24-6550

No. 24A488

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

*****

PAUL BROWN,
Petitioner,

v.

THOMAS Mc GINLEY, Superintendent Coal Township SCI, et. al.
Respondent,

*****

ON PETITION FOR WRIT OF CENTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

*****

PETITION FOR WRIT OF CERTIORI

*****

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Pro Se
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1 Kelley Drive
Coal Township, PA 17866

QUESTIONS PRESENTED

Brown alleged that trial counsel was ineffective for explicitly advising him to plea guilty to charge not found in the indictment, in a plea colloquy where trial court accepted Brown's guilty plea without him been informed of the mandatory cannotes for a valid plea Counsel's promise and incorrect advice misled Brown in believing he would receive a 10 yrs. sentence arising from plea agreement with DA and judge. counsel admitted in court that the sentence was illegal and that Brown all along maintanied his innocent. Brown try to withdraw his guilty plea at sentencing but counsel coerced him to take the deal that did not exist, Brown was convicted in large part by counsel's admission of guilt at plea hearing and Brown pleading guilty. The case thus present the following questions.

I Did the third Circuit err in misapplication of strickland and Slack when Brown had made a substantial showing of undisputed factual evidence apparent on the record that his plea was entered involuntarily and counsel was ineffective for providing incorrect advice a decision conflict with it's and other circuit and contrary to clearly established Federal law and 28 U.S.C. § 2254(d)(1) & (2).

II Did the Third Circuit err affirming the denial of Brown's § 2254 petition where the District Court failed to conduct an evidentiary hearing to resolve the factual disputes.

LIST OF PARTIES

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

[X] 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:

Mark S. Matthews, Esq.
Assistant District Attorney
Monroe County Courthouse
610 Monroe Street, Ste 126
Stroudsburg, PA 18360

Attorney General Pennsylvania

RELATED CASES

Commonwealth v Brown, 2016 Pa. Dist. & Cnty. Dec Lexis 14009 (May 25, 2016)

Commonwealth v Brown, 169 A.3d 1178 (Pa. Super 2017)

Commonwealth v Brown, 194 A.3d 716 (Pa. Super 2018)

Commonwealth v Brown, 2019 Pa. Lexis 4086, No. 131 MAL 2019 (July 24, 2019)

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

OPINIONS BELOW

The order and opinion of the Third Circuit Court of Appeals appears at Appendix A to the petition in case no. 23-2376. The judgment is unpublished.

The opinion of the United States District Court of Appeals appears at Appendix B to the petition and is unpublished

The order of the United States district court denying habeas corpus relief appears at Appendix C. The judgment is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was 3/5/2024. A timely petition for rehearing to the Court was denied on 8/28/2024. App. K An extension of time to file the petition for writ of certiorari was granted to and including January 25, 2025 on 11/15/2024 in Application No. 24A488. App. J

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. VI

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

U.S. CONST., AMEND. XIV

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

28 U.S.C.§2254

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

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

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

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

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

(2) An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure

of the applicant to exhaust the remedies available in the courts of the State.

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

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

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

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

(A) the claim relies on --

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

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

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

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of tyhe

sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under existing facts and circumstances what weight shall be given to the State court's factural determination.

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

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel found during Federal or State collateral posr-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Brown was convicted of attempted homicide and aggravated assault arising from a incident with his wife and son. Mrs. Brown gave statement to police that the incident arose from Brown making sexual advance when she refused an argument developed that became physical and Brown stop the attack voluntary. The legislator intend renunciation for when a actor avoided his criminal conduct by voluntary and complete withdrawal thus avoided the crime 18 Pa. C. S. § 901(c). The affidavit of probable cause made no reference of Brown attempting to kill anybody. Brown was charged with Criminal Attempt 18 Pa. C. S. § 901(a) in Information. DA did not file motion to amend information. Brown was legally on notice to defend Criminal Attempt which could be for rape, robbery for example.

At plea hearing counsel admitted guilt over Brown, express objections. Counsel advised Brown of a 10 yrs. sentence for two assault charges arising from plea agreement with DA and judge. At sentencing and PCRA hearing the DA stated on the record that it was in the range of 10-15 on the low end and 20-30 on the high for 1 attempted homicide and 1 aggravated assault.

Counsel testified at PCRA hearing that; the DA wanted 10 yrs., the sentence was illegal, we talk on several occasions when the charge was change, once you have a range that's livable and that could be made up at least in the 10 years range you could get that from two ag assaults, base on current law Brown would be able to withdraw plea, and Brown all along maintained his innocent.

Brown attempted to withdraw his guilty plea at sentencing but counsel coerced him to take the deal that did not existed.

Brown's conviction was sustained in violation of his due process rights and contrary to clearly established Federal law as the judge accepted his guilty plea without him being informed of the mandatory cannotes (address herein) for a valid plea, the Commonwealth's breach of agreement and trial counsel's ineffectiveness for providing incorrect advice.

REASON FOR GRANTING THE WRIT

I THE THIRD CIRCUIT'S MISAPPLICATION OF STRICKLAND AND *SLACK* WAS A DECISION THAT CONFLICTS WITH IT'S AND OTHER CIRCUITS AND CONTRARY TO THIS COURT DECISION WARRANTS THIS COURT'S ATTENTION

The Third Circuit's order denying Petition for rehearing asserting that a majority of the judges of the Circuit in regular service not having voted for rehearing was clearly erroneous and an abuse of discretion as it misapplied the Strickland v Washington 466 U.S. 668, 687-88(1984) test for ineffective assistance of counsel, Petitioner not meeting his burden regarding his ineffective assistance of counsel claims per Slack v McDaniel 529, U.S. 473, 484 (2000) and 28 U.S.C § 2254 (d)(1) & (2).

This Court requires, in making the unprofessional performance and prejudice under Strickland, that the reviewing Court consider all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-Conviction stage. Strickland v Washington 466 U.S. 668, 687-88 (1984); Wiggins v Smith 539 U.S. 510 (2003); Williams v Taylor, 529 U.S. 362 (2000). Under this test, it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the Court of Appeals disregarded this principle as detailed below.

Brown asserted in his § 2254 Petition as ground for relief that: Counsel was constitutionally ineffective for (1) Failing to adequately explain the consequences of accepting the government's plea and pleading guilty, (2) failing to move for suppression of certain statements or admissions made by Brown during custodial interrogation, (3) failing to object and permitting Brown to plead guilty in a group colloquy, and (4) failing to object to the sentence imposed by the trial Court. Brown's § 2254 Petition asserted that he would not have pleaded guilty had he been correctly advised of the Commonwealth's plea offer, the viable charges

against him, the statutory maximum penalty provided by law for each crime charged, the true nature of the charge, the elements of the offense for the crimes charged, the mandatory deportation collateral consequences if convicted on the crime charged, but would instead exercised his constitutional rights to a trial by jury. See. *Teague v Scott,60 F.3d 1167, 1171-72 (5th Cir 1995*) (failing to properly advise defendant of the maximum sentence that he could received falls below the objective standard required by *Strickland.* When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chance in Court).

