No. _____

In The
Supreme Court of the United States

GREGORY MCLAUGHLIN, Warden,

Petitioner,

v.

MICHAEL LEJEUNE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to resolve the conflict among federal and state courts on whether the failure to advise a pleading defendant of one of the three "*Boykin* rights" can never be deemed harmless error?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties. No corporations are involved.

TABLE OF CONTENTS

APPENDICES

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

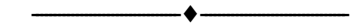
CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner McLaughlin ("the Warden") respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Supreme Court, which applied the test of the minority of courts in declining to apply a harmless error analysis to the failure to advise a criminal defendant who pleads guilty of one of the three rights identified in *Boykin v. Alabama*, 395 U.S. 238 (1969). The Georgia Supreme Court has construed *Boykin* as establishing a strict constitutional requirement that a pleading defendant be advised of all three rights, i.e., the rights to trial by jury, to confront one's accusers and the privilege against compelled self-incrimination, in order for a guilty plea to be valid under the federal due process clause. The Court found the guilty plea here was constitutionally infirm because the defendant was not told that he was waiving his right against self-incrimination by pleading guilty. The dissent would have found the error was harmless under the totality of the circumstances using the analysis applied by most of the federal and state courts which permits harmless error inquiry. The Warden seeks resolution of the conflict on whether harmless error does apply.



OPINIONS BELOW

The opinion of the Supreme Court of Georgia in the second habeas corpus appeal is published at 789 S.E.2d 191 (Ga. 2016) and is reprinted in the Appendix hereto, App. 1 infra.

The opinion of the Supreme Court of Georgia denying the motion for reconsideration is reprinted in the Appendix hereto, App. 54 infra.

The opinion of the Supreme Court of Georgia in the first habeas corpus appeal is reported at 766 S.E.2d 803 (Ga. 2014), and is reprinted in the Appendix hereto, App. 15 infra.

The opinion of the superior court, denying habeas corpus relief on remand, is not reported and is reprinted in the Appendix hereto, App. 6 infra.

The original opinion of the superior court denying habeas corpus relief is not reported and is reprinted in the Appendix hereto, App. 44 infra.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 14, 2016, and the motion for reconsideration was denied on July 25, 2016. The jurisdiction of this Court to review the judgment of the Georgia Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself. . . .

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

Respondent Michael Lejeune (hereinafter "Lejeune") was jointly indicted with Rekha Anand by a Fulton County, Georgia, grand jury in July 1999 for two counts of malice murder, felony murder, aggravated assault and concealing the death of another in connection with the shooting death and dismemberment of Ronnie Allen Davis in December 1997; Lejeune was also charged with possession of a firearm during commission of a felony. *Lejeune v. State*, 276 Ga. 179, 576 S.E.2d 888 (2003). The State sought the death penalty for the murders.

In 2003, after the first interim appeal, Anand pleaded guilty to concealing the death of another and agreed to testify for the State at Lejeune's trial. *Lejeune v. State*, 277 Ga. 749, 594 S.E.2d 637 (2004).

Lejeune's first trial, at which the death penalty was being sought, ended in a mistrial due to shootings which erupted at the courthouse. Midway during his second trial where the death penalty was again being

sought, Lejeune accepted the State's plea offer of a sentence of life without parole and pleaded guilty on November 8, 2005, to malice murder in exchange for the agreed-upon sentence.

In September 2009, through counsel, Lejeune filed a petition for a writ of habeas corpus in the Georgia courts, challenging his conviction. He raised one ground: his guilty plea was not voluntarily and knowingly entered because the trial court did not advise him of all of the constitutional rights he would be waiving by entering a guilty plea.

His plea counsel testified at the May 2011 evidentiary hearing, and the depositions of his other trial counsel and the presiding judge were taken and admitted into evidence. The habeas corpus court denied relief in November 2011. (App. 44).

Lejeune pursued his appellate remedies, and the Supreme Court of Georgia granted his application for a certificate of probable cause to appeal in April 2014. The Court asked the parties to address whether the habeas court erred in concluding that the guilty plea was knowingly and voluntarily entered.

In November 2014, the Supreme Court announced its decision in which it overruled state law which had placed the burden to establish voluntariness on the respondent and held that the petitioner bears the burden in a collateral attack to prove that his guilty plea was not knowing and voluntary. *Lejeune v. McLaughlin*, 296 Ga. 291, 766 S.E.2d 803 (2014) ("*Lejeune I*") (App.

15). The Court vacated the habeas court's order and remanded the case for another evidentiary hearing to afford Lejeune the opportunity to meet his burden. In so doing, the Court noted Lejeune claimed solely that he was never adequately advised of his privilege against self-incrimination; he had never alleged that his guilty plea was not his own choice, that he did not understand the nature of the case against him, or that he pleaded guilty without understanding the other constitutional rights he would have at a trial. (App. 16, n.2).

Lejeune testified at the January 2015 remand hearing, admitting that he had planned to testify in his defense at both trials and that he knew he did not have to take the plea offer but had listened to his attorney's advice to accept it. The parties also relied on the evidence presented at the May 2011 hearing. In March 2015, the habeas court again denied relief. (App. 6).

In September 2015, the Supreme Court granted Lejeune's application for an appeal and asked the parties to address two issues: (1) should the Court reconsider its recent precedents holding that the failure to advise a pleading defendant of one of the three "*Boykin*[1] rights" can never be deemed harmless error; and (2) did the habeas court err in finding the guilty plea was knowing and voluntary.

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[1] *Boykin v. Alabama*, 395 U.S. 238 (1969), identifies three constitutional rights that are waived by a guilty plea: the right to trial by jury, the right to confront one's accusers and the privilege against self-incrimination.

In July 2016, the Supreme Court reversed the habeas court's ruling and granted relief. *Lejeune v. McLaughlin*, 789 S.E.2d 191 (2016) ("*Lejeune II*"). (App. 1). The majority relied upon its long-standing view, expressed previously in the dissent in *Lejeune I*, that the advice and waiver of the three *Boykin* rights is a strict constitutional requirement and reversal is automatic if there is any deviation. (App. 33, 37). Despite acknowledging that Lejeune asserted "a federal constitutional claim" and did not attack his conviction on state constitutional grounds, the majority found Lejeune's plea was not valid "under our existing due process test for the constitutional validity of guilty pleas" as he had not been advised of his privilege against self-incrimination. (App. 1 n.1, 4).

The dissent announced it would have followed a 1982 Georgia case and the similar approach taken by most federal and state courts which permit a harmless error analysis. The dissent would have held that the trial court's failure to make sure Lejeune understood his privilege against self-incrimination was harmless error as the record as a whole showed that his guilty plea was knowing and voluntary under the totality of circumstances. (App. 4).

The Court denied the Warden's motion for reconsideration (App. 54), but did grant his motion to stay the remittitur on the same day it denied reconsideration.

The Warden seeks review of the Georgia Supreme Court's decision and an answer to the conflict among

the courts about whether the failure to advise a pleading defendant of all three *Boykin* rights may be subject to a harmless error analysis. The majority of federal and state courts do not read *Boykin* as requiring a specific litany nor hold that the failure to advise a defendant of each of the three rights automatically invalidates the conviction, but looks to the totality of circumstances to determine if the omission of a *Boykin* admonishment is harmless. Some states, like Georgia, interpret *Boykin* as announcing a strict constitutional rule of procedure and requiring reversal if a *Boykin* right is missed. However, this Court has not adopted such a rule, and states may not impose greater restrictions on matters of federal constitutional law than this Court has declined to impose. This Court should grant certiorari to resolve this conflict.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT ON WHETHER THE FAILURE TO ADVISE A DEFENDANT WHO IS PLEADING GUILTY OF ONE OF THE "*BOYKIN* RIGHTS" CAN NEVER BE HARMLESS ERROR.

This Court has long required that a plea of guilty must be both voluntary and intelligent in order to sustain a valid judgment of conviction. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. at 242. "The standard was and remains

whether the plea represents a voluntary and intelligent choice among the alternatives courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

A guilty plea is a waiver of three federal constitutional protections: the right to trial by jury, the right to confront one's accusers, and the privilege against compulsory self-incrimination. *Boykin*, 395 U.S. at 243; *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady*, 397 U.S. at 747 n.4

In *Boykin v. Alabama*, 395 U.S. at 242, a case on direct review, this Court found a guilty plea to be invalid where the record showed that the judge asked no questions of the defendant concerning his plea and failed to create a record affirmatively showing that the plea was knowing and voluntary. This Court declined to presume a waiver of the rights to a jury trial, to confront witnesses and against compelled self-incrimination from a silent record. *Boykin*, 395 U.S. at 243. The Court made that clear that the judge taking the guilty plea should make certain the defendant "has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244.

Rule 11 of the Federal Rules of Criminal Procedure governs the duties of a federal judge before accepting a guilty plea. The 1974 amendment to Rule 11

codified the requirements of *Boykin*, as the Advisory Committee's note makes clear, and the provisions concerning the rights to a jury trial, to confront witnesses and against compelled self-incrimination right are now contained in Rule 11(b)(1)(C) and (E).[2] In the wake of *McCarthy*, where this Court held as a matter of its supervisory authority over the lower federal courts that a defendant was entitled to plead anew if a district judge did not comply with the version of Rule 11 then in effect, Rule 11 was amended in 1983 to add a harmless error provision, Rule 11(h).[3] *United States v. Cross*, 57 F.3d 588, 591 (11th Cir. 1995). The objective in enacting Rule 11(h) "was to end the practice, then commonly followed, of reversing automatically for any Rule 11 error, and that practice stemmed from an expansive reading of *McCarthy*." *United States v. Vonn*, 535 U.S. 55, 66 (2002).

In the wake of *Boykin*, several Courts of Appeals have held that this Court did not "specify a mandatory litany" in *Boykin* and that "the failure to advise a defendant of each right does not automatically invalidate the plea." *United States v. Stewart*, 977 F.2d 81, 84-85 (3d Cir. 1992) (citing *United States v. Simmons*, 961 F.2d 183, 187 (11th Cir. 1992); *United States v. Henry*,

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[2] Rule 11(b)(1) requires the court, before accepting a plea of guilty, to inform the defendant of, and determine that the defendant understands: "(C) the right to a jury trial" and "(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."

[3] Rule 11(h) provides: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights."

933 F.2d 553, 559 (7th Cir. 1991); *Neyland v. Blackburn*, 785 F.2d 1282, 1287 (5th Cir. 1986); *United States v. Freed*, 703 F.2d 394, 395 (9th Cir. 1983)). Even before the enactment of Rule 11(h), one Circuit had found that the failure to advise a defendant of his privilege against self incrimination became "unnecessary" once the court had satisfied itself that the guilty plea was entered knowingly and voluntarily. *See United States v. Vallejo*, 476 F.2d 667, 671 (3d Cir. 1973). That approach remains the same under Rule 11(h) where the failure to advise a defendant explicitly about his right against compelled self incrimination or to confront witnesses is subject to and may be deemed harmless error, depending on the totality of circumstances. *See*, *e.g.*, *United States v. Monroe*, 353 U.S. 1346 (11th Cir. 2003); *United States v. Thomaguichard*, 779 F.2d 1139 (5th Cir. 1986).

