No. 20-5188

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ADELSO BARNES,

Petitioner

v.

STATE OF OKLAHOMA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Adelso Barnes
DOC#641200
Pro se Litigant
Dick Conner Correctional Center
129 Conner Road
Hominy, Oklahoma 74035

July 9, 2020

QUESTIONS PRESENTED

1. Whether an affirmative statement that Mr. Barnes wished to remain in the county jail for the critical ten-day period entitles Mr. Barnes to the consultation required by *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000)?

2. Whether *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) provides federal support for Mr. Barnes' invalid state conviction to establish a miscarriage of justice under AEDPA's exception of *McQuiggin v. Perkins,* 133 S.Ct. 1924 (2013)?

3. Whether actual innocence extends to the critical elements of a crime in a change-of-plea proceeding when that burden of proof must be distinguished from a trial proceeding?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Barnes respectfully request that this Court reverse the judgment of United States Court of Appeals for the Tenth Circuit.

PARTIES TO THE PROCEEDING

The petitioner in this case is Adelso Barnes.

The respondent in this case is the State of Oklahoma, Office of the Attorney General.

OPINIONS BELOW

The March 06, 2020, Order Denying a Certificate of Appealability (App. 1a – 3a) is unpublished.

The April 23, 2020, Order Denying Rehearing (App. 4a) is unpublished.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."
2. The Fourteenth Amendment to the United States Constitution provides, in relevant part: "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."

STATEMENT OF THE CASE

On February 28, 2011, Mr. Barnes, in Tulsa County, State of Oklahoma, entered a plea of guilty to the amended charge of second-degree felony murder, in violation of OKLA. STAT. tit.

21, § 701.8 (Count 2); first degree burglary, in violation of OKLA. STAT. tit. 21, § 1431 (Count 3); robbery with a dangerous weapon, in violation of OKLA. STAT. tit. 21, § 801 (Count 4); and knowingly concealing or receiving stolen property, in violation of OKLA. STAT. tit. 21, § 1713 (Count 5). App. 1a.

That same day, the Tulsa County District Court accepted Mr. Barnes' pleas, adjudged him guilty, and, in accordance with the plea agreement, imposed prison terms of 35 years, 20 years, 35 years, and 5 years, with all sentences to be served concurrently. App. 2a.

On December 29, 2011, Mr. Barnes, *pro se,* filed a motion for judicial review pursuant to OKLA. STAT. tit. 22, § 982a.

The Tulsa County District Court denied the motion of January 06, 2012.

On May 09, 2013, Mr. Barnes, *pro se,* filed a motion for suspended sentence, pursuant to OKLA. STAT. tit. 22, § 994.

The Tulsa County District Court denied the motion on June 21, 2013.

On July 13, 2017, Mr. Barnes, *pro se,* filed an application for postconviction relief pursuant to OKLA. STAT. tit. 22, § 1080.

On October 24, 2017, the Tulsa County District Court denied Mr. Barnes' application for postconviction relief.

Mr. Barnes timely appealed to the Oklahoma Court of Criminal Appeals in case no. PC-2017-1106.

On March 13, 2018, the Oklahoma Court of Criminal Appeals affirmed the denial of postconviction relief.

On February 21, 2019, Mr. Barnes, *pro se,* filed his first federal habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Oklahoma.

On November 04, 2019, the Northern District Court Judge dismissed Mr. Barnes' petition with prejudice as time-barred.

Mr. Barnes timely appealed to the United States Court of Appeals for the Tenth Circuit.

On January 21, 2020, Mr. Barnes, *pro se,* submitted Appellant's Combined Opening Brief and Petition for Certificate of Appealability.

On March 06, 2020, the Tenth Circuit denied Certificate of Appealability.

On March 16, 2020, Mr. Barnes, *pro se,* filed Petition for Rehearing and Suggestion for En Banc Consideration.

On April 23, 2020, the Tenth Circuit denied petition for rehearing.

SUMMARY OF ARGUMENT

I.

Mr. Barnes conviction is in violation of clearly established Federal law. Because Mr. Barnes did not move to "timely" withdraw his pleas of guilty in the ten-day critical period after sentencing, the only way to overcome the State procedural default was Mr. Barnes' *pro se* ability to prove that he was denied an appeal through no fault of his own. The State court made the determination, and the Northern District Court concurred, that Mr. Barnes utilized the proper vehicle to withdraw his pleas of guilty out of time. However, the Northern District Court erroneously found that the State's factual finding was sufficient to establish the State procedural bar contrary to the right to "effective assistance of counsel on first appeal as of right" when Mr. Barnes' clearly requested to remain in the county jail for the ten-day critical period to preserve the presumption of regularity of Oklahoma's Court Rules.

Of course, the Tenth Circuit found "even if Mr. Barnes's argument that he discovered new evidence in 2017 is credited his filing still falls outside of the one-year statutory tolling

period available under § 2244(d)(1)(D)." App. 2a. However, the Tenth Circuit did not determine if operation of § 2254(b)(3)(c) entitled Petitioner to a "timely" filed Application for Post-Conviction Relief analyzed under Oklahoma Court Rule 2.1(E), where the Oklahoma Court of Criminal Appeals did not grant Petitioner an "appeal out of time" but found Petitioner's plea was entered "voluntary." App. 10a – 12a. "Undoubted, operation of OCCA Rule 1.14(D)(1) 'belonged to Petitioner alone, and it was his responsibility to communicate any wish to do so" where the Trial Counsel Responsibility is not 'ambiguous." App. 12a.

