial," *id*., at 272, 79 S.Ct. 1173—that is, if it "in any reasonable likelihood [could] have affected the judgment of the jury,' " *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 271, 79 S.Ct. 1173).

> In effect, this materiality standard requires " ' "the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " *United States v. Bagley*, 473 U.S. 667, 680, n.9, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Thus, *Glossip* confirmed that *Napue*, *Chapman*, and *Giglio* clearly established that the prosecution must prove beyond a reasonable doubt that the perjured testimony did not affect the verdict.

II. The State Courts—By Concluding That The Prosecution's Knowing Presentation Of And Failure To Correct Perjured Testimony Was Not Material Because The Jury Could Have Believed The Witness's Testimony About The Identification Even If It Had Known That He Lied About The Deal—Disregarded This Court's Clearly Established Precedent That Impeachment Evidence And Exculpatory Evidence Are The Same For Purposes Of A Materiality Analysis.

The state courts correctly found that Jeresano's testimony was "necessary" to the prosecution's case because he was the only witness who identified petitioner as one of the shooters (App. 129a—Finding 119). However, the courts erroneously held that Jeresano's false testimony was not material because Wasserstein testified at trial that he told Jeresano that his cooperation probably would help at sentencing (App. 128a—Findings 115-16); and that, even if the jury had known that Flader would write a

letter to the federal judge, that would not have impeached Jeresano's identification of petitioner (App. 129a-30a; Findings 120-22; App. 132a—Finding 131).

The state courts disregarded this Court's clearly established precedent regarding the impeachment value of evidence that a key prosecution witness lied 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 testimony she elicited from Jeresano and her closing argument—had agreed to help him obtain a reduced sentence by writing a letter to the federal judge that, in turn, would cause Booth to file a Section 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 made no promise to him. Demonstrating that his testimony about his motive to testify was false not only would have undermined his credibility but also would have raised reasonable doubt regarding the credibility of his identification.

The state court also disregarded this Court's well-settled 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. The state habeas trial court found that the jury could have believed that Jeresano accurately identified petitioner even though he lied in denying that he had been promised consideration (App. 130a-32a—Findings 124-30). This Court squarely rejected that distinction in *Napue*, holding that informing the jury that a public defender would try to help a prosecution witness obtain a sentence reduction did not render immaterial his false testimony that he had not been promised anything. *See Napue*, 360 U.S. at 269-70 ("It is of no consequence that the falsehood bore upon the witness's credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject. . . ."). The court in petitioner's case also failed to consider that the jury's assessment of Jeresano's credibility ultimately would determine whether it believed his identification; the jury's knowledge that he lied about his motive certainly could have affected whether it believed that his identification was reliable.[14] In *Napue*,

14. Two of the state habeas trial court's key findings demonstrate that it did not understand this Court's relevant precedent (App. 131a-32a):

> 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

the 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. Furthermore, there is no distinction between impeachment evidence and exculpatory evidence for purposes of assessing the materiality of a prosecution witness's perjured testimony. *See Bagley*, 473 U.S. at 676.

The Fifth Circuit cited *Napue* for the proposition that, "[k]nowing that the prosecutor had cut a deal with the witness would have put the testimony in a substantially different light." (App. 16a). The Fifth Circuit sought to distinguish *Napue* on the basis that "the jury knew that Jeresano's sentencing had been continually reset so the federal prosecutor would be able to reward his cooperation by moving for a reduced sentence"; and, even though "the jury did not know that the state prosecutor had agreed to write a letter to the sentencing judge or that the federal prosecutor had firmly agreed to recommend a reduced sentence," the jury "knew that Jeresano likely had a deal with the prosecution." (App. 16a). The Fifth Circuit

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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.

thus concluded that *Napue's* facts were not "materially indistinguishable," nor was the state court decision in petitioner's case clearly wrong. (App. 16a-17a).

Four days after the Fifth Circuit issued its opinion in petitioner's case, this Court decided *Andrew v. White*, 604 U.S. ___, 145 S.Ct. 75 (2025) (*per curiam*). The issue in this federal habeas corpus case was whether the admission of evidence at a state criminal trial violated due process of law. The Tenth Circuit upheld the denial of relief based on its conclusion that *Payne v. Tennessee*, 501 U.S. 808 (1991), did not clearly establish that principle. This Court held that the Tenth Circuit erred by limiting *Payne* to its facts, as it has been clear for decades that the introduction of unduly prejudicial evidence at a state criminal trial violated due process. *Andrew*, 145 S.Ct. at 81. The Fifth Circuit erred in petitioner's case by limiting *Napue* to its precise facts and failing to recognize that the state court decision was contrary to and unreasonably applied *Napue's* clearly established standard for determining the "materiality" of perjured testimony.

This Court recently confirmed *Napue's* "materiality" standard in *Glossip v. Oklahoma*, 604 U.S. ___, 145 S.Ct. 612 (2025). Justin Sneed testified that he committed a murder because Glossip offered him remuneration. Glossip was convicted and sentenced to death. Glossip established in a post-conviction habeas corpus proceeding that the State failed to disclose that Sneed suffered from bipolar disorder which, combined with his known drug use, could have caused impulsive outbursts of violence; that a jail psychiatrist prescribed Sneed lithium to treat that condition; and that the prosecution failed to correct Sneed's false testimony that he had never seen a

psychiatrist and had been given lithium after asking for cold medicine. Glossip contended that the prosecution's failure to turn over Sneed's statements about his mental health treatment violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that its failure to correct his false trial violated *Napue*. The Court applied the *Napue* standard that a new trial is warranted if the false testimony "in any reasonable likelihood [could] have affected the judgment of the jury," which requires the prosecution "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Glossip*, 145 S.Ct. at 626-27.

The Court has emphasized that evidence can be material even if it "goes only to the credibility of the witness," *Napue*, 360 U.S. at 269; indeed, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Glossip*, 145 S.Ct. at 628. Because Sneed's testimony was the only direct evidence of Glossip's guilt, the jury could convict Glossip only if it believed Sneed. The key portion of the opinion, for purposes of petitioner's case, is as follows:

> Had the prosecution corrected Sneed on the stand, his credibility plainly would have suffered. That correction would have revealed to the jury not just that Sneed was untrustworthy . . . , but also that Sneed was willing to lie to them under oath. . . . Even if Sneed's bipolar disorder were wholly irrelevant, as *amicus* argues, his willingness to lie about it to the jury was not. " 'A lie is a lie, no matter what its subject.' " *Napue*, 360 U.S. at 269.

Id. at 628

When the *Napue* "materiality" standard is applied to petitioner's case, it is abundantly clear that petitioner has a much stronger claim for relief than Glossip. Sneed's false testimony about his mental health was indirectly relevant to his credibility. Jeresano's false testimony that he had not been promised anything when, in fact, he had been promised what amounted to a "get out of jail free card" was directly relevant to his credibility and, hence, to his identification of petitioner.

The jury in petitioner's case was informed that (1) Jeresano was facing ten years to life in prison for possession with intent to distribute ten kilograms of cocaine, (2) he came forward to help the families of the victims rather than himself, (3) he did not ask attorney Wasserstein if his cooperation would help him at sentencing, (4) Wasserstein reset the sentencing several times so Jeresano could testify against petitioner, (5) Wasserstein would tell Booth that Jeresano had testified, so she could file a motion to reduce his sentence, and (6) Flader had not promised Jeresano anything. In sum, the jury knew that Jeresano hoped for leniency but would receive no assistance from Flader. Thus, Flader falsely portrayed Jeresano and herself as having "clean hands" and "pure hearts."

Conversely, petitioner's jury was not informed that (1) Jeresano lied that no one had promised him anything, (2) Flader promised to write a letter to the federal judge regarding Jeresano's cooperation in an effort to help him obtain a reduced sentence, and (3) Flader lied in her closing argument that there had been no promise. Flader, Jeresano, and Wasserstein conspired to perpetrate a fraud on the jury. They have thus far succeeded, as ten state and five federal judges have upheld this tainted conviction.

The Fifth Circuit, in attempting to distinguish *Napue*, failed to consider how the jury's knowledge that Jeresano had lied about the deal (at Flader's direction) would have affected its assessment of the credibility of his identification of petitioner. The key line in the Fifth Circuit's opinion is: "Unlike the jury in *Napue*, though, the jury here knew that Jeresano likely had a deal with the prosecution." (App. 16a). That defies logic. If the jury knew that Jeresano "likely had a deal with the prosecution"—despite the denials by Flader and him—then the jury knew that he lied about the deal yet believed beyond a reasonable doubt his testimony about the identification. A jury that believed that Jeresano lied about the deal would have acquitted petitioner or deadlocked.

To the contrary, the jury probably believed Jeresano's testimony, supported by Flader's closing argument, that he came forward to help the families of the victims rather than himself, credited his identification, and convicted petitioner. It is unreasonable to conclude that the jury convicted petitioner despite believing that Flader promised Jeresano a benefit, he lied about it under oath, and she attempted to deceive them.

The Fifth Circuit also failed to consider in analyzing materiality why Flader suborned and failed to correct this perjured testimony. The only logical reason is that she knew that it would devastate the State's case if the jury knew the truth—that she would go to bat for a Colombian drug dealer and request leniency on a ten-kilogram cocaine case. She made a conscious decision to deceive the jury about Jeresano's motive to cooperate to increase the likelihood that the jury would believe his identification of petitioner. The materiality of Jeresano's

perjured testimony should be measured by the length to which Flader went to conceal it. Simply stated, the jury was entitled to know that the State had bought Jeresano's testimony, and he lied about it.

The Fifth Circuit's unduly narrow reading of *Napue* is contrary to *Andrew* and *Glossip*. Like the witness Sneed in *Glossip*, Jeresano was the centerpiece of the State's case. His testimony was not corroborated, and Flader's behind-the-scenes assistance was an undisclosed source of his bias. The state court's rationale—which the Fifth Circuit implicitly adopted—that the jury would have believed Jeresano's identification of petitioner even if it had known that he had lied about his deal "has no place in a materiality analysis, which asks what a reasonable decisionmaker would have done with the new evidence." *See Wearry v. Cain*, 577 U.S. 385, 393-94 (2016) (*per curiam*) (rejecting the argument that the evidence was not material because the witness's credibility had already been impugned). *Glossip*, 145 S.Ct. at 629. The state courts' decision that Jeresano's perjured testimony was not material, which the Fifth Circuit upheld, was contrary to or unreasonably applied *Napue* and its progeny.

The Fifth Circuit asserted, "We do not condone the prosecutor's conduct in this case" (App. 17a). One would hope not, as Flader committed a felony and an ethical violation by suborning and failing to correct perjured testimony. Nonetheless, by denying relief, the Fifth Circuit tolerated her conduct and incentivized other prosecutors to follow her path, as there are no adverse consequences. Indeed, by allowing her to remain anonymous, the Fifth Circuit protected her from the embarrassment and scorn that she earned.

The Fifth Circuit acknowledged, "Hiding the true nature of the sole identification witness's motive to testify in a capital murder case is reprehensible." (App. 17a). That said, Flader's deception served its intended purpose, as she elicited and failed to correct perjured testimony, obtained a conviction and, thus far, has got away with it.

The Fifth Circuit further observed that petitioner "had the chance to vindicate his claims in the state habeas process." (App. 17a). Yet that "chance" proved to be illusory because the state court clearly misapplied *Napue* and *Giglio*.

Finally, the Fifth Circuit observed that "principles of comity, finality, and federalism" prevent a federal court from reconsidering constitutional claims litigated in state court "except in the most egregious cases." (App. 17a). That general proposition assumes that the state court correctly applied Supreme Court precedent governing the knowing use of perjured testimony. What interest does the State have in obtaining a conviction by knowingly suborning and failing to correct perjured testimony? What interest does a federal court have in upholding a conviction based on perjured testimony? The short answer to these questions is none.

The decision of the Fifth Circuit is so contrary to this Court's well-settled precedent that a summary reversal is appropriate. This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry* 577 U.S. at 395 (*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 adverse consequences of the Fifth Circuit's decision are significant. The Fifth Circuit implicitly blessed a tactic that prosecutors frequently and successfully use to avoid compliance with *Napue* and its progeny. The opinion will encourage prosecutors to promise a benefit to a witness and mislead the jury about it in an effort to minimize his motive, secure in the knowledge that the courts will uphold the conviction. The tongue-lashing of an unnamed prosecutor at the end of the opinion, without reversing the conviction, will not deter other prosecutors from engaging in this illegal and unethical conduct. This Court should grant certiorari and intervene. *See* Sup. Ct. R. 10(c).

CONCLUSION

The Court should grant the petition for a writ of certiorari. Alternatively, petitioner moves that the Court recall the mandate in No. 21-151 (the denial of certiorari in the state habeas corpus proceeding) and grant certiorari in light of *Glossip*. *See Cahill v. New York, N.H. & H.P. Co.*, 351 U.S. 183, 183-84 (1956); *Gondeck v. Pan Am World Airways, Inc.*, 382 U.S. 25, 26-27 (1965).

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 17, 2025)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20435

FEANYICHI E. UVUKANSI,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1624

Before SOUTHWICK, HAYNES, and DOUGLAS, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge*:

A Texas state prisoner brought a Section 2254 application that challenged his capital murder conviction. He is currently serving a sentence of life without parole. At trial, the sole identification witness testified he had no agreement with prosecutors regarding his testimony.

The witness, though, did have an agreement. In state habeas proceedings, the court determined that jurors learned enough about the agreement from another witness to make the false testimony immaterial. The federal district court dismissed Uvukansi's application, holding that the state court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, three people were shot and killed outside a nightclub in Houston, Texas. *Uvukansi v. State*, No. 01-14-00527-CR, 2016 Tex. App. LEXIS 5915, 2016 WL 3162166, at *1-2 (Tex. App.—Houston [1st Dist.] June 2, 2016, pet. ref'd). An eyewitness named Jeresano claimed he saw the shooter's face and picked Uvukansi out of a photo array. *Id.* A jury found Uvukansi guilty of capital murder. *2016 Tex. App. LEXIS 5915*, [WL] at *1. Because the state had not sought the death penalty, he was automatically sentenced to life without parole. *Id.* His conviction was affirmed on direct appeal. *Id.*

Jeresano was the sole identification witness at trial. The prosecutor later stated that Jeresano testified "with such conviction his testimony alone convinced the jury of [Uvukansi's] guilt." As a federal judge put it, Jeresano "made [the] case. A triple murderer got convicted because of [him], basically." Undoubtedly, Jeresano's testimony was critical to the State's case.

Uvukansi argues he was not allowed at trial to elicit the facts that would have called Jeresano's credibility into

question. Jeresano had pled guilty to federal drug charges. It is now clear that an agreement had been reached that if Jeresano testified against Uvukansi, the state prosecutor would write a letter to the sentencing judge detailing his cooperation, and the federal prosecutor would move for a sentence below the ten-year statutory minimum.[1] The state prosecutor's help plausibly led to Jeresano's being sentenced only to three years of probation in the federal prosecution.

Agreements like Jeresano's provide fertile grounds for impeachment of testimony. The prosecutor on direct asked if anyone had "made any promises for testifying" at trial, and Jeresano answered "[n]ope." On cross-examination, defense counsel asked whether Jeresano had a plea agreement that if he testified, "they would consider giving you a 5K[1].1 reduction under the Federal sentencing guidelines?" He answered: "Not that I know of."

After this testimony and out of the presence of jurors, defense counsel informed the court and the state prosecutor that the federal prosecutor had agreed to recommend a lesser sentence if Jeresano testified against Uvukansi. No specific lesser sentence had been offered, but Jeresano's testimony would be considered by the sentencing judge. The state prosecutor responded that she was unaware of any sentencing agreement between

1. This motion is referred to as a "5K1.1 motion," after Section 5K1.1 of the U.S. Sentencing Guidelines. That provision allows for a departure below the recommended Guidelines range. The motion that allows the sentencing judge to sentence below the statutory minimum is a motion under 18 U.S.C. § 3553(e).

Jeresano and the federal prosecutor. She had, however, previously emailed Jeresano's attorney saying that she would be willing to write a letter detailing Jeresano's cooperation to his sentencing judge. In her closing argument, the state prosecutor described the agreement this way: "Only after [Jeresano] had pled guilty and after he came in here and testified is there even a possibility that he's going to get a deal. We don't even know."

At trial, defense counsel managed to elicit parts of the agreement from Jeresano's attorney. After the trial, Jeresano's attorney would tell the federal prosecutor of Jeresano's cooperation and ask for a Section 5K1.1 substantial assistance motion. This would let the sentencing judge reduce Jeresano's sentence. Jeresano's attorney had not explained to Jeresano what a Section 5K1.1 motion was, but he had told Jeresano that testifying would probably help him at sentencing, emphasizing that the sentencing judge had substantial discretion. Further, Jeresano's sentencing had been continually reset so he could testify against Uvukansi. Jeresano's attorney did not mention (1) a provision in Jeresano's plea agreement detailing a possible Section 5K1.1 substantial assistance motion, or (2) the state prosecutor's promise to write a letter to the sentencing judge extolling Jeresano's cooperation in the capital murder trial. Only during state habeas proceedings did Jeresano's attorney detail the full scope of the agreement.

Although Uvukansi did not raise the false testimony issue on direct appeal, he did raise it in state habeas proceedings. On November 14, 2017, he filed an application

for a writ of habeas corpus in the state district court in which he had been convicted. That court was to make findings of fact and then transmit them to the Texas Court of Criminal Appeals along with the relevant record. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3(b), (d). The appellate court then would decide whether to grant the writ. *Id.* § 5.

In this case, the state district court conducted an evidentiary hearing. It then issued the required recommended findings of fact on April 2, 2019. It also recommended that Uvukansi's application be denied. The court found Jeresano's testimony that nobody had promised him anything to be false and misleading. Whether or not Jeresano knew what a Section 5K1.1 substantial assistance motion was, he "knew that if he cooperated . . . the federal prosecutor would do something" that might result in a reduced sentence. Jeresano also knew the state prosecutor would write a letter to the sentencing judge extolling his cooperation.

The state district court then found that the false testimony was immaterial because most of the agreement was before the jury. Further, the court made a distinction that the false testimony only went to Jeresano's credibility and not to the validity of his identification. The court concluded that Uvukansi had not proved "by a preponderance of the evidence" that "there is a reasonable likelihood that the false testimony affected the judgment of the jury." In doing so, it adopted, nearly verbatim, the State's proposed findings as to why Jeresano's false testimony was not material, including the State's articulation of the standard for materiality.

As we already mentioned, these findings were recommendations to the Court of Criminal Appeals. The parties made different objections to them. Uvukansi argued that he did not bear the burden of showing materiality and that Jeresano's false testimony was material. The State insisted that Jeresano's testimony was not false. Before deciding on the objections, the appellate court on September 23, 2020, remanded the application for the state district court to address a pending motion. After the reason for the remand was resolved, the Court of Criminal Appeals denied Uvukansi's application without stating reasons on April 14, 2021. Uvukansi petitioned for a writ of certiorari, which the Supreme Court denied on June 13, 2022. *Uvukansi v. Texas*, 142 S. Ct. 2811, 213 L. Ed. 2d 1037 (2022) (mem.).

While his petition for a writ of certiorari was pending, Uvukansi filed a Section 2254 application in federal district court, raising the same claims he raised in his state application. The case was referred to a magistrate judge, who concluded that Uvukansi failed to clear the relitigation bar in the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254(d). The district court largely adopted the magistrate judge's report and recommendation.[2]

This court granted a certificate of appealability on two issues regarding the false testimony's materiality: (1) whether the state habeas decision was contrary to, or involved an unreasonable application of, clearly

2. The district court rejected the magistrate judge's conclusion that the state district court's materiality determination was a finding of fact rather than a mixed question of law and fact.

established Supreme Court precedent; and (2) whether the state habeas decision was based on an unreasonable determination of the facts. Those are the criteria for clearing AEDPA's relitigation bar. 28 U.S.C. § 2254(d).

DISCUSSION

I. AEDPA Standard of Review

"When a district court denies a [Section] 2254 application, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, 'applying the same standard of review to the state court's decision as the district court.'" *Anaya v. Lumpkin*, 976 F.3d 545, 550 (5th Cir. 2020) (quoting *Robertson v. Cain*, 324 F.3d 297, 301 (5th Cir. 2003)). Mixed questions of law and fact are reviewed *de novo*. *Id.* Uvukansi must show that the state habeas decision was either (a) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (b) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first standard applies to questions of law and mixed questions of law and fact. *Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998). The second applies to questions of fact. *Id.* A state court's factual findings are cloaked in a rebuttable "presumption of correctness," which can only be overcome "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Relevant here, materiality is a mixed question of law and fact reviewed under Section 2254(d)(1). *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997).

For purposes of Section 2254(d)(1), a state court decision is "contrary to" clearly established Supreme Court precedent only if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor* (*Williams I*), 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The decision involves an "unreasonable application" of clearly established Supreme Court precedent only if it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102.

It is clear that Supreme Court precedent must be on point: "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). Circuit precedent may not "refine or sharpen" Supreme Court precedent into clearly established law for AEDPA purposes, even if there is broad agreement among the courts of appeals. *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013). Even so, disagreement among the courts of appeals "can reflect a lack of guidance from the

Supreme Court and signal that federal law is not clearly established." *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017).

Clearing AEDPA's relitigation bar is difficult, and "it was meant to be." *Richter*, 562 U.S. at 102. Congress enacted AEDPA "to further the principles of comity, finality, and federalism." *Williams v. Taylor* (*Williams II*), 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Thus, AEDPA prevents *de novo* federal review of all but the most egregious cases.