The State of California, for example, has adopted a similar approach to permit harmless error inquiry, after surveying the law in the federal Circuit Courts of Appeals, and retreated from the strict interpretation of *Boykin* that the Georgia Supreme Court still embraces. *See*, *e.g.*, *People v. Howard*, 824 P.2d 1315, 1341-42 (Cal. 1992). *Howard* noted that all but the First and the District of Columbia Circuits had adopted the rule that *Boykin* did not require a specific articulation of each of the three rights waived by a guilty plea, as long as it was clear from the record that the plea was knowing and voluntary. *Howard*, 824 P.2d at 1342.

Other states, in the course of crafting and applying their own rules of procedure for the entry of guilty

pleas, have taken a similar approach and look to the totality of circumstances to determine voluntariness even if all three *Boykin* rights were not conveyed to the defendant. *See*, *e.g.*, *Morgan v. State*, 582 P.2d 1017 (Alaska 1978); *Lacy v. People*, 775 P.2d 1 (Colo. 1989); *People v. Fuller*, 793 N.E.2d 526 (Ill. 2002); *State v. Balsano*, 11 So. 3d 475 (La. 2009); *People v. Pellegrino*, 44 N.E.3d 145 (N.Y. 2015); *State v. Olson*, 544 N.W.2d 144 (N.D. 1996).

It appears that Georgia is in the minority of states which adhere to a strict interpretation of *Boykin* which mandates that the defendant be advised of all three *Boykin* rights in order for a guilty plea to pass due process muster. *See*, *e.g.*, *People v. Saffold*, 631 N.W.2d 320 (Mich. 2001); *State v. Smith*, 668 N.W.2d 482 (Neb. 2003); *State v. Veney*, 897 N.E.2d 621 (Ohio 2008); *State v. Hoff*, 814 P.2d 1191 (Utah 1991); *State v. Chervenell*, 662 P.2d 836 (Wash. 1983).

The flaw in their approach is that this Court has not adopted such an inflexible test as a matter of due process. The question of whether a plea is voluntary for purposes of the United States Constitution is a question of federal law. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). States may not impose greater restrictions as a matter of federal constitutional law than this Court has refrained from imposing. *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

The Warden urges this Court to grant certiorari to resolve this conflict among the state and federal courts on this important issue of whether the failure to advise

a criminal defendant of one of the three *Boykin* rights can never be harmless error. If the Court's intent in *Boykin* was to require the states to follow "the rigid prophylactic requirements of Rule 11," as the dissent posited,[4] then *Boykin* should be revisited to reflect the current approach to Rule 11 and its express tolerance of harmless error analysis. Otherwise, states could continue to invalidate guilty pleas under an inflexible interpretation of *Boykin*, as a matter of federal due process, that the federal courts would find to be constitutionally valid under Rule 11(h). The Court should grant certiorari to resolve this disparate approach.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Warden McLaughlin prays that this Court grant a writ of certiorari to review the decision of the Georgia Supreme Court as the decision presents a question of

[4] *Boykin*, 395 U.S. at 244 (Harlan, J., dissenting).

paramount importance not previously decided by this Court and on which the courts are in conflict.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: July 14, 2016

S16A0072. LEJEUNE v.
MCLAUGHLIN, WARDEN.

THOMPSON, Chief Justice.

This is the second appeal stemming from a petition for writ of habeas corpus filed by appellant Michael Lejeune. In that petition, appellant contended that his plea of guilty to murder in November 2005 was not knowingly and intelligently entered because "he never was adequately advised of his privilege against self-incrimination." See *Lejeune v. McLaughlin*, 296 Ga. 291, 292, n.2 (766 SE2d 803) (2014) ("*Lejeune I*").[1] The habeas court denied relief, finding that appellant was aware of his privilege against compulsory self-incrimination and concluding that appellant's plea was thus constitutionally valid. In the first appeal, we concluded that the habeas court's findings on which it based its ruling that appellant knew of his right against self-incrimination were not supported by the record. See id. at 292-294. We also ruled, however, that the court had improperly placed the burden of proof on the warden in this habeas proceeding and remanded the case for a new evidentiary hearing with appellant bearing the burden of proof. See id. at 294-299. On remand, the habeas court concluded that appellant was sufficiently aware of his right against

[1] Appellant asserted a federal constitutional claim and did not attack his guilty plea based on an alleged violation of the Georgia Constitution.

self-incrimination and that his plea was thus entered knowingly and voluntarily. We granted appellant's application for certificate of probable cause to appeal, see OCGA § 9-14-52, and now reverse the habeas court's ruling that appellant's plea was entered knowingly and voluntarily.

This Court has, for many years now, held that for a plea to be constitutionally valid, a pleading defendant must be informed of his three "*Boykin* rights."[2] See, e.g., *Wilson v. Kemp*, 288 Ga. 779, 779-780 (727 SE2d 90) (2011) (overruled on other grounds in *Lejeune I*, 296 Ga. at 294-297); *Foskey v. Battle*, 277 Ga. 480, 481-482 (591 SE2d 802) (2004) (overruled on other grounds in *Lejeune I*, 296 Ga. at 294-297); *Bowers v. Moore*, 266 Ga. 893, 894-895 (471 SE2d 869) (1996). And, in *Lejeune I*, this Court held that for a plea to be knowingly and voluntarily entered, a pleading defendant was required to know of his "essential constitutional protections," including his right against self-incrimination. *Lejeune I*, 296 Ga. at 291-292. Under this due process test, appellant's plea was constitutionally invalid.

Here, on remand, the only new evidence relevant to whether appellant was advised of his right against self-incrimination was his testimony that, at the time of his guilty plea, he was not aware of his right against self-incrimination and that, at pre-trial hearings,

[2] These rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right of confrontation. See *Boykin v. Alabama*, 395 U.S. 238, 243 (89 SCt 1709, 23 LE2d 274) (1969).

when his attorneys mentioned his right against self-incrimination, he did not understand what that meant. Both of appellants' attorneys testified on habeas before the remand. Their testimony certainly does not refute appellant's testimony that he was unaware of his right against self-incrimination, and in fact, tends to support it. See *Lejeune I*, 296 Ga. at 293-294 (discussing the testimony of Brian Steel), and 296 Ga. at 305 (Hines, J., dissenting) (discussing the testimony of August Siemon). In any event, the habeas court did not rely on their testimony to conclude that appellant was aware of his right against self-incrimination.

Instead, the habeas court found that when appellant pled guilty, he was aware of the right against self-incrimination, because "he had been through years of preparation for a trial in which the death penalty was being sought, [including] two aborted trials." The habeas court cited *Parke v. Raley*, 506 U.S. 20, 37 (113 SCt 517, 121 LE2d 391) (1992), for the proposition that a defendant's prior experience with the criminal justice system is relevant to the question of whether he knowingly waived constitutional rights. But in *Parke*, the prior experience on which the Supreme Court relied was a plea hearing in which the defendant was informed of the constitutional rights that he was waiving by pleading guilty. See id. at 36-37. The Supreme Court concluded that the state court did not err in inferring that based on the prior plea and other factors, the defendant was aware of his rights when he pled guilty to another crime two years later. See id. Here, on the other hand, the record contains no evidence that

appellant has had a prior experience of being informed that he waives his right against self-incrimination by pleading guilty.

For these reasons, under our existing due process test for the constitutional validity of guilty pleas, appellant's plea was not entered voluntarily and knowingly and is constitutionally invalid.

Judgment reversed. All the Justices concur, except Melton, Nahmias, and Blackwell, JJ., who dissent.

S16A0072. LEJEUNE v.
MCLAUGHLIN, WARDEN.

NAHMIAS, Justice, dissenting.

Rather than relying on this Court's more recent precedents, I would follow our earlier holding in *Goodman v. Davis*, 249 Ga. 11, 14 (287 SE2d 26) (1982), and the similar approach taken almost uniformly by federal and state appellate courts across the country, see, e.g., *United States v. Stewart*, 977 F2d 81, 84-85 (3d Cir. 1992); *People v. Howard*, 824 P2d 1315, 1341-1342 (Cal. 1992). I would hold that the trial court's failure to ensure that Lejeune understood his right against self-incrimination at trial before he entered his guilty plea was harmless error because the record as a whole shows that his plea was knowing and voluntary under the totality of the circumstances and therefore constitutionally valid. Accordingly, I dissent.

I am authorized to state that Justices Melton and Blackwell join in this dissent.

IN THE SUPERIOR COURT OF MACON COUNTY
STATE OF GEORGIA

MICHAEL LEJEUNE, GDC #1202226, Petitioner, vs. GREGORY MCLAUGHLIN, Warden, Respondent	* * * * * * *	CIVIL ACTION NO. 2010-CV-446 HABEAS CORPUS

ORDER ON REMAND

Petitioner, Michael LeJeune, filed this petition for a writ of habeas corpus, challenging his 2005 Fulton County guilty plea conviction for malice murder. Based on the record as established at the May 31, 2011, and the January 7, 2015, hearings[1]. in this case, this Court makes the following findings of fact and conclusions of law and DENIES relief.

[1] Citations to the May 31, 2011, evidentiary hearing transcript are "HT1" followed by the page number. The depositions of Brian Steel and Judge Constance Russell are not included in the evidentiary hearing transcript, but are part of the evidence in this case as Respondent's Exhibits 6 and 7, respectively. Citations to the transcript of the June 16, 2011, deposition of Brian Steel are referred to as "Resp. Ex. 6" followed by the page number. Citations to the transcript of the July 1, 2011, deposition of Judge Constance Russell are referred to as "Resp. Ex. 7" followed by the page number. Citations to the January 7, 2015, evidentiary hearing transcript are "HT2" followed by the page number.

PROCEDURAL HISTORY

Petitioner was indicted by the Fulton County grand jury on July 16, 1999 for two counts of malice murder, felony murder, aggravated assault, concealing the death of another, and possession of a firearm during the commission of a crime. (HT1 47-50). The State pursued the death penalty. (Resp. Ex. 6, p. 8). Petitioner's first trial ended in a mistrial due to the courthouse shootings in Fulton County by Brian Nichols. (HT1 33; Resp. Ex. 6, p. 13). Midway through Petitioner's second trial, on November 8, 2005, Petitioner entered a negotiated guilty plea to one count of malice murder, for which Petitioner received a sentence of life without parole. (HT1 17, 45, 52).

