No. _____

In The

Supreme Court of the United States

SAMMY JAY RIDDLE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Texas courts denied petitioner due process by rejecting his substantial ineffective assistance of counsel claim without conducting an evidentiary hearing, based on the trial prosecutor's affidavit, even though the record corroborated petitioner's and trial counsel's contradictory affidavits.

II. Whether the Texas courts' refusal to conduct an evidentiary hearing on petitioner's substantial ineffective assistance of counsel claim conflicts with this Court's decision in *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his [constitutional claim]. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers.").

III. Whether due process requires a trial court to admonish a defendant, before accepting a guilty plea, that the plea waives the defendant's constitutional right to require the prosecution to prove each essential element of the offense beyond a reasonable doubt. The Texas Court of Criminal Appeals' decision concerning this issue conflicts with decisions of other state high courts.

RELATED CASES

- *State of Texas v. Riddle*, No. 17477, 253rd District Court of Texas. Order of Deferred Adjudication entered February 23, 2016.
- *State of Texas v. Riddle*, No. 17477, 253rd District Court of Texas. Judgment Adjudicating Guilt entered August 22, 2016.
- *Riddle v. State of Texas*, No. 01-16-00657-CR, Court of Appeals for the First District of Texas. Opinion entered August 23, 2018.
- *Riddle v. State of Texas*, No. PD-1007-18, Texas Court of Criminal Appeals. Order Refusing Discretionary Review entered December 5, 2018.
- *Ex parte Riddle*, No. WR-91,158-01, Texas Court of Criminal Appeals. Order Denying Habeas Corpus Relief entered September 7, 2022.
- *Ex parte Riddle*, No. WR-91,158-01, Texas Court of Criminal Appeals. Order Denying Suggestion for Reconsideration entered September 26, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sammy Jay Riddle, respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA").

OPINIONS BELOW

The TCCA's denial of habeas corpus relief without written order (App. 1) is unreported. The TCCA's denial of petitioner's suggestion for reconsideration (App. 6) is unreported. The state habeas trial court's findings of fact and conclusions of law (App. 2-5) are unreported.

The TCCA's refusal of petitioner's petition for discretionary review (App. 7) is unreported. The Texas Court of Appeals' opinion affirming the trial court's judgment on direct appeal (App. 8-12) is unreported but is available at 2018 WL 4014036.

The trial court's judgment adjudicating guilt (App. 13-18) is unreported. The trial court's order deferring an adjudication of guilt (App. 19-22) is unreported.

JURISDICTION

The TCCA denied habeas corpus relief on September 7, 2022, and denied petitioner's suggestion for reconsideration on September 26, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defen[s]e."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE[1]

A. Procedural History

On petitioner's direct appeal in 2018, the Texas Court of Appeals summarized the relevant history of the case that preceded his filing of an application for a writ of habeas corpus (App. 9-11):

> [Petitioner] was indicted for the offenses of aggravated sexual assault of a child. . . . Almost two years later, he was indicted for the offense of continuous sexual abuse of a young child. . . . The second case was set for trial, but after a jury was selected, [petitioner] and the State reached a plea agreement. As part of the

[1] The record in the court below is cited as follows: "C.R." refers to the clerk's record of the original trial court proceedings. "S.C.R." refers to the Supplement Clerk's Record in the court below. "AX" refers to petitioner's exhibits offered in the state habeas corpus proceedings. "R.R." refers to the court reporter's record of proceedings in the trial court.

agreement, [petitioner] pleaded guilty to the charge of aggravated sexual assault of a child. In exchange, the State recommended a deferred adjudication on that charge and a dismissal of the remaining charge of continuous sexual abuse of a young child. The court accepted [petitioner's] guilty plea, and it found that the evidence supported a guilty finding. It deferred adjudication and placed [petitioner] on community supervision [probation] for ten years.

The State subsequently filed a motion to revoke community supervision. After a hearing, the court determined that [petitioner] had committed twenty violations of the conditions of his community supervision. [Petitioner] then was adjudicated guilty and sentenced to 54 years in prison for the offense of aggravated sexual assault of a child.

