No. _____

IN THE
Supreme Court of the United States

CHRISTOPHER N. BILYNSKY,

Petitioner,

v.

STATE OF MAINE,

Respondent.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting as the Law Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Maine Supreme Judicial Court Sitting as the Law Court ("Law Court") recently ruled that the Due Process Clauses of the federal constitution do not require a court to conduct a clear, on-the-record waiver colloquy before it accepts a defense attorney's stipulations to elements of offenses, including elements that, by themselves, expose a defendant to increased punishment. *State v. Bilynsky*, 2021 ME 56, ¶¶ 4-5, 263 A.3d 163. The Law Court's decision expands a division among the circuits and state courts of last resort.

The questions presented are:

(a) Do the Due Process Clauses and *Boykin v. Alabama*, 395 U.S. 238 (1969) mandate that, before a trial court accepts stipulations as to elements of offenses, including elements that by themselves increase sentencing exposure, it conduct an on-the-record colloquy demonstrating that the defendant knowingly, intelligently and voluntarily waives the attendant constitutional privilege against self-incrimination and the right to a jury trial?

(b) Where a defendant's attorney, but not the defendant himself, signs a stipulation to elements of offenses, including an element that, by itself, increases sentencing exposure, and there is no colloquy demonstrating that the defendant personally assents to the stipulations, may waiver of the attendant constitutional privilege against self-incrimination and the right to a jury trial be presumed?

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PARTIES TO THE PROCEEDING

Christopher Bilynsky, petitioner on review, was the defendant-appellant below. The State of Maine, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Proceedings pertaining to underlying judgment:

Trial: *State of Maine v. Christopher N. Bilynsky,* YRKCD-CR-2018-00824 (judgment entered August 14, 2019).

Plea: *State of Maine v. Christopher N. Bilynsky*, YRKCD-CR-2018-00577, York County Unified Criminal Docket (consolidated with YRKCD-CR-2018-00824 for sentencing) (judgment entered August 14, 2019).

Motion for correction or reduction of sentence: *State of Maine v. Christopher N. Bilynsky*, YRKCD-CR-18-00577 & 00824, York County Unified Criminal Docket (decision entered August 26, 2020).

Related discretionary appeal (from denial of mot. for correction or reduction of sentence): *State of Maine v. Christopher N. Bilynsky*, Yor-20-246, Maine Supreme Judicial Court Sitting as the Law Court (decision entered April 28, 2021).

Direct appeal/ruling below: *State of Maine v. Christopher N. Bilynsky*, Yor-20-246, Maine Supreme Judicial Court Sitting as the Law Court (decision entered November 9, 2021).

Collateral review: *Christopher N. Bilynsky v. State of Maine*, YRKCD-CR-2020-368, 369 (currently held in abeyance).

Proceedings regarding related, predicate judgment:

Plea: *State of Maine v. Christopher N. Bilynsky*, YRKCD-CR-2017-1024 & CR-18-89 (judgment entered April 20, 2018).

RELATED PROCEEDINGS-Continued

Collateral review: *Christopher N. Bilynsky v. State of Maine*, YRKCD-CR-2019-423 (order entered November 10, 2021).

INTRODUCTION

Christopher Bilynky's trial attorney stipulated to all but one of the elements of the two offenses with which he was charged; the trial court read the stipulations into evidence despite the lack of a record demonstrating that Bilynsky knowingly, intelligently and voluntarily waived his attendant privilege against self-incrimination and right to have a jury trial. The stipulations encompassed an array of information the prosecution would have otherwise had to prove beyond a reasonable doubt, ranging from Bilynsky's prior convictions and status on bail to his actual knowledge that the conduct in which he allegedly engaged was prohibited. The stipulation, by itself, increased Bilynsky's sentencing exposure from only 180 days' jail to five years' imprisonment.

