No. 16-552

IN THE
Supreme Court of the United States

GREGORY MCLAUGHLIN, Warden

Petitioner,

v.

MICHAEL LEJEUNE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state supreme court, reviewing a state trial court's denial of habeas corpus relief, is permitted, under this Court's precedent in *Boykin v. Alabama*, to find a substantial denial of the prisoner's federal constitutional rights when the prisoner has shown that his plea was not knowing and voluntary because he was not aware of his right against self-incrimination.

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STATEMENT OF THE CASE

The State of Georgia indicted Michael Lejeune in 1999, on six felony counts, including two counts of malice murder. App. to Pet. Cert 7. Six years later, after a mistrial and in the midst of a second trial in which the State sought the death penalty, Lejeune pled guilty to a single malice murder charge and received a life sentence without the possibility of parole. *Id.* It is undisputed that, in that guilty plea colloquy, Lejeune was never expressly advised by the court of his right against self-incrimination, one of the three essential *Boykin* rights. *See Lejeune v. McLaughlin* (*Lejeune I*), 766 S.E.2d 803, 812–813 (Ga. 2014); App.. 48.

After four years in prison, Lejeune filed a timely petition in state court for a writ of habeas corpus alleging that his plea was not knowing and voluntary because he had not been made aware of his right against self-incrimination when he pled guilty, and that his plea was thus invalid under the United States Constitution. App. 45. In May of the following year, the court held an evidentiary hearing on Lejeune's claims, *id.*, at which Lejeune's trial-court attorneys testified that they had no recollection of advising him of his right against self-incrimination, *Lejeune I* at 813 (Hines, J., dissenting), nor did they (or the court) use a plea waiver form, *id.* n.5. Nevertheless, the habeas court denied relief, ruling that Lejeune was aware of his right against self-incrimination from his invocation of it in the context of several pretrial hearings that occurred over two years prior to trial, and that (notwithstanding the

testimony of Lejeune's attorneys to the contrary) his attorneys had advised him of the right against self-incrimination. *Id.* at 803–806.

Lejeune appealed. The Georgia Supreme Court reversed the habeas court's decision on the ground that it was not supported by the record: The pretrial invocation of the right against self-incrimination more than two years prior to his plea was insufficient to conclude Lejeune was aware of that right as to trial, and the habeas court had misconstrued the attorneys' testimony. *Id.* However, the Georgia Supreme Court stopped short of granting habeas because the habeas court had proceeded under the assumption that the State had the burden of showing voluntariness of the plea, consistent with prior Georgia Supreme Court precedent. *Id.* at 806. Rather, the Georgia Supreme Court overturned that prior precedent, finding that, on habeas, the petitioner has the burden to prove the voluntariness of a guilty plea. *See id.* Three justices dissented on the second point, arguing in the bulk of the dissent that the burden should be on the State to show that he was aware of the *Boykin* rights, and adding that "even if the evidentiary burden was Lejeune's, he has carried it," and that it would be unreasonable to require either party to go back and adduce evidence about a plea made "nearly a decade ago." *Id.* at 815 (Hines, J., dissenting).

Due to the changed burden of proof requirement imposed by the Georgia Supreme Court, the case was remanded for further proceedings. *Id.* at 809. On remand, the habeas court again examined the

validity of Lejeune's guilty plea. In addition to reviewing the guilty plea transcript and the testimony of Lejeune's attorneys, the habeas court now had before it Lejeune's testimony, which indicated "that, at the time of his guilty plea, he was not aware of his right against self-incrimination and that, at pre-trial hearings, when his attorneys mentioned his right against self-incrimination, he did not understand what that meant." *See Lejeune v. McLaughlin* (*Lejeune II*), 789 S.E.2d 191, 193 (Ga. 2016). This time, however, the habeas court refused to grant relief on the ground that, "he had been through years of preparation for a trial in which the death penalty was being sought, [including] two aborted trials." *Id.*

