No. 22-5412

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Clifton Lee Tribble — PETITIONER
(Your Name)

vs.

Bobby Lumpkin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
The Court of Criminal Appeals of Texas
The Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Clifton Lee Tribble
(Your Name)

1525 FM 766
(Address)

Cuero Texas 77954
(City, State, Zip Code)

361-275-2075
(Phone Number)

QUESTION(S) PRESENTED

1. If a State makes an increase in a defendant's authorized punishment by statute contengent on the findings of a fact, no matter how they label the fact, does that fact have to be found by a jury beyond a reasonable doubt? Without any additional findings, a DWI carries 10 years maximum in Texas.

2. The Texas Court of Criminal Appeals has repeatedly held that the district clerk's policy of refusing transcripts behind Tex. Govt Code Ann 552.028 as justification to deny access to the Courts. Does 3 years in denial make valid petitioner's claim that deprivation of the transcripts prevented demonstration of facts if fairly presented could have obtained relief?

3. Does the trial courts failure to comply with Rule 11(b) of federal rule of criminal procedures fundamentally impare the fairness of the trial to the level of constitutionally failing to provide the standard set forth by Congress?

4. Does the prosecutor's failure to correct testimony that he knew, or should have known, since he had the police report and probable cause supplement, but he failed to correct it. Can false testimony and false evidence be used to obtain a conviction under the due process clause U.S. Const. amend XIV?

5. The respondent claims that during the habeas proceeding trial counsel Ben Baker thoroughly responded to Tribble's allegations in an affidavit No mention of the untimely filing. Petitioner supplied the U.S. district court with a letter from the clerk stating that she shows no hearing on any docket? Every sentence except one in the entire affidavit was advocating the State's possition and they left that one sentence out. See the first paragraph of page 2, last sentence validates no evidence to sustain a deadly weapon finding. So why is Baker silent as a mouse in court as to this vital evidence in favor of petitioner? IAC?

LIST OF PARTIES

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

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

RELATED CASES

Deadly Weapon Finding Cases Governing Case was Brister v. State 449 SW3d 490 &
" " 414 SW3d 336

Montgomery County District Court Cases - Strouse v. State, 2016 Tex. App. Lexis 7425
was decided 2 months before the case at hand and should have governed under Stare decisis doctrine.

Clark v. State 573 SW3d 367
2019 Tex App Lexis 2371
Citing Brister 8 times and see HN4 and Conclusion as well as Page 375 reasoning.
Brister was still the State of the Law in "2019"

Hoff v. State, 2016 Tex. App. Lexis 11315
HN5
Exparte Hoff, 2019 Tex Crim. App Lexis 274
from the same 359th as case at hand
Prichard v. State 533 SW3d 315 2017 Tex. Crim. App Lexis 586
Ex Parte Flannery, 736 SW2d 652 1987 Tex Crim. App Lexis 603 HN1
Baptiste v. AG. United States, 841 F3d 601 2016 U.S. App Lexis 20140
HN22 DUE PROCESS Clause

Exparte Jones, 957 SW2d 849
H.B. 571 65th Legislature
Chapter 42.12 Section 3g

Sixth Amendent Cases
Apprendi v. New Jersey 530 U.S. 466 2000 US Lexis 4304
US v. Booker 9. 125 S.Ct. 738 2005 U.S. Lexis 628, Ring v. Arizona 536 US 584 2002 US Lexis 4651
Jones v. United States 1999 US Lexis 2191

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APPENDIX B Probable Cause Supplement of 09/10/16
Shows 5 DWI's Subject Name Tribble, Clifton Lee

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APPENDIX D Arrest Record 1609-1968 by G. Westbrook

APPENDIX E Affidavit of Exparte Tribble of December 22 2017 2 Pages

APPENDIX F Affidavit of Clifton Lee Tribble of JUNE 9, 2021 1 page

Appendix G The Index of Diligence that was attached to Petitioner's Federal Rules of Civil Procedure 60(b)(3) Motion. The U.S.D.C. was contacted via US Mail of petitioners need for these documents to be returned JUNE 14, 2022, and have yet to supply them. Petitioner assumes that they on the record in this case via computer.

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Appendix H. Deputy Report of Incident 16091968 Page 1 and Page 3 of 8 in which Paragraph 8 shows that the currant criminal history shows that "Tribble had 5 previous convictions for DWI." Not the 8 that, or 9 Attorney Ben Baker states, nor the 7 ADA Santini states

Appendix I. Letter # 8 in the Index of Diligence from Montgomery County Clerk Office (2 pages)

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Appendix L. State v. Tribble Hearing Order of November 17 2016 9:00 AM for Information.

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Appendix O. United States District Court, Southern District of Texas Civil Docket for Case #: 4:18-cv-02021 (2 pages)

Appendix P. Notice of Case Filing of JUNE 19 2018 from David J. Bradley Clerk

Appendix Q Ex parte Clifton Lee Tribble 16-09-10710-CR-(1) letter from Montgomery County Post Judgment Division notifying attorney of record the trial court has Ordered him to respond by filing an affidavit on or before 30 days from signing of this Order. Ben Baker then violates this Order under Tex. R. Civ. P. 193.6(b) by failing to timely repond.

Appendix R. Order Designating Issues where the Questions Clearly demonstrate the district court is aware of the Fed. R. Civ. P. 11 (b) violations and "tries to clean it up" of November 15, 2017 (2 pgs)

Appendix S. Ben Baker's untimely Responce of January 8, 2018 where he clearly advocates the State of Texas, 5 pages

Appendix T. States Exhibit No 1 showing where Ben Baker circled guilty and true.

Appendix U. 3 Google Maps of the location of arrest. (3 pgs)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

[✓] For cases from **state courts:**

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

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

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 04/08/2022.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 05/16/2022, and a copy of the order denying rehearing appears at Appendix BV.

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

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

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

The date on which the highest state court decided my case was 5·23·2018. A copy of that decision appears at Appendix W.

[ ] 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. USCS Const. Amend. 6
Amendment 6 Rights of the accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him: to have compulsory process for obtaining witness in his favor, and have the Assistance of Counsel for his defence.

2. USCS Fed Rules Crim Proc. Rule 11. Pleas
(b) Considering and accepting a Guilty Plea or Nolo Contendre Plea.
(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendre the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address the court must inform the defendant of, and determine that the defendant understands the following:
(A) the goverment's right, in a prosecution for perjury or fake statement, to use against the defendant any statement that the gives under oath
(B) the right to plead not guilty, or having already so pleaded to persist in that plea
(C) the right to a jury trial
(D) the right to be represented by counsel - and if necessary have the court appoint counsel at trial and at every other stage of the proceeding
(E) the right at trial to confront and cross examine adverse witnesses, to be protected from compelled self incrimination to testify and present evidence and to compel the attendance of witnesses
(F) the defendant's waiver of these rights if the court accepts the guilty plea or nolo
(G) the nature of the charge to which the defendant is pleading
(H) the maximum penalty including imprisonment, fine and term of supervised release
(I) any manditory minimum penalty
(J) any applicable forfeiture
(K) the court's authority to order Restitution
(L) the court's obligation to impose a special assessment
(M) in determining a sentence the court's obligation to calculate applicable sentencing guideline range and to consider range possible departures and other factors of USC 3553(a)
(N) any term of any plea agreement provision waiving the right to appeal or collateral attack
(O) that if convicted a defendant who is not a U.S. citizen may be removed from the United States denied citizenship and denied admission to U.S. in future.

3. Texas Code Criminal Procedure Art. 42.12 3(g) has since been repealed.

STATEMENT OF THE CASE

On September 9, 2016 I went to a Sports Bar by my home, around midnight I left there and went to a McDonalds next door to get an ice cream cone. This is the 15000 block of Hwy 105 in Conroe, Texas. As I was leaving two vehicles were side by side @ the entrance to Hwy 105. I previously told my attorney of record that these vehicles were at the light, he thought I meant traffic light when in fact I was refering to the McDonalds Sign @ entrance.

