No. 22-7719

ORIGINAL

Supreme Court, U.S.
FILED
MAY 31 2023
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

GUSTAVO XAVIER — PETITIONER
(Your Name)

vs.

Superintendent of SCI-Albion
Attorney General Pennsylvania — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GUSTAVO XAVIER
(Your Name)

10745 ROUTE 18
(Address)

ALBION, PA 16475-0002
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Mr. Xavier alleged that his trail counsel was ineffective for failing to conduct any type of investigation before advising him to take a plea of the maximum sentence for the Third Degree Murder charge (20-40). Prior to plead guilty, Mr. Xavier repeatedly informed trial counsel that the Commonwealth has the wrong murder weapon. Trial counsel testified (evidentiary hearing on June 16, 2020) that she knew that the Commonwealth had the wrong murder weapon.

Also, Mr. Xavier alleged that his confession was coerced inside Room 4 of Intensive Care Unit, CMC Hospital, Scranton, PA and that is the main reason why the Commonwealth has the wrong murder weapon and the wrong date of the incident because the interrogation was so manipulated and coerced that insults the reader's intelligence and to render that confession voluntary would be unreasonable because it presents manifest injustice.

The case thus present the following questions:

1. Whether the Third Circuit err finding that Xavier was no prejudiced by his trial counsel's failure to conduct any type of investigation knowing that the Commonwealth has the wrong murder weapon depriving the defendant the opportunity to prove manslaughter with his blood and skin fiber on said object?
2. Whether the Third Circuit err in finding trial counsel effective when trial counsel failed to move to suppress an allegedly inadmissible confession given to police while Xavier was hospitalized, intoxicated, excessive sedated and heavily medicated?
3. Whether the Third Circuit err in not finding evidence of coercion before Xavier entered a plea?

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

TABLE OF CONTENTS

INDEX TO APPENDICES

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

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

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

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

[ ] 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,
[ ] is unpublished.

The opinion of the _____ 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was December 2, 2022.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 17, 2023, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] 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).

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONSTITUTION, AMENDMENT V

" no person should be compelled in any criminal case to be a witness against himself". Due process (coerced interrogations).

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district whereing the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court , a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:

(A) the applicant has exhausted the remedies available in the courts of the State;

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(C) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuan to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim...

(1) resulted in a decision that 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) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that...

(A) the claim relies on:

(i) a new rele of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable: or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provide in Section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel. Appointment of counsel under this section shall be governed by section 3006A of title 18.

STATEMENT OF THE CASE

On May 1, 2009, Petitioner/Appellant Gustavo Xavier-now an inmate at the State Correctional Institution in Albion, Pennsylvania-pleaded guilty to third-degree murder.

Xavier's trial counsel, in her 20 years as a Public Defender, had a total of 2 felony trials, one for aggravated assault and one for burglary. (See Appendix B). Leading up to the May 2009 guilty plea hearing, counsel met with Xavier a total of three times: September 16,2008, April 2, 2009 and April 29, 2009. Without having conducted any investigation of Xavier's claims beyond review of the discovery file, counsel nevertheless strongly recommended to Xavier that he take the Commonwealth's offer of a third-degree murder plea. (the maximum sentence, 20-40 years of incarceration)

Xavier realized quickly that, because trial counsel failed to investigate his mitigation claims adequately, he should have gone to trial. Dissatisfied with cousel's recommendation of the murder plea deal, Xavier pursued and ultimately exhausted state collateral proceedings to challenge the validity of his plea, he filed state PCRA collateral proceedings in November 2009.

After exhausting state collateral proceedings, Xavier filed a timely pro-se Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in August 2012. Ultimately, the Court granted Xavier's Petition for Certificate of Appealability as to two specific issues: (1) whether the District Court erred in concluding that Xavier is procedurally barred from pursuing his claim that counsel was ineffective for failing to advise him that he might be convicted only of manslaughter if he opted for trial; and (2) whether counsel

was ineffective for failing to challenge inculpatory statements given to investigators while Xavier was excessive sedated in the ICU.

