No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMY DENSON
Petitioner
v.
THE STATE OF TEXAS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

THEODORE LEE WOOD*
Assistant Public Defender
Harris County, Texas
TBN 21907800
1201 Franklin, 13th Floor
Houston, Texas 77002
Phone: (713) 274-6705
ted.wood@pdo.hctx.net

*Counsel of Record

Attorneys for Petitioner
Jeremy Denson

QUESTION PRESENTED

Judges must ensure defendants fully understand the consequences of their guilty pleas. *Boykin v. Alabama* requires judges to use "the utmost solicitude of which courts are capable in canvassing the matter with the accused." And judges must make the record show the defendant's plea was knowing. Here, the defendant initialed several contradictory statements in his plea papers. Did the judge err in accepting the defendant's guilty plea without asking him about the contradictory statements?

PARTIES TO THE PROCEEDINGS

PETITIONER: Jeremy Denson

ATTORNEYS FOR PETITIONER:

ALEX BUNIN
Chief Public Defender
Harris County, Texas

THEODORE LEE WOOD
Assistant Public Defender
Harris County, Texas
1201 Franklin Street, 13th Floor
Houston, Texas 77002

RESPONDENTS:

KIM OGG
Harris County District Attorney
500 Jefferson Street, Suite 600
Houston, Texas 77002

KEN PAXTON
Texas State Attorney General
P.O. Box 12548
Austin, Texas 78711

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B. Order Refusing Petition for Discretionary Review, *Denson v. State,* No. PD-0666-21 (Tex. Crim. App., October 20, 2021). Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

On May 18, 2021, a panel of the Fourteenth District Court of Appeals of Texas issued an opinion rejecting Mr. Jeremy Denson's appellate arguments.[1] On July 27, 2021, the same panel of the Fourteenth Court of Appeals rejected Mr. Denson's motion for rehearing. Mr. Denson did not file a motion for en banc reconsideration.

Mr. Denson timely filed a petition for discretionary review with the Texas Court of Criminal Appeals on September 15, 2021. On October 20, 2021, the Texas Court of Criminal Appeals refused Mr. Denson's petition for discretionary review.

This petition for a writ of certiorari is filed on November 11, 2021. This is within 90 days of the denial of the petition for discretionary review in Mr. Denson's case. Therefore, the petition for a writ of certiorari is timely. *See* SUP. CT. R. 13(1). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

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[1] *See Denson v. State,* No. 14-19-00192-CR, 2021 WL 1972354 (Tex. App.—Houston [14th Dist.] May 18, 2021, pet. ref'd)(mem. op., not designated for publication).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE[2]

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[3]

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance for Counsel for his defence.[4]

FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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[2] This case involves a guilty plea and the waiver of certain constitutional rights. As announced by this Court:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers.

Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) (internal citations omitted).

[3] U.S. CONST. amend. V.

[4] U.S. CONST. amend. VI.

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

[5] U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Jeremy Denson, Petitioner, pleaded guilty to the offense of sexual assault of a child younger than 17 years old.[6] The trial court sentenced him to serve twelve years in prison.[7]

On appeal, Mr. Denson argued that the trial court erred in accepting his guilty plea without confirming it was entered knowingly and voluntarily. The Fourteenth Court of Appeals of Texas rejected Mr. Denson's argument.

Having been afforded no relief by the Fourteenth Court of Appeals, Mr. Denson turned to the Texas Court of Criminal Appeals. He filed a petition for discretionary review with the Court of Criminal Appeals that the Court ultimately refused.

In light of the fact that the Texas courts have denied his requested relief, Mr. Denson now files this petition for a writ of certiorari.

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[6] *Denson v. State* at *1.
[7] *Id.*

Reason for Granting the Petition

We reach out to the United States Supreme Court from down here in Texas where we definitely need some help from a higher authority. Our state courts are eviscerating *Boykin* and its protections for criminal defendants who plead guilty.

In this particular case, the defendant, Jeremy Denson, made multiple contradictory statements in the papers he signed when pleading guilty. Apparently, he signed whatever was placed in front of him. These plea papers were examined by the trial judge. Yet despite the contradictory statements, the judge made no inquiry to see if Mr. Denson actually understood what he had just signed.