Claims of ineffective assistance of counsel is governed by the two prong test set forth in *Strickland v Washington 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984).* In the plea bargaining context, a Petitioner must demonstrate that (1) counsel's advice and performance fell below an objective standard of reasonableness, and (2) the Petitioner would not have pleaded guilty and would have insisted on going to trial in the absence of his attorney's error. *Hill v Lockart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370-71, 88 L.ED 2d 203 (1985);* In this case, the record reflect that trial counsel induced Brown's guilty plea with specific maximum sentence of ten (10) years for two aggravated assault charges. Relying substantially on the State Court factual finding and *Slack v Daniel*, the District Court denied relief without an evidentiary hearing, ruling that Petitioner has failed to demonstrate a substantial showing of the denial of a Constitutional right which was erroneous as Brown had made a substantial showing of counsel's unprofessional actions and inactions, the prejudices he suffered there from back up by on the record undisputed factual evidence which if proven warrant relief. See. *Jordan v Hepp 831 F.3d 837, 849-50 (7th Cir. 2016)* (A District Court must conduct a hearing under section 2254 (a) to

determine if these facts are true); *Fooks v Superintendent, 96 F.4th 595 (3d Cir. 2023); 28 U.S.C.§ 2254 (d)(1).*

The Third Circuit rehearing penal denial was plain error and an abuse of discretion warrant this Court's reversal as Brown had made a substantial showing by a preponderance of undisputed evidence that his guilty plea was entered unknowingly, unintelligently and involuntarily based on counsel's bad advice, misrepresentation, coercion and inducement, coupled with trial Court's active role in plea negotiations along with it's failure to inform Brown with the mandatory plea provisions required for a valid guilty plea and the Commonwealth's induced guilty plea offer and recommendation in violation of Brown's United States Fifth, Sixth and Fourteenth Amendment Constitutional due process rights a decision conflict with other Circuits and contrary to Federal law. *See 28 U.S.C. § 2254 (d)(1)§ (2)* .

Trial counsel testified under oath at PCRA hearing 4/4/16 that (1) he had plea discussion with the DA and Judge prior to Brown entry of guilty plea and that the DA wanted 10 yrs. max and judge wanted 10-15 yrs. max sentence for Brown's plea for 2 aggravated assault charges. See. PCRA N.T. 4/4/16 pg. 9 at 24-25, pg. 8 at 11-22, pg.23 at 10-11, pg.50 at 6-9, Letter to judge 12/16/15, Letter from Judge 1/4/16, Letter to Saurman 11/2/15 & 7/10/15.

(2) he did not know when sentencing was. See PCRA N.T. 4/4/16 pg 14 at 16-17.

(3) the sentence imposed was illegal thus a valid issue on appeal but abandon Brown stating **"it wouldn't matter." It would have been a waste of time."** PCRA N.T. 4/4/16 pg. at 2-11.

(4) " **we talked on several occasions about when the charge was changed."**

PCRA N.T. 4/4/16 pg. 14 at 16-17. However the Commonwealth produced a Plea Offer Memo dated 11/21/14 which contained one attempted homicide & one aggravated assault charge and explicitly stated that it was not moving off its initial offer but was willing to have plea

discussions, and explicitly ask trial counsel "**did you, in fact relate to Mr. Brown that the Commonwealth was in the range of 10-15 on the low end and 20-30 on the high end" and counsel answered "I wouldn't have put it exactly that way, but I said that we had an understanding of the range of sentence 10-15" PCRA N.T. 4/4/16 pg at 18-25 & 23 at 1. Once you have a range that's livable and a range that could be made up, at least at the 10 year range, you could get that of two assaults, ..Even if you win the main case you could still get 10 years, so why don't we go ahead." PCRA N.T. 4/4/16 pg. 23 at 6-11. See Plea offer Memo.**

(5) The Commonwealth further ask trial counsel did Mr. Brown express to you that he wished to withdrew him his guilty plea? And trial counsel answered "my **recollection is that on the morning of actual sentencing he made a reference that maybe he should withdraw his guilty plea. And I said, look there's a deal in place. There's a sentencing range in place, You're better off taking this then not." PCRA N.T. 4/4/16. pg. 24 at 5-14.**

The Commonwealth continues to ask counsel... "**do you believe Mr. Brown would have been able to make more than a bare assertion of innocence in order to meet the standard of Carrasquillo to withdraw his plea that morning**?" And trial counsel answer " Do I think he could have? Yeah, if that were the issue. Mr. Brown had from the beginning ... laid out what I thought was a defensible position,... which was that he had been hit on his head, that he was disoriented, that he was being assaulted himself, and that he struck back in self defense in disorientation. And I think that was a sufficient basis to overturn the plea.? PCRA N.T. 4/4/16 pg.25 at 8-21.

(6) He received Brown's letter dated July 10th [1] and was ask "**So this letter is dated July 10th . Do you have any reason to doubt that, that letter was in fact, sent to you at around that time and received by your office?** And he answered "**I have no reason to doubt that, no** PCRA N.T. 4/4/16 pg. 12 at 14-18. That's question one, "**Why was the charge changed from assault to attempted homicide**?" And was ask "**And the second question he asked is, he writes, Count I and IV, does that mean that the judge will be sentencing to five counts of felony of the first degree?** Answered "**Right**" Question "**So it appears as though he added one and four and came up with five counts**? Answer "**I would believe so**, yes. PCRA N.T. 4/4/16 pg. 13 at 2-11. The record clearly showed that:

(1) Brown was denied of his constitutional right to be present "at a critical stage" of his criminal proceeding when trial Court ordered him on 3/27/15 to be present in Court for plea discussions on 4/22/15, and Brown who sign no waiver was prevented from appearing in Court by counsel failing to file habeas corpus to have him present per Court order and trial Court who received no waiver held plea discussions in Brown's absence in violation of Brown's U.S. Const.Amend.V, VI and XIV due process rights.

The Due process Clause of the Fifth and Fourteenth Amendments guarantee a criminal defendant the right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *Stincer, 482 U.S. at 745, 107 S.Ct. 2658.* The defendant's right to be present extends to "any stage of his criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure." *Stincer 482 U.S. at 754, 107 S.Ct. 2658.*

[1] Brown wrote counsel on July 10th which was after guilty plea April 29 and before sentence July 28th , expressing confusion over what he plead to and asking (1) why was the charge change from two aggravated assault to one assault and one attempt homicide and (2) Count 1 and count IV, does that mean that the judge will be sentencing to five counts of felony of the first degree?

Had Brown constitutional rights not been violated he would have being aware of the true Commonwealth's plea offer and have the opportunity to defend himself absent of which had to rely on counsel's bad advice.

As such the state Courts denial which the U.S. District Court adopted and the Third Circuit denial was a decision contrary to Kentucky v Stincer, 482 U.S. 730, 745,754 107 S.Ct. 2658, 96 L.Ed. 2d 631 (1987); United States v Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed. 2d 486 (1985); and conflict with Campbell v Rice, 302 F.3d 892, 898 (9th Cir. 2002); People v Ochoa, 26 Cal. 4th 398, 433, 110 Cal. Rptr. 2d 324, 28 P.3d 78 (2011).

(2) Trial Court took an active role in plea negotiations in violation of Brown's Fifth and Fourteenth Amendment Due Process Rights to a free and fair proceedings as trial counsel testified at PCRA hearing that he had plea discussion with the D.A. and Judge, and that the D.A. wanted 10 year max sentence and the judge wanted 10-15 year max sentence for Brown's guilty plea. PCRA N.T. 4/4/16 pg.8 at 11-25 & pg. 9 at 23-25.

When the judge wanted 10-15 years sentence prior to Brown's plea, taking any such participation in the plea bargaining process and in Brown's absence, jeopardized the plea. The Pennsylvania Supreme Court resolved to exclude the trial judge from participation in plea bargaining process. The Evans Court held that" a plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary, " and we forbade "any participation by the trial judge in the plea bargaining prior to the offering of a guilty plea." *Commonwealth v Evans 434 Pa. 52, 252 A.2d 689, 690 (1969)* See also *Commonwealth v Johnson 2005 PA Super 159, 875 A.2d 328 (Pa. Super. 2005); United States v Bruce, 976 F.2d 552 (9th Cir. 1992)* ("Judge's improper participation in plea negotiations violated *Fed.R.Crim.P.11 (C) (1)* and raised questions of impartiality and coerciveness"); American Bar

Association Project on Minimum Standards for Criminal Justice, Standards Relating to plea of guilty § 3.3 (a) at 74 (Approved Draft, 1968) ("The trial judge should not participate in plea discussions.")

Indeed Federal law prohibits trial judge from participating in plea negotiations. See *Fed. R.Crim P.11(C) (1)* which is identical to its Pennsylvania state counter part *Pa. R. Crim. P.590 (B) (1);* As such Brown's conviction was in violation of his due process rights and plea was involuntarily and the denial of relief by the State Courts, U.S. District Court and Third Circuit was a decision conflict with American Bar Association Project on Minimum Standards for Criminal Justice, standards relating to plea of guilty § 3.3 (a) at 74 (Approved Draft, 1968); *United States v Miles, 10 F.3d 1135, 1140 (5th Cir 1993); United States v Bruce, 976 F.2d 552 (9th Cir. 1999) ; United States v Pena 720 F.3d 561, 570 (5th Cir. 2013); United States v Adams 634 F.2d 830, 839 (5th Cir. 1981); United States v Harrell 751 F.3d 1235, 1237, 1239 (11th Cir. 2014).*

(3) Brown was convicted on a silent record in violation of his Fifth, Sixth and Fourteenth Amendment due process rights to a free, fair and impartial proceeding and *Rule 590 (a)(B)(1)* as at no time during oral plea colloquy was Brown informed in understanding terms the critical elements, of the offenses for the crimes to which he pled guilty to, nor was the indictment read into the record, nor did counsels for the Commonwealth and defense state on the record, in open Court in Brown's presence the terms and conditions of the plea or that Brown had a constitutional right to confront his accusers, prior to trial Court accepting Brown's guilty plea. The legislator intend that trial Court informed the defendant of these mandatory cannotes in open Court prior to accepting the plea of guilty, which is to ensure that the defendant in this case Brown knows what he is actually pleading to and the consequences there from, and entering his guilty plea knowingly and intelligently.

This Court ruled in Henderson that "Defendant who was not informed of critical elements of the offense, to which he pled guilty, entered his plea involuntary." *Henderson v Morgan 426 U.S. 637, 49 L.Ed. 2d 108, 96 S. Ct. 2253 (1976);* Thus, "a plea is invalid if a defendant enters it without being informed of the elements of the crime at some point." *Bradshaw v Stumpf, 545 U.S.175, 183, 125 S.Ct. 2398, 162 L. Ed 2d 143 (2005).*

In Boykin, this Court has held that it is error "to accept Petitioner's guilty plea without an affirmative showing that it was intelligent and voluntarily. Presuming waiver from a silent record is impermissible." *Boykin v Alabama 395 U.S. 238, 242-44, 89 S.Ct.1709, 1712, 23 L.Ed.2d 274 (1969).*

The Ingram Court reasoned, we have often enunciated the principle that an adequate on the record colloquy under Rule 319), now *Rule 590*, must include a demonstration "that the defendant understands the nature of the charges." *Commonwealth v Campbell, 451,Pa. 465, 304 A.2d 121, 122 (1973*); In order to demonstrate that a defendant possesses such understanding, he certainly must be told more than just that he has been charged with murder or robbery, for example. While such terms clearly cannote some meaning to the layman, this meaning does not always embrace the basic legal elements of the crime. If this were not the case, there would be no need for instructions to a jury on such points, for certainly, an average defendant cannot be presumed to understand more than an average juror. Thus, for an examination to demonstrate a defendant's understanding of the charge, the record must disclose that the elements of the crime or crimes charged were outlined in understanding terms. *Commonwealth v Ingram 455 Pa. 198, 316 A.2d 77, 80 (1974).*

This Court has held "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged, " *In re Winship, 397 U.S. 358, 364* (1970), and "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case, "*Mullaney v Wilber, 421 U.S. 684, 704 (1975).*

The record clearly show that Brown was never informed of the elements of the offense for the crimes charge, the permissive range of sentence for each charge, that he had a right to confront his accusers, the true nature of the charge and the Commonwealth key witness statement to police that the incident arose out of heat of passion. As such Brown's plea was entered involuntary and unknowingly and the denial of relief by the State Courts which the U.S. District Court adopted and Third Circuit denials was a decision contrary *to Boykin v Alabama 395 U.S. 238, 242-44 (1969); Bradshaw v Stumpf, 545 U.S. 175, 183 (2005);* Henderson v Morgan, 426 U.S. 637 (1976); *Bradley v United States, 397 U.S. 742, 748-49, 90 S.ct 1463, 25 L.Ed . 2d 749* (*1970); " In re Winship 397 U.S. 358, 364* (1970), *Mullaney v Wilber, 421 U.S. 684, 704 (1975). Pointer v Texas, 380 U.S. 400, 404 (1965); McCarthy v United States, 394 U.S. 459, 466 (1969) and conflict with Cole v Young 817 F.2d 412,423 (7th Cir. 1987); United States v Schweitzer 454 F.3d 197, 202-03 (3rd Cir. 2006); Johnson v Plappert 2024 U.S. App. Lexis 12335 (6th Cir. 2024)* (Where the Court granted COA based on trial Court denied due process by accepting a guilty plea that was not entered knowingly, voluntarily & intelligently). See. Police Incident Report Form pg.15, 1st paragraph & Guitly plea N.T. 4/29/15,

Murder of the first degree is an intentional killing, which is defined in part, as a willful, deliberate, and premeditated killing, 18 Pa.C.S. § 2502 (a) (d). However, if at the time of the killing the defendant is acting under a sudden and intense passion resulting from serious provocation; the defendant is guilty of voluntary Manslaughter. *18 Pa. C.S.§ 2503 (a).* In both

crimes, the actor commits the act with intent to kill. However, the difference between first degree murder and voluntary Manslaughter is whether the actor committed the killing under a sudden and intense passion resulting from serious provocation. The Supreme Court of Pennsylvania has defined "passion" as anger, rage, sudden resentment or terror rendering the mind incapable of cool reflection. Commonwealth v Laich 566 Pa. 19, 777 A.2d 1057 (Pa. 2001);

While trial Court did State that the Commonwealth had to prove beyond a reasonable doubt every element of the offense for each crime charge in order to convict Brown, it clearly failed to provide Brown with any of those elements of the offenses for the crime charged thus relieved the State of its burden "to prove every element of an offense beyond a reasonable doubt. As Such the State Courts denial of relief which the U.S. District Court adapted and Third Circuit denials was a decision contrary to *Sandstrom v Montana 442, U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979),*

Also the record is silent of Brown receiving real notice of the true nature of the charge against him, the permissive range of sentence for each of the crime charged, nor any alternative course of action open to him, nor was he informed of what constitute First degree Murder defined *18* Pa. C.S.§ 2502 (a), Serious Bodily Injuries defined *18 Pa. C.S. § 2301*, Criminal attempt18 Pa. C.S.§ 901(a) and voiding of a Criminal Attempt under *18 Pa. C.S.§ 901 (c)* in light of the State's key witness statement to police that the incident arose out of heat of passion and that Brown abandoned his conduct, and the affidavit of probable cause made no reference of Brown attempting to kill anyone. As such Brown's plea was entered involuntarily, unknowing & unintelligently and the denial of relief by the State Court which the U.S. District Court adopted and Third Circuit denials was a decision contrary to *North Carolina v Alford, 400 U.S. 25, 91 S.Ct. 160 (1970); Bousley v United States, 523 U.S. 614, 621-22, 118 S.Ct. 1604,1 40 L.Ed.2d*

823 (1998); Smith v O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed 2d 859 (1941); McCarthy v United States, 394 U.S. 459, 464 (1969); Henderson supra. Brady supra, and conflict with Charlton v Davis, 439 F.3d 369, 372 (7th Cir. 2005); See Police Incident report form pg.15, 1st paragraph.

(4) The Commonwealth did not charge Brown with Murder defined 18 Pa.C.S.§ 2502 (a) nor Seriously Bodily Injuries (SBI) defined 18 Pa. C.S.§ 2301 in the Police Criminal Complaint or Information thus violating Apprendi, Ex parte, Bain, Rabe, and Brown's U.S. Const. Amend.V.& XIV due process rights to free and fair proceeding as the trial Court sentence Brown to attempt homicide 15-40 years when the Commonwealth only charge Brown with Criminal attempt defined 18 Pa. C.S. 901 (a) which sentence imposed reflect a constructive amendment of information by the trial Court, a prohibited act by Federal law. While the legislator enacted Rule 564 as the sole mechanism of amending the information anytime prior to imposition of sentence pursuant to Motion for Amendment of Information Pa.R. Crim. P. 564, the Commonwealth plainly refused to do so and Brown is innocent of the charge of Attempt Homicide.

We must take the indictment as thus construed conviction upon a charge not made would be sheer denial of due process." *Dejonge, 299 U.S. at 362.* "A Fundamental miscarriage of justice may be found if the Petitioner presents evidence of actual innocence of the underlying criminal charge." *Schlup, 513 U.S. at 327.*

In *United States v O'Hagan, 139 F.3d 641 (8th Cir. 1998*) the Court ruled "If an essential element of the charge has been omitted from the indictment, the omission is not cured by the bare citation of the charging statute. If an essential element is omitted from the indictment, then the defendant's Fifth Amendment right to be tried on charges found by a grand jury has been

violated." And in *United States v Faweitt 155 F.2d 764, 767 (3rd Cir. 1940)* the court noted that, at common law, an indictment could not be amended whatsoever, except by the grand jury that return it . See Id. at 766. The reasoning behind this principle was that "the finding of a grand jury was upon an oath and, depending upon this fact amongst other for its validity, could not be amended by the Court."

This Court ruled in *Rabe v Washington 405 U.S.313, 31 L.Ed.2d 258, 92 S.Ct 993 (1972)* that "No principle of procedural due process is more clearly establish than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all Courts, State or Federal. And in *Apprendi v New Jersey 530 U.S. 466, 120 S.Ct. 2348 (2013)* (any fact that increases the minimum statutory penalties must be charged in the indictment and proved beyond a reasonable doubt).

The Fifth Amendment of the United States Constitution state in part, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.." U.S. Const.Amend. V. The Fifth Amendment thus ensures that a person's jeopardy is limited" to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." Stirone v United States, 361 U.S. 212, 217-218, 80 S.Ct 270 (1960). These principles are preserved in more than a Century of decisional law. See Ex Parte Bain, 121 U.S. 1, 9-10, 7 S.Ct. 781, 30 L. Ed. 849 (1887).

In Commonwealth v King 660 Pa. 482, 234 A.3d 549 (2020) the Court held that, "although the criminal information put defendant on notice for a prosecution for a crime of attempt murder, the Commonwealth violated Apprendi principles because he was not given formal notice of the Commonwealth's intent to prosecute him for aggravated crime of attempted murder causing

serious bodily injury. *18 Pa.C.S.§ 1102* (c). Also in *Commonwealth v Johnson 2006 Pa. Super.265, 910 A.2d 60 (Pa. Super 2006*) Johnson was convicted of attempted murder generally and received a sentence of seventeen and one half to forty years of incarceration under 1102 (c). Johnson, *910 A.2d at 63.* The Supreme Court vacated Johnson's sentence based on the United States Supreme Court's decision in *Apprendi v New Jersey 530 U.S. 466, 467-68 (2000).* The Fuller Court ruled that it is analytically consistent with the purposes of criminal jurisprudence to punish a criminal who completes an aggravated assault and cause serious bodily injury more severely than a criminal who merely takes a "substantial step" towards completion of a murder. See *Solem v Helm 463 U.S. 277, 293, 103 S.Ct. 3001, 3011, FFL Ed. 2d 637, 651 (1983*) ("It is generally recognized that attempts are less serious than completed crimes.") Mode 1 Penal Code § 5.05. *Commonwealth v Fuller, 396 Pa. Super 605, 615-616, 579 A.2d 879, 884-85 (1990).*

As the record clearly showed that Brown was never charge with murder, nor serious bodily injury and the trial Court made a constructive amendment to the information resulting in an unlawful sentence which should be vacated and the denial of relief from the State Courts, which the U.S. District Court adopted and the Third Circuit denial was a decision contrary to *Rabe v Washington 405 U.S. 313 (1992); Stirone v United States 361 U.S. 212 (1960); Ex Parte Bain, 121 U.S.(1987); Apprendi v New Jersey 530 U.S. 466 (2000). Alleyne v United States, 133 S.Ct. 2151, 2163, 186 L.Ed 2d 314 (2013); Cole v Arkansas 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed 644 (1948); Schulp v Delo, 513 U.S. 298,327, 115 S.Ct. 851, 130 L. Ed 2d 808 (1995); Solen v Helm, 463 U.S. 277, 293 (1983); Dejonge v Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed 2d 278 (1937); United States v Miller, 471 U.S. 130, 140, 105 S. Ct. 1811,*

1817, 85 L.Ed 2d 99 (1985); Jones v United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed. 2d 311

(1999); and conflict with United States v O'Hagan, 139 F. 3d 641 (8th Cir. 1998); Werts v Vaughn 228 F.3d 178, 193 (3rd Cir. (2000); United States v Dario, 445 F.3d 253, 259-60 (3rd Cir. 2006); United States v Harra, 985 F.3d 196, 221-22 (3rd Cir. 2021); United States v Faweitt, 115 F.2d 764, 767 (3rd Cir. 1940).

(5) Trial Court committed structural error when it imposed a sentence for Count 1 Attempt Homicide 15 years (180 months)-40 yrs. representing a prior record score (PRS) of 4, guidelines range 168-240 months and Count 4 Aggravated Assault 5 yrs (60 months)-10 yrs representing PRS of 1, guideline range 42-60 months were in the aggravated range, an upward departure from the guidelines without stating no reason on the record, resulting in more jail time and created a structural defect in the proceeding in violation of 42 Pa. C.S.§ 9721 (b), Rule 590 (a) (3) and Brown's Fifth and Fourteenth Amendment Due process rights to a fair and impartial proceeding as Brown's PRS is O with a guideline range of 72-240 months for Count 1 and 35-54 months for Count 4, for which the trial Court accepted and convicted Brown on 4/29/15 there-after on 7/28/15 sentence Brown upwards from the guidelines it prior accepted, thus voiding Brown's conviction. See Pa. Sentencing Martix 2014, Guilty Plea N.T. 4/29/15 and sentencing N.T. 7/28/15.

The Brown and Valazques Courts reasoned that "A Sphinx-like silence on the Court's part precludes anyone (including the parties, the judge, and the appellate tribunal) from learning whether he acted in error.)" Brown, 479 F.2d at 1173. "Requiring such procedure would encourage the judge to clarify and justify, in his own mind, the grounds for the sentence he

chooses. As a result, sentencing decisions would tend, on the whole, to be more carefully thought out." Velazquez, 482, F.2d at 142.

A State Court's fact-finding may qualify as unreasonable where "the State court.. had before it, and apparently ignored" evidence supporting the habeas Petitioner's claim. Miller-El v Cockrell, 537 U.S. 322, 346 (2003). Here, the State Court totally ignored and/or disregarded the significance of utilizing the proper prior score-a score which would have reduced the sentencing guideline applicable to Brown. See *Commonwealth v Dotzman, 588 A.2d 1312, 1317 (Pa.* Super. *1991)* ("The Court's discretion comes into play...only after it has determined the proper sentencing guideline range). While the guidelines are advisory and nonbinding, a sentencing Court must ascertain the correct guideline ranges before a departure is in order, *Commonwealth v Archer, 722 A.2d 203, 210 (Pa. Super. 1998).*

See. United States v Booker, 543 U.S. 220, 264 (2005) (while a Court may depart from the guidelines, beforehand, it "must consult them and take them into account when sentencing") as such provides "certainly and fairness in sentencing"); Rosales-Mireless v United States, 138 S.Ct 1897 (2018) (holding that, the defendant who pleaded guilty to illegal reentry, and who was erroneously sentenced to a pre-sentences report which mistakenly counted a State misdemeanor conviction twice, resulting in a guideline range of 77 to 96 months when the correct calculated range was 70-87 months was entitled to resentencing).

It is undisputed that the state Court did not ascertain the correct guidelines ranges before it sentence Brown in the aggravated range an upward departure from the guidelines without stating no reason on the record in violation of Brown's due process rights, and as such the sentence imposed was clearly unlawful and the denial of relief by the State Courts which the U.S. District Court adopted and the third Circuit denial was a decision contrary to *Miller-El v*

Cockrel, 537 U.S. 322, 346 (2003); United State v Booker, 543 U.S. 220, 264 (2005); Rosales-Mireles v United States, 138 S.Ct. 1897 (2018); Glover v United States, 531 U.S. 198, 203 (2001) ("any amount of actual jail time has sixth Amendment significane"); *Dorszynski v United States, 418 U.S. 424, 455-57 (1974*) and conflict with *Richardson v Superintendent Coal Twp. SCI 905 F.3d 750 (3rd Cir. 2018); Moore v United States, 571 F.2d 179, 183 (3rd Cir. 1978); United States v Bazzano, 570 F.2d 1120, 1137-38 (3rd Cir. 1977) (requiring District Courts to state a reasons for criminal sentence); United States v Valazques, 482 F.2d 139,142 (2nd Cir. 1973*); American Bar Association project on Minimum Standards for Criminal Justice, Standard relating to Appellate Review of Sentence§ 2.3 (c) and commentary (e) at 45-47 (App. Draft 1968); Berkowitz, The Constitution Requirement for a written statement of reasons and facts in support of the sentencing decision: A due process Proposal, 60 Iowa L. Rev. 205, 208-212 (1974); *United States v Brown, 479 F.2d 1170, 1173 (2nd Cir. 1973); United States v Munoz-Fontanez, 61 F.4th 212,214 (1st Cir. 2023) (Vacating a 20% upward variance there); United States v Sepling, 944 F.3d 138, 145 (3rd Cir. 2019).*

(6) The Commonwealth breach the plea agreement in violation of Brown's Fifth & Fourteenth Amendment due process rights, Santobello v New York and cause Brown to enter an involuntary plea warrant reversal. As evidence, the Commonwealth at sentencing stated on the record "...**the Commonwealth will be looking for a 10-15 on the low end, 20-30 on the high end for Mr. Brown's conviction for these two offenses.' And "I still would be requesting your Honor, a minimum sentence of at least 10-15 on the low end, 20-30 on the high end....the discussion from the time we met in chamber."** Sentencing N.T. 7/28/15 pg.2 at 16-19 and pg. 4 at 4-8

At PCRA hearing the Commonwealth ask defense counsel **"did you in fact relate to Mr. Brown that the Commonwealth was in the range of 10-15 on the low end and 20-30 on the high end"** PCRA N.T. 4/4/16 pg. 22 at 18-25.

Trial Court sentence Brown to 15-40 years for attempt homicide and 5-10 years for aggravated assault and both the prosecutor, and defense counsel remain silent.

The Alvardo Court ruled "we have at the same time viewed as invalid pleas entered on the strength of the prosecutor's unkept bargain." *Commonwealth v Alvardo, 442, Pa. 516, 276 A.2d 526 (1971).* Indeed, the Federal constitution mandates that we do so. *Santobello v New York 404 U.S. 257, 262 (1978).*

In Santobello v New York 404 U.S. 257, 262, (1978) this Court ruled that **"when a plea rest in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration such promise must be fulfilled,"** A plea agreement that is ambiguous must be read against the government. *United States v Jefferies 908 F.2d 1520 (11 Cir. 1990).* The Supreme Court stated in a case dealing with oral plea promises which were subsequently breach, **"A guilty plea, if induced by promises"... "which deprive it of the character of a voluntary act is void."** *Machibroda v United States, 368 U.S. 487, 493 (1962).*

In Brown's case 10-15 on the low end and 20-30 on the high end in of itself was ambiguous as the numbers could represent month or year. Assuming its years, Brown received a 40 year sentence, 10 years more than the Commonwealth's 30 year induced offer and recommendation. As such the denial of relief by the State Courts which the U.S. District Court adopted and the denials of the Third Circuit was a decision contrary to *Santobello v New York, 404 U.S. 257, 262 (1978); Machibroda v United States, 368 U.S. 487,493 (1962); and conflict with United States v*

Velez Carrero, 77 F.3d 11 (1st Cir. 1996); United States v Jefferies, 908 F.2d 1520 (11 Cir. 1990); United States v Taylor, 139 F.3d 924 (D.C. Cir. 1998); United States v Loughery, 905 F.2d 1014, 1018 (D.C.Cir. 1990).

(7) The record is also silent of defense counsel explaining to Brown that the charges if convicted carries a mandatory deportation collateral consequence. PCRA N.T. 12/18/18 pg. 8 at 1-9. The United States Supreme Court has held that counsel must inform a non citizen defendant as to whether a plea carries a risk of deportation. *Padilla v Kentucky, 559 U.S. 356,372 (2010).* Padilla Court also observed that some potential deportation situations are unclear and uncertain while other deportation situation are truly clear, *Id. 1483.* The Court commented that, when the relevant deportation law is succinct and straight-forward, counsel need to do more than advise the client that the charge/conviction may carry a risk of deportation. However, when the deportation consequence is truly clear, **"the duty to give correct advice is equally clear,"** Id. (emphasis added.).

`As defense counsel failed to explain or even advise Brown that the charges/conviction carries a mandatory deportation collateral consequence, Brown entered his plea involuntarily, unknowingly and unintelligently in violation of his U.S. Sixth Amendment right and the denial of relief by the State Courts which the U.S. District Court adopted and Third Circuit denials was a decision contrary to *Padilla v Kentucky, 559 U.S. 356 (2010); Lee v United States, 582 U.S. 357 (2017).*

(8) Trial counsel admitted guilt over Brown's express objection and failed to be Brown's advocate and denied Brown counsel at a critical stage. As evidence was counsel's testimony under oath that Brown had from the beginning claim he was innocent, was attack and struck back

in self-defense, and that Brown has his own recollection of events. See PCRA N.T. 4/4/16 pg. 25 at 8-21 & sentencing N.T. 7/28/15 pg 4 at 23-24.

At oral guilty plea counsel recited on the record to the Court (fact finder) the alleged" **facts and version of event of the State"** instead of rejecting the plea offer and prepare for trial base on Brown's innocence and self defense claims. See Guilty Plea N.T. 4/29/15 pg. 9 at 12-19 .

Counsel also testified that on the morning of sentencing Brown told him that he will be withdrawing his guilty plea and instead of being Brown's advocate and proceed on an oral on the record motion to with Brown's guilty plea, **counsel coerce Brown into taking counsel's own mis- advice made up plea offer and not the plea offer the State**. See. PCRA N.T. 4/4/16 pg 24 at 5-14.

It is clear from the record address herein that Brown communicated and maintains his innocence to counsel and a concession of guilt should have been off the table and that the plea was not the choice or free will of Brown and that counsel's admission of Brown's guilt over Brown's express objection is error structural in kind. See Cooke, 977 A.2d at 849 (counsel's override negated Cooke's decision regarding his constitutional rights, and created a structural defect in the proceeding as a whole"). Such an admission block the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury (or a judge) would almost certainly be swayed by a lawyer's concession of his client's guilt. Brown is entitled to McCoy and must therefore accorded a new trial without any need to show prejudice.

This Court granted Certiorari in *McCoy v Louisiana 584 U.S. 414 (2018)* in view of a decision of opinion among State Courts of last resort on the question whether, it is unconstitutional to allow

defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. 582 U.S. 967 (2012).Compare with the instant case, e.g. Cooke v State,977 A.2d 803, 842-846 (Del. 2009) (Counsel's pursuant of a" guilty but mentally ill" verdict over defendant's "vociferous and repeated protestations" of innocence violated defendant's " constitutional right to make fundamental decisions regarding his case); State v Carter, 270 Kan. 426,440 14 P.3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder when client adamantly maintain his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial.)

This Court ruled in *Anders v California, 386 U.S. 738,743 (1967)* ("that the adversarial process protected by the Sixth Amendment requires that that the accused have "counsel acting in the role of an advocate."), and in United States v Cronic, 466 U.S. 648 (1984) which held that automatic reversal is required where a defendant is denied counsel "at a critical stage." *Lee v United States, 582 U.S. 357, 371(2017)* (requiring that a defendant might reject a plea and prefer" taking a chance at trial." Despite "almost certain" conviction. U.S. Const. Amend.VI; See. ABA Model Rule of Professional Conduct 1.2 (a) (2016) ("**a layer shall abide by a client's decision concerning the objectives of representation**"); Hashimoto, Resurrecting Autonomy. The Criminal Defendant Right to control the case. 90 B.U.L Rev. 1147, 1178 (2010) (for some defendants, the possibility of an acquittal, even if remote, may be more valuable then the difference between a life and death sentence.")

As counsel admitted guilt over Brown's express objection, failed to be Brown's advocate and denying counsel at a critical stage (plea & sentencing) in violation of Brown's U.S. Fifth, Sixth and Fourteen constitutional Amendment rights the state Courts denial of relief which the U.S. District Court adopted and the Third Circuit denials was a decision contrary to *McCoy v*

Louisiana, 584 U.S. 414 (2018); Lee v United States 582 U.S. 357,371 (2017*); United States v Cronic, 466 U.S. 648 (1984); Anders v California 386 U.S. 738, 743 (1967); Faretta v California, 422 U.S. 806 (1975) and conflict with State v Carter, 270 Kan. 426, 440 (2000); Cooke v State, 977 A.2d 803, 842-846 (Del. 2009).*

In order to be valid, a guilty plea must be both knowing and voluntary. *Parke v Raley, 506 U.S. 20 (1992*). Because a guilty plea must be the voluntary expression of the defendant's own choice, See. *Brady v United States, 397 U.S. 742, 748 (1970),* the Supreme Court has long held that "the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."Id. at 750; See also *Machibroda v U.S. 368 U.S. 487,493 (1962*) ("a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void" and " open to collateral attack"). The voluntariness of a plea " can be determined only by considering all of the relevant circumstances surrounding it." *Brady, 397 U.S. at 749.*

As relevant were, the Supreme Court has also held that "a transcript showing full compliance with the customary inquiries and admonitions furnishes strong, although not necessarily conclusive evidence that the accused entered his plea without coercion and with an appreciation of its consequences.' See *Boykin v Alabama, 395 U.S. 238,242-44 (1969*). And although such "solemn declarations in open Court carry a strong presumption of verity" that create a "formidable barrier in any subsequent collateral proceedings" See. *Blackledge v Allison, 431 U.S. 63, 74 (1977),* there is no per se rule that a defendant's sworn statements are an " insurmountable" obstacle to a coercion claim. See. id.

In Blackledge v Allison, 431 U.S. 63 (1977) a State defendant was required to complete a printed form used by the trial Court in connection with guilty pleas. One of the question asked whether,

the defendant understood he could be imprisoned for a minimum of ten years to life. the defendant wrote "yes" in response. The other relevant question was whether, the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plea guilty." id. at 66. the defendant answered "No". After sentencing, the defendant filed a Petition in Federal Court alleging that before he entered his plea, his attorney had led him to believe that as result of an agreement with the Solicitor and the judge, the sentence would be no more than ten years. The defendant also asserted that he had been instructed to answer the questions on the court's form as he had done. The supreme Court held that Allison's habeas corpus petition should not have been dismissed simply because of his answers to the questions at the plea proceeding. the Court explained that **"the barrier of the plea or sentencing proceeding record, although imposing, is not invariable insurmountable."** Id. at 74. Consequently, "the Federal Courts cannot fairly adopt a per se ruling excluding all possibility that defendant's representations at the time of his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." Id. at 75.

For decades, the Supreme Court has recognized that a lawyer can violate Strickland by **"failing to advise the defendant"** properly or misadvising him and thus causing him to plea guilty. *Hill v Lockhart*, 474 U.S. 52, 56-60 (1985)(involving misadvice about parole eligibility). Strickland equally guards against letting a defendant decide to turn down a plea deal based on a lawyer's incorrect advice. See *Lafler v Cooper*, 566 U.S. 156, 163-64 (2012). Either way, **"incompetent advice distorts the dfendant's decision making process" and "makes it "hard to say that the plea was entered with the advice of constitutionally competent counsel."** *Padilla v Kentucky*, 559 U.S. 356, 385 (2010).

Brown case is similar to Allison and Machibroda in that Brown was misled by counsel's incorrect advice and promise in believing that he would be getting a 10 year maximum sentence for two aggravated assault charges arising from plea discussion counsel had with DA and judge. Brown signed written plea colloquy form and answered the plea Court as instructed by counsel with the bona-fide belief that he would received a 10 year sentence, not the 40 year sentence he received. A 10 year sentence is a 5-10 or a 2-4 with a consecutive 3-6 for example. Brown wrote counsel prior to and after sentencing expressing confusion over what he plead to verses what was promised and what's the status with the appeal but received no response. Brown wrote the judge explaining his abandonment and what counsel promised him, which the judge forwarded the letter to counsel who did nothing.

Brown has met the ***Strickland*** two prong test as trial counsel's performance was deficient for **(a)** failure to object to the trial court's : accepting Brown's guilty plea without being informed of the elements of the offense for the crimes charged, the permissive range of sentence for each offense charged, the true nature of the charge, counsels stating on the record in open court in Brown's presence the terms and conditions of the plea, that Brown had a constitutional right to confront his accusers; accepting Brown's guilty plea for attempt homicide when the Commonwealth only charge Brown with criminal attempt in the information which could have been for murder, rape, robbery for example; accepting Brown's guilty plea for the applicable guideline range but later reverse course sentencing outside the applicable guideline range without stating no reason on the record; constructive amendment of information at sentencing; violating several state and federal laws.

(b) advising and coercing Brown to plea to charge not found in the information; his own made up 10 year plea for two aggravated assault charges when the Commonwealth wanted 10-15 on the low end and 20-30 on the highend for one attempt homicide and one aggravated assault charge;

admitting guilt at plea hearing over Brown's express objections; admitting the sentence was illegal and his failure to file a direct appeal was without concent; failure to object to the Commonwealth's breach of plea agreement; failure to advise Brown that the charges if convicted carries a mandatory deportation collateral consequence; failure to file habeas corpus to have Brown present at court ordered plea discussions; failure to be Brown's advocate by mounting a defense on Brown's innocence and self defense claims and file motion to vacate guilty plea; failue to be knowledgeable about the currant state of the law ie. what constitutes a valid plea, indictment, viable charge and penal statute, and the legislator's intent there of.

Counsel's deficient performance prejudice Brown as there is a reasonable probability that but for counsel'a deficient: failure to **(c)** consult with him about an appeal Brown would have timely appeal; object to the trial court's constructive amendment of information violated Brown's due process rights to a fair proceeding and prejudice Brown into serving an unlawful sentence with more jail time; advice of the mandatory deportation collateral consequence of taking the plea violated Brown's due process right as he is facing deportation without due process of law. Brown would have taken his chances at trial; be advocate by mounting an innocence defense as pleading guilty should have been of the table and by filing motion to vacate plea, Brown would have stated on the record in open court an oral on the record motion to vacate guilty plea; be knowledgeable about currant state and federal laws misled Brown in entering an involuntary plea, pleading to charge not found in the indictment, to a plea agreement that did not exists and waive certain constitutional rights absent of which Brown would have exercise his right to trial by jury, confront his accusers, file motion to dismiss attempt homicide charge and indictment and no juror properly instructed would have found Brown guilty of attempt homicide.

(d) in admitting guilt over Brown's expressed objections at plea hearing to the Court (fact finder)

would almost certainly be swayed by counsel's concession of Brown's guilt.

(e) coercing and repeated incorrect advice that led Brown into an involuntary guilty plea, had Brown been properly advised of the laws in relation to the facts of the case absent of which Brown would have insisted on going to trial and ask the Court for new competent counsel to fully explain the facts, consequences and laws of the case.

Brown's undisputed factual assertions are obvious and apparent on the record and is entitled to the benefit of this Court's holdings and opinion in *Allison, Machibroda, Strickland, Cronic, Ex parte Bain, Bousley, Booker, McCoy, Padilla, Lee, Henderson, Lafler, Hill, Boykin, Santobello, Pointer, McCarthy, Anders, Solen, Rabe, Glover, Dejonge, Fontaine, Saunders, Farette, Bradshaw, Williams, Brady' In Re Winship, Sandstorm, Smith, Stirone, Apprendi, Cole, Schulp, Wiggins*, all supra, *Roe v Flores-Ortega*, 528 U.S. 470, 477-78, 484 (2000); *United States v Timmereck*, 441 U.S. 780, 763 (1975); *Tollett v Henderson*, 41 U.S. 258, 267 (1973) and have his plea and sentence vacated, indictment dismissed as counsel was constitutionally ineffective under the Sixth Amemdment and Strickland and had no strategic reasons for his actions and inactions.

This Court's reviewal is done on a case by case examination of the totality of the evidence. *Williams*, 529 U.S. at 391, *Strickland*, 466 U.S. at 695. See also *Taylor v Kentucky*, 436 U.S. 478 (1978)(Cumulative errors, while individually harmless, when considered together, can prejudice defendant as much as a single reversable error and violate a defendant's right to due process of law); *Williams v Taylor*, 529 U.S. 362 (2000); *Wiggins v Smith*, 539 U.S. 510 (2003).

Structural error "deprives defendantt of basic protections without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence... and no criminal punishment may be regarded as fundamentally fair.'" *Neder v United States*, 527 U.S. 1,

8-9 (1998)(quoting *Rose v Clark*, 478 U.S. 570, 577-78 (1986).

Habeas corpus relief is available only to protect against "a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure." *United States v Timmreck*, 441 U.S. 780, 783 (1975) (quoting *Hill*, 368 U.S. at 428).

Brown has demonstrated herein by clear and convincing facts and evidence apparant on the record that the state Courts conviction resulted in a decision that was contrary to clearly established federal law and involved an unreasonable application of Strickland, also resulted in a decision that was based on an unreasonable determination of the facts,and that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms considering all the circumstances. 28 U.S.C. § 2254(d)(1) &(2); *Strickland*, 104 S.ct. at 2064-65. The Third Circuit Court of Appeals erred in it's denial and this court has a duty to correct clear and obvious errers, to protect the public interest and the judiciary integrity and Brown should be allowed to proceed futher. Silber v U.S., 370 U.S. 717 (1962); U.S. v Atkinson, 297 U.S. 157, 160 (1936).

II THE COURT OF APPEALS ERRED AFFIRMING THE DENIAL OF PETITIONER'S §2254 PETITION WHERE THE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE THE FACTUAL DISPUTES

Section 2254(e)(1) provides that **"a determination of a factural issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."** 28 U.S.C. § 2254(e)(1). See e.g. *Fontaine v United States*, 411 U.S. 213, 215 (1973)(reversing summary dismissal and remanding for hearing because "motion and the files and records of the case did not conclusively show that petitioner is entitled to no relief"); *Saunders v United States*, 373 U.S. 1, 19-21 (1963);

Davis v Ayala, 576 U.S. 257, 271 (2015).

The Court presumes any factual determination made by the state Courts are correct, **"unless the petitioner rebuts the 'presumption of correctness by clear and convincing evidence.'"** *Howell* v *Superintendent Rockview SCI*, 939 F.3d 260, 264 (3d Cir. 2019)(quoting *Lambert v Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004).

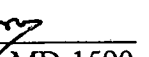
Brown's § 2254 petition alleged facts that, if proved, entitle Brown to relief. See *Hill v* Lockhart, 474 U.S. 52, 60 (1985); and *Blackledge v Allison*, 431 U.S. 63, 82-83 (1977). Petitioner asserted that he would not have pleaded guilty had he been correctly advised of the statutory maximum sentence penalty provided by law. Petitioner presented an affidavit detailing the facts concerning the statutory maximum he was advised of by counsel which was supported by the record and stated under oath he would not have pleaded guilty had he known the correct statutory maximum penalty provided by law. Thus, petitioner was entitled to an hearing. See *United States v Scott*, 625 F.2d 623, 625 (5th Cir. 1980); *Pitts v United States*, 763 F.2d at 201; *United States v Birdwell*, 887 F.2d 643, 645 (5th Cir. 1989)(evidentiary hearing warranted if petition contains **"specific factual allegations not directly contradicted in the record"**); *Richardson v Superintendent Coal Twp SCI*, 905 F.3d 750 (3d Cir. 2018); Fook v Superintendent, 96 F.4th 595 (3d Cir. 2023); *Jordan v Hepp*, 831 F.3d 837, 849-50 (7th Cir. 2016)(A district Court must conduct a hearing under section 2254(e) to determine if these facts are true).

CONCLUSION

Brown has been deprived of basic fundamental rights guaranteed by the Fifth, Sixth and fourteenth Amendments of the United States Constitution and seek relief in this Court to restore those rights. Base on the arguments and authorities presented herein, Brown's guilty plea was sustained in violation of due process and not voluntarily or intelligently entered because he did not understand the consequences of his plea, received incorrect legal advise and was deprived of his right to effective legal assistance of counsel at plea and sentence stage in the state Courts. Brown prays this court will issue a writ and reverse the Order of the Third Circuit Court of Appeals[2] or whatever relief this court sees fit.

Date: January 22, 2025

Respectfully submitted



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[2] If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter remanded to the third Circuit Court for reconsiseration in light of this Court's opinion in *Strickland, Hill, Timmreck, Fontaine, Saunders, Davis, all supra.*