The Georgia Supreme Court took up the case for a second time. The court noted that "for a plea to be knowingly and voluntarily entered, a pleading defendant [is] required to know of his 'essential constitutional protections,' including his right against self-incrimination." *Id.* at 192–193. The court noted that the habeas court's second decision was premised solely on Lejeune's general presumed familiarity with the criminal justice system based on his preparation for trial. *Id.* Because that experience with the criminal justice system did not include any prior pleas of guilty, however, it was insufficient to support a conclusion that this experience made him aware of his right against self-incrimination. *See id.* at 193. As a result, "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." *Id.*

One of the questions the Georgia Supreme Court asked the parties to address in *Lejeune II* (and which had been alluded to in *Lejeune I*) was whether the Georgia Supreme Court precedents holding that failure to advise a defendant of one of his *Boykin* rights could never be harmless error were inconsistent with a 1982 decision of the Georgia Supreme Court applying a harmless error standard to the failure to advise a defendant of his right against self-incrimination. *See* Pet. 5. However, the Georgia Supreme Court's ultimate opinion in *Lejeune II* did not directly discuss this broader question, and did not even specify what standard of review it applied. Rather, it held only that, in this case, and on this record, Lejeune's plea was not knowing and voluntary because there was no evidence in the record that he was aware of his right against self-incrimination, and it was therefore constitutionally invalid. *Lejeune II* at 193. Three justices dissented, expressing the view that the Georgia Supreme Court's standard of review was inconsistent with both the prior Georgia Supreme Court and the practices of other state and federal appellate courts. *Id.* (Nahmias, J., dissenting). The Georgia Supreme Court denied a motion for reconsideration. App. 54.

The Warden filed its Petition for Writ of Certiorari to this Court on October 24, 2016. Lejeune requested and received a 14-day extension, through and including December 7, 2016, to file this Brief in Opposition.

ARGUMENT

I. The Split in Authority Alleged in the Petition is Not a Split in the Interpretation of *Boykin*.

Lumping together cases in a variety of contexts and factual scenarios, the Warden contends there is a split in the interpretation of federal constitutional requirements of when a plea is knowing and voluntary. However, the difference between these cases is not a difference as to the core meaning of *Boykin*, but chiefly a difference in the application of *Boykin* and its implications to a variety of other contexts.

A. The Settled Rule of *Boykin* Is That There Must Be Evidence in the Record from Which the Court Can Conclude That the Defendant Was Aware of and Therefore Knowingly Waived Three Important Constitutional Rights.

Boykin generally holds that, as a matter of due process, there must be affirmative evidence on the record that a guilty plea was be "intelligent and voluntary" for it to be constitutionally valid. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). A necessary (but not sufficient) requirement for a plea to be intelligent, or knowing, and voluntary, is that the defendant is aware of and understands three specific constitutional rights that he is waiving, evidence of which was missing in *Boykin*. *See* 395 U.S. at 242. *See also Godinez v. Moran,* 509 U.S. 389, 398 (1993) (holding that the standard of competence for

pleading guilty is the same as the standard of competence to stand trial, because pleading guilty involves waiving the rights enumerated in *Boykin*). *Boykin* holds that the failure of the record to disclose that a defendant was aware of these rights when pleading guilty is plain error requiring reversal. 395 U.S. at 242. Indeed, this Court so held over the objections of Justices Harlan and Black, who complained that the result was a rule that "the Due Process Clause of the Fourteenth Amendment requires the outright reversal of petitioner's conviction," even though "petitioner makes no allegations of actual involuntariness." 395 U.S. at 246–47 (Harlan, J., dissenting). Reversal was required because record was simply silent as to any aspect of Boykin's guilty plea (including the three constitutional rights he purportedly waived). *Id.* at 243.