Mr. Denson appealed. He argued that the trial judge abdicated his responsibilities as set out in *Boykin*. But the Texas appellate courts were unmoved. The Fourteenth Court of Appeals (an intermediate appellate court) held that the trial judge did everything he was required to do. And the Texas Court of Criminal Appeals declined to review that holding.

Mr. Denson now respectfully asks this Court to reiterate that *Boykin* is the law – even in the great State of Texas.

I. Boykin v. Alabama

A trial judge has a duty to ensure that a guilty plea is free and voluntary before accepting such a plea. In *Boykin v. Alabama,* this Court made this declaration regarding a judge's duty in accepting a defendant's guilty plea:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.[8]

The *Boykin* Court also said:

> A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences.[9]

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[8] *Boykin v. Alabama,* 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) emphasis added).
[9] *Id.* at 244 n. 7.

II. The traditional understanding of *Boykin* in Texas

In the 2013 case of *Davison v. State,* the Texas Court of Criminal Appeals explained its understanding of *Boykin*:

> [W]e regard the rule of *Boykin* to be in the nature of a systemic requirement, imposing a duty on the trial court to make the record demonstrate the knowing and voluntary quality of a guilty plea. The system will not tolerate the entry of a guilty plea on the basis of a record devoid of any indication that the defendant possessed a full understanding of what the plea connotes and of its consequence.[10]

So under Texas law, the trial court has a duty to make the record show that a defendant's plea was knowing and voluntary. As the *Davison* Court declared:

> *Boykin* operates like a rule of default. Unless the appellate record discloses that a defendant entered his guilty plea "voluntarily and understandingly[,]" a reviewing court must presume that he did *not*, and rule accordingly.[11]

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[10] *Davison v. State,* 405 S.W.3d 682, 690 (Tex. Crim. App. 2013).

[11] *Id.* (brackets and emphasis in original).

III. The contradictions in Mr. Denson's plea papers

The plea papers executed by Jeremy Denson contain four contradictions.

First, Mr. Denson signed one statement saying he agreed to be punished pursuant to a prosecutor's recommendation in a presentence investigation (PSI) report. But he also initialed a document saying he declined to participate in the preparation of a PSI report.[12]

Second, Mr. Denson initialed a statement saying he had never been convicted of a felony. But he also initialed a separate paragraph stating the opposite.[13]

Third, Mr. Denson initialed a statement saying he understood that he had to register as a sex offender for ten years at the end of his sentence. But he also appeared to initial a different statement saying he understood he had to register as a sex offender for the rest of his life.[14]

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[12] C.R. at 30-35.
[13] C.R. at 35.
[14] C.R. at 36-37. There is a mark of some kind before this statement, but it is not entirely clear if it is supposed to be Mr. Denson's initials.

Fourth, Mr. Denson initialed a statement saying he waived the filing of a grand-jury indictment. But he also initialed a statement saying he had read the indictment and committed each and every element of the alleged offense.[15]

[15] C.R. at 32.

IV. The statements signed by the trial judge

The trial judge signed three plea documents. The first of the three documents is entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession." The judge's signed statement says:

> This document was executed by the defendant, his attorney, and the attorney representing the State, and then filed with the papers of the case. The defendant then came before me and I approved the above and the defendant entered a plea of guilty. After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary.[16]

The second of the three documents is labeled "Admonishments." The trial judge signed this document indicating that he approved the statement therein that had been initialed by Mr. Denson.[17]

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[16] C.R. at 31.