State supreme courts and the circuits are largely split over the lawfulness of such stipulations absent on-the-record colloquies, and the Maine court's decision deepens this fissure. Some, notably the highest court of Hawaii, require extensive waiver colloquies before accepting stipulations to any elements of offenses, citing the Fourteenth Amendment. *See State v. Ui*, 418 P.3d 628, 635 (Haw. 2018); *State v. Murray*, 169 P.3d 955, 965 (Haw. 2007). Others, such as California state courts, do not require personal, on-the-record waiver colloquies prior to just any stipulation to elements of offenses, *see People v. Cross*, 347 P.3d 1130, 1139 (Cal. 2015), but *do* require such colloquies prior to accepting stipulations to elements that do, alone, increase sentencing ranges. *People v. Adams*, 862 P.2d 831, 839 (Cal. 1993). The Iowa Supreme Court, and the Third, Eighth and Ninth Circuits are in accord with

this latter interpretation, believing it to derive from federal constitutional law. *See State v. Harrington*, 893 N.W.2d 36, 42, 45-47 (Iowa 2017); *Government of Virgin Islands v. George*, 741 F.2d 643, 649 (3d Cir. 1984); *Cox v. Hutto*, 589 F.2d 394, 395-96 (8th Cir. 1979) (*per curiam*); *Wright v. Craven*, 461 F.2d 1109 (9th Cir. 1972) (*per curiam*). The Fifth and Tenth Circuits disagree. *Joseph v. Butler*, 838 F.2d 786, 791 (5th Cir. 1988); *Johnson v. Cowley*, 40 F.3d 341, 346 (10th Cir. 1994). The Eleventh Circuit has skirted the issue, noting no "clearly established federal law." *Dombrowski v. Mingo*, 543 F.3d 1270, 1275-76 (11th Cir. 2008). The Maine court's decision deepens this divide.

Indeed, under the Sixth Amendment, these are "not easy questions." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1516-17 (2018) (Alito, J., dissenting). However, this Court should grant this petition to clarify that a partial answer already exists under the Due Process Clauses. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) established the necessity of a clear, on-the-record waiver of three constitutional rights, including the privilege against self-incrimination. Clarity from this Court would, of course, resolve a split; it would also ensure a fair way forward and coherence with this Court's case-law regarding the privilege against self-incrimination, which does not require a defendant at his own trial to invoke the privilege to preserve it. *Salinas v. Texas*, 570 U.S. 178, 184 (2013) (plurality decision). Likewise, A decision along these lines would also forestall the need for wasteful posttrial litigation concerning the permissibility of counsel's ostensible waiver on behalf of her clients, giving sooner finality to those in the criminal justice system.

OPINION BELOW

The Maine Supreme Judicial Court Sitting as the Law Court's decision is reported at 2021 ME 56, 263 A.3d 163 and 2021 Me. LEXIS 60. Pet. App. 2a-10a

JURISDICTION

The Maine Supreme Judicial Court issued the decision below on November 9, 2021. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See also Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (waiver of constitutional right "is a federal question for us to decide.").

CONSTITUTIONAL PROVISIONS INVOLVED

"[N]or shall any person…be compelled in any criminal case to be a witness against himself, nor be deprive of life, liberty, or property without due process of law…." U.S. CONST. amend V

"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." U.S. CONST. amend VI.

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law…." U.S. CONST. amend XIV, § 1.

STATEMENT OF THE CASE

I. The State's case against Bilynsky

The State obtained an indictment charging Bilynsky with two offenses: violating a bail condition and violating a court-imposed protective order. Pet. App. 5a-6a. Both alleged violations stemmed from the same conduct. According to the State, while he was incarcerated at the local jail, Bilynsky attended church services at the jail's gymnasium-cum-chapel. Pet. App. 3a. While seated there on July 31, 2018, female prisoners were brought into the chapel, including Ashley Cox, with whom, per defendant's allegedly-then-effective bail conditions and the terms of the protective order, defendant was not permitted to have "contact." Pet. App. 3a.

At trial, the State played a video that depicted the chapel, in which Bilynsky turned around and gestured in the direction of Ms. Cox. Tr. 91-93. Ms. Cox testified that Bilynsky greeted her, "Hi, how are you? Are you keeping your head up?" Tr. 93. He "mouthed" words to her from across the room, but she could not make out what he was saying in the loud room. Tr. 102. At the conclusion of the services, Ms. Cox walked toward Bilynsky's seat, stopping to interact with him. Tr. 111-12. At that time, Bilynsky asked Ms. Cox whether she had spoken with his lawyer and private investigator. Tr. 90.

