No. 20-7551

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS ROGER BOLZE – PETITIONER

vs.

WARDEN, FCI COLEMAN LOW/STATE OF TENNESSEE- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE:

When a State intentionally abandons State law and deprives an individual of counsel during a critical stage in the criminal proceedings, does the state court lose subject-matter jurisdiction over the criminal case? and,

QUESTION TWO:

Is 28 U.S.C. §2254's limit constitutionally valid when its enforcement results in an individual's detention without a lawful reason, i.e. a valid criminal judgment creating a fundamental miscarriage of justice in the process?

LIST OF PARTIES

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

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CASES FROM THE STATE OF TENNESSEE CRIMINAL COURT OF APPEALS

APPLICABLE STATE LAW OF TENNESSEE

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below:

As it relates to cases from federal courts:

The opinion of the United States court of appeals appears at Appendix E to the petition and is published at *Bolze v. Warden*, 2019 U.S. App. LEXIS 20626, No. 20-5114 (6th Cir. July 1, 2020).

The opinion of the United States district court appears at Appendix D to the petition and is reported at *Bolze v. Warden*, 2019 U.S. Dist. LEXIS 215912, No. 3:19-cv-00369 (E.D. Tenn. December 16, 2019).

As it relates to cases from State of Tennessee courts:

The opinion of the State of Tennessee Criminal Court of Appeals and the Supreme Court of the State of Tennessee appears at Appendix C to the petition and is published at *Bolze v. State*, E2018-01231-CCA-R3-PC (Tenn. July 17, 2019).

The opinion of the original State of Tennessee Criminal Circuit Court for Sevier County appears at Appendix C of the petition and remains unpublished at this time.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 7, 2020.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 26, 2021 and a copy of the order denying rehearing appears at Appendix F.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented concerns the abandonment by the Judiciary of the State of Tennessee Legislative's mandates under Tenn. Code Ann. 8-14-206(a)-(b) for criminal court to follow during all felony prosecutions. These mandates are consistent with a defendant's rights of counsel his right of self-representation, and his right against self-incrimination encapsulated within the Tennessee Constitution, the United States Constitution's Fifth, Sixth, and Fourteenth Amendment Right to Due Process and the United States Supreme Court's long settled precedents. The trial court loses its jurisdiction to reach a valid conviction when it fails to enforce a defendant's right to due process before accepting a plea of guilt. The resulting conviction and its judgment are void without legal effect.

The questions also concern the proper application of Tenn. Code Ann. 30-40-102(a) involving a post-conviction claim. A post-conviction claim is only valid – if – there is a valid conviction in the first instance. While Tenn. Code Ann. 40-30-103 mandates relief from a void or avoidable conviction. 28 U.S.C. §2254 statute of limitation is not applicable when the State conviction has no legal effect.

A district court's review is limited, by statutory construction to valid post-conviction claim where a procedural default exists and where the State courts did not adjudicate the merits of the trial court's abandonment of State law to reach a void conviction. The district court should have invoked the pre-AEDPA modified standard of review because the State Criminal Court of Appeals did not attempt to reach the merits of the Constitutional issues presented.

STATEMENT OF CASE

1). In May of 2001, Bolze was indicted by the Sevier County Grand Jury on sixteen (16) counts of Failure to File Sales Tax Return – a Class E felony in the State of Tennessee. *Appendix ("Appx.") A* at **7-24**. The July 2, 2001 arraignment sheet indicated that he stated he was not guilty and had "[a]ppeared [without] counsel, but will retain counsel, 15 days allowed [.]" and a change of plea hearing was scheduled. *Id.* at **27**.

2). On August 28, 2001, Bolze appeared at the change of plea hearing, without retained counsel. Bolze executed two State offered forms: a Waiver of Jury Trial and Entry of Guilty Plea. The waiver forms indicate Bolze acted pro se. *Id.* at **28-30**.

3). The certified state trail record clearly indicates Bolze never sought appointed of counsel, appointment of side-counsel, or was there any appearance of counsel. The trail record does not indicate whether the state court inquired into a lack of counsel – contrary to state law. The court also did not confirm that he agreed to waive his right of counsel, or require Bolze to execute an "in written" waiver of right of counsel, placing both in the trial record as mandated by State law. *Id.* at **1-6.**

4). The plea provided that Bolze would be sentenced to two year for each Class E felony conviction in Counts 1 through 4, with one count served consecutively, for an aggregate sentence of six years probation. The remaining counts were nolle prosequied. *Id.* at **28**.

5). The trial court accepted the plea and entered judgments, the top right of each judgment form indicating that Bolze was pro se. *Id.* at **28-45**.

6). In late 2010, Bolze plead guilty in federal court and was sentenced for financial crimes. He was appointed counsel. Evidence indicates neither trial or appellate counsel investigated the known prior uncounseled, unwaived right of counsel and unwaived right against self-incrimination state conviction. Bolze's criminal history scoring was enhanced based on the unchallenged prior conviction resulting in 117 months of heightened imprisonment. *See* ***United States v. Bolze***, 3:09-cr-00093 (E.D. Tenn. 2009).

7). In early 2011, Bolze attempted to secure copies of the state trial court's records along with a copy of the transcripts of the proceedings. *See Appx. A* at 49-51; *also see Appx. H*; Affidavit of Dennis R. Bolze at 1-4, citing **101-123** Correspondences between Bolze and Clerk's Office.

8). In 2012, after the Supreme Court denied a Writ of Certiorari, a timely 28 U.S.C. §2255 was filed seeking relief from the uncounseled, unwaived right of counsel and right against self-incrimination state conviction sentencing enhancement. See ***Bolze v. U.S.A.,*** 3:09-cr-00093; Docs. 109-112 (E.D. Tenn. 2012). In late 2015, while still pursuing copies of the transcripts from the state clerk's office, the habeas court only determination was the "[c]onvictions derived from the voluntarily-entered plea of a non-indigent pro se defendant are wholly consistent with the Sixth Amendment." *See Id.* at Doc. 145; §2255 Opinion at 37. In doing

so, the habeas court failed to reach the merits of whether the state trial court had, in fact, secured an "in writing" waiver of right of counsel or right against self-incrimination before allowing Bolze to proceed with self-representation. The habeas court denied an evidentiary hearing for Bolze to offer his proof.

9). For over 6 years, while pursuing his claim of constitutional error in federal court, evidence indicates the State Clerk's Office had continued to "impede" Bolze's ability to obtain a copy of the transcripts of the proceedings by insisting it was "still searching for the cassette." *Appx. H* at **101-124**.

10). In 2017, after the Supreme Court denied a Writ of Certiorari based on the §2255 petition, Bolze moved in state court to vacate the otherwise void or avoidable judgment. The Criminal Circuit Court denied the motion as time-barred and affirmed on reconsideration. The initial post-conviction ruling did not include any analysis of the merits of the sentencing court's abandonment of established state law. *Appx. B* at **52-53**.

11). A timely appeal was filed in the State Criminal Court of Appeal, where the appellate court affirmed the lower court's opinion without reaching for the merits of the case. *Appx. C* at **54-60**; citing *Bolze v. State*, E2018-01231-CCA-R3-PC (Tenn. July 17, 2019). The Supreme Court for the State of Tennessee declined to consider the case. *Id.* at **61-62**.

12). On August 19, 2019, a pro se 28 U.S.C. §2254 was timely filed in federal court raising he same violations of state law. On December 16, 2019, the district court denied an evidentiary

hearing based on the AEDPA time-bar without determining whether the state highest court to hear the case had adjudicated the case based on its merits – that is: whether a fundamental miscarriage of justice or a violation of the right to due process including violations of settled state law existed to allow an evidentiary hearing to offer proof. *Appx. D.* at **63-71**

13). On January 23, 2020, a timely pro se notice of appeal was filed raising the same violations of state law and errors of both the state and federal Constitutions. *See* ***Bolze v. Warden***, 3:19-cv-00369 (E.D. Tenn. Jan. 23, 2020.

14). The Sixth Circuit denied a Certificate of Appealablity ("COA") on July 1, 2020 [*Appx. E* at **22-75**] and denied en banc rehearing on February 23, 2021. *See Appx. F* at **76-77**. The appellate court also did not address the merits of the underlying Constitutional errors or the fact the State Criminal Court failed to subscribe to the intent of the Legislative's enactment of Tenn. Code Ann. 8-14-206.

REASON FOR GRANTING THE WRIT

QUESTION ONE

WHEN A STATE INTENTIONALLY DEPRIVES AN INDIVDUAL OF A STATE LEGILATURE'S MANDATE FOR A RIGHTOF COUNSEL OR HIS RIGHT AGAINST SELF-INCRIMINATION DURING THE CRITICAL STAGE IN THE CRIMINAL PROCEEDINGS, DOES THE STATE COURT LOSE SUBJECT-MATTER JURISDICTION OVER THE CRIMINA CASE?

I: FACTUAL BACKGROUND:

A factual basis was established through the "complete" certified Technical Record[1] from the Circuit Court of Sevier County at Sevierville, Tennessee which clearly indicates: (1) On May 30, 2001, Bolze was indicated for sixteen (16) counts of Failure to File Sales Tax Return – a Class E felony; *Appx A* at **7-24**; (2) on July 7, 2001, an initial appearance was made in Case No. 8611 where Bolze, appearing without counsel, was allowed 15 days to retain one. *Id.* at ***27;*** (3) On August 28, 2001, Bolze again without an appearance or counsel or otherwise, and without an "[i]n writing wavier" waiving his right of counsel and without waiving his right against self-incrimination, entered a State offered plea agreement along with a Waiver of Jury Trial form. *Id* at **28-30**; and (4) the trial judge accepted the State's offered executed forms and sentenced Bolze to six (6) years of imprisonment, suspended with an oversight term depriving Bolze of his personal liberties. *Id.* at **28-45**. **The conviction is void due to the trial court lost of jurisdiction to reach a constitutionally valid conviction and has no legal effect.**

[1] *See Appx. A at* **49-51**; *Appx. H* at **101-123** showing correspondences between Bolze and Clerk's Office and where the Clerk's Office stated that the "complete" trial record was being provided to Bolze.