II. Which State Habeas Decision?

To begin, we must determine which state court decision to consider: the state district court's reasoned recommendation to deny relief or the actual denial of relief without stated reasons issued by the Texas Court of Criminal Appeals. Uvukansi challenges the findings of the former ruling, arguing in particular that it placed the burden on him to prove that the testimony affected the jury verdict. If we "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" — here, the state district court's recommendation on habeas — we consider the lower court's actual reasoning. *Wilson v. Sellers*, 584 U.S. 122, 125, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018). The State finds no error in the state district court's ruling but also argues it would be proper to consider only the unreasoned appellate decision and "determine what arguments or theories supported or, as here, could have supported, the state court's decision." *Richter*, 562 U.S. at 102.

A panel of this court recently determined that when there is a prior reasoned decision, *Wilson* creates a rebuttable presumption that we should "look through" an unreasoned denial of habeas relief to that prior decision. *Wooten v. Lumpkin*, 113 F.4th 560, 567 (5th Cir. 2024); *see Wilson*, 584 U.S. at 131 (holding that *Richter* applies when there is "no lower court opinion to look to"). This presumption may be rebutted by evidence indicating that the unreasoned denial relied on reasons different from those advanced by the lower court. *Wilson*, 584 U.S. at 132. For example, "the unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the [higher] court adopted the same reasoning." *Id.* The presumption may also be rebutted by showing that "convincing alternative arguments for affirmance" were made before the higher court or that there was a "valid ground for affirmance that is obvious from the state-court record." *Id.* Further, the text of the unreasoned denial might imply — through citations or other means — that the decision rested on alternative grounds. *Wooten*, 113 F.4th at 567 (higher court's citation of harmless error cases helped rebut *Wilson*'s "look through" presumption).

The State argues we should not consider findings or conclusions made by a state district court pursuant to Section 3 of Article 11.07. That is because that statute provides for the court to recommend, not decree, an outcome. Therefore, there is no prior final judgment to look to. It is true that the Supreme Court has occasionally referred to "one reasoned state judgment" and "later unexplained orders upholding that judgment." *See Wilson*, 584 U.S. at 129 (quoting *Ylst v. Nunnemaker*, 501 U.S.

797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)). We do not see the use of "judgment" in *Ylst*, though, to be a limitation on look-through principles. What we are seeking is reasoning that the higher state court may have accepted in reaching its decision. The very purpose of initial proceedings followed by recommended findings and conclusions, whether by a state district judge under Section 3 of Article 11.07 or by a United States magistrate judge under 28 U.S.C. § 636(b)(1)(B)-(C) (both procedures were utilized for Uvukansi's claims), is to provide both the evidence and an initial, reasoned explanation of what the evidence shows and the relevant law requires. We then can review the controlling ruling for evidence of acceptance or rejection of the recommendations.

In fact, the *Wooten* opinion dealt with a Texas district court's recommended findings under Texas Code of Criminal Procedure Article 11.07, which were followed by the Texas Court of Criminal Appeals' denial of the writ of habeas corpus "without written order." 113 F.4th at 566.[3] Thus, we have already implicitly rejected the State's argument that we cannot look through to a decision consisting only of recommendations.

Here, we find that the State has not rebutted *Wilson*'s "look through" presumption. First, as discussed below, the state district court's recommendation was not obviously

3. Though our opinion neither cited Article 11.07 nor gave many procedural details, a review of the record in *Wooten* reveals the same procedure was involved there as here.

unreasonable.[4] *See Wilson*, 584 U.S. at 132 (majority opinion). Second, the State did not raise "convincing alternative arguments for affirmance" in its objections to the state district court's recommendation. *Id.* Notably, the state district court adopted the State's materiality argument nearly verbatim, including its standard for materiality. The State's only alternative argument was that Jeresano's testimony was not false. We do not find that argument compelling, and nothing in the record indicates that the Texas Court of Criminal Appeals adopted it. Third, the unreasoned denial did not otherwise imply that it rested on alternative arguments. *See Wooten*, 113 F.4th at 567. The denial read, in its entirety, "Denied without written order." Neither party has cited Texas authority on how the Court of Criminal Appeals may have described the effect of an unreasoned decision in this context, so there is no specific state practice to apply. We conclude it is appropriate to consider the reasoning of the recommendations.[5]

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4. We note that placing too much weight on the reasonableness of the lower court's decision creates a lose-lose situation for Section 2254 applicants. If AEDPA's relitigation bar is only cleared by an unreasonable decision and the "look through" presumption does not apply when the decision is unreasonable, then *Richter*'s standard will always apply in practice. *See Wilson*, 584 U.S. at 146-47 (Gorsuch, J., dissenting). We do not think the Supreme Court meant for us to apply *Wilson*'s "look through" presumption so parsimoniously.

5. Uvukansi suggests that the Texas Court of Criminal Appeals always rejects findings and conclusions it disagrees with. Because the *Wilson* presumption applies, we need not determine whether this is true.

With our sights properly set on the state district court's actual reasoning, we next consider whether Uvukansi clears AEDPA's relitigation bar.

III. AEDPA's Relitigation Bar

Staring down AEDPA's strict relitigation bar, Uvukansi marshals a legion of arguments to conquer it. *First*, he argues that the state district court wrongly required him to prove by a preponderance of the evidence that he would not have been convicted absent the false testimony. We agree that would be the wrong standard. "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . [.]'" *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). The state district court, though, 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.[6] The state district court did not impose

6. At oral argument, Uvukansi noted *O'Neal v. McAninch*, 513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995), which held that when judges are in grave doubt as to the harmlessness of an error, the habeas applicant must win. *Id.* at 437. Therefore, Uvukansi argues, he does not bear the burden of proof on materiality. Uvukansi puts the cart before the horse: his argument assumes that the Supreme

a standard higher than the Supreme Court's "reasonable likelihood" standard.

Second, Uvukansi claims the state district court wrongly placed the burden of proof on him instead of the State. He argues the proper standard is the harmless error test from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). He insists the State, as the beneficiary of the false testimony, must prove beyond a reasonable doubt that the false testimony did not affect the jury's verdict. *See id.* at 24. No majority of the Supreme Court has indicated that *Napue*'s materiality standard is the same as *Chapman*'s harmless error standard. *See Ventura v. Att'y Gen. of Fla.*, 419 F.3d 1269, 1279 n.4 (11th Cir. 2005) (making this observation). 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, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (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. As a leading treatise has stated, many of our sister circuits have treated materiality as an element of a *Napue* violation, not merely as a means of avoiding reversal. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(d) n.155 (4th ed. 2024) (collecting cases). The practice of other circuits suggests the Supreme Court

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Court has clearly established that materiality is not an element of the constitutional violation itself but rather a means of avoiding reversal. As discussed below, that is far from clear.

has not clearly placed the burden of proof on the State. *Evans*, 875 F.3d at 216.

Third, Uvukansi claims the state district court wrongly held that false credibility testimony — as opposed to false inculpatory testimony — is *per se* immaterial. We conclude that Supreme Court precedent clearly establishes that false credibility testimony may be material. *Napue*, 360 U.S. at 269. The state district court did not hold otherwise. It simply considered the fact that the false testimony only went to Jeresano's credibility as a factor in judging its materiality. The record shows that, far from holding the false credibility testimony *per se* immaterial, the state district court considered whether its force was diminished by later testimony impeaching Jeresano's credibility. No Supreme Court precedent clearly bars this curative approach.

The state district court's conclusion that Jeresano's testimony was not material was neither "contrary to" nor "an unreasonable application of" clearly established Supreme Court precedent. Uvukansi has identified no Supreme Court precedent resolved differently "on a set of materially indistinguishable facts." *Williams I*, 529 U.S. at 413. Nor has he shown how, in light of Supreme Court precedent, the state district court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

The most analogous Supreme Court precedent is *Napue*, in which a prosecutor promised the State's star eyewitness — who had been sentenced to 199 years in

prison — that he would recommend a sentence reduction. 360 U.S. at 265-66. At trial, the witness falsely denied being made any promises, although the jury knew that "a public defender 'was going to do what he could'" to help the witness. *Id.* at 267-68. The jury's knowledge that a public defender would help the witness did not render the false testimony immaterial. *Id.* at 270. Knowing that the prosecutor had cut a deal with the witness would have put the testimony in a substantially different light. *Id.*

Here, by contrast, the jury knew that Jeresano's sentencing had been continually reset so the federal prosecutor would be able to reward his cooperation by moving for a reduced sentence. True, the jury did not know that the state prosecutor had agreed to write a letter to the sentencing judge or that the federal prosecutor had firmly agreed to recommend a reduced sentence. Unlike the jury in *Napue*, though, the jury here knew that Jeresano likely had a deal with the prosecution. Under these circumstances, the state district court's conclusion that Jeresano's false testimony was not material is not objectively unreasonable under "existing law beyond any possibility for fairminded disagreement," nor are *Napue*'s facts "materially indistinguishable." *Richter*, 562 U.S. at 103; *Williams I*, 529 U.S. at 413. Even if we might have reached a different conclusion than the state district court, that alone is not enough to clear AEDPA's relitigation bar.

Uvukansi has not shown that the state district court's materiality analysis was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States." 28 U.S.C. § 2254(d)(1). Additionally, he has not shown that the state district court's analysis "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," as he has not shown "by clear and convincing evidence" that the state district court's relevant factual findings were wrong.[7] *Id.* § 2254(d)(2), (e)(1). Uvukansi does not clear the relitigation bar, so we cannot reexamine the alleged *Napue* error *de novo*.

* * *

We do not condone the prosecutor's conduct in this case. Hiding the true nature of the sole identification witness's motive to testify in a capital murder case is reprehensible. Even so, Uvukansi had the chance to vindicate his claims in the state habeas process. Congress has decided that "principles of comity, finality, and federalism" should prevent us from reconsidering constitutional claims litigated in state court, except in the most egregious cases. *Williams II*, 529 U.S. at 436. This is not one of those cases.

AFFIRMED.

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7. Uvukansi attempts to force arguments about materiality into this provision, but materiality is a mixed question of law and fact considered under Section 2254(d)(1), not Section 2254(d)(2). *Corwin*, 150 F.3d at 471; *Nobles*, 127 F.3d at 416.

Appendix A

HAYNES, *Circuit Judge*, concurring:

I reluctantly concur with the affirmance based upon the requirements of AEDPA. If the standard applied to the state court decision was any lower, I would vote for reversing because of the prosecutor's conduct as discussed in the opinion. But, given the high standard for habeas cases based upon state court decisions, I agree that we must affirm.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 17, 2025)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20435

FEANYICHI E. UVUKANSI,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1624

Filed January 17, 2025

Before SOUTHWICK, HAYNES, and DOUGLAS, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

Appendix B

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FEBRUARY 11, 2025)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20435

FEANYICHI E. UVUKANSI,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1624

Filed February 11, 2025

Before SOUTHWICK, HAYNES, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

ON PETITION FOR REHEARING

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 12, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20435

FEANYICHI E. UVUKANSI,

Petitioner-Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Filed January 12, 2024

ORDER

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1624

Feanyichi E. Uvukansi, Texas prisoner# 01939267, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application. Uvukansi filed the application to challenge his life sentence

for capital murder. He contends that his due process rights were violated because the state prosecutor knowingly presented false testimony that was material to the jury's verdict of guilty. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

A COA is GRANTED on the following questions: Whether the district court erred in concluding that: (1) the state court decision requiring appellant to prove by a preponderance of the evidence that the false testimony of the sole eyewitness to the murders about the consideration he would receive for his testimony affected the verdict was contrary to or involved an unreasonable application of clearly established Supreme Court precedent; and (2) the state court decision that the false testimony was not material was based on unreasonable determinations of the facts. As to any other questions, the COA is DENIED.

/s/_____
Catharina Haynes
United States Circuit Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION (AUGUST 18, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 4:21-CV-01624

FEANYICHI E. UVUKANSI,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

Filed August 18, 2023

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pending before the Court is the July 27, 2023 Memorandum and Recommendation ("M&R") prepared by Magistrate Judge Peter Bray. (Dkt. No. 19). Magistrate Judge Bray made findings and conclusions and recommended that Uvukansi's petition, (Dkt. No.1), be dismissed with prejudice. (Dkt. No. 19).

Appendix E

The Parties were provided proper notice and the opportunity to object to the M&R. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). On August 10, 2023, Uvukansi filed three objections. (Dkt. No. 20). First, Uvukansi objects to Magistrate Judge Bray's "determination" that the state habeas court's finding on the materiality element of Uvukansi's claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), is a finding of fact rather than a conclusion of law. (*Id.* at 5-6). Second, Uvukansi objects to Magistrate Judge Bray's determination that the state habeas court properly placed the burden of proof on Uvukansi to establish the materiality element of his claim. (*Id.* at 5-10). Third, Uvukansi objects to Magistrate Judge Bray's finding that the state habeas court's determination of materiality was not an unreasonable in light of the facts before the court. (*Id.* at 11-12). Uvukansi also included in his objections, a motion for a Certificate of Appealability ("COA"). (*Id.* at 1-4). The Court construes this as an objection to Judge Bray's determination that no COA should be issued.

In accordance with 28 U.S.C. § 636(b)(1)(C), the Court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After conducting this de novo review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The Court has carefully considered de novo those portions of the M&R to which objection was made. The

Court recognizes that the M&R mischaracterizes the state habeas court's determination on materiality as a finding of fact rather than as a mixed question of law and fact. However, the Court's de novo review has determined that Magistrate Judge Bray's ultimate conclusion on this issue is correct, so this objection is overruled. The Court also overrules the other three objections. After reviewing the remaining proposed findings, conclusions, and recommendations for plain error, the Court finds no error. The Court accepts the M&R and adopts it as the opinion of the Court. It is therefore ordered that:

(1) Magistrate Judge Bray's M&R, (Dkt. No. 19), is **ACCEPTED** and **ADOPTED** in its entirety as the holding of the Court; and

(2) Petitioner's Petition for Writ of Habeas Corpus, (Dkt. No.1), is **DISMISSED WITH PREJUDICE**.

It is SO ORDERED.

Signed on August 18, 2023.

/s/
Drew B. Tipton
United States District Judge

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION (JULY 27, 2023)

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

Civil Action 4:21-CV-1624

FEANYICHI E. UVUKANSI,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

Filed July 27, 2023

REPORT AND RECOMMENDATION

Feanyichi E. Uvukansi, a Texas state inmate, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction and sentence for capital murder. ECF No. 1. The respondent answered the petition and filed copies of the state-court records. ECF Nos. 10, 11. At the court's request, Uvukansi filed a reply. ECF No.

13. Having considered the petition, the answer and reply, all matters of record, and the applicable legal authorities, the court recommends that this case be dismissed.

1. Procedural Background

On June 20, 2014, a jury in the 174th District Court in Harris County convicted Uvukansi in Cause Number 1353181 of one count of capital murder. ECF No. 11-5 at 499-501. The court sentenced Uvukansi to life in prison. *Id.* The Texas First Court of Appeals affirmed Uvukansi's convictions and sentences on June 2, 2016. *See Uvukansi v. State*, No. 01-14-00527-CR, 2016 Tex. App. LEXIS 5915, 2016 WL 3162166 (Tex. App.—Houston [1st Dist.] June 2, 2016, pet. ref'd) (mem. op. not designated for publication). The Texas Court of Criminal Appeals refused Uvukansi's petition for discretionary review. *See Uvukansi v. State*, PD-0727-16 (Oct. 19, 2016). ECF No. 11-34.

Uvukansi filed an application for a state writ of habeas corpus on November 14, 2017, raising one claim of prosecutorial misconduct under *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), one claim of ineffective assistance of trial counsel, and a claim of cumulative error. ECF No. 11-55 at 5-22. The state habeas trial court held a lengthy evidentiary hearing on Uvukansi's claims. ECF Nos. 11-48, 11-49. Based on its review of the trial proceedings, Uvukansi's application and its exhibits, the State's response and its exhibits, and the evidence presented at the hearing, the state habeas trial court entered findings of fact and conclusions of law and recommended that the habeas application be denied.

ECF No. 11-54 at 155-82. The Court of Criminal Appeals denied Uvukansi's application without written order on April 14, 2021. *In re Uvukansi*, Writ No. 88,493-02 (Tex. Crim. App. Apr. 14, 2021). ECF No. 11-39.

On May 17, 2021, Uvukansi filed his federal habeas petition under 28 U.S.C. § 2254, raising two claims:

1. The prosecutor knowingly introduced false testimony from witness Oscar Jeresano concerning whether he had been promised a benefit in exchange for his testimony.

2. Trial counsel provided ineffective assistance by failing to elicit testimony that, in exchange for Jeresano's testimony, the prosecutor had agreed to write a letter detailing Jeresano's assistance at Uvukansi's trial to the federal judge presiding over Jeresano's pending criminal case.

ECF No. 1 at 5-8. The respondent answered the petition, contending that the petition should be denied on the merits. ECF No. 10. At the court's request, Uvukansi filed a reply to the answer. ECF No. 13.

While his federal petition was pending, Uvukansi filed a petition for a writ of certiorari with the United States Supreme Court, seeking review of the denial of his state habeas application. ECF No. 15. After being notified of the pending certiorari petition, this court stayed this action pending a decision from the Supreme Court. ECF No. 16. After the Supreme Court denied certiorari, this

court lifted the stay, and these proceedings recommenced. ECF No. 17.

2. Factual Background

The First Court of Appeals summarized the evidence presented at trial as follows:

> Frazier Thompson testified that on June 20, 2012, immediately after his performance at a rap concert at The Blue Room nightclub (the "nightclub"), he walked outside into the nightclub's parking lot and towards his car, which he had valeted "right in front of the club." Within a "few seconds" of stepping into the parking lot, someone shot him in the back. Frazier, who was standing in front of the nightclub, near the valet stand, did not see the shooter. However, he knew the two other men, the complainants, Coy Thompson and Carlos Dorsey, who were shot and killed in the parking lot.
>
> Oscar Jeresano testified that on June 20, 2012, the nightclub hosted a rap concert, during which he valeted patrons' cars. He explained that "the whole night was pretty busy," "pretty, pretty hectic," and people were everywhere "coming in and out." When the concert "let out . . . around 2:00, 2:10 [a.m.]," "a lot of people started gathering" in the parking lot, and there was "a big pile of people" "all over the parking

lot." Jeresano estimated that "100 people or more" had congregated outside of the nightclub.

While Jeresano was speaking with a woman about her car, he "heard shots" fired, immediately "turned around," and saw a "flame coming out of [a] gun." He also saw approximately eighty to eighty-five percent of the face of the shooter. Jeresano focused on the shooter, who had a "determined look" on his face, like "he knew what he was going for," and "[i]t wasn't [just] a random thing." While the shooter, who held his arm "straight out" with a "gun in his hand," was moving, Jeresano "[d]odged for cover behind or to the side of a [car]" and saw "bodies drop[]" to the ground.

Jeresano further testified that he heard approximately fifteen shots fired in the parking lot, saw only one shooter, and "witness[ed] three people die." He noted that the shots had been fired "one after another," with "no pause [in] between them," and he did not see "anybody . . . shooting back." In other words, this was not a "shoot out" between several people. The shooter fired his gun "towards the crowd" of people outside of the nightclub, "shooting all over the place." Although Jeresano did not see "exactly where [each] bullet went," because "there w[ere] too many people" and he could not "follow" each individual bullet, he did see the shooter "shooting at the crowd" of people.

Appendix F

After the shooting, Jeresano met with a Houston Police Department ("HPD") officer, who showed him a photographic array containing a photograph of appellant and five other men with similar physical characteristics. He recognized the shooter in the photographic array "right away," and he was "[one] hundred percent" certain of his identification. Jeresano identified appellant as the shooter that he saw at the nightclub on June 20, 2012.

HPD Officer W. Reyes testified that on June 20, 2012, he was dispatched to the nightclub, where, upon his arrival, he saw in the parking lot, which was "packed" and "full," "a large crowd" of "over 100" people "running around frantic." "[S]hots" had been fired "all along the parking lot," indicating that the shooter was "moving" when he fired his gun, and three individuals were pronounced "deceased" at the scene. During Reyes's testimony, the trial court admitted into evidence photographs of the bodies of the two complainants where they had been slain in the parking lot.

HPD Officer W. Tompkins testified that when he arrived at the nightclub's parking lot on June 20, 2012 after the shooting, he saw a "very large amount of people." He recovered eighteen bullet "casings" from the parking lot; however, "because of the large amount of people and vehicles," it was "highly possible that [he] might have missed some."

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HPD Officer C. Cegielski testified that on June 20, 2012, "[t]here [was] a concert at a club, [with] a lot of people. [When the] [c]lub . . . let out, [a] shooting happened in the parking lot. Three people were killed at the scene." He met with Jeresano after the shooting and showed him several photographic arrays, all containing photographs of six "males of similar characteristics, age, [and] facial hair." One array contained a photograph of appellant and five other men. Jeresano "went straight to [appellant's] picture" and said "this is the guy with the gun," Jeresano also stated that "he only saw one person with a gun" that night, he looked at the shooter "face-to-face," and he heard "a lot of shots" fired, about "15 to 20." According to Cegielski, no one other than appellant was ever "identified as the shooter."

Officer Cegielski obtained a "pocket warrant" for appellant's arrest. And, following his arrest, appellant waived his legal rights and gave a statement, which Cegielski recorded. HPD officers then obtained a search warrant to view the contents of appellant's cellular telephone. Officers ultimately recovered two photographs, State's Exhibits 55 and 56, from appellant's telephone, and Cegielski identified the individuals pictured in the photographs at trial.