[17] C.R. at 35. Mr. Denson's statement was as follows:

> Joined by my counsel, I state that I understand the foregoing admonishments and I am aware of the consequences of my plea. I am mentally competent to stand trial and my plea is freely and voluntarily made. If my counsel was appointed, I waive and give up any time provided me by law to prepare for trial. I am totally satisfied with the representation provided by my counsel and I received effective and competent representation. Under Art. 1.14 V.A.C.C.P., I give up all rights given to me by law, whether of form, substance, or procedure. Joined by my counsel, I waive and give up my right to a jury trial in this case and my right to require the appearance, confrontation, and cross-examination of the witnesses. I consent to oral and written stipulations of evidence in this case. I have read the indictment and I committed

The third of the three documents is entitled "Sex Offender Admonishments." The trial judge signed the following statement at the end of this document:

> The Defendant came before me and prior to accepting a plea of guilty or nolo contendere, I have admonished the Defendant of the fact that the Defendant will be required to meet the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure if the Defendant is convicted of or placed in deferred adjudication for an offense for which a person is subject to registration under that chapter. I find that Defendant's Attorney has advised the Defendant regarding the registration requirements under Chapter 62 of the Texas Code of Criminal Procedure. I further find that the Defendant is aware of and understands the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure and that his plea is knowingly and voluntarily made understanding the consequences of the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure.[18]

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each and every element alleged. I waive and give up my right of confidentiality to the presentence report filed in the case and agree that the report may be publicly filed. Under oath, I swear that the foregoing and all the testimony I give in this case is true.

[18] C.R. at 38.

V. The questions asked by the trial judge

The record contains no conversation between the trial judge and Mr. Denson on the date Mr. Denson pled guilty and signed his plea papers.[19] The only colloquy in the record between the trial judge and Mr. Denson occurred at the PSI hearing about two months later.[20] The colloquy was short; the entirety of the dialogue is reproduced below:

> THE COURT: Sir, is your name Jeremy Denson?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you speak and understand English, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you currently suffering from any type of mental condition?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Counsel, in your opinion is your client competent?
>
> MR. KELLY: Yes, he is, Your Honor.
>
> THE COURT: Sir, you stand before this Court charged with the second-degree felony offense of sexual assault of a child under the age of 17. The range of punishment is two to 20 in

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[19] Mr. Denson pled guilty on December 10, 2018. R.R. at 5; C.R. at 30-39. This was also the date on which the trial judge signed the statements set out in Part IV of this petition.

[20] The hearing on the PSI report took place on February 7, 2019.

the Texas Department of Criminal Justice and up to a $10,000 fine. Do you understand the charge and the range of punishment?

THE DEFENDANT: Yes, sir.

THE COURT: Back on December the 10th of 2018, you pled guilty to this offense; is that correct?

THE DEFENDANT: That's correct.

THE COURT: And are you waiving your right to a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand at the end of this PSI hearing I can either incarcerate you for a period of time in the Texas Department of Criminal Justice or I can place you on Community Supervision? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you still want to go forward with this PSI hearing?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you. You may have a seat.

VI. Mr. Denson's argument

Mr. Denson signed plea papers containing four contradictory statements. These contradictions suggest that Mr. Denson did not appreciate the significance of what he was signing. Thus, it is at least questionable whether he made his plea knowingly and with a full understanding of the rights he was giving up.

The trial judge should have been aware of these contradictions. They were contained in the plea papers that the judge attested Mr. Denson had signed before appearing before the judge.[21] But nothing in the record indicates the judge asked Mr. Denson any questions about his inconsistent statements. This hardly constitutes a "canvassing [of] the matter" with "the utmost solicitude of which courts are capable" as *Boykin* demands.

As noted in Part I of this petition, a trial court should conduct an on-the-record examination to insulate guilty-plea convictions from attack. But here the trial judge did nothing of the sort to insulate Mr.

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[21] *See* C.R. at 31 and Part IV of this petition ("This document was executed by the defendant, his attorney, and the attorney representing the State, and then filed with the papers of the case. The defendant then came before me and I approved the above and the defendant entered a plea of guilty.").

Denson's conviction. The judge made no attempt to satisfy himself that Mr. Denson understood the nature of the charges. The judge should have at least engaged in some questioning of Mr. Denson regarding his initialization of multiple contradictory statements. By not engaging in any such questioning, the judge failed to satisfy *Boykin's* mandate as explained by the Texas Court of Criminal Appeals. That mandate is that the trial court "make the record demonstrate the knowing and voluntary quality of a guilty plea."[22]

[22] *See* Part 2 of this petition.