II. Defense counsel stipulated to all but one element of the offenses.

To prove its case, on paper, the State had to establish several elements beyond a reasonable doubt. On Count One (bail violation), the State had to prove: (1) Bilynsky was on bail; (2) a bail condition prohibited him from directly or indirectly

contacting Cox; (3) the offense for which Bilynsky on bail was a felony matter (*i.e.*, a crime punishable by a year or more of incarceration); (4) Cox was "a victim" in that felony matter; (5) Bilynsky had "prior knowledge" of the bail condition prohibiting his contact with Ms. Cox while he was incarcerated (*i.e.*, not merely when he was "out" on bail).[1] 15 M.R.S. § 1092(1)(B); 15 M.R.S. § 1026(3)(A)(5); *State v. Leblanc-Simpson*, 2018 ME 109, ¶ 18, 190 A.3d 1015. The elements requiring proof that the bail condition had been imposed in a felony-level case in which Ms. Cox was "the victim," by themselves, elevated the Count One from a Class E misdemeanor (punishable by up to 180 days' jail) to a Class C felony (punishable by up to 5 years' prison). 15 M.R.S. §§ 1092(1)(A), (B); 17-A M.R.S. §§ 1252(2)(C), (E) (2017). In other words, by stipulating to elements (3) and (4), defense counsel automatically exposed defendant to a more than 10-times increase in incarceration.

Regarding Count Two (violation of protective order), the State was required to evince sufficient proof that: (1) Bilynsky was subject to a protective order; (2) he had "prior actual notice" of that order; and (3) he violated a condition of that order. 19-A M.R.S. § 4011(1)(A) (2018).

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[1] Additionally, when a defendant "assert[s]" at trial that he lacked such knowledge, the State is further required to prove that he "was advised of the penalties for and consequences of violating" the condition in question. *Leblanc-Simpson*, 2018 ME 109, ¶ 20; *see* 15 M.R.S. § 1026(5) (2017). The jury was not instructed about this element, presumably because the stipulation caused the trial judge to believe that Bilynsky did not "assert[]" a lack of the requisite knowledge.

Immediately preceding the jury-trial, defense counsel, the prosecutor and the trial judge convened a chambers conference without Bilynsky. There, the attorneys discussed stipulating to several elements of the charges and the admissibility of the State's video evidence. The transcript of the conference indicates that Bilynsky's attorney said he wanted to review the proposed stipulations with Bilynsky before he agreed to them. Tr. 9-11, 49-50. After the judge and attorneys had hashed out the details of the stipulation, the judge asked defense counsel – now at sidebar, without Bilynsky – whether Bilynsky wanted to be present at sidebars or in chambers; counsel stated he did not. Tr. 62

The record does not contain any further indication that Bilynsky was advised of the proposed stipulations, that he understood them, or that he voluntarily agreed to waive his right to insist that the State affirmatively prove them. Rather, Bilynsky's lawyer signed an eight-point "Stipulation" that was read to the jury on the heels of the attorneys' opening statements:

> So, ladies and gentlemen, the attorneys for the State and for Mr. Bilynsky have reached some agreements, some stipulations. And I'm going to read those to you now.
>
> The following is stipulated to be – is stipulated to by the State and the defense and shall be entered as part of the evidence in this matter.
>
> Number one: State's Exhibit No. 1, the video of the York County Jail's chapel from July 31st, 2018, you're going to watch that in just a moment.
>
> Number two, on or about July 31st, 2018, Christopher Bilynsky was on pre-conviction bail for a crime punishable by a maximum period of imprisonment of one year or more.
>
> Number three, as part of the preconviction bail, there was a condition of no contact with Ashley Cox.

> Number four, Ashley Cox was the victim of the alleged crime that Christopher Bilynsky was on bail for.
>
> Number five, Christopher Bilynsky received notice of these bail conditions by a judge on June 22nd, 2018.
>
> Number six, on or about July 31st, 2018, there was an active final protective order against Christopher Bilynsky issued by a court in the State of Maine.
>
> Number seven, the final protective order prohibited Christopher Bilynsky from having direct of indirect contact with Ashley Cox.
>
> And, finally, number eight, Christopher Bilynsky received notice of this final protective order by law enforcement on July 16, 2018.

