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

REPLY BRIEF FOR THE PETITIONER

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The Supreme Court of Ohio held, as a matter of federal law, that George Brinkman's guilty plea was invalid. The Supreme Court of Ohio's constrained review of the record and automatic remedy are not required by the United States Constitution-a fact that Brinkman does not dispute. The Court should accept review for three reasons. *First*, this case offers a chance to resolve a conflict between Ohio, other states, and the federal courts. *Second*, this case raises a recurring question, as most criminal cases are resolved through guilty pleas. *Third*, this case presents a good vehicle to consider the questions because the Supreme Court of Ohio's decision was undoubtedly based on its interpretation of federal law.

I. BRINKMAN'S CONCESSIONS HIGHLIGHT THE NEED FOR REVIEW

Before turning to Brinkman's opposition, it is important to note the major concessions in his response. Brinkman has not disputed (1) that the trial court ultimately advised him of all of his constitutional rights, (2) that the State preserved the harmless error argument, (3) that federal law does not require reversal, (4) that his plea could have been affirmed had the Supreme Court of Ohio properly applied federal law, (5) that if this case had been decided in a federal court, the plea would have been affirmed, and (6) that a conflict exists.

A. Brinkman's plea was knowingly, intelligently, and voluntarily entered

Brinkman never moved to withdraw from his guilty plea before or after sentencing. He never objected or

raised concerns in the trial court. Instead, his counsel confirmed that the trial court properly advised Brinkman of his constitutional rights. It was not until his direct appeal to the Supreme Court of Ohio that Brinkman challenged the validity of his plea. In his Brief in Opposition, Brinkman never argues that his plea was less than knowingly, intelligently, and voluntarily entered. There is nothing that Brinkman claims he failed to understand.

In sum, Brinkman's claim is that Ohio's criminal rule was not followed. He makes no argument that the failure to follow a rule caused his plea to be unconstitutional. Brinkman effectively concedes that the violation of Ohio's Criminal Rules occurred without harm to his ability to understand his plea. That concession is proper. Not only does the record show that Brinkman was ultimately advised of his rights, he *used* them during the proceedings.

B. Brinkman agrees that he was advised of his constitutional rights

In his Brief in Opposition, Brinkman concedes that the trial court conducted another colloquy to ensure that Brinkman was advised of all his constitutional rights. Brinkman agrees with Petitioner that each of his constitutional rights were provided to him by the trial court before he was sentenced. Brinkman's argument is one of timing rather than substance. Brinkman argued-and the Supreme Court of Ohio agreed-that as a matter of *federal* law the additional colloquy should not be considered. The Petition showed that is not the case. Brinkman's concession is important because if his plea was knowingly,

intelligently, and voluntarily entered then there was no basis to vacate it.

C. There is no dispute that federal law does not require reversal and that if this case had been before a federal court, Brinkman's plea would have been affirmed

Brinkman never claims that his plea was other than knowingly, intelligently, and voluntarily entered consistent with *Boykin v. Alabama,* 395 U.S. 238 (1969). In arguing that Ohio provides greater protection, Brinkman concedes that reversal would not be required before a federal court with the exact same record that exists now.

D. There is no dispute that the State preserved the harmless error argument

At no point in Brinkman's Brief in Opposition does he claim that Ohio's arguments were not preserved for the Court's review. Instead, Brinkman says that the Supreme Court of Ohio "rejected the State's arguments: that the rule had not been violated and that even if it had, the violation should be deemed harmless." Brief in Opposition, pg. 9. Brinkman's concession shows why this case is a good vehicle to decide the questions presented.

E. Brinkman concedes that Ohio presented recurring questions

Brinkman also recognizes the importance of the questions presented. In his Brief in Opposition, Brinkman agrees that "[m]ost criminal cases are resolved by guilty pleas," citing statistics as high as 90

to 97 percent. Brief in Opposition, p. 6. "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 [is] evident." *Id*. Ohio agrees. Brinkman, represented by multiple lawyers, was advised of *Boykin* rights over the span of two plea colloquies. And because this is a capital case, Brinkman had a chance to exercise some of those rights despite having entered a guilty plea. Ohio also agrees that there should be uniformity-not just within Ohio but between Ohio and the rest of the nation.