This Court has long applied the rule that waiver of fundamental constitutional rights is not presumed. *Brookhart v. Janis*, 384 U.S. 1, 4 (2001); *Carnley v. Cochran*, 369 U.S. 506, 515 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is that longstanding rule that animated this Court's decision in *Boykin* that a waiver of the three "*Boykin* rights" cannot be presumed from a silent record. *See* 395 U.S. at 243 n.5. Shortly after *Boykin*, in *Brady v. United States*, 397 U.S. 742 (1970), this Court noted that "[t]he requirement that a plea of guilty must be intelligent and voluntary has long been recognized. The new element added in *Boykin* was the requirement that the record *affirmatively disclose* that a defendant who pleaded guilty entered his plea

knowingly and voluntarily." 397 U.S. at 747 n.4 (emphasis added) (internal citations omitted). That is, *Boykin* combined the longstanding rule that a guilty plea must be knowing and voluntary with the other longstanding rule that a waiver of constitutional rights is not presumed, arriving at a rule that the voluntariness of a plea must be affirmatively shown by the record.

Brady therefore does not undermine the *Boykin* requirement that the defendant actually be aware of his constitutional rights in order for his waiver of them to be valid (although in *Brady*, the defendant's knowledge of his constitutional rights was not at issue—only whether the availability of the death penalty rendered his guilty plea coerced, *see* 397 U.S. at 744). Rather, *Brady* summarizes and reaffirms the *Boykin* rule that the record must affirmatively show the guilty plea was knowing and voluntary. *See id.* at 748 (mentioning specifically the right against self-incrimination and the right to a jury trial and commenting: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and the likely consequences.")

No case from this Court has ever retreated from the *Boykin* holding that a plea is constitutionally invalid if record is silent as to whether the defendant was aware (from some source or experience) of all three constitutional rights before waiving them. Rather, if anything, this Court has recently reaffirmed that basic understanding of *Boykin*. In

United States v. Dominguez Benitez, 542 U.S. 74 (2004), this Court discussed the requirement of showing prejudice to obtain relief for a Fed. R. Crim. P. 11 ("Rule 11") error, and noted:

> This is another point of contrast [between a Rule 11 question and] the constitutional question whether a defendant's guilty plea was knowing and voluntary. We have held, for example, that when the record of the criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights that he was putatively waiving, the conviction must be reversed. *Boykin v. Alabama*. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

542 U.S. at 84 n.10.

In alleging that there is a split in authority warranting a grant of the writ, the Warden cites cases that do not involve interpretation or application of this basic principle in relation to the constitutional validity of a conviction, but rather address other matters related to the plea, or involve different settings where the difference is not the right but the remedy.

B. The Petition Relies on Cases That Do Not Involve an Interpretation of the Constitutional Requirements for Defendant's Waiver of *Boykin* Rights by Pleading Guilty.

Among the cases cited in the Petition, many of them involve allegations that the plea was not knowing and voluntary because of the failure to inform the defendant of some fact *other than* the basic *Boykin* constitutional rights. Another significant group of cases involve solely an interpretation of Rule 11, or its state law equivalent. Neither type of case creates a split in authority regarding the requirement that the defendant be aware of the three constitutional rights enumerated in *Boykin*.

1. Cases Alleging Pleas Were Not Knowing and Voluntary Based on Lack of Knowledge of Facts or Law Besides Constitutional Rights.

One set of cases cited by the Warden involve allegations that a plea was not knowing and voluntary because the defendant was unaware of other facts related to the consequences of conviction. *See, e.g., People v. Fuller,* 793 N.E.2d 526, 539 (Ill. 2002) (admonishment regarding minimum and maximum sentences); *Brady*, 397 U.S. at 749 (involuntariness of plea because of coercive nature of death penalty being an available punishment). These cases are inapposite because they do not involve the defendant's awareness and understanding of the constitutional rights he is waiving by pleading guilty.

Being aware of and intentionally waiving the constitutional rights enumerated in *Boykin* is a necessary, but not sufficient, condition for a plea to be "knowing and voluntary." There may be additional

facts or understandings of the law that may be necessary for a plea to be knowing and voluntary, determination of which is likely to be fact-intensive, based on a totality of the circumstances, such as the charges at issue and the necessary elements, relevant maximum and minimum sentences, particular facts alleged by the prosecution, and defenses potentially available. Whatever standard may apply to the more fact-bound question of whether a plea was knowing and voluntary because the defendant was missing some piece of information about the crimes charged, it is clear from *Boykin* that the defendant must actually be aware of and understand each of the three constitutional rights enumerated in *Boykin* in order to waive them.