Petitioner filed this habeas corpus petition in Chattooga County on September 21, 2009, and raised one ground challenging the voluntariness of his plea. The case was subsequently transferred to this Court. An evidentiary hearing was held on May 31, 2011, at which Petitioner's former plea counsel, August Siemon, testified. (HT1 11). After the hearing, the deposition of Petitioner's former trial attorney, Brian Steel, and of Judge Constance Russell, who presided over Petitioner's guilty plea, were taken and entered into evidence. (Resp. Ex. 6; Resp. Ex. 7).

This Court entered a final order denying relief on November 23, 2011. Petitioner timely filed a notice of appeal and an application for a certificate of probable cause to appeal.

On April 22, 2014, the Georgia Supreme Court granted the application for certificate of probable cause to appeal to determine whether Petitioner's guilty plea was knowingly and voluntarily entered.

After briefing and oral argument, the Georgia Supreme Court announced its decision in November 2014 in which it overruled *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971), and progeny[2], and held that it is in fact the petitioner in a habeas corpus case who bears the burden of proving that his guilty plea was not knowingly and voluntarily entered as opposed to the respondent. *LeJeune v. McLaughlin*, 296 Ga. 291, 294, 766 S.E.2d 803 (2014). Accordingly, the Georgia Supreme Court vacated and remanded the case to this Court, with instructions that a new evidentiary hearing be held to afford Petitioner a "fair opportunity to carry that burden, and to permit the habeas court in the first instance to consider the evidence with a proper understanding of the burden." *Id.* at 299.

This Court held an evidentiary hearing in accord with those instructions on January 7, 2015, at which Petitioner testified. (HT2 6). The parties also relied on and incorporated by reference the evidence presented at the May 2011 hearing.

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[2] *Purvis* and its progeny stand for the proposition that, in habeas actions, the respondent bears the burden of proving that the petitioner's guilty plea was knowingly and voluntarily entered.

VOLUNTARINESS OF THE GUILTY PLEA

In the sole ground asserted in his petition, Petitioner claims his guilty plea was not voluntarily and intelligently entered, in that the trial court did not advise Petitioner of all of the constitutional rights he would be waiving by entering the guilty plea, specifically, that the trial court failed to advise Petitioner of his right against self incrimination.

Findings of Fact

Petitioner was represented on the Fulton County charges by August Siemon and Brian Steel. (HT1 15-16).

Mr. Siemon was admitted to the Georgia Bar in 1976 and, over the course of his career, has handled approximately one thousand criminal cases including trials, guilty pleas, appeals, and petitions for habeas corpus in both state and federal court. (HT1 12). He has also been lead counsel or sat second-chair in around thirty death penalty cases, consulted on at least sixty other death penalty cases, and received the Indigent Defense Award given by the Georgia Association of Criminal Defense Lawyers. (HT1 13-14).

Mr. Steel was admitted to the Georgia Bar in 1991 and has handled hundreds of criminal cases, including death penalty cases, in both state and federal court, and has received awards for his legal work, as well. (Resp. Ex. 6, p. 8).

Mr. Steel and Mr. Siemon worked as a team, but Mr. Steel was recognized as lead counsel. (HT1 16-17; Resp. Ex. 6, p. 9). However, Mr. Siemon worked closely with Mr. Steel through the entirety of the case. (HT1 16). Mr. Siemon helped investigate the case, interviewed witnesses, researched legal issues, and attended all of the court proceedings. (HT1 17).

Petitioner's case first proceeded to a jury trial, which ended in a mistrial prior to the close of the State's case. (Resp. Ex. 6, pp. 13-14). In preparation for the first trial, Petitioner had been informed that it was his choice whether or not to testify. (Resp. Ex. 6, pp. 13-15).

In preparation for the second trial, counsel again discussed with Petitioner whether Petitioner would choose to testify. (Resp. Ex. 6, pp. 15-16). During the second trial, after some incriminating evidence was ruled admissible, Mr. Siemon negotiated a guilty plea deal with the District Attorney. (HT1 19). Mr. Siemon communicated the offer to Petitioner, and Petitioner made the decision to accept the offer and enter a guilty plea in exchange for a sentence less than death. (HT1 19-20).

Prior to entry of the guilty plea, Mr. Steel withdrew from representing Petitioner because of a perceived conflict of interest, and Mr. Siemon represented Petitioner at the guilty plea hearing. (HT1 16; Resp. Ex. 6, pp. 10-11). Mr. Siemon advised Petitioner that Petitioner would be wa[i]ving certain rights by entering the guilty plea. (HT1 21).

At the guilty plea hearing, Petitioner was advised of the charges he was facing, the possible sentences, the terms of the negotiated guilty plea, and that Petitioner was waiving his rights to a trial by jury and to confront his accusers. (HT1 55-56). Petitioner was also advised that, at a jury trial, Petitioner would have the right to testify, but that by entering the guilty plea he would give up that right. (HT1 58). Petitioner acknowledged that he understood the rights he was waiving and he had sufficient time to talk to Mr. Siemon about the case and was satisfied with his legal representation. (HT1 57). A factual basis was given, the court found that sufficient statutory aggravating circumstances warranted the imposition of a sentence of life without parole, and the court sentenced Petitioner as negotiated. (HT1 61).

Conclusions of Law

Under the United States Constitution, the entry of a guilty plea involves the waiver of three constitutional rights: the right to a trial by jury, the right to confront witnesses against the accused, and the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Britt v. Smith*, 271 Ga. 611, 612, 556 S.E.2d 435 (2001). *Boykin* did not establish any particular procedural requirements for accepting guilty pleas, just that the Constitution requires the court "to make sure" that a defendant has "a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244. *See also Johnson v. Smith*, 280 Ga. 235, 236, 626 S.E.2d 470 (2006).

Where the voluntariness of a guilty plea is challenged in a habeas corpus petition, the petitioner bears the burden of proving that his guilty plea was unknowingly and involuntarily entered. *LeJeune*, 296 Ga. at 294, 299. Petitioner has failed to carry that burden to show that his guilty plea was entered without a full understanding of the nature of the offenses he was charged with, without knowing the consequences of entering a plea, and without knowing the rights he was waiving by pleading guilty. The Court does not find it plausible that Petitioner would have proceeded with his death penalty trial but for counsel's purported failure to inform him of his right against self-incrimination. *See Jones v. Leverette*, 230 Ga. 310, 311, 196 S.E.2d 885 (1973) ("even 'the uncontradicted testimony'" of a petitioner need not be accepted by the habeas corpus court.)

The Georgia Supreme Court has consistently interpreted *Boykin* not to require any "precisely-defined language" or "magic words" to convey a defendant's rights to him during a guilty plea proceeding. *Arnold v. Howerton,* 282 Ga. 66, 67, 646 S.E.2d 75 (2013). *See also Wilson v. Kemp* 288 Ga. 779, 780, 707 S.E.2d 336 (2010); *Adams v. State*, 285 Ga. 744, 745, 683 S.E.2d 586 (2009). Rather, the purpose underlying *Boykin* is simply "to ensure a defendant's receipt of adequate information about his rights." *Adams*, 285 Ga. at 745.

At the time Petitioner entered his guilty plea, he had been through years of preparation for a trial in which the death penalty was being sought, two aborted

trials, and finally, after several years, he decided to accept the negotiated plea offer and enter a guilty plea in order to avoid the possibility of a death sentence. *See Parke v. Raley*, 506 U.S. 20, 37 (1992) (a defendant's prior experience with the criminal justice system is relevant to the question of whether he knowingly waived constitutional rights). The Court finds that Petitioner was sufficiently aware of the consequences of entering a guilty plea, and the rights he would be waiving by entering that plea, despite an explicit waiver of his right to remain silent contemporaneously on the record of the plea hearing.

Accordingly, Petitioner's sole ground lacks merit.

CONCLUSION

WHEREFORE, the petition is denied.

If Petitioner desires to appeal this order, he must file an application for certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days after the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Macon County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby directed to mail a copy of this order to counsel for Petitioner, Respondent and the office of the Attorney General of Georgia.

SO ORDERED, this 27th day of March, 2015.

/s/ George M. Peagler
GEORGE M. PEAGLER, JR.
Southwestern Judicial Circuit

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[Certificate Of Service Omitted]

Lejeune v. McLaughlin

S14A1155.

SUPREME COURT OF GEORGIA

296 Ga. 291; 766 SE2d 803; 2014 Ga. LEXIS 938

November 24, 2014, Decided

OPINION

BLACKWELL, Justice.

In November 2005, Michael Lejeune pleaded guilty to murder, was convicted upon his plea, and was sentenced to imprisonment for life without the possibility of parole. Years later, Lejeune filed a petition for a writ of habeas corpus, alleging that his plea was invalid because, he said, he never was advised that, if he instead had insisted upon a trial, he could not have been compelled at that trial to testify against himself. Following an evidentiary hearing, the habeas court denied his petition. Lejeune appeals,[1] and we vacate the decision of the habeas court and remand for further proceedings consistent with this opinion.

1. To properly form the basis for a judgment of conviction, a guilty plea must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U. S. 742, 748 (I) (90 SCt 1463, 25 LEd2d 747) (1970). *See also Hicks v. State*, 281 Ga. 836, 837 (642 SE2d 31) (2007).

[1] Lejeune timely filed an application for a certificate of probable cause to appeal from the decision of the habeas court, *see* OCGA § 9-14-52, and we granted that application.

For a plea to be knowing and intelligent, the accused must have "sufficient awareness of the relevant circumstances and likely consequences" of his plea. *Brady*, 397 U. S. at 748 (I). The circumstances and consequences of which the accused must be aware include the essential constitutional protections that the accused would enjoy if he instead insisted upon a trial, protections that he waives by pleading guilty and consenting to judgment without a trial. *See Schneckloth v. Bustamonte*, 412 U. S. 218, 238 (II)(C) (93 SCt 2041, 36 LEd2d 854) (1973) ("Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them." (Footnote omitted.)). *See also Loyd v. State*, 288 Ga. 481, 485 (2) (b) (705 SE2d 616) (2011). As the United States Supreme Court explained in *Boykin v. Alabama*, 395 U. S. 238 (89 SCt 1709, 23 LEd2d 274) (1969), among these essential protections is the constitutional privilege against compulsory self-incrimination. *See id*. at 243. In this case, Lejeune alleged that his plea was invalid because no one advised him of his privilege against self-incrimination.[2]

In its order denying the petition for a writ of habeas corpus, the habeas court proceeded from the

[2] Lejeune never alleged that his plea was not a voluntary expression of his own choice, that he did not understand the nature of the case against him, nor that he entered his plea without understanding the other constitutional rights that he would have been afforded at trial. His habeas petition was based exclusively on the allegation that he never was adequately advised of his privilege against self-incrimination.

premise that the Warden had the burden of proving that Lejeune entered his guilty plea voluntarily, knowingly, and intelligently, and to carry that burden over the allegations of the petition in this case, the habeas court reasoned, the Warden had to show that Lejeune understood at the time of his plea that, if he had insisted upon a trial, he could not have been compelled at trial to testify for the prosecution. The habeas court concluded in the end that the Warden carried that burden. As a basis for its conclusion, the habeas court appears to have relied in significant part on the fact that the prosecution of Lejeune spanned several years, and it involved numerous pretrial hearings, a trial by jury in March 2005 that ended in a mistrial, and a second trial by jury in November 2005 that was underway when Lejeune pleaded guilty. Whether or not Lejeune was advised of his privilege against self-incrimination at or in connection with the proceeding in which he entered his plea, the habeas court found that he already had an adequate understanding of the constitutional privilege by virtue of earlier events in the course of his prosecution. On appeal, Lejeune contends that a number of these earlier events on which the habeas court relied do not actually support its finding, and we agree.