HPD Officer J. Brooks testified that Jeresano told HPD officers that he saw

> appellant "shooting," and although Jeresano did not see exactly "where [each of] the bullet[s] went," he saw "the direction of the shooting," which was "into . . . the crowd." According to Brooks, "[t]he description of where [Jeresano] said" he saw appellant "shooting" was in accord with the location of the bodies of the two complainants in the parking lot of the nightclub. Brooks also testified that the two photographs "recovered from [appellant's] cell phone," State's Exhibits 55 and 56, were taken an hour after the shooting.

Uvukansi, 2016 Tex. App. LEXIS 5915, 2016 WL 3162166, at *1-2 (cleaned up).

3. Standard of Review under 28 U.S.C. § 2254(d)

Uvukansi's petition for federal habeas corpus relief is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254; *see also Woodford v. Garceau*, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Review under AEDPA is "highly deferential" to the state court's decision. *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). To merit relief under AEDPA, a petitioner may not simply point to legal error in the state court's decision. *See White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (stating that being "merely wrong" or in "clear error" will not suffice for federal relief under AEDPA). Instead,

AEDPA requires inmates to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 419-20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

Under AEDPA, federal habeas relief cannot be granted on claims that were adjudicated on the merits by the state courts unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012). The first provision applies to questions of law or mixed questions of law and fact, while the second applies to questions of fact.

On questions of law or mixed questions of law and fact, this court may grant habeas relief only if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. *Richter*, 562 U.S. at 97-98. The "contrary to" clause applies "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set

of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *see also Broadnax v. Lumpkin*, 987 F.3d 400, 406 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 859, 211 L. Ed. 2d 568 (2022). The "unreasonable application" clause applies "if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell*, 535 U.S. at 694; *Broadnax*, 987 F.3d at 406. Under this clause, to merit relief the state court's determination "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015) (per curiam) (cleaned up).

On questions of fact, this court may grant habeas relief only if the state habeas court's decision was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2); *see also Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011). The state court's findings are "presumed to be correct," and a petitioner seeking to rebut that presumption must do so with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

4. Discussion

Uvukansi raises two claims in his federal petition, each of which were considered and rejected by the state habeas court based on factual findings made after an evidentiary hearing.

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a. Prosecutorial Misconduct (Claim 1)

In his first claim, Uvukansi alleges that the prosecutor knowingly introduced false testimony in violation of *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). He alleges that Oscar Jeresano—the only witness who identified Uvukansi as the shooter—had pleaded guilty in a federal drug case before Uvukansi's trial, but he had not yet been sentenced. ECF No.1 at 5. Uvukansi alleges that during trial, Jeresano testified that he was facing a federal sentence of ten years to life in prison, and that no one had promised him anything in exchange for his testimony against Uvukansi. *Id*. Uvukansi alleges that this testimony was demonstrably false because the prosecutor had promised before trial to provide a cooperation letter to the federal judge in exchange for Jeresano's testimony. *Id.* Uvukansi asserts that after Jeresano testified, he received a sentence of only three years' probation in his federal case. *Id.*

Uvukansi alleges that the prosecutor's conduct in failing to correct Jeresano's false testimony amounted to a *Giglio* violation, and he asks this court to vacate his conviction and sentence and remand for a new trial. *Id.* at 15. The State responds that Uvukansi has failed to show that the state court's adjudication of this claim was objectively unreasonable when considered in light of the record as a whole. ECF No. 10 at 10.

In *Giglio*, the Supreme Court "made clear that deliberate deception of a court and jurors by the knowing presentation of false evidence is incompatible with

'rudimentary demands of justice.'" *Giglio*, 405 U.S. at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935) (per curiam)). Under *Giglio*, "the State is not permitted to present false evidence or allow the presentation of false evidence to go uncorrected," *see Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir. 1998), and the knowing use of perjured testimony by the government violates a defendant's right to due process of law. *See Knox v. Johnson*, 224 F.3d 470, 477 (5th Cir. 2000).

"To establish a due process violation based on the government's use of false or misleading testimony, a petitioner must show (1) that the witness's testimony was actually false, (2) that the testimony was material, and (3) that the prosecution knew the witness's testimony was false." *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997). "Evidence is 'false' if, *inter alia*, it is 'specific misleading evidence important to the prosecution's case in chief.'" *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). For evidence to be false, the prosecutor must "actually know[] or believe[] the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements." *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002). In addition, a witness's testimony is "material" only if the false testimony could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154.

Uvukansi's claim that Jeresano testified falsely about his motives for testifying, that the State knew the

testimony was false, and that the State failed to correct the testimony was litigated both during the trial itself and in the state habeas proceedings. After considering the trial record, the parties' pleadings, and the evidence presented at the hearing, the state habeas court found that Uvukansi had carried his burden to show that Jeresano's testimony—that no one promised him anything in exchange for his testimony—was false and that the prosecutor knew it was false. ECF No. 11-54 at 172-77. However, the state habeas court found that Uvukansi had failed to show that the Jeresano's false testimony was material in light of all of the evidence presented during trial:

> 111. The Court finds that [Assistant District Attorney Gretchen] Flader told [defense counsel Vivian] King before trial that she promised [Jeresano's federal defense counsel Brett] Wasserstein she would write a letter to the federal judge if Jeresano cooperated with the state's case and testified. (Writ 232, lines 8-12)
>
> 112. The Court finds that such evidence may be considered relevant impeachment evidence as it relates to the credibility of Jeresano as a witness and his motive to testify untruthfully.
>
> 113. The Court finds, however, that although Flader revealed this information to King as well as information that she would notify the federal prosecutor about Jeresano's cooperation

if he testified, for all practical purposes it was for naught. 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** (emphasis added)[1] promises for testifying in court. Further, Flader objected to King asking Jeresano about the information contained in an email that included information about the 5K1 reduction. Flader's objection was sustained and thus prevented King from simply asking specifically if Jeresano knew whether or not Flader would write a letter to the federal judge if he testified. (Writ 63, lines 5-10)

114. The Court finds that the false testimony elicited on direct examination by Flader coupled with his false and misleading testimony on cross-examination by King left a false impression with the jury.

115. The Court finds, however, Jeresano's credibility was impeached on Flader's cross-examination of Wasserstein during the jury trial when Wasserstein testified **that he did explain to Jeresano that testifying will probably help him when it comes time** for the judge to do the sentencing; but that there was

1. All emphasis and alterations of any kind within the quoted material throughout this Report and Recommendation, and the parentheticals referencing or explaining the emphasis, are original to the quoted material.

no agreement to what the sentence would be that it would be up to the judge. (Writ 47, lines 17-25; 48, lines 1-4)

116. The Court finds that, even if Jeresano's testimony that "*he was not made any promises*" was regarded to be "false," that testimony was not "**material**" since there is not a ***reasonable likelihood*** that it affected the judgment of the jury since Flader impeached Jeresano through the cross examination of Wasserstein when Wasserstein testified that he did in fact tell Jeresano that testifying would probably help him in his federal court case.

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—Wasserstein's testimony on cross-examination by Flader was such impeachment evidence, and on direct examination by King.

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 [Ex parte] Weinstein*, 421 S.W.3d [656] at 667-68 [(Tex. Crim App. 2014)]. (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, its 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 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**.

123. The Court finds that, for instance, had the issue been that the false testimony was that Jeresano identified appellant as the shooter but there was impeachment evidence to establish Jeresano said he made it all up to gain a benefit in his federal case, then this would be material and reasonably likely to influence the judgment of the jury.

124. The Court finds that in the case at hand, there was no claim that Jeresano gave false testimony about who the shooter was; there was no testimony that Jeresano made a previous statement that he could not positively identify the Appellant in the photo array. Had that been the case, a false statement that Appellant was the shooter would be material and reasonably likely to influence the judgment of the jury.

125. The Court finds that the jury had to make a determination whether Jeresano was telling the truth or not telling the truth about the Appellant being the shooter.

126. The Court finds that the jury was not left without any evidence showing the falsity of Jeresano's statement that "*he was not promised anything for his testimony*", and they could have determined Jeresano was not truthful and disbelieved him because of this false testimony.

127. The Court finds, however, because the jury can believe some, none, or all of a witness's testimony, the jury could have determined that Jeresano gave false testimony but that they still believed he properly identified the shooter.

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 not 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.

130. The Court finds that even if the jury gave value to the impeachment evidence, including the letter; there was still evidence that established the veracity of Jeresano's identification of the Appellant, such as the evidence that he was able to confidently identify the Appellant from a photo array. In addition, the jury could have thought Jeresano was truthful regarding his identification because of

> his testimony describing how the shooter fired into the crowd corroborated the detectives' observation of how casings were found at the scene.
>
> 131. Therefore, the Court finds that Appellant has failed to prove Jeresano's testimony that "*Nope*", he had not been made any promises to testify in court (*including the promise that a letter would be written to the federal judge*) was "material" such that there is a "reasonabl[e] likelihood" that this false testimony affected the jury's judgment.

ECF No. 11-54 at 177-79. Based on these findings, the state habeas court denied relief.

Uvukansi challenges this denial on three separate grounds. First, Uvukansi contends that the state habeas court's finding that Jeresano's false testimony was not material was contrary to established Supreme Court precedent because the jury should have been specifically told that Jeresano lied. ECF No. 2 at 35. Citing *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), Uvukansi argues that "a lie is a lie, no matter what its subject," and he contends that the jury should have been told that the prosecutor had promised to write a letter to the federal judge that could be used in determining Jeresano's sentence so that the jury could assess Jeresano's credibility.

However, to be able to assess Jeresano's credibility, the jury needed to know only that, contrary to Jeresano's testimony, he expected to receive some benefit from testifying; the jury did not need to know the exact mechanics of how that benefit might come about. The state habeas court found, and this court's independent review of the record confirms, that any false impression left by the prosecutor's questioning of Jeresano was dispelled during his cross-examination, as well as through the direct and cross-examination of Wasserstein during the defense case. By the close of evidence, the jury was well-aware that Jeresano knew before he testified that the federal court would look favorably on him testifying against Uvukansi and would consider his cooperation when imposing his sentence on his federal charge. Thus, the jury had the essential facts it needed to assess Jeresano's credibility. *See*, *e.g.*, *Brown v. Wainwright*, 785 F.2d 1457, 1464-65 (11th Cir. 1986) ("The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony."); *see also Hill v. Black*, 887 F.2d 513, 517 (5th Cir. 1989) (finding no *Giglio* violation when the defense revealed every essential part of the witness's plea bargain even though the prosecutor had not), *vacated on other grounds*, 498 U.S. 801 (1990). Because any false impression left at the conclusion of Jeresano's direct examination was corrected through further testimony, there is no reasonable probability that, had the jury been told that the prosecutor had promised to write a letter, the result of the proceeding would have been different. Uvukansi has not established that the state habeas court's finding of fact on this point was unreasonable in light of the evidence before it, and so he is not entitled to federal habeas relief on this basis.

Second, Uvukansi contends that he is entitled to federal habeas relief because the state habeas court misapplied controlling Supreme Court precedent by requiring him, rather than the State, to prove that the false evidence was material. ECF No. 2 at 33-39. He argues that once the state habeas court determined that the prosecutor knowingly presented false evidence, the State, as the beneficiary of the constitutional error, had the burden to prove that the evidence was material. But Supreme Court authority does not support Uvukansi's argument.

Both the Supreme Court and the Fifth Circuit clearly hold that the question of whether a false statement is "material" is one of the three elements required to prove that a constitutional violation occurred under *Giglio* and that the burden is on the petitioner to prove each of those elements, including materiality. *See*, *e.g.*, *United States v. Bagley*, 473 U.S. 667, 685, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (holding that the defendant "is not entitled to have his conviction overturned unless *he* can show that the evidence withheld by the Government was 'material.") (White, J., concurring) (emphasis added); *see also In re Raby*, 925 F.3d 749, 756 (5th Cir. 2019) ("To establish a due process violation under *Giglio*, a *habeas petitioner* must show '(1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false.'" (quoting *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007)) (emphasis added); *Summers v. Dretke*, 431 F.3d 861, 872 (5th Cir. 2005) ("For Summers to prevail under *Napue* / *Giglio*, he must prove that Dr.

Grigson's testimony was (1) false, (2) known to be so by the state, and (3) material."); *Kutzner*, 303 F.3d at 337 (finding that the petitioner had failed to prove all of the elements of a *Giglio* violation, including "that the State knowingly presented or failed to correct materially false testimony during trial"). The petitioner does not prove that a *Giglio* violation occurred until he proves all three elements; proof of falsity alone—without proof of materiality—does not establish a constitutional error. *See United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997) ("It is axiomatic that not every lie is material."). Uvukansi cites no authority from any court holding that the petitioner must prove only two of the three elements necessary to establish a *Giglio* violation and that the State must prove the third.

In support of his argument, Uvukansi cites *Bagley* and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), for the proposition that the State, as the beneficiary of the error at trial, has the burden to prove that a constitutional violation is harmless. ECF No. 13, pp. 3-4. He then argues that because the question of whether false testimony is material is similar to the question of whether a constitutional violation is harmless, the burden to prove materiality should be on the State. *Id.* But neither *Bagley* nor *Chapman* place the burden of proving the materiality element of *Giglio* on the State. And while the two questions utilize similar standards, that similarity does not support conflating the two separate inquiries into one. *Compare Coleman v. Vannoy*, 963 F.3d 429, 434 (5th Cir. 2020) (noting the similarity between harmless error analysis and the prejudice element of

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but stating that the two differ in important ways, including that "in the former, it is the state's burden to prove harmlessness beyond a reasonable doubt; in the latter, it is the defendant's burden to prove a reasonable probability that the result would have been different"); *see also Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir, 2000) (noting that the standard for determining materiality under *Giglio* is "considered less demanding on the defendant" than the standards for determining harmless error).

To obtain federal habeas relief, the petitioner has the burden to prove that his constitutional rights were violated. *See Williams v. Taylor*, 529 U.S. 362, 388, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) ("We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated."). In the context of an alleged *Giglio* violation, the petitioner has the burden to prove that the State knowingly presented false testimony that was material. *See*, *e.g.*, *Bagley*, 473 U.S. at 685; *In re Raby*, 925 F.3d at 756. While the question of materiality may use a standard like that used in a harmless error analysis, the question of whether an error is harmless does not arise until after the fact of the error itself has been established. The similarity of the standard used does not support eliminating one of the elements of the petitioner's case, nor does it support shifting the burden of proof on one element of the test for a *Giglio* violation to the State.

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The state habeas court's decision was not "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The state habeas court properly placed the burden on Uvukansi to show that a constitutional violation had occurred. To prove a *Giglio* violation, Uvukanski was required to prove that the prosecutor knowingly presented false testimony and that the false testimony was material. Uvukanski has not shown that the state habeas court's thorough and accurate analysis of the materiality element was contrary to the law. Once the state habeas court found that Uvukansi did not prove that the false testimony was material, it correctly concluded that he had failed to prove that a constitutional error occurred. And absent proof of a constitutional error, the issue of harmless error did not need to be addressed. Uvukansi has not shown that the state habeas court misapplied the law, and he is not entitled to federal habeas relief on this basis.

Third, Uvukansi's repeated allegations concerning the prosecutor's alleged culpability do not entitle him to federal habeas relief. Throughout Uvukansi's petition, his brief in support of the petition, and all of his state habeas pleadings, he takes issue with the prosecutor's conduct, first in eliciting the false testimony and then in failing to correct the false impression it left. He seems to contend that he should be entitled to a new trial based on the prosecutor's misconduct alone. But the purpose of the *Giglio* rule is to ensure that the defendant receives a fair trial by ensuring that the jury is not misled by falsehoods; it is a not a rule intended to punish prosecutor. *See O'Keefe*,

128 F.3d at 894 (citing *United States v. Meinster*, 619 F.2d 1041, 1042 (4th Cir. 1980)). Because the record shows that Uvukansi received a fair trial and the jury was not misled, he is not entitled to federal habeas relief as a means to punish the prosecutor for eliciting false testimony.

In sum, Uvukansi does not point to any clear and convincing evidence sufficient to rebut the presumption of correctness afforded to the state habeas court's findings of fact. The state habeas court applied the correct law to the facts it found credible and reached an objectively reasonable determination that Uvukansi failed to prove that the false testimony presented by the State was material to the jury's determination of his guilt. Under the deferential standard applicable to this court's review, Uvukansi has failed to show that he is entitled to relief.

b. Ineffective Assistance of Counsel (Claim 2)

In the second claim in his federal petition, Uvukansi alleges that trial counsel provided ineffective assistance by failing to elicit testimony from either Jeresano or his counsel, Wasserstein, that the prosecutor, Gretchen Flader, had agreed to provide Jeresano with a cooperation letter in exchange for his testimony. ECF Nos. 1 at 7; 2 at 40-41. The respondent answers that Uvukansi has not shown that the state court's resolution of this claim was contrary to or an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts. ECF No. 10 at 18-29.

Appendix F

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. U.S. CONST. amend. VI. Claims of ineffective assistance of counsel are governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires a habeas petitioner to show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable," *Id.*

To establish the deficient-performance prong of *Strickland*, a habeas petitioner must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-88. To meet this standard, counsel's error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *see also Buck v. Davis*, 580 U.S. 100, 118-19, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017). In addition, "because of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) (quoting *Strickland*, 466 U.S. at 689).

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003) (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002)). "The Supreme Court has admonished courts reviewing a state court's denial of habeas relief under AEDPA that they are required not simply to give [the] attorney's [sic] the benefit of the doubt, . . . but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (cleaned up) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)). Therefore, "[o]n habeas review, if there is any 'reasonable argument that counsel satisfied *Strickland's* deferential standard,' the state court's denial must be upheld." *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting *Richter*, 562 U.S. at 105).

In addition to showing deficient performance, the habeas petitioner alleging ineffective assistance of counsel must also show that he was prejudiced by that deficient performance. *See Strickland*, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To demonstrate prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[T]he

question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

When ineffective assistance of counsel claims are raised in a federal habeas petition, they present mixed questions of law and fact that are analyzed under the "unreasonable application" standard of § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). AEDPA does not permit *de novo* review of counsel's conduct, *see Richter*, 562 U.S. at 101-02, and a federal court has "no authority to grant habeas corpus relief simply because [it] conclude[s], in [its] independent judgment, that a state supreme court's application of *Strickland* is erroneous or incorrect." *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (quoting *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (en banc)).

Instead, the "pivotal question" for this court is "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101; *see also Visciotti*, 537 U.S. at 27. Thus, this court's review becomes "'doubly deferential' because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." *Rhoades*, 852 F.3d at 434; *see also Woods v, Etherton*, 578 U.S. 113, 117, 136 S. Ct. 1149, 194 L. Ed. 2d 333 (2016) (per curiam) (explaining

that federal habeas review of ineffective-assistance-of-counsel claims is "doubly deferential" because "counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'" and requiring that federal courts "afford 'both the state court and the defense attorney the benefit of the doubt'" (quoting *Burt v. Titlow*, 571 U.S. 12, 15, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013))); *see also Richter*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.") (cleaned up). "'If this standard is difficult to meet'—and it is—'that is because it was meant to be.'" *Burt*, 571 U.S. at 20 (quoting *Richter*, 562 U.S. at 103).

Because Uvukansi's ineffective-assistance claim was rejected by the state habeas court, the question for this court is whether that court's application of the *Strickland* standard to the facts it found credible was objectively unreasonable. After the hearing on Uvukansi's claim, the state habeas trial court made the following findings of fact relating to this claim:

> 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.

Appendix F

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 after Jeresano testified; that the following exchange took place between Flader and King during a pre-trial setting regarding the State's compliance with the defense's motions for disclosure. (III R.R. at 5-6, 25-26)

(MS. FLADER): Number five is: Any relationship that exists between the government and any witness, potential witness, or informant to be inclined, encouraged, or perceived some personal benefit in response to the government or defense request for information or testimony. In regards to that, the State's prosecutor has agreed to write the federal judge about one of the witness' cooperation in the case. That witness is currently pending a sentencing for a federal drug charge. And we'll discuss that a little bit more in the future, but the State has agreed to write the federal judge about that witness' cooperation in the case.

MS. KING: I'd like that witness' name on the record, please.

MS. FLADER: Oscar-I'm trying to remember his last name.

MS. KING: I think I wrote it down on this next deal as I know it.

MS. FLADER: I don't know what you wrote it down on.

MS.-KING: I know you don't. I'm sorry.

THE COURT: You've got the name, right?

MS. FLADER: Oscar Jeresano.

THE COURT: Okay.

MS. FLADER: All right. The next one is a request –

MS. KING: Let me ask one more question, please, to the prosecutor on that. And Oscar Jeresano, I believe he pled guilty to a federal offense in the federal district—Southern District of Texas, Victoria, if I'm not mistaken, possibly in 2012 or '13. And the question is for the record: Is his case—is he awaiting sentencing until after he testifies in the State's case against my client, Feanyichi Uvukansi?

MS. FLADER: The information that I have is he is awaiting sentencing and his defense attorney has been asking for continuances on that sentencing until after this case has been completed.

MS. KING: And I just want to make sure it's clear. Based on your

information, Madam Prosecutor, Mr. Oscar's defense lawyer is asking the Federal Court to delay sentencing until after he testifies against Uvukansi in this case?

MS. FLADER: Yes.

THE COURT: Okay.

. . . .