II: THE STATE OF TENNESSEE'S LAW REGARDING CRIMINAL PROCEEDINGS

Certainly a federal district court would determine a guilty plea was defective under federal law, by relying on the facts and the Supreme Court's holdings in ***Boykin v. Alabama,***[2] ***Johnson v. Zerbst,*** *and* ***Gideon v. Wainwright*** among others. Tennessee law, however, requires more than federal law in ensuring a felony criminal defendant either has counsel or has properly waived counsel to proceed under self-representation before accepting a plea of guilt. In this regards, the Tennessee Legislature mandated in Tenn. Code Ann 8-14-206(a)-(b) three provisions of law – i.e. the Waiver of Right of Counsel – the Writing – and the Procedure for Acceptance as follows:

> (a). "[N]o person in this state shall not be allowed to enter a plea in any criminal prosecution or other proceedings involving possible deprivation of liberty when not represented by counsel, unless such person has ***in writing*** waived the right to the assistance of counsel."
>
> (b). "[B]efore a court shall accept a written waiver of right of counsel; the court shall first advise the person in open court concerning the right to the aid of counsel in every stage of the proceedings."
>
> "[T]he court shall at the same time determine whether or not there has been a competent and intelligent waiver of such right, by inquiring into the background, the experience, and the conduct of the person and such other matters as the court may deem appropriate."
>
> If a waiver is accepted, the court shall approve and authenticate it and file it with the papers of the cause, and if the court is one of record, ***the waiver shall also be entered into its official minutes***."
>
> (Emphasis and underline added)

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[2] *See* ***Boykin v. Alabama***, 395 U.S. 238, 242-44 (1969); ***Johnson v. Zerbst,*** 304 U.S. 458, 464 (19938); and ***Gideon v. Wainwright***, 372 U.S. 335, 339-43 (1938);

III: ANALYSIS

In the context of a prisoner seeking relief from a void or avoidable state conviction, no reasonable jurist would debate that in this case, the certified state trial record strongly indicates the trial judge's failed to subscribe of the Legislature's mandate found in Tenn. Code Ann. 8-14-206(a)-(b) cited above.

This was the basis for the pro se motion to vacate the judgment because, in affect, the state trial court lost subject-matter jurisdiction by failing to follow state law before accepting a plea of guilt. If the sentencing court lacked jurisdiction, then the conviction is void or avoidable and must be set aside.[3] The Tennessee Legislature further mandated that "[w]hen the conviction or sentence ***is*** void or avoidable because of the abridgment of 'any' right guaranteed by the Constitution or the Constitution of the United States," the court is directed to grant prisoners post-conviction relief. The statutory construction does not tie this provision of law with 40-30-102(a). *See* Tenn. Code Ann. 40-30-103; *also see Appx. G* at 5 citing ***Whitehead v. State***, 403 S. W. 3d 618, 622 (Tenn. 2013) available at *Appx. G* herein. (Emphasis added).

A: TRIAL COURT's ABANDONMENT OF STATE LEGAL PRECEDENTS

The state trial court initially recognized in the post-conviction motion where the issue involved "[t]he denial of counsel at the time of guilty plea." However, without an answer from

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[3] *See* ***Williams v. United States***, 582 F. 2d 1039, 1041 (6th Cir.), cert. denied, 439 U.S. 988, 99 S.Ct. 584, 58 L. Ed. 2d 661(1978).

the State, discovery, or any further proceeding on the issue including a hearing, the trial court denied the motion as time barred citing Tenn. Code Ann. 40-30-102. *Appx. B* at 52.

The trial court also recognized in the motion for reconsideration the "[a]rgu[ment] that the statute of limitations should be tolled on procedural grounds." But, "[a]fter reviewing cited authority and addition precedent, the court decline[d] to reconsider its previous order" because "[t]he period for filing post-conviction relief should not be tolled in this situation." The state court did not consider the merits of the motion. *Id.* at 53

The right of assistance of counsel in the preparation and presentation of a defense to a criminal felony charge is cabined in both the Tennessee and United States Constitution. *See* U.S. Const. amend VI; Tenn. Const. art. 1 at 9. There also exists an alternative right, the right of self-representation which is necessarily implied by the structure of the Sixth Amendment and Tenn. Code Ann. 8-14-206(a)-(b).[4]

The exercise of the right of self-presentation depends, in large part, upon a knowing and intelligent waiver of the right of counsel. *Id*; ***State v. Burkhard***, 541 S.W. 2d 365 (Tenn. 1976); ***State v. Herrod***, 754 S.W. 2d 627, 629-30 (Tenn. Crim. App. 1988). Consequently, in cases where the accused represents himself, as was in Bolze's case, the trial judge has a duty to first determine whether the waiver is knowing and intelligent under state law. *See* 8-14-206(a)-(b);

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[4] *See* ***Faretta v. California***, 422 U.S. 806, 821-22 (1975); ***State v. Northington,*** 667 S.W. 2d 57, 60 (Tenn. 1984)("[T]he right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails."); *also see* ***Northington***, 667 S.W. 2d at 60 (quoting ***Faretta***, 442 U.S. at 821-822.).

also see ***Johnson v. Zerbst***, 304 U.S. 45, 465 (1938)(The Supreme Court placed "[t]he serious and weighty responsibility ... of determining whether there is an intelligent and competent waiver" directly upon the judge.). In ***Smith v. State***, 987 S.W. 2d 871 (Tenn. Crim. App. 1998), the Court affirmed that in cases where a defendant aspires to proceed pro-se, the trial court should conduct its inquiry in accordance with the guidelines contained in 1 Bench Book for United States District Judges 1.02.2 to 5 (3rd ed. 1986).

In addition, both State and Federal laws holds the waiver must be clear from the trial record that the defendant understood the nature of the rights waived and knowing asserted to their waiver. ***Phillip v. Neil*** 452 F. 2d 337, 349 (6th Cir. 1971), cert. denied, 409 U.S. 884 (1972). "[A] valid waiver of the right of counsel must appear in the record and will not be otherwise presumed from a silent record." ***Carnley v. Cochran***, 369 U.S. 506 at 516-17 (1987); *also see* Tenn. Code Ann. 8-14-206(a)-(b). Finally, in ***Burgett v. Texas***, 389 U.S. 109 (1967), the High Court explained that the certified records of the Tennessee conviction "[r]aises a presumption that petitioner was deprived his right of counsel ... and therefore his conviction was void." *Id.* at 114, 88 S.Ct. at 261.

Jurist would not debate that Federal district courts are under a duty to hold an evidentiary hearing on state claims that have been unconstitutionally been denied right of counsel prosecution, where material facts reaching on issues of knowing and voluntary waiver were inadequately developed in state court's post-conviction proceedings. ***Boyd v. Dutton***, 405 U.S. 1, 30 L. Ed. 2d 755, 92 S.Ct. 758 (1972).

On its face, the plain language of Tenn. Code Ann. 40-30-102(a) would bar Tennessee courts from considering any petition for post-conviction relief that was untimely for any reason other then those listed in Tenn. Code Ann. 40-30-102(b). However, the General Assembly of Tennessee may not enact laws that conflict with the Constitution of the Tennessee or the Constitution of the United States. Both the United State Supreme Court and the Supreme Court of Tennessee have recognized fundamental due process rights. *Appx. G* at 83 citing ***State v. Whitehead,*** S.W. 3d at n.8 (Tenn. 2013)(citing U.S. Const. amend VI at 1 and amend V; Tenn. Const. art. 1 at 8). Fundamental due process requires that, once the Legislature provides prisoners with a method for obtaining post-conviction relief, prisoners must be afforded an opportunity to seek this relief. *Id.* at 6 citing ***Burford v. State,*** 845 S.W. 2d 204, 209 (Tenn. 1992)(citing ***Logan v. Zimmerman Brush Co***. 455 U.S. 422, 437 (1982).

With regards to Bolze's right to bring a state due process violation before the state court, claiming the conviction is void or avoidable under state law because of an abridgement of the Constitution's due process violation, the Tennessee Supreme Court recognized that due process is flexible and calls for such procedural protections as a particular situation demands. The flexible nature of procedural due process requires an imprecise definition because due process embodies the concept of fundamental fairness. In determining whether what procedural protections a particular situation demands. The State Supreme Court held that "[t]he private interest stakes" of the petitioner must be considered. In the post-conviction context, the Tennessee Supreme Court explained that "[t]he private interest stakes" is the

opportunity to attack a conviction on the grounds that he was deprived of a constitutional right during the conviction process. *Appx. G* at 82-84 citing ***Whitehead***, 402 S.W. 3d at 623 (citing ***Burford***, 845 S.W. 2d at 207).

The Legislature recognized the United States Constitution and its Constitution required a separate avenue (part from Tenn. Code Ann. 40-30-102) for Tennessee courts the ability to by-pass the statute of limitations and grant petitioners post-conviction relief when a "[c]onviction or the sentence is void or avoidable because of an abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States". *Appx. G* at 82-84 citing Whitehead 402 S.W. at 622 (citing Tenn. Code Ann. 40-30-102); ***Bryant v State***, 460 S.W. 3d 513 (Tenn. 2015)("[W]hen the conviction or sentence is void or avoidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States, post-conviction relief is appropriate."); ***Bryant v. Westbrooks***, 2018 U.S. Dist. LEXIS 150668 (M.D. Tenn. Sept. 4, 2018); ***MacFariance v. Westbrook,*** 2013 U.S. Dist. LEXIS 165050 (M.D. Tenn. Nov. 20, 2013)("[T]he Tennessee Supreme Court has previously construed the Tennessee Constitution's protection of due process to be co-extensive with the protections provided by the United States Constitution.")(quoting ***State v. Fergusion***, 2 S.W. 3d 916 (Tenn. 1999)(quoting ***Bryant v. State***, 845 S.W. 3d at 107).

In this case, the trial court committed a legal error in denying the pro se motion by not adjudicating the merits of an abandonment of exception ("the private interest stake") cabined

in Whitehead's precedent of the facts of the case and only limiting its review under Tenn. Code Ann. 40-30-102(a) and failing to consider Tenn. Code Ann. 40-30-103. *Appx. B* at 52-53.

B: THE CRIIMINAL COURT OF APPEALS ABANDONMENT OF LEGAL PRECEDENTS.

An appeal was filed with the Tennessee Criminal Court of Appeals ("TCCA") to advance the grievance that the felony conviction was void or avoidable because of the abridgement of Bolze's constitutional rights to due to the trial judge's clear abandonment of mandated State law under Tenn. Code Ann. 8-14-206(a)-(b).

TCCA unreasonably made an application of state law when it explained that "[p]etitioner's claims require proof outside the record." "[T]he limited records is silent on the issue of whether the trial court property ascertained that the Petitioner made an informed decision to represent himself [.]" "[T]hus, the Petitioner's claim requires a finding of fact not available in the record." *Appx. E* at 74-75.

As demonstrated above, the Legislature made it clear in Tenn. Code Ann. 8-14-206 for the trial judge's mandated duty to "[p]roperly ascertain" a defendant's decision to self-representation was made through "[a]n informed decision," and "[s]uch person has ***'in writing'*** waived the right of assistance of counsel" before "[b]e[ing] allowed to enter a plea." *See* Tenn. Code Ann. 8-14-206(a) (emphasis and underline added). Further, the law required that the judge "[m]ust first advise the person in open court concerning the right to aid of counsel" and "[s]hall at the time determine whether or not there has been a competent and intelligent waiver of such right" and "[i]f a waiver is accepted, the court shall approve and authenticate it

and ***file it*** with the papers of the case." *See* Tenn. Code Ann. 8-14-206(b) (emphasis and underline added).

The State did not argue nor did the TCCA not find that contrary to the evidence provided from the certified trial court records (its papers) that the record was incomplete. Rather, only that the silent record "[r]equires a findings of fact outside the record." *Appx. E* at 74. This was exactly the premise of Bolze's argument, the trial judge failed to meet the mandates of State law and place a properly waived right of counsel and a properly waived right against self-incrimination in the record before accepting a plea of guilt. It was the trial court actions who did not subscribe to state law and "cause" the trial record to be silent or void of any mandated compliance with State law – not the actions of the defendant.

In addition, TCCA further made an unreasonable application of law in another manner. The Court cited ***Whitehead v. State,*** 402 S.W. 3d 615 (Tenn. 2013) which identified three (3) scenarios requiring tolling the post-conviction statute of limitation. As stated above, one such scenario is the "[o]pportunity to attack his conviction [ ] on the grounds he was deprived of a constitutional right during the conviction process." *Appx. G* at 83.

TCCA provided no analysis of the merits of the claim of whether or not one of those three (3) scenarios existed or whether or not there was a deprivation of a constitutional right under the Tennessee Constitution, the Constitution of the United States, or a Legislative mandates. TCCA provided no analysis of findings of fact of where the Legislature provided a

separate avenue for petitioners to attack their conviction or sentence when the "[c]onviction or sentence is void or avoidable because of an abridgement of any right guaranteed by the Constitution of Tennessee or of the United States. *See* Tenn. Code Ann. 40-30-103. TCCA provided no analysis as to the merits of the claim presented of whether or not this Legislative mandate was applicable to the application of either State or Federal law in this case.

Finally, TCCA reached an unreasonable determination of facts and an unreasonable application of law when it explained "[t]hat a judgment is entitled to a presumption of regularity and is not void unless a defect appears on the face of the judgment." *Appx. E* at 74-75. In this context, the Waiver of Jury Trial and Guilty Plea form (a part of the judgment record) does not entitle a presumption of regularity when Bolze proceeded with self-representation since the face of the judgment is void of any waivers of right of counsel and wavier of right against self-incrimination.

Thus, reasonable jurist would find no debate that the TCCA made both an unreasonable application of State or Federal law or an unreasonable determination of law in light of the facts and merits they would drawn from the certified state trial record. Jurist would find no debate TCCA denied Bolze's his ability to cure the constitutional defects (created by the trial judge) and allow him to an opportunity to expand the record and prove his claim that he ultimately enter an unknowing and unintelligent plea of guilt.

It must be noted that under the AEDPA standard of review; however, it only applies to claims that are "adjudicated on the merits in highest State court proceedings to review the matter. *See* 28 U.S.C. §2254(d); ***Wiggins v. Smith***, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L. Ed 2d 471 (2003). When a claim is not adjudicated in the state court proceedings, the pre-AEDPA modified standard controls reviewing de novo questions of law and mixed questions of law and fact. ***Maldonado v Wilson***, 416 F. 3d 470, 475-76, (6th Cir. 2005) cert. denied, 546 U.S. 1101, 126 S.Ct. 1038, 163 L. Ed. 2d 874 (2006).

QUESTION TWO:

IS 28 U.S.C. §2254's LIMIT CONSTITUTIONALLY VALID WHEN ITS ENFORCEMENT RESULTS IN AN INDIVIDUAL'S DETENTION WITHOUT A LAWFUL REASON – i.e. A VALID CRIMINAL JUDGEMENT?

The Supreme Court of Tennessee denied to hear the pro se Application for Permission to Appeal. *Appx C* at 61-62. A timely 28 U.S.C. §2254 petition was filed in the United States District Court. *See* ***Bolze v. Warden***, 3:19-cv-0036-PLR-DCP (E.D. Tenn. Feb. 13, 2020). The district court recognized the grievance was "[b]ecause he was denied his constitutional rights to counsel and against self-incrimination." The Court determined "[t]his action will be dismissed as untimely." *Appx D;* at 63 citing Doc. 11 at 1 & 2.

The modified standard of review held in Maldonado for habeas petitions under AEDPA requires the court to conduct a careful "review of the record" and "applicable law," but "nonetheless bars the court from reversing unless the state court's decision is contrary to or an

unreasonable application of federal law." *Id.* ***Maldonado***, 416 U.S. at 416 F. 3d 476 citing ***Williams v. Taylor***, 529 U.S. 362, 412-23, 146 L. Ed. 2d 389, 120 S.Ct. 1495 (2000).

When there is noncompliance with a state procedural rule, the district court conducts a four-step analysis to determine whether the petitioner has indeed defaulted and, if so, whether the default may be excused:

1). Whether there is a procedural rule applicable to the claim at issue, and whether the petitioner in fact failed to follow it;

2). Whether the state courts actually enforced their procedural sanction;

3). Whether the state's procedural forfeit is an "adequate and independent ground "on which the state can rely to foreclose federal review; and

4). Finally, in order to avoid default, the petitioner can demonstrate that there was "cause" for him to neglect the procedural rule, and that he was actually prejudiced by the alleged constitutional error.

See ***Maupin v. Smith***, 785 F. 2d 135, 138 (6th Cir. 1986)(citing ***Wainwright v. Sykes***, 433 U.S. 72, 87 53, L. Ed. 2d 594, 975 S.Ct. 2497 (1977). In this case, reasonable jurist would debate that these prescribed steps were not adhered to in the district court's own analysis.