Tr. 69-70; Pet App. 11. As the attorneys saw it, and as they told the jury in their argumentation, the sole remaining issue for deliberation was whether Bilynsky had "contact" with Ms. Cox. *See*, *e.g.*, Tr. 63-64, 65, 187, 197.

After the trial judge instructed the jury to consider the stipulations as if they were evidence,[2] he further enumerated all the elements that the State was required to prove to convict Bilynsky. Tr. 185, 218-21. The jury later asked for, and was given, reinstruction on those elements. Tr. 239-43. Four minutes after the reinstruction, the jury returned "guilty" verdicts on both counts. Tr. 243.

At sentencing a few months later, Bilynsky was sentenced to 48 months' and 364 days' incarceration, respectively, to be served concurrently. Pet App. 3a-4a.

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[2] Actually, as the decision below reaffirms, the judge was incorrect: In Maine, a stipulation is more than mere evidence; it "'relieve[s]'" the State "of the burden of introducing evidence other than the stipulation itself to prove [the relevant] element." 2021 ME 56, ¶ 10 (quoting *State v. Ouellette*, 2019 ME 75, ¶ 12, 208 A.3d 399)).

III. Post-trial litigation

About a month after sentencing, Bilynsky filed a motion to correct or reduce his sentence, and a hearing on the motion was held nearly a year later. *See* M.R.U.Crim.P. 35(c); Pet. App. 5a. At the hearing, Bilynsky stated that he had not agreed to the stipulations. R35Tr. 34-35. Bilynsky represented that, factually, certain of the stipulations were incorrect, particularly those concerning notice of the bail condition. R35Tr. 36-37. The motions court denied Bilynsky's motion orally on state procedural grounds, determining that those arguments were not cognizable in such a proceeding. R35Tr. 35, 37. The Law Court denied Bilynsky leave to pursue an appeal of that ruling, also on state procedural grounds. Order Denying Cert. of Probable Cause, Yor-20-246, April 28, 2021.

Bilynsky then pursued a direct appeal of his convictions, arguing, *inter alia*, that he was deprived of due process by the use of the stipulation as evidence without a record establishing that he acknowledged or agreed to relieve the State of its burdens. He also argued that he lacked "prior notice" of the stipulation such that it should not have been entered as evidence. The Law Court affirmed, addressing these arguments in two paragraphs:

> Bilynsky contends that he never agreed to the stipulation—or the facts it contained—which encompassed nearly every element the State was required to prove beyond a reasonable doubt. Because Bilynsky failed to object or otherwise challenge the admission or reference to the stipulated facts at trial, we review his challenge for obvious error. *See State v Lovejoy*, 2014 ME 48, ¶ 19, 89 A.3d 1066. To vacate a conviction based on obvious error, "there must be (1) an error, (2) that is plain, and (3) that affects substantial rights." *Id.* (quotation marks omitted). When those conditions are met, "we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously

> affects the fairness and integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted).
>
> "The best practice for parties wishing to enter into a stipulation is to either file a written stipulation signed by the parties or their attorneys or orally enter the stipulation on the record." *Potter v. Great Falls Ins. Co.*, 2020 ME 144, ¶ 10 n.4, 243 A.3d 1188. Here, a written stipulation signed by both attorneys was filed with the court. Additionally, the record demonstrates that the stipulation was discussed, read, or referenced at least seven times in Bilynsky's presence during the trial, including by his admissions to its stated facts in his own opening and closing arguments. At no time did Bilynsky or his attorney object to the stipulation or any of its facts at trial. Although Bilynsky now argues that the judge should have conducted the equivalent of a M.R.U. Crim. P. 11 colloquy with him on the record to confirm that he agreed to the contents of the stipulation, he fails to offer any authority mandating such a colloquy. Because the stipulation of facts was signed by both attorneys and was filed with the court, the trial court committed no error, and certainly no plain error, that affected Bilynsky's substantial rights by reading the stipulation to the jury.

