18-6846

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Luis A. Pena — PETITIONER
(Your Name)

vs.

State of Maryland — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals of Maryland
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Luis A. Pena
(Your Name)

N.B.C.I. 14100 McMullen, Hwy, S.W.
(Address)

Cumberland, Maryland 21502
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

I. Whether The Maryland Appellate Courts In Concluding Pena Failed To Sustain His Burden Of Proving He Did Not Voluntarily And Knowingly Enter A Guilty Plea With Understanding Of The Crime Elements By Failing To Testify At The Coram Nobis Hearing That Before Pleading Guilty Defense Counsel Had Not Advise Him Of The Nature And Elements Of Crime Erred Or Abused Its Discretion Since Those Conclusions Conflict With This Court's Bradshaw v. Stumpf Opinion That The Plea Record Suffices?

(a) Whether Since This Court In "Bradshaw v. Stumpf" Scaled Back The Presumption Suggested In Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 108 (1976) Whether Without Defense Counsel Testifying At The Hearing The Maryland Appellate Courts erred Or Abused Its Discretion In Concluding Base Only On The Coram Nobis Court's Presumptive Knowledge Of Defense Counsel Reputation Of Being Mindful Of His Clients Rights That Pena Pleaded guilty Voluntarily With The Understanding Of The Crime Elements?

(b). Whether The Maryland Appellate Courts Erred Or Abused its Discretion In Looking Beyond The Guilty Plea Record To Conclude The Initial Appearance Report Serve As Proof Pena Had Been Advised Or Understood The Elements Of The Crimes Since Those Conclusions Are In Direct Conflict With This Court's Controlling Precedent Decided In Bradshaw v. Stumpf?

II. Whether The Maryland Appellate Courts Erred Or Abused Its Discretion In Concluding That The Trial Judge Use Of The 2001 Convictions And Fifteen Year Sentence Invalid Under Bradshaw v. Stumpf As Reasons For Imposing A Consecutive Twenty-Five Year Sentence Did Not Constitute Significant Collateral Consequences?

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:

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OTHER

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.

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

The opinion of the highest state court to review the merits appears at Appendix A B 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 Court of Special Appeals and Court of Appeals court appears at Appendix A B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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 July 31, 2018. A copy of that decision appears at Appendix A1.

[ ] 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).

yes

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment To The United States Constitution

STATEMENT OF THE CASE

On February 5, 2001 a Baltimore County Grand Jury returned a criminal indictment against Luis Alberto Pena, charging numerous criminal offense which included Robbery with a Dangerous and Deadly Weapon and Use of a Handgun in the Commission of a Felony or Crime of Violence. September 11, 2001, without the nature and elements of armed robbery and use of a handgun in the commission of a felony or crime of violence offenses having being explicitly reviewed on the record with Pena by defense counsel at the 2001 plea proceedings. Petitioner Pena waived a jury trial and submitted his case on agreed statement of fact, entered a pleaded guilty to the indictment counts charging robbery with a dangerous and deadly weapon and use of a handgun in the commission of a felony in the Circuit Court for Baltimore County. Pena on December 5, 2001 was sentenced to two concurrent terms of fifteen years imprisonment. Petitioner did not seek leave to appeal. [1]/

Under the holdings of State v. Daughtry, 419 Md. 35, (2011) by way of a petition for writ of error coram nobis relief filed on July 28, 2016. Pena challenged the guilty pleas he entered on September 11, 2001 and sentences imposed December 5, 2001. After holding a hearing on January 18, 2017, Judge Judith C. Ensor ruled in open court by dictating into the record the reasons for denying coram nobis relief. Then subsequently, thereafter, issued a written order denying coram nobis relief on January 19, 2017. Pena filed a timely notice of appeal on January 31, 2017, appealing the Honorable Judge Judith C. Ensor's on the record

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FN1. In an unrelated case, Pena at a bench trial was convicted of attempted murder, use of a handgun in the commission of a crime of violence, and a host of other crimes. January 31, 2002, he was sentenced to twenty-five years imprisonment for attempted murder and to a concurrent term of fifteen years (the first five years without the possibility of parole) for the handgun offense, with those sentences to run consecutive to any outstanding sentence.

denial of coram nobis relief January 18, 2017, and subsequently, thereafter, filed February13, 2017 a timely supplement notice of appeal appealing Judge Judith C. Ensor written order dated January 19, 2017 denying coram nobis relief.

The Court of Special Appeals issued an order on April 5, 2017 that required Pena to file a brief before or on May 15, 2017. Pena filed on April 25, 2017 a motion for extension of time of the May 15, 2017 filing deadline to include until June 1, 2017 because prison officials had not provided Pena with that actual order issued April 5, 2017 by the Court of Special Appeals. Pena on direct appeal challenged the reasons for the coram nobis court's denial of his petition for coram nobis relief as following below:

> I. Did The Circuit Court After Holding An Evidentiary Hearing Err In Holding Appellant Had Failed To Prove His Guilty Pleas Were Either Unknowing Or Involuntary Based On Conclusions She Highly Doubt Or Was One Hundred Percent Sure Trial Counsel An Seasoned Attorney For More Than Thirty Years Had Advised Him Of The Nature And Elements Of The Charges And Sign Documents Prove He Was Advised Since Those Conclusions Are In Direct Conflict With The Appellate Courts Holdings Reached In Daughtry, Miller And Graves?
>
> II. Did The Circuit Court After Holding An Evidentiary Hearing Err In Concluding Appellant Pena Had Failed To Prove That He Was Suffering Significant Collateral Consequence As A Result Of The Convictions Challenged Under Daughtry Because The Sentences Imposed Were Within The Sentencing Guidelines?

In an unreported per curiam opinion date April 6, 2018 the Court of Special Appeals affirmed the judgment of the coram nobis court's denial of Pena's allegations that he had been unaware of the nature of the charges when he entered guilty pleas. The mandate of the Court of Special Appeals was issued May 7, 2018 but not at the time served on Pena. A petition for writ of certiorari was filed with the Maryland Court of Appeals challenging the Court of Special Appeals opinion. And on July 31, 2018 the Court of Appeals of Maryland issued an order denying Pena's petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari here presents the perfect opportunity for this Court to grant certiorari to resolve and determine:

[i]. Whether the Maryland Appellate Courts erred or abused its discretion in concluding a Petitioner was required at a coram nobis hearing to testify defense counsel did not advise him of the nature and elements of the crime before pleading guilty since those conclusions conflicts with this Court's Bradshaw v. Stumpf opinion that the Plea record suffices.

[a]. To resolve and determine since this Court in "Bradshaw v. Stumpf" scaled back the presumption suggested in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 108 (1976) whether without defense counsel testifying at the hearing the Maryland Appellate Courts erred or abused its discretion in concluding base only on the coram nobis court's presumptive knowledge of defense counsel reputation of being mindful of his clients rights that Pena pleaded guilty voluntarily with the understanding of the crime elements .

[b]. To resolve and determine whether the Maryland Appellate Courts erred or abused its discretion in looking beyond the guilty plea record to conclude that the initial appearance report serve as proof Pena had been advised or understood the elements of the crimes since those conclusions are in direct conflict with this Court's controlling precedent decided in Bradshaw v. Stumpf.

[ii]. This Court should grant a writ of certiorari to resolve and determine whether the Maryland Appellate Courts erred or abused its discretion in concluding the trial judge use of

the 2001 conviction and fifteen year sentence invalid under Bradshaw v. Stumpf as reasons for imposing a consecutive twenty-five year sentence did not constitute significant collateral consequences.

ARGUMENT I:

I. Whether The Maryland Appellate Courts In Concluding Pena Failed To Sustain His Burden Of Proving He Did Not Voluntarily And Knowingly Enter A Guilty Plea With Understanding Of The Crime Elements By Failing To Testify At The Coram Nobis Hearing That Before Pleading Guilty Defense Counsel Had Not Advise Him Of The Nature And Elements Of Crime Erred Or Abused Its Discretion Since Those Conclusions Conflict With This Court's Bradshaw v. Stumpf Opinion That The Plea Record Suffices?