I left, turned on 105 and went about 700 feet to Tejas and was attempting to turn left when the light turned yellow. I stopped, as there were no other cars (I stayed were I stopped in the wrong lane) Next thing I see is Conroe PD coming out of the parking lot. The officer turned on his emergency lights and got behind me, got out and asked what I was doing? I explaind I was waiting for light to change so I could turn in. He then instructed me to drive over to the LVS parking lot. He followed me down the entrance road and into the parking lot. The record does not demonstrate me ever encountering another vehicle and no one was placed in actual danger by my stopping in the wrong lane in my attempt to exit the roadway. There is no mention in the police report, probable cause or any mention of a deadly weapon charge? The officer clearly saw no danger to any other motorist or he would not have had me to continue doing what I was doing.

I was arrested for DWI 3rd Habitual. No mention of a deadly weapon.

At first setting I was appointed Ben Baker of Conroe the Judge was not in so he reset it with the clerk and handed me a form to fill out with my recollection of the night in question. This is where my Conflict of Interest came from.

As the Reporter's Record validates Ben Baker shared the form with the ADA Vince Santini in violation of ABA Standards, Ethic of Professional Conduct to name a few. Unless he had a Crystal Ball, there is no other explaination.

The first thing Santini says to the Judge was, "He thought he was at a light, I think."

I have NEVER EVER spoken to or seen Vince SANTINI until that day in Court. So there is no way for him to have that information unless Ben Baker discussed it with him. NO WAY!

After I got to TDCJ Jan. 3rd 2017 I sent him numerous letters to his office. That day, March 23 2017, April 18, 2017, June 4 2017, July 1, 2017 and never got any responce. He should have an obligation to assist me in getting the transcripts but was no help and did never even responded to any of the letters.

In his late filed affidavit he avers that Mr Tribble is very intelligent with an acute legal savviness' There is no way for him to have formed this opinion in the two short conversations we had. This came about only after he read my habeas corpus filed with his ineffectiveness included.

REASONS FOR GRANTING THE PETITION

The petition Clifton Lee Tribble has diligently contested the fundamental unfair treatment from Montgomery County in General. From the Courtroom to the Clerk's Office there has been a diliberate and concerted effort to hide the sloppy, unprofessional work done in this case. The reason is obvious from the reporter's record that they realized after the fact, the rule of Fed.Civ.P. Rule 11 core concern violations and attempted to coach Ben Baker in his late filed affidavit, in affect glossing over their obligations as public servants. Then the clerk's office hindered the proper and affective filing of the State habeas by not providing essential validation of what petitioner was claiming in habeas.

Apprendi, Ring, and Jones all concur that the Sixth Amendment requires relevant facts that increase the punishment beyond what is legally prescribed must be found by a jury beyond a reasonable doubt. Petitioner said this exact thing in his 11.07 in State Court citing, In re Winship, because he was unable to to review newer cases due to hinderance, delay and denial of his access to relevant and non-availible case laws in the law libraries of T.D.C.J. ie Violation of access to the Courts.

Additionally, the reporter's record shows false testimony given to the court to influence the judge with specious claims and out right colusion between State's counsel and attorney of record.

Respectfully admitted
Cliff Tribble

Additionally, in the 6 years that petitioner has been incarcerated he has seen countless DWI intoxication manslaughter cases and he has yet to see one with 30 years. Many 12, 15, 17, 28, but then have taken a life. The petitioner is being punished for what he might done not what he did. Speculation is not proof and Brister was the State of the law. See the other Montgomery County Cases that recognized it?

The petitioner appoligizes to the Court for this handwritten writ, as the Stevenson Unit Commisary is, and has been out of typing ribbon for a few months, and we have no computer access, or word processor so if the word count is incorrect, I tried my best, God Willing. I pray the following, Lamentations 3-34 of the Good News Translation

The Lord knows when our spirits
are crushed in prison;
He knows when we are denied
the rights he gave us;
When justice is perverted in
court he knows.

Amen

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Clifton Lee Tibble

Date: August 12, 2022

Sixth Amendment

When a judge exercizes her discretion to impose a sentence within the guideline range and states for the record that she is doing so, little explanation is required. However, when the judge elects to give a non-guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for the defendant. The reasons should be fact specific and include, for example, aggrevating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, criminal history, relevant conduct of other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable. Such reasons are essential to permit this court to review the sentence for reasonableness as directed by the United States Supreme Court's holding in Booker see headnote HN#4 United States v. Booker 125 S.Ct. 738 2005 U.S. Lexis 628; United States v. Mares, 402 F.3d 511 2005 US App Lexis 3653

In the case at hand the Court of Appeals should have reviewed for plain error the claim that defendant was deprived of his Sixth Amendment right to a jury trial beause the sentencing judge enhanced under a manditory system based on facts found by a judge that were neither admitted by him or proved to a jury beyond a reasonable doubt, when the petitioner did not object in the district court.

The Supreme Court in Booker held. "Any fact, other than prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by the plea of guilty must be admonished and admitted by the defendant or proved to a jury beyond a reasonable doubt. Also See HN#7 of Apprendi, supra @ 494. In re Winship, 397 U.S. 358; Jackson v. Virginia 443 US 307 @ 319.

An accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of common law, and is no accusation in reason. The "statutory maximum" as the Supreme Court held in Apprendi is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See HN#4 of Apprendi Indictment and Due Process.

For purposes set forth in Apprendi, the relevent statutory maximum is the maximum sentence a judge may impose before finding additional facts. Said another way, The relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts, or findings. The maximum sentence for DWI is 10 years in TDCJ.

When a judge inflicts punishment that a juries verdict alone doesnot allow, the jury has not found all the facts which the law makes essential to the punishment and the the judge exceeds her proper authority. When a defendant pleads guilty the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding. Neither scenerio took place as evidenced in the guilty plea colloquy reporter's record of the instant case.

It is unconstitutional for a legislature to remove from a jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. Apprendi makes clear the finding cannot be reserved for the judge. Ring Id @ 603. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt. Ring v Arizona, 536 U.S. 584 2002 U.S. Lexis 4651 HN7 Jones v. United States 526 U.S. 227 1999 U.S. Lexis 2191 HN 2 & 4

Jones, Apprendi, and Ring made the requirements clear about the Sixth Amendent giving the defendant the right to have the jury find the existance of "any particular fact" that the law makes essential to his punishment. 524 U.S. @ 301. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Id @ 303.

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As at the time of the Fifth and Sixth Amendments adoption, a judge's sentencing authority derives from, and is limited by, the jury's factual findings of criminal conduct. A jury must find beyond a reasonable doubt every fact "which the law makes essential to the punishment" that a judge might later seek to impose. Blakely v. Washington 542 U.S. 296 2004 U.S. Lexis 4573. Headnotes 5 & 6 & 7.

Regardless of whether a judge's authority to impose an enhanced sentence depended on finding a specified fact, finding one of several specified facts, or finding any aggravating fact, a jury's verdict alone did not authorize the sentence, as (1) the judge had acquired that authority only upon finding some additional fact; (2) it did not matter that the judge, after finding aggravating facts, had to make a judgment that these facts had presented a compelling ground for departure (3) the judge could not make that without finding some facts to support it beyond the bare elements of the offense: (4) regardless of whether the judicially determined facts required a sentence enhancement or merely allowed it, a verdict did not authorize it, and the defendant did not admit it.

In Texas the penalties for DWI are 2 to 10 years, by statute; it can be enhanced due to prior convictions for the same offense. The fact found by the judge had an onerous effect on the sentencing by additional 50% being required be served, as opposed to the 1/3 requirement traditionally attached to a DWI without additional facts.

This case is not about the constitutionality of determinate sentencing but only about how it can be implemented in a way that respects the Sixth Amendment. The Supreme Court's commitment to Apprendi reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of a jury trial.

This case requires the application of the rule expressed in Apprendi v. New Jersey, 530 U.S. 466 (2000) "Other than the fact of prior convictions, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, (which in the instant case is 10 years in prison) must be submitted to a jury, and proved beyond a reasonable doubt." The fact in question increased the amount of of time be served to 15 years; and forbids outside trustee status.