After first issue: whether trial counsel was ineffective for failing to discuss with Xavier that the charge of criminal homicide include an alternative lesser-included manslaughter offense. See Xavier v. Sup't Albion SCI, 689 Fed (3rd Cir. 2017).

On remend, the Magistrate Judge held an evidentiary hearing on June 16 and 17, 2020. During the hearing trial counsel testified that she and Xavier had discussed manslaughter several times, and her contemporaneous notes of her meetings with Xavier supported this account.

The Magistrate Judge issued a Report and Recommendation, recommending that habeas relief be denied. (See Appendix A).

The Magistrate Judge found cousel's testimony fully credible. Trial Counsel on cross-examination (evidentiary hearing on June 16) she was asked if she had obtained Xavier's medical records and she said she did not. She was asked if she had review the physical evidence as the murder weapon and she said she did not. She was asked if she had called a single witness and she said she did not. (See Appendix C).Therefore, if Magistrate Judge found counsel's testimony fully credible, he could not found cousel effective because as she testified she never conduct any type of investigation before advise Xavier to take a plea. The Magistrate Judge further found that cousel provided "sound and reasonable advice" when she

advised Xavier that he was unlikely to secure a voluntary manslaughter conviction at trial, rather than a murder conviction because there was strong evidence from which a jury could conclude that Xavier acted with malice.

Xavier filed objections, arguing that even crediting counsel's testimony, mere discussion of voluntary manslaughter was insufficient when counsel did not investigate even a single fact that Xavier raised (discussed in more detail below) that may have supported voluntary manslaughter. Absent any such investigation, counsel could not have adequately discussed with Xavier rejecting the plea agreement and pursuing a jury verdict of voluntary manslaughter. Therefore, Xavier's plea could not be knowing, voluntary and intelligent. Xavier further argued that counsel's ineffective assistance prejudiced him because but for counsel's deficient advise concerning the likelihood of a voluntarly manslaughter conviction, Xavier would not have pleaded guilty to third-degree murder. The District Court overruled Xavier's objections, adopted the Report and Recommentation in its entirety, denied and dismissed the Petition, and declined to issue a certificate of appealability. Xavier filed a timely Notice of Appeal and a Petition for Certificate of Appealability. By Order dated Fabruary 2, 2022, the Court granted a Certificate of Appealability "because jurists of reason could debate the merit of his claim that ineffective assistance of counsel resulted in the entry of an involuntary unintelligent guilty plea. (See Appendix A).

Xavier presented multiple witnesses at the hearing establishing prejudice but Magistrate Judge Saporito was trying to covered-up the police miscounduct on his "Report and Recommentadion" **See Appendix A** what he thinks Troopers Purdum and Oliver were saying at the evidentiary and what they actually were saying at the evidentiary hearing.

Therefore, Xavier had to present to this honorable court part of the transcripts obtained at the evidentiary hearing. **See Appendixes K and L** where trooper's statements are contradicted each other but Magistrate Judge found both testimonies fully credible.

The Third Circuit's decision is in conflict with **Strickland v. Washington 466, U.S. 668 (1984); and Andrus v. Texas, 140 S.Ct 1875 (2020)**, emphasizing that in determining Strckland prejudice, the court must examine both, the evidentiary hearing testimony and the post conviction evidence to determine whether, had the omitted evidence been presented, there is a reasonable probability of a different outcome.

Evidence from the evidentiary hearing shows that trial counsel never investigate this case. **See Appendix C.**

Failure to conduct any pretrial investigation, to discover, obtain and present mitigating evidence generally constitutes a clear instance of ineffectiveness. **United States v. Gray, 878 F.2d 702 (3rd Cir. 1989).**

About the coerced confession the Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself". Accordingly, it is clear that only voluntary confessions may be admitted at the trial. **U.S. v. Swint, 15 F.3d 286 (3rd Cir. 1994).**

If a person's will is overborne or his capacity for self-determination critically impaired, the person's statements are involuntary. Appendix F, G, and H.