Although not specifically raised, the Northern District recognized this State procedural mechanism of an appeal-out-of-time process that would have "reset" the AEDPA's statute of limitations and did not pass upon whether "[i]f counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance." *United States v. Fabian-Baltazar,* 931 F.3d 1216, 1217-1218 (9th Cir. 2019). Under the standard of *Roe v. Flores-Ortega,* the Tenth Circuit determined that "[a]n attorney has a 'constitutionally imposed duty to consult with' a convicted defendant 'about an appeal when there is reason to think ... that a rational defendant would want to appeal.' *Id.* at 480, 120 S.Ct. 1029. One reason a rational defendant might want to appeal is if 'there are nonfrivolous grounds for' doing so. *Id.*" *Smith v. Allbaugh,* 921 F.3d 1261, 1269 (10th Cir. 2019). App. 26a.

In the instant petition at bar, violation of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) is a nonfrivolous issue constitutionally entitling Mr. Barnes to "consultation" during the ten-day hiatus between the sentencing proceeding and notice of appeal proceeding.

II.

It is clear that Mr. Barnes was not provided sufficient and accurate notice in entering his pleas of guilty. It is also clear that the record reflects Mr. Barnes is convicted for offenses of the amended charge to second degree felony murder, first degree burglary, robbery with a dangerous weapon, and knowingly concealing or receiving stolen property. App. 1a. As a matter of law, these convictions cannot stand, as a matter of constitutional law, Mr. Barnes' pleas are indeed involuntary, unintelligent, and unknowing.

Mr. Barnes' proceeded *pro se* when filing his writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the *pro se* filing, Mr. Barnes argues that his particular claim is not subject to AEDPA's one-year statute of limitations, in an *inartful* "double-jeopardy" claim. However, the Northern District Court dismissed Petitioner's *pro se* arguments as "misplaced" and concluded that "[i]n short, none of the authorities Petitioner relies on to argue that double-jeopardy claims are not subject to the AEDPA's one-year limitation period support that argument." App. 41a. As a *pro se* litigant, Petitioner asserts that a conviction in contrary to clearly established law constitutes a "miscarriage of justice" and "that a constitutionally invalid guilty plea may be set aside on collateral attack whether or not it was challenged on appeal." *Bousley v. United States,* 116 S.Ct. 1604, 1613 (1998) (Justice STEVENS, concurring in part and dissenting in part).

In the instant petition, Mr. Barnes' relies on the "credible showing of actual innocence," *McQuiggin v. Perkins,* 569 U.S. 383, 392 (2013), as a gateway to determine that Mr. Barnes' convictions cannot stand under this Court's established law of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) as recognized as "clearly established" in *Hicks v. Franklin,* 546 F.3d 1279 (10th Cir. 2008). *Cf. Dretke v. Haley,* 541 U.S. 386, 394, 124 S.Ct. 1847 (2004)

ARGUMENT

I.

The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision United States court of appeals for the Ninth Circuit on the same important matter as to call for an exercise of this Court's supervisory power and the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decision of *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000) of this Court. Sup.Ct.R. 10(a), (c).

a.

Under the facts of Mr. Barnes' case, the Northern District Court Judge made the factual finding that "the [Tulsa County] trial court advised Petitioner of his appeal rights, and Petitioner indicated on his written plea form that he understood those rights. Doc. 1-1, at 98; Doc. 8-6, at 2; 4." App. 32a. Of course, this factual determination "that he understood his rights" is *distinguished* from counsel's "duty" to "consult." *See Fabian-Baltazar v. United States,* 2019 WL 7282046 (E.D. Cal. Dec. 27, 2019) (Slip Copy) at *5 (There is no indication that a discussion of advantages or disadvantages to an appeal were discussed at any time.). However, the Northern District Court Judge did not consider the "entire record" when drawing the inference that Mr. Barnes "did not move to withdraw his pleas within 10 days of sentencing or otherwise pursue a timely certiorari appeal with the Oklahoma Court of Criminal Appeals." App. 32a. The entire record, contained within the same documentary evidence of the February 28, 2011 Plea of Guilty, Summary of Facts form, reveals that Mr. Barnes chose to "remain in the county jail ten (10) days before being taken to the place of confinement." App. 45a. Because Petitioner had a *fundamental* right to counsel during that critical period due to the trial court's admonishment about Mr. Barnes's appeal rights, it was *fundamentally* unfair to exclude a Sixth

Amendment "failure-to-consult" analysis to Mr. Barnes' claims. Specifically the Tulsa County District Court admonished:

> The important part that starts all the appeal rights is 10 days from today's date. If you think something *legally* went wrong, you need to file what's called an application to withdraw your plea within 10 days of today's date. Now, you do not just get to change your mind and say I want to do it over. There has to be some *legal* problem.

App. 58a. (emphasis added). By itself, however, this advice is insufficient to satisfy the right to counsel. Of course, to *fundamentally* understand a "legal problem" requires the "guiding hand of counsel." Because of Petitioner's "eighth grade education," this Court determined that "he lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel *at every stage in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Gideon v. Wainwright,* 372 U.S. 335, 344 – 345, 83 S.Ct. 792 (1963) (emphasis added); U.S. Const. amdt. VI. Most concerning in the trial court's admonishment is the "constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." *Evitts v Lucey,* 105 S.Ct. 830, 836 (1985); U.S. Const. amdt. XIV.

The Tenth Circuit rejected Petitioner's *pro se* argument that "[b]ased upon the record and absence of any communication, the District Court reaffirmed that '(1) the record demonstrated Petitioner was advised of his appeal rights, (2) the record contradicted Petitioner's 'claim that he had no access to an attorney to be able to file a motion to withdraw his pleas of guilty had he indicated he wished to do so,' and (3) Petitioner 'failed to allege any specific facts that support that he attempted to communicate with his attorney regarding a desire to appeal. Doc. 8-6, at 4." App. 33a.