VII. Comparison to a math test

Does a trial court's boilerplate attestation that the defendant entered his plea knowingly and understandingly constitute "the utmost solicitude of which courts are capable? Or do contradictions in a defendant's plea papers call for the judge to do something more to ensure the defendant understands what he is doing? Mr. Denson believes that in light of his contradictory statements, the trial judge should have questioned him to test his understanding. And that questioning needed to be more than just a perfunctory inquiry as to whether he understands the consequences of his plea. A comparison to a math test may be helpful here.

Suppose a college student scores a 37 on a math test, thereby failing miserably. And suppose that after seeing the results, the professor asks the student whether he understands the concepts she had taught. Further suppose that the student says he understands the relevant ideas. Such a statement would be wholly inconsistent with the test results. The professor would need to engage in further questioning and investigation to determine if the student had truly come to understand the relevant math theories. Mere acceptance of the student's statement as a fact

would not be enough to "make sure" the student fully understood the concepts.[23]

The current situation is similar to this math example. Given Mr. Denson's contradictory statements on his plea papers, the trial court needed to do more than simply ask Mr. Denson if he understood everything. The trial court's cursory questioning did not satisfy *Boykin's* demand that the court "canvass [ ] the matter with the utmost solicitude of which courts are capable."

[23] *Accord Boykin v. Alabama,* 395 U.S. at 243-44 ("What is at stake for an accused facing death of imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequence.") (emphasis added).

VIII. The Fourteenth Court of Appeals' opinion

Step One

The Court of Appeals correctly comprehended that any appellate analysis of whether a defendant's guilty plea was made voluntarily and understandingly begins with a presumption. That presumption is that the defendant's guilty plea was not made voluntarily and understandingly.[24] So initially, the Court of Appeals properly presumed that Mr. Denson's guilty plea was not made voluntarily and understandingly.

Step Two

The Court of Appeals then made another accurate acknowledgment. Specifically, the Court recognized that its initial presumption is rebutted "[w]hen the record shows that the trial court admonished the defendant."[25] The admonishment must be in substantial

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[24] *Denson v. State* at *2 (citing *Davison v. State,* 405 S.W.3d at 690, the Court of Appeals said:

> In other words, *"Boykin* operates like a rule of default: Unless the appellate record discloses that a defendant entered his guilty plea 'voluntarily and understandingly,' a reviewing court must presume that he did not and rule accordingly."

[25] *Denson v. State* at *2.

compliance with Article 26.13 of the Code of Criminal Procedure.[26] And such a showing on the record actually creates "a prima facie showing that [the defendant's] guilty plea was knowing and voluntary."[27]

The Court of Appeals emphasized the trial judge's written attestations which disclosed that indeed Mr. Denson had been admonished by the trial judge.[28] One of these attestations said:

> After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary.[29]

The Court appropriately found that this attestation on the record "created a prima facie showing" that Mr. Denson's plea was knowing and voluntary. So the first two steps of the Court's analysis were performed perfectly.

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[26] *Id.*
[27] *Id.*
[28] *See Denson v. State* at *3.
[29] *Id.*

Step Three

The Court of Appeals next discussed Mr. Denson's argument concerning the contradictory statements in his plea papers. This is where the Court went off track.

A proper analysis would have recognized that the contradictory statements served to rebut the prima facie case established under Step Two. And such a rebuttal would then require the trial court to "make the record demonstrate the knowing and voluntary quality of [Mr. Denson's] guilty plea.[30] But the Court of Appeals treated the prima facie case as something Mr. Denson had to conclusively disprove, saying:

> When the record shows that the trial court admonished the defendant in substantial compliance with article 26.13, a prima facie showing that his guilty plea was knowing and voluntary is created. *Martinez,* 981 S.W.2d at 197; *Smith v. State,* 609 S.W.3d 351, 353 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd). The defendant then has the burden to show that he did not fully understand the consequences of his plea and that he was misled or harmed by the admonition. *Martinez,* 981 S.W.2d at 197; *Smith,* 609 S.W.3d at 353.[31]

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[30] *See Davison v. State,* 405 S.W.3d at 690.

[31] *Denson* at *2 (emphasis added). The citation to *Martinez* is to *Martinez v. State,* 981 S.W.2d 195 (Tex. Crim. App. 1998).

