

No. 21-603

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,

Petitioner,

v.

GEORGE BRINKMAN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The trial court that accepted George Brinkman's guilty plea to capital charges did not, as Ohio's Rules of Criminal Procedure and long-standing case law required, first inform him of all the constitutional rights he was waiving. As a result of the trial court's failures the Ohio Supreme Court recognized that his guilty plea was invalid under Ohio law.

1. Does the Due Process Clause of the Fourteenth Amendment forbid Ohio from holding that a plea colloquy in a felony case that does not comport with its rules may be structural error or must Ohio be required to have violations of its rules be subject to harmless error review?
2. Does this case, which concerns Ohio's application of its own Criminal Rules, present an appropriate vehicle for this Court to determine whether a state may choose to treat the advisement of rights requirement of *Boykin v. Alabama*, 395 U.S. 238 (1969), as structural error?

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INTRODUCTION

The Ohio Supreme Court vacated George Brinkman's guilty plea and the convictions and death sentences that followed on it because the court that took his plea did not comply with the mandated requirements of Ohio's Rules of Criminal Procedure and case law applying those Rules. The rules, adopted pursuant to Article IV, Section 5(B) of the Ohio Constitution to "govern[] practice and procedure in all courts of the state," are by their own terms "to be followed in all courts of this state." Ohio Criminal Rule 1(A). And because none of the experienced legal personnel in the courtroom – not any of the three trial judges on the panel that heard and accepted the plea, not any of the prosecutors, not either of Brinkman's specially certified attorneys – was paying enough attention to notice.

JURISDICTION

Petitioner, State of Ohio, asserts jurisdiction under 28 U.S.C. § 1257(a), arguing that the decision of the Supreme Court of Ohio in this case "held that Due Process demands automatic reversal of a guilty plea when a trial court omits a constitutional advisement during a plea colloquy." Pet. 8-9. But that is not what the court held.

Rather, the Ohio court held, as it had held previously, that the Ohio Rules of Criminal Procedure require that before trial courts accept guilty pleas to felony offenses, they must *first* inform defendants that guilty pleas entail waivers of certain constitutional rights. That is, certainly, a statement of what procedure is due. But it is a decision based on the Ohio Rules of Criminal Procedure, not on the

Due Process Clause. Because that holding is not repugnant to the Due Process Clause, and because Ohio has right to provide through its rules greater protection to its accused than does the federal constitution, there is no federal question for this Court to resolve and jurisdiction is improperly advanced.

Article IV, Section 5(B) of the Ohio Constitution directs the Ohio supreme court to “prescribe rule governing practice and procedure in all courts of the state.” Pursuant to that constitutional mandate, the court promulgated the Ohio Rules of Criminal Procedure which, by their own terms are “to be followed in all courts of this state.” Ohio Criminal Rule 1(A). As relevant here, Ohio Criminal Rule 11(C)(2), sets forth provisions Ohio courts must follow in accepting guilty pleas, provides:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and **shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:**

* * *

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(Boldface added)

In *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 8897 N.E.2d 621 (2008), *cert. denied*, 557 U.S. 929, the Supreme Court of Ohio resolved a conflict

among the state's intermediate appellate courts about what exactly Rule 11(C)(2) mandated and how that mandate was to be applied.

The state, which brought the appeal in *Veney* to Ohio's high court, argued that no more than substantial compliance" with the Rule was required. That although trial courts were required to inform defendants what rights they were waiving, a trial court's failure to do that was subject harmless error review. If the record as a whole indicated that the defendant likely understood his rights, any failure of the plea process would be discounted. At least, it would unless the defendant could show that had he or she been properly and timely advised by the court the plea would not have been entered. The dissenting justices agreed with the state, pointing to this Court's holding that "federal law does not require automatic vacation of a plea when a judge fails to inform a defendant of a *Boykin* right." *Veney* at § 37, citing *United States v. Vonn*, 535 U.S. 55 (2002).

The majority disagreed. Whatever federal law might allow, the court held,, Ohio's Criminal Rules mandated strict compliance. Moreover, the court held, the failure of that strict compliance would require that a guilty plea and the resulting conviction and sentence to vacated:

We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid.

Veney at ¶ 31.

As in *Veney*, so in this case.