In the case sub judice, the Maryland Appellate Courts in affirming the coram nobis court's conclusions for denying coram nobis relief held: 'The fact that the elements of the crimes were not explicitly iterated on the record, however, does not establish that Pena, in fact, did not understand the nature of the offenses when he entered the pleas, but notably he chose not to support that allegation with testimony, under oath, at the coram nobis hearing. The coram nobis court discounted his allegations that he had been unaware of the nature of the charges when he entered his guilty pleas. Id. at **Appx. 6-b.**

However, those conclusions of the Maryland Appellate Courts are erroneous because a defendant is not required to testify at a coram nobis hearing under oath that because defense counsel had not advise him at the time of the plea, he did not "pleaded guilty voluntarily with understanding of the nature and elements of the charges and consequences of the plea. Since such conclusions conflicts with this Court's Bradshaw v. Stumpf, 545 U.S. 175, (2005) opinion that guilty plea record will suffice. In Stumpf that Court held his guilty plea would indeed be invalid if he had not been aware of the nature the charges against him, including the elements of the aggravated murder charge to which he pleaded guilty. A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant

circumstances and likely consequences. "Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct 1463 (1970), Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid. Henderson v. Morgan, 426 U.S. 637, 49 L. 2d. 2d 108, 96 S. Ct. 2253 (1976).

Nonetheless held the Court of Appeals erred in finding Stumpf had not been properly informed before pleading guilty. In Stumpf's plea hearing, his attorneys represented on the record that they had explained t their client the elements of the aggravated murder charges; Stumpf himself then confirmed that this representation was true. See App. 135, 137-138. While the court taking a defendant's plea is responsible for ensuring "a record adequate fro any review that may be later sought. Boykins v. Alabama, 395 U.S. 238, 244, 23 L.Ed. 2d 274, 89 S. Ct. 1709 (1969) (footnote omitted), we have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own competent counsel. Cf. Henderson, supra, at 647, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (granting relief to a defendant unaware of the elements of his crime, but distinguishing that case from others where 'the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused"). Where a defendant is represented y competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty. Id. 545 U.S. at 182-183.

Here even assuming arguendo that the coram nobis court has authority to decides to look beyond the record and consider other evidence, such as a lawyer's testimony concerning having advised a defendant prior to the guilty plea of the nature of charges against him are admissible, and may be considered at a coram nobis hearing in determining whether the defendant plead voluntarily, with understanding of the nature of the charges

within the meaning of Md. Rule 4-242(c). Rich v. State, 230 M. App. 537, (2016) holding "Smith clarified that when a defendant brings a coram nobis petition attacking the constitutionality of a guilty plea in trial court, the ultimate issue for the appellate court is whether the defendant understood the nature of the charges, regardless of what the trial court determine from the record before. And to that end, testimony from counsel indicating that he or she advised the defendant of the nature of the charges is admissible in order to determine whether the defendant plead guilty voluntarily, and with an understanding of the nature of charge. Id. at 654. see also State v. Rich, 454 Md. at 466.

The Maryland Appellate Courts although acknowledging that the record of Pena's 2001 guilty plea was not sufficient to decide that the plea was knowing and voluntary nonetheless decided that Pena somehow had an obligation to support his coram nobis petition's allegation under oath with testimony that his defense counsel did not advise him of the nature and elements of the charges at the coram nobis hearing. An opined because Pena notably chose not to testify he failed to sustain his burden and ruled that the coram nobis court properly discounted his allegations that he had been unaware of the nature of the charges when he entered his guilty pleas, Id. at **Appx. 8-b.** [2]

Considered with those precepts in mind, even assuming arguendo the coram nobis court has authority to consider additional evidence such as the trial lawyer's testimony regarding his or her conversation with the defendant explaining the terms of the plea, in addition to the record of the plea hearing itself). State v. Rich, 454 Md. 448 (2017) at 464. Unlike in Smith were there was the trial lawyer's testimony regarding defense counsel's conversation with Smith of having explained the terms of the plea. At the January, 2017 coram nobis hearing there was absolutely no testimony taken from Pena's defense counsel or evidence offered by the State or the coram nobis court to determine he plead "voluntarily with understanding of the nature of the charges within the meaning of Md. Rule 4-242(c). Because just like in Rich the defense counsel of Pena was not called either by the state or the coram nobis court to testify at the January 18, 2017 that defense counsel had advised

him of the nature of the elements of the offenses. As so, Pena's case is thus akin to State v. Rich, 454 Md. 448 (2017) whereas, unlike in Smith, there was no testimony from defense counsel which afforded the coram nobis court to look beyond the record. [3]/