After appointment of appellate counsel, [petitioner] filed a motion for a new trial, alleging ineffective assistance of counsel relating to the circumstances of his plea bargain. He claimed that his guilty plea was neither knowing nor voluntary because his trial counsel never informed him of a misdemeanor plea-bargain offer made by the State. [Petitioner] contended that had he been aware of the offer, he would have accepted it, and thus his guilty plea was the result of ineffective assistance of trial counsel.

. . .

> The trial court did not grant a requested hearing on the motion for new trial, which was denied by operation of law.

The Texas Court of Appeals refused to address the merits of the ineffective assistance of counsel claim. It held that petitioner "could have appealed from the order placing him on deferred adjudication community supervision when the order was initially imposed" and raised the claim at that juncture (App. 12).[2] The TCCA refused discretionary review on December 5, 2018 (App. 7).

Thereafter, petitioner filed a state application for habeas corpus relief pursuant to article 11.07 of the

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[2] The Texas Court of Appeals' ruling on direct appeal was erroneous because, when petitioner was placed on community supervision, he was represented by the same lawyer who was ineffective in the prior proceedings. A lawyer who was ineffective cannot be expected to challenge his own ineffectiveness. *See Massaro v. United States*, 538 U.S. 500, 503 (2003) ("[A]n attorney . . . is unlikely to raise an ineffective-assistance claim against himself."). In the TCCA, petitioner alleged that trial counsel provided ineffective assistance by failing to advise him about counsel's own ineffectiveness, move to withdraw the guilty plea, and also move to withdraw as counsel—so that, at the very least, petitioner could properly raise an ineffective assistance claim on direct appeal.

In any event, as explained below, the Texas courts addressed the merits of petitioner's ineffectiveness claim on state habeas corpus review and did not conclude it was procedurally barred. For that reason, the ineffective assistance claim is properly before this Court. *See Harris v. Reed*, 489 U.S. 255 (1989) (federal constitutional claim properly raised on federal court review if state courts did not clearly rule that claim was procedurally defaulted under state law).

Texas Code of Criminal Procedure. Among several claims, petitioner alleged the two claims raised in this petition: (1) the ineffective assistance claim that the state courts refused to review on direct appeal and (2) a due process claim that his guilty plea was involuntary because the trial court did not advise him before he pled guilty that he was waiving the constitutional requirement that the State prove each element of the charged offense beyond a reasonable doubt. Petitioner filed affidavits from trial counsel and himself in support of the ineffective assistance claim.

The state trial court initially refused to conduct a hearing or make findings of fact and conclusions of law, as required by Texas Code of Criminal Procedure Article 11.07, § 3(d). The TCCA remanded the case to the trial court to "make findings of fact and conclusions of law within ninety days. . . ." *Ex parte Riddle*, WR-91,158-01, 2020 WL 2177300, at *1 (Tex. Crim. App. May 6, 2020). The trial court ignored the TCCA's remand order for more than two years.

On July 12, 2022, without conducting a hearing, the trial court simply adopted the State's proposed findings and conclusions *verbatim* (App. 5). The cursory findings and conclusions stated, "Applicant received effective assistance of counsel," and, "Applicant fails to state sufficient specific facts to support his grounds for relief" (App. 3).[3] The trial court refused to conduct an evidentiary hearing because "[t]here are no

[3] The state habeas trial court did not find that petitioner's ineffective assistance claim was procedurally defaulted.

material, previously unresolved issues of fact which are material to the legality of Applicant's conviction and sentence and there being ample evidence in the record for the Court to rule on the relief sought" (App. 4). Rather than conduct a hearing on the substantial ineffective assistance claim, the trial court accepted the trial prosecutor's affidavit denying that she had offered a misdemeanor plea bargain to trial counsel (App. 3).

Petitioner argued in the TCCA that the trial court erred in denying relief on the ineffective assistance claim without conducting an evidentiary hearing. The TCCA denied relief "without written order . . . on the findings of the trial court without a hearing" on September 7, 2022 (App. 1).