The AEDPA does provide a one-year statute of limitation for filing an application for a federal writ of habeas corpus. Claims deemed procedurally defaulted when at the time of the federal habeas petition; state law no longer allows the petitioner to raise the claim. *See* ***Williams v. Anderson***, 460 F 3d 789, 806 (6th Cir. 2006).

To overcome a procedural bar, petitioners must show cause for the default and actual prejudice that resulted from the alleged violation of federal law – **or** – that there will be a fundamental miscarriage of justice if the claims are not considered. *Id.* citing ***Coleman v. Thompson***, 501 U.S. 722, 750 (1991).

In certain cases, the AEDPA instructs that a district court "[s]hall not hold an evidentiary hearing" unless a petitioner meets a very similar standard to that laid out in 2244 (b)(2). See 28 U.S.C. §2244(c)(3). This heightened standard, however, applies only if petitioner "[f]ailed to develop the factual basis for a claim in State court proceedings." Id. A petitioner has not "[f]ailed to develop the record in the manner contemplated by this subsection "[w]hen is was unable to develop his claim in state court despite diligent effort" then an evidentiary hearing will not be barred by §2254(e)(2). *See* ***Williams v. Taylor***, 524 U.S. 420, 437 (2000).

A: BOLZE MET THE "CAUSE" ELEMENT OF COLEMAN v. THOMPSON

The heightened standard imposed by §2254(e)(2) depends on whether the petitioner was diligent in his efforts to develop a factual basis for his claim – the "cause" (the factual basis is the certified State trial record indicating the trial judge failed to abide by State law), not on whether the facts could have been discovered or whether those efforts would have been successful. *Id.* at ***Williams***, 524 U.S. at 435-37. Rather, the applicant must make "[a] reasonable attempt, in light of the information at the time, to investigate and pursue claims in the state court. In this case, seeking to obtain transcripts from the court for over 6 years from 2011 through 2017. *Appx. H,* Affidavit of Dennis R. Bolze & Exhibits; *also see* ***Robinson v.***

Howes, 663 F. 3d 819, 824 (6th Cir. 2011)(quoting ***McAdoo v. Elo***, 365 F. 3d 487, 502 (6th Cir. 2004). Certainly, when seeking transcripts from prison from the Clerk's Office would be an external factor when the Clerk's Office only indicates that it is still searching for the cassette. *Appx. H,* Exhibits 101-123.

In must be noted where §2254 (i) precludes a petitioner from relying on the ineffectiveness of his post-conviction attorney as a "ground for relief," it does not stop the petitioner from using the trial court's own failures to subscribe to state law, or where the Clerk's Office clearly continued to impede the defendant up to September 9, 2017 from bringing his claim to excuse procedural defaults.

In ***Fautenberry v. Mitchell***, a habeas petitioner showed "cause" where the demonstrated that he failed to raise a constitutional due process issue because it was "[r]easonably unknown to him at the time." *See* ***Fauntenberry,*** 515 F. 3d 614, 629 (6th Cir. 2007)(citing ***Amadeo v. Zant***, 466 U.S. 214, 222 (1988). The fact is that Bolze did not know at the time, that when the State had exclusively provided advise to him that was not in accordance with State law, i.e., 8-14-206(a)-(b) and advised Bolze to just self-represent to adjudicate the case that day when it offered the plea to Bolze was "cause." *See* ***Von Moltke v. Gillies***, 332 U.S. 708, 709-26 (1948).

Courts have found "cause" to excuse any procedural default when the merits of the constitutional claims would prove a violation of Federal due process rights cabined in the

United States Constitution and the laws established by the United States Supreme Court. For example:

A). In ***Mitts v. Bagley***, a constitutional due process violation claim was raised by way of a §2254 petition. The district court found "cause" surrounding a violation of due process based on the jury instructions. The court remanded with further instructions to issue a writ of habeas corpus. *See* ***Mitts***. 620 F. 3d 650, 658 (6th Cir. March 19, 2010)

B). In ***Hill v. Mitchell***, a constitutional due process violation *Brady* claim was raised by way of §2254 petition. The district court held that Hill had proved his *Brady* violation claim which demonstrated "cause" and "prejudice" to excuse the procedural default of his claim. *See* ***Hill***, 2013 U.S. Dist. LEXIS 45919 at *358 (S.D. Ohio, March 13, 2013)(citing ***Brooks v. Tennessee***, 626 F. 3d 878, 891 (6th Cir. 2010)(holding"[a] state's suppression of Brady evidence constitutes "cause" under the procedural default doctrine citing ***Banks v. Dretke,*** 540 U.S. 668, 691 (2004).

C). In ***Stilner v. Hart,*** the district court considered a §2254 petition associated with a claim of constitutional due process violation surrounding the right to effective assistance of counsel. The court stated Stiltner had established "cause" to excuse default because of a showing of some external impediment preventing his defense from construing and rising the claim citing ***Murray v. Carrier***, 477 U.S 478, (1986); Sykes, 433 U.S. at 72 (1977).

D). Finally, and most instructive is a recent §2254 petition bringing the same facts to the High Court's attention. In ***Ayers v Hall***, the defendant was charged with counts of "[f]ailure to file sales tax returns" in the State of Kentucky. The defendant wanted to hire an attorney. The certified state record in this case showed Bolze wanted to hire an attorney also and was given 15 days to do so. Ayers never filed a notice of appearance of any kind, appeared with side counsel for any purpose, or filed a motion to be allowed to precede pro-se during that time. Bolze's actions before entering his plea mirror those of Ayers. The Court, without an "in writing" waiver of right of counsel allowed the defendant to proceed with self-representation. The same facts as Bolze's case.

The defendant, in his §2254, argued the State court failed to determine whether he had ever knowingly and voluntarily "[w]aived his rights under the Sixth and Fourteenth Amendment." The same facts as in Bolze's case. The Sixth Circuit, in Ayers, determined based on the trial court's records and Federal law, a remand with instructions to grant a writ of habeas corpus. *See* ***Ayers v. Hall***, 900 F. 3d 829, 837 (6th Cir. 2018).

These examples support the premise that Bolze had "cause" to proceed in this case.

B: BOLZE MET THE "ACTUAL PREJUDICE" ELEMENT OF COLEMAN v. THOMPSON

As to the actually demonstrating "prejudice," Bolze was required to show "[n]ot merely that the errors at his state trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

United States v. Frady, 456 U.S. 152, 170, 102 S.T. 1584, 71 L. Ed. 2d 816 (1982)(emphasis in original).

First, the error of constitutional dimension was Bolze entered an uncounseled, unwaived right of counsel plea agreement; (2) Bolze entered the plea without waiving his constitutional right against self-incrimination; and (3) Bolze enter his plea without being advised by the state court the conviction could actually be used against him in any future convictions to his disadvantage.

Bolze's federally imposed sentence was enhanced with the unchallenged inclusion of his unwaived, uncounseled state felony conviction. Bolze's sentence was based on an Offense Level 37, Criminal History Category III (262 to 327 months Guideline range) where he was sentenced at the high-end of the range to 327 months. *See* ***Bolze***, 3:09-cr-93 [PSR at ¶84 & Doc. 94; Judgment] (E.D. Tenn. Aug. 26, 2010).

With the correct Guideline range based on exclusion of the state conviction, the sentencing range would have been 292 to 293 months of incarceration. A different of 34 to 87 months based solely on the district court's citation of the state conviction to reach the high-end of the Guidelines range. Bolze was clearly prejudiced when he entered his plea unknowing and unintelligently without a Faretta-style inquiry and without an "in writing" waiver of his constitutional rights based on the State prosecutor's representations. *See Appx. H*; Affidavit of Dennis R. Bolze; ***Mortiz v. Woods***, 844 F. Supp. 2d 831, 841 (6th Cir. 2012)(citing

Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000)(The High Court has clearly established that the complete denial of counsel during a critical stage of a judicial proceedings mandates a presumption of prejudice.); ***Burgett v. Texas***, 389 U.S. 109, 115 (1967)(A prior criminal conviction which is constitutionally infirming inherently prejudicial.).

Reasonable jurist would not debate the district court's determination had not address the merits of the action making a noted findings as to whether or not there was "cause" for the default or whether or not there was actual "prejudice." The district court did not address whether or not the application of Tenn. Code Ann. 40-30-103 would allow for review of a void or avoidable conviction based on the law or whether or not Bolze entered his plea knowingly or intelligently. This was a true mis-application of settle law.

C: BOLZE MEETS THE STANDARD THAT THERE WILL BE A FUNDAMENTAL MISCARRIAGE OF JUSTICE IF THE CLAIMS ARE NOT CONSIDERED.

When a State court fails to adjudicate a claim on the constitutional merits, as in this case, the AEDPA's deference standard or review does not apply. *See* ***Maples v.Stegall,*** 340 F. 3d 433, 436 (6th Cir. 2003)("[AEDPA] by its own term in applicable only to habeas claims that were 'adjudicated on the merits in State court." *Id.* (quoting 28 U.S.C.§2254(d). This rule extends to portions of a claim not addressed by the state courts. *See* ***Wiggins v. Smith,*** 539 U.S. 510, at 534 (2003).

Courts "[m]ust uphold the state court's summary decision unless [the Federal Court's[independent review of the record and pertinent federal law persuades [the Federal Court]

that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of facts in lights of the evidence presented." ***Harris v. Stevall***, 212 F. 3d 941, 943 (6th Cir. 2000)(quoting ***Ayeok v. Lytle***, 196 F. 3d 1174, 1177-78 (10th Cir. 1999).

As to the merits, claims of state law error are not cognizable in federal habeas corpus "[u]nless such errors amounts to a fundamental miscarriage of justice – **or** – a violation of the right of due process in violation of the United States Constitution." ***Cristini v. McKee***, 525 F. 3d 888, 897 (6th Cir. 2008)(citing ***Floyd v. Alexander***, 148 F. 3d 615, 619 (6th Cir.) cert. denied, 525 U.S. 1025, 119 S.Ct. 557, 142 L. Ed. 2d 464 (1998); *also see* ***Coleman v. Thompson***, 501 U.S.722 at 759 (1991).

In this action, jurist of reason would debate that because the state court decisions runs contrary to binding State law, the Constitution of Tennessee, the Constitution of the United States, and biding precedent established by the United States Supreme Court, that decision is no longer owed deference, allowing a de novo review of Bolze's Fifth, Sixth, and Fourteenth Amendment's Due Process Rights claims to proceed. *See* ***Dyer v. Bowlen***, 465 F. 3d 280, 284 (6th Cir. 2006).

The Sixth Amendment provides a criminal defendant both "[t]he right ... have the assistance of counsel for his defense" [U.S. Const. amend VI], as well as "[t]he right to self-representation-to make his own defense personally." ***Faretta***, 422 U.S. at 819. Although

defendants have both the right to counsel and the right to waive counsel, "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," defendants who opt to go it alone, "[r]elinquish, [ ] as a purely factual matter, many of the traditional benefits associated with the right of counsel. *Id.* at 834-35.

For this reason, the Sixth Amendment "[r]equires that any waiver of the right of counsel be knowing, voluntary, intelligently given;" ***Iowa v. Tovar***, 541 U.S. 77, 87-88 (2004). Critically, "[p]resuming waiver [of the right of counsel] from a silent record is impermissible." ***Carnley v. Cochran,*** 369 U.S. 506, 516 (1962). Rather, "[t]he record must show or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything else is ***not*** a waiver." *Id.*

Here, the undisputable certified trail-court record is devoid of any indication that Bolze was advised of his right of counsel or that he affirmatively declared to exercise that right. A trial court may not assume the accused's silence alone constitutes a knowing and intelligent waiver of the right of counsel or a waiver against self-incrimination. See e.g., ***King v. Bobby,*** 433 F. 3d 483, 492 (6th Cir. 2006). The State for its part did not address or find Bolze's had waived his rights through his conduct.

To affirm, there would be a "[n]eed to hold that a defendant who was allegedly never informed of his rights of counsel or his rights against self-incrimination, never spoke of a desire

to represent himself, or was never asked if he wanted to proceed pro se, had nonetheless, waived his rights simply by appear alone; such a holding would contradict ***Carnley***'s prohibition against assuming waiver simply because the defendant appeared without counsel [***Carnley***,369 U.S. at 514] and would counter the Supreme Court's requirement that "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... not presume acquiescence in the loss of fundamental rights. Id. (quoting ***Johnson v. Zerbst,*** 304 U.S. 458, 464 (1938); ***Ayers***, 900 F. 3d at 837.

Finally, "[d]efendants have no affirmative obligation to invoke their right to counsel" or their right against self-incrimination; "[r]ather, courts must offer defendants the opportunity to invoke their rights and determine who wish o go it alone must intelligently and understandably reject the offer." ***Carnley,*** 369 U.S. at 516. For fifth-eight years "[i]t has been well settled in this nation, that 'anything' else is not a waiver." *Id.* at 837.

The district court failed to observe or conduct any legal analysis of whether the state conviction was void and whether the state court lost subject-matter jurisdiction resulting in a void conviction. A conviction with no legal effect. The district court did not address the constitutional error in any manner and thus, reasonable jurist would debate the district court ruling was contrary to settle law and that an evidentiary hearing was needed to allow Bolze to present his defense and prove his claim.

Appellate courts apply a de novo review to decisions of the district court. ***Harris v. Stovall***, 212 F. 3d 940, 942 (6th Cir. 2000). Bolze filed his §2254 after the passage of the AEDPA, codified principally at §2254(d). It provides in part that a federal court may grant a writ of habeas with respect to a state-court judgment. This statute by its own terms is applicable only to valid state-court judgments. Where, as here in this action, the state court did not assess the merits of a claim properly raised in the habeas petition, thus, deference due under AEDPA does not apply. ***Williams v. Coyle***, 260 F. 3d 684, 706 (6th Cir. 2001)(applying the pre-AEDPA standards to a habeas petition filed pursuant to §2254 because "[n]o state court reviewed the merits of [the] claim that the conviction was void. Instead, the Appellate Court's review questions of law and mixed questions of law and facts de novo. *Id.*

In this legal precedent, reasonable jurist would argue and debate the facts of this case as discussed above, which establishes an unreasonable application of, clearly established Federal law or was the result of an unreasonable determination of facts in light of the certified trial-court record and the fact the conviction was void and has no legal effect.

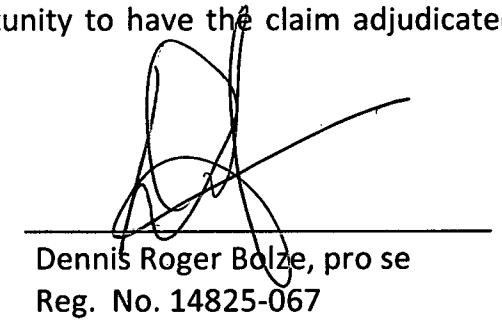
CONCLUSION

The certified state court record clearly rebuts the presumption of correctness by its compelling and convincing evidence that Bolze proceed in self-representation without waiving his rights afforded under due process in violation of State law, the Constitution of Tennessee, the Constitution of the United States Fifth, Sixth, and Fourteenth Amendments.

The state trial court lost its jurisdiction to accept a knowing and intelligent plea of guilt and thus, the conviction on its face is void or avoidable. Bolze is suffering the effects of this violation of his rights with a federally enhanced sentence of at least 34 months and as much as 87 months.

Both the State's highest court to hear the matter and the Federal courts have held to the principle that a procedural default excludes a writ being issued for Bolze to present his constitutional errors and offer proof. For this reason, a writ of habeas corpus should be granted to provide this Defendant his first opportunity to have the claim adjudicated on its merits.

DATED: March 12, 2021



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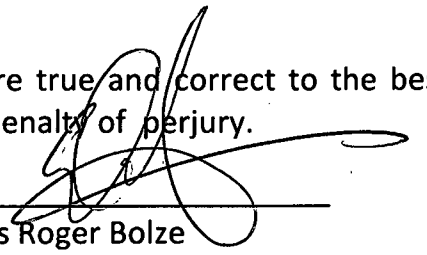
DECLARATION

I above statement, evidence, and facts presented are true and correct to the best of knowledge and the statement is made under the pains and penalty of perjury.



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