However, the crucial factor and the necessary predicate for a finding is coercive police activity. **See Colorado v. Connely, 479 U.S. 157, S.Ct 515 (1986).**

Althoug, there is no precise definition of coercive police activity, the Supreme Court has identified the following examples as constituting such: interrogating the defendant for more then one hour while he was incapacitated and sedated in I.C.U.

What is relevant in this case, is the state of mind of the police where there is evidence of "trickery" conduct. **Appendix G and H Question and Answer No. 10.**

In 1959, the Supreme Court held in Napue v. Illinois, 360 U.S. 264 (1959) that " a conviction obtained through use of false evidence, must fall under the Due Process Clause of the 14th Amendment. The false evidence in Xavier's case would be the wrong murder weapon and the wrong date of the incident depriving Xavier the opportunity to show manslaughter. Miscarriage of justice exist when a conviction is sustained based on a coerced confession and no conviction should be sustained based on a coerced confession. When police misconduct occurs, records often stay secret. **See Appendix K, L and M).** Lying about the facts or how the police obtained the confession increases the risk of false confessions. **Frazier v. Cupp, 394 U.S. 731, 739 (1969).**

The Third Circuit ignored the misconduct by government officials (that contributed to the false confession. The misconduct distorts the evidence used to determine the type of homicide in this case. Concretely, that means misconduct that produces unreliable, misleading of false evidence of guilt, distorts true evidence. Misconduct in interrogations of suspects should never been ignored. **See Appendix i.**

Magistrate Judge Saporito should not be allowed to hide the process from how troopers obtained a coerced confession finding both troopers's testimony credible. When police officers (troopers) fail to conduct a careful investigation in a criminal case, the consequences may be catastrophic. Xavier's interrogation was conducted secretely when recorded interrogations are the most effective means for preventing false confessions and misconducts in interrogations.

In sum, Xavier's case exposes the ugliness of police brutality because torture can be mental as physical. **See Exhibit H the repeated questions.**

Therefore, Xavier's right to due process was violated by introduction of his involuntary and coerced confession. In **Chapman v. California, 386 U.S. 18, 22 (1967)** states: "Judgments shall not be reversed for errors or defects which do not affect the substantial rights to the parties". (quoting 28 U.S.C. s 2111). However, the **Chapman** court acknowledged that some constitutional rights are so fundamental that their infraction can never be harmless.

In **Arizona v. Fulminante, 499 U.S. 279 (1991)...**

explains the harm of applying harmless error to coerced confession. These errors are so intrinsically harmful as to require automatic reversal... without regard to their effect on the outcome.

District Court denied Xavier's claim that trial counsel was ineffective for failing to move to suppress allegedly inadmissible inculpatory statements he made to police who questioned him while he was hospitalized, excessive sedated and he had decreased mental status when he confessed after trying to commit suicide. Government agents were showing a enormous disregards of defendant's constitutional rights. Such conduct is only relevant to the constitutional validity of a waiver of it deprives a defendant of knowledge essential to his ability to understand the nature of his rights. (Appendix G.)

The Third Circuit puts too much weight on the aggravating evidence and/or circumstances which it would be that Xavier wrapped the victim's head in a plastic bag and placed her body in a closet rather than focus and the protection of Xavier's constitutional rights inside Room 4 of I.C.U.

The aggravated evidence happened after Xavier committed the crime. It would be a post-morten issue, it has nothing to do with the manslaughter issue in question here.

Xavier, would rebutted that aggravated evidence with the assistance of a toxicology expert. He would testify that the drug Xavier ingested, (tricyclic) a powerful antideppressant, would cause when overdose happens, hallucinations, respiratory failure, fever, cardiac arrhuthimias, convulsions and coma.

Therefore, Xavier lost his mind after he tried to commit suicide, and the Third Circuit never mentioned that Xavier tried to kill himself showing remorse.

In fact, the Third Circuit erred saying that "Xavier's choice of weapon is not dispositive of malice. One could use a tire jack in a crime of malice or in the heat of passion just as one could a sink post.