In this case, the only question was whether Lejeune was aware of his constitutional right against self-incrimination, one of the three rights enumerated in *Boykin*, when he pled guilty. The trial court did not expressly advise him of this right, and the Georgia Supreme Court held that there was no evidence in the record from which it could conclude that Lejeune was otherwise aware of that right. Cases involving awareness of various other facts related to the consequences of a guilty plea, other than the *Boykin* rights, do not demonstrate that the courts diverge in interpreting *Boykin*.

2. Cases Relying Solely on Federal Rule 11 or State-Law Equivalent.

Rule 11 contains a number of requirements, but these requirements are not by themselves of

constitutional dimension standing alone. *United States v. Timmreck*, 441 U.S. 780, 783–84 (1979) (holding that Rule 11 error, without more, is not cognizable on habeas review). The determination of whether a plea was taken in violation of Rule 11, and what the remedy should be for such a violation, is a matter of this Court's "supervisory power over the lower federal courts." *McCarthy v. United States*, 394 U.S. 459, 464 (1969).

Rule 11(h) contains an express harmless error provision, and thus the analysis in many federal cases about guilty pleas that postdate the addition of Rule 11(h) rely solely on an interpretation of that rule (as well as the consequences of failing to object to violation of that rule), which is not binding on state courts. *Cf.* Pet. at 10 (citing *United States v. Monroe*, 353 F.3d 1346 (11th Cir. 2003) (decision based solely on violation of Rule 11); *United States v. Guichard*, 779 F.2d 1139 (5th Cir. 1986) (same); *United States v. Vallejo*, 476 F.2d 667 (3d Cir. 1973) (same)). Cases that discuss the remedy for failing to comply with Rule 11 (without addressing a constitutional argument) do not conflict with a state habeas case based directly on violation of *Boykin*.

Similarly, state cases that involve interpretation of that state's version of Rule 11 do not implicate Georgia's application of *Boykin* on state habeas.[1] *Cf.,*

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[1] Georgia's plea colloquy rule, Uniform Superior Court Rule 33.8, does not contain a harmless error provision, and nonconstitutional violations of the rule are not cognizable on

Pet. 11 (citing *State v. Hoff*, 814 P.2d 1119 (Utah 1991), *abrogated by State v. Guard*, 371 P.3d 1 (Utah 2015) (interpretation of Utah R. Crim. P. 11(5), Utah Code Ann. § 77–35–11(e) (Supp.1985) (repealed 1990)); *State v. Veney*, 897 N.E. 621, 627 (Ohio 2008) (requiring strict compliance with Ohio Crim. R. 11(C)(2)(c)); *People v. Saffold*, 631 N.W.2d 320, 322 (Mich. 2001) (determining whether failure to strictly comply with Mich. Crim. R. 6.302(B)(3)(c) requires reversal of conviction)).

C. The Petition Also Relies on Cases That Apply a Different Remedy in Different Settings

In asserting that there is a split in the interpretation of *Boykin*, the Warden also conflates right and remedy. As discussed above, a defendant's constitutional rights are violated when the court accepts his plea of guilty without there being evidence in the record that he understood, and therefore knowingly waived, his right against self-incrimination as well as his right to trial by jury and his right to confront his accusers. Many of the cases the Warden cites involve determination of the appropriate remedy for such a violation in settings other than state habeas.