For instance, the habeas court pointed to three pretrial hearings in which Lejeune (through counsel) asserted his privilege against self-incrimination. But as Lejeune notes, a pretrial hearing is not a trial, and without more, the assertion of the privilege in a pretrial hearing would not necessarily put an accused on notice that he would enjoy the same privilege in other

sorts of proceedings, such as a trial. *See Wilson v. Kemp*, 288 Ga. 779, 780 (727 SE2d 90) (2011) (it is the privilege *at trial* against self-incrimination that is significant for purposes of a guilty plea). *See also Campos v. State*, 292 Ga. 83, 85 (734 SE2d 359) (2012); *Adams v. State*, 285 Ga. 744, 746 (1), n. 3 (683 SE2d 586) (2009). *But see Hawes v. State*, 281 Ga. 822, 825 (642 SE2d 92) (2007). Moreover, the first of these hearings was in December 2001, and the others were in June 2003. Lejeune did not enter his guilty plea until November 2005, nearly two-and-a-half years later. Cf. *Bazemore v. State*, 273 Ga. 160, 162 (1) (535 SE2d 760) (2000) (advice given to petitioner in connection with 1988 pleas did not show that petitioner was aware of his constitutional rights at the time of his 1990 plea). For these reasons, the pretrial hearings on which the habeas court relied do not support its finding that Lejeune understood at the time of his plea that, if he instead insisted upon a trial, he could not be compelled to incriminate himself.

The habeas court also relied on the testimony of attorney Brian Steel – who represented Lejeune in connection with his second trial, but withdrew prior to Lejeune entering his guilty plea – which, according to the habeas court, showed that Steel advised Lejeune of his "*Boykin* rights." But as Lejeune argues on appeal, the habeas court appears to have taken a portion of that testimony out of context and misconstrued it. When Steel was deposed in connection with the habeas proceeding, he was asked on direct examination about the consultations that he had with Lejeune in

connection with the second trial, especially whether he and Lejeune discussed that Lejeune could choose whether to testify at the trial. In response to these questions, Steel said:

> It wasn't ripe yet because [Lejeune] didn't actually – it wasn't the defense case in either trial. I don't know. I mean, I'm very thorough with my clients. So I don't know. I know I did discuss what we would call *Boykin* . . . rights with him because he never accepted a guilty plea when I was defending him.

This is the testimony on which the habeas court relied. But Steel subsequently testified that he never advised Lejeune about the constitutional rights that he would waive by virtue of a guilty plea because, during the time Steel represented Lejeune, "it never got that far." In addition, Steel later testified unequivocally that he had "no memory" of advising Lejeune about his privilege against self-incrimination. And most important, Steel was asked on cross-examination: "And I believe you said on [d]irect that you know that you did *not* discuss the *Boykin* rights with [Lejeune]; is that also correct?" (Emphasis supplied.) To this question, Steel replied: "I feel it's very comfortable, yes." From a consideration of the entirety of his testimony, it seems clear to us that Steel misspoke when he testified on direct examination that he discussed the "*Boykin* rights" with Lejeune in connection with the second trial. The reliance of the habeas court upon that misstatement was clearly erroneous.

2. Because these findings of the habeas court find no support in the record, Lejeune argues that the Warden failed to prove that his plea was voluntary, knowing, and intelligent. Maybe that is so, but it matters only to the extent that the Warden must bear the burden of proving these things. Beginning with *Purvis v. Connell*, 227 Ga. 764 (182 SE2d 892) (1971), we have held in a number of cases that, whenever a habeas petitioner alleges that the plea on which his conviction rests was not voluntary, knowing, or intelligent, the respondent bears the burden of disproving those allegations. That was the premise from which the habeas court proceeded in its consideration of the proof in this case, and it is the premise as well of the argument by Lejeune on appeal that he is entitled to habeas relief. But for the reasons that follow, we now conclude that *Purvis* and its progeny are based on a misunderstanding of *Boykin*, and they are inconsistent with the historical understanding in Georgia of the writ of habeas corpus. Accordingly, we overrule *Purvis* and its progeny, and we hold that Lejeune bears the burden as the petitioner of proving that his plea was not voluntary, knowing, or intelligent.

Our law appears always to have recognized a presumption of regularity with respect to the final judgments of courts of general jurisdiction, *see LeMaster v. Orr*, 101 Ga. 762, 764 (1) (29 SE 32) (1897), and criminal judgments of conviction were no different. *See Wells v. Pridgen*, 154 Ga. 397, 399 (114 SE 355) (1922). When a judgment of conviction was assailed by way of

a petition for a writ of habeas corpus, our law presumed the regularity of the judgment, and it was understood that the petitioner bore the burden of overcoming the presumption. *See*, *e.g.*, *Gay v. Balkcom*, 219 Ga. 554 (134 SE2d 600, 601) (1964); *Stanforth v. Balkcom*, 217 Ga. 816, 816 (125 SE2d 505) (1962); *Solesbee v. Balkcom*, 207 Ga. 352, 353 (1) (61 SE2d 471) (1950); *Wilcoxon v. Aldredge*, 193 Ga. 661, 668 (19 SE2d 499) (1942). And this Court historically treated the presumption as especially warranted when the judgment of conviction was based upon a plea of guilty. *See*, *e.g.*, *Sharpe v. Smith*, 225 Ga. 52, 54 (6) (165 SE2d 656) (1969) ("Since there is a presumption in favor of the validity of a sentence, especially where based upon a plea of guilty, the burden of overcoming this presumption is upon the prisoner." (Citation omitted.)); *Dutton v. Parker*, 222 Ga. 532, 533 (150 SE2d 833) (1966) ("There is a presumption in favor of the validity of sentences and this is especially true where, as here, they are based on pleas of guilty." (Citations omitted.)). Generally speaking, this Court has held to the presumption of regularity, and we have continued in most every context to put the burden upon the petitioner in habeas to show the irregularity of his conviction. *See*, *e.g.*, *Humphrey v. Walker*, 294 Ga. 855, 859-860 (II)(A) (757 SE2d 68) (2014); *St. Lawrence v. Bartley*, 269 Ga. 94, 97 (1) (495 SE2d 18) (1998); *Turpin v. Todd*, 268 Ga. 820, 828-830 (2) (b) (493 SE2d 900) (1997); *Gaither v. Gibby*, 267 Ga. 96, 97 (1) (475 SE2d 603) (1996).

But beginning with *Purvis*, we departed from the usual and settled rule in habeas cases in which the

petitioner claims that his plea was not voluntary, knowing, and intelligent because he entered it without an adequate understanding of an essential constitutional protection, such as the privilege against self-incrimination. Just a few years before *Purvis*, the United States Supreme Court held in *Boykin* that the United States Constitution requires the State to bear the burden of showing on direct review that a plea was voluntary, knowing, and intelligent. *See* 395 U. S. at 242-244. In *Purvis*, we extended this allocation of the burden to habeas cases. Relying exclusively on *Boykin*, we held in *Purvis* that the United States Constitution forbids Georgia courts to indulge the usual presumption of regularity in a habeas case in which the petitioner contends that his plea was not voluntary, knowing, and intelligent:

> We are aware of cases in this state holding that since there is a presumption in favor of the validity of a sentence . . . especially where based upon a plea of guilty, the burden of overcoming this is upon the prisoner. However, this presumption can no longer be indulged with the advent of the *Boykin* case. . . .

227 Ga. at 767 (citations omitted). We failed in *Purvis*, however, to acknowledge that *Boykin* was no habeas case – it was a direct appeal from a judgment of conviction, *see* 395 U. S. at 240-241 – and the United States Supreme Court said nothing in *Boykin* about the burden in habeas proceedings or the presumption of regularity with respect to final judgments of conviction. Considering that failure, the soundness of our

reasoning in *Purvis* always was debatable. In the years after *Purvis*, although we adhered to its holding in a handful of cases, we never elaborated on its reasoning, nor did we articulate any alternative basis for its holding. Instead, in those few cases in which we mentioned *Purvis*, we simply restated its holding without additional comment. *See*, *e.g.*, *Knight v. Sikes*, 269 Ga. 814, 816 (2) (504 SE2d 686) (1998); *Bowers v. Moore*, 266 Ga. 893, 895 (1) (471 SE2d 869) (1996); *Glover v. Jones*, 245 Ga. 848, 849 (268 SE2d 156) (1980); *Roberts v. Greenway*, 233 Ga. 473, 475 (2) (211 SE2d 764) (1975).

In the meantime, the United States Supreme Court decided *Parke v. Raley*, 506 U. S. 20 (113 SCt 517, 121 LEd2d 391) (1992), making clear in its decision that *Boykin* did not, in fact, abrogate the presumption of regularity that attaches to final judgments, and nothing about *Boykin* requires that the State bear the burden of proving the voluntariness of a plea in the context of a collateral attack upon a final judgment:

> To import *Boykin*'s presumption of invalidity into this very different context [of a collateral attack on a conviction] would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the "presumption of regularity" that attaches to final judgments, even when the question is waiver of constitutional rights.