B. Relevant Facts

1. Ineffective Assistance of Counsel Claim

The state court record and the affidavit of petitioner's trial counsel, Robert Turner, demonstrated that the trial court prosecutor, Kathy Esquivel, offered Turner a plea bargain on a misdemeanor in 2015.[4] Turner discussed the misdemeanor plea bargain with Esquivel on September 15, 2015, but he failed to finalize the negotiations or inform petitioner of the offer

[4] At the hearing on the motion to revoke petitioner's community supervision, Turner stated, "at one time, we even had been offered a misdemeanor" (11 R.R. 221). Importantly, the trial prosecutor did not dispute that assertion at that time.

(S.C.R. 13; AX 2). One month after Esquivel offered the misdemeanor plea bargain to Turner, the State indicted petitioner for continuous sexual abuse of a child in cause number 18428. Petitioner first learned of the misdemeanor plea bargain then, but Turner told him that Esquivel had withdrawn the offer. Had petitioner known about the misdemeanor plea bargain before it expired, he would have accepted it (S.C.R. 15).

In the state habeas proceeding, Esquivel submitted a controverting affidavit asserting that she never offered a misdemeanor plea bargain. Instead, she contended that Turner had *proposed* a plea bargain to misdemeanor assault but that misdemeanor assault was not a lesser-included offense of sexual assault, so Turner's proposed plea bargain was "not even legally possible."[5]

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[5] Esquivel's affidavit was incorrect as a matter of law for two reasons. First, the TCCA's decision in *McKithan v. State*, 324 S.W.3d 582 (Tex. Crim. App. 2010), did not categorically hold that misdemeanor assault (Tex. Pen. Code § 22.01(a)) is never a lesser-included offense of aggravated sexual assault of a child (Tex. Pen. Code § 22.021). *McKithan* only addressed whether misdemeanor assault was a lesser-included offense of a specific allegation of aggravated sexual assault at issue in that case. It left open whether misdemeanor assault could be a lesser-included offense of aggravated sexual assault in other scenarios. *McKithan*, 324 S.W.3d at 585 & n.10. Texas courts regularly hold that misdemeanor assault is a lesser-included offense of aggravated sexual assault in other scenarios. *See*, *e.g.*, *Ibarra v. State*, 445 S.W.3d 285, 286 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) ("In 1998, appellant . . . was charged with sexual assault. On March 16, 1998, he pleaded guilty to a lesser charge of misdemeanor assault. . . ."). A district court in Texas has jurisdiction to adjudicate a

The state habeas trial court adopted the State's proposed findings and conclusions that credited Esquivel's affidavit without conducting a hearing and despite Turner's and petitioner's controverting affidavits (App. 3-5).

2. Petitioner's Challenge to the Voluntariness of His Guilty Plea

The transcript of petitioner's guilty plea demonstrates that he knew he was waiving three specific constitutional rights—the Fifth Amendment privilege against self-incrimination and the Sixth Amendment rights to a jury trial and to confront witnesses. However, the trial court failed to admonish him during the colloquy that he was waiving his due process right to have the State prove each element of the charged

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misdemeanor offense that is a lesser-included offense of a charged felony. *Golden v. State*, 833 S.W.2d 291, 292 (Tex. Crim. App. 1992).

Second, Esquivel's affidavit failed to acknowledge that a misdemeanor assault charge could have been filed in Chambers County Court of at Law, and that charge could have been transferred to the Chambers County District Court. Tex. Gov't Code § 24.490(c) ("The 344th District Court has concurrent jurisdiction over all matters of civil and criminal jurisdiction, original and appellate, in cases over which the county court has jurisdiction under the constitution and laws of this state. Matters and proceedings in the concurrent jurisdiction of the 344th District Court and the county court shall be filed in the county court, *and all cases of concurrent jurisdiction may be transferred between the 344th District Court and the county court*.") (emphasis added).

offense beyond a reasonable doubt.[6] Nor did the plea paperwork that petitioner signed warn him that he was waiving this critical constitutional right.[7]

REASONS FOR GRANTING CERTIORARI

Two separate reasons warrant this Court's review. First, the State courts denied petitioner due process of

[6] The transcript of petitioner's guilty plea shows the following colloquy between the court and petitioner (6 R.R. 5-6):

> THE COURT: I have before me papers that you have signed, your attorney signed, and the prosecutor has signed. In those papers you stated that you know what you're charged with, what the range of punishment is, you've admitted your guilt, waived your right to a jury trial, waived your right to call and confront witnesses, and other rights that you have, including your right of appeal. . . . Do you understand all of these papers?
>
> THE DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: Did you go over all of this paperwork with your attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you understand it all prior to the time that you signed it?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you agree with your client thus far?
>
> MR. TURNER: I do (6 R.R. 5-6).