2021 ME 56, ¶¶ 4-5; Pet. App. 5a-6a.

In the meantime, Bilynsky sought state post-conviction review in the predicate case, the one in which he was allegedly on bail when he contacted Ms. Cox in the jail chapel. Docket rec. in YRKCD-CR-2019-423. The day after Bilynsky's direct appeal – the decision below – was denied, the post-conviction court entered an order amending that predicate charge to reflect that Bilynsky was then charged with a misdemeanor – a charge that would *not* have qualified to elevate his maximum sentence in this case from 180 days' to 5 years' prison, counter to the stipulation his attorney had entered at trial. Pet. App. 13a-22a.

REASONS FOR GRANTING THE PETITION

I. There is a split of authority concerning whether a stipulation to an element of an offense must be preceded by a knowing, intelligent and voluntary waiver that is affirmatively reflected in the record.

The Law Court is of the view that there is "no authority" requiring a trial court, before entering a stipulation establishing an element of an offense, to ensure on the record that the defendant is knowingly, intelligently and voluntarily waiving the constitutional rights that stipulation encapsulates. 2021 ME 56, ¶ 5. Other state courts of last resort, however, split over this question, particularly as it relates to elements that, by themselves, increase a defendant's sentencing exposure.

For instance, the highest court of Hawaii requires that trial courts accepting such stipulations first "engage a defendant in an on-the-record colloquy to ensure that the defendant is intelligently, knowingly, and voluntarily relinquishing" the right to require the State to prove all elements. *State v. Ui*, 418 P.3d 628, 631 (Haw. 2018). This requirement has existed in Hawaii state courts since at least 2007. *See State v. Murray*, 169 P.3d 955, 964 (Haw. 2007) ("[T]he trial court must conduct a colloquy regarding waiver of proof of an element of the offense."). The Hawaii courts reason that, because stipulations to elements of offenses work a waiver of the fundamental right to be presumed innocent unless and until the prosecution proves otherwise, an on-the-record waiver is necessary. *Ui*, 418 P.3d at 635 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Other state supreme courts require colloquies before defendants stipulate to elements of offenses, though it is unclear whether they do so pursuant to federal

constitutional law or their own superintendence powers. *See*, *e.g.*, *Ferguson v. State*, 210 S.W.3d 53, 58 (Ark. 2005) (trial court to accept stipulation "conditioned by an on-the-record colloquy with the defendant…acceding to the stipulation or admission."); *Brown v. State*, 719 So.2d 882, 884 (Fla. 1998) (same); *State v. Nichols*, 541 S.E.2d 310, 323 (W. Va. 1999) ("When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant."); *see also State v. Hauk*, 652 N.W.2d 393, 402-03 (Wisc. App. 2002) (invalid waiver when stipulation is signed by the defendant's attorney and not the defendant herself).

Other states, such as California, take a more nuanced position. Whereas stipulations to facts that alone satisfy a "'prerequisite' for increased punishment" must be preceded by a *Boykin*-style colloquy and waiver, *see In re Yurko*, 519 P.2d 561, 565 (Cal. 1974), stipulations to other elements do not, so long as some other factual element remains to be proven. *People v. Cross*, 347 P.3d 1130, 1139 (Cal. 2015). The dividing line is whether "the defendant's unwarned admission…automatically exposed him to increased punishment." *Ibid*; *People v. Adams*, 862 P.2d 831, 839 (Cal. 1993).

Frequently, the issue arises in the context of sentencing enhancements. For example, recognizing the "constitutional dimension" of the rights at stake, the Third Circuit has required a quasi-*Boykin* inquiry before a district court judge accepts a defendant's admission to having a prior conviction. *Government of Virgin Islands v.*