The Apprendi rule reflects two longstanding tenets of common law criminal jurisprudence, that being, the "truth of every accusation" against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) and that "an accusation within the common law which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason." 1 J. Bishop, Criminal Procedure § 87 pg 55 2d ed 1872. These principles have been acknowledged by courts and treaties since the earliest days of graduated sentencing and are compiled in relevant authorities in Apprendi. See 530 U.S. @ 476-483, 489-490 n15, 147 L Ed 2d 435 id @ 501-518

If a statute prescribes a particular punishment to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggrevations, then those special circumstances must be specified in the indictment or the charging instrument.

A fact that increases a sentencing floor forms an essential ingredient of the offense. More over, It is impossible to dispute that facts that increase the legally prescribed floor aggrevate the punishment by heightening the loss of liberty associated with with the crime. The defendant's expected punishment has increased, as a result the prosecution is empowered by invoking the manditory minimum to require the judge to impose a higher punishment than he might wish. The core crime and the fact triggering the manditory minimum sentence together constitute a new crime, an aggrevated new crime and the elements of which must be submitted to a jury.

The essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally proscribed punishment so as to aggrevate it, the fact necessarilly forms a constituent part of a new offense and must be submitted to a jury. It is no answer to say the defendant could have recieved the same sentence with or with out that fact. One reason is that each crime has different elements and a defendant can be convicted only if a jury finds each element of the crime of conviction.

Any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime. Establishing what punishment is availible by law and setting a specific punishment within the bounds that the law prescribed are two different things. <u>Apprendi, 530 U.S. @ 519.</u>

Under the doctrine of stare decisis the courts generally adhere to prior decisions and doing so promotes evenhanded, predictable and consistant developement of legal principles, fosters reliance on judicial decisions and contributes to the actual and percieved integrity of the judicial process. <u>Payne v. Tennesee 501 U.S. 808 1991 U.S. Lexis 3821</u>

To protect these important values we require a special justification when departing from precedent. <u>Dickerson v. United States, 530 U.S. 428</u> 2000 U.S. Lexis 4305.

The Supreme Court held that a legislature may not remove from a jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. <u>530 U.S. @ 490.</u> and applied <u>Apprendi</u> to strike down manditory sentencing systems at the State and Federal levels. See <u>Cunningham v. California 549 U.S. 270</u>, <u>United States v. Booker 543 U.S. 220</u>. <u>Blakely v. Washington 542 U.S. 296</u> and has extended It to criminal fines. See <u>Southern Union Co. v. United States, 567 U.S. 343.</u>

Apprendi is firmly rooted in jurisprudence of the Sixth Amendment and apply to the manditory minimums and consistant with stare decisis principles. Again <u>Apprendi</u> held facts that expose a defendant to a punishment greater than that otherwise legally proscribed were by definition "elements" of a seperate legal offense. See <u>Almendarez-Torres v. United States 523 U.S. 224</u> 1998 U.S. Lexis 2118 HN8 citing the 1970 <u>In re Winship 397 U.S. 358,</u> holding that the Constitutions Due Process Clause protects against conviction except upon proof beyond a reasonable doubt.

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A.T.C.

Congress adopted the Rules Governing §2254 Cases, of particular relevance to this case is Rule 6(a) of the §2254 Rules. which provides: "A party shall be entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exerzize of his discretion and for good cause shown grants leave to do so, but not otherwise.

Under 28 U.S.C.A. §2254(e)(2) the petitioner has concretely demonstrated the diligence required and that discovery was indispensable to a fair rounded development of material facts, specific Court reporter's report, that are not subject to reasonable dispute. Petitioner supplied the U.S. District Court with copies of letters from Montgomery County Clerk's Office, Montgomery County Prosecutors Office, The Post-Judgment Division, and Defense attorney of record, all in a futile attempt at obtaining the Guilty Plea Colloquy Hearing Transcripts in preperation of filing his Habeas Corpus 11.07 in State Court. See Index of Diligence, 1 through 55 see: USDC Civil Action No H-18-2021 Docket# 45 & 46. Claiming misrepresentation of a party in opposition, which prevented the petitioner from fully and fairly presenting his case. Hesling v. CSX Transp. Inc. 396 F3d 632 2005 U.S. App. Lexis 126. These attempts began on JUNE 14, 2017 and continued until JUNE 11, 2020 to Montgomery County Clerk's Office, which repeatedly invoked Tex. Gov't Code Ann. 552.028 as reason for not supplying requested documents. The letters to the Prosecutors Office clearly alerted the opposing party of petitioner's intention to dispute his case. It was not until State Courts denied relief, and petitioner filed the instant 28 USCA §2254, and two seperate discovery motions that that were denied, (that petitioner avers was abuse of discretion) see USDC Docket #13 & 29 in Civil Docket #4:18-cv-02021 filed 8/20/2018 and 11/06/2018, which included a set of 25 interrogatories for Ben Baker in support of his ineffective assistance of counsel claims. Petitioner provided sufficiently specific allegations that could not have been subject to to reasonable dispute, and therefore demonstrated his discovery request could yield evidence to support grounds for relief if the facts were fully developed. See: HN15 United States v. Fields, 761 F3d 443 2014 U.S. App. Lexis 14590, and see §2254(e)(2)(A)(ii), and (f). After U.S. District Court granted I.F.P. the petitioner was finaly able to move Montgomery County to produce the Guilty Plea Colloquy. The records petitioner has supplied this Court via pleadings in this case, the necessary diligence for the purposes of the opening clause of 28 U.S.C. 2254(e)(2) in that he has demonstrated more than a reasonable attempt to investigate and pursue claims in State court. See; Jones v. Davis 890 F3d 559 2018 U.S. Lexis 12599 HN4 and HN5. and 28 U.S.C.S. 2254 (f). The federal court failed to direct the State to. The Texas Court of Criminal Appeals in 2014 case, In re Bonilla, 424 SW3d 528 2014 Tex. Crim. App. Lexis 277. held, "if the district clerks policy deprives the inmate of the ability to obtain transcripts, the policy deprives the inmate of the ability to prepair a writ of habeas corpus application, thereby denying him access to courts." See HN5 and 6.

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"The U.S. Supreme Court has repeatedly struck down restrictions impeading access to the courts by habeas applicants and has required remedial measures to insure that inmate access to the Courts is adequate, effective and meaningful. Multiple decisions by the Supreme Court have struck down State laws and rules that unconstitutionally impead an inmates access to the courts." HN 7 Bonilla.
The Texas Court of Criminal Appeals in 2019 Tex.Crim. App. Lexis 976 Exparte Jones 584 SW3d 434.
Judge Yeary's Opinion was that Montgomery County District Clerk's duty when an inmate makes a request for a cost estimate for preperation of the record from his case, the district clerk must respond with an estimate. also see: Inre Artiga, 2016 Tex.Crim. App Unpub Lexis 1136 Id@529-30 534
Petitioner made many attempts to obtain the transcripts as evidenced by the Index of Diligence he provided the District Court. In re Ingram 575 SW3d 367 2019 Tex.Crim.App.Lexis 605, concurred that "a general request for information on how to obtain trial transcripts ought to be sufficient to invoke the Bonilla requirement that the district clerk respond."
It is worth noting that the Texas Rules of Appellate Procedure identify what must be contained in a "Clerk's Record" and then seperately what must be contained in a Court Reporter's Record" Tex. R. App. P 34. It is unlikely that an inmate untrained in law would understand the differences between both records. Bonilla is and was settled precedent, and govern petitioner's Claim of denial of access to court documents under Texas law, as well a Supreme Court rulings.
The respondent has made repeated pleadings to the effect of, "Tribble was properly admonished." and "pled true to enhancements." in Docket #26 Motion for Summary Judgment @ page 17, and footnote 3 of page 3. See Tex. R. Civ. P. Rule 59." ... allegations in answer shall be deemed a part there of for purposes.
Petitioner filed a second Motion for Discovery and Production of Documents #29 Docket Date 11/27/2018
The District Judge could have expanded the record under Rule 7 to allow petitioner to support his claims with material evidence. The U.S. Supreme Court has long recognized that under the Equal Protection Clause of the 14th Amend, as well as the Due Process Clause require the State to provide a free transcript to an indigent defendant. Habeas Rule 28 USCS 2250.
In the 5th Circuit's Sixta v. Thaler, 615 F3d 569 2010 US App Lexis 17272 HN 3 and HN 5.
"When a respondent in a habeas proceeding does, in fact, include exhibits to the answer, there can be little doubt that those exhibits must be served on the habeas petitioner. see Fed R. Civ. P. 5(a) which provides that a pleading filed after the original complaint must be served on every party. In turn, Fed.R. Civ. P. 7 list an answer to a compliant as a "pleading" and Fed R. Civ. P. 10(c) provides that a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes. Considered together, the rules plainly require that respondent serve both the answer any other exhibit thereto, on the habeas petitioner. Under Fed. R. Civ. P. 56(c)(1)(A), (d)(2) and (e) the respondent failed to properly support an assertion of fact, and failed to address petitioner's Claims by suppying the trial transcripts in a timely manner, but clearly referenced them. Therefore, the claim of "proper admonishment" was conclusory at best. see Thompson v. Green, 427 F3d 263 2005 US App Lexis 23002 (4th Circuit 2005) 539