Because Brinkman was capitally charged, his plea colloquy was conducted not in the presence of single trial judge but before a panel of three trial judges. There were, at least two prosecutors present along with Brinkman's two counsel, both of whom had been specially certified, by training and experience, to accept appointments in capital cases. The panel's presiding judge conducted a colloquy at after which Brinkman entered guilty pleas to the various counts in the indictment including capital charges and death specifications. The court then accepted the pleas. Four days later the court determined that it had not complied with the mandates of Ohio Criminal Rule 11(C)(2). It had not, before it accepted his plea, informed Brinkman of two of the rights he would be waiving. The court then conducted another colloquy, this time mentioning those rights. But Brinkman did not again enter a plea.

The failure properly to obey the mandate of Rule 11(C)(2), the Supreme Court of Ohio held unanimously, was "irresponsible," required the plea – and the ensuing conviction and sentences to be vacated. "[W]e hold that the trial court's failure to strictly comply with Crim.R. 11(C)(2)(c) before accepting Brinkman's guilty plea renders his plea invalid." Pet. App. 17, 15.

In so holding, the court held, as it had in *Veney* but this time unanimously, that a trial court's failure to follow the dictates of the rules it had properly and constitutionally promulgated would not be excused. That decision, applying the Ohio high court's supervisory power over the state's lower courts, was well within

its proper authority. This Court, of course, has no supervisory authority over the Ohio courts. This Court does not have the authority to tell Ohio what its Rules of Criminal Procedure mean or how they are to be applied. Only if the application of a rule is repugnant to the federal constitution may this Court step in.

That the state of Ohio wishes the Ohio Criminal Rules were different or were differently understood does not create a federal question. Rule 11(C)(2) eliminates no constitutional rights. It diminishes no constitutional rights. This Court has no jurisdiction to review state rules that provide their citizens with more protection than does the federal constitution

STATEMENT OF THE CASE

An Ohio grand jury brought a thirteen-count indictment against George Brinkman. Among the charges were counts including specifications that had the potential of death sentences. Because Brinkman chose to enter guilty pleas to the underlying offenses, Ohio required that the case, including sentencing hearing, could be presented neither to a jury nor to a single judge. Rather, it would be heard by a three-judge panel. Ohio Criminal Rule 11(C)(3).

Ohio's Criminal Rules further provided that before it could accept the guilty plea, the panel would first have to conduct a colloquy during which it would inform Brinkman, and determine that he understood, that by pleading guilty he would be "waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at

which the defendant cannot be compelled to testify against himself or herself.” Ohio Criminal Rule 11(C)(2).

The panel, conducted a colloquy, but failed to inform Brinkman that by pleading guilty he would be waiving two of those rights. Nevertheless, and in violation of the criminal rules, the court accepted his guilty pleas. After a mitigation hearing, the panel imposed three death sentences and an additional and consecutive prison term of 47 years.

Because he was sentenced to death, Brinkman had an automatic appeal to the Supreme Court of Ohio which held that because his plea was taken in violation of the Ohio Rules of Criminal Procedure, the plea and the consequent verdicts and sentences had to be vacated. It then remanded the case to the trial court.

REASONS FOR DENYING THE WRIT

- I. Because Ohio, by formal Rule, elects to provide greater protection than the United States Constitution requires as a minimum, this case presents no constitutional issue for this Court to address.**

Most criminal cases are resolved by guilty pleas. As the Vera Institute of Justice notes, “most criminal cases that result in conviction—97 percent in large urban state courts in 2009, and 90 percent in federal court in 2014—are adjudicated through guilty pleas.”¹ What is true nationwide is true in Ohio. In 2019, for instance, verdicts were returned in 40,739 cases in Ohio’s common pleas courts. Of

¹ Subramanian, Digard, Washington, and Sorage, *In the Shadows; A Review of the Research on Plea Bargaining*,” Vera Institute of Justice (Sept. 2020), p. 1 and endnote 4.

those, 792 were tried either to the bench or a jury while fully 39,947, 98%, were resolved either by guilty plea to the original charge or by plea bargain.²

Given this reality, the need to assure that the procedures for taking guilty pleas should be fair to the accused and uniform across the state was evident. To that end, and in the exercise of the its supervisory authority granted by the Ohio Constitution, Article IV, §5(B), the court promulgated Rule 11(C)(2) of the Ohio Rules of Criminal Procedure:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and **shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:**

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of, and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(Boldface added)

² Ohio Department of Administrative Services, "State of Ohio Courts of Common Pleas, General Division: Dispositions" (2020), https://analytics.das.ohio.gov/t/SCPUB/views/FormA-judge-state-PROD/Dispositions?iframeSizedToWindow=true&%3Aembed=v&%3AshowAppBanner=false&%3Adisplay_count=no&%3AshowVizHome=no

The requirements are not onerous. Every trial judge in Ohio knows them as do all prosecutors and defense counsel. They can recite them by heart. And most judges presumably have a cheat sheet before them when taking pleas just to be certain that they don't mess up. Yet, mess up they occasionally do. And in *State v. Veney, supra*, the Ohio high court determined how that rule was to be applied.

Every one of those advisements, the *Veney* majority said, must be given *before* a guilty plea can be accepted. And a failure to give those advisements before the plea is accepted will be deemed structural error. *Id.* at ¶ 31. The dissenters objected, observing that federal due process did not require such strict requirements. They said that federal law, the United States Constitution, would be satisfied by substantial compliance where a plea from a defective proceeding would be upheld if the record would indicate that the defendant understood the rights being waived unless the defendant were able to show that the plea would not have been entered had the court given proper advisements. *Id.* at ¶ 37. The majority, holding otherwise, determined not that the dissenters were wrong about what the United States Constitution might allow, but that the Ohio Rules of Criminal Procedure demanded more. They demanded more of the trial courts, and they provided greater protection for criminal defendants.

The three-judge panel that took George Brinkman's plea did not strictly adhere to Criminal Rule 11(C)(2). A failure that nobody – not the judges, not the prosecutors, not defense counsel – was paying sufficient attention to notice at the time. It was four days later, four days after it had accepted Brinkman's guilty

pleas, that the trial court noticed that it had failed properly to advise him before accepting his pleas as the rule required. At that point it provided the missing advisements. Yet it did not attempt to have him again enter guilty pleas. Again, no one noticed the problem.³

The Ohio Supreme Court recognized that violation of the Ohio Rules of Criminal Procedure. And it rejected the State's arguments: that the rule had not been violated and that even if it had, the violation should be deemed harmless. Violation of Criminal Rule 11(C)(2), the court held, is structural error. The federal constitution's lesser demands of trial courts and lesser protections for criminal defendants who plead are all well and good. And they are enshrined in the federal rules. See Fed.R.Crim.P. 11(h), adopted in 1983 and specifying harmless error review when a plea is taken in violation of the rules.⁴ Ohio has chosen not to adopt a cognate provision. The Ohio Rules of Criminal Procedure demanded more.

As they may. For there is no federal bar to a state providing greater protections to its citizens than the United States Constitution provides. The federal constitution sets the floor, not the ceiling. That Ohio provides more protection for the accused entering a guilty plea does not raise a question of constitutional moment.

³ That "inattention," the Supreme Court of Ohio held in what must be viewed as understatement, was "impermissible, especially in a case such as this in which a death sentence is on the line." Pet. App. 17.

⁴ Subsection (h) was added to the Rule in 1983 with the specific intention of displacing the apparent structural error analysis suggested by *McCarty v. United States*, 394.U.S. 459 (1969).

III. The merits of Ohio's strict compliance and structural error rules are not subject to review by this Court.

Both the State of Ohio and its amicus, Ohio Prosecuting Attorneys Association, argue that Ohio's Rule is bad policy. Requiring that a court's failure to strictly comply with the Rule 11(C)(2) procedures for taking guilty pleas amounts to structural error, they say. "The victim's surviving family members should not be subjected to a potential [new] trial." Pet. at 16. "The needless reversal of convictions for claims of plea-colloquy error beard directly on the work of Ohio prosecutors, reopening cases that need not be reopened, talking up the time and effort of prosecutors on remand . . . , and renewing for crime victims the ordeal of undergoing the criminal-justice process again." Amicus at 1.

But Ohio's policy choices, embodied in its criminal rules and exemplified by its refusal to adopt a provision similar to Fed.R.C.P. 11(h) are not subject to federal review. If the State of Ohio and its Prosecuting Attorneys Association want Ohio to modify its rules or its understanding of them, their remedy is to present their desire and argue their case to the Supreme Court of Ohio's Rules Advisory Committee. Instead, they ask this Court to change in Ohio's Rules.

Amicus seems to understand the flaw. If this Court were to grant certiorari, it argues, would "allow[] the Ohio Supreme Court to address its own state-law criminal-rule advisement requirements" something it "readily" could do on its own. Amicus at 23. Precisely.

There is no reason for this Court to grant the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDIX

Ohio Rule of Criminal Procedure 11(C)(2)

(C) Pleas of guilty and no contest in felony cases.

...

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally either in-person or by remote contemporaneous video in conformity with Crim.R. 43(A) and doing all of the following:

- (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
- (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
- (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.