That statement is absurd. Presenting the tire-jack (the correct murder weapon) Xavier would be able to show that he was attacked with said object, that is the reason why he was requesting his DNA, the murder weapon and the medical records.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANTS THIS COURT'S ATTENTION

The Third Circuit's opinion misapplied the ***Strickland v. Washington, 466 U.S. 668, 687-88 (1984)*** test for prejudice in two important ways.

First, the court flagrantly misstated the record. Magistrate Judge wrongly stated that does not matter what murder weapon Xavier used to kill the victim but Xavier is presenting a valid argument saying that "it does matter" what weapon he used because it would be an exculpatory evidence. **See Appendix I.**

The Third Circuit completely ignored the fact that the record shows on trial counsel's notes that Xavier requested to investigate two important critical evidence to prove manslaughter.

1) -"if his follicle would help him to prove manslaughter"-. In other words Xavier was asking, requesting to trial counsel to obtain his DNA. **See Appendix D.**
2) - Xavier told trial counsel that the Commonwealth had the wrong murder weapon and the wrong date of the incident and she knew about it but she didn't conduct any type of investigation. **See Appendix E.**

Trial counsel testified on June 16, 2020 that she never investigate this case. To prove manslaughter Xavier would have needed his DNA, the murder weapon and the Medical Records never obtained by trial cousel either. **See Appendix F and I.**

There is a big difference betweex Xavier requesting, begging to his counsel to investigate, to obtain his DNA and the murder weapon, rather then a merely discussion about manslaughter without these three important critical exculpatory evidence such as Xavier's DNA, the murder weapon and the medical records.

Having Xavier's Medical Records **(Appendix F)** showing his injuries, the murder weapon with Xavier's blood and skin fiber and Xavier DNA as he requested, trial counsel could have had a meaningful discussion about manslauther and Xavier would not have pleaded guilty to Third Degree Murder.

With a proper representation and investigation, Xavier would have these three exculpatory evidence that would undermine the malice element of his homicide charge. Also, there is a four evidence that the Third Circuit further ignored. Xavier was attacked in his own dweeling by a drugged person. **(See Appendix J)** It would be another mitigating evidence that trial counsel ommited.

Failure to conduct any pretrial investigation, to discover, obtain and present mitigating evidence generally constitutes a clear instance of ineffectiveness. **See U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989).**

However, trial counsel failed her Constitutional duty and refused to obtain Xavier's DNA, the murder weapon and Xavier's medical records.

Instead, trail counsel left the defendant no alternative except to accept a plea offer to Third Degree Murder because he had no defense without these important exculpatory evidence.

The well-know standard for establishing a violaton of a defendant's Sixth Amendment constitutional rights to effective assistance of trial counsel states that the defendant must allege, and the court ultimately determine, that "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professional competent assistance." ***Strickland v. Washington, 466 U.S. 668, 690 (1984). See Taylor v. Horn, 504 F.3d 416, 430 (3rd Cir. 2007).*** (Sixht Amendment claims of ineffective assistance of counsel are governed by ***Strickland***).

In ***Strickland***, the Supreme Court explained that "the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled... The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." ***Strickland*** further recognized that counsel can "deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance".

Under the two-pronged ***Strickland*** standard, a defendant must allege and ultimately establish that: **(1)** trial counsel's performance was deficient; and **(2)** that the deficient performance prejudiced him. To demonstrate deficient performance, a defendant must show that counsel's representation "fell below an objective standard of reasonableness. ***See Outten v. kearney 464 F.3d 401, 414 (3rd. Cir. 2006)***

To establish prejudice, the defendant must "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". ***Strickland, 466 U.S. at 694.***

More specifically, the two-part *Strckland* test applies to claims of ineffective assistance of counsel regarding guilty pleas. The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary, knowing and intelligent choice among the alternative courses of action open to the defendant. ***Hill v. Lockhart, 474 U.S. 52, 58, 59 (1985),*** and to satisfy the prejudice requirement, "the defendant must show that there is a reasonable probability that, butfor counsel's errors, he would not have pleaded guilty and would have insisted ongoing to trial."

Further, ***Strickland*** requires that the right to counsel is the right to effective assistance of cousel. ***See Missouri v. Frye, 555 U.S. 134, 138 (2012).*** And the Constitution provides an accused with the right to effective assistance of counsel during all "critical stages" of a prosecution, which includes not only trial but also sentencing. ***E.g. Gardner v. Florida, 430, U.S. 349, 358 (1977).***

More specifically, " a defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." ***See Model Code of Professional Responsibility EC 7-7 (1992); See Von Moltke v. Gillies 332, U.S. 708, 721 (1948)*** ("An accused is entitled to rely upon his counsel...to offer his informed opinion as to what plea should be entered.")

A critical element of advising a client "fully" is the need for counsel to

to conduct reasonable investigation into her client's case, which extends to the law as well as the facts, to formulate sound advice. ***See Heard v. Addison, 728 F.3d 1170, 1179 (10th Cir. 2013),*** citing Strickland at 690-91. "Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the cases has been completed, including and analysis of controlling law and the evidence likely to be introduced at trial". at 1179-80, citing ***Padilla v. Kentucky, 559, U.S. 356 (2010)*** (describing the ABA's standards as "valuable measures of the prevailing professional norms of effective representation"). This Court has recognized that "the courts of appeals are in agreement that the failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness". ***United States v. Gray, 878, F.2d 702, 711 (3rd. Cir. 1989).***

With respect to the first Strickland prong, the record does not support a knowing, voluntary, and intelligent plea because trial counsel did not provide Xavier with sufficient information without having the murder weapon, Xavier's DNA and Xavier's medical records.

True, the record does indicate that trial counsel talked about voluntary manslaughter with Xavier on several occasions. But in light of Xavier's claim that he acted solely in response to the victim's physically abusing him, mere discussion just one month before the guilty plea hearing is not, by itself, effective assistance. Trial counsel failed to investigate the long volatile and violent history between Xavier and the victim which could have put the fatal altercation in which

the victim ultimately died of blunt head trauma and Xavier was admitted to a hospital's intensive care unit in a manslaughter favorable context. **(See Appendix F, Xavier's injuries).**

Xavier presented multiple witnesses at June 2020 Evidentiary Hearing whose testimony would support Xavier's claim that only a charge of manslaughter, not third degree murder was appropriate.

* Trooper Craig Purdum, one of three law enforcement officers that went to the hospital to interview Xavier on September 1, 2008, testified that he didn't know that Xavier was in I.C.U. when he was interviewed. **(See Appendix K).** He said -" He was in a room. I can't tell you what room he was in."- He also said that Xavier's ability to speak and understand English was limited. Trooper Purdum testified -"I didn't talk to any medical personnel about his problems,"-and then he testified about Xavier's answers, specifically Answer No. 10 **(See Appendix H)** when Xavier said "Yesterday the 27th at 6:30". When he (trooper) was cross-examinated by Federal Public Defender about that answer, Trooper Purdum was speechless saying -" I guess, yeah, I---well, yeah, okay, right, yeah, he just---yep."- Trooper Purdum, knowing that Xavier's statement was wrong, he continued with the interrogation asking 90 more questions risking that those answers would be out of order chronologically.

Detective John Brunza (hired by Federal Public Defender Ingrid S. Cronin) told Xavier that the date on the "Death Certificate" has been changed. The record shows that Xavier was not oriented in time when he confessed. (See Appendix F).

* Trooper John Oliver also offered testimony casting doubt on the voluntariness of Xavier's hospital statement. (Appendix L). He testified -" We would check everyday and check with the staff when he was able to be interviewed. It was daily. Not by me personally. It could have been Craig (Purdum). Craig was the lead on that."-

First of all, it could not be everyday or daily because Xavier arrived to the hospital on August 31, at 6:30 a.m. (See Appendix F) and the interrogation took place the following day, September 1st at 12:00 p.m. (See Appendix H)

Secondly, Trooper Purdum testified the day before, June 16th that he never talk to any medical personnel about Xavier's condition.

Therefore, somebody was lying under oath and the Magistrate Judge could not found both testimonies fully credible when clearly their testimonies are contradicted each other.

Trooper Oliver also was admitting that the Waiver Form "looks odd" and that was the only time they ever done that. (See Appendix G). Further, Trooper Oliver admitted that the District Attorney's Office instructed him not to talk with Federal Public Defender and/or Investigator John Brunza.

Trooper Oliver testified that the interrogation was not audio-video taped and the Federal Public Defender Lori J. Ulrich was assuming that he was listening to a recording when he typed the interrogation. (Appendix H). He also testified that the original handwriting was destroyed on September 4th, 2008, four days after the interrogation.

* Policce Officer Bonilla was acting as translator at the hospital I.C.U. While Mr. Bonilla described his Spanish skills in 2008 as proficient, he testified that if there were a complicated situation, he would have gotten a translator or had his mother on speed dial. Officer Bonilla testified that he had no recollection of that interview and he did not remember being there. (See Appendix M). This testimony would have cast doubt on the voluntariness of the statement taken at the I.C.U.

* Tonya Hance, a bartender at the County Seat, testified that Xavier was usually calm and peaceful. She testified that Xavier had a big bruise across his face that looked like it had been inflicted with something such as baseball bat. Xavier told her that he and the victim had gotten into a fight and that she hit him.

* Kevin Nagy owned a stone operation where Xavier was working. He testified that Xavier was a reliable, hard worker, one of his best. In August 2008, he notice Xavier with injuries, a gash on his face, and a black eye. Xavier told him that he and his girlfriend got into a scuffle.

The Magistrate Judge found all these witnesses credible. Trial cousel interviewed none of them.

In sum, trial counsel despite being provided with names of witnesses who may have supported a self-defense claim or voluntary manslaughter charge- did not conduct any investigation, did not obtain Xavier's medical records, did not look at the physical evidence in the case (murder weapon) and did not interview even a single witness. Nevertheless, counsel recommended to Xavier that he take the Commonwealth's offer of a third degree murder plea.

With respect to the second Strickland's prong, the record establishes that Xavier's plea severely prejudiced him by locking him into a 20-40 years maximum sentence when he might have gone to trial, and if not acquited, convicted of a lesser charge as manslaughter. **Vickers v. Superintendent Graterford SCI (3rd Cir. 2017)**. Provocation negates malice and Xavier was attacked by a drugged person inside his own dweeling.

The record demonstrates a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different: Xavier would have gone to trial and would be serving a shorter sentence for manslaughter and/or a shorter sentence for third degree murder presenting his mitigating evidence as: Medical records, Waiver form, Autopsy, the real murder weapon, Victim's background showing a violent person, etc.

To establish prejudice, Xavier has to show that there is a reasonable probability that, for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. **Hill v. Lockhart, 474 U.S. 52, 106 S.Ct 366 (1985).**

In an alleged error of counsel to investigate, the determination of prejudice by causing him to plead guilty rather than go to trial depends on the likelihood that the discovery of the evidence would have led counsel to change his recommendation as to the plea.

This assessment, in turn, depends in large part on a prediction whether the evidence, likely would have changed the outcome of a trial.

The predictions regarding the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncasies of the particular decisioin maker".

Here, trial counsel failed to conduct any investigation and therefore, her discussions regarding voluntary manslaughter could not have been meaningful.

Her advice to plead guilty to third degree murder cannot be reasonable, an her ineffectiveness is established.

Also, the Third Circuit overlook the signs of coercion by trial counsel scarying the defendanty making descriminatory statements. **(See Appendix @ N)**

Xavier, presenting all these new evidence at the evidentiary hearing on June 16 and 17, 2020 is able to show to this honorable court that in fact he was coerced to take a plea and his interrogation was coerced inside I.C.U.

One critical aspect of this ineffective assistance besides having the wrong murder weapon in this case was trial counsel's failure to challenge the inculpatory statement Xavier made to police one day after he was admitted to the hospital's I.C.U. in critical condition after a failed suicide attempt.