For instance, many of the cases the Warden cites in support of the purported "majority rule" occur in

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state habeas in Georgia, *see Britt v. Smith*, 556 S.E.2d 435, 436 (Ga. 2001), *overruled on other grounds by Lejeune I.*

the context of sentencing enhancement or predicate acts, where another court in a separate proceeding enhances a sentence based on one or more prior convictions based on a guilty plea that the defendant alleges is defective under *Boykin*. *See* Pet. 9–10 (citing *United States v. Stewart*, 977 F.2d 81 (3d Cir. 1992) (sentencing enhancement under Armed Career Criminals Act); *United States v. Simmons*, 961 F.2d 183 (11th Cir. 1992) (sentencing enhancement under 18 U.S.C. § 924(e)); *United States v. Henry*, 933 F.2d 553 (7th Cir. 1991) (sentencing enhancement under Armed Career Criminals Act); *United States v. Freed*, 703 F.2d 394 (9th Cir. 1983) (conviction for possession of a firearm as a convicted felon, using challenged conviction as the predicate for the charge); *People v. Howard*, 824 P.2d 1315, 1341–42 (Cal. 1992) (admission supporting special finding of prior conviction to enhance a sentence). *See also* Pet. 11 (citing *Lacy v. People*, 775 P.2d 1 (Colo. 1989) (habitual criminal sentencing enhancement); *State v. Balsano,* 11 So.3d 475 (La. 2009) (fourth offense enhancement for three prior DUI's); *State v. Olson*, 544 N.W.2d 144 (N.D. 1996) (sentencing enhancement for two prior DUI's)).

As this Court noted in *Parke v. Raley*, 506 U.S. 20 (1992), where the defendant is not actually attacking the convictions themselves, but instead is attacking their use to enhance a sentence in a collateral proceeding, it "defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability was due to governmental misconduct) that the defendant was not advised of his rights." *Id.* at 30 (noting that the transcripts of

the earlier plea colloquies in this case did not exist and that plea proceedings in Kentucky are not always transcribed). Rather, when collaterally attacking the plea in a sentencing enhancement setting, the burden is properly on the defendant to show that the plea was not knowing and voluntary due to the evidentiary challenges presented by a separate and unrelated proceeding. *Id.* at 29.

This Court's precedents show that state courts may require a different standard in a sentencing enhancement proceeding. In addition to rejecting a challenge as to the burden of proof, *Parke* also upheld the state court's decision against a challenge regarding the *measure* of proof, noting that "*Boykin* did not address the measure of proof [for when an extant record would be insufficient to support a knowing and voluntary waiver], and even if it had, it would not necessarily follow that the same standard would apply in recidivism proceedings." *Id.* at 34. Indeed, the Court observed that the level of proof required by state courts in recidivism proceedings was "far from uniform" and required anywhere from a preponderance to clear and convincing evidence, none of which this Court considered to rise to a level of constitutional concern. Further, *Custis v. United States*, 511 U.S. 485 (1994), notes a distinction between collateral attack in a habeas setting, and collateral attack on underlying convictions used for sentencing purposes, which is unavailable if not expressly authorized by the sentencing statute. *See* 511 U.S. at 497 (holding that collateral attack of underlying state-court convictions based on *Boykin* was unavailable for sentences enhanced under 18

U.S.C. § 924(e); rather, defendant's remedy was to attack the convictions in state or federal habeas review).

Accordingly, to the extent that state and federal courts apply a more forgiving standard in sentencing enhancement proceedings for whether to rely on prior convictions based on guilty pleas that allegedly violate *Boykin*, that does not inform whether a state court may grant habeas based on such a violation. Therefore, there is no split created by these cases: They are simply inapposite.

Ultimately, the Petition cites no state habeas case involving a decision whether a guilty plea is valid under *Boykin* outside of the sentencing enhancement context. In fact, the only habeas case it cites that does not involve an enhancement for a prior conviction is *Neyland v. Blackburn*, 785 F.2d 1282 (5th Cir. 1986), a federal habeas case reviewing a state court conviction. Importantly, *Neyland* noted that the Louisiana Supreme Court had held that the *Boykin* rights "must be specifically stated and waived," but that "any complaint of the failure of the Louisiana trial court which accepted Neyland's plea to comply with Louisiana's interpretation of *Boykin* is a matter for resolution only by the Louisiana courts." *Id.* at 1289. Likewise, as was clear from the question the Georgia Supreme Court asked the parties to address in *Lejeune II* (but which it ultimately did not address in its opinion), the question of whether the Georgia state habeas *remedy* is appropriate when there is an undisputed violation of a federal constitutional right is a question for the

Georgia courts, and does not impact the federal circuits or other states.

II. The Rule Applied in Most Cases Where One of the *Boykin* Rights Was Actually at Issue is the Essentially the Same in Substance as the Rule Applied in Georgia.

Most of the cases cited in the Petition are simply inapposite, as described above. But even to the extent that the cases cited actually involve an interpretation of what *Boykin* requires for a guilty plea to be constitutionally valid, the test applied in most courts is not significantly different from that applied by Georgia, and any differences are insufficient to support a grant of *certiorari*.

A. The Standard Applied by the Georgia Courts Is Not a Strict Rule Requiring Reversal Whenever a Trial Court Does Not Advise the Defendant of His Rights.

To obtain habeas relief in Georgia courts, the prisoner must show that "in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state." O.C.G.A. § 9-14-42. Thus, presumably, when the Georgia Supreme Court reverses a denial of habeas relief, it is determining that the denial of the defendant's rights was substantial—essentially the same standard as Fed. R. Crim. P. 52(a) (errors that do not "affect substantial rights" are harmless and must be disregarded). Proving this level of error in Georgia is

no easy task. As the Georgia Supreme Court held as a matter of state law in *Lejeune I*, consistent with *Parke v. Raley*, the burden is on the prisoner in a Georgia habeas proceeding to show that his plea was not knowing and voluntary because it was taken without an understanding of the three constitutional rights he was waiving. A habeas petitioner cannot obtain relief merely by showing the absence of a specific incantation of rights at the plea colloquy; extrinsic evidence in the record can support an inference that the petitioner was aware of his *Boykin* rights at the time he pled guilty. *See, e.g., Brown v. State*, 718 S.E.2d 1, 2–3 (Ga. 2011) (finding valid waiver of *Boykin* rights despite the trial court's failure to inform the defendant of his *Boykin* rights at the plea colloquy, because the record showed that defendant signed a waiver-of-rights form waiving his *Boykin* rights and that defense counsel reviewed the form and its meaning with defendant).

Naturally, in assessing the validity of guilty pleas, the Georgia Supreme Court first looks to the plea colloquy to see if the trial court informed the defendant of the waiver of *Boykin* rights. *See, e.g., Wilson v. Kemp,* 727 S.E.2d 90, 90 (Ga. 2011), *overruled on other grounds by Lejeune I.* Even if the trial court does not discuss the *Boykin* rights with the defendant in the plea colloquy, however, extrinsic evidence may also demonstrate that the defendant knowingly waived his *Boykin* rights. *See, e.g., Mims v. State,* 787 S.E.2d 237, 241–42 (Ga. 2016) (acknowledgement and waiver-of-rights form signed by defendant and defense counsel, along with order of plea judge entered contemporaneously with the

plea, established valid waiver of *Boykin* rights). Georgia courts regularly sustain guilty plea convictions involving a faulty plea colloquies by finding that extrinsic evidence proved the defendant knowingly waived his *Boykin* rights. *See Burch v. State*, 750 S.E.2d 141, 142 (Ga. 2013) (Validity of guilty plea shown by extrinsic evidence of waiver form, certification of counsel, and contemporaneous order of plea judge); *Brown*, 718 S.E.2d at 2–3 (waiver form, defendant's testimony, and certification of counsel that defendant read and understood plea form); *State v. Cooper*, 636 S.E.2d 493, 495 (Ga. 2006) (plea form and evidence that defendant read and understood plea form); *Beckworth v. State*, 635 S.E.2d 769, 770 (Ga. 2006), *overruled on other grounds by Lejeune I* (proper waiver form and testimony of defense counsel); *Spencer v. State*, 398 S.E.2d 179, 188 (Ga. 1990) (plea questionnaire, certification of counsel, contemporaneous order of plea judge, and judge's recollection). The court will reverse a conviction or grant habeas relief only if, with respect to one or more of the defendant's *Boykin* rights, it finds no evidence in the record showing the defendant knowingly waived that right. *See, e.g., Bowers v. Moore,* 471 S.E.2d 869, 872 (Ga. 1996), *overruled on other grounds by Lejeune I* (no *Boykin* discussion in plea colloquy and no extrinsic evidence presented).

The Warden suggests from its Statement of the Case that *Lejeune II* relied on a longstanding and express rule that "the advice and waiver of the three *Boykin* rights is a strict constitutional requirement and reversal is automatic if there is any deviation,"

Pet. 6, thus creating a split with federal courts and a majority of state courts. But a review of *Lejeune I* and *Lejeune II* reveals no such stark rule being applied by the Georgia Supreme Court in this case, and the cases the Warden cites present no more stark a constitutional rule the other direction. Rather, these cases are, for the most part, consistent with the essential rule in *Boykin*: that there must be evidence in the record from which the court can conclude the defendant was actually aware of all three *Boykin* rights in order to hold that a guilty plea waiving those rights was knowingly and voluntarily made.

B. Any Difference in the Constitutional Standard Courts Apply to *Boykin* Errors Is Not Substantial.

The Warden is concerned that state courts will invalidate guilty pleas that federal courts would uphold. Pet. 12. Not only, as discussed *supra*, is this concern flawed because it assumes state courts must follow a standard governed by *federal* rules of procedure; this concern is also unsupported by the evidence. Georgia courts consider the same evidence other courts consider, and there is little difference in the outcomes between Georgia cases and other state cases.

When considering the constitutional validity of pleas in relation to *Boykin* errors, other courts agree that *Boykin* requires the record to show that a guilty plea was entered into knowingly and voluntarily. If a defendant was not actually aware of his *Boykin*

rights, his guilty plea fails to satisfy constitutional requirements because it was not "knowing." In assessing a defendant's awareness of his waiver of *Boykin* rights, other courts, like Georgia's, consider evidence outside the defendant's plea colloquy with the judge at his plea hearing.

Several courts have noted the clearest path to determining a defendant's awareness of his *Boykin* rights is the record of the plea colloquy with the trial judge; however, in determining whether a *Boykin* error occurred, courts do not require "letter-perfect" advisement during the plea colloquy. *See, e.g., Guichard*, 779 F.2d at 1141; *Brown,* 718 S.E.2d at 3 ("Nothing in *Boykin* requires the use of any precisely-defined language or 'magic words' during a guilty plea proceeding.").

This is the rule applied by most state courts. *See, e.g., State v. Chervenell*, 662 P.2d 836, 839 (Wash. 1983) (allowing reference to extrinsic evidence to determine whether defendant was aware of *Boykin* rights); *State v. Smith*, 668 N.W.2d 482, 487–488 (Neb. 2003) (referencing plea checklist in addition to transcript of group plea colloquy to support validity of guilty plea). Only a very small minority of states require the trial court to orally instruct the defendant of her Boykin rights, and even then, these "strict compliance" cases appear to be decided under state versions of Rule 11 that serve as prophylactic protection of defendants' *Boykin* rights. *See, e.g., Hoff*, 814 P.2d at 1119 (referencing requirement of strict compliance with Utah Rules of Criminal Procedure); *Veney*, 897 N.E.2d at 627 (requiring

strict compliance with Ohio Crim. R. 11(C)(2)(c)); *Saffold*, 631 N.W.2d at 322 (determining whether non-strict compliance with Mich. Crim. R. 6.302(B)3)(c) requires reversal of conviction). And even Ohio, which requires strict compliance with its version of Rule 11, allows reference to portions of the record beyond the plea colloquy to determine constitutional validity of a plea when the colloquy transcript is ambiguous, and generally allows imprecise recital of the *Boykin* rights to support a plea. *See State v. Barker*, 953 N.E.2d 826, 831 (Ohio 2011).

