

No. 18-7901

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
OCT 19 2018

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Darrius DaJuan Cohee — PETITIONER  
(Your Name)

vs.

James A. Yates — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
United States Court Of Appeals  
For The Tenth Circuit  
1823 Stout Street  
Denver, Colorado 80257

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

PETITION FOR WRIT OF CERTIORARI

Darrius DaJuan Cohee #695588

(Your Name)

OCF Davis Corr. Facility  
6888 East 133rd Road

(Address)

Holdenville, Oklahoma 74848

(City, State, Zip Code)

c/o (405) 379-6400

(Phone Number)

**QUESTION(S) PRESENTED**

- (1) Was Petitioner's Counsel Ineffective For Failing To File Petitioner's Motion To Withdraw Guilty Plea After Petitioner Specifically Requested For Counsel To Do So
- (2) Was Petitioner's Constitutional Rights Violated Due To Counsels Failure To File Motion To Withdraw Guilty Plea?
- (3) Was Petitioner's Federal Substantive Rights Violated By The State Using A Procedural State Bar Unconstitutionally Applied Without The State Meriting And Answering Petitioner's Federal Claims?
- (4) Did Petitioner Utilize The Correct Avenue To Challenge These Issues Through The Uniform Post-Conviction Procedure Act?
- (5) Did The Oklahoma Court Of Criminal Appeals Commit Error By Failing To Reverse The Order Denying Post-Conviction Relief For The Reasons Set Forth In His Petition In Error Relating To Petitioner's Ineffective Assistance Of Counsel Claims?
- (6) Did The Oklahoma Court Of Criminal Appeals Commit Error In Failing To Not Sustain Petitioner's Application For Post-Conviction Relief In The Lower District Court?
- (7) Did The Petitioner Sufficiently Raise His Claims For Relief Within The United States District Court For The Western District Of Oklahoma Where The Petitioner Could Bypass The AEDPA Statue Of Limitations By Demonstrating Exception For "Cause And Prejudice" Standards Due To Ineffective Assistance Of Counsel?
- (8) Did The United States District Court For The Western District Of Oklahoma Fail To Conduct A Requested Evidentiary Hearing On Petitioner Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus On Petitioner's Ineffective Assistance Of Counsel Claims, Conflict Of Interest Claim, Denial Of Petitioner's Right To Appeal, Failure To File On Petitioner's Behalf In The Lower District Court?
- (9) Did The Courts Commit An Abuse Of Discretion In Failing To Adhere To United States Supreme Court Precedent Cases And United States Constitutional Rights That Did Not Pass Constitutional Muster And Comport To Federal Substantive Law?
- (10) Will The United States Supreme Court Intervene And Protect Petitioner And His Constitutional Rights That Have Been And Continue To Be Unresolved In The Lower Courts And Set A New Precedent Law?
- (11) Did The United States District Court For The Western District Of Oklahoma Commit Error When It Failed To Issue Petitioner's Subpoena Duces Tecum On Witnesses That Would And Still Will Prove Petitioner's Claims On Related Ineffective Assistance Of Counsel?
- (12) Did The United States Court Of Criminal Appeals For The Tenth Circuit Commit Error By Failing To Address The Federal Constitutional Issues Raised Throughout Petitioner's Collateral Appeals Process?

## LIST OF PARTIES

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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| United States v.Mercer, 510 F.2d 343 (7th Cir.1982).....                         | _____.      |
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### STATUTES AND RULES

### OTHER

United States v.Scott, 625 F.2d 623,625 (5th Cir.1980).....\_\_\_\_\_.  
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United States v.Wolak, 510 F.2d 164 (6th Cir.1975).....\_\_\_\_\_.  
Wade v.Wainwright, 420 F.2d 898 (5th Cir.1969).....\_\_\_\_\_.

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. Petitioner prays that this Honorable Court will issue forth a "Writ Of Certiorari" to review the judgement and opinion of the United States Court Of Appeals For The Tenth Circuit, entered in the above proceedings on July 27, 2018.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix H 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 G 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 Oklahoma Court Of Criminal Appeals court appears at Appendix G to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

1.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 27, 2018.

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).

For cases from **state courts**:

The date on which the highest state court decided my case was January 5, 2017. A copy of that decision appears at Appendix G \_\_\_\_\_.

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

- (1) The Fifth (5th) Amendment of the United States Constitution provides:  
"No person shall be...deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."
- (2) the Sixth (6th) Amendment of the United States Constitution provides:  
"In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation;...and to have the assistance of counsel for his defence."
- (3) The Fourteenth (14th) Amendment of the United States Constitution provides:  
"...No state shall make or enforce any law which shall abridge the privileges...;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."
- (4) The Oklahoma Constitution Article II,§6 provides:  
"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."
- (5) The Oklahoma Constitution Article II,§7 provides:  
"No person shall be deprived of life, liberty, or property, without due process of law."
- (6) The Oklahoma Constitution Article II,§9 provides:  
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."
- (7) The Oklahoma Constitution Article II,§15 provides:  
"No..., ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed..."
- (8) The Oklahoma Constitution Article II,§20 provides:  
"In all criminal prosecutions the accused shall have...He shall be informed...and have compulsory process for obtaining witnesses in his behalf...he shall the right to be heard...to prove the allegations..."
- (9) The Oklahoma Statute Title 22 O.S.2011,§1080 et seq. provides:  
"Any person who has been convicted of, or sentenced for, a crime and who claims: (a)...,(b)...,(c)...,(d)...,(e)...,(f)..., may institute a proceeding under this act in the court in which the judgement and sentence on conviction was imposed to secure the appropriate relief..."
- (10) The United States Code Title 28 U.S.C. §2254 provides:  
"(A) Case involving a petition under 28 U.S.C.§2254. These rules govern a petition for writ of habeas corpus filed in a United States district court under Title 28 U.S.C.§2254 by: (1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and (2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the constitution, laws, or treaties of the United States. (B) Other cases. The district court may apply any or all these rules to habeas corpus petition not covered by Rule 1(a).

## STATEMENT OF THE CASE

On March 27, 2012, the Seventh Judicial District Court, State of Oklahoma under the explicit authority of David W. Prater, District Attorney Elect, filed an Information charging Darrius DaJuan Cohee and thirty various other co-defendants with the offenses Conspiracy To Trafficking A Controlled Dangerous Substance (Cocaine) [Count One], and Aggravated Trafficking [Count Three]. See Oklahoma Statute Title 63 O.S.2011,§2-414; 63 O.S.2011;2-415.

On February 24, 2014, the day of trial, Petitioner announced his decision to plead guilty to Count One the Conspiracy To Trafficking A Controlled Dangerous Substance (Cocaine), in exchange for a negotiated plea agreement that Petitioner would receive an eighteen (18) year maximum term of imprisonment, to be served under the custody and control of the Oklahoma Department of Corrections, and a fine of not more than \$100,300.00 in Fines, Costs and Penalty's, and the State of Oklahoma agreed to the negotiated Plea of Guilty/Summary of Facts form whereon the State endorsed.

During the guilty plea colloquy, as is mandatorily required by United States Title 18 U.S.C., Federal Rules Of Criminal Procedure, Rule 11(c)(1), the Seventh Judicial District Court, State of Oklahoma advised Petitioner that the maximum sentence he could receive was life imprisonment and a fine of not more \$25,000.00 on each count. See Plea Of Guilty/Summary Of Facts form and transcripts by incorporation by reference @ OSCN.net (CF-2012-1837) (Okla.Co.), as if plead in full hereto. The State Of Oklahoma presented a O.C.C.A. 13.10 form, written plea agreement to the Seventh Judicial District Court to which specifically defined that Petitioner would receive an eighteen (18) years maximum term of imprisonment under the custody and control of the Oklahoma Department of Corrections, and a fine of not more than \$100,300.00 in Fines, Costs and Penalty's.

The original plea agreement signed and entered into by Petitioner and all interested parties, was specifically for one count of Conspiracy To Trafficking A Controlled Dangerous Substance to which the State of Oklahoma dismissed page two for purposes of plea. On the day of sentencing, the District Attorney, District Court, nor the Petitioner's Attorney Ed Blau never advised or informed the Petitioner that the original O.C.C.A. 13.10 form Plea Of Guilty/ Summary Of Facts form was constructively amended by unknown persons or individuals whereby Petitioner was unknowingly, unintelligently and unwillingly pleading guilty to additional charges. See Plea of Guilty/Summary of Facts form 13.10 attached hereto as Appendix "B".

On February 24, 2014, after Petitioner's Sentencing Hearing, it was discovered by the Petitioner during a review of his Plea of Guilty/Summary of Facts paperwork to which had been changed, altered and amended after he had previously signed it, to which Petitioner then became very concerned and confused because it was not the original plea agreement he had entered into with the State of Oklahoma. Immediately after discovering these discrepancies and errors, the Petitioner specifically informed Edward Blau to withdraw his plea of guilty. Petitioner also was calling his family members and many friends to have them get into contact with his defense attorney because he wanted to withdraw his guilty plea. See "affidavits" contained within the record of Petitioner's Title 28 U.S.C. §2254 and incorporate by reference herein as if plead in full.

Directly after the sentencing hearing and his return to the county jail facility on the very date of sentencing through the next two weeks, Petitioner and his family's calls were not returned, nor did his defense counsel come to the Oklahoma County Jail Detention Facility to visit with the Petitioner. No "Motion To Withdraw Guilty Plea was filed on Petitioner's behalf as specifically requested and demanded by said referenced Petitioner, nor was a

timely Notice Of Intent To Appeal filed by Defense Attorney Edward Blau.

On April 30, 2014 , the Petitioner received a copy of his Amended Judgment and Sentence whereby the District Court erroneously constructively amended and assessed and ordered and decreed punishment at two (2) terms of eighteen (18) years imprisonment that the Petitioner did not originally enter into. See the Seventh Judicial District Court's Judgment and Sentence attached hereto as Appendix "A".

On June 27, 2016, the Petitioner filed an Application For Post-Conviction Releif specifically claiming propositions of error on collateral attack whereby the State of Oklahoma by and throuygh t Oklahoma County DIstrict Attorney recharacterized the Petitioner's Application For Post-Conviction Releif into thirteen (13) propositions of error. See Appendix "C" attached hereto and incorporated hereto as if replead in full.

On October 6,2016, the Petitioner's Applciation For Post-Conviction Relief was denied by the Seventh Judicial District Court. See Appendix "E" Order Denyinmg Relief attached hereto.

On October 13,2016, the Petitioner filed a timely Notice OF Intent To Appeal/Designation Of Record. See Appendix "F" attached and incorporated by reference as if plead in full hereto, and is the O.C.C.A. Petition In Error.

Petitioner then filed a timely Petition In Error and submitted it unto the Oklahoma Court of Criminal Appeals. See Appendix "F" attached hereto and incorporated by reference as if plead in full.

On January 5,2017, the Oklahoma Court of Criminal Appeals affirmed the denial of the Seventh Judicial District Courts senial of Petitioner's Application For Post-Concviction Relief.

On December 29,2017, the Petitioner timely filed a Petition For Writ Of habeas Corpus Title 28 U.S.C. §2254 into the western District Court For The Western District Court of Okalhoma.

On May 9,2018, the western District Court Of Oklahoma denied the Petitioner Writ Of habeas Corpus Title 28 U.S.C. §2254.

On June 7,2018, the Petitioner filed for a Certificate of Appealability and submitted it unto the jurisdiction of the Tenth Circuit Court of Appeals to which now the Petitioner now seeks this Honorable Courts sound ruling pertaining to a Writ Of Certiorari.

## REASONS FOR GRANTING THE PETITION

(A) THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS HONORABLE COURT.

(1) The Tenth Circuit Court Of Appeals Panel Opinion affirming the United States District Court For The Western District Of Oklahoma's denial of Petitioner's Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus whereby holding that Petitioner's claim was dismissed because Petitioner did not establish "cause" and "prejudice" to excuse procedural default under the Antiterrorism Effective Death Penalty Act or AEDPA. Contrary to the Tenth Circuit Court of Appeals holding, the Petitioner showed 'cause and prejudice' excusing procedural default due to ineffective assistance of counsel, conflict of interest, failure to file Petitioner's motion to withdraw guilty plea, etc.. Petitioner received a sentence "greater" than the Oklahoma County District Courts formal admonishment due to the constructive amendment of the Petitioner's O.C.C.A. 13.10 Plea of Guilty/ Summary of Facts form that was altered, amended and changed after Petitioner had first originally signed them, without his knowledge, permission or consent, and Petitioner diligently asserted throughout the Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus, all the herein referenced propositions of error, as well as that the Petitioner would not have pleaded guilty had Petitioner been fully advised of the unknown constructive amendments. The guilty plea was sustained in violation of due process and in direct conflict with the applicable decisions of this Honorable Court and is, in fact, cognizable in a Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus, in light of this said tribunal's precedence. This Honorable Court should therefore, exercise its supervisory powers over the lower courts and issue forth the writ in favor of the Petitioner.

(2) The Tenth Circuit Court of Appeals Panel Opinion committed error affirming the United States District Court For The Western District Of Oklahoma's denial of Petitioner's ineffective assistance of counsel claims because its decision is in direct conflict with this Honorable Court's decision in *Strickland, Hill, and Evitts*, *infra*. The affidavit against the Petitioner's interests, as shown in the record of this instant case, shows that counsel created a conflict of interest, by signing an affidavit against Petitioner's interest by which the State Of Oklahoma used to aid in its denial of Petitioner's Application For Post Conviction Relief, as well as created a conflict of interest by failing to file Petitioner's requested Motion To Withdraw Guilty Plea, rendered ineffective assistance of counsel by allowing the State of Oklahoma to constructive amendment of the Plea of Guilty/ Summary Of Facts 13.10 form without Petitioner's knowledge, consent or permission and without advising Petitioner of such alterations; then intentionally lying to Petitioner's and the Court because Petitioner's family had, in fact, attempted to contact him in order to get Petitioner's guilty plea withdrawn. Petitioner asserted these propositions of error in his Title 28 U.S.C. §2254 Writ Of Habeas Corpus, as well as that he would not have not plead guilty, absent counsel's erroneous and faulty misconduct during his ineffective representation of Petitioner.

(3) The Tenth Circuit Court of Appeals committed error in affirming the denial of Petitioner's Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus where the United States District Of Oklahoma failed to conduct an evidentiary hearing to resolve the factual dispute which if true, warranted Habeas relief and the record did not "conclusively show" that he could not establish facts warranting relief under Title 28 U.S.C. §2254, to which in fact, entitled Petitioner to such said hearing.

Petitioner respectfully urges that all aspects of the Tenth Circuit Court of Appeals decision are incorrect and erroneous and at a variance with this Honorable Courts precedent decisions as explained further in the arguments herein below.

### Argument amplifying Reasons For Writ

(1) The Tenth Circuit Court Of Appeals Erred In Affirming The Conviction On The Basis That Petitioner's Constitutional Violations Was Not Cognizable In A §2254 Proceeding And Petitioner Failed To Show Cause For Procedural Default

The guilty plea was sustained in violation of due process because the

Petitioner received a sentence "greater" than the original plea agreement than the statutory maximum fine, penalty and punishment admonishment, to which is wholly inconsistent with the rudimentary demand of fair procedure. See **United States v. Scott**, 625 F.2d 623, 625 (5th Cir.1980). Petitioner's §2254 Petition For Writ Of Habeas Corpus asserted that he would not have pleaded guilty had he been correctly advised of the statutory maximum penalty and punishment provided for by law. The district court advised the Petitioner that his maximum penalty was, in fact, according to the original plea agreement, was eighteen (18) years imprisonment and a fine up to twenty-five (\$25,000.00) dollars and/or both. The district court then imposed a sentence to which the Petitioner had no knowledge or agreement about and then constructively amended and entered two (2) eighteen (18) year terms of imprisonment and then entered that the Petitioner must serve a term of post-imprisonment supervision for a period of not less than nine (9) months nor more than one (1) year following confinement. A total sentence of thirty-six (36) and one half ( $\frac{1}{2}$ ) years or thirty-seven (37) years. See Appendix "B" attached hereto.

Under the "**worse case**" scenario, Petitioner would serve his eighteen (18) year term of imprisonment in full and then be required to commence serving the nine (9) month to one (1) year term of supervised release and have the supervised portion revoked on the last day of the supervision period and serve every day of the additional one (1) year and three hundred sixty-five days in prison following revocation. **United States v. Bachynsky**, 934 F.2d 1349, 1353 (5th Cir.1991); **United States v. Hekiman**, 975 F.2d 1098, 1103 (5th Cir.1992). Under this scenario, thirty-seven years, eleven months, and approximately thirty days would have to pass from Petitioner's first day of imprisonment to his last.

Petitioner did not and could not have understood the consequences of his guilty plea, the plea itself therefore, was not entered into voluntary or intelligently and was sustained in violation of the Fifth (5th) Amendment Due Process Clause of the Untied States Constitution. Due Process requires that before the court accepts a plea of guilty, the defendant be fully advised with respect to the nature of the charges and the maximum possible penalty for the offense. **Brady v. United States**, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970); **United States v. Wolak**, 510 F.2d 164 (6th Cir.1975). Constitutional protection of due process mandates that an accused's guilty plea be voluntary and intelligent. **Boykin v. Alabama**, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-1712, 23 L.Ed.2d 274 (1969). Because a guilty plea waives the rights against self-incrimination, to trial by jury, and to confront one's accusers, its acceptance requires the "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." *Id.* @ 243-244, 89 S.Ct. @ 1712.

"It is well settled that a plea of guilty is invalid as not being understandingly entered if the defendant does not know the maximum possible penalty for the offense." **Marvel v. United States**, 380 U.S. 267, 85 S.Ct. 953, 13 L.Ed.2d 960 (1965). Failure of the trial court to assure itself with respect to ascertaining whether the accused knew the outer limits of penalty which he could suffer upon entering plea of guilty is inconsistent with due process. **Wade v. Wainwright**, 420 F.2d 898 (5th Cir.1969). Due process requires that before the court accepts a plea of guilty it is necessary that the defendant be fully advised with the respect to the nature of the charges and the maximum possible penalty for the offense. **United States v. Wolak**, 510 F.2d 164 (6th Cir.1975) ("Not only is a defendant to be informed of the maximum possible period of incarceration but he is to be made aware of other direct consequences of the guilty plea.").

The Tenth Circuit Court in affirming the denial of Petitioner's §2254 Petition For Writ Of Habeas Corpus relied on this Court's decision in **United States v. Timmreck**, 441 U.S.780, 60 L.Ed.2d 634, 99 S.Ct.2085 (1979), which held that 'a conviction based on a guilty plea is not subject to collateral attack under Title 28 U.S.C. §2254 soley on the basis that a formal violation of Rule 11 occurred , such a violation being neither constitutional nor jurisdictional especially where no claim could reasonably be made that any error resulted in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure." Id. The Tenth Circuit Court erroneously relied on Timmreck to affirm the denial of Petitioner's §2254 Writ of Habeas Corpus.

The **Timmreck** case is readily distinguished from the Petitioner's case. Unlike **Timmreck**, the Petitioner received a sentence that was "greater" than the district court original plea of guilty statutory sentence advisement and the originally agreed upon plea agreement accepted by the district court to which violates due process and constitutes a proceeding inconsistent with the rudimentary demands of fair procedure governed by the Uniform Plea Of Guilty rules. See **Timmreck** and **Scott**, both *supra*.

A conviction on a guilty plea tendered solely as a result of faulty advice is a miscarriage of justice. **United States v. Scott**, 625 F.2d 623,625 (5th Cir. 1980). **Scott** alleged that he would not have tendered a guilty plea had the trial court advised him of the potential six year sentence under the Youth Corrections Act. The Fifth (5th) Circuit Court found that this allegation distinguishes **Scott**'s pleading albeit slightly from those in **Timmreck** where **Timmreck** never alleged that if he had been properly advised by the trial court he would not have plead guilty, 441 U.S.784, 99 S.Ct.2087. **Scott**'s pleading allege prejudice, which, if proved would afford the basis for a collateral attack. **Scott**, 625 F.2d 625.

A miscarriage of justice excuses "cause" for procedural default. See **Murray v. Carrier**, 477 U.S.478,496, 106 S.Ct.2639,2649-2650, 91 L.Ed.2d 397 (1985) ("habeas corpus available to avoid miscarriage of justice"); **Swayer v. Collins**, 494 U.S.108, 108 L.Ed.2d 93, 110 S.Ct.974 (1990). Where the defendant did not claim a mere technical violation of formal provision of Rule of Criminal Procedure, but, rather, error committed was of constitutional magnitude, since waiver of defendant's constitutional rights was based on a promise that was unkept, and the actual consequences of pleading guilty were contrary to the consequences conveyed to the defendant by the district court before and prior to the acceptance of the guilty plea, defendant could collateral attack the conviction under the statute to vacate the judgment of conviction. Rule 11, 18 U.S.C.A.; Title 28 U.S.C. §2255. See **United States v. Mercer**, 510 F.2d 343 (7th Cir.1982).

(B) Same Consideration Compel Finding That Petitioner's Claim Violates Due Process And Results In A Miscarriage Of Justice Excusing "Cause" For Procedural Default.

The very same consideration which compelled the Court's to conclude that **Scott, Brady, Boykin, Marvel, Timmreck** and **Murray**, all *supra*, that a guilty plea sustained in violation of due process was open for collateral attack and a miscarriage of justice to which, in fact, excuses "cause" for procedural default also applied to Petitioner.

(C) The Tenth Circuit Court Of Appeals Erred By Determining That Petitioner's Ineffective Assistance Of Counsel Claims Did Not Meet The Standards Set Forth By This Honorable Court In 'Strickland' And 'Hill' Constitutional "Cause And Prejudice".

Petitioner asserted in his Title 28 U.S.C. §2254 Petition For Writ Of Habeas Corpus relief that: Counsel was constitutionally ineffective because counsel did not file his requested Motion To Withdraw Guilty Plea, Failed To File Notice Of Intent To Appeal, Misadvised Him And Allowed The State Of Oklahoma To Constructively Amendment Of His Plea Of Guilty/Summary Of Facts Form,

Petitioner asserted that he would not have plead guilty had he correctly been advised, but instead would have exercised his constitutional rights to trial by jury. See **Teague v. Scott**, 60 F.3d 1167, 1171-1172 (5th Cir. 1995) ("failing to properly advise the defendant...falls below the objective standard required by Strickland. When the defendant lacks a full understanding of the risks..., he is unable to make an intelligent choice of whether to accept a plea or take his chances in court.").

Claims of Ineffective Assistance Of Counsel is governed by the two-prong test set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In the plea bargaining context, a petitioner seeking to establish ineffective assistance of counsel must demonstrate that (1) counsel's advice and performance fell below an objective standard of reasonableness, and (2) the petitioner would not have pleaded guilty and would have insisted on going to trial in the absence of his attorney's errors. **Hill v. Lockhart**, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370-371, 88 L.Ed.2d 203 (1985). In this case and referenced cause of action, the record will adequately reflect and show that counsel induced Petitioner's guilty plea with a specific sentence of eighteen (18) years. Relying substantially on the United States District Court Sitting For The Western District Of Oklahoma's decision, the Tenth Circuit denied relief without conducting an evidentiary hearing, ruling that the claimed errors were not of sufficient magnitude to warrant collateral relief.

In **Timmerreck**, the United States Supreme Court held that: "formal" or "technical" violations of Federal Rules of Criminal Procedure Rule 11 do not warrant collateral relief. See *id.* @783-784. In that specific case, the defendant brought a motion based upon the trial courts failure to advise him of a mandatory special parole term. Significantly, the defendant did not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." *Id.* @ 784. Thus, **Timmerreck's** only claim was indeed a purely "technical" one: "the trial court judge failed to adhere ritualistically to the dictates of Rule 11 and dismissed this portion of his motion pursuant to **Timmerreck**.

Petitioner argued on appeal that the deficiencies in the trial courts and defense counsel's misadvice concerning the statutory maximum penalty involved cannot be characterized as a mere "technical" or "formal" errors, but, in fact, be on instead of constitutional magnitude because he received a sentence to which exceeded the statutory maximum advisement originally entered into by the petitioner.

The written plea agreement signed by defense counsel, the District Attorney and the Petitioner, to which was then ratified by the Court. The Plea of Guilty/Summary of Facts states in relevant part: See Appendix "B" attached and incorporated by reference hereto as if plead in full.

The agreement further stated that the State of Oklahoma would agree to dismiss the after former conviction from the State of Texas as listed in the page two that was pending and going to be used against the defendant in the event Petitioner proceeded to trial. Once Defense Counsel Edward Blau signed the plea agreement, he then became a party to the eighteen (18) year maximum sentence agreement at the very moment he endorsed his signature thereto on the Plea of Guilty/Summary of Facts form and had it ratified by the Oklahoma County, Seventh Judicial District Court.

The District Court sentenced the Petitioner to terms that was not agreed upon and imposed a sentence instead of two (2) eighteen (18) year terms of imprisonment and nine (9) months to One (1) year term of supervised release to follow said referenced terms of imprisonment. The total sentence imposed by the District Court was thirty-six (36) years nine (9) months and/or thirty-seven (37) years, to which, in fact, is not the original plea agreement en-

tered into by the Petitioner. See Appendix "A" attached hereto.

The instant case and said reference cause of action involves constructiver amendments changing and altering the original plea agreement and affirmative misstatements of the maximum possible penalty's and fines provided for by law due to the clearly evident misconduct of the District Court, The State of Oklahoma and Defense Counsel Edward Blau. The district court then imposed a sentence to which exceeded the Plea of Guilty/Summary of Facts statutory maximum advisement originally agreed and entered into by the Petitioner and without being advised of such prior thereto and without knowledge, advice or objection from counsel constituting deficient performance thus proving the ineffective assistance of counsel claim excusing "cause" for procedural default. See **Pitts v. United States**, 763 F.2d 197,201 (6th Cir.1985); **Teague v. Scott**, 60 F.3d 1167,1171-1172. Numerous cases have held that misunderstanding of this very nature invalidates the guilty plea. See **United States v. Rumery**, 698 F.2d 764 (5th Cir.1983) ("on appeal of denial of motion to withdraw plea, the Court held that the defendant was denied effective assistance of counsel because his maximum exposure was five (5) years, but the Court appointed attorney advised him of maximum possible exposure of thirty (30) years"); **United States v. Herrold**, 635 F.2d 213 (3rd Cir.1980) (per curium) ("on appeal of denial of motion to withdraw plea, the court held that trial court's misadvice in telling defendant of maximum possible sentence of forty-five (45) years invalid the plea when twenty-five (25) years was the maximum possible sentence); **United States v. Scott**, 625 F.2d 623,625 (5th Cir.1980) (per curium) ("on collateral attack, the court held that a guilty plea is invalidated by the trial court's telling the defendant of a five (5) year maximum exposure when he faced a possible of six (6) year maximum exposure); **Hammond v. United States**, 528 F.2d 15 (4th Cir.1975) ("on collateral attack, court held that a guilty plea is invalidated when the court clerk and court appointed attorney misadvised the defendant that the total exposure was in excess of nionety (90) years, when the total exposure was actually only fifty-five (55) years").

Had counsel filed the requested motions to withdraw guilty plea and filed Petitioner's Notice Of Intent To Appeal, Petitioner's conviction would have been reversed and sentence vacated and remanded to plead anew. See **United States v. Bounds**, 943 F.2d 541,543 (5th Cir.1991), where the Court summarized the exact same issue: "The Court erred in failing to advise Bounds in open court of the possibility of supervised release. We cannot examine this failure for harmless error because the total length of the imposed penalty, based on the periods of incarceration and supervised release is greater than the statutory maximum of which Bounds was advised. "The Fifth Circuit Court reversed Bounds conviction, vacated his sentence and remanded for him to plead anew. The exact same scenario would have applied to the Petitioner, absent counsel's unprofessional errors and omissions. Thus "prejudice" has been shown, **Strickland**, 466 U.S. @ 694, 80 L.Ed.2d @ 698.

Contrary to the Tenth Circuit Court's Opinion, Petitioner asserted that he would not have plead guilty had he correctly advised of the statutory maximum penalty provided by law. Thus, establishing "prejudice" under **Strickland**. See **Hill v. Lockhart**, 477 U.S. @58-59. There exists more than a reasonable probability that absent counsel's unprofessional legal advice and omissions, the results of the trial court and appellate courts proceedings would have been different. See **Herrold, Scott, Hammond and Bounds**, all supra.

(D) The Tenth Circuit Court Of Appeals Erred In THe DErial Of Petitioner's Title 28 U.S.C. §2254 Writ Of Habeas Corpus Where The Court Failed To Conduct An Evidentiary Hearing As Requested By Petitioner.

Section §2254 provides that: "[U]nless the motion and the files and records

of the case conclusively show that the petitioner is entitled to no relief, the court shall...grant a prompt hearing thereon, determine the issues and make findings of facts and conclusions of law with respect thereto." See e.g., **Fontaine v. United States**, 411 U.S.213,215 (1973) ("reversing summary dismissal and remanding for hearing because "motion and the files and records of the case [did not] conclusively show that the Petitioner is entitled to no relief."); **Sanders v. United States**, 373 U.S.1,19-20 (1963).

Petitioner's §2254 Petition For Writ Of Habeas Corpus alleged facts that, if proved, does entitle the Petitioner to relief. See **Hill v. Lockhart**, 474 U.S.52,60 (1985); and **Blackledge v. Allison**, 431 U.S.63,82-83 (1977). Petitioner asserted and maintained all throughout, that he would not have plead guilty had he been correctly advised of the constructive amendment done without his knowledge, pertaining to his guilty plea/summary of facts alterations and the statutory maximum penalty's that exceeded those provided in the original plea agreement and those specifically allowed by law. Petitioner presented several affidavits detailing further specific facts to which family members and freinds corroborated to which reflects that they had attempted to contact defense counsel Edward Blau's Offcie that is actually contained and supported within the record that was stated and sworn to under oath and penalty of perjury tht was verified notarized with legality. Thus, Petitioner was factually entitled to an evidentiary hearing. See **United States v. Scott**, 625 F.2d 623,625 (5th Cir.1980); **Pitts v. United States**, 763 F.2d @ 201; **United States v. Birdwell**, 887 F.2d 643,645 (5th Cir.1989) ("evidentiary hearing warranted if petition contains "specific factual allegations not directly contradicted in the record.").

#### CONCLUSION

Petitioner, Darrius DeJuan Cohee, has been deprived of basic fundamental rights guaranteed by the Fifth (5th) and Sixth (6th) Amendments of the United States Constitution and seeks relief in this Honorable Court to restore those rights. Based on the arguments and authorities presented herein. Petitioner's guilty plea was sustained in violation of due process and not voluntarily or intelligently entered because of the illegal unknown constructive amendment altering his understanding and original agreement as to the charges he was pleading guilty to, the fines exceeding those allowed by law, and the consequences of his plea of guilty. Petitioner was deprived of his right to effective assistance of counsel in the district court and failed to be recognized by the appellate courts. Petitioner requests that this Honorable Court will issue forth a Writ OF Certiorari and reverse the judgment entered in the Tenth Circuit Court of Appeals.

In the event that this Honorable Court does not address the issues presented within this Petition at this time and juncture, it is respectfully requested that the Writ Of Certiorari issue and the matter be reversed and remanded to the Tenth Circuit Court of Appeals for reconsideration in light of this Honorable Court's opinions and precedent laws in **Strickland, Hill, Timmreck, Fontaine and Sanders**, all supra.

IT IS SO PRAYED WITHOUT PREJUDICE.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darrius DeJuan Cohee

Date: October 17, 2018.