George, 741 F.2d 643, 649 (3d Cir. 1984). The Eighth and Ninth Circuits have held similarly. *Cox v. Hutto*, 589 F.2d 394, 395-96 (8th Cir. 1979) (*per curiam*) ("constitutional error" where stipulation to prior offenses read into evidence without on-the-record colloquy); *Wright v. Craven*, 461 F.2d 1109 (9th Cir. 1972) (*per curiam*) (same). The Fifth and Tenth Circuits have decided otherwise. *Joseph v. Butler*, 838 F.2d 786, 791 (5th Cir. 1988); *Johnson v. Cowley*, 40 F.3d 341, 346 (10th Cir. 1994). The Eleventh Circuit has punted, noting a lack of "consensus amongst the lower federal courts" and the absence of "clearly established federal law" on the question. *Dombrowski v. Mingo*, 543 F.3d 1270, 1275-76 (11th Cir. 2008). State courts that have taken up the issue have held that a *Boykin*-like colloquy is required only when a stipulation itself – without need for any additional facts – justifies an increased sentence. *Cross*, 347 P.3d at 1139; *State v. Myers*, 963 A.2d 11, 23-24 (Conn. 2009) (stipulation by counsel without on-the-record colloquy acceptable because there was other evidence of prior convictions); *State v. Harrington*, 893 N.W.2d 36, 42, 45-47 (Iowa 2017) (stipulation to prior convictions necessary for "sentencing enhancement" must be preceded by on-the-record- colloquy to ensure knowing and voluntary waiver); *see State v. Dettman*, 719 N.W.2d 644, 650-51 (Minn. 2006) (ascribing right to Sixth Amendment right to jury trial); *People v. Isaacks*, 133 P.3d 1190, 1194-95 (Colo. 2006) (same); *see also State v. Cheatham*, 80 P.3d 349, 354 (Idaho App. 2003) ("[D]ue process principles preclude the acceptance of a stipulation to the truth of persistent violator allegations without judicial inquiry to determine that the

defendant makes the admission voluntarily and with an understanding of the consequences.").

In the context of stipulations at trial that are not, by themselves, "tantamount" to guilty pleas, many jurisdictions do not see a federal constitutional requirement for a colloquy. *See*, *e.g.*, *State v. Allen*, 220 P.3d 245, 247-48 (Ariz. 2009) ("*Boykin* does not require a colloquy in this case."); *Adams v. Peterson*, 968 F.2d 835, 840-42 (9th Cir. 1992) (due process merely requires knowing and voluntary stipulation, not colloquy); *United States v. Lyons*, 898 F.2d 210, 215-16 (1st Cir. 1990) (though "complete" colloquy not constitutionally mandated, record must demonstrate that defendant "understood the nature and scope of his stipulation."); *Witherspoon v. United States*, 633 F.2d 1247, 1251 (6th Cir. 1980) (though "full" colloquy not required, "suggest[ing]" that district courts conduct one anyway when most or all elements stipulated). Maine now falls on this side of the rift.

II. The opinion below wrongly decided an important issue of federal law.

A. An on-the-record colloquy is required by the Constitution.

Presuming waiver of the rights inherent in a guilty plea from a silent record is impermissible. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Specifically, a colloquy must demonstrate a valid waiver of "the privilege against compulsory self-incrimination," "the right to trial by jury," and "the right to confront one's accusers." *Id*. at 243. No court may "presume a waiver of these three important federal rights from a silent record." *Ibid*.

Put aside for a moment the second and third of these rights; *arguendo*, a defendant who stipulates to *some* (even most) but *not all* elements of an offense retains his rights to have a jury trial and to confront some accusers. However, a stipulation to an element ineluctably cedes the privilege to stay silent and refrain from self-incrimination. *See Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964) ("The privilege afforded not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." (ellipses omitted) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)); *see Alleyne v. United States*, 570 U.S. 99, 109 (2013) ("If a fact was by law essential to the penalty, it was an element of the offense."). That privilege dissipates the moment a judge accepts a stipulation. *Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974) ("[A]n inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."); *cf. Mitchell v. United States*, 526 U.S. 314, 324 (1999) ("[S]tatements or admissions made during the preceding plea colloquy are later admissible against the defendant, as is the plea itself."). Reading *Boykin* closely and in the context of the privilege against self-incrimination, then, the Due Process Clause requires that any stipulation to an element of an offense be preceded by an on-the-record colloquy demonstrating a knowing and intentional waiver. *See* 395 U.S. at 243.

