

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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STATE OF OHIO,

*Petitioner,*

v.

GEORGE BRINKMAN,

*Respondent.*

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*On Petition for Writ of Certiorari to  
the Supreme Court of Ohio*

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

George Brinkman confessed to murdering a mother and her two daughters. In the face of overwhelming evidence, Brinkman, represented by counsel, chose to enter a guilty plea to the indictment. Fifty-two years ago, the Court held that due process requires an affirmative showing that a guilty plea was entered knowingly, voluntarily, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969). *Boykin* held that the waiver of constitutional rights during a plea cannot be presumed from a silent record, but it did not limit what a reviewing court can consider. Despite a lack of objection, the Supreme Court of Ohio vacated Brinkman's plea finding that due process can only be satisfied by a narrow review of the plea proceedings—a standard the Court has never previously required. The Supreme Court of Ohio's "presumption of prejudice" standard conflicts with decisions from the Court as well as nearly all other state and federal courts. The two questions presented for the Court are:

1. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit review of the entire record to determine whether a guilty plea was knowingly, intelligently and voluntarily entered?
2. Should this Court grant certiorari to resolve the conflict among the courts on whether the failure to strictly adhere to the advisement of rights in *Boykin* should result in the automatic reversal of a guilty plea?

**LIST OF PARTIES AND  
CORPORATE DISCLOSURES**

The caption of the case contains the names of all the parties. No corporations are involved.

**STATEMENT OF RELATED PROCEEDINGS**

This case arises from the following proceedings:

- State of Ohio v. George Brinkman, Criminal Case No. 618342, Court of Common Pleas Cuyahoga County, Ohio (sentencing entry filed December 28, 2018 and sentencing opinion filed January 18, 2019).
- State of Ohio v. George Brinkman, Supreme Court of Ohio Case No. 2019-0303, Slip Opinion No. 2021-Ohio-2473 (decision filed on July 21, 2021).
- State of Ohio v. George Brinkman, Criminal Case No. 618342, Court of Common Pleas Cuyahoga County, Ohio (petition for postconviction relief filed November 17, 2020 but rendered moot by the decision of the Supreme Court of Ohio).

There are no other proceedings in state or federal trial or appellate courts directly related to this case.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner State of Ohio respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio which vacated a knowing, voluntary and intelligent guilty plea though an overexpansive interpretation of what process is due when a criminal defendant resolves his case by a plea.

**OPINIONS BELOW**

The Supreme Court of Ohio's opinion is reproduced at Pet. App. 1.

**JURISDICTIONAL STATEMENT**

The Supreme Court of Ohio issued its order vacating Brinkman's guilty plea on July 21, 2021. Pet. App. 1. The state has timely sought certiorari in the Court. The Court has jurisdiction under 28 U.S.C. § 1257(a).

**RELEVANT CONSTITUTIONAL PROVISIONS****United States Constitution, Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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.

**United States Constitution, 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 of counsel for his defense.

**United States Constitution, Fourteenth Amendment**

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

**STATEMENT OF THE CASE**

**A. The Indictment**

An Ohio grand jury in Cuyahoga County returned a thirteen-count indictment charging Brinkman with the aggravated capital murders of Suzanne Taylor and her daughters, Taylor Lynne Pifer and Kylie Elizabeth Pifer. Pet. App. 2. If found guilty as charged, Brinkman could be subject to capital punishment. Brinkman was

appointed two attorneys qualified to handle capital cases.

### **B. The Plea Hearing**

On November 5, 2018, the trial court conducted a plea hearing after being informed that Brinkman wanted to change his pleas of not guilty and enter a guilty plea to the indictment as charged. After some preliminary questions, the trial court advised Brinkman of the following:

The Court: Do you understand that by entering pleas of guilty you will be giving up certain constitutional rights?

Brinkman: Yes, sir.

The Court: All right. I'm going to go through your rights with you, sir, and ask you if you understand each one. When I ask you if you understand, answer yes out loud. If you don't understand, say no, or feel free at any point to interrupt me and I'll explain it to you. First of all, sir, do you understand that you have a right to an attorney? If you cannot afford an attorney, one will be appointed to you at no cost to yourself.