No procedural default issue applies here. In his PCRA appellate's brief Xavier included the issues: "was trial counsel ineffective in not challenging the defendant's mental and physical (condition) along with circumstance out of defendant's control at time of interrogation" and "Did the Commonwealth violate the defendant's rights against self-incrimination and Due Process of Law through the acceptance of acts of coercion during interrogation. Xavier's constitutional rights were violated specifically the 5th, 6th and 14th Amendments of the United States Constitution when the interrogation was taken in Room 4, I.C.U., CMC Hospital, Scranton.

Medical Records indicate injuries to Xavier's eyes, lips and legs as well as compromised mental status. Around 30 hours later, police come to his I.C.U. hospital bed where he was handcuffed, catherized and drugged to read him his rights and interrogate him for 75 minutes, apparently to obtain a confession. **Appendix F.**

The transcript of the interrogation **(Appendix H)** indicates that Xavier "began mumbling", failed to respond to some questions and was intermittently incoherent, not oriented in time and eventually making inculpatory statements. **Appendix H question No. 10).**

Thus, at that time. Xavier was in a mentally compromised state and medically incapable of consenting to be interviewed by law inforcement.

The prejudice flowing from counsel's ineffective assistance is self-evident: had trial counsel properly challenged such an inadmissible statement, the Government would have lost substantial leverage in charging an offense or negotiating a guilty plea, and Xavier would have been in a position to demand a plea of manslaughter, at most. But for the lack of this meritorious challenge to the inculpatory statements, Xavier would not have pleaded guilty, and would have gone to trial with the expectation of at worst, a manslaughter conviction, and a sentence lower than the 20 to 40 year sentence for third degree murder.

Thus, Xavier was plainly prejudice to the extent either that a plea to third-degree murder exceeds the plea he could have entered to a lesser manslaughter charge, or the sentence imposed for manslaughter after a jury trial. The Pennsylvania courts' refusal to grant relief on this basis was an unreasonable application of clearly established federal law.

To the extent the District Court suggests a lack of record evidence on this point, that lack flows necessarily from the refusal of any post-conviction court to provide Xavier with an evidentiary hearing in which he would have had the opportunity to provide such record evidence.

Indeed, the District Court notes that "I am without the benefit of trial counsel's explanation for why certain tactical decisions were made". The District Court would have that explanation after the Evidentiary Hearing very well conducted by Federal Public Defender Lori J. Ulrich on June 16 and 17, 2020 but of course the evidentiary hearing took place three years later after the District Court's decision.

The record remains silent about the police misconduct by troopers inside I.C.U. and the reason would be because they thought that Xavier has not constitutional rights in 2008.

But, Xavier had constitutional rights on September 1st, 2008 because he was married with an american citizen, he had a Social Security Number XXX-XX-2743 and he is a father of two american citizens (Xavier's kids born in U.S.A.) but he didn't have a "Green Card" because his wife went to prison in 2004 for child abuse and Xavier had to miss the appointment with Immigration.

Plyler v. Doe, 457 U.S. 202 (1982) - "Illegal aliens protected by the Equal Protection Clause of the 14th Amendment".

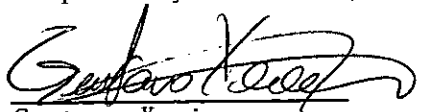
Kwong Hai v. Colding, 344, U.S. 590 (1953). -**"Resident aliens is a** person with the rights of the 5th Amendment"-.

These cases, however, establish only that aliens receive constitutional protection when they have come within the territory of the U.S. and developed substantial connections with this country as Xavier's situation his wife and kids are americans.

Because the Third Circuit of Appeals has truncated the scope of Strickland's prejudice review, this Court must grant certiorari.

Xavier has made a convincing showing that counsel did not fulfill her responsibility as an advocate on his behalf, thereby preventing Xavier from making a voluntary, knowing and intelligent decision to plead guilty. For these reasons, Petitioner/Applicant, Xavier requests to this Court to grant certiorari.

Respecfully submitted,



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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 5/30/23