Fed.R. Civ. P. 11(b) Violation and Impaired Fairness

The violations of Fed.R.Crim.P. 11 fundamentally impaired the fairness of the trial and violated the defendant's due process rights, which poses the question, did the petitioner have a fair trial that comports with the constitutional standards set forth by Congress?

Based on the withheld transcripts of the guilty plea colloquy, the trial court failed address core concerns in allocution. United State v. Punch 709 F2d 889 @ 894. "In complex cases, a judge in a Fed.R.Crim.P. 11 proceeding must do more than have the indictment read to the defendant. In non-complex cases, a reading will usually suffice." Although the the petitioner did acknowledge in response to a seperate inquiry by the court that he "signed the plea agreement." The United States v. Dayton 604 F2d 931 1979 U.S. App Lexis 11093 The court held that what was necessary was that the district court, given the nature of the charges and character and capacities of the defendant, personally participate in the colloquy mandated by Rule 11. The district judge had to satisfy himself (or herself) fully that, within those limits, defendant understood what he was admitting and what the consequences of that admission might be, as well as that what he was admitting constituted the crime charged, and that admission was voluntary. This did not happen here. The Reporter's Record concretely demonstrate that this senario was not followed. The petitioner repeatedly asked the U.S. District Judge to judicially notice these undisputable court documents under Fed.R. Evid. 201(b)(2) & (c)(2) as petitioner had assumed that respondent supplied the Courts with them since they continually alleged, "Tribble was properly admonished." Such service is an elementary step in litigation of our Judicial System contemplated when the rules were promulgated by the Supreme Court in 1976. Thompson v. Green 427 U.S. @ 268-69. The 5th Circuit in Dayton held, "nowhere indicates that a judge may satisfy his obligation to inform the defendant of the nature of the charges against him by relying on representations by defense counsel that he has informed his client of these charges." In McCarthy v. United States 394 U.S. 459, the Supreme Court held that counsel's statements that he explained the nature of the charges to the defendant did not absolve the judge of his personal obligation to inform the defendant of the nature of those charges. McCarthy, 89 S.Ct @ 1173; Id 89 S.Ct. @ 1176 Also HN6 onto HN8 of Dayton.

The Texas Code of Judicial Conduct Canon #2.A. states. "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Under Tex.R. Admin. 12.4's Access to Judicial Records (b) Voluntary Disclosure. A records custodian may voluntarily make all or part of the information in a judicial record avaible to the public ... Information voluntarilly disclosed must be avallible to any person who request it. Generally, Judicial records are open to the public for inspection and copying. These are from Rule 12. Public Access to Judicial Records for the State of Texas.

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Plain error clearly affected petitioner's Substantial rights and the fairness and integrity of the proceedings. An error affects substantial rights of a defendant when the error "affected the outcome of the district court proceeding. United States v. Palmer, 456 F3d 484 2006 U.S. App Lexis 17986. HN5 A denial of a critical element of a charge cannot constitute a guilty plea. The substance of a guilty plea has a special character. The plea is more than a mere confession, it is an admission that the defendant committed the charged offense. The U.S. Court of Appeals for the Fifth Circuit considers plea colloquies solemn declarations in open court which carry a strong presumption of verity. Its willingness to accept plea agreements and colloquis as a factual basis for convictions demands a corollary respect for the integrity of their contents. The question is not one of the district court's belief of credibility but the plea words themselves. Here, the petitioner has demonstrated that the error affected the outcome of the district court proceedings. United States v. Norris 434 F3d 767 @ 774 quoting Mares, 402 F3d @ 521 It extended the required time to be served before being eligible for parole from 1/3 of the sentence to 1/2 of the sentence being required. In petitioner's case a dramitic difference from 3½ years to 15 years. That is more than the maximum penalty by statute for a DWI by 5 years. Fed R Crim P 11(c)(1) @ HN 6 "A plain erron is one which is clear under currant law." The district court's error was contrary to Fed. R. Civ. P. 11 and Olano 507 U.S. 725 required error so clear the judge and prosecutor were derelict in countenancing it. It is quite clear by the 4 questions presented to defense counsel in the Order Designating Issues that both were aware of the Rule 11 violations. The district court/trial court's was incorrect in accepting the guilty plea without making sure that, "The defendant possessed an understanding of the law in relation to the facts." United States v. Guichard 779 F2d 1139 1986 U.S. App Lexis 27999 HN2 Reversable error exist when there is a "entire failure to address any of the three core concerns of Rule 11. citing McCarthy, see 394 U.S. @ 466. Obviously, if the deadly weapon was not even in the colloquy of what the petitioner was charged with, it can not be explained how it relates to the law. The petitioner has continually avered that he never saw any information nor was it read in open court. There was only the speculations of A.D.A. Santini as to his opinions, which are contradicted by the police reports. He did in fact withhold the fact that the officer at the scene directed the continued use and exibition of the alleged deadly weapon when he instructed the petitioner to drive over to the CVS parking lot. Which poses the question: If the petitioner was discharging a firearm in the middle of HW 4105, would the officer advise him to continue this activity but do so over in CVS parking lot? Ultimately the plea agreement and colloquy support only DWI, and not a deadly weapon enhancement.

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Petitioner brings this to the Courts attention due to the fact after numerous attempts to get the Guilty Plea Transcripts and Montgomery County Clerk's Office repeatedly invoking TEX. Gov't Code Ann. 552.028 as reason for not responding to a request for reagrding cost of transcripts, petitioner's brother called their Office and ask the Same thing. He was told by someone there that, "Since your brother pled guilty, there probably were no transcripts. Contrary to Rule 12 Tex.R.Admin. 12.4.
Under the Texas Code of Judicial Conduct Canon 3 c.(2) A judge should require court officials and others subject to the judges direction and control to observe standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their duties. And Canon 5 states, A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration Section D. Disciplinary Responsibilities (2) A judge who recieves information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. See: Rule 15.01 A.& B., Rule 15.02(a)(b)(c)(d).
Of particular relevance to petitioner's circumstances and case are Rule 15.05. Violations of Duties Owed to the Legal System.

A. False Statements, Fraud, and Misrepresentations. Absent aggrevating or mitigating circumstances, and upon application of factors set out in Rule 15.02 the following are generally appropriate in cases involving conduct that impeads administration of justice or involves dishonesty, fraud, deceit or misrepresentation to a court or another:

1. Disbarment is generally appropriate when Respondent, with the intent to deceive the court or another, makes false statements, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
2. Suspension is generally appropriate when Respondent knows that false statements or documents are being submitted to the court or another or that material information is improperly being withheld, and take no remedial action, and causes injury or potential injury to a party, or causes adverse or potentially adverse effect on legal proceedings.