The underlined statement is consistent with the *Martinez* case which was decided in 1998.[32] But there is a legitimate question as to whether *Martinez* is consistent with this Court's teachings in *Boykin*. In any event, *Martinez* no longer seems to be the law in Texas. In 2013, the Court of Criminal Appeals published the *Davison* opinion. And *Davison* says the trial court has a duty to "make the record demonstrate the knowing and voluntary quality of a guilty plea."[33] So once the record revealed the contradictory statements in Mr. Denson's plea papers, it was actually the trial court that had a "duty." That duty was to "make the record demonstrate" that Mr. Denson's guilty plea was knowing and voluntary. Mr. Denson had no duty to conclusively show he did not fully understand the consequences of his plea. But the Court of Appeals mistakenly placed such a duty on Mr. Denson, saying:

> When, as here, a defendant waives his right to have a record taken of the plea proceedings and later challenges on appeal

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[32] *See Martinez v. State,* 981 S.W.2d at 197 which said:

> A finding that a defendant was duly admonished creates a prima facie showing that a guilty plea was entered knowingly and voluntarily. *Ex parte Gibanitch,* 688 S.W.2d 868 (Tex. Crim App. 1985). A defendant may still raise the claim that his plea was not voluntary; however, the burden shifts to the defendant to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *Id.* at 871.

[33] *Davison v. State,* 405 S.W.3d at 690.

> the voluntariness of his plea, the defendant retains his burden to ensure a sufficient record is presented to establish error.[34]

The Court of Appeals erred in faulting Mr. Denson for waiving his right to have a record taken of the plea proceedings. It is the trial court that has a duty to "make the record demonstrate the knowing and voluntary quality of a guilty plea."[35] Requiring Mr. Denson to conclusively establish that he did not understand the consequences of his plea effectively eviscerates the guarantee provided under *Boykin*. Such a requirement renders the protections provided by *Boykin* wholly illusory.

The Court of Appeals' conclusion

The Court of Appeals put great weight in the trial judge's attestation:

> With these attestations, the trial judge confirmed that during the plea proceedings, he ensured appellant was aware of the consequences of his plea and entered a guilty plea knowingly and voluntarily. Nothing in *Boykin* or its progeny requires more than this.[36]

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[34] *Denson v. State* at *2.
[35] *See Davison v. State,* 405 S.W.3d at 690.
[36] *Denson v. State* at *3 (emphasis added).

In essence, the Court of Appeals relied entirely on the trial court's boilerplate attestation that Mr. Denson understood the consequences of his plea. This is a sad state of affairs. *Boykin* commands trial courts must use

> the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

And *Boykin* further commands trial courts to "leave[ ] a record adequate for any review that may be later sought."[37] These commands were not obeyed in the instant case. The Court of Appeals sanctioned this departure from Supreme-Court precedent. This is an error that Mr. Denson respectfully asks this Court to take notice and address.

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[37] *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) emphasis added).

PRAYER

Mr. Denson respectfully prays that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

THEODORE LEE WOOD
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 21907800
1201 Franklin, 13th Floor
Houston Texas 77002
Phone: (713) 274-6705
ted.wood@pdo.hctx.net

List of Appendices

Appendix A

Opinion of the Fourteenth District Court of Appeals of Texas, *Denson v. State,* No. 14-19-00192-CR, 2021 WL 1972354, 2021 WL 1972354 (Tex. App.—Houston [14th Dist.] May 18, 2021, pet. ref'd) (mem. op., not designated for publication).

Appendix B

Order Refusing Petition for Discretionary Review, *Denson v. State,* No. PD-0666-21 (Tex. Crim. App., October 20, 2021).

Appendix A

Opinion of the Fourteenth District Court of Appeals of Texas, *Denson v. State,* No. 14-19-00192-CR, 2021 WL 1972354, 2021 WL 1972354 (Tex. App.—Houston [14th Dist.] May 18, 2021, pet. ref'd) (mem. op., not designated for publication).

2021 WL 1972354

Court of Appeals of Texas, Houston (14th Dist.).