The Warden asserts that Georgia applies an "inflexible" standard, Pet. 11, but Georgia case law shows that its analysis of *Boykin* errors does not differ substantially from the bulk of the state court cases. For example, this past June, the Georgia Supreme Court affirmed a conviction despite there being no explicit advisement of the *Boykin* rights at the defendant's plea colloquy. *See Mims*, 787 S.E.2d at 240. In accord with its prior precedent, the court found that the written plea and acknowledgment-of-waiver form bearing the signatures of the defendant and his trial counsel, and the contemporaneous order of the plea judge, demonstrated that the defendant was aware of the waiver of his *Boykin* rights. *Id.* at 242. *See also Burch,* 750 S.E.2d at 142; *Beckworth*, 625 S.E.2d at 770; *Spencer,* 398 S.E.2d at 188.

The California Supreme Court case cited by the Warden, *People v. Howard*, illustrates that there is little distinction between Georgia's standard and the standards applied by the cases the Warden cites. In

Howard, the California Supreme Court held that, for an admission of a prior criminal conviction (to enhance a sentence) to be valid, the record must affirmatively show that the defendant made that admission intelligently and voluntarily. *See* 824 P.2d at 1339. Though Howard was not informed in so many words of his right against self-incrimination, the record did contain a colloquy with the trial judge in which Howard acknowledged that he was waiving the right to force the district attorney to prove his prior conviction. Therefore, the California Supreme Court concluded that, while the trial judge did not use the "talismanic phrase 'right not to incriminate himself'" in the plea colloquy, *see id.* at 1343, the record did affirmatively demonstrate waiver of *that specific Boykin* right. *Id. Howard* therefore supports the continuing vitality of the position that a defendant pleading guilty must be aware of *each* of his *Boykin* rights.

Not only is this the rule applied in most state courts, it is also the rule applied in several of the federal circuit cases The Warden cites. *See, e.g., Stewart*, 977 F.2d at 85 (upholding plea despite no specific articulation of *Boykin* rights, where defendant had an extensive plea colloquy in another case in which the *Boykin* rights had been discussed on the record just six weeks earlier); *Neyland*, 785 F.2d at 1287 ("The guilty plea form signed by petitioner and initialed after each statement, and likewise signed by his counsel, indicates that the petitioner understood that he was waiving rights to trial and appeal . . . ."). This contradicts the Warden's claim, *see* Pet. 12, that a failure to grant

certiorari would allow states to continuously invalidate convictions that federal courts would uphold as constitutional.

III. The Standard Applied by the Georgia Supreme Court to *Boykin* Errors is Consistent with This Court's Precedent, and Therefore This Case Is Not an Appropriate Vehicle for *Certiorari*.

Whatever the courts of other states or the federal circuits may hold, the Georgia Supreme Court's decision is consistent with this Court's precedent. In *Boykin*, this Court held that the absence of any record demonstrating that the defendant was aware of his right to a jury trial, right to confront his accusers, and right against self-incrimination was actually reversible on a *plain* error standard. 395 U.S. at 241–42. Subsequent cases from this Court do not diverge from the essential constitutional rule that, where there is no evidence from which the court can conclude that a defendant was aware of all three of his *Boykin* rights and thus knowingly and voluntarily waived them, the plea is constitutionally suspect. See *Dominguez Benitez*, 542 U.S. at 84 n.10.

The Georgia Supreme Court engaged in that same analysis in this case. The transcript of the plea colloquy showed that Lejeune had not been informed of all three *Boykin* rights. The court then looked to the extrinsic evidence. It considered testimony of Lejeune and his trial counsel, and found they demonstrated he lacked awareness of his waiver of his right against self-incrimination. The court also considered Lejeune's prior experience with the

criminal justice system. The court found that the facts of this case showed Lejeune did not enter into his plea agreement with a full understanding of the consequences of the plea because he was not aware of his waiver of his right against self-incrimination. This holding is entirely consistent with this Court's precedent set in *Boykin* and *Brady*.

In sum, the Georgia Supreme Court's precedent is entirely consistent with the precedent established by this Court, which it followed in reaching its decision in this case. Even if there were a split in the authority of other courts regarding *Boykin* errors, this case is not the right vehicle for addressing such a split.

CONCLUSION

Accordingly, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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