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When a Defendant obtains counsel, whether they be court-appointed or retained, they confide in their counsel and trust they will be directed in the right direction by said counsel. Unfortunately, Defendants many times are led down an unclear path. This has happened in Mr. Stump's case.

Claims of ineffective assistance of counsel are governed by the two-part Strickland test. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2059, 80 L. Ed.2d 674 (1984). To prevail on his ineffective counsel claim Mr. Stump must show 1) counsel's representation fell below an objective standard of reasonableness and 2) the reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. Boyd v. State, 915 P.2d 922, 925 (Okla. Crim. App. 1996) (citing Strickland, 466 U.S. at 677-78).

To establish deficient performance under Strickland's first prong, Mr. Stump must "overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct" and "that the challenged action could not be considered sound trial strategy." Davis v. State, 123 P.3d 243, 246 (Okla. Crim. App. 2005) (citing Strickland, 466 U.S. at 689). A "reasonable probability" of a different outcome under Strickland's second prong is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694.

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At his plea, Mr. Stump was represented by James Rowan with the Oklahoma Indigent Defense System in Norman. While discussing the plea agreement with Petitioner, Mr. Rowan told Petitioner that by accepting this plea, he would be out of prison on parole within seven (7) to nine (9) years; that Mr. Rowan had previously had clients in the same position of Petitioner that were already out on parole. Based on Rowan's promise, Petitioner pled guilty to the charges against him. This fact is corroborated by the fact that Petitioner did not waive his right to remain in the county jail for ten (10) days. And finally, Petitioner was not in his right state of mind as he was only eighteen (18) years old when this plea was entered and believed the statements of his counsel and was easily influenced by those statements. Petitioner's guilty plea was induced by Rowan's unfulfilled assurances. Such a promise by Rowan falls below the objectionable standard of reasonableness and Petitioner was induced to enter a guilty plea and prejudiced by Rowan's assurances. Petitioner's guilty plea was induced by an unfulfilled promise by Rowan, and therefore, Petitioner's guilty plea was involuntary. In addition, such promises constitute ineffective assistance of counsel, and Petitioner should be allowed to withdraw his plea of guilty. In addition to the assurances made prior to the entry of the plea, Petitioner has recently contacted his trial counsel asking why that counsel would make such assurances to him when there was no way that Petitioner could be released in

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such a short time with a plea of guilty to Second Degree Murder. Mr. Rowan again assured Petitioner that he had clients that had been paroled from life sentences after serving only eight (8) years.

This Court had improperly dismissed Mr. Stump's petition for habeas corpus relief as untimely. Mr. Stump is entitled to "tolling" time based on uncontrollable circumstances not only for not following the appeal process available to him (if, in fact, he understood that he could appeal), but also for the time spent expecting release from prison based on what his counsel had told him at the time of his plea. To hold Petitioner to the one year statute of limitations for filing his Petition is unfair and prejudicial because it was not until eight (8) years later that he was aware that action needed to be taken. At that time, he filed an Application for Post-Conviction Relief to exhaust his state remedies, was denied and appealed, then when that Application was denied, he filed a Petition for Writ of Habeas Corpus in this Court.

Mr. Stump exercised due diligence based on the fact that he was proceeding pro se and these future proceedings were necessitated because counsel had given false information at the time of Mr. Stump's plea, by stating that he would be paroled within seven (7) to nine (9) years. A case in point is Dalton v. Battaglia, 402 F.3d 729 (7<sup>th</sup> Cir. 2005) wherein the Seventh Circuit stated:

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In Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the Supreme Court held that a defendant's guilty plea "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," *id.* at 748, 90 S.Ct. 1463. The Court defined voluntariness as follows: "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper . . ." *Id.* at 755, 90 S.Ct. 1463 (internal quotation marks omitted).

Although the Supreme Court has not defined the "direct consequences" of a guilty plea, it must have intended this term to encompass the maximum sentence for which a defendant is eligible. Compare Fed.R.Crim.P. 11(b)(H)-(M); Ill. S.Ct. Rule 402(a)(2). We can imagine no consequence of a defendant's guilty plea more direct, immediate, and automatic than the maximum amount of time she may serve as a result of her plea. See Warren v. Richland County Circuit Court, 223 P.3d 454, 457 (7<sup>th</sup> Cir. 2000). While a defendant need not know "all consequences, such as loss of the right to vote or of the right to own a gun, or the effect on future sentences," he must "certainly [know] the maximum punishment that he faces if he is convicted in the case at hand." Trueblood v. Davis, 301 F.3d 784, 786 (7<sup>th</sup> Cir. 2002) (citing United States v. Lumpkins, 845 F.2d 1444, 1449 (7<sup>th</sup> Cir. 1988).

402 F.3d at 733.

Another decision rendered by the Tenth Circuit relative to parole is Dulworth v. Evans, 442 F.3d 1265 (10<sup>th</sup> Cir. 2006). In this case a state prisoner had filed a §2241 petition seeking habeas relief from administrative determination regarding his security level and ability to earn credits against his sentence. The United States

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District Court for the Western District of Oklahoma, Stephen P. Friot, J., dismissed petition as untimely. Prisoner appealed and sought certificate of appealability (COA).

Honorable Paul J. Kelly, Jr., Circuit Judge, held that:

- (1) on issue of first impression, one-year limitations period applied to §2241 petition contesting administrative decision, and
- (2) one-year limitations period did not commence until decision rejecting administrative appeal became final when petitioner timely and diligently exhausted administrative remedies.

Mr. Stump's one-year limitations period should not have commenced until he realized he had been in prison for eight years (when told by counsel he would be out in 7 - 9 years) and filed his Application for Post-Conviction Relief at the state district court. After receipt of a denial in that court, he appealed the Oklahoma Court of Criminal Appeals, wherein his Application was also denied.

Now, to shift gears and focus on the parole eligibility issue. Mr. Stump has been harmed by his attorney's improper and inaccurate promises. At the time Mr. Stump was received by the Department of Corrections (May 16, 1996), there was a law requiring the parole board to consider at fifteen percent (15%) of an offender's sentence, which for Mr. Stump it would be  $(1996 + (15\% \text{ of } 75 = 11)) 11 = 2007$ . Mr. Stump's current parole hearing date is set on the docket for February, 2007. The date set for February 2007 is a parole hearing, not a guarantee of release. Mr. Stump will

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not be released in seven (7) to nine (9) years as promised by his trial attorney. Mr. Stump would not have entered a plea of guilty had he been told by his attorney at the time of his plea the true maximum sentence he faced.

#### CONCLUSION

In Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999), the Fifth Circuit Court of Appeals said, "We must be cautious not to apply the statute of limitations too harshly." The Court concluded, "Dismissal of a first habeas corpus petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Id. Here, the district court failed to exercise the required caution and applied the AEDPA's statute of limitations in a harsh manner.

For the reasons cited above, Petitioner Joshua Stump would respectfully request this Honorable Court provide him the relief requested; and for all such other and further relief as this Court deems just, equitable, proper and/or legal.

Respectfully submitted,  
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JOSHUA STUMP

**CERTIFICATE OF SERVICE**

This is to certify that on this 26th day of October, 2006, a true and correct copy of the foregoing instrument was served electronically via the ECF System on the following ECF registrants: Diane Slayton, Assistant Attorney General at [fhc.docket@oag.state.ok.us](mailto:fhc.docket@oag.state.ok.us)

*s/M. Michael Arnett*