[7] The paperwork consisted of the "Written Plea Admonishments" and "Warnings and Admonishments & Waiver of Right Against Self-Incrimination." It discussed the privilege against self-incrimination and the rights to a jury trial and confrontation but did not mention the constitutional right to require the State to prove each element of the charged offense beyond a reasonable doubt (C.R. 86-87, 89-90).

law by refusing to conduct an evidentiary hearing on his substantial claim that trial counsel was ineffective in failing to tell him about a misdemeanor plea bargain that he would have accepted had he known about it before it expired. The denial of an evidentiary hearing where petitioner introduced supporting affidavits warrants reversal under this Court's longstanding requirement that state courts must afford meaningful evidentiary development of colorable constitutional claims raising genuine disputes about material facts. *See*, *e.g.*, *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his [constitutional claim]. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers.").

Second, this Court should grant review and address the important issue of whether the logic of *Boykin v. Alabama*, 395 U.S. 238 (1969), requires a trial court to admonish a defendant before pleading guilty that he is waiving his due process right to require the State to prove each element of the charged offense beyond a reasonable doubt. The TCCA's decision in this case conflicts with the decisions of other state high courts.

I.

THE COURT SHOULD VACATE THE TCCA'S JUDGMENT AND REMAND FOR AN EVIDENTIARY HEARING ON PETITIONER'S SUBSTANTIAL CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE DUE PROCESS CLAUSE AND THIS COURT'S PRECEDENT GOVERNING EVIDENTIARY HEARINGS WHEN THERE IS A SUBSTANTIAL FEDERAL CONSTITUTIONAL CLAIM RAISED ON STATE COLLATERAL REVIEW.

Petitioner raised a substantial ineffective assistance claim in state court based on affidavits from petitioner and trial counsel, who failed to convey to petitioner the State's misdemeanor plea bargain. Additionally, the contemporaneous trial record corroborated trial counsel's affidavit. Petitioner's affidavit—and common sense—support that he would have accepted a misdemeanor plea bargain rather than facing trial on or pleading guilty to aggravated sexual assault of a child, a felony that carried a potential life sentence. The state courts denied petitioner's repeated requests—in his motion for new trial and in the habeas corpus proceeding—for an evidentiary hearing on that Sixth Amendment claim.

Petitioner would be entitled to relief if, after an evidentiary hearing, the Texas courts found that (1) the State offered a misdemeanor plea bargain but counsel did not convey it to petitioner before it expired and (2)

there is a reasonable probability that he would have accepted the offer. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); *id.* at 147 ("To show prejudice . . . where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer. . . . To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge. . . .").

Although the United States Constitution does not require the States to provide direct appeals or collateral review to defendants in criminal cases, the States that have established post-conviction proceedings must ensure that the procedures comport with the Due Process Clause of the Fourteenth Amendment. *See*, *e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Texas created collateral review of non-capital felony convictions under article 11.07 of its Code of Criminal Procedure. Thus, the Due Process Clause applies to Texas habeas corpus proceedings, just as it applies to state court direct appeals,[8] probation and parole revocation

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[8] *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (Although "the Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," "the Due Process and Equal Protection Clauses require the appointment of

proceedings,[9] and non-criminal proceedings such as driver's license revocations.[10] The Constitution does not require any of those proceedings. But if a State offers it, it must comport with due process.

Although "flexible," due process calls for judicial procedures "as the particular situation demands." *Morrissey*, 408 U.S. at 481. Exactly what type of process depends on consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Applying those three factors in petitioner's case, this Court should conclude that petitioner was entitled to an evidentiary hearing and that

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counsel for defendants, convicted on their pleas, who seek access to first-tier [appellate] review.").