Petitioner notes that his *ignorance* and lack of legal knowledge allowed him to place confidence in a prison "paralegal" to *inartfully* assert "postconviction" claims of relief on his behalf, when in fact, those "postconviction" claims could not be realized because of Oklahoma's Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. "adequate and independent" default rule. That is, contrary to Petitioner's right to effective assistance of counsel for his first appeal as of right, is the standard in law that "the Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal." App. 33a – 34a. In this *legal* sense, Petitioner, a layman of the law, was deprived his *fundamental* right to challenge his conviction in a state-created statutory process, OKLA. STAT. tit. 22, § 1080, "excluding a timely appeal." *Ibid.*

Nevertheless, the record ignores the fact that Petitioner was clearly without counsel in the 10-day critical period requiring "effective assistance of counsel," when Mr. Barnes requested to "remain in the county jail." The record below is incomplete in that certain facts are missing: (1) Mr. Barnes was never 'consulted' upon waiver of his appeal rights under federal standard and (2) trial counsel's 'failure-to-consult' defaulted Mr. Barnes right to appeal where trial counsel's 'failure-to-file' a jurisdictional form is not purely ministerial under Oklahoma law pertaining to appeals from the change of plea process under Section IV, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011–2019). Moreover, the Tulsa District Court Judge placed a "pleading barrier" in front of Mr. Barnes' in instructing Petitioner to identify "legal" errors prior to exercising his *fundamental* right to appeal. This Court states that there is an "additional safeguard against miscarriages of justice in criminal cases ... That safeguard is the right to effective assistance of counsel, which, as this Court has indicated, may in a particular

case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier,* 106 S.Ct. 2639, 2649 (1986). See App. 15a.

The Northern District Court Judge recognized that Mr. Barnes attempted—although unsuccessfully—to apply for an "appeal out of time" pursuant to the available remedy, although not enumerated under the Oklahoma Post-Conviction Procedures Act, 22 O.S. § 1080 *et. seq.* (2011). Specifically, "[t]he state district court treated Petitioner's second proposition as a request for a recommendation to file an appeal-out-of-time and denied that request." App. 33a.

Alternatively, the Tenth Circuit did not serve the "ends of justice" in recognition the "even if Mr. Barnes's argument that he discovered new evidence in 2017 is credited his filing still falls outside of the one-year statutory tolling period available under § 2244(d)(1)(D)," (App. 2a), when utilizing the March 13, 2018, Oklahoma Court of Criminal Appeals affirming Petitioner's post-conviction proceedings. App. 34a. That is, the only critical question before that court of last resort was whether Petitioner, under the bare facts before it, met his burden that he was denied an appeal through no fault of his own. Nonetheless, the Oklahoma Court of Criminal Appeals did not apply the correct standard in assessing that "Judge Musseman found no merit in the claim that Barnes entered a guilty plea based on conduct that did not constitute a crime, and determined that nothing in Barnes's pleadings supported a finding that his plea was not knowing and voluntary." App. 11a. *Cf. Orange v. Calbone,* 318 F.3d 1167, 1171 (10th Cir. 2003) (Indeed, our review of Oklahoma case law suggests that an application for a direct appeal out of time is rarely granted, and respondent [the Oklahoma Attorney General] does not dispute this conclusion at oral argument.). As such, deference cannot be extended to the Court of Criminal Appeals standardless review.

Under the procedural framework of 28 U.S.C. § 2254, "[a]n application for a writ of habeas on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." Id.(b)(1)(A).

The Tulsa County District Court found that "Petitioner's claims are incredibly difficult to abstract, but the essence of them appears to be discernible into five main propositions of error." Accordingly, the state district court judge applied the correct legal standard in *liberally* construing Mr. Barnes' application for postconviction relief ("APCR"). Nonetheless, the state judge abused his discretion when disposing of the application without conducting an evidentiary hearing. Under the "state corrective process" Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. "is the only procedural mechanism by which [Mr. Barnes] could withdraw his plea *at this time.*" App. 9a. *See Landreth v. Harvanek,* 2014 WL 1390803 (W.D. Okla. 2014) (unpublished) (According to Judge Erwin, Petitioner should have attempted to obtain leave to file a direct appeal out of time in state court prior to pursuing this habeas action.).

The Tenth Circuit supported the conclusion that "even assuming trial counsel's conduct was sufficiently egregious and prejudicial in that it caused Petitioner to default his federal claims in state court, Petitioner cannot demonstrate that trial counsel's conduct prevented him from complying with § 2244(d)(1)'s one-year statute of limitations." App. 37a. However, the Tenth Circuit did not address whether Petitioner's *pro se* attempt to vindicated his "appeal rights" in an "appeal-out-of-time" process could be analyzed under *Roe v. Flores-Ortega's* "failure-to-consult" standard. Because the "right to file out-of-time direct appeal" is predicated upon a "factual finding"—in the instant case, that counsel abandoned Mr. Barnes—neither the Tulsa

County District Court nor the Northern District Court evaluated such a finding under Petitioner's "right to counsel" in a clearly established "critical stage." On one hand, the Tulsa County District Court made an inconclusive factual finding that Petitioner did not "wish" to be consulted, *de minimis* in accordance with the Rules, after sentencing and as such, Petitioner's post-conviction claims are subject to procedural bar. On the other hand, the Northern District Court made a conclusive finding that Petitioner's pleas of guilty were "voluntary" with an incorrect standard of review. Either way, the judicial process was fundamentally unfair to Petitioner's *pro se* status. In other words, the state corrective process did not adequately "toll" Petitioner's *pro se* attempt to "exhaust his state remedies" predicated upon "evidentiary" rather than "conclusive" facts, specifically Petitioner was not denied counsel for his first appeal as of right. Because those allegations "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light," and were not so "vague (or) conclusory," as to permit summary disposition, the Court rule that the defendant was entitled to the opportunity to substantiate them at an evidentiary hearing. *See Blackledge v. Allison,* 97 S.Ct. 1621, 1628 (1977) (citations omitted).