MS. FLADER: Okay. Number four is the federal plea agreement to cooperate with the State in this case for Oscar Jeresano. There was no plea agreement for that witness to cooperate in this case. Any agreements made with the witness, there have been no agreements other than what was previously put on the record that the State did tell defense counsel for Mr. Jeresano that she would write a letter to the federal judge informing him of the witness' cooperation on this capital murder case.

MS. KING: And I'd ask: Was that done in writing—by e-mail or in writing, that commitment?

MS. FLADER: I believe I just told him.

MS. KING: If it was via e-mail or any written form, I would ask that that be provided to defense counsel.

MS. FLADER: Sure.

MS. KING: Thank you.

73. The Court finds that King called Jeresano's attorney Wasserstein as a witness to impeach Jeresano; that during direct and cross-examination of Wasserstein, the jury heard the following testimony regarding a possible downward departure in Jeresano's federal sentencing as a result of his testimony in the applicant's case. (IX R.R. at 40-49):

(BY MS. KING) Q. And after he testifies in this trial, you will inform the prosecutor, the United States prosecutor that he did testify in exchange for the prosecutor to file a Federal motion for the judge to reduce his sentence; is that correct? If you would like I could show that to you.

A. Well, for the most part I'm going to let Patty Booth, who is the assistant U.S. attorney know that he's testified and ask them to file a motion. It's called a 5K1 motion in which the Government will file and the judge

will see it and he'll decide if he's going to reduce the sentence based on his cooperation with the United States Government.

. . .

(BY MS. FLADER) And as his attorney are you trying to get him the best possible deal?

A. Absolutely.

Q. Have you ever explained the potential for this, I don't even know what it's called, 5K1; is that right?

MS. KING: Yes, ma'am.

MS. FLADER: 5K1.

MS. KING: 1.1.

Q. (BY MS. FLADER) 1.1 to be filed after he has cooperated with this case?

A. I haven't explained to him what a 5K1 is. I have told him that him testifying will probably help him when it comes time for the judge to do the sentencing, but that there's no

> agreement between the Government and the defendant as to what the sentencing is going to be. It's going to be up to Judge Rainey in Federal Court.
>
> Q. (BY MS. FLADER) And you testified that you've asked for resets, for his sentencing to be reset, Why have you done that?
>
> A. For a few reasons, number one, I'm hoping that his cooperation with the State is something that I can ask the assistant U.S. attorney to file this 5K1 motion to possibly get his sentence reduced. Also, from my understanding and from practicing that once somebody goes into Federal custody, it's difficult to get them out to testify in court.

74. The Court finds from the trial and writ evidentiary hearing records that King's trial strategy regarding impeaching Jeresano included an exploration of the details of a possible downward departure of his federal sentence premised upon his cooperation with the State in the applicant's case; that to implement this strategy, King questioned Jeresano and Wasserstein about the details of Jeresano's federal plea bargain; that King felt

it was strategically unnecessary to question Jeresano or Wasserstein about the letter Flader intended to write; that the following portions of King's testimony at the writ evidentiary hearing support the Court's finding (I W.R. at 257-60, 306):

> (BY MR. SCHAFFER) Q. Why didn't you impeach him with the plea agreement?
>
> A. I thought I had made my point by talking about it in front of the Court and by subpoenaing his lawyer to talk about the agreement in case he was not smart enough to know that is what we called it.
>
> . . . .
>
> A. I did not make a bill because I believe that Judge Price sustained—he did sustain the objection. But my trial strategy was to bring in his lawyer, to talk to his lawyer about the agreement because I really believe that Mr. Jeresano just wasn't smart enough to understand what his agreement was. I mean, he knew what he was doing. So I went as far as to call the lawyer, which is unusual in trial, but I did, and his lawyer testified. So I was going to get to it another way.

Q. Well, then, Mr. Jeresano wasn't honest enough to admit it.

MR. REISS: Objection, argumentative.

THE COURT: Sustained.

Q. (By Mr. Schaffer) But the only way to challenge the judge's ruling would be to make the bill, correct?

A. That's not the only way.

Q. Okay. Well, then –

A. I mean, I—well, I was trying to win the trial. I was trying to get to the evidence so that I could argue it before the jury that the guy had an agreement and he knew it. So I wanted his lawyer to say he had an agreement and he told him about the agreement, which I believe his lawyer did.

Q. Now, why didn't you ask Mr. Wasserstein whether Ms. Flader had agreed to write a letter to the judge regarding Jeresano?

A. Because I thought by Jeresano's lawyer explaining that his client was

testifying and expecting to get a downward departure answered—that was what I wanted. I wanted the jury to know that was the bias and that the lawyer explained it.

Q. Well, but Ms. Flader had represented to the jury through Jeresano's testimony that he was testifying because his uncle had been murdered and he wanted to help the victims' families, not that she agreed to write a letter for him, correct?

A. I understand that, but I couldn't get him—they wouldn't let him testify. I mean, that's the way—that's my approach in trying to get the information out. But there was an agreement by his lawyer who ultimately did the negotiating with the feds, the federal prosecutor, to get on the witness stand and say there was an agreement that he told his client about. And so that was my point so the jury could then see the guy was lying, that Jeresano was lying.

Q. So why didn't you elicit from Wasserstein that Flader had agreed to write a letter to the judge after he testified?

A. I didn't think it was necessary. It had already been sustained. I thought that the agreement that his lawyer had negotiated was enough.

Q. Well, it had been sustained through questioning Jeresano because the judge said Jeresano claimed he didn't know anything about it but –

MR. REISS: Objection, leading.

THE COURT: I haven't heard the question yet.

Q. (By Mr. Schaffer) But Wasserstein did know something about it, so he would have personal knowledge of that agreement, would he not?

THE COURT: Sustained to leading. Ask another question.

Q. (By Mr. Schaffer) Would Wasserstein have personal knowledge of the agreement with Flader?

A. Yes.

Q. So if the jury was going to find out about the letter, based on Judge

Price's ruling, would it have to find out through Wasserstein rather than Jeresano?

A. You know what, hold on. I'm sorry. I misstated something. I misunderstood your question. I meant that Wasserstein, the lawyer, would know because he had the agreement with the federal prosecutor, as I stated a few comments ago, not necessarily with Gretchen. I didn't know about what he knew about with Gretchen because this deal was all based on the federal prosecutor.

Q. Well, but Flader had disclosed to you before trial that she had made an agreement with Wasserstein to write the letter to the judge.

A. Yes, sir. But in my mind, that wasn't the dispositive fact. To me, I mean, the federal prosecutor could have asked anybody on that team—Gretchen didn't try that case by herself, she had a co-counsel. So the federal prosecutor, based on my experience, could have talked to either one of them or the federal prosecutor could have looked on JIMS and saw there was a conviction and just gave

him the 5K. I didn't think a letter was dispositive of giving a 5K. I thought it was his testimony and conviction.

Q. The letter would have impeached his testimony that he had no motive to testify for any reason other than to help the victims' families, wouldn't it?

MR. REISS: Objection, leading.

THE COURT: Sustained.

Q. (By Mr. Schaffer) How could you have used the letter to impeach his testimony on direct examination regarding his motive?

A. I could have used it to further my theory that he was doing it only to get a benefit, but I didn't think that was the only way. I thought the best way was to show that the night of the melee with hundreds of people in the parking lot, he did not come forward and tell the police what he saw. I never—it was always suspicious to me that he would wait and go to a lawyer that's representing him on his federal case to then get with the prosecutors instead of being a good citizen that night and reporting what he saw that

night. I thought—that was my trial strategy to show that he wasn't right, that he was a liar because he didn't come forth that 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.
>
> 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.

ECF No. 11-54 at 167-72.

The state habeas court found that King investigated the circumstances surrounding Jeresano's cooperation with the State and its potential impact on his federal sentence, developed a trial strategy intended to establish for the jury that Jeresano's testimony was biased by his desire to improve his federal sentence, and tried to execute that strategy during trial. When the trial court sustained

the State's objection to King's questions to Jeresano about the prosecutor's promised letter, she asked permission to call Jeresano's attorney, Mr. Wasserstein. She then elicited testimony from him about his discussions with both the state and federal prosecutors about obtaining a reduced sentence for Jeresano in exchange for his testimony. Her "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel" unless that strategy is "so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton*, 343 F.3d at 752-53. The fact that postconviction counsel would have handled the matter differently does not establish deficient performance.

The record shows that the state habeas court considered Uvukansi's arguments, made credibility determinations based on the evidence presented at the lengthy hearing and its review of the trial proceedings, applied the *Strickland* standard to the facts it found credible, and concluded that Uvukansi had failed to demonstrate either deficient performance or actual prejudice as a result of how King dealt with the evidence concerning Jeresano's pending federal sentencing. Uvukansi has not shown that the state habeas court's application of the *Strickland* standard was objectively unreasonable, nor has he pointed to any clear and convincing evidence that would permit this court to conclude that the state habeas court's factual findings were unreasonable in light of the evidence before it. Because the state habeas court's decision was neither contrary to clearly established federal law nor an objectively unreasonable application of that law to the facts in the record, Uvukansi fails to show that the state

court's decision was unreasonable under this deferential standard.

5. Conclusion and Recommendation

The court recommends that Uvukansi's federal habeas corpus petition be **DISMISSED with PREJUDICE**. The court also recommends that a certificate of appealability not issue.

The petitioner has fourteen days from service of this report and recommendation to file written objections. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72. Failure to timely file objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See Thomas v. Arn*, 474 U.S. 140, 147-49, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

Signed at Houston, Texas, on July 27, 2023.

/s/ Peter Bray
Peter Bray
United States Magistrate Judge

APPENDIX G — ORDER OF THE UNITED STATES SUPREME COURT DENYING CERTIORARI (JUNE 13, 2022)

SUPREME COURT OF THE UNITED STATES

No. 21-151

FEANYICHI EZEKWESI UVUKANSI,

Petitioner,

v.

TEXAS.

June 13, 2022

OPINION

Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

APPENDIX H — ORDER OF THE TEXAS COURT OF CRIMINAL APPEALS (APRIL 14, 2021)

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

4/14/2021

Tr. Ct. No. 1353181-A
UVUKANSI, FEANYICHI EZEKWESI WR-88,493-02
This is to advise that the Court has denied without written order the application for writ of habeas corpus.
JUDGE KEEL DID NOT PARTICIPATE.

Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

APPENDIX I — 174TH DISTRICT COURT OF HARRIS COUNTY, TEXAS, FINDINGS OF FACT AND CONCLUSIONS OF LAW (APRIL 2, 2019)

IN THE 174th DISTRICT COURT OF
HARRIS COUNTY, TEXAS

No. 1353181-A

EX PARTE

FEANYICHI EZEKWESI UVUKANSI,

Applicant

Filed April 2, 2019

COURT'S PARTIAL ADOPTION OF STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court enters the following the following Findings of Fact and Conclusion of Law, and recommends to the Court of Criminal Appeals that habeas corpus relief should be DENIED. The Court has considered the following:

1. The reporter's and clerk's record in cause no. 1353181, the *State of Texas vs. Feanyichi Ezekwesi Uvukansi*;

2. The applicant's writ of habeas corpus and all associated exhibits in cause no. 1353181-A, *Ex parte Feanyichi Ezekwesi Uvukansi*;

3. The testimony and exhibits presented at the writ evidentiary hearing conducted on August 6, 2018;

4. All of the documents and motions presented by the State of Texas for *in camera* inspection in response to the applicant's motions for discovery in the instant habeas application;

5. The Court of Appeals decision affirming the applicant's conviction, *Uvukansi v. State,* NO. 01-14-00527-CR, 2016 WL 3162166 (Tex. App. – Houston [1st Dist.] 2016. pet. ref'd) (not designated for publication); and,

6. The arguments of counsel.

PROCEDURAL HISTORY

1. The State charged the applicant Feanyichi Ezekwesi Uvukansi by indictment with the felony offense capital murder for murdering two people during the same criminal transaction, namely Coy Thompson and Carlos Dorsey (C.R. at 27).[1] A jury found the applicant guilty as charged in the indictment on June 20, 2014 (C.R. at 1091). As required by statute, the trial court sentenced the applicant to lifetime confinement in the Texas Department of Criminal Justice—Correctional Institutions Division without the possibility of parole

1. The following abbreviations will be used throughout: "C.R." stands for the clerk's record in the applicant's jury trial; "R.R. stands for the reporter's record in the applicant's jury trial; and, "W.R." stands for the reporter's record in the writ evidentiary hearing.

(C.R. at 1,092). TEX. PENAL CODE ANN. §12.31(a)(2) (West Supp. 2014).

2. The First Court of Appeals affirmed the applicant's conviction. *Uvukansi v. State,* NO. 01-14-00527-CR, 2016 WL 3162166 (Tex. App. - Houston [1st Dist.] 2016. pet. ref'd) (not designated for publication).

3. The applicant was represented at trial by attorneys Vivian King, Matthew Brown, JaPaula Kemp, and Darren Sankey; the State was represented by Assistant District Attorneys Gretchen Flader and Kyle Watkins.

4. The trial was presided over by Hon. Frank Price.

SUMMARY OF THE TRIAL EVIDENCE

STATE'S EVIDENCE AT GUILT-INNOCENCE

5. Oscar Jeresano worked as a valet in the parking lot for the Room Night club on June 20, 2012, while the club next door, Hottie's hosted a rap concert (VIII R.R. at 5-6). The performance included rapper Trae-Tha-Truth, whose given name was Frazier Thompson (VII R.R. at 27-28)(VIII R.R. at 7). After the performance concluded round 2:00 or 2:10 a.m., and as Thompson walked toward the valet stand to get his car, he heard gunshots and felt a bullet strike him (VII R.R. at 29, 34-35, 36)(VIII R.R. at 14). He sustained a gunshot wound to his back, but he did not see who shot him (VII R.R. at 35). He fell to the sidewalk when someone grabbed him and rushed him to the hospital (VII R.R.

6. Jeresano saw Thompson leave the club and a number of people stood around him, but the area was very crowded with roughly 100 or more people lingering to see Thompson or to get their cars from the valets. (VIII R.R. at 15-16). As Mr. Jeresano spoke to a woman about retrieving her car, he heard the shots, but he initially thought they were only from a BB gun until he saw the flames come from the gun (VIII R.R. at 17-19). He turned and found himself staring at the shooter (VIII R.R. at 19-21). He froze while staring at the shooter for about five to six seconds, and he saw almost a full frontal or at least 85% view of the man's face (VIII R.R. at 20-23). As he stared, he focused on the man's face, and he had plenty of light in which to see it based on the parking lot lighting (VIII R.R. at 23-24). He noticed that the shooter had a determined look on his face and seemed to "kn[o]w what he was going for . . . It wasn't a random thing. The look on his face that was what attracted [Jeresano] . . . what kept [him] staring" (VIII R.R. at 24). He saw the shooter moving, kind of jumping as though trying to get to his car (VIII R.R. at 26). He described the shooter with a "fade" haircut, he wore all black, and he was about Mr. Jeresano's size (VIII R.R. at 71-73)

7. After the five to six seconds, Mr. Jeresano dodged behind a nearby car, but he could see beneath the car to where the bodies fell, and he saw people running around or attempting to attend to those shot (VIII R.R. at 27-29). He heard roughly 15 shots, and he thought from the noises that there was only one shooter (VIII R.R. at 29-30). The shots came one after the other without a pause (VIII R.R. at 61).

Although he could not say definitively who shot the men and woman killed, he saw the applicant shoot at the crowd toward the area where the victims fell (VIII RR. at 100-02). Carolos Dorsey, Erica Dotson, and Coy Thompson died from the gunshot wounds they sustained (XI R.R. at 54-82). *State's Exhibit Nos. 60, 66, 79.*

8. When police arrived, Jeresano did not immediately volunteer what he had seen (VIII R.R. at 32). He faced his own charges in federal court, he felt fearful of speaking with police before first talking to his attorney, and he assumed police were unlikely to believe him because of his legal situation (VIII R.R. at 32). Afterward, he contacted his attorney Brent Wasserstein who arranged for Jeresano to speak to police at his office. (VIII R.R. at 33-35). Jeresano received nothing in exchange for his testimony, and he had already pled guilty to his case and was awaiting sentencing when he testified (VIII R.R. at 35). When he met with police, no one offered him any sort of a reduction in his sentencing range (VIII R.R. at 35).

9. Police showed Jeresano a group of photographs, and from them he identified the applicant as the man he saw firing into the crowd (VIII R.R. at 35-39, 101). He felt 100 percent certain of the identification, and he identified the applicant in the courtroom as the shooter (VIII R.R. at 38-39).

10. When patrol officers arrived at the scene, people were not forthcoming with information, a fact the patrol

officer had found common in that area of town (VII R.R. at 48-53). People were frantic, ran around, and the crowd numbered over 100 people (VII R.R. at 56). Some people performed CPR on the three victims, but the officer saw no signs of breathing, and the victims did not appear to respond to the medical help (VII R.R. at 57). All three victims were pronounced dead at the scene (VII R.R. at 59-60).

11. The crime scene investigator found 18 shell casings at the scene (VII R.R. at 101, 103, 115-116, 129, 169). Nine of the casings lay in a concentrated area, but people could easily displace and move casings around (VII R.R. at 115-16). He also recovered a bullet fragment from a vehicle in the parking lot (VII R.R. at 103). A firearms examiner reviewed all the ballistics evidence and determined that two different weapons produced the casings located at the scene (VII R.R. at 157-70). Both weapons were .40 caliber firearms (VII R.R. at 170).

12. Houston Police Department Investigator John Brook worked the case with his partner Sergeant Chris Cegielski (VIII R.R. at 135-37). During the investigation, Brooks reviewed photographs downloaded from applicant's cell phone. (VIII R.R. at 137-41). The trial court admitted two of the photographs over objection (VII R.R. at 137-38). Someone took the photographs within hours after the shooting (VIII R.R. at 139). The applicant's friend, Devonte Bennett initially testified that he recognized people in the photographs and admitted he was in

one of them, but then he refused to answer any more questions except to repeat "no", and ultimately he stated that he refused to testify (VII R.R. at 137-45) (VIII R.R. at 133).

13. Sergeant Cegielski explained that Coy Thompson, one of the victims, was a Crips gang member, and his gang name "Poppa C" came up in several investigations including a murder from January 2012 (VIII R.R. at 167). Yet, despite the word on the street that Coy Thompson set up the January murder, the State did not charge him with it, but police charged two other Crips gang members with the crime (VIII R.R. at 168-70). Crips members shot three Bloods gang members during the January incident, two died, and a third survived to identify his assailants (VIII R.R. at 169).

14. The June murder investigation proceeded with few leads, but police did learn that Coy Thompson had texted a request at 1:30 a.m. to "Black Willow FPC," to "bring a strap" which police understood to mean a gun (VIII at 180-82). They later learned that FPC stood for Forum Park Crips (VIII R.R. at 181). Then, after many unproductive leads, Dedrick Foster contacted police and during the conversation, the investigator learned of a possible suspect (VIII R.R, at 196-99). He showed Foster a photo array containing a picture of the applicant. (VIII R.R. at 196-99). He then confirmed information provided by Mr. Foster with other information he had received during the investigation (VIII R.R. at 199). He obtained pocket warrants for the applicant, Todrick

Idlebird, and Dexter Brown (VIII R.R. at 199-200). Later on the day he got the warrants, he learned of Oscar Jeresano's eyewitness account (VIII R.R. at 200-01).

15. During the investigators' interview with Jeresano, Jeresano provide a basic description of the shooter, and that description matched the suspect they had already developed (VIII R.R. at 203). After one of the investigator's provided Jeresano with the standard Houston Police Department Witness Admonishment form, he showed Jeresano the photo spread containing appellant's picture, and Jeresano "went straight to the [applicant's] picture and said, this is the guy with the gun" (VIII R.R. at 206). *State's Exhibit No. 54.* Jeresano then circled the photograph of the applicant, wrote his name, and wrote "shooter" next to it (VIII R.R. at 206-07). *State's Exhibit No. 52.* Jeresano also identified Dexter Brown as someone he saw at the club that night, but he did not recognize Todrick Idlebird's photograph (VIII R.R. 207-08).

16. The investigator interviewed Dexter Brown twice, but on each occasion, he did not find Brown's statements believable (VIII R.R. at 211-17). Idlebird's interview also did not lead officers to find his statements credible (VIII R.R. at 215). Ultimately, police released Brown rather than charge him with the capital murder (VIII R.R. at 219). During that time, another officer contacted the applicant appellant to request that he come for an interview, but the applicant never called to make an appointment (VIII R.R. at 220).

17. Police arrested the applicant with the pocket warrant on July 3, 2012, and he provided a custodial statement the jury heard during the trial (VIII R.R. at 221-24, 230). *State's Exhibit No. 58.* In the statement, the applicant contended that he went to the club on the night of the murder with his friend Michael Rhone, was outside when he heard shots, and that his friend pulled him into the club to avoid the gunfire. *State's Exhibit No. 58.* When asked what he wore that night, the applicant claimed he wore a green and white shirt, as well as blue jeans. *Id.* He claimed Rhone wore orange shorts, a white shirt, and orange shoes. *Id.* He provided police with Rhone's full name, a description of where he lived, as well as Rhone's home and cellular telephone numbers. *Id.* The applicant used his cell phone to provide the numbers to police. *Id.* When the officer brought his phone into the interview room, the applicant pulled up the phone numbers for the officers using it, and even offered to call the numbers for them. *Id.*

18. When police found and spoke to Michael Rhone, however, he did not confirm the applicant's statement (VIII R.R. at 233). Likewise, Rhone testified at trial that he was not with the applicant the night of the shooting, and instead had been at a friend's house (VIII R.R. at 117). Police reviewed the photographs on the applicant's cell phone pursuant to a search warrant and they located two pictures taken within an hour of the shooting (VIII R.R. at 233-34, 243). *State's Exhibit No. 55, 56.* The photographs showed Dexter Brown's younger brother, along with Anthony Jones,

Devonte Bennett, Dexter Brown, Deveon Griffin, Patrick Kennedy, and Tarah Bradley, the women who had provided Dexter Brown's alibi for the time of the shooting (VIII R.R. at 212, 234-35. The applicant wore the same clothes in both photographs, a white shirt and red pants, whereas Dexter Brown wore a green and white shirt in one of the photographs. (VIII R.R. at 235-38). Jeresano told police before viewing the photo arrays that the shooter was a black male who wore a black long-sleeved shirt and jeans (VIII R.R. at 261-63).

19. The investigator spoke to Anthony Jones, and his story matched Dexter Brown's statements (VIII R.R. at 238). He learned roughly two weeks later of Dedrick Foster's murder (VIII R.R. at 239). They spoke to a number of other witnesses, but the interviews did not lead to any new evidence (VIII R.R. at 238-43). Pursuant to the same search warrant, police looked at texts the applicant had on his phone, but although not exactly incriminating, they indicted which of the people interviewed had been together and helped to identify everyone in the photographs (VIII R.R. at 243-44). Throughout the investigation, no witness identified anyone other than the applicant as a shooter, and policed discovered nothing to indicate the applicant was not the person responsible for the murders (VI R.R. at 251).

20. Autopsies performed on the three victims revealed that Carlos Dorsey sustained a gunshot wound to the right side of his face just below his ear (IX R.R. at 54).

State's Exhibit No. 60. The wound perforated a major blood vessel in his neck, and he died from blood loss and internal bleeding (IX R.R. at 54, 61). Erica Dotson sustained a gunshot wound below her left armpit and another to her back, one of which perforated her lungs, her aorta, and a large blood vessel and artery that ran along her spine (IX R.R. at 66-69). The other bullet perforated one of her lungs and her kidney (IX R.R. at 71). Her wounds were consistent with her hunched toward the ground when shot (IX R.R. at 73). Coy Thompson had a bullet wound that entered the back of his right hip and struck his liver, right kidney, and passed through his heart before exiting out his left chest (IX R.R. at 78). Because the bullet passed through his heart, his wound would not have been survivable regardless of immediate medical intervention (IX R.R at 78). The gunshot wound to Mr. Thompson was also consistent with his leaning toward the ground when shot, and he had a second gunshot wound to his upper outer right thigh (IX R.R. at 78-79). The medical examiner recovered bullets from Mr. Thompson and Ms. Dotson's bodies, but the firearms examiner determined that the two bullets were not consistent with the same weapon firing them (VII R.R. at 176)(IX R.R. at 81-82). *State's Exhibit No. 93.*

21. Mr. Dorsey's stepfather identified a photograph of Carlos Dorsey taken during his autopsy, as did Mr. Thompson's stepmother identify Coy Thompson in another of the autopsy photographs. (VII R.R. at 185-99)(IX R.R. at 941). *State's Exhibit Nos 61, 80.*

Dorsey's stepfather explained that he was at the event that night working in the entertainment industry as an assistant to the promoter of the event (IX R.R. at 95).

DEFENSE'S EVIDENCE AT GUILT-INNOCENCE

22. Jeresano's attorney Brent Wasserstein testified as an impeachment witness. Wasserstein testified that Jeresano was found to be in possession of 10.9 kilograms of cocaine on Dec 4, 2011; that after Jeresano had been indicted on the federal drug charge he came to Wasserstein to indicate that he had witnessed a murder; that Wasserstein arranged for HPD to come to his office to interview Jeresano; that Jeresano had been indicted and pled guilty in federal court in Corpus Christi, but had not yet been sentenced; that the punishment range for Jeresano's crime was 10 years to life; that Jeresano was currently on federal bond; that Jeresano was facing possible deportation; that Jeresano's sentencing date had "continually" been reset in order for him to testify at the applicant's trial; that he initially had been on a home detention secured by a GPS monitoring device, but those restrictions had been removed by order of the federal court (IX R.R. at 40-45).

23. Wasserstein explained that after Jeresano testifies in state court, he will make Assistant United States Attorney (AUSA) Patty Booth, the prosecutor responsible for Jeresano's federal case, aware of Jeresano's testimony; that Wasserstein will ask

AUSA Booth to file a file a 5K1.1 motion "in which the Government will file and the judge will see it and he'll [the judge] decide if he is going to reduce the sentence based on his [Jeresano's] cooperation with the United States Government" (IX R.R. at 45).

24. On cross-examination, Wasserstein testified that Jeresano did not ask him if talking to the police about the capital murder would help his federal case; that he asked for a series of resets in Jeresano's federal case because once a person goes into federal custody it is difficult to get them to state court to testify; that he was hoping Jeresano's state court testimony would lead to a 5K1 motion being filed to "possibly get his sentence reduced"; that he told Jeresano "testifying will probably help him when it comes time for the judge to do the sentencing, but that there's no agreement between the Government and the defendant as to what the sentencing is going to be. It is going to be up to Judge Rainey in Federal Court" (IX R.R. at 45-49).

25. Dr. Steven Smith, Texas A & M professor of psychology, testified about memory research and potential inaccuracies in eyewitness identifications; that the longer time you have to view something the more accurate it becomes that studies indicate individuals in high stress, high fear situations such as a shooting tend to present issues in their ability to recall the identity of someone involved in the shooting; that there are higher false positives when simultaneous photospreads are used; that issues exist in cross-racial identifications lead to a higher number of false identifications (IX R.R. at 103-33).

Appendix I

APPLICANT'S HABEAS CLAIM #1: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

OVERVIEW OF CLAIM

26. The applicant alleges that trial counsel provided deficient representation in the following areas: (a) counsel failed to file a motion in limine and, if necessary, object to testimony that Dedrick Foster, was murdered two weeks after he talked to the police; (b) counsel failed to file a motion in limine and, if necessary, object to the opinions of the prosecutors and police officers that the applicant lied in denying that he committed the offense and was guilty; (c) counsel failed to object to testimony that Dedrick Foster and Devonte Bennett, who refused to testify, implicated the applicant; (d) counsel failed to move for a mistrial after Devonte Bennett refused to testify; (e) counsel failed to make consistent statements during closing argument about whether Jeresano was present at the scene of the capital murder; and, (f) counsel failed to elicit testimony that ADA Flader agreed to write a letter to U.S. District Court Judge Rainey in exchange for Jeresano's testimony.

LEGAL STANDARD

27. The United States Supreme Court held in *Strickland v. Washington,* 466 U.S. 668, 686; 104 S.Ct. 2052, 2064 (1984), that the benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied upon as having produced a just result. The Court in *Strickland* set forth a two-part standard, which has been adopted by Texas. *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). First, the defendant must prove by a preponderance of the evidence that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688). Reasonably effective assistance of counsel does not require error-free counsel. *Hernandez,* 726 S.W.2d at 58. Second, to obtain habeas corpus relief under *Strickland,* an applicant must show that his counsel's performance was deficient and that there is a "reasonable probability," one sufficient to undermine confidence in the result, that the outcome would have been different but for his counsel's deficient performance. *Ex parte Chandler,* 182 S.W.2d 350, 354 (Tex. Crim. App. 2005). Whether a defendant has received effective assistance is to be judged by "the totality of the representation," rather than isolated acts or omissions of trial counsel. *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983). In evaluating a *Strickland* claim, it is presumed that trial counsel made all significant decisions in the exercise of professional judgment. *Delrio v. State,* 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). The Court will not use hindsight to second-guess a tactical decision made by trial counsel. *Chandler,* 182 S.W. 2d at 359. Moreover, trial counsel is not ineffective simply because another attorney might have employed a different strategy. *Strickland,* 466 U.S. at 689.

Appendix I

OVERVIEW OF REPRESENTATION

28. Based upon a review of the reporter's and clerk's record from the applicant's trial, as well as the habeas record, including the writ evidentiary hearing, the Court finds that trial counsel conducted a thorough pre-trial investigation, filed pre-trial motions, conducted a pre-trial motion to suppress hearing, made opening and closing arguments, lodged multiple and timely objections, cross-examined witnesses, and presented the testimony of two witnesses (Wasserstein and Dr. Smith).

29. The Court finds that at the writ evidentiary hearing the applicant chose to present the testimony of Vivian King, and to not present the testimony of Co-counsel Matthew Brown.

30. The Court finds the writ evidentiary hearing testimony of King to be credible (I W.R. at 233-311).

IATC ALLEGATION: COUNSEL FAILED TO FILE A MOTION IN LIMINE AND, IF NECESSARY, OBJECT TO TESTIMONY THAT DEDRICK FOSTER WAS MURDERED TWO WEEKS AFTER HE TALKED TO THE POLICE.

31. The applicant avers that trial counsel was ineffective for failure to file a motion in limine and object to the State's reference to the murder of Dedrick Foster; that, according to the applicant, Foster's murder was an "extraneous offense". *Applicant's Writ* at 8-9; *Applicant's Brief in Support* at 23.

32. To support this claim for relief the applicant points to the following: (a) the State's opening argument that the police had no leads in the capital murder until Foster came forward and helped develop the applicant as a suspect, but he could not testify because he was killed two weeks after he talked to the police (VII R.R. at 17); (b) Sgt. Cegielski testified without objection that Foster was murdered after the applicant was in custody (VIII R.R. at 239); and (c) the State argued in closing that Foster could not testify because he was dead (X R.R. at 5). *Applicant's Brief in Support* at 23.

33. The Court finds that the State did not list Foster's murder as an extraneous offense in its pretrial motions (C.R. at 289-91).

34. Based on its review of the trial record and the writ hearing testimony (I W.R. at 275, 299-301), the Court finds that King's trial strategy was to prevent the State from leaving an impression that the applicant was responsible for Foster's murder; that King achieved this strategy via the following: (a) in opening argument, King made clear that the applicant was incarcerated at time of Foster's murder, and what Foster said was hearsay (VII R.R. at 24), (b) King successfully objected during Cegielski's testimony in order to limit the scope of the State's questioning regarding Foster's murder (VIII R.R. at 196-99), and (c) on cross-examination of Cegielski, King elicited testimony that the applicant was in jail at the time of Foster's murder and was not responsible for Foster's murder (VIII R.R. at 260-61).

35. The Court finds that King's trial strategy regarding testimony of Foster's murder was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO FILE A MOTION IN LIMINE AND, IF NECESSARY, OBJECT TO THE OPINIONS OF THE PROSECUTORS AND POLICE OFFICERS THAT THE APPLICANT LIED IN DENYING THAT HE COMMITTED THE OFFENSE AND WAS GUILTY.

36. The applicant avers that trial counsel was ineffective for failure to file a motion in limine and, if necessary, object to the pinions of the prosecutors and police officers that the applicant lied in denying that he committed the offense and was guilty. *Applicant's Writ* at 8-9; *Applicant's Brief* at 24.

37. To support his claim for relief the applicant points to the following: (a) the State asserted as it concluded its opening statement, "After hearing all of the credible evidence in this case, we're going to ask you all to find what the police have found, what the State finds, what the evidence finds. We're going to ask you all to find him guilty of capital murder" (VII R.R. at 19-20); (b) Sgt. Cegielski testified without objection that Jeresano's description of the shooter fit one of the suspects (VIII R.R. at 203); and, (c) Sgt. Cegielski testified that he believed the applicant lied to him because Rhone did not confirm the applicant's statement that they were together at the club (VIII R.R. at 233).

38. The Court finds that during the writ evidentiary hearing, King explained her general strategy regarding lodging objections (I W.R. at 289-91):

> Well, I don't object to everything. I just do counter-argument and can I use – what some lawyers object to, I ask questions on cross-examination to get to that point. So that's not my trial strategy. I use cross, and I've been effective doing that through the years. And that's what I do. I do cross, and I do a counter-closing argument.
>
> I do not object to everything that is objectionable, because in my experience with over 200 appeals, cases are not reversed based on objections unless it's something cumulative. So I don't always object and get on the jury's nerves. I just get the story out, and let's try to fight it.

39. The Court finds that in response to the State's opening argument, King argued as she concluded her opening argument, "Be satisfied with the credibility of the witnesses, their biases, their prejudices, their motivations to lie and in the end you will have a reasonable doubt that Uvukansi committed this murder and be strong enough when you come to that conclusion to find Mr. Uvukansi not guilty."; that this was an appropriate and adequate response to the State's opening argument.

40. The Court finds that Sgt. Cegielski's testimony that Jeresano's description of the shooter fit one of the

suspects occurred in the context of laying predicate for introduction of the photospread (VIII R.R. at 233); that when Cegielski provided this testimony it was cumulative as Jeresano had already testified and provided an in-court identification of the applicant as the shooter (VIII R.R. at 5-113).

41. The Court finds that Sgt. Cegielski's testimony that he believed the applicant lied to him because Rhone did not confirm the applicant's story would likely have been admissible as lay opinion (I W.R. at 302); that a review of the trial record makes clear Sgt. Cegielski's opinion was offered based upon his investigation and knowledge of the facts of the case. TEX. R. EVID. 701; *Davis v. State,* 313 S.W.3d 317, 349-50 (Tex. Crim. App. 2010); *Fairow v. State,* 943 S.W.2d 895, 898-99 (Tex. Crim. App. 1997).

42. The Court finds that, consistent with King's trial strategy, on cross-examination Sgt. Cegielski acknowledged that Rhone may not have been entirely truthful with him; that this mitigated the impact, if any, of his opinion regarding Rhone's truthfulness (VIII R.R. at 233, 273-75)(I W.R. at 301-03).

43. Considering the applicant's averments in the context of (a) the entire trial record, (b) TEX. R. EVID. 701, and (c) King's explanation of her strategy regarding objections, the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

Appendix I

IATC ALLEGATION: COUNSEL FAILED TO OBJECT TO TESTIMONY THAT DEDRICK FOSTER AND DEVONTE BENNETT, WHO REFUSED TO TESTIFY, IMPLICATED THE APPLICANT.

44. The applicant avers that trial counsel as ineffective for failure to object to testimony that Dedrick Foster and Devonte Bennett, who refused to testify, implicated the applicant. *Applicant's Writ* at 8-9; *Applicant's Brief* at 26-27.

DEDRICK FOSTER

45. With regard to Foster, to support his claim for relief, the applicant points to the following to support his claim for relief: (a) the State's violation of a motion in limine during opening argument that the applicant was developed as a suspect based on information provided by Foster, who could not testify because he had been murdered (VII R.R. at 17); (b) the State's elicitation of testimony from Sgt. Cegielski that he showed Foster a photospread including the applicant and was "able to confirm the information that he was giving you from other information you already had?" (VIII R.R. at 198-99); (c) the State's closing argument that the police had no leads until Foster came forward and "gave this defendant's name as someone involved in the shooting" (X R.R. at 31,35).

46. The Court finds that King, during her opening statement immediately responded to the State's argument regarding Foster; that King made clear

the applicant was incarcerated at time of offense, and what Foster said was hearsay (VII R.R. at 24).

47. The Court finds that King timely objected during direct examination of Sgt. Cegielski to limit the scope of the questioning regarding Foster's murder (VIII R.R. at 196-99); that Cegielski's testimony that Foster was "able to confirm the information that he was giving you from other information you already had?" was cumulative of Jeresano's eyewitness testimony and in-court identification of the applicant as the shooter (VIII R.R. at 5-113).

48. The Court finds that on cross-examination of Sgt. Cegielski, King elicited testimony that Foster was not at the club at the time of the capital murder; that the applicant was in jail at the time of the Foster's murder; that the applicant was not responsible for the Foster's murder (VIII R.R. at 260-61).

49. Considering the applicant's averments in the context of the entire trial record, and the writ evidentiary hearing record (I W.R. at 303-05), the Court finds the applicant's claim to be unpersuasive, that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

DEVONTE BENNETT

50. To support his claim for relief with regard to Bennett, the applicant points to the following: (a) Sgt. Cegielski

testified that Bennett's statements matched the evidence he had developed to that point (VIII R.R. at 243-44); and (b) during closing argument the State argued that Bennett's statement was consistent with Jeresano's (X R.R. at 35).

51. The Court finds that Bennett was "unavailable" as a witness because he refused to testify, therefore Sgt. Cegielski's testimony that Bennett's statements matched the evidence he had developed to that point was not hearsay, and the State's closing argument and jury argument was proper (I W.R. at 303-06). TEX. R. EVID. 804(a)(2); *see Ward v. State,* 910 S.W.2d 1, 3 & n.2 (Tex. App.—Tyler, pet. ref'd) (when witness first suggested that she could not remember events and then persisted in refusing to testify about the event, she became "unavailable").

52. The Court finds that the jury charge included language that Bennett's refusal to testify could not be considered as evidence against the applicant (C.R. at 1,087); that the jury was deemed to have followed the charge. *Gamboa v. State,* 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

53. The Court finds that King objected to the following portion of the State's closing argument as improper: "Now, Devonte got up on the stand and refused to speak. Here's what he did not do? He did not plead the Fifth? What does that mean? If you could incriminate yourself"; that the Court sustained this objection; that upon King's request, the Court instructed the jury to

disregard the State's argument; that King's request for a mistrial was denied. (X R.R. at 33-34).

54. Considering the applicant's averments in the context of the of the trial record, the writ evidentiary hearing record, and TEX. R. EVID. 804(a)(2), the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO MOVE FOR A MISTRIAL AFTER DEVONTE BENNETT REFUSED TO TESTIFY.

55. The applicant avers that trial counsel was ineffective for failing to move for a mistrial when Bennett refused to testify. *Applicant's Writ* at 8-9; *Applicant's Brief* at 29-30.

56. To support his claim for relief, the applicant asserts King should have moved for a mistrial when (a) Bennett refused to testify because the State indicated during its opening statement that the evidence would show Bennett came forward after the applicant was charged with capital murder and identified the applicant as the shooter (VII R.R. at 19); and (b) when the Court sustained two objections by King to cross-examination questions of defense expert Professor Smith regarding the accuracy of Bennett's identification of the applicant as the shooter (IX R.R. at 155-56). *Applicant's Writ* at 9; *Applicant's Brief* at 29-30.

57. The Court finds that the State's opening argument was not evidence for the jury to consider. *Bigby v. State*, 892 S.W.2d 864, 886 (Tex.Crim.App.1994).

58. The Court finds that the jury charge instructed that Bennett's refusal to testify could not be considered as evidence against the applicant; that King requested this specific instruction (C.R. at 1,087)(I W.R. at 309).

59. The Court finds that the jury charge instructed the jury not to consider "any matters not in evidence" (C.R. at 1,089).

60. The Court finds that the jury was deemed to have followed the charge. *Gamboa,* 296 S.W.3d at 580.

61. Considering the applicant's averments in the context of the trial record, the writ evidentiary hearing record, and well established jurisprudence regarding the presumption that the jury is deemed to follow instructions, the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO MAKE CONSISTENT STATEMENTS DURING CLOSING ARGUMENT ABOUT WHETHER JERESANO WAS PRESENT AT THE SCENE OF THE CAPITAL MURDER.

62. The applicant avers that trial counsel was ineffective for providing inconsistent closing statements. *Applicant's Writ* at 9; *Applicant's Brief* at 31.

63. To support his claim for relief, the applicant asserts that King argued Jeresano was at the nightclub selling cocaine at the time of the capital murders while Co-counsel Brown argued that Jeresano was not at the nightclub at all (X R.R. at 14, 26).

VIVIAN KING

64. King explained her closing argument strategy during the writ evidentiary hearing; she believes her closing argument was a reasonable deduction from the evidence given that cocaine was found at the scene and Jeresano pleaded guilty to a multi-kilo cocaine case (I W.R. at 296).

65. The Court finds King's explanation of the rationale supporting her closing argument strategy to be credible and in accord with prevailing professional norms. *Strickland*, 466 U.S. at 698-700.

MATTHEW BROWN

66. During the writ evidentiary hearing, King explained that she was caught off-guard by Brown's closing argument; that she talked with Brown after the trial "to see what he was thinking"; that he explained that there could be a reasonable possibility that Jeresano was not at the nightclub given that they never could obtain from the federal government the readings from Jeresano's GPS monitor he was required to wear while on bond; that King explained, "And what he [Brown] told me, I understood because we never felt

comfortable that he was there, and if he was there, he was there to sell dope. I mean we thought both was a possibility." (I W.R. at 298-99).

67. The State was silent regarding the lack of consistency between King and Brown when it made its closing argument (X R.R. at 28-36).

68. The Court finds that in evaluating a *Strickland* claim, it is presumed that trial counsel made all significant decisions in the exercise of professional judgment. *Delrio,* 840 S.W.2d at 447 (Tex. Crim. App. 1992); that Brown is entitled to this presumption; that the applicant elected to not subpoena Brown to testify at the evidentiary hearing even though he had raised Brown's performance as a claim for relief; that, accordingly, the applicant fails to pierce the favorable presumption to which Brown is entitled. *Strickland,* 466 U.S. at 698-700.

69. Considering the applicant's averment in the context of the trial record, the writ evidentiary hearing record, the applicant's failure to subpoena Brown to testify at the writ evidentiary hearing, and well established jurisprudence regarding the presumption that Brown is entitled to a presumption that he exercised professional judgment, the Court finds the applicant's claim to be unpersuasive; that King's and Brown's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

Appendix I

IATC ALLEGATION: COUNSEL FAILED TO ELICIT TESTIMONY THAT ADA FLADER AGREED TO WRITE A LETTER TO U.S. DISTRICT COURT JUDGE RAINEY IN EXCHANGE FOR JERESANO'S TESTIMONY

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.

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 after Jeresano testified; that the following exchange took place between Flader and King during a pre-trial setting regarding the State's compliance with the defense's motions for disclosure (III R.R. at 5-6, 25-26).

> (MS. FLADER): Number five is: Any relationship that exists between the government and any witness, potential witness, or informant to be inclined, encouraged, or perceived some personal benefit in response to the government or defense request for information or testimony. In regards to that, the State's prosecutor has agreed to write the federal judge about one of the witness' cooperation in the case. That witness is currently pending a sentencing for a federal drug charge. And we'll discuss that a little bit more in the future, but the State has agreed to write the federal judge about that witness' cooperation in the case.
>
> MS. KING: I'd like that witness' name on the record, please.
>
> MS. FLADER: Oscar – I'm trying to remember his last name.
>
> MS. KING: I think I wrote it down on this next deal as I know it.
>
> MS. FLADER: I don't know what you wrote it down on.

MS. KING: I know you don't. I'm sorry.

THE COURT: You've got the name, right?

MS. FLADER: Oscar Jeresano.

THE COURT: Okay.

MS. FLADER: All right. The next one is a request –

MS. KING: Let me ask one more question, please, to the prosecutor on that. And Oscar Jeresano, I believe he pled guilty to a federal offense in the federal district – Southern District of Texas, Victoria, if I'm not mistaken, possibly in 2012 or '13. And the question is for the record: Is his case – is he awaiting sentencing until after he testifies in the State's case against my client, Feanyichi Uvukansi?

MS. FLADER: The information that I have is he is awaiting sentencing and his defense attorney has been asking for continuances on that sentencing until after this case has been completed.

MS. KING: And I just want to make sure it's clear. Based on your information, Madam Prosecutor, Mr. Oscars defense lawyer is asking the Federal Court to delay sentencing until after he testifies against Uvukansi in this case?

MS. FLADER: Yes.

THE COURT: Okay.

. . .

MS. FLADER: Okay. Number four is the federal plea agreement to cooperate with the State in this case for Oscar Jeresano. There was no plea agreement for that witness to cooperate in this case. Any agreements made with the witness, there have been no agreements other than what was previously put on the record that the State did tell defense counsel for Mr. Jeresano that she would write a letter to the federal judge informing him of the witness' cooperation on this capital murder case.

MS. KING: And I'd ask: Was that done in writing – by e-mail or in writing, that commitment?

MS. FLADER: I believe I just told him.

MS. KING: If it was via e-mail or any written form, I would ask that that be provided to defense counsel.

MS. FLADER: Sure.

MS. KING: Thank you.

73. The Court finds that King called Jeresano's attorney Wasserstein as a witness to impeach Jeresano; that during direct and cross-examination of Wasserstein, the jury heard the following testimony regarding a possible downward departure in Jeresano's federal sentencing as a result of his testimony in the applicant's case (IX R.R. at 40-49):

(BY MS. KING) Q. And after he testifies in this trial, you will inform the prosecutor, the United States prosecutor that he did testify in exchange for the prosecutor to file a Federal motion for the judge to reduce his sentence; is that correct? If you would like I could show that to you.

A. Well, for the most part I'm going to let Patty Booth, who is the assistant U.S. attorney know that he's testified and ask them to file a motion. It's called a 5K1 motion in which the Government will file and the judge will see it and he'll decide if he's going to reduce the sentence based on his cooperation with the United States Government.

(BY MS. FLADER) And as his attorney are you trying to get him the best possible deal?

A. Absolutely.

Q. Have you ever explained the potential for this, I don't even know what it's called, 5K1; is that right?

MS. KING: Yes, ma'am.

MS. FLADER: 5K1.

MS. KING: 1.1.

Q. (BY MS. FLADER) 1.1 to be filed after he has cooperated with this case?

A. I haven't explained to him what a 5K1 is. I have told him that him testifying will probably help him when it comes time for the judge to do the sentencing, but that there's no agreement between the Government and the defendant as to what the sentencing is going to be. It's going to be up to Judge Rainey in Federal Court.

. . .

Q. (BY MS. FLADER) And you testified that you've asked for resets, for his sentencing to be reset. Why have you done that?

A. For a few reasons, number one, I'm hoping that his cooperation with the State is something that I can ask the assistant U.S. attorney to file this 5K1 motion to possibly get his sentence reduced. Also, from my understanding and from practicing that once somebody goes into Federal custody, it's difficult to get them out to testify in court.

74. The Court finds from the trial and writ evidentiary hearing records that King's trial strategy regarding impeaching Jeresano included an exploration of

the details of a possible downward departure of his federal sentence premised upon his cooperation with the State in the applicant's case; that to implement this strategy, King questioned Jeresano and Wasserstein about the details of Jeresano's federal plea bargain; that King felt it was strategically unnecessary to question Jeresano or Wasserstein about the letter Flader intended to write; that the following portions of King's testimony at the writ evidentiary hearing support the Court's finding (I W.R. at 257-60, 306):

(BY MR. SCHAFFER) Q. Why didn't you impeach him with the plea agreement?

A. I thought I had made my point by talking about it in front of the Court and by subpoenaing his lawyer to talk about the agreement in case he was not smart enough to know that is what we called it.

. . .

A. I did not make a bill because I believe that Judge Price sustained – he did sustain the objection. But my trial strategy was to bring in his lawyer, to talk to his lawyer about the agreement because I really believe that Mr. Jeresano just wasn't smart enough to understand what his agreement was. I mean, he knew what he was doing.

So I went as far as to call the lawyer, which is unusual in trial, but I did, and his lawyer testified. So I was going to get to it another way.

Q. Well, then, Mr. Jeresano wasn't honest enough to admit it.

MR. REISS: Objection, argumentative.

THE COURT: Sustained.

Q. (By Mr. Schaffer) But the only way to challenge the judge's ruling would be to make the bill, correct?

A. That's not the only way.

Q. Okay. Well, then –

A. I mean, I – well, I was trying to win the trial. I was trying to get to the evidence so that I could argue it before the jury that the guy had an agreement and he knew it. So I wanted his lawyer to say he had an agreement and he told me about the agreement, which I believe his lawyer did.

. . .

Q. Now, why didn't you ask Mr. Wasserstein whether Ms. Flader had agreed to write a letter to the judge regarding Jeresano?

A. Because I thought by Jeresano's lawyer explaining that his client was testifying and expecting to get a downward departure answered – that was what I wanted. I wanted the jury

to know that was the bias and that the lawyer explained it.

Q. Well, but Ms. Flader had represented to the jury through Jeresano's testimony that he was testifying because his uncle had been murdered and he wanted to help the victims' families, not that she agreed to write a letter for him, correct?

A. I understand that, but I couldn't get him – they wouldn't let him testify. I mean, that's the way – that's my approach in trying to get the information out. But there was an agreement by his lawyer who ultimately did the negotiating with the feds, the federal prosecutor, to get on the witness stand and say there was an agreement that he told his client about. And so that was my point so the jury could then see the guy was lying, that Jeresano was lying.

Q. So why didn't you elicit from Wasserstein that Flader had agreed to write a letter to the judge after he testified?

A. I didn't think it was necessary. It had already been sustained. I thought that the agreement that his lawyer had negotiated was enough.

Q. Well, it had been sustained through questioning Jeresano because the judge said Jeresano claimed he didn't know anything about it but –

MR. REISS: Objection, leading.

THE COURT: I haven't heard the question yet.

Q. (By Mr. Schaffer) But Wasserstein did know something about it, so he would have personal knowledge of that agreement, would he not?

THE COURT: Sustained to leading. Ask another question.

Q. (By Mr. Schaffer) Would Wasserstein have personal knowledge of the agreement with Flader?

A. Yes.

Q. So if the jury was going to find out about the letter, based on Judge Price's ruling, would it have to find out through Wasserstein rather than Jeresano?

A. You know what, hold on. I'm sorry. I misstated something. I misunderstood your question. I meant that Wasserstein, the lawyer, would know because he had the agreement with the federal prosecutor, as I stated a few comments ago, not necessarily with Gretchen. I didn't know about what he knew about with Gretchen because this deal was all based on the federal prosecutor.

Q. Well, but Flader had disclosed to you before trial that she had made an agreement with Wasserstein to write the letter to the judge.

A. Yes, sir. But in my mind, that wasn't the dispositive fact. To me, I mean, the federal prosecutor could have asked anybody on that team. Gretchen didn't try that case by herself, she had a co-counsel. So the federal prosecutor, based on my experience, could have talked to either one of them or the federal prosecutor could have looked on JIMS and saw there was a conviction and just gave him the 5K. I didn't think a letter was dispositive of giving a 5K. I thought it was testimony and conviction.

Q. The letter would have impeached his testimony that he had no motive to testify for any reason other than to help the victims' families, wouldn't it

MR. REISS: Objection, leading.

THE COURT: Sustained.

Q. (By Mr. Schaffer) How could you have used the letter to impeach his testimony on direct examination regarding his motive?

A. I could have used it to further my theory that he was doing it only to get a benefit, but I didn't think that was the only way. I thought the best way was to show that the night of the melee with hundreds of people in the parking lot, he did not come forward and tell the police what he saw. I never – it was always suspicious to me that he

would wait and go to a lawyer that's representing him on his federal case to then get with the prosecutors instead of being a good citizen that night and reporting what he saw that night. I thought – that was my trial strategy to show that he wasn't right, that he was a liar because he didn't come forth that 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 pre-trial, 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.

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.

APPLICANT'S HABEAS CLAIM #2:
THE STATE USED AND FAILED
TO CORRECT FALSE TESTIMONY

OVERVIEW OF CLAIM

76. The applicant avers that the State used and failed to correct Jeresano' testimony regarding consideration he might receive in federal court in exchange for his state court testimony; that Jeresano's testimony did not reveal that Flader agreed to write a letter to U.S. District Court Judge Rainey regarding his testimony in the applicant's case. *Applicant's Writ* at 7; *Applicant's Writ* at 8-18.

Appendix I

LEGAL STANDARD

77. The State's use of material false testimony violates a defendant's due-process rights under the Fifth and Fourteenth Amendments to the United State constitution. *Ex parte Weinstein,* 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (citing *Ex parte Fierro,* 934 S.W.2d 370, 372 (Tex. Crim. App. 1996) et.al.

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**. *Id.*

79. To determine whether a particular piece of evidence has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *Ex parte Ghahremani,* 332 S.W.3d 470, 479 (Tex. Crim. App. 2011).

80. 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. *Weinstein,* 421 S.W.3d at 665.

Appendix I

ALLEGATION: THE STATE USED AND FAILED TO CORRECT JERESANO'S FALSE TESTIMONY.

81. Before the applicant's trial, Flader disclosed to King that she intended to write a letter to Judge Rainey about Jeresano's "cooperation"; that Flader would send the letter after Jeresano testified in the applicant's case (III R.R. at 5-6, 25-26).

82. Wasserstein requested that Flader write a letter to Judge Rainey regarding his cooperation with the State in the applicant's case; that Wasserstein intended the letter in order to show Jeresano's "good character"; that Flader's letter would supplement the federal court's consideration of cooperation Jeresano was also providing the federal government in his narcotics case; that Flader's letter was not a condition precedent for the U.S. Attorney's Office to file a 5K1.1 motion (I W.R. at 202-05, 220).

83. The Court finds that the trial and writ evidentiary records reflect that Flader's legal career has been focused in the area of Texas criminal law; that, at the time of the applicant's trial, Flader was unfamiliar with the nuances of federal sentencing guidelines; that Flader remains unfamiliar with the nuances of federal sentencing guidelines (VIII R.R. at 83-88)(IX R.R. at 47-48)(I W.R. at 101-02).

84. The Court finds that there was no *quid pro quo* arrangement between the State and Jeresano; (I W.R. at 115, 202).

85. The Court finds that Flader credibly believed Jeresano would receive federal penitentiary time after his testimony but was hopeful that it would be "on the lower end of the range based on my letter"; that she ultimately did not believe her letter would be important" or actually affect his sentence because, "Judges get letters from people in sentencing all the time, and the judge gets to decide what they want to do with that letter" (I W.R. at 119).

FALSITY EXAMINATION

86. On direct examination, Jeresano testified to the flowing regarding the status of his pending federal sentencing (VIII R.R. at 35)

[BY MS. FLADER] Q. What is the current status of your federal case?

A. I have pled guilty already, and now I'm waiting for sentencing.

Q. Have you been made any promises for testifying in court today?

A. Nope.

Q. Have they told you that the range of punishment is going to be lowered?

A. No.

Q. What is your understanding of what the possibilities are for your range of punishment?

A. Ten years to life.

87. **The Court finds Jeresano's answer ("Nope") to the question, *"Have you been made any promises for testifying in court today?"* misleading the jury regarding any benefits Jeresano may obtain for testifying.**

88. The Court finds that the Merriam-Webster defines "promise" as a declaration that one will do or refrain from doing something specified.

89. The Court finds that before the trial and during Jeresano's testimony, Jeresano knew that his cooperation to testify in the Appellant's trial could be considered by the federal judge to determine if his federal sentence would be reduced below the minimum punishment. (Writ Record 169, line 11-19; lines 24, 25;); (Writ Record 170, lines 1-6; lines 14-18).

90. The Court finds that Jeresano knew that if he cooperated *(i.e, his testimony was helpful to the State's case)* that the federal prosecutor would do something, which was to present information to the federal judge that he cooperated by testifying in a State trial so that the judge could consider whether he would do something; such as, reduce his sentence below the sentencing guidelines.

91. The Court finds that Jeresano knew the foregoing because his attorney, Wasserstein, told him that the federal prosecutor had declared it to be the case. (Writ 169, line 24; 170, lines 1-6).

92. The Court finds that during the Writ Hearing, attorney Wasserstein testified that he told Jeresano before trial that the federal prosecutor (Booth) would file a motion to reduce his sentence if he testified. (Writ 185, lines 1-13).

93. Moreover, the Court finds that during the Writ Hearing, attorney Wasserstein testified that Flader promised him that she would do something, that is, write a letter to the federal judge after Jeresano testified. (Writ 182, lines 18-21).

94. The Court finds that prior to the trial day, Wasserstein told Jeresano that Flader would write a letter to the federal judge if he testified. (Writ 184, lines 22-25).

95. The Court finds Wasserstein's testimony to be credible.

96. The Court, thus, finds there was a "promise" made to Jeresano and his attorney by the State prosecutor (Flader) and the federal prosecutor (Booth).

97. The Court finds the foregoing testimony elicited by Flader to be **FALSE**.

98. On cross-examination, Jeresano testified to the following regarding the status of his pending federal sentencing:

> [BY MS. KING] Q. And you did have a plea agreement that says if you cooperated with the State in this case, they would consider giving you a 5K1 reduction under the Federal sentencing guidelines?
>
> A. Not that I know of.
>
> Q. Your lawyer never told you that?
>
> A. No.
>
> Q. And the prosecutors never told you that?
>
> A. I never talked to the prosecutor before.
>
> Q. So when you got your federal case, you didn't study what would happen in terms of how much time you could give if you cooperated versus how much you would get if you didn't?
>
> A. Excuse me.
>
> Q. You have no idea?
>
> A. I don't understand the question. Can you repeat it?

Q. Yes. You know with ten kilograms of cocaine you could get 30 years in federal prison?

A. Yes.

Q. And be deported?

A. I could get more than 30 years.

Q. You can get up to life, right?

A. Uh-huh.

Q. And depending on your criminal history; is that correct?

A. Yes.

Q. And so you know in cooperating with the State in this case, you can get a lot less time; is that correct?

A. Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody.

Q. No one has ever told you that?

A. No. I'm here by my own free will, not to help myself. I'm here to help the families of the people that died, nothing else.

Q. Would you let your – if your lawyer came to court would you allow him to tell us that?

A. Yes.

99. The trial and writ evidentiary hearing records reflect that the jury was removed shortly after Jeresano testified that "Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody".

100. The Court finds that Wasserstein was present during Jeresano's testimony at trial, and on cross-examination by attorney King, Wasserstein saw that Jeresano's testimony was confusing (VIII R.R. at 170) and on the break before Jeresano had been excused as a witness, Wasserstein spoke with him regarding that it was possible that the federal judge could depart below the statutory minimum if the motion (5K1.1) was filed. (Writ Record 169, lines 12-18).

101. The Court finds that after Wasserstein spoke with Jeresano on the break, that Jeresano had a general understanding of his cooperation agreement. (Writ 169, lines 15-18); (Writ 170, lines 17, 18).

102. The Court finds that on cross-examination, Jeresano's answer, *("Not that I know of.")* to King's question "*And you did have a plea agreement that says if you cooperated with the State in this case, they would consider giving you a 5K1 reduction under the Federal sentencing guidelines?"* was **FALSE** regardless if Jeresano did or did not understand the

terminology, "5K1"; clearly there is no response from Jeresano in the record stating he did not understand what "5K1" meant. Jeresano's attorney, Wasserstein, testified in the Writ Hearing that prior to the jury trial in the case at hand, Jeresano signed a plea agreement in federal court that contained the 5K1 provision, and that the he and the judge explained to Jeresano that he could get a possible reduction if he gave substantial assistance. (Writ 188, lines 11-25; 189, lines 7-25; 190, lines 1-11)

103. The Court finds that a follow-up question, a long these same lines, by King – *"And so you know in cooperating with the State in this case, you can get a lot less time; is that correct?"*, was not answered by Jeresano. Instead of Jeresano answering, "Yes" or *"No"*, Jeresano answered an entirely different question responding – "*Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody.*"

104. The Court finds that Jeresano's nonresponsive answer does not establish he made a false or misleading statement to King's question because there was no evidence that anyone told Jeresano that he was going to get his sentenced reduced; his response stated the truth, that is, there was no certainty that he would get a sentence reduction from the judge as that was totally within the judge's discretion.

105. The trial record reflects that the attorneys held a bench conference while the jury was removed from

the courtroom (VIII R.R. at 81-98); that during the bench conference King moved to impeach Jeresano with an e-mail she received from the United States Attorney's Office; that the e-mail explained Jeresano's plea agreement was a "standard" plea agreement containing a provision "whereby the Government will recommend to the Court the sentence reduction under U.S. sentencing guideline Section 5K1.1, if the defendant provides substantial assistance as in the State or Federal prosecution"; that Flader objected that use of the e-mail would be improper impeachment because Jeresano had already testified that no one had told him he would receive less time for his cooperation (VIII R.R. at 88); that the Court sustained the State's objection (VIII R.R. at 93); that the Court explained its ruling: "The fact that we've been talking about [Section 5K1.1] doesn't mean anything as far he is concerned. He doesn't know. Does his lawyer know? Maybe so." (VIII R.R. at 93); that the Court invited King to impeach Jeresano through Wasserstein (VIII R.R. at 96). *[Although Flader testified initially that she objected to the letter, she later stated that she believed that she was objecting to King questioning the defendant regarding something he testified on cross-examination that he did not know about, the SKI. (See Writ 63, lines 10-20; 64, lines 1-7)]*

106. The Court finds that at the time of the jury trial in the case at hand, Jeresano may not have fully understood what the term 5K1.1 meant, because Wasserstein testified that he only went over the term "5K1.1" the day before Jeresano's federal rearraignment.

Nevertheless, the Court finds that Jeresano had the opportunity to hear the term mentioned to him on the day Wasserstein explained it to him and during his re-arraignment in front of the federal judge. (I W.R. at 211).

107. The Court finds that when King asked the question regarding receiving a 5K1.1 reduction, Jeresano did not respond by saying that he did not understand what 5K1.1 reduction meant, but he answered the question.

108. The Court finds that King's impression was that Jeresano "just wasn't smart enough to understand what his agreement was" (I W.R. at 254).

109. The Court finds that Wasserstein indicated Jeresano *"understood about cooperation. But using 5K1, we probably read over it, but I didn't go specifically into it"* (I W.R. at 211).

110. The Court finds that the determinative inquiry regarding the applicant's falsity allegation rests on whether or not Jeresano's direct examination testimony that he had not been "made any promises for testifying in court today" gave the jury a false impression when the testimony is examined as a whole. *Ghahremani,* 332 S.W.3d at 479.

The Court finds that the State did present false testimony, and gave the jury a false impression when examined as a whole.

111. The Court finds that Flader told King before trial that she promised Wasserstein she would write a letter to the federal judge if Jeresano cooperated with the state's case and testified. (Writ 232, lines 8-12).

112. The Court finds that such evidence may be considered relevant impeachment evidence as it relates to the credibility of Jeresano as a witness and his motive to testify untruthfully.

113. The Court finds, however, that although Flader revealed this information to King as well as information that she would notify the federal prosecutor about Jeresano's cooperation if he testified, for all practical purposes it was for naught. 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** [emphasis added] promises for testifying in court. Further, Flader objected to King asking Jeresano about the information contained in an email that included information about the 5K1 reduction. Flader's objection was sustained and thus prevented King from simply asking specifically if Jeresano knew whether or not Flader would write a letter to the federal judge if he testified. (Writ 63, lines 5-10).

114. The Court finds that false testimony elicited on direct examination by Flader coupled with his false and misleading testimony on cross examination by King left a false impression with the jury.

115. The Court finds, however, Jeresano's credibility was impeached on Flader's cross-examination of Wassertein during the jury trial when Wasserstein testified **that he did explain to Jeresano that testifying will probably help him when it comes time for** the judge to do the sentencing, but that there was no agreement to what the sentence would be that it would be up to the judge. (Writ 47, lines 17-25; 48, lines 1-4).

116. The Court finds that, even if Jeresano's testimony that *"he was not made any promises"* was regarded to be "false," that testimony was not **"material"** since there is not a ***reasonable likelihood*** that it affected the judgment of the jury since Flader impeached Jeresano through the cross examination of Wasserstein when Wasserstein testified that he did in fact tell Jeresano that testifying would probably help him in his federal court case.

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.

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.**

123. The Court finds that, for instance, had the issue been that the false testimony was that Jeresano identified appellant as the shooter but there was impeachment evidence to establish Jeresano said he made it all up to gain a benefit in his federal case, then this would be material and reasonably likely to influence the judgment of the jury.

124. The Court finds that in the case at hand, there was no claim that Jeresano gave false testimony about who the shooter was; there was no testimony that Jeresano made a previous statement that he could not positively identify the Appellant in the photo array. Had that been the case, a false statement that Appellant was

the shooter would be material and reasonably likely to influence the judgment of the jury.

125. The Court finds that the jury had to make a determination whether Jeresano was telling the truth or not telling the truth about the Appellant being the shooter.

126. The Court finds that the jury was not left without any evidence showing the falsity of Jeresano's statement that *"he was not promised anything for his testimony"*, and they could have determined Jeresano was not truthful and disbelieved him because of this false testimony.

127. The Court finds, however, because the jury can believe some, none, or all of a witness's testimony, the jury could have determined that Jeresano gave false testimony but that they still believed he properly identified the shooter.

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 not 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.

130. The Court finds that even if the jury gave value to the impeachment evidence, including the letter; there was still evidence that established the veracity of Jeresano's identification of the Appellant, such as the evidence that he was able to confidently identify the Appellant from a photo array. In addition, the jury could have thought Jeresano was truthful regarding his identification because of his testimony describing how the shooter fired into the crowd corroborated the detectives' observation of how casings were found at the scene.

131. **Therefore, the Court finds that Appellant has failed to prove Jeresano's testimony that *"Nope"*, he had not been made any promises to testify in court *(including the promise that a letter would be written to the federal judge)* was "material" such that there is a "reasonably likelihood" that this false testimony affected the jury's judgment.**

Appendix I

APPLICANT'S HABEAS CLAIM #3: CUMULATIVE PREJUDICE

132. The applicant avers that he "demonstrated sufficient prejudice to require habeas corpus relief because of professional misconduct[2] or ineffective assistance of counsel. Assuming *arguendo* that the Court of Criminal Appeals disagrees, the cumulative effect of the prejudice flowing from these constitutional violations requires relief." *Applicant's Writ* at 10, *Applicant's Brief* at 34-35.

133. The Court finds that the applicant fails to demonstrate any prejudice given that there was an absence of error. See Court's *Findings of Fact.*

CONCLUSIONS OF LAW

INEFFECTIVE ASSISTANCE OF COUNSEL

1. The Court concludes that the applicant fails to demonstrate by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 698-700.

2. In the alternative, the Court concludes, particularly given the extensive impeachment of Jeresano by

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2. The Court notes that the applicant alleged that the State presented and failed to correct false testimony, not prosecutorial misconduct.

King, that the applicant fails to demonstrate by a preponderance of the evidence that the outcome of the trial would have been different but for his counsel's deficient performance. *Strickland,* 466 U.S. at 698-700.

FALSE TESTIMONY

3. The Court concludes that the appellant has demonstrated by a preponderance of the evidence that the State presented false testimony. *Ex parte De La Cruz,* 466 S.W.3d 855, 867-71 (Tex. Crim. App. 2015).

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.

CUMULATIVE PREJUDICE

5. The Court concludes that in the absence of error there is no cumulative prejudice. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *see Derden v. McNeel,* 978 F.2d 1453, 146 (5th Cir. 1992) ("Even if the events of which Derden complains were 'errors' it cannot reasonably be said that they cumulatively so infected the trial with unfairness as to render his conviction a denial of due process.").

Appendix I

IN THE 174th DISTRICT COURT OF
HARRIS COUNTY, TEXAS

No. 1353181-A

EX PARTE

FEANYICHI EZEKWESI UVUKANSI,

Applicant

RECOMMENDATION AND ORDER

THE COURT HEREBY RECOMMENDS THAT THE APPELLANT'S WRIT OF HABEAS CORPUS BE DENIED.

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in cause no. 1353181-A and transmit same to the Texas Court of Criminal Appeals, as provided by TEX. CRIM. PROC. CODE art. 11.07, §3(d). The transcript shall include certified copes of the following documents:

1. All of the applicant's pleadings and exhibits filed in cause no. 1353181-A, including his writ of habeas corpus;

2. All of the State's pleadings and motions filed in cause no. 1353181-A;

3. This Court's Findings of Fact, Conclusions of Law, and Order denying relief in cause no. 1353181-A;

4. Any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or the State;

5. The reporter's record for the August 6, 2018 writ evidentiary hearing and November 2, 2018 argument of counsel; and,

6. The indictment, judgment, sentence, docket sheet, and appellate record in cause number 1353181, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send a copy of the Court's Findings of Fact and Conclusions of Law, including its order, to applicant's counsel: Randy Schaffer; One City Centre, 1021 Main Street, Suite 1440, Houston, Texas 77002; and counsel for the State: Joshua A. Reiss, Assistant District Attorney, Harris County District Attorney's Office, 500 Jefferson Street, 11th Floor; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT PARTIALLY ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NUMBER 1353181-A.

SIGNED this 2nd day of April, 2019.

/s/ Hazel Jones
Hazel Jones
Presiding Judge [SEAL]
174th District Court
Harris County, Texas

APPENDIX J — ORDER OF THE TEXAS COURT OF CRIMINAL APPEALS DENYING DISCRETIONARY REVIEW ON DIRECT APPEAL (OCTOBER 19, 2016)

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

10/19/2016 **COA No. 01-14-00527-CR**
Tr. Ct. No. 1353181
UVUKANSI, FEANYICHI EZEKWESI **PD-0727-16**

On this day, the Appellant's petition for discretionary review has been refused.

Abel Acosta, Clerk

1ST COURT OF APPEALS CLERK
CHRISTOPHER A. PRINE
301 FANNIN
HOUSTON, TX 77002-7006
* DELIVERED VIA E-MAIL *

APPENDIX K — OPINION OF THE TEXAS COURT OF APPEALS (JUNE 2, 2016)

[SEAL]

In The Court of Appeals
For The
First District of Texas

NO. 01-14-00527-CR

FEANYICHI EZEKWESI UVUKANSI,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1353181

Opinion issued June 2, 2016

MEMORANDUM OPINION

A jury found appellant, Feanyichi Ezekwesi Uvukansi, guilty of the offense of capital murder.[1] Because the State did not seek the death penalty, the trial court, as statutorily required, assessed his punishment at

1. *See* Tex. Penal Code Ann. § 19.03(a)(7) (Vernon Supp. 2015).

confinement for life without parole.[2] The trial court further found that appellant used a deadly weapon, namely, a firearm, in the commission of the offense. In four issues, appellant contends that the evidence is legally insufficient to support his conviction and the trial court erred in not instructing the jury on the lesser-included offense of felony murder, denying his motion to suppress evidence, and overruling his objection to a portion of the State's closing argument.

We affirm.

Background

Frazier Thompson testified that on June 20, 2012, immediately after his performance at a rap concert at The Blue Room nightclub (the "nightclub"), he walked outside into the nightclub's parking lot and towards his car, which he had valeted "right in front of the club." Within a "few seconds" of stepping into the parking lot, someone shot him in the back. Frazier, who was standing in front of the nightclub, near the valet stand, did not see the shooter. However, he knew the two other men, the complainants, Coy Thompson and Carlos Dorsey, who were shot and killed in the parking lot.[3]

Oscar Jeresano testified that on June 20, 2012, the nightclub hosted a rap concert, during which he valeted

2. *See id.* § 12.31(a) (Vernon Supp. 2015).

3. In addition to the two complainants, a woman was also killed. In the instant case, the State did not accuse appellant of causing her death.

patrons' cars. He explained that "the whole night was pretty busy," "pretty, pretty hectic," and people were everywhere "coming in and out." When the concert "let out . . . around 2:00, 2:10 [a.m.]," "a lot of people started gathering" in the parking lot, and there was "a big pile of people" "all over the parking lot." Jeresano estimated that "100 people or more" had congregated outside of the nightclub.

While Jeresano was speaking with a woman about her car, he "heard shots" fired, immediately "turned around," and saw a "flame coming out of [a] gun." He also saw approximately eighty to eighty-five percent of the face of the shooter. Jeresano focused on the shooter, who had a "determined look" on his face, like "he knew what he was going for," and "[i]t wasn't [just] a random thing." While the shooter, who held his arm "straight out" with a "gun in his hand," was moving, Jeresano "[d]odged for cover behind or to the side of a [car]" and saw "bodies drop[]" to the ground.

Jeresano further testified that he heard approximately fifteen shots fired in the parking lot, saw only one shooter, and "witness[ed] three people die." He noted that the shots had been fired "one after another," with "no pause [in] between them," and he did not see "anybody . . . shooting back." In other words, this was not a "shoot out" between several people. The shooter fired his gun "towards the crowd" of people outside of the nightclub, "shooting all over the place." Although Jeresano did not see "exactly where [each] bullet went," because "there w[ere] too many people" and he could not "follow" each individual bullet, he did see the shooter "shooting at the crowd" of people.

Appendix K

After the shooting, Jeresano met with a Houston Police Department ("HPD") officer, who showed him a photographic array containing a photograph of appellant and five other men with similar physical characteristics. He recognized the shooter in the photographic array "right away," and he was "[one] hundred percent" certain of his identification. Jeresano identified appellant as the shooter that he saw at the nightclub on June 20, 2012.

HPD Officer W. Reyes testified that on June 20, 2012, he was dispatched to the nightclub, where, upon his arrival, he saw in the parking lot, which was "packed" and "full," "a large crowd" of "over 100" people "running around frantic." "[S]hots" had been fired "all along the parking lot," indicating that the shooter was "moving" when he fired his gun, and three individuals were pronounced "deceased" at the scene. During Reyes's testimony, the trial court admitted into evidence photographs of the bodies of the two complainants where they had been slain in the parking lot.

HPD Officer W. Tompkins testified that when he arrived at the nightclub's parking lot on June 20, 2012 after the shooting, he saw a "very large amount of people." He recovered eighteen bullet "casings" from the parking lot; however, "because of the large amount of people and vehicles," it was "highly possible that [he] might have missed some."

HPD Officer C. Cegielski testified that on June 20, 2012, "[t]here [was] a concert at a club, [with] a lot of people. [When the] [c]lub . . . let out, [a] shooting happened

in the parking lot. Three people were killed at the scene." He met with Jeresano after the shooting and showed him several photographic arrays, all containing photographs of six "males of similar characteristics, age, [and] facial hair." One array contained a photograph of appellant and five other men. Jeresano "went straight to [appellant's] picture" and said "this is the guy with the gun." Jeresano also stated that "he only saw one person with a gun" that night, he looked at the shooter "face-to-face," and he heard "a lot of shots" fired, about "15 to 20." According to Cegielski, no one other than appellant was ever "identified as the shooter."

Officer Cegielski obtained a "pocket warrant" for appellant's arrest. And, following his arrest, appellant waived his legal rights and gave a statement, which Cegielski recorded. HPD officers then obtained a search warrant to view the contents of appellant's cellular telephone. Officers ultimately recovered two photographs, State's Exhibits 55 and 56, from appellant's telephone, and Cegielski identified the individuals pictured in the photographs at trial.

HPD Officer J. Brooks testified that Jeresano told HPD officers that he saw appellant "shooting," and although Jeresano did not see exactly "where [each of] the bullet[s] went," he saw "the direction of the shooting," which was "into . . . the crowd." According to Brooks, "[t]he description of where [Jeresano] said" he saw appellant "shooting" was in accord with the location of the bodies of the two complainants in the parking lot of the nightclub. Brooks also testified that the two photographs "recovered

from [appellant's] cell phone," State's Exhibits 55 and 56, were taken an hour after the shooting.

Dr. Roger Milton, an assistant medical examiner at the Harris County Institute of Forensic Sciences, testified that he performed autopsies on the bodies of the two complainants. He noted that Dorsey had "a gunshot wound to the right side of his face," with "a corresponding gunshot exit wound to the left jaw." Milton's internal examination of Dorsey showed that he,

> had a gunshot track through his upper neck and posterior or back portion of his face that perforated some major vessels in the right side of his neck. [His] internal and external carotid arteries that are high-pressure vessels that pump blood into the brain, . . . had been severed, and the bullet had fractured his jaw, went through the back of his throat and exited. [H]e [also] had extensive bleeding in his lungs and his stomach, which indicat[ed] high-pressure blood being forced into his respiratory system, his throat, lungs, and his stomach. . . .

Milton further explained:

> The bullet entered the right, just adjacent to [Dorsey's] right jaw; and it perforated some major vessels in [his] upper neck, the internal and external carotid arteries, that supply blood to the brain and also to the soft tissue structures of the right side of [his] face. It's a

> high-pressure arterial system and then [his] blood kind of poured out into [his] neck and throat and the blood was inhaled and swallowed. And so, [Dorsey] died as a result of blood loss and as a result of respiratory compromise from [his] blood being inhaled into [his] lungs.

Milton opined that the gunshot itself did not "instantly" kill Dorsey; instead, he died from "internal bleeding," "blood loss," and "respiratory compromise," due to his lungs "fill[ing] with blood." Dorsey's death occurred slowly, "essentially like drowning or suffocating." And it is "very unlikely" that Dorsey's injuries were survivable, even if he had made it to a hospital.

In regard to Thompson, Milton testified that he had "a gunshot entrance wound [on] the upper outer aspect of [his] right hip region." The bullet that struck Thompson,

> had a very steep upward trajectory. . . . [It] entered the posterior back of [his] right hip and perforated [his] liver, [his] right kidney, and passed through [his] heart as well and then exited [his] body on the left chest. So it traveled from the lower right side of [his] body into the upper left side of [his] body.

Milton opined that Thompson's injuries were not survivable and were "consistent" with him having had "his back to the shooter" and "him leaning over or being on the ground" when he was shot. Thompson also suffered a second gunshot wound on "the upper, outer right thigh," which fractured his right femur.

Appendix K

Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because "there is no evidence which proves that [he] intentionally killed . . . Dorsey."

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

A person commits the offense of capital murder if he "murders more than one person . . . during the same criminal transaction." Tex. Penal Code Ann. § 19.03(a)(7)(A) (Vernon Supp. 2015). A person commits murder if he "intentionally or knowingly causes the death of an individual." *Id.* § 19.02(b)(1) (Vernon 2011). A person acts

intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (Vernon 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b); *see also Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) ("Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death."). A person is guilty of murder if he intentionally or knowingly fires a firearm into a crowd of people and at least one of the persons in the crowd dies. *Medina v. State*, 7 S.W.3d 633, 636–37, 640 (Tex. Crim. App. 1999).

Appellant asserts that the evidence did not establish that he "had the specific intent to kill Dorsey." In other words, there is "nothing [in the record] to support an intentional killing of Dorsey" by appellant.

"Intent is almost always proven by circumstantial evidence." *Trevino v. State*, 228 S.W.3d 729, 736 (Tex. App.—Corpus Christi 2006, pet. ref'd); *see also Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) ("Direct evidence of the requisite intent is not required. . . ."); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Manrique v. State*, 994 S.W.2d

640, 649 (Tex. Crim. App. 1999). A jury may also infer knowledge from such evidence. *See Stahle v. State*, 970 S.W.2d 682, 687 (Tex. App.—Dallas 1998, pet. ref'd); *Martinez v. State*, 833 S.W.2d 188, 196 (Tex. App.—Dallas 1992, pet. ref'd).

Further, a firearm is a deadly weapon per se. Tex. Penal Code Ann. § 1.07(a)(17) (Vernon Supp. 2015); *Sholars v. State*, 312 S.W.3d 694, 703 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). And the intent to kill a complainant may be inferred from the use of a deadly weapon in a deadly manner. *Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993); *Watkins v. State*, 333 S.W.3d 771, 781 (Tex. App. Waco 2010, pet. ref'd). If the defendant uses a deadly weapon in a deadly manner, the inference of intent to kill is almost conclusive. *Watkins*, 333 S.W.3d at 781; *Trevino*, 228 S.W.3d at 736. And when a deadly weapon is fired at close range and death results, the law presumes an intent to kill. *Womble v. State*, 618 S.W.2d 59, 64–65 (Tex. Crim. App. 1981); *Trevino*, 228 S.W.3d at 736; *Childs v. State*, 21 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). "[T]he most obvious cases and the easiest [cases] in which to prove a specific intent to kill, are those . . . in which a firearm [is] used and [is] fired . . . at a person." *Godsey v. State*, 719 S.W.2d 578, 581 (Tex. Crim. App. 1986).

Here, Jeresano testified that June 20, 2012 was a "pretty busy" and "pretty, pretty hectic" night for the nightclub, where he was valeting cars. People were everywhere, "coming in and out" of the nightclub throughout the night. He noted that when the rap

concert at the nightclub "let out," "a lot of people started gathering" outside in the parking lot, and there was "a big pile of people" "all over the [club's] parking lot." Jeresano estimated that "100 people or more" had congregated outside of the nightclub.

Officer Reyes similarly testified that when he arrived at the nightclub, he saw "a large crowd," "over 100" people "running around frantic." He described the nightclub's parking lot as "packed" and "full." Officer Tompkins explained that there was a "very large amount of people" in the parking lot when he arrived at the scene. And Officer Cegielski testified: "There [was] a concert at a club, [with] a lot of people. [When the] [c]lub . . . let out, [a] shooting happened in the parking lot."

Jeresano further testified that while he was speaking with a woman about her car, he "heard shots" fired. When he "turned around," he saw a "flame coming out of [a] gun." Appellant, who Jeresano identified as the shooter, was facing him and had a "determined look" on his face, like "he knew what he was going for" and "[i]t wasn't [just] a random thing." Appellant held his arm "straight out" with a "gun in his hand." Jeresano noted that approximately fifteen shots were fired in the parking lot, "one [right] after another," with "no pause [in] between them." He "saw the bullets" and appellant "shooting towards the crowd" of people. Appellant was "shooting all over the place." Although Jeresano did not see "exactly where [each] bullet went," because "there w[ere] too many people" and he could not "follow" each individual bullet, he did see appellant "shooting at the crowd." From his position, he

saw "bodies drop[]" to the ground, and he "witness[ed] three people die." And appellant was the only shooter that Jeresano saw in the nightclub's parking lot that night.

Officer Cegielski further testified that Jeresano identified appellant as "the guy with the gun" and told him that appellant was the "one person" he saw "with a gun." Jeresano also told Cegielski that he heard "a lot of shots" fired, about "15 to 20." And Officer Brooks noted that Jeresano told HPD officers that he saw appellant "shooting," and although he did not see exactly "where [each of] the bullet[s] went," he saw "the direction of the shooting," which was "into . . . the crowd." According to Brooks, "[t]he description of where [Jeresano] said" he saw appellant "shooting" was in accord with the location of the bodies of the two complainants in the parking lot of the nightclub.

In short, the evidence presented at trial establishes that appellant fired a gun at least fifteen times, without pausing, in the direction of a large crowd of people.[4] And, the two complainants, who were *both* in the crowd of people, sustained gunshot wounds that resulted in their deaths. This evidence is sufficient to establish that appellant intentionally or knowingly caused the deaths of both of the complainants. *See Medina*, 7 S.W.3d at 637 ("Opening fire with an automatic rifle, at close range, on a group of people supports the conclusion that [defendant] acted with the specific intent to kill."); *Vuong v. State*, 830

4. In his brief, appellant concedes that "he was shooting into the crowd."

S.W.2d 929, 933–34 (Tex. Crim. App. 1992) ("[Defendant]'s use of a deadly weapon in a tavern filled with patrons supplies ample evidence for a rational jury to conclude beyond a reasonable doubt that [he] had the requisite intent to kill"); *Delacerda v. State*, 425 S.W.3d 367, 398 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("[E]vidence that [defendant] opened fire on the group of boys at relatively close range and shot at least five or six times . . . is evidence of intent to kill.").

In his brief, appellant also asserts that the State failed to establish that he intended to "solicit[], encourage[], direct[], aid[] or attempt[] to aid another person in shooting . . . Dorsey." *See* Tex. Penal Code Ann. § 7.02(a)(2) (Vernon 2011) ("A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. . . ."). While the trial court's charge to the jury in this case authorized conviction of appellant on a law-of-the-parties theory, the charge also authorized the jury to convict appellant as the sole actor in the murder of the two complainants. It is well-established that when a jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the theories submitted, the verdict will be upheld. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992). Having concluded that the evidence is sufficient to establish that appellant possessed the specific intent to kill both of the complainants regardless of any law-of-the-parties considerations, we need not address appellant's law-of-the-parties argument. *Cf. Cantu v.*

State, No. 13-04490-CR, 2006 WL 3953398, at *2 n.2 (Tex. App.—Corpus Christi Dec. 21, 2006, pet. ref'd) (mem. op., not designated for publication) ("Because we conclude the evidence was legally . . . sufficient to convict [defendant] as a party to capital murder and attempted capital murder, we need not address whether the evidence was sufficient to convict appellant as a primary actor.").

Appellant also asserts that he had "absolutely no motive . . . to kill Dorsey" and this should be considered in determining whether he possessed the requisite intent to commit the offense of capital murder. Notably though, the State is not required to establish motive in order to sustain a conviction of capital murder. *See Vuong*, 830 S.W.2d at 934; *Garcia v. State*, 495 S.W.2d 257, 259 (Tex. Crim. App. 1973).

Viewing all the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have reasonably found that appellant intentionally or knowingly caused the deaths of both of the complainants. Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction for the offense of capital murder.

We overrule appellant's first issue.

Lesser-Included Offense

In his second issue, appellant argues that the trial court erred in denying his "timely request for a jury instruction on the lesser-included offense of felony

murder" because "[f]elony murder is a lesser-included offense of capital murder" and "some evidence exist[ed] that would [have] permit[ted] [the] jury to rationally find that . . . he [was] guilty only of the lesser offense of [felony] murder."

We review a trial court's decision not to submit a lesser-included offense instruction for an abuse of discretion. *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005); *Threadgill v. State*, 146 S.W.3d 654, 665–66 (Tex. Crim. App. 2004). And courts use a two-step analysis to determine whether a defendant was entitled to a lesser-included offense instruction. *Hall v. State*, 225 S.W.3d 524, 528, 535–36 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993).

First, we determine whether the requested offense is a lesser-included offense by comparing the elements of the two offenses. *Hall*, 225 S.W.3d at 535–36; *Young v. State*, 428 S.W.3d 172, 175–76 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). Second, we determine whether some evidence exists in the record that would permit a rational jury to find that the defendant is guilty only of the lesser offense, if he is guilty at all. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d at 672–73; *Young*, 428 S.W.3d at 176. There must be some evidence from which a rational jury could acquit the defendant of the greater offense, while convicting him of the lesser-included offense. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). We review all evidence presented at trial to make this determination. *Rousseau*, 855 S.W.2d

at 673. And we may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore*, 969 S.W.2d at 8. Anything more than a scintilla of evidence entitles a defendant to an instruction on the lesser-included offense. *Hall*, 225 S.W.3d at 536.

Because the State concedes that felony murder is a lesser-included offense of capital murder, we need only determine whether the evidence would allow a rational jury to find that appellant was guilty only of the offense of felony murder. *Cf. Young*, 428 S.W.3d at 176; *see also Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999) ("[F]elony murder is a lesser included offense of capital murder."). Appellant asserts that the jury could have believed that he "intended to kill . . . Thompson (whom [he] arguably had some motive to kill)," but that "Dorsey was killed by indiscriminate shooting into the crowd" and appellant had "no intent to kill him."

A person commits the offense of felony murder if, during the commission of or attempt of a felony, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. Tex. Penal Code Ann. § 19.02(b)(3). The only difference between the offense of capital murder and the offense of felony murder is that capital murder requires *the specific intent to kill*, whereas felony murder involves an unintentional killing *See Santana v. State*, 714 S.W.2d 1, 9 (Tex. Crim. App. 1986); *Fuentes*, 991 S.W.2d at 272 ("The distinguishing element between felony murder and capital murder is the *intent to kill*." (emphasis added)); *Rousseau*, 855 S.W.2d at 673. Thus, in order for appellant to be entitled to an

instruction on the lesser-included offense of felony murder, "there must be some evidence that would permit a jury rationally to find" that appellant intended to commit a felony but did not intend to cause the death of Dorsey. *See Threadgill*, 146 S.W.3d at 665.

Here, contrary to appellant's assertion, the evidence at trial showed that he intentionally or knowingly caused the death of *both* of the complainants. As several witnesses testified at trial, a crowd of more than "100 people" gathered in the nightclub's parking lot after a rap concert had "let out." Jeresano explained that he "heard shots" fired and saw appellant standing with his arm "straight out," a "gun in his hand," and a "flame coming out of the gun." Appellant had a "determined look" on his face and fired approximately fifteen shots, "one [right] after another," without "paus[ing]." Appellant shot "at the crowd" and "towards the crowd" of people. Jeresano saw "bodies drop[]" to the ground, and he "witness[ed] three people die." Further, he saw appellant shoot in the "same" direction as where both of the complainants'"bodies were located" in the parking lot of the nightclub.

Such evidence establishes a "specific intent to kill," as required for the offense of capital murder. *See Medina*, 7 S.W.3d at 637; *Vuong*, 830 S.W.2d at 933–34; *Delacerda*, 425 S.W.3d at 398. And given this evidence, a rational jury could not have found that appellant was guilty of only the offense of felony murder and not the offense of capital murder. *See Mohammed v. State*, 127 S.W.3d 163, 166–67 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding trial court did not err in denying requested jury instruction

on lesser-included offense of felony murder where evidence showed defendant "committed an intentional killing"); *see also Salinas v. State*, 163 S.W.3d 734, 741–42 (Tex. Crim. App. 2005) (concluding "evidence did not raise the issue of felony murder" where it showed "intent to kill"); *Baker v. State*, No. 05-07-01209-CR, 2008 WL 5252451, at *15 (Tex. App.—Dallas Dec. 18, 2008, pet. ref'd) (mem. op., not designated for publication) (determining no evidence defendant "could have been found guilty of only felony murder and not of capital murder" where record showed he "intentionally shot and killed both victims").

Accordingly, we hold that the trial court did not err in denying appellant's request for a jury instruction on the lesser-included offense of felony murder.

We overrule appellant's second issue.

Suppression of Evidence

In his third issue, appellant argues that the trial court erred in denying his motion to suppress two photographs, State's Exhibits 55 and 56, obtained from his cellular telephone because the telephone was seized from "a third person's residence" "without a warrant" and "not incident to his arrest."

We review a trial court's denial of a motion to suppress evidence under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion and its application of the law to the

facts de novo. *Id.* At the suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility, and it may choose to believe or disbelieve all or any part of the witnesses' testimony. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). When, as here, a trial judge does not make explicit findings of fact, we review the evidence in a light most favorable to the trial court's ruling. *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). Almost total deference should be given to a trial court's implied findings, especially those based on an evaluation of witness credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48.

Prior to trial, appellant moved to suppress "all evidence SEIZED from [his] cell phone that was UNLAWFULLY SEIZED from the home of [a third person], where [he] was arrested." The trial court denied appellant's motion, and during trial, it admitted into evidence, over appellant's objection, State's Exhibits 55 and 56, which were obtained from appellant's cellular telephone after HPD officers had secured a search warrant. Appellant made clear at the hearing on his suppression-motion that his complaint concerned the initial seizure of his cellular telephone by HPD officers from a third-person's residence, rather than the actual search of his telephone's contents, which occurred after they had obtained a search warrant.

Appendix K

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Tex. Const. art. I, § 9; *see State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013). A search or seizure that is conducted without a warrant issued upon probable cause is per se unreasonable subject to only a few specifically established and well-delineated exceptions. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000). Here, it is undisputed that HPD officers did not obtain possession of appellant's cellular telephone through a validly issued search warrant, instead it was seized, along with appellant's clothing, by officers who were executing an arrest warrant for appellant at a third-person's residence. Thus, the State had the burden to show that the seizure of appellant's cellular telephone fell within one of the exceptions to the warrant requirement. *See State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998).

Assuming, without deciding, that the warrantless seizure of appellant's cellular telephone by HPD officers violated the Fourth Amendment and the trial court erred in denying his motion to suppress State's Exhibits 55 and 56, we must still determine whether the trial court's error was harmless.

We review the harm resulting from a trial court's erroneous denial of a motion to suppress and subsequent admission of evidence obtained in violation of the Fourth

Amendment under the constitutional harmless-error standard. TEX. R. APP. P. 44.2(a); *see Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (mandating application of Rule 44.2(a) to harm analysis of trial court's erroneous denial of motion to suppress under Fourth Amendment). This standard requires us to reverse the trial court's judgment of conviction unless we determine "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a); *see also Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008). In applying the harmless-error test, the primary question is whether there is a "reasonable possibility" that the error might have contributed to the conviction. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (internal quotations omitted).

We are directed that our harmless error analysis should not focus on the propriety of the outcome of the trial. Instead, we must calculate, as much as possible, the probable impact of the evidence on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). We "should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment,'" and if applicable, we may consider the nature of the error, the extent that it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting TEX. R. APP. P. 44.2(a)). This requires us to evaluate the entire

record in a neutral, impartial, and even-handed manner and not "in the light most favorable to the prosecution." *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989) (internal quotations omitted), *disagreed with in part on other grounds by Snowden*, 353 S.W.3d at 821–22; *Daniels v. State*, 25 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Error does not contribute to the conviction or punishment if the jury's verdict would have been the same even if the erroneous evidence had not been admitted. *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007).

Initially, we note that there is ample evidence of appellant's guilt in the record, as detailed in our discussion of the background facts and appellant's legal-sufficiency challenge. During Officer Brook's testimony, the trial court admitted into evidence the two photographs, State's Exhibits 55 and 56, obtained from appellant's cellular telephone and about which he now complains. State's Exhibit 55 is a photograph of a group of eight individuals at an undisclosed outdoor location. State's Exhibit 56 is a photograph of another group of eight individuals at an undisclosed indoor location. Brooks testified that the photographs were "recovered from [appellant's] cell phone" and were taken "an hour after the shooting."

Officer Cegielski also testified about the photographs, similarly noting that State's Exhibit 56 was "recovered" from appellant's cellular telephone and taken "[w]ithin an hour or so after the shooting." He identified seven of the eight individuals pictured in State's Exhibit 56 as Daryl Brown, Dexter Brown, Anthony Jones, Devonte Bennett,

Deveon Griffin, Tarah Bradley, and Patrick Kennedy.[5] Cegielski could not identify the eighth individual, a female, and did not identify appellant as any of the individuals pictured in State's Exhibit 56. In regard to State's Exhibit 55, Cegielski testified that it was also taken "about an hour or so after the shooting." He noted that appellant appeared in the photograph along with seven other individuals, including Daryl Brown, Dexter Brown, Anthony Jones, Devonte Bennett, and Deveon Griffin.[6]

Officer Cegielski also specifically testified about an individual who was wearing "a green shirt with a white collar" in State's Exhibit 55. According to Cegielski, appellant, in his statement to HPD officers, indicated that he was wearing "a green shirt with a white collar" on the night of the shooting. However, Cegielski explained that the individual wearing "a green shirt with a white collar" in State's Exhibit 55 is Dexter Brown, not appellant. Cegielski also explained that in State's Exhibit 55, appellant is seen wearing a "white shirt with . . . red pants."

Appellant argues that the trial court's denial of his motion to suppress "resulted in constitutional error"

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5. We note that there are discrepancies in the record regarding the correct spelling of the names of these individuals.

6. We note that contrary to Officer Cegielski's testimony, Bennett, before he refused to continue testifying, initially testified at trial that he was pictured in State's Exhibit 56, but not in State's Exhibit 55. And he testified that appellant was also not pictured in State's Exhibit 55.

which harmed him because the photographs "provided the State evidence which linked [him] . . . to other persons the police considered [as] suspects" and "cast doubt on [his] credibility in the story he initially gave to police." He asserts that State's Exhibits 55 and 56 "link[]" him to Bennett, who refused to testify at trial and who, as referenced by the State in its opening statement, provided a "big break" in HPD's investigation. He also asserts that the photographs link him to Dexter Brown, who, as testified to by Officer Cegielski, was an additional suspected shooter. He further complains that the State used the photographs to "impeach [his] statement to the police" and show that he "lied about what he was wearing" on the night of the shooting.[7]

In regard to appellant's assertions that State's Exhibits 55 and 56 "link[]" him to Bennett and Dexter Brown, we note that, according to Officer Cegielski, appellant is not one of the individuals pictured in State's Exhibit 56 with Bennett and Dexter Brown. Further, before refusing to continue his testimony, Bennett had already testified that he and appellant are not pictured in State's Exhibit 55 and he did not know appellant. And although Officer Cegielski did testify that he "believed that Dexter Brown was one of the . . . shooters" at the nightclub on June 20, 2012, he also testified that Jeresano did not identify Dexter Brown as the person he saw with a gun. And Jeresano similarly confirmed that it was

7. In his statement to HPD officers, which the trial court admitted into evidence, appellant stated that on the night of the shooting, he was wearing a "green . . . white collar shirt," "blue jeans," and "some white Chuck Taylors."

appellant that he saw with his arm "straight out" and a "gun in his hand," "shooting towards the crowd" of people.

Further, in regard to State's Exhibit 55 in which, according to Officer Cegielski, appellant is pictured, appellant questioned Cegielski about the exhibit and elicited testimony from him confirming that both Bennett and Dexter Brown appear in the photograph with appellant. Cegielski also confirmed, in response to appellant's questions, that in State's Exhibit 55, it is Dexter Brown, not appellant, who is wearing the "green shirt" "with a white [c]ollar." In other words, it is appellant's questioning of Cegielski that "linked" him to Bennett and Dexter Brown and showed that he "'lied [to HPD officers] about what he was wearing'" on the night of the shooting. *See Leday v. State*, 983 S.W.2d 713, 717–18 (Tex. Crim. App. 1995).

Finally, to the extent that appellant's complaint centers on the State's assertion, in its opening statement, that Bennett was a "friend[]" of appellant, who provided a "big break" in HPD's investigation,[8] we note that an opening statement is not evidence. *Powell v. State*, 63 S.W.3d

8. In regard to Bennett, the State, during its opening statement, asserted as follows:

> Following [his] talk with [Jeresano], Sergeant Cegielski then file[d] charges on [appellant]. He continue[d] to work the case, continue[d] to follow up on leads, continue[d] to look for information, for witnesses and three months later, the last big break in the case. Man named Devonte Bennett, a young man who knows the defendant, was friends with the defendant.

435, 440 (Tex. Crim. App. 2001) (Johnson, J., concurring); *Lopez v. State*, 288 S.W.3d 148, 171 (Tex. App.—Corpus Christi 2009, pet. ref'd); *Hitt v. State*, 53 S.W.3d 697, 710 (Tex. App.—Austin 2001, pet. ref'd). And the trial court, in its charge, instructed the jury that "[d]uring [its] deliberations in th[e] case, [it] must not consider, discuss, nor relate any matters not in evidence before [it]." *See Colburn v. State*, 966 S.W.2d 511, 510 (Tex. Crim. App. 1998) ("[W]e generally presume the jury follow[ed] the trial court's instructions. . . ."). Further, appellant did not object to any portion of the State's opening statement, and when Bennett actually testified at trial, he did not state that he saw appellant "holding a gun" or "shooting" or that he even saw appellant on June 20, 2012. In fact, he denied knowing appellant and stated that he had never seen him before.

Accordingly, we conclude beyond a reasonable doubt that the trial court's error, if any, in not suppressing the two photographs, State's Exhibits 55 and 56, obtained from appellant's cellular telephone, was harmless. *See* Tex. R. App. P. 44.2(a).

We overrule appellant's third issue.

> Devonte Bennett c[a]me[] forward and sa[id], Yeah, I know him; and I saw him there that night. I saw him out in the parking lot before the shooting; and Devonte sa[id], I was coming out of that door with that same crowd and I hear[d] shots and I look[ed] up and there he [was], holding a gun, shooting that gun, shooting those people.

Appendix K

Closing Argument

In his fourth issue, appellant argues that the trial court erred in overruling his objection to the portion of the State's closing argument in which it stated that "a witness[,] who [did] not testify] at trial," identified appellant "as someone involved in the shooting" because the argument "interjected new and harmful facts into the proceeding[]" and was outside the scope of the record.

We review a trial court's ruling on an objection to a jury argument for an abuse of discretion. *See Cole v. State*, 194 S.W.3d 538, 546 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Proper jury argument is generally limited to: (1) summation of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Wesbrook*, 29 S.W.3d at 115; *Swarb v. State*, 125 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). To determine whether an argument properly falls within one of the above categories, we consider the argument in light of the record as a whole. *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

A trial court has broad discretion in controlling the scope of closing argument. *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. App. El Paso 2004, no pet.). And the State, afforded wide latitude in its jury arguments, may draw all reasonable, fair, and legitimate inferences from the evidence. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988).

Appendix K

Appellant specifically complains about the following statement made by the State during its closing argument:

> But then [HPD officers] got – they got a break. Dedrick Foster came forward, and he gave this defendant's name as someone involved in the shooting.

At trial, appellant objected, arguing that this statement constituted an "improper argument" because it was "outside the record" and "there[] [was] no evidence of that in the record." The trial court overruled appellant's objection.

To preserve a complaint for appellate review, a party must make a timely and specific objection. TEX. R. APP. P. 33.1(a)(1)(A). A party must also object each time the objectionable argument is made or his complaint is waived. *Ethington v. State*, 819 S.W.2d 854, 858–59 (Tex. Crim. App. 1991); *Wilson v. State*, 179 S.W.3d 240, 249 (Tex. App.—Texarkana 2005, no pet.).

Here, although appellant objected the first time that the State made the complained-of statement about Foster during its closing argument, he did not object when the State continued its argument and subsequently reiterated to the jury that HPD officers "got [appellant's] name from [Foster]" and "they also got the name of two other individuals that were involved in the shooting." Nor did appellant object when the State also argued that HPD officers "talked to some other people, and, you know,

Dedrick Foster isn't here because he died. He is dead. He is not able to testify because he is dead." Further, in its opening statement, the State explained, without objection:

> The case then catches its first break. A man comes forward and says he has information, and based on that information the defendant is developed as a suspect. Now, that man that came forward, . . . Foster, you won't hear from him. He was killed two weeks after talking to the police.

Because appellant did not object each time that the State made the same or a similar argument regarding Foster, we hold that he has not preserved his complaint for appellate review.[9] *See Wilson*, 179 S.W.3d at 249 (defendant "did not object to [an] argument, which [was] very similar to the one complained-of" on appeal); *Dickerson v. State*, 866 S.W.2d 696, 699 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) ("Because [defendant] did not continue to object or make a running objection, he did not preserve error. . . .").

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9. In a footnote in his brief, appellant also complains that the State, in its opening statement, "informed the jury" "that a witness who did not testify [at trial] had told police that . . . [a]ppellant was the shooter." Appellant, however, did not object at trial to the complained-of statement and has failed to adequately brief his complaint on appeal. *See* Tex. R. App. P. 33.1(a)(1)(A); *id.* 38.1(i). Accordingly, we hold that this complaint is not preserved for our review.

Appendix K

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).

APPENDIX L — 174TH DISTRICT COURT JUDGMENT (JUNE 20, 2014)

IN THE 174TH DISTRICT COURT
HARRIS COUNTY, TEXAS

[SEAL] CASE NO. 135318101010
INCIDENT NO./TRN: 9167869262A001

THE STATE OF TEXAS

v.

UVUKANSI, FEANYICHI EZEKWESI

STATE ID NO.: TX06663916

JUDGMENT OF CONVICTION BY JURY — NON-DEATH CAPITAL

Judge Presiding:	Date Judgement Entered:
HON. FRANK PRICE	**6/20/2014**
Attorney for State:	Attorney for Defendant:
GRETCHEN FLADER	**VIVIAN KING**
Offense for which Defendant Convicted:	
CAPITAL MURDER	
Charging Instrument	Statutes for Offense:
INDICTMENT	**N/A**

Appendix L

Date of Offense:
6/20/2012

Degree of Offense:	Plea to Offense:
CAPITAL FELONY	**NOT GUILTY**

Verdict of Jury:	Findings on Deadly Weapon:
GUILTY	**YES, A FIREARM**

Plea to 1st Enhancement Paragraph: ~~N/A~~ **ABANDONED**	Plea to 2nd Enhancement/ Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **N/A**	Findings on 2nd Enhancement/ Habitual Paragraph: **N/A**

Punished Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
COURT	**6/20/2014**	**6/20/2014**

Punishment and Place of Confinement: **LIFE WITHOUT PAROLE, INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN **CONCURRENTLY.**

Appendix L

Fine:	Court Costs:	Restitution	Restitution Payable to:
$N/A	$ 529.00	**$N/A**	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was N/A.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:	From 7/3/2012 to 6/20/2014	From to
	From to	From to
	From to	From to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A DAYS NOTES: **N/A**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris** County, Texas. The State appeared by her District Attorney.

Appendix L

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.
☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **Ordered** it entered upon the minutes of the Court.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

Appendix L

The Court **Orders** Defendant punished as indicated above. The Court **Orders** Defendant to pay all fines, court costs, and restitution as indicated above.

The Court **Orders** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the Director, Institutional Division, TDCJ. The Court **Orders** Defendant to be confined for the period and in the manner indicated above. The Court **Orders** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **Orders** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

The Court **Orders** Defendant's sentence **executed.**

The Court **Orders** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Deadly Weapon.

The Court FINDS Defendant used or exhibited a deadly weapon, namely, A FIREARM, during the commission of a felony offense or during immediate flight therefrom or was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. CODE CRIM. PROC. art. 42.12 §3g.

Appendix L

Signed and entered on June 20, 2014

X Frank C. Price
HONORABLE FRANK PRICE
JUDGE PRESIDING

[Right Thumbprint Omitted]

Ntc Appeal Filed: JUN 20 2014 Mandate Rec'd: _____

After Mandate Received, Sentence to Begin Date is: _____

Def. Received on _____ at _____ AM / PM

By: _____, Deputy Sheriff of Harris County

Clerk: J. WYCOFF