506 U. S. at 29 (II) (B) (citation omitted).[3] After *Parke*, it was apparent that the rule of *Purvis* and its progeny was based on a misunderstanding of federal constitutional law. But when *Parke* was brought to our attention in *Byrd v. Shaffer*, 271 Ga. 691 (523 SE2d 875) (1999), a majority of the Court decided nevertheless to adhere to *Purvis* and its progeny. The majority did so, however, without any meaningful explanation of its decision. The majority instead just stated summarily that the respondent bears the burden in habeas of proving that a plea was voluntary, knowing, and

[3] To be sure, *Parke* involved a recidivist sentencing proceeding in which an earlier judgment of conviction fell under collateral attack, and *Parke* does not directly address the burden of proof with respect to the voluntariness of a plea in habeas. But like the collateral attack in *Parke*, a proceeding in habeas corpus "is a collateral attack that is separate and distinct from direct review, and occurs only after a prisoner has failed to obtain relief by direct appeal. It is not an extension of direct appeal: Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have otherwise become final. . . ." *Gibson v. Turpin*, 270 Ga. 855, 857 (1), (513 SE2d 186) (1999) (citation omitted; emphasis in original). More important, in speaking of the presumption of regularity in *Parke*, the United States Supreme Court made clear that it was speaking of the same presumption long recognized in habeas proceedings: "Although we are perhaps most familiar with this principle in habeas corpus actions, it has long been applied *equally* to other forms of collateral attack." *Parke*, 506 U. S. at 29-30 (II) (B) (citations omitted; emphasis supplied). A number of other courts have recognized that the holding of *Parke* extends to habeas proceedings. *See*, *e.g.*, *Skaftouros v. United States*, 667 F.3d 144, 158 (B) (1) (2d Cir. 2011); *Little v. Crawford*, 449 F.3d 1075, 1080 (III) (A) (9th Cir. 2006); *United States v. Custis*, 988 F.2d 1355, 1363 (III) (4th Cir. 1993).

intelligent, citing authority derived from *Purvis*,[4] and without any citation to *Parke*.[5] *See Byrd*, 271 Ga. at 692-693 (2). Justices Carley and Hines dissented, relying on *Parke*, and arguing that "the petitioner in a habeas corpus proceeding bears the burden of overcoming the presumption of the validity of the conviction and sentence entered on his guilty plea." *Id.* at 696 (Carley, J., dissenting) (citations omitted). Since *Byrd*, we have reaffirmed in a number of cases that the respondent has the burden in habeas to prove that a plea was voluntary, knowing, and intelligent, but we never have articulated any basis for that rule other than our original reasoning in *Purvis*. *See*, *e.g.*, *Tyner v. State*, 289 Ga. 592, 593 (2) (714 SE2d 577) (2011); *Wilson v. Kemp*, 288 Ga. 779, 779 (727 SE2d 90) (2011); *Sentinel Offender Svcs. v. Harrelson*, 286 Ga. 665, 666 (1) (690 SE2d 831) (2010); *Sanders v. Holder*, 285 Ga. 760, 761 (684 SE2d 239) (2009); *Bullard v. Thomas*, 285 Ga. 545, 545 (1) (678 SE2d 897) (2009); *State v. Hemdani*, 282 Ga. 511, 511 & n. 1 (651 SE2d 734) (2007); *Arnold v. Howerton*, 282 Ga. 66, 66 (646 SE2d 75) (2007); *Hawes v. State*, 281 Ga. 822, 822-823 (642 SE2d 92) (2007); *Beckworth v. State*, 281 Ga. 41, 42 (635 SE2d 769) (2006); *Green v. State*, 279 Ga. 687, 688 (620 SE2d 788) (2005); *Baisden*

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[4] The *Byrd* majority cited *Bowers*, 266 Ga. at 895 (1). Like *Byrd, Bowers* summarily stated that the burden is on the State to show that a plea is voluntary, and *Bowers* cited only *Roberts*, 233 Ga. at 475 (2), for that proposition. *Roberts* relied on *Purvis*.

[5] Justice Hunstein concurred, acknowledging that no constitutional law required the State to bear the burden in habeas, but accepting that allocation of the burden as reflecting "the better policy position." *Byrd*, 271 Ga. at 693.

v. State, 279 Ga. 702, 702 (620 SE2d 369) (2005); *State v. Futch*, 279 Ga. 300, 300 (1) (612 SE2d 796) (2005); *Foskey v. Battle*, 277 Ga. 480, 482 (1) (591 SE2d 802) (2004); *Britt v. Smith*, 274 Ga. 611, 616-617 (1) (556 SE2d 435) (2001); *Wetherington v. Carlisle*, 273 Ga. 854, 855 (547 SE2d 559) (2001).

As we noted earlier, that reasoning is quite clearly erroneous. Throughout our history, Georgia law has presumed the regularity of final judgments of conviction, even when those judgments were challenged by way of a petition for a writ of habeas corpus. In *Purvis*, we departed from the presumption of regularity, but *only* because we concluded from *Boykin* that the United States Constitution required such a departure.[6] *Parke* made clear that we had misread *Boykin*, and the United States Constitution does not, in fact, abrogate the presumption of regularity. As a rule of federal constitutional law, the rule of *Purvis* and its progeny is simply wrong, and the dissent does not even attempt to argue otherwise.

Instead, our dissenting colleagues would adhere to *Purvis* and its progeny as a matter of stare decisis. But even the venerable doctrine of stare decisis does not permit us to persist in an error of *federal* constitutional law. *See Oregon v. Hass*, 420 U. S. 714, 719 (II) (95 SCt 1215, 43 LEd2d 570) (1975) (on questions of federal

[6] To the extent that the dissent points to the Georgia Constitution, neither *Purvis* nor any of its progeny suggests that the *Purvis* rule is one of state constitutional law.

constitutional law, state courts must adhere to the decisions of the United States Supreme Court). And in any event, "stare decisis is not an inexorable command." *State v. Jackson*, 287 Ga. 646, 658 (5) (697 SE2d 757) (2010) (citation and punctuation omitted). "When we consider whether an earlier decision ought to be reexamined, we consider a number of factors, including the age of the precedent, the reliance interests involved, the workability of the prior decision, and most importantly, the soundness of its reasoning." *Smith v. State*, 295 Ga. 120, 122 (757 SE2d 865) (2014) (citation and punctuation omitted). We also consider the ease with which the People and their elected representatives might overrule our precedents, if they think them incorrect. *See Georgia Dept. of Nat. Resources v. Center for a Sustainable Coast*, 294 Ga. 593, 601 (2) (755 SE2d 184) (2014) ("The doctrine of stare decisis is always important, but it is less compelling when, as in this case, the issue is the meaning of a constitutional provision. That is because it is much harder for the democratic process to correct or alter our interpretation of the Constitution than our interpretation of a statute or regulation." (Citation omitted.)).

A consideration of the factors that inform the application of stare decisis leads to the conclusion that *Purvis* and its progeny ought to be overruled. First, because those precedents are based on a misunderstanding of *federal* constitutional law, their error is not capable of correction by the People of this State. Second, the reasoning of those precedents is quite obviously unsound, as shown by *Parke.* Third, when the

courts speak of reliance interests in the context of stare decisis, they refer to contract interests, property rights, and other substantive rights. *Jackson*, 287 Ga. at 658(5). *See also State v. Hudson*, 293 Ga. 656, 661 (748 SE2d 910) (2013). The rule of *Purvis* and its progeny implicates no such substantive rights. Fourth, the usual rule in habeas cases – that the petitioner bears the burden of proof – is more workable than the rule of *Purvis* and its progeny, inasmuch as, "in establishing a *Boykin* violation[,] the [petitioner] is the one best situated to know whether his or her rights were infringed in the earlier proceedings." *Nash v. State*, 271 Ga. 281, 285 (519 SE2d 893) (1999) (citation and punctuation omitted). The only factor that points toward continuing adherence to *Purvis* and its progeny is the age of *Purvis.* But without more, that we have been wrong for many years and in many cases is no reason to persist in the error. *See*, *e.g.*, *Center for a Sustainable Coast*, 294 Ga. at 601 (2) (overruling precedent that was "less than 20 years old," and citing cases in which the Court overruled precedents that were 29 and 90 years old); *Hudson*, 293 Ga. at 656-657 (unanimous decision overruling 38-year-old precedent to account for more recent developments in federal constitutional law). We now overrule *Purvis* and its progeny.[7]

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[7] The dissent suggests that our overruling of *Purvis* and its progeny is some sort of novel departure from the usual rule of stare decisis. But this Court – unanimously, in most cases – has not hesitated to overrule longstanding precedents when it has become apparent that they are out of step with recent developments in federal constitutional law, even when our precedents were not themselves, strictly speaking, precedents of federal constitutional

3. "We recognize that, given the clear, though incorrect, mandate of our overruled case law, [Lejeune] may be caught somewhat by surprise with this opinion." *Sosniak v. State*, 292 Ga. 35, 40 (3) (734 SE2d 362) (2012). In the proceedings below, Lejeune and the habeas court both proceeded from the premise that the Warden had the burden of proof. That premise was wrong, and it is Lejeune who has the burden of proving that his plea was not voluntary, knowing, and intelligent. To afford Lejeune a fair opportunity to carry that burden, and to permit the habeas court in the first instance to consider the evidence with a proper understanding of the burden (and without the findings we have held to be clearly erroneous in Division 1), we vacate the decision of the habeas court, and we remand for a new evidentiary hearing consistent with this opinion.[8]

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law, and instead were only influenced by our understanding of federal constitutional law. *See*, *e.g.*, *Hudson*, 293 Ga. at 656-657; *Sosniak v. State*, 292 Ga. 35, 37-40 (2) (734 SE2d 362) (2012). The rule of *Purvis* and its progeny was not just influenced by our (mis)understanding of federal constitutional law; that rule *is* a rule of federal constitutional law, having been adopted only because we thought that *Boykin* required it.

[8] We express no opinion about the nature or quality of the evidence required to carry the burden, and in particular, the extent to which a plea transcript alone, extrinsic evidence, or some combination of the two may be sufficient. *See Parke*, 506 U.S. at 30 (suggesting that extant transcript that is "suspiciously silent on the question [of] whether the defendant waived constitutional rights" might be enough to overcome the presumption of regularity and make out a case that the plea was not voluntary, knowing, and intelligent). We also need not determine at this point whether

Judgment vacated and case remanded with direction. All the Justices concur, except Hines, P.J., Benham and Hunstein, JJ., who dissent.

DISSENT BY: HINES

DISSENT

HINES, Presiding Justice, dissenting.

I respectfully dissent because the opinion of the majority upturns well-established and well-founded Georgia precedent, and, under the facts of this case,

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we should reconsider our recent precedents holding that the failure to advise a pleading defendant of one of the "three *Boykin* rights" can never be deemed harmless error, precedents which appear inconsistent with an earlier decision of this Court, *see Goodman v. Davis*, 249 Ga. 11, 13-14 (1) (287 SE2d 26) (1982), and which also have been subject to some criticism more recently. *See Tyner*, 289 Ga. at 595-596(4) (opinion of Nahmias, J.); *Wilson*, 288 Ga. at 781-782 (Carley, P.J., dissenting). To reach and decide the merits in this case, the dissent would sweep away *Goodman* as an "anomaly," without any discussion of the soundness of its reasoning (including its conformity to the decisions of the United States Supreme Court) or the other factors that inform the application of stare decisis as they relate to *Goodman*, a precedent that has been on the books for nearly as long as *Purvis.* The inconsistency of our more recent cases with *Goodman* will have to be resolved some day, and perhaps in this case, but that is better done on a record following a hearing at which everyone understood the proper allocation of the burden. We remand for development of such a record, and we decline at this point to further address the apparent inconsistency between *Goodman* and the other cases on which the dissent relies.

will result in a legal distinction without an effective difference.