Brinkman: Yes.

The Court: Do you understand that you have a right to a trial by a jury or to a judge?

Brinkman: Yes.

The Court: Do you understand you have the right to use the Court's power of compulsory process through a subpoena to compel witnesses to come to court and testify on your behalf?

Brinkman: Yes.

The Court: Do you also understand that you have a right to remain silent and not testify and no one could hold it against you that you did not testify, nor could anyone make a comment about your silence to the jury?

Brinkman: Yes.

...

The Court: Do you have any questions for this Court about any of those proceedings or the consequences of your plea here today?

Brinkman: No, sir.

The Court: Has anyone threatened you or promised you anything to force you to change your plea here today?

Brinkman: No, sir.

Pet.App. 3-4.

The trial court found Brinkman's plea to be knowingly and voluntarily entered. Brinkman did not raise any objection during this proceeding.

Ohio Criminal Rule 11(C)(3) contains additional protections for capital defendants by requiring the trial court to make an additional determination that the defendant is in fact guilty of aggravated murder before making a formal finding of guilt. This is accomplished through an evidentiary hearing. During that proceeding, the trial court corrected the omissions from the November 5, 2018 hearing. At that time, before any finding of guilt, the following exchange took place:

The Court: The Court reviewed a transcript of a plea colloquy and noticed that there was *[sic]* some omissions that were not thoroughly covered, and the Court would like to make sure that they are thoroughly covered. So, Mr. Brinkman, I must ask you a couple of questions like we did on Monday. First of all, you understand that by your guilty plea you're giving up your constitutional rights with respect to a trial? Do you understand that?

Brinkman: Yes, sir.

The Court: And that includes a trial by jury or to the judge. Do you understand this?

Brinkman: Yes, sir.

The Court: And you're giving up your right to that jury trial in which 12 jurors must unanimously find the evidence true beyond a reasonable doubt.

Brinkman: Yes, sir.

The Court: And that you have a right to use this Court's power of compulsory process through a subpoena to compel witnesses to come to court and testify on your behalf. Do you understand that?

Brinkman: Yes, sir.

The Court: Do you also understand that you have a right to have the State, through its prosecuting attorney, prove your guilt by evidence beyond a reasonable doubt, and your attorneys would have the opportunity to confront and cross-examine each and every witness the State would bring forward? Do you understand you're giving that up?

Brinkman: Yes, sir.

The Court: Do you also understand you have a right to remain silent and not testify and no one could hold it against you that you did not testify, nor make any comment about it to the jury that you did not testify? Do you understand that?

Brinkman: Yes, sir.

The Court: And I think we very thoroughly went over all the offenses, and you did indicate you understood those and the possible consequences of this guilty plea. Do you have any questions about



any of these things we've talked about?

Brinkman: No, sir.

The Court: All right. And so hopefully that will- - anything else, Mr. Schroeder?

Mr. Schroeder: I think we missed the right to confront witnesses, Your Honor.

The Court: Okay. I'll say - - I think I said that, but I'll - - I'll make sure. I'll say it again. That you have a right to have the State, through its prosecuting attorney, prove your guilt by evidence beyond a reasonable doubt, and your attorneys would have the opportunity to confront and cross-examine each and every witness the State would bring forward?

The Court: Yes, sir.

The Court: And you are presumed innocent until, in fact, the State proves you otherwise?

Brinkman: Yes, sir.

The Court: Okay. Is that satisfactory to everyone?

Mr. Conway: Yes, Your Honor.

Mr. Schroeder: Yes, Your Honor.

Mr. Mack: Yes, Your Honor. Thank you.

Pet.App. 5-8.

Following the multiple colloquies and the admission of evidence, the trial court found Brinkman guilty of the charges that he pled to. The matter proceeded to the sentencing phase, where the three-judge panel unanimously imposed a death sentence. Pet.App. 2.