Looking to the Sixth Amendment, respectfully, is a distraction. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004) ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is

unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent."); *cf. Brookhart v. Janis*, 385 U.S. 1, 7 (1966) (where record demonstrates that the defendant did not intelligently and knowingly agree to "the equivalent of a guilty plea," counsel cannot waive rights inherent in such a plea); *cf. McCoy v. Louisiana*, 138 S.Ct. 1500, 1505, 1510 (2018) (Sixth Amendment violation when record demonstrates that the defendant "adamantly objected" to conceding guilt but counsel nonetheless concedes guilt to jury). Looking only through the lens of the right to counsel begs several "not easy questions," including whether an attorney may stipulate to elements of offenses without her client's consent at all, let alone without a record affirmatively establishing such consent. *McCoy*, 138 S.Ct. at 1516-17 (Alito, J., dissenting). Rather than looking for these answers in the attorney-client relationship, due process has an altogether different focus: For a "waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *Boykin*, 395 at 243 n. 5 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 1938)). Regardless of an attorney's duty, in other words, the presiding judge has her own responsibilities.

Indeed, this Court's decisions already recognize the due process responsibilities of judges when such weighty rights are at stake. It delegates to attorneys those decisions necessary to "manage the conduct of the trial." *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (quoting *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (internal quotation marks and citation omitted)). But it reserves for judges

the due process obligation to safeguard "certain fundamental rights" by requiring that they see to it that a defendant "participate[s] personally in the waiver" of those rights. *Gonzalez*, 553 U.S. at 248 (quoting *Hill*, 528 U.S. at 114). Within the class are the right to counsel, *Zerbst*, 304 U.S. at 464-65; *Faretta v. California*, 422 U.S. 806, 835 (1975); the right to be present at trial, *Taylor v. Illinois*, 484 U.S. 400, 418 n. 24 (1988); and, of course, the three rights noted in *Boykin*: the privilege against self-incrimination, the right to confront one's accusers, and the right to trial by jury. 395 U.S. at 243; *Taylor*, 484 U.S. at 418 n. 24.

There should be no doubt that the Fifth Amendment privilege against self-incrimination at trial, extended to the states via the Fourteenth Amendment, *Malloy*, 378 U.S. at 8, qualifies as such a "fundamental right" as to necessitate a personal waiver overseen by a judge. Indeed, the privilege is uniquely personal, "an individual's substantive right, a right to a private enclave where he may lead a private life." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (quotation marks omitted). It "is purely a personal privilege of the witness," *Hale v. Henkel*, 201 U.S. 43, 69 (1906), that may be waived only when that individual "'chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 at 460 (quoting *Malloy*, 378 U.S. at 8). Whereas many a defendant may choose not "to participate in his [own] defense," *McCoy*, 138 S.Ct. at 1509, thereby justifying the need for his attorney to retain authority over tactical matters, the constitutional privilege against self-incrimination embodies a "choice on his part to speak." *Miranda*, 384 U.S. at 465. It would be peculiar to allow someone else – even a lawyer – to waive such a personal right. In

fact, it is petitioner's contention that this Court already does not allow that. *See Boykin*, 395 U.S. at 243.

The decision whether to incriminate oneself is not akin to a decision regarding mere "[s]cheduling matters," *Hill*, 528 U.S. at 115, or whether to accede to a magistrate rather than an Article III judge presiding over jury selection, *Gonzalez*, 553 U.S. at 250. Rather, the decision to incriminate oneself forgoes "the essential mainstay of our adversary system." *Miranda*, 384 U.S. at 460. This must qualify as a "fundamental" right of the sort necessitating a personal, on-the-record waiver.

Moreover, this Court's self-incrimination case-law already requires an affirmative waiver to relinquish the right. *Salinas v. Texas*, 570 U.S. 178, 184 (2013) (plurality decision) ("[A] criminal defendant need not take the stand and assert the privilege at his own trial."). Permitting self-incrimination by stipulation unaccompanied by a clear waiver muddies these doctrinal waters: Has such a defendant preserved his privilege by remaining silent and *not* asserting the privilege? *See id.* at 185 ("[W]here assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence."). Requiring a defendant to blurt out in open court – counter to his attorney's admissions and the judge's recitation of the stipulation – "I do not agree!"[3] both requires assertion of the

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[3] Recall that, while at sidebar (and thus, out of Bilynsky's earshot), Bilynsky's attorney declined the judge's invitation for Bilynsky to participate in sidebar and chambers conferences. Tr. 62.

privilege and undermines its efficacy. *See Griffin v. California*, 380 U.S. 609, 613-15 (1965) (recognizing threat that jurors will infer guilt from silence and comment on silence). In other words, absent an on-the-record colloquy prior to a judge's acceptance of a stipulation, this Court's case-law on when and how a defendant preserves his privilege against self-incrimination lacks coherence.