Jeremy DENSON, Appellant
v.
The STATE of Texas, Appellee

NO. 14-19-00192-CR

Opinion filed May 18, 2021

Discretionary Review Refused October 20, 2021

On Appeal from the 177th District Court, Harris County, Texas, Trial Court Cause No. 1585395

Attorneys and Law Firms

Melissa H. Stryker, Kim K. Ogg, Eric Kugler, for Appellee.

Scott Christopher Pope, Theodore Lee Wood, for Appellant.
Jeremy Denson, Pro Se.

Panel consists of Justices Bourliot, Hassan, and Poissant.

MEMORANDUM OPINION

Frances Bourliot, Justice

*1 Appellant Jeremy Denson pleaded guilty to and was convicted of sexual assault of a child younger than 17 years old and was sentenced to 12 years in prison. Citing contradictory statements that he signed and initialed in his plea documents, appellant contends, in two issues, that the trial court erred in accepting his guilty plea without confirming that it was entered knowingly and voluntarily and his trial counsel provided ineffective assistance of counsel by affirming that the plea was knowingly and voluntarily given. We affirm.

Background

Appellant was charged by indictment with sexual assault of a child younger than 17 years old. Appellant pleaded guilty, and as a part of that process, he signed and initialed several documents, including a Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession; Admonishments; and Sex Offender Admonishments. Appellant also entered his plea in open court before the trial judge, although he waived the preparation of a record of that hearing and thus no record was made.

At the heart of his appellate complaints, appellant highlights four perceived discrepancies or inconsistencies in the plea documents. First, in the Waiver of Constitutional Rights that appellant signed, it states that "I intend to enter a plea of guilty and the prosecutor will recommend that my punishment should be set at Presentence Investigation and I agree to that recommendation," but in the Admonishments, appellant placed his initials beside a paragraph that includes the statements, "I ... decline to participate in the preparation of a Presentence Investigation Report and request that said report not be made prior to the imposition of sentence." Second, in the Admonishments, appellant placed his initials beside a paragraph that states, "I have not been previously convicted of a felony offense," as well as another paragraph that states the opposite, "I have been convicted of a felony offense."

Third, paragraph 4 of the Sex Offender Admonishments states:

> I understand I am subject to the above described registration program [under Texas Code of Criminal Procedure article 26.13] and **the duty to register does not generally expire until ten years after my sentence or community supervision ends** because I will have been convicted or placed on deferred adjudication for one of the offenses listed below:
>
> [listed offenses omitted]

OR

> I understand I am subject to the above described registration program and **the duty to register is for the remainder of my life** because I have been convicted or placed on deferred adjudication for one of the offenses below:

[listed offenses omitted but included sexual assault].

(Emphasis added). It appears that appellant initialed before the first section of paragraph 4 and possibly before the second section. There is a mark before the second section, but it is not clear that it is appellant's initials.

Fourth, in the Admonishments, appellant initialed before paragraphs stating both that he waived the filing of a grand jury indictment and that he "read the indictment and ... committed each and every element alleged." As will be detailed below, the plea documents also contained affirmations signed by the trial judge and by appellant's trial counsel regarding the proceedings.

*2 Appellant contends that the inconsistencies in the plea documents should have alerted the trial judge that appellant may have lacked understanding about the consequences of his guilty plea and that the trial court should have made inquiries on the record to ensure that appellant understood the

consequences and knowingly and voluntarily pleaded guilty. Appellant further contends that his trial counsel was ineffective in affirming the contradictory statements and not ensuring appellant entered his plea knowingly and voluntarily.

Alleged Error

Due process protections under the United States Constitution require that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). When a defendant pleads guilty, he relinquishes his Sixth Amendment rights to trial by jury and confrontation of witnesses as well as his Fifth Amendment privilege against self-incrimination. *Id.* (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). For a guilty plea to withstand constitutional scrutiny, the defendant must possess actual awareness of the nature and gravity of both the charges and the constitutional rights and privileges he is relinquishing, in other words, "a full understanding of what the plea connotes and of its consequence." *Id.* at 686-87 (quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)).