Lejeune was indicted for two counts of malice murder, felony murder, aggravated assault, concealing the death of another, and possession of a firearm during the commission of a crime, and the State sought the death penalty. Lejeune's first trial ended in a mistrial, and it was in the midst of his second trial that Lejeune entered his negotiated plea of guilty to one count of malice murder and was sentenced to life without the possibility of parole. Brian Steel and August Siemon represented Lejeune at both trials, with Steel acting as lead counsel. However, Steel withdrew from the case prior to Lejeune entering his guilty plea, and Siemon alone represented Lejeune at the plea hearing. Lejeune filed the present habeas corpus petition, alleging that his guilty plea was not entered into voluntarily and intelligently because the trial court failed to advise him of all of the constitutional rights he would be waiving by entering the plea. Following a hearing on the petition, the habeas court rejected Lejeune's challenge to the plea and denied the requested relief. This Court granted Lejeune's application for a certificate of probable cause to appeal the denial of his petition for a writ of habeas corpus expressly to determine whether the habeas court properly concluded that Lejeune's plea was knowingly and voluntarily entered. And, that is what this Court should do.

When a criminal defendant challenges the constitutionality of his guilty plea, it is the State's burden to

show that the plea was informed and voluntary, including that the defendant made an articulated waiver of the three constitutional rights set forth in *Boykin v. Alabama*, 395 U. S. 238 (89 SCt 1709, 23 LEd2d 274) (1969), which are the right to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers. *Lewis v. State*, 293 Ga. 544, 545 (748 SE2d 414) (2013).[9] For more than 40 years this Court

[9] The State's burden can be met by showing on the record that the defendant was aware of his rights and that he waived those rights, or by using extrinsic evidence that shows affirmatively that the defendant entered the guilty plea knowingly and voluntarily. *Bazemore v. State*, 273 Ga. 160, 161 (1) (535 SE2d 760) (2000). If the State does not make this showing, the defendant's guilty plea will be deemed invalid. *Id.* It should be noted that more than 30 years ago, *Goodman v. Davis*, 249 Ga. 11 (287 SE2d 26) (1982), issued from this Court. In that case, following pleas of guilty to burglary and aggravated assault on a peace officer, the defendant filed a petition for habeas corpus challenging the validity of his pleas on the bases that at the time he tendered his pleas, the plea court failed to advise him of his right against self-incrimination, and therefore, his pleas were not voluntarily entered. He maintained that under *Boykin* the plea court's failure to determine, on the record, whether he knowingly waived his right against self-incrimination prior to accepting his guilty pleas required reversal and invalidation of the pleas. This Court stated that it did "not read *Boykin* as requiring the invalidation of a voluntarily made guilty plea where the record clearly reflects that the accused fully understands the nature of the charges against him and the consequences of entering a guilty plea, *but the court fails to specifically advise him that he has a right to remain silent prior to accepting the guilty plea.*" *Id.* at 13. (Emphasis supplied.) The Court went on to state that it construed *Boykin* as requiring that there be a sufficient record of the plea proceeding to determine whether the defendant had freely and voluntarily entered the plea, and understood the nature of the charges against him and the consequences of his plea; that Goodman did not allege that he was in any way prejudiced by the failure of the

has firmly held that this is so specifically in the context of a habeas corpus proceeding. Indeed, in 1971, in *Purvis v. Connell*, 227 Ga. 764 (182 SE2d 892) (1971), this Court acknowledged the general burden of the petitioner in a habeas proceeding, but made the deliberate decision to have the State, in a *Boykin* challenge, bear the responsibility of showing voluntariness of the plea not only on direct appeal but also in habeas cases. *Purvis v. Connell*, supra at 767. As acknowledged by the majority, since *Purvis*, this Court has issued a legion of decisions adhering to the determination to have the *Boykin* burden remain the State's in a habeas proceeding. *See*, *e.g.*, *Tyner v. State*, 289 Ga. 592, 593 (2) (714 SE2d 577) (2011); *Wilson v. Kemp*, 288 Ga. 779 (727 SE2d 90) (2011); *Sentinel Offender Services, LLC v. Harrelson*, 286 Ga. 665, 666 (1) (690 SE2d 831) (2010); *Sanders v. Holder*, 285 Ga. 760, 761 (684 SE2d 239) (2009); *Bullard v. Thomas*, 285 Ga. 545 (1) (678 SE2d 897) (2009); *State v. Hemdani*, 282 Ga. 511 (651 SE2d 734) (2007); *Arnold v. Howerton*, 282 Ga. 66, 67-68 (646

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plea court to advise him of his right to remain silent; and that any error in failing to advise Goodman of his right against self-incrimination was, under the facts of the case, harmless. *Id.* at 14. The Court concluded that the record showed that Goodman's pleas were voluntarily entered, and "decline[d] to adopt a rule which would demand that failure to advise an accused of his right against self-incrimination invalidates a guilty plea in a case where the record reflects that the central considerations of *Boykin* have otherwise been met." *Id.* Since *Goodman*, this Court has consistently viewed "advice and waiver of the 'three *Boykin* rights' as a strict constitutional requirement, with reversal the automatic consequence if any deviation is found to have occurred." *Tyner v. State*, 289 Ga. 592, 595 (4) (714 SE2d 577) (2011). Thus, to the extent that *Goodman* is an anomaly, it should be disapproved.

SE2d 75) (2007); *Hawes v. State*, 281 Ga. 822 (642 SE2d 92) (2007); *State v. Cooper*, 281 Ga. 63, 64 (1) (636 SE2d 493) (2006); *Beckworth v. State*, 281 Ga. 41, 42 (635 SE2d 769) (2006); *Green v. State*, 279 Ga. 687 (620 SE2d 788) (2005); *Baisden v. State*, 279 Ga. 702 (620 SE2d 369) (2005); *State v. Futch*, 279 Ga. 300, 301 (1) (612 SE2d 796) (2005); *Foskey v. Battle*, 277 Ga. 480, 482(591 SE2d 802) (2004); *Britt v. Smith*, 274 Ga. 611, 612 (556 SE2d 435) (2001); *Bazemore v. State*, 273 Ga. 160, 161 (1) (535 SE2d 760) (2000); *Byrd v. Shaffer*, 271 Ga. 691, 692 (2) (523 SE2d 875) (1999); *Knight v. Sikes*, 269 Ga. 814 (504 SE2d 686) (1998); *Glover v. Jones*, 245 Ga. 848 (268 SE2d 156) (1980); *Mason v. Banks*, 242 Ga. 292 (248 SE2d 664) (1978); *Andrews v. State*, 237 Ga. 66 (1) (226 SE2d 597) (1976).

This Court's position was not diminished by the Supreme Court's 1992 decision in *Parke v. Raley*, 506 U. S. 20 (113 SCt 517, 121 LEd2d 391) (1992), which dealt with a collateral attack in a recidivist proceeding. In fact, post *Parke v. Raley*, this Court in *Byrd v. Shaffer*, supra, confirmed its intent to require the State to show the voluntariness of a plea in habeas cases.[10] Indeed, the argument for shifting the evidentiary burden

[10] The majority opinion concludes that *Purvis* and its progeny incorrectly apply federal constitutional law, and criticizes this dissent as not attempting to argue otherwise. But, the linchpin of the majority's conclusion that this Court has for decades misapplied federal constitutional law is its unbounded reading of *Parke v. Raley* as a mandate to burden shift when a *Boykin* challenge is made in a habeas proceeding. Moreover, the majority's criticism fails to take into account any impact of the constitutional law of this State. A state high court certainly has the right to interpret its State Constitution to grant individuals more rights than those

was made and soundly rejected. *Id.* at 693 (2). And, while 15 years ago I joined then Justice Carley's dissent in *Byrd v. Shaffer*, I recognize that imposing opposite burdens in a *Boykin* challenge on direct appeal and on habeas may be problematic as a matter of policy and practice.

As noted by Justice Hunstein in her concurrence in *Byrd v. Shaffer*, a habeas corpus proceeding filed by a defendant who pled guilty to the challenged conviction may be different from the situation of a recidivist defendant, in that a habeas petitioner challenging the voluntariness of a guilty plea can raise the issue only if it has not been procedurally defaulted; when a timely direct appeal was not brought from a conviction on a guilty plea, habeas corpus is the only remedy for a criminal defendant who subsequently asserts that his plea was not knowingly and voluntarily entered based on a matter which requires examination of evidence

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provided by the Federal Constitution. *Powell v. State*, 270 Ga. 327, 331, n.3 (510 SE2d 18) (1998). As noted earlier, *Boykin* identifies three federal constitutional rights that are waived when a plea of guilty is entered in a state criminal trial, i.e., the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. The Constitution of the State of Georgia also guarantees those three rights. *See* Ga. Const. of 1983, Art. I, Sec. I, Par. XVI (privilege against self-incrimination); Art. I, Sec. I, Par. XI (right to trial by jury); Art. I, Sec. I, Par. XIV (right to confront adverse witnesses). Indeed, this Court has held that the Georgia Constitution affords broader protection than the federal constitution in regard to the privilege against self-incrimination. *Green v. State*, 260 Ga. 625, 627 (398 SE2d 360) (1990). The protections guaranteed to the citizens of Georgia provide further support for maintaining that the State bear the responsibility for showing the voluntariness of a plea in habeas cases.

outside the record. *Byrd v. Shaffer* at 694. In such a situation, the habeas petitioner essentially is in the same position as a defendant who has directly appealed his guilty plea. *Id.* at 695.

Equally problematic is the majority's abandonment of precedent in this case as it is in flagrant disregard of the important principle of stare decisis and promotes a practice of singular case rule. This Court, and in fact the author of the majority, most recently affirmed the great significance of stare decisis in our system of justice:

> As a general rule, American courts adhere to the principle of stare decisis, which directs the courts to stand by their prior decisions. We have noted that the application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence. As the United States Supreme Court has explained, very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Smith v. State, 295 Ga. 120, 121-122 (757 SE2d 865) (2014) (Blackwell, J.) (citations and punctuation omitted). Certainly, there may be compelling reasons to reexamine an earlier decision. *Id.* at 122. But, there is no such urgent need in this case; our original interpretation of the mandate of *Boykin* is nearly half a century old, and the fifteen-year-old controlling precedent confirming that decision has been imminently workable, and takes into account the important policy considerations outlined above. *Smith v. State*, at 121-122. It also is an acknowledgment of the gravity of a *Boykin* challenge, for advice and waiver of the three *Boykin* rights is a strict constitutional requirement. *Tyner v. State*, supra at 595 (4).

Even if we were to overrule our long standing precedent in this regard, and shift the burden to the petitioner this is not the appropriate vehicle in which to do so, and remand the case for yet another hearing, in that the undisputed record shows a *Boykin* violation. Regardless of who technically had the burden, there was an extensive hearing below, and neither the record of the plea proceeding nor the offered extrinsic evidence permits the legal conclusion that Lejeune was advised of the right against self-incrimination.