Above, Bilynsky asked the Court to momentarily put aside two rights guaranteed by *Boykin* and its progeny; now, he returns to the right to a jury trial, one of those rights. 395 U.S. at 243. In *Blakely v. Washington*, 542 U.S. 296, 310 (2004), this Court wrote of the need for "appropriate waivers" before sentences are enhanced beyond those justified by facts found by a jury. Defendants who stipulate to elements that, by themselves, enhance a sentence are forgoing their jury-trial rights; they have the right to insist that jury find every fact necessary to increase a sentence. *Id*. at 301-02; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). How does due process therefore not already require a *Boykin*-style inquiry to ensure that a defendant knows he is volunteering to surrender that right? *Boykin*, 395 U.S. at 243.

It is not satisfactory to put off such questions until post-conviction proceedings. Yes, post-conviction, a fact-finder may finally decide whether a defendant knowingly and voluntarily acceded to a stipulation or whether an ineffective attorney instead "waived" the rights involved on behalf of his client; but problems are caused by putting off the determination. First, what is the standard? As Justice Alito's dissent in *McCoy* makes clear, nobody knows whether a defendant or his attorney gets to cast the deciding vote whether to stipulate. 138 S.Ct. at 1516-17 (Alito, J., dissenting).

Those thorny issues could be avoided by ensuring an appropriate waiver when it is offered. Second, how might stipulations – now record evidence admitted at trial – be crammed back into the bottle so that they shall not be used to incriminate defendant in future proceedings? *See Tucker*, 417 U.S. at 440-41. Third, must courts, parties and witnesses suffer sustained delays in finality because of something so fundamental as a waiver of the privilege against self-incrimination? Fourth, leaving the matter to collateral review essentially flips the due process burden concerning waivers; a "presumption of regularity" applies to claims of waiver of constitutional rights raised after a conviction becomes final. *Parke v. Raley*, 506 U.S. 20, 31 (1992).

B. The record fails to demonstrate that Bilynsky waived his federal constitutional rights.

The putative waiver of a federal constitutional right is a federal question for this Court to decide. *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967). It is the State of Maine's responsibility to ensure that Bilynsky "'knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences,'" waived his privilege against self-incrimination. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (brackets omitted) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Recall again, "a criminal defendant need not take the stand and assert the privilege [against self-incrimination] at his own trial." *Salinas*, 570 U.S. at 184. "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great…." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

Taking the undisputed facts – counsel, not Bilynsky himself, signed the stipulations; counsel, without Bilynsky, negotiated the stipulations before they were

made; and, as the Law Court noted, neither Bilynsky nor counsel objected when the stipulations were "discussed, read, or referenced at least seven times in Bilynsky's presence"[4] – how has the State of Maine demonstrated a waiver? On this record, how has the State demonstrated that Bilynsky was "adequately and effectively apprised" that he did not have to stipulate to elements of the offenses? *Id*. at 374? Because there was no "affirmative showing" that Bilynsky intelligently and voluntarily gave up his privilege to self-incrimination or his right to a jury trial, the State has not established a constitutionally valid waiver. *Boykin*, 395 U.S. at 242.

CONCLUSION

This Court should grant the petition for a writ of certiorari, summarily granting, vacating and reversing, or calling for proceedings in the usual course.

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Respectfully submitted,

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[4] Deprived of the opportunity to appear at sidebar or in chambers because his attorney declined the invitation – without Bilynsky's apparent assent – how, short of causing a scene in front of the jurors about to judge him, was Bilynsky to object to these references, assuming he comprehended them and their importance?