[9] *Gagnon v. Scarpelli*, 411 U.S. 778, 783-91 (1973) (extending federal due process protections to probationers facing revocation); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972) (extending federal due process protections to parolees facing revocation).

[10] *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

the Texas court's denial of that procedure violated due process.

The Sixth Amendment right to the effective assistance of counsel is the "foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The only way that inmates can vindicate their essential right to the effective assistance of counsel in most cases is by filing post-conviction challenges to their convictions or sentences. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003). Such claims usually cannot be properly litigated before collateral review. *Id.*

When a state court inmate raises a substantial Sixth Amendment claim of ineffective assistance of counsel and there is a genuine dispute of material fact concerning the claim, due process requires an evidentiary hearing. *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process entitles recipient of governmental assistance facing loss of benefits to pretermination evidentiary hearing). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269.

The Texas courts' denial of petitioner's substantial ineffective assistance claim based solely on the trial prosecutor's affidavit did not comport with such basic due process. This is especially true where the contemporaneous record strongly corroborated trial counsel's affidavit.[11] When there is a genuine dispute of material

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[11] As noted *supra*, at the 2018 hearing on the State's motion to revoke petitioner's community supervision, Turner stated, "at

fact concerning a substantial ineffective assistance claim, a state court must conduct an evidentiary hearing at which the witnesses are subject to cross-examination under oath. Here, the trial prosecutor who denied offering a misdemeanor plea bargain should have been subject to cross-examination. And the State should have had the opportunity to cross-examine trial counsel.

Although this Court has not specifically addressed whether due process requires an evidentiary hearing in a state habeas corpus proceeding when there is a genuine dispute of material fact, this Court repeatedly has vacated judgments of state courts on collateral review and remanded when those courts failed to conduct evidentiary hearings on substantial federal constitutional claims raising genuine issues of material fact. *See*, *e.g.*, *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his [constitutional claim]. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."); *Wilde v. Wyoming*, 362 U.S. 607, 607 (1960) (*per curiam*) ("It does not appear from the record that an adequate hearing on these allegations was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court. We find nothing in our

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one time, we even had been offered a misdemeanor" (11 R.R. 221). The trial prosecutor did not dispute that assertion. Yet, two years later, she submitted an affidavit denying that she ever offered that plea bargain.

examination of the record to justify the denial of hearing on these allegations."); *Sublett v. Adams*, 362 U.S. 143, 143 (1960) (*per curiam*) ("Petitioner charged that he was being held in prison without lawful authority and in violation of due process of law under the Fourteenth Amendment. The West Virginia Supreme Court of Appeals refused the writ [of habeas corpus] without either a hearing or a response from the State. We hold that the facts alleged are such as to entitle petitioner to a hearing. . . .").[12]

Because those cases involved state court proceedings on collateral review, this Court necessarily concluded that denial of an evidentiary hearing violated the Constitution. Otherwise, this Court would have lacked federal question jurisdiction to vacate the state courts' judgments and remand for evidentiary hearings on the federal constitutional claims.

As a practical matter, state collateral review proceedings are the main event for inmates, like petitioner, who claim that trial counsel were ineffective. It has become increasingly difficult to obtain relief in federal court under the substantive and procedural hurdles created by 28 U.S.C. § 2254. *See*, *e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that

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[12] *See also Cash v. Culver*, 358 U.S. 633, 637-38 (1959); *Palmer v. Ashe*, 342 U.S. 134, 137-38 (1951); *Jennings v. Illinois*, 342 U.S. 104, 111-12 (1951); *Rice v. Olson*, 324 U.S. 786, 791-92 (1945); *Tomkins v. Missouri*, 323 U.S. 485, 488-89 (1945); *Williams v. Kaiser*, 323 U.S. 471, 478-79 (1945); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942); *Smith v. O'Grady*, 312 U.S. 329, 333-34 (1941).

review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003) (*per curiam*) (affording "double deference" to a state court's conclusion that a defense attorney challenged as ineffective did not afford ineffective assistance); *see also May v. Shinn*, 37 F.4th 552, 559 (9th Cir. 2022) (Block, D.J., concurring) ("[T]he practical effect of [the Antiterrorism and Effective Death Penalty Act] was 'to halt the prior federal practice of employing habeas review to bring new conditions of fairness to the steamroller systems of justice found in too many states.'") (quoting Jed S. Rakoff, *The Magna Carta Betrayed?*, 94 N.C. L. REV. 1423, 1429 (2016)). Particularly for ineffective assistance claims, which are extremely common in collateral review,[13] federal "habeas relief today is virtually a dead letter." *Id.* at 559.

The hurdles that exist on *federal* habeas corpus review do not exist on *state* collateral review. In view of those hurdles in federal court, this Court must ensure that federal due process protections apply to state court post-conviction proceedings. *See generally* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 160 (2021).

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[13] See Nancy J. King *et al*., *Executive Summary: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed By State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* 5 (2007) (noting the majority of federal habeas petitioners raised an ineffectiveness claim), available at https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf.

The Court should grant certiorari, vacate the TCCA's judgment, and remand for an evidentiary hearing at which petitioner can question the trial prosecutor under oath.

II.

DUE PROCESS REQUIRES A TRIAL COURT TO ADMONISH A CRIMINAL DEFENDANT THAT, BY PLEADING GUILTY, HE IS WAIVING HIS CONSTITUTIONAL RIGHT TO HAVE THE PROSECUTION PROVE EACH ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court addressed what a trial court must do to ensure that a defendant's guilty plea is knowing, voluntary, and intelligent under the federal Due Process Clause. The trial court must "spread on the record" the defendant's awareness and valid waiver of three fundamental constitutional rights—the Fifth Amendment privilege against compulsory self-incrimination and the Sixth Amendment rights to a jury trial and to confront witnesses. *Id.* at 242-43. The court must make a contemporaneous record, as a matter of due process, "to make sure [the defendant] 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." *Id.* at 244. However, when the record shows that the trial court did not "canvass [these rights] with the accused,"

it is "reversible error because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." *Id*. at 244 (citation and internal quotation marks omitted); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004) ("We have held . . . that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed.") (citing *Boykin*).

Boykin did not expressly mention the constitutional right to have the prosecution prove each element beyond a reasonable doubt. But that omission is understandable because this Court did not "announce" that distinct constitutional right until one year after it decided *Boykin*. *See In re Winship*, 397 U.S. 358 (1970); *see also Ivan V. v. City of New York*, 407 U.S. 203, 205 (1971) (*per curiam*) (retroactively applying "constitutional standard of proof beyond a reasonable doubt announced in *Winship*").

After *Winship*, this Court's cases have spoken of the Sixth Amendment right to a jury trial and the due process right to require the prosecution to prove each element of the offense beyond a reasonable doubt as concomitant rights. *See*, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 522-23 (1996) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) (noting "*Winship*'s due process [requirement]" and "associated jury

protections" under Sixth Amendment) (citation and internal quotations omitted).

Predictably, several lower courts have recognized that, after *Winship*, a defendant's plea of guilty not only waives the three "*Boykin* rights" but "also involves a waiver of other constitutional rights [including] the right to insist upon the prosecution's proof of guilt beyond a reasonable doubt at trial. . . ." *People v. Meyers*, 617 P.2d 808, 815 (Colo. 1980); *accord Commonwealth v. DelVerde*, 496 N.E.2d 1357, 1360 (Mass. 1986); *see also Santobello v. New York*, 404 U.S. 257, 264 (1972) (Douglas, J., concurring) ("a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, . . . to confront one's accusers . . . , to present witnesses in one's defense . . . , to remain silent, . . . and to be convicted by proof beyond all reasonable doubt. . . ." (citing, *inter alia*, *Winship*).