The petitioner has provided the documentation that demonstrates that the prosecutor and defense counsel have made false statements and misreprecentations to the court in the guilty plea colloquy. [1] The prosecutor in making the false statements was thus performing the function of a witness rather than an advocate.[2] Defense counsel in making false statements was avoiding the principle responsibility and duty to serve the undivided interest of his client, and his indispensable obligation to act independently of the goverment and oppose it in adversary litigation. See: Criminal Justice Act of 1964 Pp.408-409 and the ABA Project on Standards for Criminal Justice Defence Functions[3] 3.9 (App Draft 1971) The Chief Justice of the Supreme Court held, " defense counsel who is appointed by the Court... has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger. Counsel for the Prosecution and Defense Roles under minimum standards. 8 Am. Crim. L. Q. 2, 6 1969 <u>Ferri v. Ackerman, 444 U.S. 193</u> 1979 U.S. Lexis 153 See: LEdHN [1c].

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The ABA Standard of Criminal Justice 4-7.8(b) provides; It is unprofessional conduct for a lawyer to express a personal belief or opinion in his clients guilt/innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

The Court Reporter's Record @ page 9 line 10. "<u>He thought he was at a trafficlight, I think.</u>" was Mr. Vince Santini's opinion of evidence he obviously did not review, because the Arrest Record filed by the arresting Officer G. Westbrook, in the Probable Cause Surrounding Arrest @ line 2, "<u>The vehicle was stopped at the intersection for Tejas and Highway 105.</u>"

At line 13 and 16, "<u>And this was his ninth arrest for DWI. @16 I think seventh conviction.</u>"

This False Statement by the prosecutor is clearly disputed by the Probable Cause Supplement Narrative filed by Westbrook 09/10/16. In the fifth paragraph, the 3rd line. "I placed him in custody for DWI. A CCH was ran on Tribble. (This is a <u>Currant Criminal History</u> which is updated daily by the Texas Department of Public Safety.)" The CCH showed that Tribble had 5 previous convictions for DWI on 4/14/89, 3/24/99, 7/31/00, 11/2/04 and 4/7/07."

Additionally, Montgomery County 911 switchboard advised, "a white pick up truck had stopped one light west of McCaleb Road." These documents are not subject to reasonable dispute, and convincingly demonstrate the misrepresentations by State's counsel to the Court.

And for the false statement to the court by Ben Baker, see page 5 lines 3, 4, 5, 6.

Mr Santini: "And I think Mr Baker and the defendant are waiving their 10 days notice of Enhancement."

Mr Baker: "We are. And we have been familiar with them since the very first court apperance."

This misrepresentation of the truth by Baker is concretely contradictory to the previous statement by Santini, "Today we amended --- it was an infomation." @ Page 4 lines 24 & 25. And as petitioner has already stated, Baker did not advise of waiver.

Under well establish federal law as the Supreme Court of the United States held in 1959, <u>Napue v. Illinous, 360 U.S. 264 1959 U.S. Lexis 811 LEdHN[2]</u> The principle that a State may not knowingly use false evidance, including false testimony, to obtain a tainted conviction, is implicit in any concept of ordered liberty. @ LEdHN[3] It is of no consequence that the falsehood bore upon the credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what it's subject, and, if it in any way is relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.

A prosecutor has a duty to insure that the Court has complete and accurate information concerning a defendant, as an official of the court has a duty to bring the correct state of affairs to the attention of the court. <u>United States v. Block, 660 F2d 1086 1981 U.S. App. Lexis 16085.</u> HN*5 and HN12.

Under Legal Ethics of the ABA Standards for Criminal Justice § 3-6.2 1980 "a Prosecutor should assist the Court in basing its sentence on complete and accurate information." The ABA Model Code of Professional Conduct Rule 4.4(a)(2011)(4) an attorney must not "<u>engage</u> conduct involving dishonesty, fraud, deceit or misrepresentation." <u>2013 U.S. Dist. Lexis 188084.</u>

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The Supreme Court in Townsend v. Burke 344 U.S. 736 U.S Lexk 1988 held that, The prisoner was sentenced on the basis of assumptions concerning his criminal history, on record which were materially untrue. Such a result whether caused by carelessness or design is inconsistont with due process of law and such convictions cannot stand 344 U.S. @ 740. Implicit in the Court's holding in Tucker v. United States 404 U.S. 443, 1972 U.S. Lexis 101, was that despite the broad discretion left to trial in assessing background information a defendant retains the right not to be sentenced on the basis of invalid premiss. Russo v. United States, 470 F2d 1347 1972 U.S App Lexis 6184.

Petitioner avers that based on the reporter's record of the guilty plea hearing, it is readily apparent that the court relied, at least in part, on the defendant's bad record." Petitioner has contested the court's factual assumption as to his record and sought only to have an oppertunity to present facts that he claimed dispel these assumptions, and challenged the fairness of the sentencing procedure where the judge had to rely on erroneous factual information in assessing the sentence imposed.
The Texas Court of Criminal Appeals held that, "to demonstrate falsity, court's have required some evidence that contradicts the impression of the testimony". See: Exparte Chavez 371 SW3d 200 @ 208 2012 Tex Crim App Lexis 696. The Court observed that in cases involving the State's Knowing use of fake testimony in violation of due process, of the Fourteenth Amendment to obtain the conviction regardless of whether it does so knowingly or unknowingly. Testimony need not be perjured to constitute a due process violation, rather it is sufficient that the testimony is false. The question is whether the testimony, taken as a whole gives a false impression, and the State's introduction of false or inaccurate testimony is not relevant to a false testimony due process error analysis. See: Almanzar v. State, 2012 Tex App Lexis 10524 and United States v. Espinoza 481 F2d 553 1973 U.S. App. Lexis 8980 HN1 "it is widely recognized that a sentencing judge relies on certain information in assessing a sentence; fundamental fairness requires that a defendant be given atleast some oppertunity to rebut that information.
Almost 9 arrest and 7 convictions is a far cry from the 5 convictions for DWI that the Currant Criminal History revealed to the arresting officer in this Case. And the prosecutor's, "I think he thought he was at a light, I think." comment was designed to infer the petitioner's being unaware of where he was.
The ABA's Legal Ethics in Standards for Criminal Justice states, a Prosecutor should assist the Court in basing its sentence on complete accurate information.
The petitioner was denied due process under the 14th amendment as a review of the record establish that under the State of the law, and case law from Montgomery County District Courts, the deadly weapon was not established nor was it pled to." It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made". See: De Jonge v. Oregon 299 U.S. 353 1937 U.S. Lexis 1135, HN2. It is axiomatic that a conviction upon a charge not made or on a charge not tried constitutes a denial of due process. Cole v. Arkansas, 333 U.S. 196 1948 US. Lexis 2789.

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Petitioner can now validate the Texas Disciplinary Rules of Professional Conduct 15.05 Violation of Duties Owed to the Legal System in subsection A's False Statements Fraud and misrepresentations. The Court Reporter's Record clearly shows misrepresentation in their testimony to the court, and the petitioner herein provides convincing proof in Exhibits in the appendices.

The Montgomery County Clerk's Office, Prosecutor's Office in the 359th Judicial District and Post Judgment Division, as well as defense counsel of record were all aware of and ignored petitioner's repeated request for Public Record to do so unconstitutionally impeded petitioner from obtaining essential proof, that could not be reasonably disputed by reasonable factfinders as they were certified court documents.

Without this record being availible to the reviewing court, the court was incapable of providing a fair evaluation of the merits of such a serious allegation as the denial or infringment of due process rights. The plea colloquy clearly demonstrates the petitioner did not recieve adequate instruction from the trial court as to how the law related to the facts to which he was pleading guilty. This grievously wronged petitioner in that the State court proceeding was contrary to and involved unreasonable application of clearly established federal law. i.e. McCarthy v. United States, 394 U.S. 459 1969 U.S. Lexis 3280, Smith v. Grady, 312 U.S. 329 1941 U.S. Lexis 921. Harrington v. Richtner, 562 U.S. 86 2011 U.S. Lexis 912. Berghuis v. Thompkins, 560 U.S. 370 2010 U.S. Lexis 4379 quoting 28 USC 2254 (d)(1) and Brecht v. Abrahamson, 507 U.S. 619 1993 U.S. Lexis 2981. which admonished that. "Habeas Corpus is designed to guard against extreme malfunctions in State Criminal Justice system."

In the instant case the record demonstrates that the trial court judge neither had the information read to the Defendant, see United States v. Punch 709 F2d 889 1983 U.S. App Lexis 26278. nor gave explaination as to the nature of the charges to which the plea was offered. United States v. Wetterlin 583 F2d 346 @ 350-52. 7th circuit Irizarry v. United States 508 F2d 960 2nd Cir.

"A factual basis cannot simply be implied from the fact that a defendant pled guilty. A guilty plea is not effective as an admission of all the elements of a charge unless the defendant possesses an understanding of the law in relation to the facts." That fact, is that a guilty plea reserves only constitutional issues, and not whether the defendant's conduct constitutes an offense under statute, neither lessens the foregoing Rule 11 requirement nor precludes reversal on appeal for failure to meet it. United States v. Spruill, 292 F3d 207 U.S. App Lexis 9211.

A plea is constitutionally valid to the extent it is "voluntary and intelligent", if there is no mention of an essential element before the plea is made, the judgment was entered without due process of law. Smith v. Davis 2018 U.S. Dist Lexis 52154.

It is incumbent upon a district judge accepting a plea of guilty to make the minor investment of time and effort necessary to set forth the meaning of the charges and to demonstrate for the record that the defendant understands. United States v. Kamer, 781 F2d 1380 @ 1385. There is no excuse for failing to undertake procedures utility ensuring voluntary and intelligent pleas that are subseptible to meaningful review. United States v. Coronado 554 F2d @ 172 Unquestionably it is permissible for a defendant to waive constitutional right, but ordinarily such waiver must be knowing and it must be intelligently made. Brady v. United States 397 U.S. @ 748, United States v. Miller, 468 F2d 1041 Therefore it is obvious that such a person cannot waive a right that he does not know he has or possesses. McCarthy v. United States, 394 U.S. @ 466, citing Johnson v. Zerbst 304 U.S 458 The record is barren of any oral communication with petitioner as to the deadly weapon enhancement, nor the consequence of additional time required to serve on the sentence by statute 42.12 3g. That and petitioner never admitted to that element nor asked about his plea to such element. United States v. Aleman, 417 F. Supp. 117 1976 U.S. Dist. Lexis 14628.

This delay in obtaining indispensable legal documents resulted in the dismissal of State habeas application Art. 11.07, as well as the adverse judgment of his federal habeas 2254. May 10, 2021 the U.S. District Court's Southern District denied petitioner's Fed.R.Civ.P. 60(b) Motion alleging adverse party engaged in fraud or misconduct that prevented the moving party from fully and fairly presenting his case. See Hesling v CSX Transp. Inc., 396 F3d 632 U.S. App Lexis 126.

As in this instant case, in Hesling the prevailing party withheld evidence that was requested by the losing party, petitioner initially contacting Montgomery County Clerk's Office in June of 2017 until June 2020. After 3 years of attempting to obtain guilty plea colloquy transcripts the petitioner still contends that respondent intentionally and diliberately deprived petitioner of an enumerated Constitutional right, particularly the right to the access to the Courts as protected by the First Amendment right to petition for redress of grievances and the Fourteenth Amendment guarantees of procedural and substantive due process. Any diliberate impeadment to access, even a delay of access may constitute a constitutional deprivation. Hesling HN4.

The Fifth Circuit has held that, "When an inmate has alleged a diliberate denial of access to the Courts to pursue a civil appeal, he has alleged a diliberate deprivation of a substantive constitutional right found in the first amendment, as well as a potential deprivation of substantive and procedural due process. A substantive right of access to the Courts is one of the fundamental rights protected by the constitution. Under headnote 8 summary judgment in Jackson v. Procunier, 789 F2d 307 1986 U.S. App Lexis 24980. The court held. "A plaintiff's inability to obtain evidence under the control of the defendants does not justify summary judgment.

Petitioner cited this headnote and the District Court did not follow precedent for reasons unknow to petitioner? The evidence was material and controlling if presented.

In petitioner's pleadings, he repeatedly ask the Court to judicially notice the transcipt of the guilty plea colloquy in the record, as he assumed that respondent complied with USCS Fed. Rules Civ. Proc. 56(c)(1), since they repeatedly asserted that the "Petioner, "Tribble was properly admonished." and, "pled true to the enhancements". Being that they did not, (e)(2) should have governed their failure to support their repeated and specious claims. The respondent never supported by evidence that can establish the presence or absence of material fact and does not present proof of material fact because of only "vague assertions were supported only by self servingstatements" that did not establish the absence or presence of a gunuine despute. See; Fed R. Civ. P. Rule 56(c)(1)(A), (d)(2) and (e) (1) through (4).

Under U.S.C.S. Fed. Rules Civ. Proc. 56 (d) When facts are unavialible to the non-movant. If a non-movant shows by affidavit or declaration that for specified reasons it cannot present facts essential to justify opposition the Court may: (1) defer consideration of motion or deny it
(2) allow time to obtain affidavits, declarations or take discovery
(3) issue any appropriate order

The US District Court should have reconsidered petitioner's first motion for the Discovery and Inspection of Documents, which included the colloquy of the Guilty plea hearing. Docket #13 of 08/20/2018 that he Denied before petitioner had even recieved notice, as premature. Petitioner filed a second Motion for Discovery and production of Documents on 11/06/2018, or his declarations in pleadings. Petitioner's right to adequate, effective, and meaningful access to the courts as recognized in the Supreme Court in Bound v. Smith 430 U.S. 817 1977 U.S. Lexis 79 This recognition of constitutional right of access to the courts long procedes Bounds and from its inception has been applied to civil as well as Constitutional claims, Petitioner's motions for Discovery should have alerted the federal judge of Rule 11 violations.

The Montgomery County Court Reporter's Record from the 359th District Court of Trial Court No. 16-09-10710-CR now allows petitioner to support his claims with material evidence, and clearly demonstrate that there were previous contraverted, and under developed facts within the habeas petition 11.07. ie. Petitioner only pled to DWI, and Habitual, no plea to the deadly weapon enhancement. One Constitutional challenge raised by petitioner was that the district court erred in failing to admonish the defendant as to the minimum manditory attached, therein violative of clearly established federal law. A principle is clearly established law governing the case if, and only if, it so obviously, given a set of facts, that there could be no fairminded disagreement on the question. Petitioner alleged 14th amendment infringment of due process because the Court did not comply with core concerns in the allocution by not addressing the enhancement allegations of a deadly weapon's use and/or exhibition. The judge specifically admonished @ Page 4 of Reporter's Record. Appendix "A". Line 9, 10, 11, The Court: "Better days, I know. Sir, you were charged with driving while intoxicated subsequent offense. That is being pled as a habitual offender..."

The petitioner's claim 1 of the State habeas corpus 11.07 clearly states that, "the deadly weapon was not mentioned." @ line 5 page 7. This enhancement is a direct consequence of a guilty plea.

If the Court did not admonish petitioner of all the elements to which the plea conotes by law, it cannot rely on, or accept the plea as knowing and voluntary. See: McCarthy v. United States 394 U.S. 459 1969 U.S. Lexis 3280 Guilty Pleas, Allocution and Colloquy @ 467 LEdHN [10] & [58]. Under the provisions of Rule 11 of the Federal Rules of Criminal Procedure that judgment shall not be entered upon a plea of guilty unless the District Court is satisfied that there is a factual basis for the plea, the judge must determine that the that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty; requiring such an examination of the relation between the law and the defendant's acts is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge without realizing that his conduct does not actually fall within the Charge.

LEdHN [5A & 5B] "... a District Court shall not accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea, the judge must personally inquire whether the defendant understands the nature of the charge and cannot properly assume that the defendant is entering the guilty plea with a complete understanding of the charge against him merely because the defendant, in responce to the judge's remarks, states a desire to plead guilty and expresses understanding of the consequences of such a plea as explained by the judge.

Citing Decisions to date on McCarthy amount to 4979, one of which is the 5th Circuit Court of Appeals ruling in United States v. Briggs 920 F2d 287 1991 U.S. App Lexis 37 which held, "The factual basis cannot simply be implied from the fact that the defendant pled guilty. The plea is not affective as admission of all the elements charged unless he possesses understanding of the law in relation to the facts. HN3 Role of Court, Factual Basis, citing McCarthy.