Since no evidentiary hearing was held, on the state or federal level, the record as a whole does not make it "less clear" that Petitioner did not desire an appeal when requesting to remain in the county jail for ten (10) days apparently awaiting "consultation" from trial/plea counsel. To be sure, the involuntary nature of Petitioner's plea (argued below) is a "nonfrivolous" claim entitled to consultation under the rubric of *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000). The *Flores-Ortega* Court "hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* 120 S.Ct., at 1038.

Because the Tenth Circuit relied on a narrow reading of *Slack v. McDaniel,* 529 U.S. 473, 484 (2000), the Tenth Circuit did not reach the threshold that Mr. Barnes' in fact made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). App. 2a. That is, "[i]t is unreasonable for a lawyer with a client like [Petitioner Barnes] to walk away from [his] representation after trial or after sentencing without at the very least acting affirmatively to ensure that the client *understands* the right to appeal." *Flores-Ortega,* 120 S.Ct. at 1041 (Justice SOUTER, with whom Justice STEVENS and Justice GINSBERG join, concurring in part and dissenting in part.) (emphasis added). Moreover, the "isolated error" of abandoning Petitioner in a "critical stage" is error that is "sufficiently egregious and prejudicial" both under Oklahoma Criminal Court Rules and the right to effective assistance of counsel for Petitioner's first appeal as of right predicated upon a pleading barrier before that appeal can be realized by the Oklahoma Court of Criminal Appeals.

Although distinguished from the statute of limitations exception argument below, the erroneous finding that a trial judge's admonishment—trial court error—is sufficient to overcome the right to constitutionally effective assistance of counsel—Fourteenth Amendment right—recognized in *Flores-Ortega* cannot be squared with the procedural pitfall in which Mr. Barnes was subjected[1]. Unlike the Petitioner in *Slack,* Mr. Barnes can make a clear showing "the denial of a constitutional right," *Id.* 120 S.Ct., at 1604, under the holding "that criminal defendant is entitled to effective assistance of counsel on first appeal as of right." *Evitts v. Lucey,* 105 S.Ct.

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[1] The general rule is that claims not raised on direct appeal may not be raised on collateral review unless the petitioner can show cause and prejudice. In Mr. Barnes' case, the State court denied "Post-Conviction Relief" in a "factual-finding" setting without inquiring into the communication between Mr. Barnes and his counsel after sentencing and during the ten-day critical period in which Mr. Barnes chose to wait for the legal process entitled to him, under Oklahoma Court Rules, having force of statute law. Ultimately, this denial of post-conviction subjected Mr. Barnes, *pro se* and without sufficient funds to hire a reasonably effective attorney, to the inadequate and independent bar of 22 O.S. § 1086 in respect to effective assistance of counsel claims. It is presumed that the Northern District Court recognized this aspect in Oklahoma law in dismissing Petitioner's petition with prejudice.

830 (1985); U.S. Const. amdt. XIV. Plainly stated, "ineffective assistance of counsel on *direct appellate review* could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a **constitutional** claim." *Martinez v. Ryan,* 132 S.Ct. 1309, 1316-17 (2012) (emphasis added). *See and compare, Dretke v. Haley,* 541 U.S. 386, 394, 124 S.Ct. 1847 (2004) (we expressed confidence that, "for the most part 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.'"; *Murray v. Carrier,* 477 U.S. 478, 495 – 496, 106 S.Ct. 2639 (1986) (quoting *Engle v. Isaac,* 456 U.S. 107, 135, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (Our confidence was bolstered by the availability of ineffective assistance of counsel claims—either as a ground for cause or as a freestanding claim for relief—to safeguard against miscarriage of justice.).

Apparently, the fact that Petitioner was abandoned during the ten-day critical period by counsel did not affect his right to effective assistance of counsel for his appeal, a fundamental right, and the Tenth Circuit found it reasonable that the factual finding of Petitioner being admonished his appeal rights, a State procedural right, negatived his Sixth Amendment right to counsel for appeal without adequate federal waiver of that fundamental right. However, in the normal course, Petitioner would have been provided "notice" of the AEDPA's one-year statute of limitations had his "appeal as of right" been secured rather than abandoned. In other words, "even assuming trial counsel's conduct was sufficiently egregious and prejudicial in that it caused Petitioner to default his federal claims in state court, Petitioner cannot demonstrate that trial counsel's conduct prevented him from complying with § 2244(d)(1)'s one-year statute of limitations." App. 2a. The analysis at hand does not give accurate credence to the fact that the Oklahoma Court of Criminal Appeals denied Petitioner's request for a *certiorari* appeal-out-of-time, therefore could not reach the merits of Petitioner's case under *Strickland's* analysis. That

is, grant of a *certiorari* appeal-out-of-time would have "reset" the limitations of AEDPA and Petitioner's constitutional right of a entering "knowing, intelligent and voluntary plea" would have been vindicated.

Accordingly, the right to constitutionally effective assistance of counsel is grounded upon the "Due Process Clause" to the Fourteenth Amendment. *See Evitts v. Lucey,* 105 S.Ct. 830 (1985). The Tenth Circuit did not assess whether the Northern District Court Judge abused his discretion under *Flores-Ortega's* "failure-to-consult" standard when "defendant's right to assistance of counsel applied to statutory ten-day period for filing notice of intent to perfect appeal, even though defendant did not express to appointed counsel his decision to appeal." *Baker v. Kaiser,* 929 F.2d 1495 (10th Cir. 1991). To the contrary, the Ninth Circuit determined:

> But, th[is] Court expressly left "undisturbed today *Flores-Ortega's* separate discussion of how to approach situations in which defendant's wishes are less clear." 139 S.Ct. at 746 n. 9.
> Because that discussion governs our analysis today, we quote it in pertinent part:
>
> If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonably manner only by failing to follow the defendant's express instruction with respect to an appeal. **If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: Whether counsel's failure to consult with the defendant itself constitutes deficient performance.**
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> *Flores-Ortega,* 528 U.S., at 478, 120 S.Ct. 1029 (internal citation omitted).