Therefore, to comply with the Due Process Clause, a trial court must warn a defendant that his guilty plea waives the constitutional right to require the prosecution to prove each element of the charged offense beyond a reasonable doubt. *See State v. Veney*, 897 N.E.2d 621, 625-26 (Ohio 2008) ("[T]he state argues that a trial court need only substantially comply with the obligation to advise a defendant of the prosecution's burden of proof because the right is not specified in *Boykin* as one that is constitutionally required. Yet, as the United States Supreme Court held the year after *Boykin*, the right to have the state prove guilt beyond a reasonable doubt is a constitutionally protected right

of an accused.") (citing *Winship*); *Anderson v. State*, 465 N.E.2d 1101, 1102 (Ind. 1984) ("Here the record does not demonstrate that the appellant was meaningfully informed by the trial judge that his plea of guilty was a waiver of his right to have the State prove his guilt beyond a reasonable doubt. . . . Therefore this cause is remanded to the trial court with instructions to vacate the guilty plea and to permit the reinstatement of the plea of not guilty."). The TCCA's decision directly conflicts with these decisions of other state high courts.

A majority of this Court has not yet decided whether the *Boykin* requirements should include a specific admonishment that the defendant's guilty plea waives the *Winship* right.[14] But simple logic compels that result. After all, the right to have the State prove each element of an offense beyond a reasonable doubt is more fundamental than the three rights identified in *Boykin*. The fundamental nature of the *Winship*

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[14] *See Johnson v. Ohio*, 419 U.S. 924, 945 (1974) (Douglas, J., joined by Brennan & Marshall, JJ., dissenting from denial of certiorari) ("The *Boykin* enumeration was illustrative, not exhaustive. The necessity that one be found guilty beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)) . . . [is] likewise involved. . . . Ohio seems to recognize the need to accommodate constitutional rights other than the three mentioned in *Boykin*, since its own supreme court has held that a trial judge must advise the defendant of his right to be proven guilty beyond a reasonable doubt before accepting a guilty plea."). The State of Ohio filed a petition for writ of certiorari requesting this Court to overrule the Ohio Supreme Court's decision in *State v. Veney*, 897 N.E.2d 621 (Ohio 2008). *See* Petition for Writ of Certiorari, *Ohio v. Veney*, No. 08-1018, 2009 WL 344627 (filed February 9, 2009). This Court denied the petition without comment or dissent. *Ohio v. Veney*, 557 U.S. 929 (2009).

right became evident when this Court gave *Winship* "complete retroactive effect." *Ivan*, 407 U.S. at 205. By contrast, the Court refused to apply retroactively its decisions regarding the privilege against self-incrimination,[15] the right to a jury trial,[16] and the right to confront witnesses.[17]

Similarly, in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court concluded that a violation of the due process requirement set forth in *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*), concerning an erroneous definition of "reasonable doubt," was a "structural error" requiring automatic reversal on appeal. *Cage*, of course, merely applied *Winship*. Conversely, the Court has held that violations of the privilege against self-incrimination and the right to confront witnesses are not "structural errors" and, instead, are subject to harm analysis.[18] Accordingly, logic dictates that the *Winship* right to have the prosecution prove each element of the offense beyond a reasonable doubt is a *Boykin*-type constitutional right. A trial court must

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[15] *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966) (refusing to apply retroactively *Griffin v. California*, 380 U.S. 609 (1965)).

[16] *Schriro v. Summerlin*, 542 U.S. 348, 356-57 (2004) (recognizing *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied Sixth Amendment jury-trial guarantee to States).

[17] *Whorton v. Bockting*, 549 U.S. 406 (2007) (refusing to apply retroactively *Crawford v. Washington*, 541 U.S. 36 (2004)).

[18] *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991).

admonish a defendant of that right and obtain a valid waiver of it before a accepting a guilty plea.

This Court's post-*Boykin* cases unquestionably demonstrate that a defendant's constitutional right to require the State to prove each element of the offense beyond a reasonable doubt is more fundamental than the three *Boykin* rights identified one year before *Winship*. For that reason, petitioner's guilty plea was invalid because the record unquestionably shows that the trial court did not admonish him that, by pleading guilty, he was waiving that fundamental constitutional right.

This Court should grant certiorari and decide the important issue of whether the due process right to have the prosecution prove each element of the offense beyond a reasonable doubt should become part of the *Boykin* admonishments.

CONCLUSION

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

Respectfully submitted,

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