Moreover, pursuant to the Supreme Court in *Boykin*, "the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady*, 397 U.S. at 747 n.4 (discussing *Boykin*). If the appellate record contains no evidence a defendant understood the rights he was waiving by pleading guilty, the conviction must be reversed. *See, e.g., United States v. Benitez*, 542 U.S. 74, 84 n.10 (2004); *Davison*, 405 S.W.3d at 687. For a defendant to prevail on a due process claim under these circumstances, the record must either affirmatively reflect that he did not understand the nature of the plea and its consequences or be silent with respect to whether he was provided or otherwise aware of the requisite information. *See Davison*, 405 S.W.3d at 687. In other words, "*Boykin* operates like a rule of default: Unless the appellate record discloses

that a defendant entered his guilty plea 'voluntarily and understandingly,' a reviewing court must presume that he did not, and rule accordingly." *Id.* at 690. In assessing the voluntariness of a guilty plea, we examine the entire record and consider the totality of the circumstances surrounding the plea. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998); *Houston v. State*, 201 S.W.3d 212, 217 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Texas Code of Criminal Procedure article 26.13(a) requires trial courts to admonish defendants, either orally or in writing, of certain facts and consequences attendant to a guilty plea before accepting such a plea. Tex. Code Crim. Pro. art. 26.13(a), (d). Additionally, a court may not accept a guilty plea "unless it appears that the defendant is mentally competent and the plea is free and voluntary." *Id.* art. 26.13(b). When the record shows that the trial court admonished the defendant in substantial compliance with article 26.13, a prima facie showing that his guilty plea was knowing and voluntary is created. *Martinez*, 981 S.W.2d at 197; *Smith v. State*, 609 S.W.3d 351, 353 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd). The defendant then has the burden to show that he did not fully understand the consequences of his plea and that he was misled or harmed by the admonition. *Martinez*, 981 S.W.2d at 197; *Smith*, 609 S.W.3d at 353. When, as here, a defendant waives his right to have a record taken of the plea proceedings and later challenges on appeal the voluntariness of his plea, the defendant retains his burden to ensure a sufficient record is presented on appeal to establish error. *Houston*, 201 S.W.3d at 218. Moreover, we presume recitals in court documents are correct unless the record affirmatively shows otherwise. *See id.* (citing *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984)).

*3 Appellant acknowledges that he signed and initialed admonishments in the plea documents, including but not limited to admonishments that by pleading guilty he was waiving the rights to trial by jury and confrontation of witnesses as well as the privilege against self-incrimination, that he was entering the plea voluntarily, and that he understood its nature. Appellant also acknowledges that such admonishments created a prima facie showing that his guilty plea was knowing and voluntary. *See* Tex. Code Crim. Pro. art. 26.13; *Martinez*, 981

S.W.2d at 197; *Smith*, 609 S.W.3d at 353. Appellant insists, however, that because he initialed inconsistent paragraphs in the plea documents, the record fails to show that he entered his guilty plea voluntarily and understandingly as required by *Boykin*. *See Davison*, 405 S.W.3d at 690. On this basis, appellant asserts in his first issue that the trial court failed to fulfill its duty under *Boykin* to ensure that the record reflected appellant understood the nature of his plea and its consequences. Appellant posits that the trial judge should have at least asked appellant about the inconsistent paragraphs on the record. 1

As stated, because appellant waived his right to have a record taken of the plea proceedings, we do not actually know the specifics of the verbal plea or the inquiries made by the court regarding appellant's understanding of the admonishments. We do, however, have a report from the trial judge about what took place during the plea entry proceedings. Certain plea papers appellant signed and initialed also included attestations by the trial judge regarding the proceedings after appellant signed the documents. In the Waiver of Constitutional Rights, the trial judge attested:

> This document was executed by the defendant, his attorney, and the attorney representing the State, and then filed with the papers of the case. The defendant then came before me and I approved the above and the defendant entered a plea of guilty. After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary.

In the Sex Offender Admonishments, the trial judge averred:

> The Defendant came before me and prior to accepting a plea of guilty ..., I have admonished the Defendant of the fact that the Defendant will be required to meet the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure if the

> Defendant is convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter. I find that the Defendant's Attorney has advised the Defendant regarding the registration requirements under Chapter 62 of the Texas Code of Criminal Procedure. I further find that the Defendant is aware of and understands the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure and that his plea is knowingly and voluntarily made understanding the consequences of the registration requirements of Chapter 62 of the Texas Code of Criminal Procedure.