Brinkman's acknowledgement of the criminal justice system's reliance on guilty pleas, and the need for uniformity, is another reason why this case is a good vehicle to decide the questions presented.

II. THE SUPREME COURT OF OHIO'S DECISION WAS BASED ON FEDERAL LAW

Brinkman's sole argument against certiorari is that his plea was vacated on state law grounds. That is simply incorrect. The Supreme Court of Ohio's ruling was rooted in its interpretation of Due Process. Pet.Appx. 9 ("Due process requires that a defendant's plea be made knowingly, intelligently, and voluntarily; otherwise, the defendant's plea is invalid."). That the Supreme Court of Ohio made the same error in its prior decisions does not diminish its reliance on federal law.

In *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621 (2008), *cert. declined* 557 U.S. 929, 129 S.Ct. 2824, 174 L.Ed.2d 569 (2009), the court held that a plea must be knowingly, intelligently, and voluntarily entered to comply with both the United

States Constitution and the Ohio Constitution. *Veney* at ¶ 7 (citing *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996)). Of course, it does. But what *Veney* didn't say was that Ohio law afforded any greater protection. *Veney* incorrectly found that strict compliance and automatic reversal were federally required. See *Veney* at ¶¶25-26 ("we found a split of authority on the issue of 'whether the complete omission of a *Boykin* rights alone is cause to nullify a guilty plea.'" "We adopted the latter view: '[A] guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner at the time of entering his guilty plea of his [*Boykin* rights].'"). The error in *Veney* has continued to cause havoc on guilty pleas in Ohio.

Despite the arguments in his Brief in Opposition, Brinkman's earlier briefing never suggested anything more than Ohio's Constitution providing rights coextensive to the United States Constitution. Brinkman argued the following to the Supreme Court of Ohio:

> "Settled and uncontroversial law holds that a plea of guilty must be knowing, intelligent, and voluntary. Sixth and Fourteenth Amendments, United States Constitution; Article I, Sections 5, 10, and 16, Ohio Constitution; *Kercheval v. United States*, 274 U.S 22, 223 (1927); *Mabry v. Johnson*, 467 U.S. 504, 508-509 (1984)."

Brinkman did not make any argument that the Ohio Constitution provided greater protection. Nor could he. Ohio has rarely found greater protection under the Ohio Constitution in criminal cases, and in those cases,

none have discussed the issues presented here. *See State v. Brown*, 99 Ohio St.3d 323 (2003) (finding greater protection under Section 14, Article I of the Ohio Constitution than the Fourth Amendment to preclude warrantless arrests for minor misdemeanors); *State v. Farris*, 109 Ohio St.3d 519 (2006)(finding that Article I, Section 10 of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment in order exclude physical evidence seized as a result of unwarned statements); *State v. Bode*, 144 Ohio St.3d 155 (2015) (holding that Ohio's Due Process Clause provides greater protection in order to prohibit the use of uncounseled juvenile dispositions to enhance the penalty of a subsequent offense); *State v. Brown*, 143 Ohio St.3d 444 (2015)(finding Ohio's Due Process Clause provides greater protection to prevent traffic stops for even minor misdemeanors made outside an officer's statutory jurisdiction); *State v. Mole*, 149 Ohio St.3d 215 (2016) (finding greater protection of Ohio's equal protection clause in ordered to find a provision of Ohio's sexual battery statute unconstitutional); *State v. Aalim*, 150 Ohio St.3d 463 (2016)(holding that the mandatory transfer of juveniles to the general division of a common pleas court violates juveniles' rights to due process under Article I, Section 16 of the Ohio Constitution). In those rare cases where the Supreme Court of Ohio has found greater protection, the court has explicitly done so. The same cannot be said for *Veney* or *Brinkman*.

The constitutional nature of the Supreme Court of Ohio's decisions in *Veney* and *Brinkman* is reinforced by the extreme remedy of automatic reversal it is

applying. As Brinkman concedes, *Veney* and *Brinkman* represent a "structural error" approach to the omission of a plea-colloquy advisement. But the Supreme Court of Ohio has repeatedly recognized that it will only apply a structural-error approach to *constitutional* errors. "Structural error has therefore been recognized only in limited circumstances involving fundamental constitutional rights * * *." *State v. Jones*, 160 Ohio St.3d 314, 2020-Ohio-3051, 156 N.E.3d 872, ¶ 21 (2020). "[T]he threshold issue in determining whether an error is structural is whether the error deprives the accused of a constitutional right." *Id.* ¶ 22. "[A]ll structural errors are by nature constitutional errors," and "only constitutional defects may be structural errors." *Id.* ¶¶ 22, 31, quoting in part *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18 (2007); *see also State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 198 (2017) ("Here, there is no constitutional defect triggering a structural-error analysis."). The Supreme Court of Ohio also expressly recognizes that a violation of the Ohio Criminal Rules is not by itself a "structural error". *Jones*, ¶¶ 2, 26, 31.

There is no indication that the Supreme Court of Ohio would apply a "structural error" approach without its conclusion in *Veney* and *Brinkman* that the omission of the one of these advisements implicates the "constitutional guarantee of due process" under *Boykin*. If faced with only the violation of a criminal rule, that court very likely would apply Ohio Crim.R. 52(A), which provides for harmless-error review of "any error" and "any defect". That court has even cited Ohio Crim.R. 52(A) in the context of claims of plea-

colloquy error. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *State v. Johnson*, 40 Ohio St.3d 130, 134, 532 N.E.2d 1295 (1988); *State v. Billups*, 57 Ohio St.2d 31, 39 & n. 6, 385 N.E.2d 1308 (1979); *State v. Stewart*, 51 Ohio St.2d 86, 93, 364 N.E.2d 1163 (1977).

Indeed, the Supreme Court of Ohio recently confirmed this, stating that it has "made a limited exception to the prejudice component of [Ohio Crim.R. 52(A)] in the criminal-plea context. When a trial court fails to explain the constitutional rights that a defendant waives by pleading guilty or no contest, we *presume* that the plea was entered involuntarily and unknowingly, and no showing of prejudice is required." *State v. Dangler*, 162 Ohio St.3d 1 at ¶14 (2020). Emphasis Added. The *Dangler* court refused to require automatic reversal "when a trial court fails to fully cover other 'nonconstitutional' aspects of the plea colloquy[…]." *Id*.

Equally unavailing is Brinkman's assertion that *Veney* and *Brinkman* may represent the Supreme Court of Ohio's exercise of "supervisory authority" over the lower Ohio courts vis-à-vis its criminal rules. There is no indication that the Ohio Supreme Court was invoking any such authority. *See Brief of Amicus Curiae Ohio Prosecuting Attorney's Association*, pg. 11-15. There is no inherent authority in Ohio courts to create criminal procedure in Ohio, *State v. Jama*, 10th Dist. No. 11AP-210, 2012-Ohio-2466, 2012 Ohio App. LEXIS 2168, ¶ 36 (2012) ("courts have only that power which has been conferred by statute or by rule."), so the

Supreme Court of Ohio could not disregard Ohio Crim.R. 52(A).

The Supreme Court of Ohio vacated Brinkman's guilty plea based on its interpretation of federal law. When it came to a fork in the road, the Supreme Court of Ohio chose the wrong path in *Veney*. The repercussions from that decision persist and were the basis for vacating Brinkman's plea. This will continue to happen in Ohio with real consequences not just to defendants but to the victims and their families as well. The questions presented are fairly before the Court and are worthy of certiorari.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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