United States v. Fabian-Baltazar, 931 F.3d 1216, 1217 – 1218 (9th Cir. July 30, 2019) (emphasis added). On remand, the United States District Court, E.D. California determined that relief under *Flores-Ortega* was warranted for "[t]here is no indication that a discussion of advantages or disadvantages to an appeal were discussed *at any time*. Therefore, the Court concludes that there was no "consultation" between Petitioner and [his attorney] regarding an appeal of

Petitioner's sentence. Without a consultation, the question is whether the failure to consult was deficient." *Fabian-Baltazar v. United States,* 2019 WL 7282046, at *5.

The State of Oklahoma would establish that there is "no automatic duty for counsel to consult with a defendant about the possibility of filing an appeal." *Davis v. State,* 2011 OK CR 7, ¶ 5, 246 P.3d 1097, 1098 – 99 (citing *Roe v. Flores-Ortega,* 528 U.S. 470, 480, 120 S.Ct. 1029, 1036, 145 L.Ed.2d 985 (2000)). *Cf. United States v. Reyes-Espinoza,* 754 Fed.Appx. 752 (10th Cir. 2018) (explaining counsel's *constitutional* conduct). App. 13a – 14a. However, under *Flores-Ortega,* prejudice is shown by demonstrating that counsel's failure to consult deprived a petitioner of an appeal that he would have taken. *Id.* 528 U.S. at 484. Whether a given defendant can make this showing "will turn on the facts of the particular case." *Id.* at 485. Under *Roe v. Flores-Ortega,* the Tenth Circuit determined that "[a]n attorney has a 'constitutionally imposed duty to consult with' a convicted defendant 'about an appeal when there is reason to think ... that a rational defendant would want to appeal.' *Id.* at 480, 120 S.Ct. 1029. One reason a rational defendant might want to appeal is if "there are nonfrivolous grounds for' doing so. *Id.*" *Smith v. Allbaugh,* 921 F.3d, at 1269 (10th Cir. 2019).

Under the particular facts of Mr. Barnes' case, the claimed error is that counsel's erroneous advice did not comprehend the law in respect to the "felony-murder" doctrine and the trial court did not cure this error in the law. That is, the Tenth Circuit has determined, in accordance with Oklahoma law, that "[o]nce the state has established that a defendant used a dangerous weapon in the course of a robbery that results in death, the offense of second degree murder is no longer an option under Oklahoma law." *Wilson v. Sirmons,* 536 F.3d 1064, 1103 – 04 (2008) (citations omitted); *Lambert v. Workman,* (Not Reported) 2009 WL 1941971, at *15.

Because the law *strictly* favors the unconstitutionality of Mr. Barnes' conviction, counsel's failure to consult was deficient performance and the prejudice suffered is the inability to identify what "legally went wrong" in Petitioner's case. Of course, the dispute is that Mr. Barnes' clear request to remain in county jail during the ten-day critical period can *reasonably* infer a desire to be "consulted" upon—*at the minimum* for counsel to explain the "advantages and disadvantages" of appealing—given that the Tulsa County District Court *fatally* admonished Mr. Barnes, a defendant with an eighth grade education, to discern "if you think something legally went wrong." App. 58a. It is clear that from the face of the record, "[i]n 2011, Mr. Barnes pled guilty to second degree felony murder, first degree burglary, robbery with a dangerous weapon, and knowingly concealing or receiving stolen property [—which cannot be predicate to second degree felony murder]." App. 2a – 3a. Simply stated, the State of Oklahoma charged Petitioner with "first degree felony murder" and Petitioner pled guilty to "second degree felony murder," a charge not contained in the indictment or the information.

b.

It must be duly noted that the Northern District Court "dismisses the petition for writ of habeas corpus, *with prejudice*, as time-barred." App. 31a; 1a. By this Opinion and Order, the Northern District Court recognized that Petitioner, under a *liberal construction* standard, utilized the proper procedure to "withdraw his pleas of guilty out of time." App. 33a. However, the factual findings to support that Petitioner was not denied the effective assistance of counsel is in contrary to federal law. It was unreasonable to conclude that Petitioner's appeal-out-of-time proceedings was fundamentally fair predicated upon the "factual finding" that Petitioner was "advised of his appeal rights by the trial court," when that State court factual finding did not address whether that subjective standard could be overcome with the *Strickland* ineffective

assistance of counsel standard. While there is lacking a "clear request" for counsel to "appeal" Petitioner's case, as a layman of the law, Mr. Barnes' was entitled to a presumption of regularity in counsel's presence when requesting to stay in the county jail during the ten-day critical period to satisfy the *minimal* "due process" guarantee of the Fourteenth Amendment. "Undoubted, operation of OCCA Rule 1.14(D)(1) 'belonged to Petitioner alone, and it was his responsibility to communicate any wish to do so" where the Trial Counsel Responsibility is not 'ambiguous." App. 12a. Because OCCA Rule 1.14(D)(1) possesses "force of statute" "[a] state's failure to follow its own statutory criminal procedures may, in some circumstances, constitute a deprivation of due process." *Martinez v. Romero,* 626 F.2d 807, 810 (10th Cir. 1980). Petitioner's *particular* case provide the "circumstance" constituting a deprivation of due process.

In denying Petitioner an appeal-out-of-time, the Tulsa County District Court also found that "[t]here is no automatic duty for counsel to consult with a defendant about the possibility of filing an appeal." Because, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think that a rational defendant would want to appeal because there are nonfrivolous grounds for appeal," Mr. Barnes' was denied this duty under the nonfrivolous grounds of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) as recognized as "clearly established" in *Hicks v. Franklin,* 546 F.3d 1279 (10th Cir. 2008). *See also United States v. Gigot,* 147 F.3d 1193, 1198 (10th Cir. 1998) (finding plea involuntary where the defendant was "never informed by the indictment or otherwise of the elements of the offenses to which she pled guilty"). Thus, in order to establish cause a federal habeas petitioner need only satisfy the district court "that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic." *Murray v. Carrier, supra,* 106 S.Ct. at 2643 (quoting *Carrier v. Hutto,* 724 F.2d 396, 401 (4th Cir. 1983)).

II.

The United States Court of Appeals for the Tenth Circuit has not passed on, but it should be settled by this Court on whether clear violation of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) as recognized as "clearly established" in *Hicks v. Franklin,* 546 F.3d 1279 (10th Cir. 2008) is a *fundamental* miscarriage of justice exception that survived passage of Antiterrorism and Effective Death Penalty Act (AEDPA) of *McQuiggin v. Perkins,* 133 S.Ct. 1924 (2013). See App. 22a – 25a. This constitutional claim advanced by Mr. Barnes calls into question the accuracy of the determination of his guilt in a change of plea proceeding. This Court determined that "a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519, 520 – 521, 92 S.Ct. 594 (1972); *see also Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285 (1976); *United States v. Trujillo,* —F.3d—, No. 19-2057, 2020 WL 2745526, at *5 (10th Cir. May 27, 2020) (While error may have violated Defendant's constitutional right to due process, the Supreme Court has repeatedly recognized that constitutional errors are not always structural errors.) The circuit courts that have considered the issues are split, with the Fifth, Sixth, and Tenth Circuits holding that a constitutionally invalid plea is not structural error, *United States v. Trujillo,* — F.3d—, No. 19-2057, 2020 WL 2745526, at *5 (10th Cir. May 27, 2020); *United States v. Hicks,* 958 F.3d 399 (5th Cir. 2020); *Ruelas v. Wolfenbarger,* 580 F.3d 403, 410-11 (6th Cir. 2009), while the Fourth Circuit holds otherwise, *United States v. Gary,* 954 F.3d 194, 207-08 (4th Cir. 2020). *See United States v. Coleman,* —F.3d—, No. 19-2068, 2020 WL 3039057 (8th Cir. June 8, 2020).

a.

Mr. Barnes filed his initial writ of habeas under 28 U.S.C. § 2254 *pro se.* As a *pro se* litigant, Mr. Barnes was entitled to a *liberal* construction of his pleadings. Recognizing the importance of *Haines v. Kerner, supra,* the Tenth Circuit "believe that this rule means that if a court can reasonably read the pleading to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's *failure to cite proper legal authority, his confusion with various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.*" *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991) (footnote omitted) (emphasis added). Against this standard, the Northern District Court *ultimately* concluded that Mr. Barnes' *pro se* basis for relief arose from the *Menna-Blackledge* doctrine, *United States v. Broce,* 488 U.S. 563 (1989), and *Class v. United States,* 138 S.Ct. 798 (2018). However, in analyzing the "double-jeopardy" claim at issue, the Northern District Court unreasonably concluded that Petitioner's *pro se* ability to rely on "double-jeopardy claims raised by federal prisoners" was "misplaced." App. 35a. Specifically, the Northern District Court concluded that, "[i]n short, none of the authorities Petitioner relies on to argue that double-jeopardy claims are not subject to the AEDPA's one-year limitation period support that argument." App. 35a. In support, the Northern District referenced unpublished cases arising out of the reasoning of *Morales v. Jones,* 417 Fed.App'x. 746 (10th Cir. 2011) to bar Petitioner's *pro se* "subject matter jurisdiction" theory. App. 36a.

Nonetheless, *Morales v. Jones,* is persuasive in that Petitioner's "claim is only cognizable in federal habeas to the extent that it raises *violation of United States Constitution or federal law.*" *Id.* 417 Fed.App'x. at 749 (emphasis added). However, the misconstruction of Petitioner's *pro se* argument is that Mr. Barnes was charged with first degree felony murder with its predicate felonies, the "subject matter" in question—plain on its face—is whether Mr. Barnes'

plea to second degree felony murder was legally permissible without "real" notice where neither trial counsel nor the trial court explained the difference in elements of the lesser charge and its substantially lessen consequences.

Because of the procedural stance of Petitioner's case at bar: Mr. Barnes defaulted the ten-day window to *timely* withdraw his plea and the subsequent Post-Conviction pleading to withdraw his plea out-of-time was denied, Mr. Barnes could not vindicate his claims on "direct appeal." Nevertheless, the Northern District Court erroneously found that "none of these cases required the Supreme Court to determine whether a habeas petitioner's claims challenging the constitutional validity of a state-court judgment entered following a guilty plea were, or could be, barred by § 2244(d)(1)'s statute of limitations." App. 41a. *See Bousley v. United States,* 118 S.Ct. 1604, 1610 (1998) (We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review ... And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.); *see also Dretke v. Haley, supra,* 124 S.Ct. at 1856 (In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail).

As such, this Court has determined that "Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy 'has resulted in the conviction of one who is actually innocent.'" *Bousley, supra,* 118 S.Ct., at 1611 (citation omitted). The Northern District committed ERROR and the Tenth Circuit did not remand to cure that error in its construction of Petitioner's pleading arguing that "the AEDPA's statute of limitations does not apply." App. 34a – 37a.

In the *Bousley* dissent, Justice STEVENS points to the Petitioner receiving "critically incorrect legal advice." *Id.* 118 S.Ct., at 1613. This Court has *clearly* determined that "[o]ur

cases make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid. *Smith v. O'Grady,* 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941); *Henderson v. Morgan,* 426 U.S. 637, 644-645, 96 S.Ct. 2253, 2257-2258, 49 L.Ed.2d 108 (1976)." *Ibid.* Under this standard, the lack of Information and "critically incorrect legal advice" make Mr. Barnes' conviction "constitutionally invalid." Similar to *Henderson v. Morgan,* Petitioner "did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment entered without due process of law." *Id.* 426 U.S. at 647, 96 S.Ct. 2253. More succinct, "[t]his case is unusual in that the offense to which defendant pleaded was not charged in the indictment. The indictment charged first-degree [felony] murder. The defendant pleaded guilty to the included offense of second-degree murder, the elements of which were not set forth in any document which had been read to the defendant or to which he had access." *Id.* at 649, n. 2 (Mr. Justice WHITE, with whom Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice POWELL join, concurring.).

b.

Mr. Barnes' stated a *pro se* claim for relief in arguing that AEDPA's statute of limitations did not apply to his case. *See and compare McQuiggin v. Perkins,* 133 S.Ct., at 1932 (The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage.) On the face of the *minimal* record before this Court, the State of Oklahoma initially charged Mr. Barnes with "first degree felony murder," and as a part of the plea agreement (there is no doubt that plea agreements are *constitutionally* recognized as a critical stage requiring Sixth Amendment protection) the State "orally" amended the charge to "second degree felony murder." The law of *Henderson v. Morgan, supra* holds for the proposition that "real notice" is a prerequisite to the "basic protections, without which a criminal [change of plea proceeding] cannot reliably serve

the function as a vehicle for determination of guilt or innocence." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246 (1991).

In the Plea of Guilty, Summary of Facts Form, the record reflects that the only "notice" was "Felony Murder, 2ND" next to the question "Is there a plea agreement?" on page 3 and "Amended to Felony Murder, 2" on page 5. App. 50a. To the opposite, Mr. Barnes' misunderstanding is evident on page 1: "Felony Murder, 21 O.S. 701.7" and page 2: "minimum Life maximum LWOP." App. 49a. The plea colloquy from February 28, 2011 at page 5 reflect that:

> MR. KUNZWEILER [District Attorney]: Yes, sir.
> Your Honor, pursuant to plea negotiations, at this time, Count 2 we're amending to allege with regard to Mr. Barnes that he committed the crime of felony murder in the second degree. Pursuant to that amendment, we expect him to plead guilty to that offense and we'll recommend 35 years regarding that particular count.
> THE COURT: You heard the announcements of the State of Oklahoma. Is that your understanding?
> DEFENDANT BARNES: Yes, sir.

App. 51a.

However, without "real notice," in an amended information or record colloquy, Mr. Barnes clearly did not have an understanding of (1) "Homicide is murder in the second degree ... When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection B, of this act," OKLA. STAT. tit. 21, § 701.8(B) and (2) "A person who is convicted or pleads guilty to or nolo contendere to murder in the second degree shall be guilty of a felony punishable by imprisonment in a state penal institution for not less than ten (10) years nor more than life," OKLA. STAT. tit. 21, § 701.9(B).

From the February 28, 2011 plea colloquy the State of Oklahoma determined the "fact basis" supported a lesser charge of second degree felony murder, but did not *legally* explain the predicate "when perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection B, of this act." 21 O.S. § 701.8.

In contrary to clearly established law, Mr. Barnes' did not receive "real notice" of the charge when he was NOT "informed of both the nature of the charge to which he is pleading guilty and its elements." *Hicks v. Franklin,* 546 F.3d at 1284 (citing *Henderson,* 426 U.S. at 644-47, 96 S.Ct. 2253.). Similar to *Hicks,* "[t]he prosecutor orally amended in court the first degree murder charge to murder in the second degree," *Id.* at1281, distinguished is the factor that "pursuant to that amendment, we expect him to plead guilty to that offense and we'll recommend 35 years regarding that particular count." App. 51a. In *Hicks,* the Tenth Circuit found that "the basis that Mr. Hicks had committed an 'imminently dangerous act,' was unfounded because "he lacked notice concerning the nature of the amended charge." *Id.* at 1285. In the instant case, neither counsel, the district attorney nor the trial court explained the "amended" charge to Petitioner. As a matter of fundamental fairness, equal protection and due process of law, this cannot be tolerated as the nominal course of a change-of-plea proceeding.

Accordingly, "[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements, [the voluntary, knowing, and intelligent] standard is not met and the plea is invalid." *Ibid.* Subsequently, the conviction is *constitutionally* impermissible and cannot stand. That is, this Court "has clearly established the rule that a defendant must receive notice of all critical elements of the charge to which he pleads guilty." *Hicks,* 546 F.3d at 1284. As such, "[t]here is simply no indication in the record of the guilty plea proceeding that Mr. [Barnes'] plea

can stand as an intelligent, knowing, and voluntary admission of guilt as to all elements of the crime with which he was charged." *Id.* at 1286.

Under this "clearly established" *constitutional* law, it was unreasonable to determine that "[e]ven liberally construed, the Court does not read this bare assertion [where Petitioner alleges the trial court "failed to ensure the [he] is guilty in fact"] as alleging, much less demonstrating, that Petitioner's untimely filing could be excused through a credible claim that he is actually innocent." App. 35a, n. 10. (citing, *Perkins,* 569 U.S. at 386, 392). Similar to the facts of *Henderson v. Morgan,* the Tenth Circuit recognized the "State initially charged Petitioner in Count 2 with first degree felony murder, in violation of OKLA. STAT. tit. 21, § 701.7, but the State orally amended the charge to second degree felony murder as part of the plea agreement. Doc. 8-5, at 2 n.1." App. 32a. In stark contrast, Petitioner was never informed of "the critical element of the charge" of second degree felony murder. In this light, Petitioner can certainly rely on *Henderson v. Morgan, supra* as reasonable grounds for habeas relief.

As a structural matter, any conviction predicated upon an invalid plea cannot stand for "a plea of guilty and the ensuing conviction comprehended all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce,* 109 S.Ct. 757, 762 (1989). In this regard, "an error may be classified as structural where 'the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.'" *Trujillo, supra,* 2020 WL 2745526, at *5. The *Trujillo* Court "explained that a defendant can show his plea was involuntary under *Henderson* if he: (1) establishes that the omitted element was a critical element of the crime of the crime charged; (2) overcome the presumption that his attorney explained the element to him at some time prior to his guilty plea; and (3) shows that, prior to entering his plea, he did not receive notice of the

element from any other source." *Id.* 2020 WL 2745526, at *3. However, "[w]ithout a more analogous case in which the Supreme Court has held such an error is structural, we decline to do so in the first instance." *Id.,* at *7. *Cf. United States v. Gary,* 954 F.3d 194, 206 (4th Cir. 2020) (Finally, we independently find the error is structural on the ground that fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea.). Therefore, "a constitutionally invalid guilty plea may be set aside on collateral attack whether or not it was challenged on appeal." *Bousley,* 118 S.Ct. 1604, 1613 (Justice STEVENS, concurring in part and dissenting in part.).

CONCLUSION

The Tenth Circuit reached a contrary decision in denying Mr. Barnes a Certificate of Appealability. Because Mr. Barnes proceeded *pro se*, as a matter of law, he was entitled to a liberal construction of his pleadings. While *Class, Broce,* and *Menna-Blacklege* does find support for Mr. Barnes' inartful claims, it was unreasonable to conclude against Mr. Barnes that "federal authorities" did not lie to vindicate his invalid state conviction.

The "constitutional rule relevant to this case is that the defendant's guilt is not deemed established by entry of a guilty plea, unless he either admits that he committed the *crime charged,* or enters his plea *knowing what the elements of the crime charged.*" *Henderson v. Morgan,* 426 U.S. at 651, 96 S.Ct. 2253 (Mr. Justice WHITE, with whom Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice POWELL join, concurring) (emphasis added). In sum, Petitioner was charged with "Count 2, felony murder; Count 3, burglary first degree; Count 4, robbery with a weapon, and Count 5, knowingly concealing stolen property." App. 32a. The only admonishment provided was "at this time [during the plea colloquy], Count 2 we're amending to allege with regard to Mr. Barnes that he committed the crime of felony

murder in the second degree. Pursuant to that amendment, we expect him to plead guilty to that offense and we'll recommend 35 years regarding that particular count." App. 59a.

Wherefore, because the plain facts support Mr. Barnes' contention that his State conviction is in contrary to *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) and *Hicks v. Franklin,* 546 F.3d 1279 (2008), it is duly asserted that such a invalid conviction falls within the "miscarriage of justice" exception to AEDPA of *McQuiggin v. Perkins,* 133 S.Ct. 1924 (2013).

The Petition for Writ of Certiorari to the United States Courts of Appeals for the Tenth Circuit should be granted and REMAND necessary to apply the correct *constitutional* standard, notwithstanding the reasoning of *Dretke v. Haley,* 541 U.S. 386, 124 S.Ct. 1847 (2004).

REASON FOR GRANTING WRIT

The State of Oklahoma's procedural framework for the appeal-out-of-time process encompasses a subjective standard where the "right to appeal is dependent upon [Mr. Barnes'] ability that he was denied an appeal through no fault of his own." Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011).

The Northern District Court recognized this process in denying Petitioner's writ with prejudice as time-barred. Respectfully, the Tenth Circuit erroneously determined that Mr. Barnes did not make a "substantial showing of the denial of a constitutional right [to effective assistance of counsel for his first appeal as of right]," 28 U.S.C. § 2253(c)(2), to obtain a COA. Moreover, it was unreasonable to conclude that Petitioner's "state conviction became final" when Petitioner, *pro se,* could not overcome a subjective—and inadequate to "effective assistance of counsel" guarantees—state procedure to "withdraw his plea" or "appeal out of time" where such a proceeding when analyzed under *Roe v. Flores-Ortega,* 120 S.Ct. 1029 could have established the requisite *prejudice* "in the circumstance-specific reasonableness inquiry

required by *Strickland,* and that alone mandates vacatur and remand." *Id.* 120 S.Ct. at 1035. "In [this] case, however, [Petitioner] alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was—either actually or constructively—denied the assistance of counsel altogether." *Id.* at 1038.

In light of the procedural ruling, the Northern District Court did not perform its analysis under the rubric of Ineffective Assistance of Counsel but rather determined the State factual finding that "remaining in the county jail for the ten-day critical period" was not synonymous with exercising his constitutional right to counsel and the "force of statute" *procedural* right to be consulted about "something that legally went wrong" in his particular case in the "nonfrivolous" issue that "[s]ince [Mr. Barnes] did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law." *Henderson v. Morgan,* 96 S.Ct. 2253, 2260 (1976). This Court recognizes that a guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonably competent advice." *McMann v. Richardson,* 90 S.Ct. 1441, 1448 – 1449 (1970).

Because the law is "clearly established" in respect to Mr. Barnes' involuntary and unintelligent pleas of guilty, the miscarriage of justice in Mr. Barnes' particular case is evident from the face of the record, even the actual innocence of pleading to a crime that was legally impermissible.

It is apparent that the Oklahoma state proceeding against Petitioner was inconsistent with the rudimentary demands of fair procedure. It is also apparent that plea bargaining "*is* the criminal justice system." *Missouri v. Frye,* 132 S.Ct. 1399, 1407 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992)). As such, this Honorable Court

should clarify and extend the holding of *Bousley v. United States,* 118 S.Ct. 1604 (1998) to writs brought under 28 U.S.C. § 2254, specifically, where a federal court "must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." *Dretke v. Haley, supra,* 124 S.Ct. at 1852.

IT IS SO PRAYED.

July 9, 2020

Respectfully submitted,

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