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Further at HN4 Guilty Pleas, Allocution & Colloquy. states, Fed. R. Crim. P. 11(f) provides that notwithstanding the acceptance of the plea of guilty the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a facted basis for the plea. This is an "essential part of the constitutionally valid and enforcable decision to plead guilty." There must be an evidentary foundation in the record which is sufficiently specific to allow the Court to determine the defendant's conduct was within the ambit of that defined as criminal. United States v. Oberski 734 F2d 1030 1984 U.S. App Lexis 21713, United States v. Davila, 698 F2d 715 1983 US. App Lexis 30730 . @ 717 United States v. Johnson 546 F2d @ 1226 1977 US. App Lexis. 10039, which reversed and remanded the case to the district court. The court held that the factual basis of plea had not demonstrated the existance of an essestial element of the offense.

It also repeated the fact that, The Rule 11 factual basis for a guilty plea must be precise enough and sufficiently specific to show that the accused conduct on the occasion involved was within the ambit of that defined as criminal. Before the guilty plea can be validly accepted, the district court must insure that the conduct admitted by the accused constitutes the offense charged in the information. McCarthy v. United States, 394 U.S. 459 (1969) United States v. Vera 514 F2d 102 (1975), United States v. Davis. 493 F2d 502 (1974), Reed v. United States. 471 F2d 721 (1973), United States v. Frontero 452 F2d 406 (1971).

The Federal Rule of Criminal Procedure 11 (b)(3) provides, Before entering judgement on a guilty plea, the court must determine that there is a factual basis for the plea. This rule is intended to ensure that "the Court makes clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime." United States v. Fountain, 777 F2d 351 1985 U.S. Lexis 24204

Rule 11(c)(1) requires that the court inform the defendant of any manditory minimum penalty provided by law for the charged offense. HN4 United States v. DeFusco, 949 F2d 114 1991 U.S. App. Lexis 26583. HN4 Guilty Pleas. Allocution and Colloquy, United States v. Mastrapa, 509 F3d 652 2007 U.S. App. Lexis 28684

Acceptance of a guilty plea from a defendant who did not admit to an essential element of guilt under the charged offense would surely cast doubt upon the integrity of the judicial process. HN1 citing Olano 507 U.S. @ 735-36 see 1993 U.S. Lexis 2986. Also see Fed R. Crim P. 11 advisory notes 1966 committee.

USCS Fed Rules Crim. Proc. R 11 McCarthy has been most frequently relied on in cases where, the defendant sought relief because of a Rule 11 violation. Prejudice inheres in a failure to comply with Rule 11, for non-compliance deprives the defendant of the Rules procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of the plea.

HN2 An appellate court shall conduct a review of each challenge under Fed R. Crim. P. 11 solely on the basis of the record on appeal - principally the transcript of the plea colloquy hearing, but also other portions of the record. Such as any written plea agreement, the transcript of the sentencing hearing and the sentence actually imposed, the court shall consider only such information contained therein as temporally relevant to the voluntary and uncoerced nature of the defendant's guilty plea, and his knowledge and understanding of the nature of the charges and of the consequences of his plea. United States v. Johnson, 1 F3d 296 1993 U.S. App Lexis 21633 @ 298-99 Analysis A. "Finally, overarching the rule and review procedure we announce today is our solemn admonition that nothing in this opinion should be construed as condoning even the slightest diminution in the degree of diligence that the district court's of this circuit are expected to comply fully with both the letter and the spirit of Rule 11 in every instance. see HN 1, 2, 4, 6, 7, 8, 9, 10, 11. of Johnson.

A review of the formation and content of the trial court's subjective questions to defense attorney Ben Baker in it's Court Issued Order of Designation of Controverted previously unreasolved issues, of November 15, 2017, should have alerted the Southern District's Judge as to the State's attempt to allude the obligations proscribed in Rule 11. It is blatently clear that the trial court was aware of their failure to follow the core concerns in allocution/colloquy by this attempt at subterfuge. The respondent continued the subterfuge in their Motion for Summary Judgment in an attempt to avoid liability under Supreme Court precedent as to Rule 11 violations, by the continued allegations that, "Tribble was properly admonished." and their continued concealment of the transcript of the plea hearing and sentencing colloquy, which conclusively contradict the allegation. There was no mention of the minimum manditory 50% requirement. Even a cautious review of the voluminous jurisprudence on point produced by several cir's during the decade since the adoption of Rule 11(h) demonstrates beyond peradventure that the admonition to scrutinize errors made during Rule 11 colloquies closely, has indeed been taken to heart. @ Fed R. Crim P 11 advisory commitee notes to 1983 amendments.

In 2020 the 5th Circuit held that; "To enter a valid guilty plea a defendant must have full knowledge of what the plea connoted and of it's consequences." United States v. Avalos-Sanchez, 975 F3d 436 2020 US App Lexis 28955 United States v Lord 915 F3d 1009 2019 U.S. App Lexis citing, Brady v United States, 397 U.S. 742

HN8; "A plea of guilty entered by one fully aware of the direct consequences..."

As demonstrated in the Reporter's Record, the deadly weapon enhancement nor the requirements of the Texas Code Crim. Proc. Art 42.12 3g (a)(2) (See HN 6, Voltman v. State No 14-12-0059-CR 2013 Tex. App. Lexis 11445) were addressed. (and Background @ pg 2)

Headnote #7 of Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Guilty Pleas of United States v. Lavalais, 960 F3d 180 2020 U.S. App Lexis 16421 held that, "Unpreserved errors conserning the plea colloquy under Fed. R. Crim. P. 11(b) are reviewed for plain error.

Convicted felons are prohibited from possessing firearms and anyone who knowingly violates this prohibition may be imprisoned up to 10 years. The United States Supreme Court has construede these provisions of 18 USCS § 922(g) to require that the prosecutor prove that the felon knows he is possessing a firearm. See headnote #1. The deadly weapon enhancement in the instant case was neither proved or pled-to; This reasoning should apply here to meet the Rule 11 mandates.

Findings of fact are to be reviewed for clear error, as petitioner has repeatedly averred. The appellate court should review the reasonableness of a sentencing decision for abuse of discretion.

There is something unfair about affirming a conviction when the record contains substantial evidence the defendant was not advised of sentencing mandate consequences prior to his plea. It can not be said that upholding conviction does not adversely affect the public reputation of the judicial proceeding where petitioner has demonstrated he was not advised of the consequences nor ask to plea to the deadly weapon enhancement, an established right by law that can be enforced, and have been conferred by the Constitution, by statute, or by Common Law. James W. Moore's Federal Practice § 1.05 [2][b] @ 1-29 3d. ed 2016

This essential right did affect the outcome and as the Fifth Circuit held @ headnote 8 of United State v. Punch Sufficiency of Allocution. "Where some of the elements remain unstated, misunderstandings are likely to occur." 709 F2d 889.

The failure to advise a defendant in accordance with criminal procedure rule prior to a guilty plea is not harmless error if there is a reasonable possibility that a defendant was confused in a way that compliance with the rule could have remedied. Also Johnson v. United States 520 U.S. 461, 117 S.Ct. 1544 1997, @ headnote 5, and United States v. Olano, 507 U.S. 725, 113 S.Ct 1770. 507 U.S. @ 732 113 S.Ct @ 1776. "The second prong at a minimum must be plain under current law."

AEDPA provides that a federal court may grant habeas relief to a State prisoner based on a claim adjudicated by a State court on the merits if the resulting decision is contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. Santabello v. New York 404 U.S. 257 1971 U.S. Lexis 1 held; In considering the validity of a plea agreement, parties must realize that a plea bargain is a contract. LEdHN9 This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rest on any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.

In the instant case the Admonitions to the Defendant for Plea to Court affirmatively states, "Defendant agrees to plea guilty to the above specified offense(s), true to the enhancement allegations if any, judically confess, waive any right to appeal this case."

The specified offense as the record of petitioner's negotiated bargain read by trial court judge Hamilton @ Page 4 line 9 and 10. Clearly demonstrate a breach of agreement. Exhibit A.

The Court: "Better days, I know. Sir, you were charged with driving while intoxicated subsequent offense.

LINE 11 "That is being pled as a habitual offender ..."

AS petitioner has continued to aver, there was no mention of a deadly weapon used or exhibited during this offense prior to the plea, nor after.

@ Page 7 line 16 "Mr. Tribble, how do you plead to the allegations ... in which you are charged with committing the offense of DWI subsequent offense?

The essence of petitioner's contentions is that his guilty plea was not knowing and understanding because the trial court did not conform to requirements of Rule 11 of the federal rules criminal procedure.

It is clear that the colloquy between the judge and the defendant during the taking of the guilty plea, that the judge did not inquire into the totality of the circumstances to see whether the plea was voluntary, knowing, and intelligenty entered by the defendant. United States v. Gearin, 496 F2d 691 1974 U.S. App Lexis 7058. Petitioner was not informed of the key elements of the charged offense in the instant case, and there must be a meticulous compliance with the express requirements set out in Rule 11. Further, it is certain that there are particular elements that must be present in the taking of a guilty plea in order to adhere to minimal constitutional prerequisites. Finally, there are certain procedural requirements to be complied with not because they are specifically constitutionally or statutorily mandated but because they bear on the voluntariness of a plea.

The following is a list of prerequisites that this court feels encompasses the minimum inquiries necessary in taking a guilty plea:

1. The defendant must be placed under oath. Bryan v. United States 492 F2d 775 (1974 5th Cir.)
2. A defendant must have an understanding of the nature of the charges which have been made against him. McCarthy v. United States, 394 U.S. 459, United States v. Maggio, supra @ 86 Rule 11(c) Federal Rules of Criminal Procedure.
3. A guilty plea is invalid unless voluntarily made with a full understanding of the possible consequences of the plea. Brady v. United States 397 U.S. 742 Fed R. Crim. P. 11(c)(1).
4. There must be direct inquiry to determine that the plea is voluntary and not the result of coercion or unauthorized promises apart from the plea bargain Rule 11 (d) Fed R. Crim. P.

5. A court must explain that plea agreements are permissible and point out the duty to disclose the nature of any existing agreement.

6. The Court must be satisfied that there is a factual basis for the plea. Santobello v. New York 404 U.S. 257, McCarthy v. United States, supra @467, Jimenez v. United States, 487 F2d 212 (5th Cir 1973)

7. The accused must be questioned to determine if he has recieved effective assistance of counsel. Rule 11(c)(2) Fed. R. Crim. P.

8. A judge must inform defendant that he has certain rights that he will be waiving by a plea of guilty. United States v Gearin 496 F2d 691 (5th Cir 1974)

These are minimum inquires required before acceptance of a guilty plea. Its clear by the guilty plea colloquy that the information was never read by the court, and the relation of the deadly weapon finding to the DWI was also never addressed. McCarthy is clearly established federal law per the Supreme Court, and these are clearly imperative to make sure the defendant was fully apprised of the nature of the charges against him, and the consequences of his plea. See: United States v. Aleman 417 F. Supp. 117 Texas Southern District Court 1976 U.S. Dist Lexis 14628.

A decision is contrary to clearly established Federal law if the State Court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the State Court decides a case differently than the Court has on a set of facts materially indistinguishable facts Williams v Taylor, 529 U.S. 362 2000 U.S. Lexis 2837

The due process clause requires that each element of a crime be proved beyond a reasonable doubt. The Apprendi rule holds that any fact that exposes the defendant to a greater punishment than that authorized by a jury verdict is an element that must be submitted to a jury. In the years since adoption of the Apprendi Rule, it has been applied to instanses involving plea bargains, sentencing guidelines, criminal fines, and manditory minimums.
A deadly weapon finding significantly affects the gravity of the punishment, carrying with it serious legal consequences that effect parole and punishment range. When the finding is made under Tex. Code Crim Proc. art. 42.12 3g, an inmate serving a sentence for an offense for which the judgment contains an affirmative finding is not eligable for release on parole until the inmate's actual calendar time served, without consideration of "good time" or good conduct time equals one-half or 30 calendar years, which ever is less, but in no event is the inmate eligable for release on parole in less than two years. The Statutory language is exceedingly broad in that a deadly weapon can be anything. The objective of the Statute is considerably determined to effect these acts of violent crimes dealing with weapons. The sponsor of of the bill, Senator Meier told the committee: "The purpose of the bill... citing debate on H.B. 571. 65th Leg. 1977 see: Ex parte Jones, 957 S.W.2d 849 1997 Tex Crim App Lexis 111. HN2 @ 850-851. En Banc decision of Texas Court of Criminal Appeals. The statute appears in Chapter 42 of the Code of Criminal Procedure entitled Judgment and Sentence in a specific section entitled "Community Supervision" Tex Code Crim Proc. art. 42.12 Section 3 in that article permits a judge to suspend imposition of sentence and place a defendant on community supervision. However it prohibits the judge from ordering community supervision to these offenses. 1. murder 2. capital murder 3. indecency with a child 4. aggravated kiddnapping 5. aggravated sexual assault 6 aggrevated robbery 7. use of child in the commission of certain offenses 8 certain violations of drug free zones 9 sexual assault 10 first degree injury to a child. 11. sexual performance by a child 12. first degree solicitation. 13 compelling prostitution 14. trafficing in persons, and 15 certain burglaries.

The trial court significantly deviated from rule 11(c)(1) by failing to offer explaination as to the justification or affect of Tex Code Crim Proc. Art 42.12(3)(g) would have on the minimum period of imprisonment authorized by Statute.

United States v. Hekimain, 975 F2d 1098 1992 U.S. App Lexis 25472 explained at HN1: "Fed. R. Crim P. 11(c)(1) reads in pertinent part, as follows: (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the Defendant understands, the following: (1) the nature of the charge to which the plea is offered, the manditory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances."

In the instant case, the district court explained the nature of the charge to which the plea was offered as: "Sir you were charged with driving while intoxicated subsequent offense. That is being pled as a habitual offender, charged as that, where the term of punishment would not be less than 25 years and not more than 99 years or life and in addition -- I don't think there is a fine."

See Exhibit A @ Pg. 4 Lines 9 thru 14
The Court:

As petitioner demonstrated, the trial court "does not mention the deadly weaponfinding"
See: Ground One @ line 5 of page 7 of petitioner's Habeas Corpus under Art 11.07.

Then @ Pg. 7 line 16 of Reporter's Record thru line 19.

The Court: Mr. Tribble, how do you plead to the allegations contained in this cause in which you are charged with committing the offense of driving while intoxicated subsequent offense?

There is no mention of the requirement to consider any applicable sentence guidelines i.e. The 50% of sentence being required before parole is eligable by statute 42.12 3g. of Tex Code of Crim Proc. This would fall under "applicable sentencing guidelines" of the Fed. R. Crim. Proc. 11(c)(1) mandate. see HN2 Guilty Pleas, Allocution & Colloquy United States v. Hekimain
The district court does not explain the law in relation to the facts because the prosecutor @ Pg 4 of Reporter' Record lines 24 and 25 - Mr. Santini: "Today we amended -- it was an information. We added Enhancement Paragraph A and B."

Then @ Pg. 5 line 3 Mr. Santini: "And I think Mr. Baker and the defendant are waiving their 10 days notice of enhancement."

line 5 Mr. Baker: "We Are. And we have been familiar with them since the very first court apperance."

As petitioner has continually avered, he was never advised of, nor shown any of these enhancements, and Mr. Baker never mentions any 10 day notice requirement as to enhancement of sentence being law. As such petitioner had no say in the decision to oppose such enhancement paragraph. Baker's only advise was, "Don't say anything unless the judge specifically ask you a question, I got this."
Merely affording defendant's counsel the opportunity to speak does not satisfy Rule 32(a). See HN2 of Taylor v. United States, 285 F2d 703 1960 U.S. App. Lexis 3072 9th Circuit Court of Appeals.