### **C. The Appeal**

As a defendant sentenced to death, the Ohio Constitution provided Brinkman with an automatic direct appeal to the Supreme Court of Ohio. Citing both the Sixth and Fourteenth Amendments of the United States Constitution, as well as sections of the Ohio Constitution, Brinkman argued that his plea was invalid because he was not advised of his constitutional rights. The prosecution argued that, reviewing the entire record, Brinkman was advised of his rights and that his plea was knowingly, intelligently, and voluntarily entered. The Supreme Court of Ohio vacated Brinkman's guilty plea and remanded the matter to the trial court. Pet. App. 17.

### **REASONS FOR GRANTING THE WRIT**

The Court should grant the petition for writ of certiorari to review the Supreme Court of Ohio's decision in this case.

*First*, the Supreme Court of Ohio decided a federal question when it held that Due Process demands automatic reversal of a guilty plea when a trial court omits a constitutional advisement during a plea

colloquy. The Supreme Court of Ohio's decision conflicts with the Court's precedent and is in conflict with state and federal precedent throughout the country on this issue. Compounding the issue was the Supreme Court of Ohio's decision to limit review to only a portion of the record. That decision conflicts with the Court's precedent on a federal question.

*Second*, this case presents a good vehicle to decide the questions that have been presented. The Supreme Court of Ohio vacated George Brinkman's guilty plea on direct review. The record is uncomplicated, and the state court's decision is clear. The Supreme Court of Ohio has taken an overly rigid approach to its review of this issue for years, causing the mandated reversal of otherwise knowing, intelligent, and voluntarily entered guilty pleas. That result is not required by the United States Constitution.

In *Boykin*, the Court found that due process was violated when the Alabama trial court had accepted the defendant's guilty plea without any evidence in the record that the defendant was aware of the following constitutional rights: (1) the right to jury trial; (2) the right to confront witnesses; and (3) the right not to be compelled to testify against himself. The "wholly silent" record was not sufficient to comply with Due Process. *Id.* at 240. Ohio's Criminal Rule 11(C)(2)(c) extends *Boykin* to require trial courts advise defendants of their right to compulsory process and the right to require the prosecution to prove guilt beyond a reasonable doubt at a trial.

When George Brinkman entered his guilty plea, the trial court initially failed to orally advise Brinkman of

his right to confront witnesses and his right to have the prosecution prove his guilt beyond a reasonable doubt. Pet.App. 11. In Ohio, Criminal Rule 11(C)(3) requires a trial court to “determine” that defendant’s guilty plea to a capital offense is supported by the evidence. When the parties returned for that portion of the proceeding, the trial court discovered the omissions in Brinkman’s plea, and the trial court properly advised Brinkman of his rights.

Brinkman was ultimately advised of his *Boykin* rights as well as the other requirements of Ohio Criminal Rule 11. Although not mentioned by the Supreme Court of Ohio, Brinkman used his right to confront the state’s witnesses during the evidentiary hearing. For that reason, any “error” in the timing of the advisement of Brinkman’s constitutional rights was harmless. Nor was there any error under *Boykin* because the record affirmatively shows that Brinkman was properly advised of and waived his rights.

The Supreme Court of Ohio concluded that the guilty plea must be vacated. As it has done before, the court “reaffirmed that a trial court must strictly comply with Crim.R. 11(C)(2)(c) before accepting a defendant’s guilty plea and that its failure to notify the defendant of his constitutional rights under that rule ‘amounts to plain error,’ that ‘cannot be deemed harmless.’” Pet.App. 10. Applying this standard, the court found that the error required automatic reversal.

The Supreme Court of Ohio’s ruling was rooted in its interpretation of Due Process. Pet.App. 9 (“Due process requires that a defendant’s plea be made knowingly, intelligently, and voluntarily; otherwise,

the defendant's plea is invalid."). But the Court has never expanded *Boykin* to demand automatic reversal, and it has not demanded that result without considering the entire record. Nor has nearly every federal or state court who has addressed this issue. "[T]he overwhelming weight of authority no longer supports the proposition that the federal Constitution requires reversal when the trial court has failed to give explicit admonitions on each of the so-called *Boykin* rights." *People v. Howard*, 1 Cal.4th 1132, 1175, 824 P.2d 1315, 1339 (1992); see also, *Jhun v. State*, 2004 Haw. LEXIS 348 (Haw. 2004) (collecting cases; "this is the prevailing view among the federal appellate courts.").