With these attestations, the trial judge confirmed that during the plea proceedings, he ensured appellant was aware of the consequences of his plea and entered a guilty plea knowingly and voluntarily. Nothing in *Boykin* or its progeny requires more than this. *See Davison*, 405 S.W.3d at 690 ("*Boykin* operates like a rule of default: Unless the appellate record discloses that a defendant entered his guilty plea 'voluntarily and understandingly,' a reviewing court must presume that he did not, and rule accordingly."); *see also Aguirre-Mata v. State*, 125 S.W.3d 473, 476–77 (Tex. Crim. App. 2003); *Friemel v. State*, 465 S.W.3d 770, 776 (Tex. App.—Texarkana 2015, pet. ref'd). This and other courts of appeal have consistently rejected similar arguments to those appellant makes here. *See, e.g., Venegas v. State*, No. 13-07-00396-CR, 2009 WL 4458710, at *4-5 (Tex. App.—Corpus Christi Dec. 3, 2009, pet. ref'd) (mem. op., not designated for publication); *Tatum v. State*, No. 14-04-00109-CR, 2005 WL 282880, at *1 (Tex. App.—Houston [14th Dist.] Feb. 8, 2005, pet. ref'd) (mem. op., not designated for publication); *Espinal v. State*, No. 01-00-00662-CR, 2001 WL 1663940, at *2 (Tex. App.—Houston [1st Dist.] Dec. 27, 2001, no pet.) (mem. op., not designated for publication); *Medina v. State*, No. 14-97-00859-CR, 1999 WL 587657, at *2 (Tex. App.—Houston [14th Dist.] Aug. 5, 1999, no pet.) (mem. op., not designated for publication). Because the record reflects that the trial judge performed his duties under *Boykin*, we overrule appellant's first issue.

Assistance of Counsel

*4 In his second issue, appellant contends that he received ineffective assistance of counsel because counsel permitted appellant to plead guilty and affirmed in the plea documents that the plea was knowingly and voluntarily given despite the inconsistencies in the admonitions. The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Claims of ineffective assistance of counsel are evaluated under the two-pronged *Strickland* test, which requires a showing that counsel's performance was deficient and that the defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *see also Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Essentially, appellant must show his counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. In the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the alleged failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). A proper record is best developed in a habeas corpus proceeding or in a motion for new trial hearing. *DeLeon v. State*, 322 S.W.3d 375, 381 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

As discussed above, the record here does not reflect that appellant entered his plea involuntarily or unknowingly. To the contrary, the record supports the conclusion that despite any inconsistent statements in the written admonitions, the trial court determined that appellant was aware of the consequences of his plea and entered a guilty plea knowingly and voluntarily. Accordingly, the record does not support appellant's assertions that his counsel permitted him

to plead guilty unknowingly or involuntarily, that counsel's performance was deficient, or that appellant suffered prejudice as a result. *See Thompson*, 9 S.W.3d at 812-13. We overrule appellant's second issue.

We affirm the trial court's judgment.

All Citations

Not Reported in S.W. Rptr., 2021 WL 1972354

Footnotes

1 We need not decide whether the paragraphs at issue all presented actual inconsistencies or discrepancies or whether the paragraphs were related to consequences of appellant's guilty plea. Appellant's contention is that the trial court should have made inquiries based on the inconsistent paragraphs.

End of Document

Appendix B

Order Refusing Petition for Discretionary Review, *Denson v. State,* No. PD-0666-21 (Tex. Crim. App., October 20, 2021).

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

10/20/2021 **COA No. 14-19-00192-CR**

DENSON, JEREMY **Tr. Ct. No. 1585395** **PD-0666-21**

On this day, the Appellant's petition for discretionary review has been refused.

JUDGE HERVEY DID NOT PARTICIPATE

Deana Williamson, Clerk

THEODORE LEE WOOD
HARRIS COUNTY PUBLIC DEFENDER'S OFFICE
1201 FRANKLIN STREET
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *