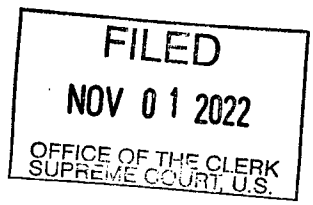
No. 22-5994 ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN LEON LUCIEN — PETITIONER
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kevin Leon Lucien #2211511
(Your Name)

12071 FM 3522
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Was trial counsel ineffective for failing to investigate and present evidence of voluntary intoxication as mitigating evidence at punishment?

2. Was trial counsel ineffective for failing to investigate and present evidence of Petitioner's troubled childhood and mental health issues as mitigating evidence at punishment?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Lucien v. State, No. 10-18-00241-CR, 2020 Tex.App. LEXIS 2079 (Tex.App.-Waco, Mar. 11, 2020)

Ex parte Kevin Leop Lucien; Writ No. WR-93,979-01
Tr. Ct. No. 16-02396-CRF-361-A

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State Cases

Rules & Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Tenth Court of Appeals court appears at Appendix A to the petition and is

[X] reported at 2020 Tex.App. LEXIS 2079(Tex.App.-Waco 2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 8/11/2022. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel at trial.

STATEMENT OF THE CASE

On November 15, 2015, Markish "Burton", the mother of EL, left EL and her twin brother DL in the care of Petitioner, who is their father. While babysitting EL and DL, who were both only three-months-old at the time, Petitioner, whom admittedly had an addiction to K2, which is synthetic marijuana, got high. EL suffered serious bodily injury.

When Burton returned, she noticed that EL was injured and questioned Petitioner about EL's condition. Petitioner made up fictitious accounts of how EL came to be injured. Accompanied by Petitioner, Burton took EL to the Emergency Room at St. Joseph's Hospital.

EL had bruising to the left and right side of the forehead and an abrasion to the bridge of her nose. (3 RR 34) An abrasion to the neck. (3 RR 35) A CAT scan of the brain and neck showed small skull fractures and a small brain bleed. Id.

EL was transported to Dell Children's Medical Center in Austin, Texas. (3 RR 121) While there it was determined that she had retinal hemorrhages in her right eye. (3 RR 147) And pre-retinal hemorrhages caused by trauma to EL's left eye. Id. EL had two acute rib fractures. (3 RR 152) Also, EL had a Grade IV lacerated liver, caused by blunt force trauma to the abdomen. (3 RR 158)

At the hospital, Petitioner told Lindsey "Maly", the emergency room charge nurse, that the baby was lying on a pillow and had rolled off the bed onto the floor. (3 RR 31) That 'accident' did not match the injuries suffered by EL.

Petitioner admitted that he was home with the child, and Burton was not there. (3 RR 32)

Petitioner initially told Detective Matt "Miller", who responded to the child abuse call, that EL fell off the bed while he was tending to DL, and hit the floor and potetially hit the crib that was in the room. (3 RR 90)

Miller told Petitioner that he had spoken with doctors and believed that Petitioner was not telling him the truth. (3 RR 93) Miller told Petitioner that he needed to tell the truth so that the doctors could treat EL. (3 RR 94) Petitioner replied that he was scared. Id. Petitioner stated that accidents ha happened out of the blue, then asked if he was going to jail. Id. Petitioner said that he didn't want to be a bad father. Id.

Petitioner then stated that EL was on a little bouncing chair on the table, he came in from the balcony dancing and hit the rocker with his elbow, and it tumbled in the air and hit the floor. (3 RR 95)

Petitioner failed to tell anyone that at the time that EL was injured he was under the influence from smoking K2, for fear that he would be in trouble for getting high when he was supposed to be babysitting.

Eventually, on March 12, 2016, Petitioner was arrested and charged with injury to a child-serious bodily injury.

After Petitioner was arrested, on August 9, 2016, an evaluation for competence to stand trial was performed on him by Dr. Macy Alice "Conroy", of Sam Houston State University. A copy of Conroy's written report was attached in the state

habeas proceedings. (See Appx. C)

There is evidence in Conroy's written report that Petitioner was taken from his biological family at age 3, and grew up in foster homes. He was physically abused by at least one foster motherr He attended special education classes all through school, and was kicked out of the house by his foster parents and made homeless. Also he had a history of K2 and marijuana use. (Appx. C, pg. 2) There was evidence in this report that Petitioner was diagnosed with bi-polar disorder and ADHD when he was young, and had been prescribed Risperdal, Abilify, as well as Sertraline, and had attended counseling. And that available records indicated that Petitioner had a history of using these substances, and that Conroy's diagnosis was Cannabis Use Disorder. (Appx. C, pg. 3)

There was also evidence in EL's medical reports that Burton didn't know if Petitioner had a history of mental illness, 'He is the way he is all the time.' Burton also reported that Petitioner used marijuana. (Appx. D, pg. 25)

On January 17, 2018, the State notified Donald "Andreski", counsel, of its intent to use extraneous conduct against Petitioner during his trial. Particularly, Petitioner's repeated use of illegal drugs, but not limited to marijuana, and K2. (Appx. E, pg. 2 #7)

During Petitioner's trial the State presented numerous witnesses and an abundance of evidence supporting its theory that EL had suffered serious bodily injury, and at the time, Petitioner was the sole caretaker.

In short, the evidence of Petitioner's guilt was overwhelming. Petitioner was convicted of the offense for which he was tried.

During the guilt/innocence phase or punishment, Andreski did not present a single witness and Petitioner, who has no prior felony convictions, was sentenced to life in prison, the absolute maximum penalty allowed under the law. (4 RR 96)

On January 27, 2022, Petitioner filed an application for a writ of habeas corpus alleging that he received ineffective assistance of counsel where counsel: 1) failed to investigate and present evidence of Petitioner's voluntary intoxication as mitigating evidence at trial; and 2) failed to investigate and discover evidence of Petitioner's troubled background and mental health issues for presentation as mitigating evidence during punishment.

The habeas court appointed Lane D. "Thibodeaux" to represent Petitioner during his state collateral proceedings. Andreski was ordered by the court to respond to Petitioner's allegations by affidavit.

Andreski answered that he was aware that Petitioner had been determined competent to stand trial and sane. Appx. F, pg. 2) Additionally, he requested funds to retain Dr. Don "Schaffer" as an expert to assist him in investigating Petitioner's case. Id. Upon Schaffer's review of the evidence in the case, he said EL's injuries could not have been caused in the manner described by Petitioner. Specifically, Shaffer told Andreski that, while there was a possibility (albeit

"unlikely") that EL's lacerated liver could have occurred from an accidental fall, her head injuries would have required separate impacts. Schaffer said that, in his opinion, Petitioner was lying about how EL was injured. Id.

Andreski points out how Petitioner told him that he had been playing with EL, throwing her up in the air, and that he missed catching her and she fell onto the coffee table. (Appx. F, pg. 4) And that this story was vastly different than the stories that he had told to either police or Conroy. Id.

When Andreski asked Petitioner why his story was different, Petitioner told him that he was scared. (Appx. F, pg 5)

Andreski argued that Petitioner would not have been entitled to an instruction on temporary insanity due to voluntary intoxication. (Appx. F, pg 5) Andreski based this belief upon Ex parte Martinez, 195 S.W 3d 713, 722 (Tex.Crim. App. 2006)(saying, "To be entitled to the mitigating instruction based on voluntary intoxication, it must be shown that the convicted person was unable to understand the wrongness of his conduct."). (Appx. F, pg 6)

In support of his position,Andreski calls attention to the fact that EL suffered a fractured arm previously, also while in Petitioner's care. (Appx F, pgs 7-8)

The trial strategy that Andreski had prepared was for Petitioner to testify, and to seek a conviction on a lesser-offense of reckless or negligent injury to a child. (Appx. F, pg 9) Telling the jury that Petitioner was going to get up on the witness stand and tell them what really happened that day.

He's the only person that was there. And what he would tell them would be consistent with the injuries that the child received and consistent with the doctor's testimony. (3 RR 25-26). Id.

Andreski then goes on to assert that on a break during the State's case-in-chief, Petitioner told him that he did what he is accused of, and wanted to testify and ask for mercy. Now, Andreski advised him against it. (Appx. F, pg 9)

The following morning, July 18th, Petitioner showed Andreski a written statement which he said he intended to read to the jury where Petitioner now claimed that he had accidentally dropped EL down some stairs at his apartment. (Appx F, pgs 9-10)] Petitioner wanted to tell this story because it was "more believable" than his previous claims about how EL was hurt. (Appx. F, pg 10)

As a result, Andreski hand-wrote a note in his file to document what happened. Additionally, he attempted to withdraw from his representation of Petitioner. The trial court denied that request. (Appx. F,pg 10)

Petitioner ended up changing his mind on testifying and Andreski immediately rested on his behalf. (Appx. F, pg 11) According to Andreski, Petitioner's actions cut short his case during the guilt phase of trial, and also impacted the trial strategy with respect to the punishment phase of trial. '[O]nce [Petitioner] made clear that he intended to lie on the witness stand, it effectively eliminated our punishment case as well.' (Appx. F, pgs 11-12)

Andreski did not present evidence of voluntary intoxication to mitigate Petitioner's moral responsibility because Petitioner never claimed that he had been intoxicated at the time of EL's injuries, and he consistently told him that EL was accidentally injured during play. (Appx. F, pg 12)

Regarding the second issue, Andreski blames his failure to present mitigating evidence during punishment on Petitioner's unwillingness to share information with him before trial, and his actions during trial when Petitioner indicated that he would lie on the witness stand. (Appx. F, pg 12)

Andreski met with Petitioner on May 30, 2018, to begin preparing for his July 16th trial. They discussed Petitioner's background. (Appx. F, pg 12) Petitioner told him that he had been bounded around homes in the foster care system, and had only completed the 8th grade. **Id.** Petitioner only provided the names of his final foster family. **Id.**

Andreski made attempts to contact Petitioner's adoptive family. He informed Petitioner that they were not returning his calls. (Appx. F, pg 13) On July 15, 2018, a day before Petitioner's trial was set to begin, Andreski located accounts for Petitioner's foster family members in a last ditch effort to make contact with them. (Appx. F, pgs 13-14)

Petitioner did tell Andreski that he had been treated for mental health issues, but could not give him more specific details. Petitioner believed that his adoptive mother might provide information about his mental health treatments. (Appx. F, pg 14) Because Petitioner's family would not respond, and

because he had no friends or coworkers for Andreski to call, Andreski alleges that he had no punishment witnesses to call to the stand. Id.

Andreski agreed that the information that Petitioner provided him was potentially mitigating. (Appx. F, pg 14) Andreski felt that Petitioner could best discuss his upbringing and life circumstances. (Appx. F, pgs 14-15) However, Andreski concluded that he could not sponsor Petitioner as a witness. 'Consequently, I no longer had an available witness who could testify to [Petitioner's] difficult childhood and circumstances.' (Appx. F, pg 15)

Andreski advised Petitioner not to testify in his punishment phase. Petitioner followed that advise. (Appx. F, pg 15)

The habeas court made extensive findings of fact and conclusions of law. (Appx. G) The habeas court found Andrseki's explanations to be credible, and determined that he had not provided ineffective assistance to Petitioner, and recommended that relief be denied.

On August 17, 2022, the Court of Criminal Appeals entered an order denying Petitioner habeas corpus relief. (Appx. B)

I. ARGUMENT & AUTHORITIES ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

1. Was trial counsel ineffective for failing to investigate and present evidence of voluntary intoxication as mitigating evidence at punishment?

This claim was thoroughly briefed in the state court. (St. Hb. Br. #1) On November 15, 2015, Petitioner was babysitting EL and her twin brother DL. Petitioner, an admitted K2 and marijuana user, began smoking K2, and continued doing so for the duration of the day. While under the influence of the drug, Petitioner caused serious bodily injury to EL. Fearful that he would end up in trouble if he admitted that he had been using illegal drugs while caring for the infants, and allowing EL to sustain injuries that he could not explain, Petitioner decided to fabricate a story of an accidental fall.

2. Was trial counsel ineffective for failing to investigate and present evidence of Petitioner's troubled childhood and mental health issues as mitigating evidence at punishment?

This claim was thoroughly briefed in the state court. (St. Hb. Br. #2) At approximately three-years-old, Petitioner and his younger brother were abandoned by his mother. As a result, he grew up in foster care, repeatedly being placed then removed from foster homes, where he suffered physical abuse at the hands of at least one of his foster mothers. Petitioner was in special education classes throghout his school years, and had been diagnosed, and prescribed medications for bi-polar disorder and ADHD. Later on, Petitioner was kicked out of his foster family's home, and was homeless. All of this information was contained in the written report from Petitioner competency examination, and was thus available to Andreski, yet Andreski failed to conduct his own investigation independently.

A. The Standard Of Review For Effectiveness Of Counsel.

Petitioner had a right to effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV ; Powell v. Alabama, 287 U.S. 45, 71 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759, 771 (1970).

In Strickland v. Washington, 466 U.S. 668 (1984), this Court addressed the constitutional standard to determine

whether counsel rendered reasonably effective assistance. The defendant must first show that counsel's performance was deficient under prevailing professional norms. Id. at 687-88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. Id. at 687.

The defendant must identify specific acts or omissions that are alleged not to have been the result of reasonable professional judgment. Strickland, 466 U.S. at 690. The reviewing court must then determine whether, in light of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. Ultimately, the defendant must show "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. Strickland requires a cumulative analysis. White v. Thaler, 610 F.3d 890, 912 (5th Cir. 2010).

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted. "The result of a proceeding can be rendered, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland, 466 U.S. at 694. The issue is whether he received a fair trial that produced a verdict worthy of confidence. Cf. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Because both of Petitioner's claims are couched in a counsels

duty to investigate, Petitioner will consolidate his legal arguments for the purpose of efficiency.

B. The Clearly Established Law On The Duty To Investigate.

When assessing the reasonableness of an attorney's investigation, a reviewing court must consider the quantum of evidence already known to counsel and whether the known evidence would lead a reasonable attorney to investigate further. Ex parte Martinez, 195 S.W.3d 713, 721 (Tex.Crim.App. 2006); citing Wiggins v. Smith, 539 U.S. 510, 527 (2003)(holding that counsel had available to him both the presentence investigation report prepared by the Division of Parole and Probation, as well as more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation should have led counsel to investigate further).

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. A particular decision not to investigate must be directly assessed for reasonableness in light of all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 522-23 (quoting Strickland, 466 U.S. at 690-91).

II. COUNSEL'S DEFICIENT PERFORMANCE ON THESE CLAIMS

A. The Duty Of Counsel To Investigate.

It is well-settled in Texas that counsel has an absolute

duty to "conduct a prompt investigation of the circumstances of the case and explore all avenues likely to lead to facts relevant to the merits of the case." Ex parte Briggs, 187 S.W.3d 458, 467 (Tex.Crim.App. 2005)(counsel's performance held deficient where he failed to fully investigate baby's medical records for economic reasons).

B. The Evidence Of Drug Use In Counsel's Knowledge.

From the very outset of the investigation into this incident, evidence of Petitioner's drug use surfaced repeatedly. From Burton's admissions to doctors that Petitioner was a marijuana user. (Appx. D, pg 25) To Petitioner's admissions that he was a marijuana and K2 user in the competency evaluation, and the doctor's asserting that medical records also indicated that Petitioner had a history of using these substances. (Appx. C, pgs 2 & 3) To the State's notice of its intent to use Petitioner's marijuana and K2 use as extraneous acts of drug use. (Appx. E, pg 2 #7)

Petitioner asserts that this evidence would have prompted reasonably competent counsel to investigate whether Petitioner was using K2 on the date of November 15, 2015, and exactly what the possible effects of K2 are on persons who are high on it. i.e., whether its intoxicating properties would in fact cause a person not to know that his conduct was wrong, or that he was incapable of conforming his conduct to the requirements of the law he violated.

C. The Evidence Of Petitioner's Troubled Background Within Counsel's Knowledge.

By his own admission Andreski acknowledges that he visited with Petitioner in the Brazos County Jail to begin preparing for the trial set for July, 16, 2018, which was only a month-and-a-half away. (Appx. F, pg 12) Andreski admits that Petitioner told him that he had been bounced around homes in the foster care system, and had only completed the eighth grade in school. Id. Andreski admits that Petitioner had told him that he had been treated for mental health issues, namely, bi-polar disorder, although Petitioner could not give him more details as to where, when, or who had treated him. (Appx. F, pg 14) There was also evidence that Petitioner had been abused by a foster parent, had been diagnosed with ADHD as well, and had been placed on Risperdal and Abilify (antipsychotic medications), as well as Sertraline (an antidepressant).

D. The Deficiency Of Andreski's Investigation.

Per Andreski's affidavit, regarding Petitioner's voluntary intoxication claim, '[Petitioner] also never claimed to be intoxicated at the time.' (Appx. F, pg 5) Petitioner does not believe that the issue is whether he volunteered such information at the time. Petitioner believes that the issue is whether, based upon the information known to Andreski, should it have led Andreski to investigate whether Petitioner had been under the influence of K2 at the time, and to investigate whether the hallucinatory effects of being high on K2 could in

fact cause an individual to hurt a baby and not realize what he was doing was wrong at the time, or whether it could cause an individual to be incapable of stopping himself from hurting an infant or person. Andreski absolutely never consulted with Petitioner and informed him that if he had been under the influence at the time of this incident it would have been better to be honest and say so, rather than continuing to fabricate stories of hao EL came to be injured which did not match up with the evidence.

Per Andreski's affidavit, regarding the failure to investigate and discover mitigating evidence, Petitioner did tell him about being his being bounced from foster home to foster home in the foster care system, and completing only eighth grade. (Appx. F, pg 12) Petitioner also told him that he'd been treated for mental health issues, even though Petitioner was unable to give him details about where, when, or who had treated him. (Appx. F, pg 14) Andreski said that Petitioner told him that his adoptive mother was the person who might provide information about his mental health treatments. Id. According to Andreski, he attempted to call Petitioner's adoptive mother, but because Petitioner's adoptive mother did not call him back, he had no information on where he could subpoena information on Petitioner's mental health treatment and diagnosis. Id.

This was the full extent of Andreski's investigation, and this is precisely the kind of investigation that the courts forbid. Regardless of complications in a given case, counsel is

charged with making an independent investigation of the facts of the case, eschewing wholesale reliance in the veracity of his client's version of the facts. Ex parte Duffy, 607 S.W.2d 507, 517 (Tex.Crim.App. 1980); citing Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979), aff'd on other grounds, 445 U.S. 263 (1980)(counsel must make an independent examination of the facts, circumstances, pleadings and laws involved).

E. The Strategic Decisions Of Andreski Were NOT Reasonable.

Apparently, Andreski's defensive strategy was to put Petitioner on the stand as the sole defensive witness during guilt/innocence, and during punishment, premised on the defensive theory that EL's injuries were caused when Petitioner, while playing with her and tossing her up in the air, accidentally dropped her and she fell partly onto the coffee table. (Appx. F, pg 4) But during break, Petitioner told him that he had done what he was accused of. (Appx. F, pg 9) Petitioner then stated that he wanted to testify and ask for mercy. Id. Andreski advised him against it. Id. Petitioner showed Andreski a written statement propounding that he wanted to testify that he had dropped EL down some stairs, because it was more believable. (Appx. F, pg 10) Andreski responded by advising Petitioner that he could not lie on the stand, but Petitioner persisted that he wanted to testify to this new story anyway. Id. To avoid an ethical conflict of knowingly presenting false testimony, Andreski attempted to withdraw his representation. Id. Ultimately, according to Andreski, once

Petitioner made it clear that he intended to lie on the witness stand, it effectively eliminated the punishment case as well. (Appx. F, pgs 11-12)

However, Andreski has already admitted that he sought Dr. Schaffer as an expert because the case involved extensive medical evidence pertaining to EL's injuries. (Appx. F, pg 2) And Dr. Schaffer had already made it clear that while EL's lacerated liver could have occurred from an accidental fall, her head injuries would have required separate impacts. Id. 'Dr. Schaffer said that in his opinion, [Petitioner] was lying about how EL was injured.' Id.

Thus, prior to trial, Andreski knew from his own expert that Petitioner's explanations for how EL was injured were false, and he would therefore be knowingly presenting false testimony by allowing Petitioner to testify to any of these alleged versions of fact. Not to mention that the State's experts would have shredded Petitioner's story to bits if he had attempted to tell it on the stand.

There was absolutely nothing reasonable about this alleged strategy,.

F. The Decisions Of Andreski Are NOT Entitled To Deference.

Based on Andreski's affidavit, his entire investigation consisted of speaking with Petitioner, and making a feeble attempt to contact his adoptive family. Andreski does not even allege to have made any attempt to contact Child Protective Services ("CPS"), to see if they had any records from

Petitioner's time in foster care. Nor did Andreski allege that he made any attempt to contact the Department of Human Services ("DHS"), when Petitioner was unable to give him details of where, when or who had treated him for his mental health issues, even though Dr. Conroy put it in her report that Petitioner was likely diagnosed withbi-polar disorder and ADHD through the DHS. (Appx. C, pg 3) Neither does Andreski allege that this failure to investigate was a strategic decision, and therefore, Andreski's decision not to investigate is not entitled to any deference.

Briggs, 187 S.W.3d at 467 (counsel held ineffective where there is no suggestion that trial counsel declined to fully investigate Daniel's medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive); Wiggins, 539 U.S. at 534 (trial counsel constitutionally ineffective when "incomplete investigation was the result of inattention, not reasoned strategic judgment.").

Likewise, where Andreski failed to allege that his decision not to investigate was a strategic decision, his decision is not entitled to deference.

G. The Ineffectiveness Of Counsel On The Voluntary Intoxication Issue.

With numerous references to Petitioner's drug use in the documents that were in Andreski's possession, Andreski's failure to investigate and discover that Petitioner was under the influence of K2 at the time of the offense was not reasonable,

and deprived Petitioner of his right to a fair trial. Ex parte Lilly, 656 S.W.2d 490, 493 (Tex.Crim.App. 1983)(counsel's failure to investigate the facts of the case constitutes ineffectiveness if the result is that any viable defense available to the accused is not advanced).

H. The Ineffectiveness Of Counsel On The Background Issue.

Prior to Petitioner's trial, based upon the evidence, Andreski should have assumed with a reasonable degree of certainty, that Petitioner would have been found guilty, and thus, Petitioner would necessarily have to rely on any mitigating evidence that was available.

In Petitioner's case, clearly there would have been records pertaining to his troubled background and abuse if Petitioner grew up in foster care. Yet Andreski made no investigation into the details of this evidence which deprived Petitioner of his right to effective assistance of counsel. Lilly, 656 S.W.2d at 493 (copnsel's failure to investigate the facts of the case constitutes ineffectiveness if the result is that any viable defense available to the accused is not advanced).

It is well established that a defendant's character and background are relevant mitigating circumstances. Lewis v. State, 815 S.W.2d 560, 567 (Tex.Crim.App. 1991); citing Califoirnia v. Brown, 479 U.S. 538, 545 (1987)("the defendant's background and character which will support a belief, long held by this society, that defendants who commit criminal acts that are attributable to such circumstances may be less culpable than

defendants who have no such excuse.")

If Andreski had introduced evidence of Petitioner's troubled background there is a reasonable probability that the jury would have found that Petitioner was less culpable than other defendants and sentenced him to less than the maximum sentence allowed, especially where Petitioner had no prior felony convictions on his record.

"The sentencing process consists of weighing the mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus." Hemphill v. State, Tex.App. LEXIS 2888 at *15 (Tex.App.-Houston [14th Dist.] 2015); citing Milburn v. State, 15 S.W.3d 267, 270 (Tex. App.-Houston [14th Dist.] 2000, pet. ref'd).

As in Hemphill, Andreski did not present any evidence of mitigating factors for the trial court to weigh against the aggravating factors presented by the State. While Hemphill differs, as it pertains to witnesses who were available and willing to provide mitigating evidence, it is indisputable that there is evidence of a troubled childhood, mental health history and treatment, as well as Petitioner's homelessness in the documents that were in Andreski's possession. This mitigating evidence "clearly would have been admissible" and "the court would have considered it and possibly been influenced by it." Hemphill, Id. at 15; citing Freeman v. State, 167 S.W.3d 114, 121 (Tex.App.-Waco 2005, no pet.).

III. THE PREJUDICE SUFFERED ON THESE CLAIMS

Petitioner, who had never been previously convicted of a felony, was convicted and sentenced to life in prison, the absolute maximum sentence allowable. Petitioner believes that because he was sentenced to the maximum term allowable, prejudice should be presumed, as many appellate courts have routinely found counsel to be ineffective where their failures to investigate prevented them from presenting evidence favorable to the defendants.

REASONS FOR GRANTING THE PETITION

Petitioner believes that this Court should grant the Petition because the state court's decision denying a writ of habeas corpus on the issues presented is contrary to this Court's decision in Wiggins, as well as practically every case on record from the appeals courts in the State of Texas.

Wiggins, 539 U.S. at 534 (holding counsel's decision to end investigation when they did was not reasonable in light of the evidence counsel uncovered in the social services records - evidence that would have led reasonably competent attorneys to investigate further);

Lilly, 656 S.W.2d at 493 (counsel's failure to investigate the facts of the case constitutes ineffectiveness if the result is that any viable defense available to the accused is not advanced).

Lopez v. State, 462 S.W.3d 180, 189 (Tex.App.-Houston [1st Dist.] 2015)(when defense counsel presents no mitigating factors... to balance against the aggravating factors or contact potential witnesses there is prejudice).

Shanklin v. State, 190 S.W.3d 154, 165-66 (Tex.App.-Houston [1st. Dist.] 2005, pet. dism'd)(Prejudice exists, in that context, because there was not even a possibility of the factfinder considering mitigating evidence).

Lair v. State, 265 S.W.3d 590, 595-96 (Tex.App.-Houston [1st Dist.] 2008, pet. ref'd)(concluding prejudice was demonstrated where counsel's failure to interview or call a

single witness, other than appellant, deprived him of the possibility of bringing out a single mitigating factor).

Milburn, 15 S.W.3d at 271 (held that "even though if is sheer speculation that character witnesses in mitigation would in fact have favorably influenced the trial court's assessment of punishment", a defendant nonetheless demonstrates prejudice when a counsel's failure to investigate and lack of preparation at the punishment phase of trial deprives a defendant of the possibility of bringing out a single mitigating factor).

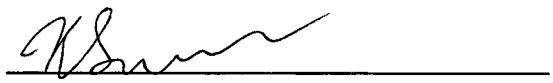
Neither should it be lost on the Court that Petitioner was facing a life sentence. "The sentencing stage of any case, regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceeding can be performed." Milburn, 15 S.W.3d at 269 (quoting Vela v. Estelle 708 F.2d 954, 964 (5th Cir. 1983)). Where potential punishment is life in prison, the sentencing proceeding takes on added importance. Id.

Petitioner believes that based on existing caselaw, the Court should grant his Petition because he was obviously prejudiced by Andreski's failure to investigate and develop evidence of his being under the influence of K2 at the time of the commission of the criminal offense, his troubled background, and mental health history and treatment, which deprived him of his constitutional right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: October 31, 2022