Nonetheless without testimony from Pena's defense counsel the Maryland Appellate Court in affirming the coram nobis court's conclusions on appeal held: 'Pena maintains that his plea was not entered knowingly because the elements of robbery with a dangerous and him on the record of the plea proceeding. The fact that the elements of the crimes were not explicitly iterated on the record, however, does not establish that Pena, in fact, did not understand the nature of the offenses when he entered the pleas, but notably he chose not to support that allegation with testimony, under oath, at the coram nobis hearing. The coram nobis court discounted his allegations that he had been unaware of the nature of the charges when he entered his guilty pleas, noting (1) that he was represented by a seasoned defense attorney who certainly would have discussed with him the nature and elements of the deadly weapon and use of a handgun in the commission of a felony were not explained to

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FN2. Although the State has always insisted the record of Pena's 2001 guilty plea was sufficient for the court to decide the plea was knowing and voluntary, and requested that court make such a decision based on that record. It should be judicially noted the guilty plea record does not reveal Pena was advised of the nature and elements of the charges.

FN3. Unlike in Smith, there was no testimony from Mr. Rich's trial counsel concerning his discussions with Mr. Rich regarding the 2001 guilty plea, because there was no coram nobis hearing at which counsel could have testified. And, there was no coram nobis hearing on the 2001 guilty plea because the coram nobis court acceded to the State's request to deny Mr. Rich's petitions without a hearing. Under these circumstances, where the State repeatedly asserted that the record of the 2001 plea hearing itself was sufficient to make a determination on whether the guilty pleas was knowing and voluntary, and the coram nobis court made such a determination without holding an evidentiary hearing, and the State did not request a remand for an evidentiary hearing on this point while the case was on appeal, the Court of Special Appeals did not err in limiting its review of Mr. Rich's claims to the record of the 2001 plea hearing. 454 Md. 448 (2017) at 467.

offenses, and (2) that the Initial Appearance Report demonstrated that he was properly advised of the nature of the charges pending against him when he first appeared in court. In short, the coram nobis court concluded that Pena failed to meet his burden that he, in fact, had entered his guilty pleas without an understanding of the nature of the charges. We find no error in that conclusion. **at Appx. 6-b, 7-b.** In that light even assuming the coram nobis courts are authorized to look beyond or outside the record to determine whether a coram nobis defendant voluntarily pleaded guilty with a understanding of the nature of the charge. Smith v. State, 443 Md. 572 (2015) at 654.

The question becomes when challenging a guilt plea through a petition for writ of error coram nobis although the guilty plea record supports the petition claims that he had not been advised of the nature and elements of the offenses before entering a guilty plea. Did Pena have an obligation or burden of testifying as to defense counsel's failure to advise him of the nature and elements of the charges when the coram nobis court decided to look outside the record to determine whether he had been advised of the natural and elements of the charges. Or could Pena rely on the guilty plea record to support his claims in light of the fact no case law required Pena at the coram nobis hearing to testify that defense counsel did not advise him of the nature and elements of the criminal offenses when the plea record itself will suffice. Bradshaw v. Stumpf, supra, "holding that absence a record to support a defendant like Pena was advised by defense counsel of the nature and elements of the charges before pleading guilty, the plea is invalid. 545 U.S. at 182-183.

In sum, Pena had no burden to testify as a result the Appellate Courts of Maryland erred or abused its discretion in affirming the coram nobis court's judgment in looking outside the record based solely on that coram nobis court's speculation and conjecture that Pena was represented by a seasoned defense attorney who certainly would have discussed with him the nature and elements of the offenses. Conjecture that was in direct conflict with those Maryland Appellate Courts own holdings reached in Smith v. State, in which the defense counsel actually testified at the coram nobis hearing. [4]

(a). Whether Since This Court In "Bradshaw v. Stumpf" Scaled Back The Presumption Suggested In Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 108 (1976) Whether Without Defense Counsel Testifying At The Hearing The Maryland Appellate Courts erred Or Abused Its Discretion In Concluding Base Only On The Coram Nobis Court's Presumptive Knowledge Of Defense Counsel Reputation Of Being Mindful Of His Clients Rights That Pena Pleaded guilty Voluntarily With The Understanding Of The Crime Elements ?

The January 18, 2018 evidentiary hearing record demonstrates without any testimony from defense counsel the coram nobis court's concluded that Pena had been advised of the nature of the offenses solely premise on that court's presumptuousness of defense counsel proficiency.

> THE COURT: You were represented by Mr. Ed. Barry, who I've known for 12 years--
>
> THE COURT: --only in my capacity as a Judge, but you can imagine, he's represented a lot of people. "T1" pg. 57, lines 23-25.
>
> THE COURT: He's in this courtroom and he is in this courthouse often.
>
> THE COURT: His reputation, and my experience with him, is that he is a very thorough attorney, very detailed-oriented and very mindful of his clients and their rights. "T1" pg. 58, lines 4-9.
>
> THE COURT: -- there is (Laughs) --- no way that Ed Barry didn't discuss with you the nature and the elements of these charges. It is not possible, I'm -- it is not possible. And anyone who knows the man will agree with me. But that's -- I'm not basing my decision only on that, is. There is actually paperwork in the file that says that the nature of the elements-- that it was explained to you. And you signed it. It's your Initial Appearance Report. (Pause)-- "T1" pg. 64, lines 16-23.
>
> THE COURT: --but now I'm telling you that I have found in this, in this file a confirmation from Judge Russell that he advised you of the nature of the charges and the allowable, mandatory penalties. So, even though-- in fact, I

can mark that as an exhibit as well -- even though I feel as strongly as human can feel strongly that Ed Barry would have discussed all of this with you. I have found confirmation in the file. So-- but, but let's pretend I'm wrong about that. "T1" pg. 65, lines 18-25, "T1" pg. 66, line 1.

THE COURT. -- is the plea knowing and voluntary? I actually find that you were advised. Um, but literally, say I'm wrong, then the next question is, are you facing significant, collateral consequences? "T1" at pg. 66, lines 6-9. January 18, 2017 hearing transcript:

Those presumptive conclusions of the coram nobis court for denying coram nobis relief were base on nothing more then pure speculation and conjecture that there was no way defense counsel didn't discuss the nature and elements of the charges runs afoul of the Appellate Courts of Maryland's own controlling precedential case law decided in State v.

FN4. Unlike the plea counsel in Daughtry, Suissa did not testify that Smith understood the charges sometime after the plea hearing (e.g., at the hearing on sentencing). Instead, Suissa's testimony directly related to Smith's understanding of the charges at the time of the guilty plea. Thus, here Suissa's was indeed relevant. Based on the analysis above, we hold that a lawyer's testimony at a coram nobis hearing concerning having advised a defendant prior to the guilty plea of the nature of the charges against him or her is admissible. Such testimony may be considered in a coram nobis proceeding in determining whether a defendant pled "voluntarily, with understanding of the nature of the charge" within the meaning of Maryland Rule 4-242(c). In this case, at the hearing on the petition for coram nobis relief, Suissa testified that he absolutely reviewed the statement of charges and indictment with Smith, and that he did not have any concerns that Smith did not understand the nature of the charges against her. Suissa testified that he discussed with Smith the amending of the charge from possession with intent to distribute to conspiracy to distribute, and that he discussed the definition of conspiracy with Smith. From this testimony, the circuit court determined that Smith was actually advised of the nature of the charges, and that her plea was knowing and voluntary. Suissa testimony "is strong evidence, absent other circumstances tending to negate a finding of voluntariness... that [Smith] entered the guilty plea knowingly and voluntarily. Id. 443 Md. at 654-655.

Daughtry, 419 Md. 35, (2011) relying on Bradshaw v. Stumpf, supra as authority and holding: "That allowing a trial court, in ensuring that a guilty plea is knowing, voluntary, and entered intelligently, to rely essentially on nothing more than a presumption that " in most cases defense counsel routinely explain the nature of the offense in sufficient **requirement that there be an adequate examination "on the record in open court.** [5] at 42. Even more importantly runs afoul of the Supreme Court in "Bradshaw" scaled back the presumption suggested in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 108 (1976) so now, when a guilty plea is entered, it cannot be presumed from the mere fact of representation that defense counsel has explained the nature and elements of the charges to the defendant; Miller v. State, 185 Md. App. at 305. The Miller court also held that we have found no decision rendered after Bradshaw approving a guilty plea when the defendant's knowledge of the nature and elements of the crime was presumed from the fact of representation, without more. In several cases, the courts have referred, approvingly, to the Henderson presumption, but their conclusions that the defendants entered into their pleas with knowledge of the nature and elements of their crimes were based on record evidence, not a presumption. Id. Miller, 185 Md. App. at 310-311; and

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FN5. "In that case, the Court noted that "the only portion of the plea colloquy" that related to "ascertaining whether the plea was knowing and voluntary was Daughtry's affirmative response to the trial judge's question, "Have you talked over your plea with your lawyer?" Id. at 70. The Court held that, "where the record reflects noting more than the fact that a defendant is represented by counsel (as in the present case) and that the defendant discussed generically the plea with his or her attorney, such a plea colloquy is deficient under Rule 4-242(c), and the plea must be vacated." Id. at 71. Defense counsel did not indicate at the plea hearing that he had explained the nature and elements of the crime to the appellant, and the appellant did not represent that he understood the charge. Under these circumstances, the prosecutor at the coram nobis hearing acknowledge that "this is a case where trial counsel only put on the record that [appellant] was pleading to a handgun charge," and therefore, the State was "not in a good position to argue that on the record [appellant] was advised of the nature and elements of the offenses as required. Id. at 355 -358.

Graves v. State, 215 Md. App.339 (2013) which held "Following Bradshaw, this Court made clear that, without express assurance of the record, a court cannot presume that "defense counsel has sufficiently explained to the defendant the nature of the offense to which he or she is entering a guilty plea." Abrams v. State, 176 Md. App. 600, 622-23 (2007). We explained that "the trial judge must either (1) explain to the defendant on the record the nature of the charge and the elements of the crime, or (2) obtain on the record a representation by defense counsel that the defendant has been 'properly informed of the nature and elements of the charge to which he [or she] is pleading guilty." Id. at 623 (quoting Bradshaw, 545 U.S. at 183). Accord Miller v. State, 185 Md. App. 293, 295, 307, 309, 970 A.2d 332 (Where "defense counsel did not represent that he had explained the nature and elements of the crime to the appellant," and neither the judge, defense counsel, or the prosecutor explained on the record the nature and elements of first-degree burglary, Mr. Miller's statement that he understood the plea agreement "was not tantamount to acknowledging that he understood the nature and elements of first-degree burglary."), cert, denied, 410 Md. 166, 978 A.2d 246 (2009).

In sum, affirming the coram nobis court's conclusions Pena's guilty plea was knowingly and voluntarily made with a understanding of the nature and elements of the offenses base only on the coram nobis court's own presumptions at the coram nobis hearing without the testimony of Pena's defense counsel attesting to having had advised him of the nature and elements of the charges before he entered a guilty plea constitutes err and abuse discretion and were in direct conflict with this Court's Bradshaw v. Stumpf opinion prohibiting such a presumptions without a record. [6]/

(b). Whether The Maryland Appellate Courts Erred Or Abused its Discretion In Looking Beyond The Guilty Plea Record To Conclude The Initial Appearance Report Serve As Proof Pena Had Been Advised Or Understood The Elements Of The Crimes Since Those Conclusions Are In Direct Conflict With This Court's Controlling Precedent Decided In Bradshaw v. Stumpf?

In the case at bar, the Maryland Appellate Courts in affirming the coram nobis court's upon other conclusions outside the record of the plea record did so base on the following:

> THE COURT: -- there is (Laughs) --- no way that Ed Barry didn't discuss with you the nature and the elements of these charges. It is not possible, I'm -- it is not possible. And anyone who knows the man will agree with me. But that's -- I'm not basing my decision only on that, is. There is actually paperwork in the file that says that the nature of the elements-- that it was explained to you. And you signed it. It's your Initial Appearance Report. (Pause)-- "T1" pg. 64, lines 16-23.
>
> THE COURT: --but now I'm telling you that I have found in this, in this file a confirmation from Judge Russell that he advised you of the nature of the charges and the allowable, mandatory penalties. So, even though-- in fact, I can mark that as an exhibit as well -- even though I feel as strongly as human can feel strongly that Ed Barry would have discussed all of this with you. I have found confirmation in the file. So-- but, but let's pretend I'm wrong about that. "T1" pg. 65, lines 18-25, "T1" pg. 66, line 1.
>
> THE COURT. -- is the plea knowing and voluntary? I actually find that you were advised. Um, but literally, say I'm wrong, then the next question is, are you facing significant, collateral consequences? "T1" at pg. 66, lines 6-9.

Evidentiary Hearing of January 17, 2017.

In adopting those conclusions the Maryland Appellate Courts erroneously decided that the Initial Appearance Report demonstrated that Pena was properly advised of the

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FN6. In Bradshaw v. Stumpf that the explanation must be on the record. For example In Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true. Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty. 545 U.S. 175 (2005). at 183

nature of the charges pending against him when he first appeared in court.

In short, the coram nobis court concluded that Pena failed to meet his burden that he, in fact, had entered his guilty pleas without an understanding of the nature of the charges. We find no error in that conclusion. Id. at **Appx. 4-b. 5-b, 6b.** Clearly, the appellate courts erred or abuse its discretion in placing reliance's on the coram nobis court's conclusions in light of its own controlling case law of Miller v. State, 185 Md. App. 293 (2009), which held: "That the State's last argument does not have merit either. It maintains that the appellant was informed adequately of the nature and elements of first degree burglary because, at his arraignment, he signed the receipt acknowledging that he had been informed of the charges against him. The record indeed reflects that on January 4, 2007, the appellant signed a "receipt" for the "Initial Appearance Report," in which he checked language stating, "I have ... had read to me the offense(s) for which I am charged, the conditions of release, the Notice of Advice of Right to Counsel. I acknowledge receipt of a copy of this form. "Neither the Initial Report nor the receipt lists the elements of any of the charged crimes or describes their nature, however. Thus, the appellant's prior acknowledgment of the charges by signing the receipt was insufficient to establish that he had been properly informed pursuant to Rule 4-242(c). Id. 185 Md. App. at 310.

In sum, thus the appellate courts embracing of the coram nobis court's erroneous conclusions base upon reliance's Pena's district court's signing of a receipt for the "Initial Appearance Report" just like in Miller was insufficient to establish that he had been informed of the elements of any of the charges offenses or described their nature. Since neither document lists the elements of any of the charged crimes or describes their nature. As so, constitute an abuse of its discretion in ignoring **Miller**, unanimous controlling case law, 188 Md. at 310. [7]

ARGUMENT II:

> **II. Whether The Maryland Appellate Courts Erred Or Abused Its Discretion In Concluding That The Trial Judge Use Of The 2001 Convictions And Fifteen Year Sentence Invalid Under Bradshaw v.**

Stumpf As Reasons For Imposing A Consecutive Twenty-Five Year Sentence Did Not Constitute Significant Collateral Consequences?

With respect to denying Pena's claim of having and continue to suffer collateral consequences as a direct result the 2001 invalid Daughtry convictions and sentences the coram nobis court ruled:

> THE COURT. -- is the plea knowing and voluntary? I actually find that you were advised. Um, but literally, say I'm wrong, then the next question is, are you facing significant, collateral consequences? "T1" at pg. 66, lines 6-9. THE COURT: And I find that you're not, right? I'm not saying, it's not a big sentence that you got form Judge Hennegan. Of course, it is. It's serious. The crime was serious. You shot somebody. "T1" at pg. 66, lines 11-14. THE COURT: And I absolutely agree with you, that Judge Hennegan was told of the home invasion robbery-- "T1" at pg. 66, lines 16-17. THE COURT: What -- I mean, honestly, of course it was consecutive. It was a completely different and unrelated crime. So, -- and, and I still, frankly, have the issue of-- like, every-- THE COURT: -- has collateral consequences. Every conviction, right? I mean, honestly, it makes it harder to get a job. That's a collateral consequence of a conviction. Now, depending on the conviction: I understand the law is changing, and sometimes people don't always know about convictions, but I mean, it's always harder. 'Everything's harder after you have a conviction, right? "T1" at pg. 67, lines 6-24.

On appeal Pena challenged those conclusions however, the appellate courts nonetheless held: 'We agree with the coram nobis court that Pena failed to establish that he was suffering a significant collateral consequence as a result of the 2001 guilty pleas. At the coram nobis hearing, Pena maintained that his sentence in 2002 case was enhanced "

FN7. Holding that the Initial Appearance Report boilerplate language in those documents does not affirmatively reflect Pena's knowledge of the nature and elements of the multiple offenses he was charged with. Since it does not itself set forth the nature and elements of the crimes. Renders it insufficient to show he understood the nature of the offenses when he entered the guilty pleas.

because it was ordered to run consecutive," which made "the first 15-years with parole automatically turned into non-parole." In other words, his position is that the ordering of the sentence in the 2002 case to run consecutive to the sentence in the 2001 guilty plea case "had the effect of transforming that initial parolable 15 year term after service of five years imposed under indictment No. 03-K-01--0468 [the guilty plea case] into a non-parolable fifteen (15) year term." the coram nobis court found no merit to that contention, an neither do we. Pena further maintains that the 2001 guilty plea increased the sentencing guidelines in the 2002 case.

In rejecting this contention, the coram nobis court noted that for the attempted murder conviction in the 2002 case, the sentencing guideline were twenty-five years to life, even without the 2001 convictions taken into consideration. The coram nobis court further noted that the sentencing transcript from the 2002 case reflected that the sentencing judge was "very close" to imposing a life sentence but, because of Pena's age, instead imposed a twenty-five year term of incarceration -- the lowest end of the guidelines. In short, there is not evidence in the record that the sentences in the 2002 case were enhanced because of the 2001 guilty pleas. Pena also attempts to establish a significant collateral consequence by asserting that the 2001 convictions were considered by the 2002 sentencing court when it ordered the sentence in that case to run consecutive to any outstanding sentence. The coram nobis court found that the 2002 case "was a completely different and unrelated crime" and that running the 2002 sentence consecutive to "any outstanding sentence" was a natural consequence, not a "significant collateral consequence" as that term is understood in the coram nobis context. We agree. Based on the forgoing, we hold that the coram nobis court did not abuse its discretion in denying Pena's petition for relief. at Appx. 7-b, 8-b.

Clearly, those conclusions are erroneous since the State in arguing for a consecutive sentence: Stated. I need to explain three incidents for you so that you can understand the Defendant's background clearly. Couple weeks after that stabbing incident, The Defendant committed a second crime. And this is the crime for which Judge Turnbull

sentenced the Defendant already for 15 years. That takes me to my third point here where I wrap up. There are really two questions for your to answer, how much time to give the Defendant and should it be concurrent or consecutive. To me I think that the first question of consecutive or concurrent time is clear. There is no reason for this sentence, the punishment, to run together. That gives the Defendant a benefit he is completely not entitled to. The attempted murder turns out the same, 25 to life. Some of the underlying and different crimes come out differently because I believe the probation agent gives the Defendant a moderate record. But having stood here today, he has been convicted of the armed robbery and the handgun and the home invasion case before Judge Turnbull. That automatically, with his prior, gives him a major record. That is where I differ with the probation agent. Either way you come up with the same guidelines for the most serious count, the attempted murder. I don't believe the Defendant has done anything to be worthy of your Honor's leniency. At every stage of the game he has denied it. He has shown his continued and escalating violence in the last couple of years while he's been out on the street. I would ask your Honor to consider a sentence of 30 years consecutive to the 15 that he is already doing. Frankly, that is near the bottom of the guidelines. I think it is fair; I think it is just, and I think it is appropriate in this case. at pg. 17, lines 22-25, pg. 18, lines 1-5, line 25; pg. 19, lines 1-25; 20, lines 1-8 pg. 20, lines 17-22; pg. 21, lines 2-5; pg. 21, lines 20-25; pg. 22, lines 1-15.

Thus because the State insisted on the sentencing court considered those convictions invalid under Bradshaw v. Stumpf as the determining factor for imposing the twenty-five year sentence to run consecutively with the 2001 fifteen term. Cause Pena to suffer the significant collateral consequences of having the fifteen year term parolable after serving five years turned into a non-parolable sentence; the twenty-five year sentence delayed from commencing until after that fifteen year term expired; and then becoming parole eligible way beyond the maximum term for parole eligible under the 25 year term. See United States v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972) which

held: (a federal district judge, in imposing a sentence, gave explicit consideration to the defendant's record of previous convictions. It was later conclusively determined that two of the previous convictions were constitutionally invalid, having been obtained in violation of Gideon v. Wainright, supra.

In sum, because the Supreme Court held that under these circumstances the Court of Appeals for the Ninth Circuit was correct in remanding the case to the district court for reconsideration of the sentence imposed upon the defendant. As so for intending purposes, Pena suffered and continues to suffer significant collateral consequences from the convictions and fifteen year term invalid under Daughtry and based on those appellate courts reliance's this Court's holdings in Bradshaw v. Stumpf, supra.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Luis A. Pena

Date: Nov. 13, 2018