The Supreme Court of Ohio "rejected" the prosecution's argument that the record showed a knowing, intelligent, and voluntary plea. Pet.App. 14. The court reasoned that "[i]nforming the defendant of his constitutional rights *after* he has already pleaded guilty" did not satisfy due process. Pet.App. 14. (Emphasis in Original). In doing so, the state court raised a federal question. *Washington v. Recuenco*, 548 U.S. 212, 217-218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (reversing the Supreme Court of Washington's holding that a *Blakely* violation could never be harmless); *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Like the Supreme Court of Washington's decision in *Recuenco*, the Supreme Court of Ohio's automatic-reversal standard is unnecessary as "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113

L.Ed.2d 302 (1991). Indeed, the Court has held that the failure to advise a defendant of his right to counsel during a plea colloquy did not preclude a plain error review. *United States v. Vonn*, 535 U.S. 55, 61-62, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). See also *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 n. 6 (2004) (the omission of a non-constitutional advisement required by Fed.R.Crim.P. 11 is not structural error). The Supreme Court of Ohio's refusal to apply a plain-error standard of review was compounded by its refusal to review the entire record. Put simply, the Supreme Court of Ohio was wrong to hold that the United States Constitution compelled such a rigid approach. See *Greer v. United States*, \_\_\_ U.S. \_\_\_, 141 S.Ct. 2090, 2098, (2021) ("This Court has repeatedly stated that an appellate court conducting plain-error review may consider the *entire* record-not just the record from the *particular proceeding* were the error occurred."). (Emphasis in original).

Given the large number of cases rejecting any "specific articulation" requirement for even the *Boykin* rights, and considering that automatic reversal is not required regardless, the questions presented for review warrant the granting of a writ of certiorari.

## **I. THE PETITION FOR A WRIT OF CERTIORARI RAISES ISSUES THAT RECUR IN THE CRIMINAL JUSTICE SYSTEM.**

The petition for a writ of certiorari raises substantial constitutional questions that regularly occur. "[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven

percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Lafler v. Cooper*, 566 U.S. 156, 170, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)(citing *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379(2012)).

The Supreme Court of Ohio’s unworkable and unnecessary standard of review for pleas is an outlier among state and federal courts. If the United States Constitution does not demand an “error-free, perfect trial,” *United States v. Hastings*, 461 U.S. 499, 508, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), why would it demand perfection from a guilty plea? A review of the Supreme Court of Ohio’s precedent shows that its decision in *Brinkman* is not a one-time decision. And in each case, the Supreme Court of Ohio based its decision on its interpretation of 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 when “a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under 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)). Like *Brinkman*, the *Veney* court relied on *Boykin* to support its holding.

If there was any doubt of the federal basis for the Supreme Court of Ohio’s decision, one needs to look no further than *Engle, supra*. There, the court allowed *Engle* to move to withdraw her plea because of a

misunderstanding of her appellate rights. The primary support for the Supreme Court of Ohio's decision came from the Court's precedent in *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012 (1927), *Mabry v. Johnson*, 467 U.S. 504, 508-509, 104 S. Ct. 2543, 2546-2547, 81 L. Ed. 2d 437, 443 (1984), *Boykin*, and its own precedent in *State v. Kelley*, 57 Ohio St. 3d 127, 566 N.E.2d 658 (1991). The *Kelley* court similarly relied on *Boykin* for its analysis.

To be sure, the Supreme Court of Ohio consistently references Ohio Criminal Rule 11 in its review of guilty pleas, but it did not satisfy this Court's "plain statement" standard by relying on the state rule as an adequate and independent basis for decision. *Michigan v. Long*, 463 U.S. 1032, 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The Supreme Court of Ohio's focus was on *Boykin* and whether Due Process was satisfied.

Having squarely decided the matter on constitutional grounds, the severe remedy of automatic reversal is a question properly before the Court.

## **II. THE SUPREME COURT OF OHIO'S DECISION TO APPLY A STRUCTURAL ERROR ANALYSIS CONTRADICTS THE COURT'S RULINGS THAT THE TOTALITY OF THE RECORD SHOULD BE CONSIDERED.**

"It is beyond dispute that a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 28, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). But what does that look like? In *Boykin*, the Court identified



three federal constitutional rights that are “involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial.” Those are (1) the privilege against compelled self-incrimination, (2) the right to a trial by jury, and (3) the right to confront one’s accusers. *Id.* A defendant’s waiver of those rights will not be presumed from a silent record. *Id.*

Both Fed. R. Crim. P. 11 and Ohio Crim.R. 11 require trial courts to advise defendants of their *Boykin* rights. Fed. R. Crim. P. 11(b)(1)(E); Ohio Crim. R. 11(C)(2)(c). The Ohio Rule also requires that a defendant be advised of his right to compulsory process for obtaining witnesses in his favor, and an advisement that the state must prove the defendant’s guilt beyond a reasonable doubt. Ohio Crim. R. 11(C)(2)(c).

In *McCarty v. United States*, 394 U.S. 459, 463-464 (1969), the Court held that “a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11.” The Court stressed, however, that it reached its conclusion without consideration of any constitutional arguments raised by the petitioner. *Id.* Following *McCarthy*, Fed. R. Crim. P. 11 was amended to include subsection (h), that “a variance from the requirements of this rule is harmless error if it does not affect substantial rights.” Years later, the Court clarified that a “defendant who lets Rule 11 error pass without objection in the trial court must satisfy Rule 52(b)'s plain-error rule.” *Vonn*, 535 U.S. at 58.

In *Vonn*, the Court specifically rejected the lower court’s decision to confine itself to only considering the record of the plea proceeding. *Id.* at 74. “The Advisory

Committee intended the effect of error to be assessed on an existing record, no question, but it did not mean to limit that record strictly to plea proceedings: the enquiry ‘must be resolved solely on the basis of the Rule 11 transcript’ and the other portions (e.g., sentencing hearing) of the limited record made in such cases.” *Id.* (citing Advisory Committee Notes 1569). The Court reaffirmed this review just this year. *Greer v. United States*, \_\_\_ U.S. \_\_\_, 141 S.Ct. 2090, 2098, (2021) (“This Court has repeatedly stated that an appellate court conducting plain-error review may consider the *entire* record-not just the record from the *particular proceeding* were the error occurred.”). (Emphasis in original).

The Supreme Court of Ohio’s confined review is not limited to this case. Nor is this case the first time Ohio has sought certiorari in the Court on this issue. *Veney, supra*. But this case does deserve the Court’s review because it is “of vital importance to the system of criminal justice that guilty pleas not be lightly set aside on fanciful arguments that exalt form over substance \*\*\*.” *United States v. Akinsola*, 105 F.3d 331, 332-33 (7th Cir. 1997). The victim’s surviving family members should not be subjected to a potential trial when Brinkman’s plea should not have been vacated. Due Process does not require the result reached by the Supreme Court of Ohio.

**III. A CONFLICT EXISTS BETWEEN OHIO AND OTHER STATE AND FEDERAL COURTS ON WHETHER A *BOYKIN* VIOLATION REQUIRES AUTOMATIC REVERSAL OF A PLEA.**

Ohio has long interpreted the federal constitution to require the presumption of prejudice for a Crim.R. 11 omission. The Supreme Court of Ohio has created a conflict between itself and other courts throughout the country.

The Supreme Court of Ohio has recognized a split in authority: “[n]umerous authorities have refused to *ipso facto* invalidate a guilty plea merely because the trial court failed to conduct a full colloquy with the defendant with regard to each of his rights [...]” *State v. Billups*, 57 Ohio St.2d 31, 37, 385 N.E.2d 1308 (1979); *State v. Ballard*, 66 Ohio St.2d 473, 478, 423 N.E.2d 115 (1981)(recognizing a “split of authority as to whether the complete omission of a *Boykin* constitutional right alone is cause to nullify a guilty plea.”). Ohio chose to proceed with the minority of states, holding that “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 rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination, and his right to compulsory process for obtaining witnesses in his behalf.” *Ballard* at 478.

The Supreme Court of Ohio created a conflict with most other state and federal courts. Avoiding the ceremony over substance approach, the Eleventh Circuit, “[e]ven prior to *Vonn*, . . . *has not*

*automatically reversed a conviction simply because a defendant has shown a Rule 11 error.” United States v. Monroe, 353 F.3d 1346, 1354 (11th Cir. 2003). The court continued that instead, it “has applied plain-error review in Rule 11 appeals and evaluated whether the defendant has carried the burden to show that his rights were substantially affected by the Rule 11 error, or what we have also sometimes called ‘prejudice.’” United States v. Monroe, 353 F.3d 1346, 1354 (11th Cir. 2003).*

Instead of the per se reversal favored by Ohio, federal courts examine “the three ‘core objectives’ of Rule 11, which are: (1) ensuring that the guilty plea is free of coercion; (2) ensuring that the defendant understands the nature of the charges against him; and (3) ensuring that the defendant is aware of the direct consequences of the guilty plea.” *United States v. Monroe, 353 F.3d 1346, 1354 (11th Cir. 2003)*. This review adequately protects the constitutional rights of defendants in federal courts. Ohio’s decision that this review is inadequate in its state courts suggests that Ohio interprets greater constitutional protections from the United States Constitution than the federal courts.

Ohio’s approach conflicts with the federal courts. The Eleventh Circuit is not alone in its view. *See Wilkins v. Erickson, 505 F.2d 761, 763-764 (9th Cir. 1974); United States v. Ward, 518 F.3d 75, 83, 84, 86 (1st Cir. 2008); United States v. Stewart, 977 F.2d 81, 84-85 (3d Cir. 1992); Wade v. Coiner, 468 F.2d 1059, 1060 (4th Cir. 1972); Neyland v. Blackburn, 785 F.2d 1282, 1287 (5th Cir. 1986); Fontaine v. United States, 526 F.2d 514, 516 (6th Cir. 1975); United States v.*

*Wagner*, 996 F.2d 906, 913 (7th Cir. 1993); *Todd v. Lockhart*, 490 F.2d 626, 628 n. 1 (8th Cir. 1974); *Stinson v. Turner*, 473 F.2d 913, 915-16 (10th Cir. 1973); *United States v. Simmons*, 961 F.2d 183, 187 (11th Cir. 1992).

It also conflicts with many of the state courts. *Morgan v. State*, 582 P.2d 1017 (Alaska 1978); *People v. Howard*, 1 Cal.4th at 1175, 824 P.2d 1315, 1341-1342 (1992); *Lacy v. People*, 775 P.2d 1 (Colo. 1989); *State v. Colyer*, 98 Idaho 32, 35-36, 557 P.2d 626, 629-30 (1976); *People v. Fuller*, 793 N.E.2d 526 (Ill. 2002); *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001); *Davis v. State*, 278 Md. 103, 116, 361 A.2d 113 (1976); *Commonwealth v. Morrow*, 363 Mass. 601, 604, 296 N.E.2d 468, 472-73 (1973); *State v. Propotnik*, 299 Minn. 56, 57-58, 216 N.W.2d 637, 638 (1974); *State v. Balsano*, 11 So.3d 475 (La. 2009); *People v. Pellegrino*, 44 N.E.3d 145 (N.Y. 2015); *State v. Olsen*, 544 N.W.2d 144 (N.D. 1996); *State v. Lambert*, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976); *State v. Beckley*, 742 N.W.2d 841, 844 (S.D. 2007); *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993); *Wood v. Morris*, 87 Wash.2d 501, 508, 554 P.2d 1032, 1036 (1976).

The Court's review would resolve the conflict created by the Supreme Court of Ohio. This benefits not only Ohio, but also the minority of states which have either not spoken on the issue or have taken a minority approach.

Reviewing the entire record, Brinkman was advised of the constitutional rights that he waived because of his guilty plea. His plea was knowingly, intelligently, and voluntarily entered consistent with *Boykin*. The

Supreme Court of Ohio's presumption of prejudice standard is not required by the United States Constitution, and Brinkman's guilty plea and certiorari should be granted so that this recurring issue can come to an end.

**CONCLUSION**

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

Respectfully submitted,

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