As the habeas court expressly concluded, the transcript of the guilty plea hearing clearly reflects that the plea court informed Lejeune of his rights to trial by jury and to confront witnesses against him, and that Lejeune waived these rights. But, the record also plainly reveals that while the plea court did inform Lejeune that he would be giving up the right to testify

during a jury trial, it did not tell him that he would be forfeiting the privilege not to incriminate himself upon entering a guilty plea.[11] Merely informing a defendant of his Sixth Amendment right to testify at trial if the defendant so wishes is insufficient to alert a defendant of his Fifth Amendment right not to incriminate himself. *Hawes v. State*, supra at 825. Nevertheless, the habeas court concluded that after consideration of the guilty plea hearing transcript along with the record, it was "convince[d]" that Lejeune was informed that he was waiving his right not to incriminate himself, was aware of his right against self-incrimination, and knowingly waived that right by entering the guilty plea. In addition, the habeas court concluded that by making the strategic decision to testify during his first trial in 2005, Lejeune understood that he could choose not to testify, and therefore, remain silent at trial. Relying on *Parke v. Raley*,[12]

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[11] The plea judge testified by deposition in the habeas corpus proceeding that she was not aware of any conversations during which Lejeune would have been advised of the rights he was waiving by entering the guilty plea; that if a plea was entered in the midst of a trial, the typical practice was to have any conversations prior to entry of the plea outside the judge's presence and to then "go on the record" for entry of the plea; and that the judge would not participate in pre-trial negotiations or discussions, and would not have off-the-record conversations about "who gets told what" during the course of the plea.

[12] In so doing, the habeas court acknowledged that this Court has rejected the proposition that the State may demonstrate the voluntariness of a plea by showing that the defendant had prior experience in the criminal justice system. *See State v. Futch*, supra at 301 (2); *Foskey v. Battle*, supra at 482 (1); *Bazemore v. State*, supra at 162 (1).

for the proposition that a defendant's prior experience with the criminal justice system is relevant to the question of whether the defendant knowingly waived constitutional rights, the habeas court held that the record and Lejeune's experience throughout the criminal case sufficiently demonstrated that he was aware of the rights he was waiving by entering the guilty plea, and therefore, his guilty plea was knowingly, intelligently, and voluntarily entered.

The habeas court's conclusions were premised upon express findings, which included in relevant part: prior to Lejeune's initial jury trial and at three separate hearings pursuant to the Unified Appeal Procedure at which Lejeune was present, his counsel informed the trial court that Lejeune would exercise his rights under the Fifth Amendment and remain silent; in preparation for the first trial, Lejeune was informed that it was his choice whether to testify; in preparation for the second trial, counsel again discussed with Lejeune whether he would choose to testify and in that exchange "did discuss what we would call *Boykin* . . . rights with [Lejeune]"; prior to the guilty plea, attorney Siemon advised Lejeune that he would be waiving certain rights by entering the guilty plea; Siemon discussed with Lejeune "what would happen when they went before the judge . . . that [Lejeune] would be asked certain questions"; Siemon would "say something about . . . that by entering a guilty plea that would end the trial and there are certain rights associated with the trial that he would waive, although [Siemon] wouldn't necessarily enumerate the rights

without a written plea form"; after having done hundreds of pleas, Siemon did not have a clear recollection of what he advised Lejeune; Siemon "agree[d]" that by entering a guilty plea constitutional rights are waived; Siemon would have advised Lejeune "generally that was the case," advised him "of what he was pleading guilty to," and would talk about the sentence, Siemon stating "I know we did in this case . . . and I think I did all of that."[13]

This Court reviews a habeas court's findings of fact for clear error, and as the majority concedes, certain pivotal findings of fact by the habeas court in this case do not survive such a standard of review. *See Denson v. Frazier*, 284 Ga. 858, 860 (672 SE2d 625) (2009). Furthermore, the habeas court's legal analysis is flawed.

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[13] At the habeas hearing, Siemon testified that other than possible sentences, he was "not sure" of what else he advised Lejeune regarding entry of the guilty plea; that he "essentially" told Lejeune that he would be waiving certain rights by entering the plea but did not "recall specifically" what he advised Lejeune "in terms of any rights that he would have been waiving"; and that as a general practice, he relied on plea forms to advise clients of the specific rights they were about to waive upon entering a guilty plea. In this case, there is no plea form in the record before the habeas court. When asked what he would do without a plea form, Siemon said "I can't, I don't think there's – I don't think I have a usual practice for when there's no plea form because it's so rare not to have a plea form. I think if I had a case where there was no plea form, I would figure that the judge was going to read all of those rights in the record, on the record, and that's why there was no plea form."

First, as stated in the majority, the habeas court's findings regarding Lejeune's exercise of his Fifth Amendment right to remain silent at hearings prior to his first trial do not support the habeas court's conclusions as a matter of law. The phrases "right to remain silent" and "right against self-incrimination" can be synonymous for the purpose of satisfying *Boykin* if it is evident that the reference is to the right to remain silent at trial. *Campos v. State*, 292 Ga. 83, 85 (734 SE2d 359) (2012). That is plainly not the situation here. The cited invocations were before Lejeune's first trial, the most recent made nearly two-and-a-half years prior to the entry of his plea. More significantly, they were made by Lejeune's attorney in direct response to the trial court's inquiries as to whether Lejeune was satisfied with the services of his counsel. As previously noted and acknowledged by the habeas court, mere familiarity with the criminal justice system will not support the determination that a plea was knowing and voluntary. *See* footnote 12, supra.

Second, the habeas court's finding that Lejeune was informed about his choice to testify prior to his first trial does not lend legal support for sustaining the guilty plea. Again, for the purposes of *Boykin*, informing a defendant of his Sixth Amendment right to testify at trial does not equate to knowledge by him of his Fifth Amendment privilege against self-incrimination which is being waived by the plea proceeding. *Hawes v. State*, supra at 825.

The cited statements about attorney Siemon's conversations with Lejeune are at best vague, general, and

speculative, and therefore, do not serve as a legal basis for upholding the plea under *Boykin*. *See Lawrence v. State*, 234 Ga. App. 603 (507 SE2d 490) (1998).

Finally, as also conceded by the majority, the facially favorable finding by the habeas court that in discussion with Lejeune in preparation for his second trial, attorney Steel "did discuss what we would call *Boykin* . . . rights with [Lejeune]" does not withstand scrutiny either. The habeas court expressly noted that the discussion was in the context of whether Lejeune would testify at trial, which might well be insufficient to satisfy the requirements of *Boykin* with respect to the right not to incriminate oneself. *Hawes v. State*, supra at 825. Even more significantly, as highlighted by the majority, examination of this fragment of a deposed statement by Steel in the context of the complete sentence and of Steel's entire deposition testimony makes plain that it was not intended to be an affirmative statement, but quite the contrary, and that at no point did he advise Lejeune that by entering a guilty plea he would waive certain rights. The cross-examination of Steel left no doubt that Steel's direct testimony was negative on the question of whether he had advised Lejeune of the *Boykin* rights. Thus, the habeas court's positive finding in regard to the statement is clearly erroneous, and therefore, not valid factual support for the plea.

In a guilty plea proceeding, there must be affirmative evidence that a defendant's rights were conveyed to him, including that the right against compulsory self-incrimination would be waived by pleading guilty.

State v. Hemdani, supra at 512. This is warranted because

> [t]he waiver of constitutional rights that occurs when a plea of guilty is entered is so great that it demands that utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Bowers v. Moore, 266 Ga. 893, 894 (1) (471 SE2d 869) (1996) (citations and punctuation omitted). In this case, there was no affirmative evidence that either the plea court or trial counsel entered into a colloquy with Lejeune and explained, even in essence, his right against self-incrimination.

Thus, even if the evidentiary burden was Lejeune's, he has carried it, and the judgment of the habeas court should not stand for that reason. The majority seeks to justify remand, in part, to "afford Lejeune a fair opportunity" to once again "carry that burden." This is disingenuous at best. And, it is difficult to fathom the fairness, or indeed reasonableness, in requiring either the prisoner or the State to again plow the same ground of a plea made nearly a decade ago, the circumstances of which have not changed. Neither the case at bar nor the judicial process is served by further hearing in this matter.

I am authorized to state that Justice Benham and Justice Hunstein join in this dissent.

IN THE SUPERIOR COURT OF MACON COUNTY

STATE OF GEORGIA

MICHAEL LEJEUNE, GDC# 1202226,	*	
	*	**CIVIL ACTION**
Petitioner,	*	**NO. 2010-CV-446**
	*	
vs.	*	
	*	**HABEAS CORPUS**
GREGORY MCLAUGHLIN, WARDEN,	*	
	*	
Respondent.	*	

FINAL ORDER

Petitioner, Michael Lejeune, filed this Petition for a Writ of Habeas Corpus, challenging his 2005 Fulton County guilty plea conviction for malice murder. Based on the record as established at the May 31, 2011, evidentiary hearing in this case,[1] this Court makes the following Findings of Fact and Conclusions of Law and **DENIES** relief.

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[1] Citations to the May 31, 2011, evidentiary hearing transcript will hereinafter be referred to as "HT" followed by the page number. The record was left open for transcripts of depositions which are not included in the evidentiary hearing transcript, but are part of the evidence in this case. Citations to the transcript of the June 16, 2011, deposition of Brian Steel will be referred to as "Resp. Ex. 6" followed by the page number. Citations to the transcript of the July 1, 2011, deposition of Judge Constance Russell will be referred to as "Resp. Ex. 7" followed by the page number.

I. PROCEDURAL HISTORY

On July 16, 1999, the Fulton County Grand Jury indicted Petitioner for two counts of malice murder, felony murder, aggravated assault, concealing the death of another, and possession of a firearm during the commission of a crime. (HT 47-50). The State was pursuing the death penalty. (Resp. Ex. 6, p. 8). On November 8, 2005, Petitioner entered a negotiated guilty plea to one count of malice murder, for which Petitioner received life without parole. (HT 45).

Petitioner filed this Petition, through counsel, in Chattooga County on September 21, 2009. The Petition was subsequently transferred to this Court. An evidentiary hearing was held on May 31, 2011.

II. GROUND FOR RELIEF

VOLUNTARINESS OF THE GUILTY PLEA

In Petitioner's sole ground, Petitioner alleges his guilty plea was not voluntarily and intelligently entered in that the trial court did not advise Petition[er] of all of the constitutional rights he would be waiving by entering the guilty plea.

FINDINGS OF FACT

Petitioner was represented on the Fulton County charges by August Siemon and Brian Steel. (HT 15-16). Mr. Steel and Mr. Siemon worked as a team, but Mr. Steel was recognized as lead counsel. (HT 16-17; Resp. Ex. 6, p. 9).

Mr. Siemon was admitted to the Georgia Bar in 1976, and since that time handled numerous federal and state criminal cases, in multiple states, acting as first or second chair in 30 death penalty cases and consulting on 60 or more death penalty cases. (HT 11-15). Mr. Siemon has made presentations on death penalty cases and received awards for his work as a capital defender. (HT 11-15). Mr. Steel became a member of the Georgia Bar in 1991, and since that time handled hundreds of federal and state criminal cases, in multiple states, including death penalty cases, and has been honored as a "Super Lawyer." (Resp. Ex. 6, pp. 7-8).

On December 10, 2001, at a hearing pursuant to the Unified Appeal Procedure, Petitioner, present but through counsel, informed the court that he would "take advantage of his rights under the Fifth amendment of the Constitution of the United States and remain silent. (HT 79-80). Again, on June 9, 2003, at a hearing pursuant to the Unified Appeal Procedure, Petitioner informed the court that he would "exercise his rights under the Fifth Amendment of the Constitution of the United States and remain silent." (HT 156). Again, on June 13, 2003, at a hearing pursuant to the Unified Appeal Procedure, Petitioner, present but through counsel, informed the court that he would "exercise his rights under the Fifth Amendment to remain silent." (HT 241).

Petitioner's case first proceeded to a jury trial, which ended in a mistrial prior to the close of the State's case. (Resp. Ex. 6, pp. 13-14). In preparation for the first trial, Petitioner had been informed that it was

his choice whether or not to testify. (Resp. Ex. 6, pp. 13-15).

Petitioner's guilty plea was taken after a second jury trial had begun. (HT 17-20; Resp. Ex. 6, pp. 13). In preparation for the second trial, counsel again discussed with Petitioner whether Petitioner would choose to testify. (Resp. Ex. 6, pp. 15-16). In discussing whether Petitioner would testify at trial, Mr. Steel "did discuss what we would call *Boykin* . . . rights with [Petitioner]." (Resp. Ex. 6, p. 16).

During the second trial, after some incriminating evidence was ruled admissible, Mr. Siemon negotiated a guilty plea deal with the District Attorney. (HT 19). Mr. Siemon communicated the offer to Petitioner, and Petitioner made the decision to accept the offer and enter a guilty plea. (HT 19-20).

Prior to entry of the guilty plea, Mr. Steel withdrew [from] representing Petitioner because of a conflict of interest, and Mr. Siemon represented Petitioner at the guilty plea hearing. (HT 16; Resp. Ex. 6, pp. 10-11). Mr. Siemon, prior to the plea, advised Petitioner that he would be wa[i]ving certain rights by entering the guilty plea. (HT 21). Mr. Siemon discussed with Petitioner what would happen when they went before the Judge . . . that he would be asked certain questions . . . (HT 22). He then stated in general what questions would be asked and to make sure his client knew how to respond. (HT 22). Further he would say something about . . . that by entering a guilty plea that would end the trial and there are certain rights associated with

the trial that he would waive, although he wouldn't necessarily enumerate the rights without a written plea form. (HT 22). Mr. Siemon testified that, after having done hundreds of pleas, he did not have a clear recollection of what he advised Petitioner. (HT 22, 23).

In further testimony Siemon agrees that by entering a guilty plea you're waiving constitutional rights. (HT 30). He would have advised my client (Petitioner) generally that that was the case. I would advise him of what he was pleading guilty to, we would talk about the sentence . . . I know we did in this case . . . and I think I did all of that. (HT 30).

In summary, at the guilty plea hearing, Petitioner was advised of the charges he was facing, the possible sentences, the terms of the negotiated guilty plea, and that Petitioner was waiving his rights to a trial by jury and to confront his accusers. (HT 55-56 and Resp. Ex. 2 p. 7). Petitioner was also advised that, at a jury trial Petitioner would have the right to testify, *but* that by entering the guilty plea he would give up that right. (HT 58 and Resp. Ex. 2 p. 7) (emphasis added). Petitioner acknowledged that he understood the rights he was waiving and he had sufficient time to talk to Mr. Siemon about the case and was satisfied his legal representation. (HT 57). A [factual] basis was given, the court found that sufficient statutory aggravating circumstances warranted the imposition of a sentence of life without parole, and the court sentenced Petitioner as negotiated. (HT 61).

CONCLUSIONS OF LAW

Under the United States Constitution, the entry of a guilty plea involves the waiver of three constitutional rights: the right to a trial by jury, the right to confront witnesses against the accused, and the privilege against self incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Britt v. Smith*, 271 Ga. 611, 612, 556 S.E.2d 435 (2001).

Petitioner alleges his guilty plea was not voluntarily and intelligently entered, in that the trial court did not advise Petitioner of all of the Constitutional rights he would be waiving by entering the guilty plea. Petitioner does not contend that he was not advised by his counsel of the rights he was waiving, or that he did not know and understand the rights he was waiving. Petitioner's allegation is based on the limited claim that the *trial court did not inform him* of the rights he was waiving.

However, *Boykin* made clear that a waiver of a defendant's constitutional protections may be shown from the record as a whole, either through the transcript of the guilty plea or through extrinsic evidence. *Boykin*, 395 U.S. at 243; *Byrd v. Shaffer*, 271 Ga. 691, 692, 523 S.E.2d 875 (1999); *Roberts v. Greenway*, 233 Ga. 473, 475, 211 S.E.2d 764 (1975). *Boykin* did not establish any particular procedural requirements for accepting guilty pleas. Instead, the judge's constitutional obligation under *Boykin* is only "to make sure" that a defendant has "a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at

244. *See also Johnson v. Smith*, 280 Ga. 235, 236, 626 S.E.2d 470 (2006) ("It is the trial court's duty to ensure that the defendant understands the constitutional rights being waived"). This requirement does not mean that the judge must personally address the defendant in order to determine if the plea is being entered knowingly and voluntarily. *Bailey v. Barker*, 232 Ga. 84, 87 (4), 205 S.E.2d 278 (1974); *Huff v. Barnett*, 230 Ga. 446, 197 S.E.2d 345 (1973).

Accordingly, Petitioner's claim that the trial court did not inform him of the rights he was waiving by entering the guilty plea does not make even a prima [facie] claim that the guilty plea was not knowingly and voluntarily entered.

Nevertheless, where the voluntariness of a guilty plea is challenged, the State or the warden has the burden to establish that the guilty plea was knowingly, voluntarily and intelligently made. *See, e.g., Byrd*, 271 Ga. At 692 (2); *Knight v. Sikes*, 269 Ga. 814, 816 (2), 504 S.E.2d 686 (1998); *Bowers v. Moore*, 266 Ga. 893, 471 S.E.2d 869 (1996). That showing may be made through the transcript of the guilty plea hearing or the use of extrinsic evidence. *Foskey v. Battle*, 277 Ga. 480, 482, 591 S.E.2d 802 (2004); *Byrd*, 271 Ga. At 692; *Bowers*, 266 Ga. At 895; *Jackson v. Hopper*, 243 Ga. 41, 42, 252 S.E.2d 467 (1979); *Roberts*, 233 Ga. At 475.

Here, the transcript of the guilty plea hearing clearly reflects that Petitioner was informed that he was waiving his rights to a jury trial and to confront witnesses. The guilty plea hearing transcript, when

considered with the record convinces this Court that Petitioner was informed that he was waiving his right not to incriminate himself and was aware of his right against self incrimination and knowingly waived that right by entering the guilty plea.

Further, at least three times prior to the entry of the guilty plea, Petitioner was asked questions by the trial court, his attorneys advised the court that Petitioner would invoke his fifth amendment right to remain silent, and Petitioner was not required to speak. Regardless of whether Petitioner's attorneys invoked Petitioner's right following consultation with Petitioner, these exchanges certainly made Petitioner aware that he had a fifth amendment right to remain silent.[2]

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[2] The United State[s] Supreme Court has not recognized a material difference between the terms "privilege against self-incrimination" and "right to remain silent" in the guilty plea conte[x]t. The phrase "privilege against self-incrimination" is not embodied in the Fift[h] Amendment. That phrase was used by the Supreme Court in *Boykin* in identifying the federal constitutional right "that are involved in a waiver when a plea of guilty is entered in a state criminal trial. First, is the privilege against self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth . . . Second, is the right to trial by jury . . . Third, is the right [to] confront one's accusers." *Boykin v. Alabama*, 395 U.S. at 243 (cits. omitted).

The text of the Fift[h] Amendment provides, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land [or] naval forces, or in the 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 he be compelled in any criminal case to**

In addition, Petitioner's attorneys discussed with Petitioner whether or not he would choose to testify at trial. Petitioner made a strategic choice that he would testify, although the trial ended before Petitioner could act on this choice. Implicit in the choice to testify at trial was the understanding that Petitioner could choose not to testify and therefore remain silent at trial.

The United States Supreme Court has held that a defendant's prior experience with the criminal justice system is relevant to the question of whether he knowingly waived constitutional rights. *Parke v. Raley*, 506 U.S. 20, 37 (1992).[3] Here, the record, including Petitioner's experience throughout the criminal case, sufficiently demonstrates that Petitioner was aware of the rights he was waiving by entering the guilty plea, and that the guilty plea was knowingly, intelligently, and voluntarily entered. This Court has considered the Supreme Court of Georgia's recent decision, *Brown v.*

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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. V (emphasis added).

[3] Because this issue rests primarily on federal law, in as much as Georgia court decisions are in conflict with *Parke* and find such evidence insufficient to demonstrate a valid waiver of federal constitutional rights, (*State v. Futch*, 279 Ga. 300 (2005); *Foskey*, 277 Ga. at 482), the Court will rely on the United States Supreme Court's holding as to this issue. *See e.g. Oregon v. Hass*, 420 U.S. 714, 719 (1975) (explaining that a State may not impose greater restrictions as a matter of federal constitutional law when the United States Supreme Court specifically refrains from imposing them).

State, S11A0949, and does not find that this Order is contrary to the ruling in *Brown* (supra).

Accordingly, this claim lacks merit.

CONCLUSION

Wherefore, the Petition for Writ of Habeas Corpus is **DENIED**.

If Petitioner desires to appeal this Order, Petitioner must file an application for a Certificate of Probable Cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this Order. Petitioner must also file a Notice of Appeal with the Clerk of the Superior Court of Macon County within the same thirty (30) day period.

The Clerk of the Superior Court of Macon County is hereby DIRECTED to mail a copy of this Order to Counsel for Petitioner, Respondent, and the Office of the Attorney General.

SO ORDERED this 21st day of November, 2011.

/s/ George M. Peagler, Jr.
GEORGE M. PEAGLER, JR. Judge
Southwestern Judicial Circuit

[SEAL] SUPREME COURT OF GEORGIA
Case No. S16A0072

Atlanta, July 25, 2016

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MICHAEL LEJEUNE v.
GREGORY MCLAUGHLIN, WARDEN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Melton, Nahmias and Blackwell, JJ., who dissent.

SUPREME COURT OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk