ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

James T. Acklin
Chief Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Israel Bautista,
*Appellant-Petitioner,*

v.

State of Indiana,
*Appellee-Respondent*

January 29, 2021

Court of Appeals Case No. 20A-PC-1542

Appeal from the Madison Circuit Court

The Honorable Thomas L. Clem, Judge

Trial Court Cause No. 48C05-1508-PC-23

**Crone, Judge.**

## Case Summary

[1] Israel Bautista appeals the denial of his petition for post-conviction relief (PCR). He asserts that the post-conviction court erred by concluding that his guilty plea

was entered into knowingly, intelligently, and voluntarily. Specifically, he contends that the Spanish translation he received at his guilty plea hearing did not adequately communicate the three constitutional rights that he was waiving by pleading guilty as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). Concluding that Bautista was not adequately advised of one of the *Boykin* rights, namely, the right to confront the witnesses against him, we reverse the denial of post-conviction relief and remand with instructions to vacate his guilty plea.

## Facts and Procedural History

[2] In November 2011, the State charged Bautista with two counts of class A felony child molesting. A public defender was appointed to represent him. In February 2012, Bautista's counsel filed a motion to appoint an interpreter at public expense, averring, "[Bautista] is Hispanic and unable to understand the English language making it difficult for counsel to explain [his] options to him in his case." Ex. Vol. 3 at 45. The trial court granted the motion and appointed Nellie DeBord to serve as Bautista's interpreter.[1] DeBord interpreted for Bautista during client conferences with counsel, the guilty plea and sentencing hearings, and the presentence investigation report interview. In April 2012, Bautista and the State entered into a written plea agreement, in which Bautista agreed to plead guilty as charged with an aggregate executed sentence to be

[1] The record does not reveal whether DeBord was a certified interpreter.

capped at thirty years but otherwise left open to the trial court. The plea agreement was written in English, and a Spanish language plea agreement was not provided.

[3] In May 2012, the trial court held a guilty plea hearing, during which the trial court provided the following advisement in English:

> Your constitutional rights are that you have the right to a public and speedy trial by jury. You have the right to face all witnesses against you, to see; hear; question and cross examine them; to have your own witnesses appear and testify for you …, and if you had a trial, the State would have to prove your guilt beyond a reasonable doubt before you can be found guilty and you have the right to testify for yourself. You also have the right to remain silent. Those are your constitutional rights, do you understand your rights?

*Id*. at 89-90 (Pet. Ex. C). DeBord translated this advisement as follows:

> The rights of your consultation are that you have the right to have an appointment of a jury quickly, ask questions and call witnesses in this case, and if you want witnesses to do-help in this case, they can call you and make the witness in this case. And you also have the right to keep the silence in this case. The State has to teach without a doubt that you're guilty before you could be found guilty in this charge. These are the rights of your consultation. Do you understand it?

*Id*. at 108 (Pet. Ex. E). Bautista, through the interpreter, answered yes. The trial court asked Bautista, "Do you understand that by pleading guilty you waive your rights?" *Id*. at 90. The interpreter translated this question as "Do you understand that by accepting this offer, you are, uh to say that you're guilty

'*ultando*' *[sic]* those rights?"[2] *Id*. at 108. Bautista again answered yes through the interpreter. The trial court accepted the plea agreement and found Bautista guilty as charged. At a subsequent sentencing hearing, the trial court sentenced him to concurrent executed terms of thirty years for each conviction.

[4] In August 2015, Bautista filed a pro se PCR petition, which took its final form in January 2020 after being amended twice by counsel. Appellant's App. Vol. 2 at 55. In February 2020, the post-conviction court held a hearing. Bautista appeared in person and by counsel. No witnesses testified on his behalf, but his five exhibits were admitted as evidence, including the transcript of the guilty plea hearing (Petitioner's Exhibit C), the affidavit of his guilty plea counsel (Petitioner's Exhibit D), and a verbatim translation/transcript of DeBord's Spanish translation at the guilty plea hearing (Petitioner's Exhibit E). Petitioner's Exhibit E is a chart consisting of three columns: a transcription of the English spoken at the guilty plea hearing, a transcription of DeBord's corresponding Spanish translation, and a corresponding English translation of the Spanish. Ex. Vol. 3 at 107-12. Petitioner's Exhibit E was prepared by Irene Bublik, an interpreter certified by the Indiana supreme court, and was reviewed by Christina Courtright, also a certified interpreter, who agreed with Bublik's

[2] Bautista asserts that "ultando" is not a word that is found in Spanish dictionaries. The State does not challenge this assertion.

English translation of DeBord's Spanish.[3] Tr. Vol. 2 at 8-9. In Petitioner's Exhibit D, Bautista's guilty plea counsel attested as follows:

> 2. Mr. Bautista was not able to speak or understand English during the representation. As a result, it was necessary to utilize a Spanish language interpreter to communicate with him. During attorney-client meetings, interpreter Nellie DeBord interpreted conversations between Mr. Bautista and I. Ms. DeBord also was utilized as proceedings interpreter during the court hearings in the case.
>
> 3. The plea agreement in the case was written only in English, not Spanish.

*Id*. at 104. At the close of the hearing, the post-conviction court took the matter under advisement, and the parties subsequently submitted proposed findings of fact and conclusions of law.

---

[3] The Indiana Interpreter Code of Conduct and Procedure, adopted in 2008, sets forth certification requirements and the standards for court interpreters. The purpose of the standards is to:

> a) Ensure meaningful access to all trial courts and court services for non-English speakers;
>
> b) Protect the constitutional rights of criminal defendants to the assistance of court interpreters during court proceedings;
>
> c) Ensure due process in all phases of litigation for non-English speakers;
>
> d) Ensure equal protection of the law for non-English speakers;
>
> e) Increase efficiency, quality, and uniformity in handling proceedings which involve a court interpreter;
>
> f) Encourage the broadest use of professional language interpreters by all those in need of such services within the trial courts.

Ind. Interpreter Conduct Rule I.1.

[5] In July 2020, the post-conviction court issued findings of fact and conclusions of law denying Bautista relief. This appeal ensued.

## Discussion and Decision

[6] "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019) (citing Ind. Post-Conviction Rule 1(1)(b)). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Id*. A defendant who files a petition for post-conviction relief "bears the burden of establishing grounds for relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017). Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment:

> Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did. We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law.

*Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted).

[7] Bautista argues that his guilty plea was not knowingly, intelligently, and voluntarily entered because the Spanish translation he received at his guilty plea

hearing did not adequately advise him of his *Boykin* rights. Our supreme court has explained what is required under *Boykin*:

> "In considering the voluntariness of a guilty plea we start with the standard that the record of the guilty plea proceeding must demonstrate that the defendant was advised of his constitutional rights and knowingly and voluntarily waived them." *Turman v. State*, 271 Ind. 332, 392 N.E.2d 483, 484 (1979) (citing *Boykin*, 395 U.S. at 242, 89 S. Ct. 1709). And *Boykin* requires that a trial court accepting a guilty plea "must be satisfied that an accused is aware of his right against self-incrimination, his right to trial by jury, and his right to confront his accusers."[4] *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001) (citing *Boykin*, 395 U.S. at 243, 89 S. Ct. 1709). The failure to advise a criminal defendant of his constitutional rights in accordance with *Boykin* prior to accepting a guilty plea will result in reversal of the conviction. *Youngblood v. State*, 542 N.E.2d 188, 188 (Ind. 1989) (quoting *White v. State*, 497 N.E.2d 893, 905 (Ind. 1986)). Accordingly, *a defendant who demonstrates that the trial court failed to properly give a Boykin advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief*.
>
> ….
>
> "[O]nce a state prisoner has demonstrated that the plea taking was not conducted in accordance with *Boykin*, the state may, if it affirmatively proves in a post-conviction hearing that the plea was voluntary and intelligent, obviate the necessity of vacating the plea." *Youngblood*, 542 N.E.2d at 189 (quoting *Todd v. Lockhart*, 490 F.2d 626, 628 (8th Cir.1974)). Stated somewhat differently, once the defendant demonstrates that the trial court

[4] In addition to *Boykin* rights, Indiana Code section 35-35-1-2(a) requires the trial court to advise the defendant of several more specified rights before accepting a guilty plea.

> did not advise him that he was waiving his *Boykin* rights by pleading guilty, the burden shifts to the State to prove that the petitioner nonetheless knew that he was waiving such rights. And where the record of the guilty plea hearing itself does not establish that a defendant was properly advised of and waived his rights, evidence outside of that record may be used to establish a defendant's understanding. *See id*. (affirming denial of post-conviction relief where no *Boykin* advisement was given at the plea hearing but trial counsel testified at the post-conviction hearing that they had explained these rights to defendant prior to the plea).

*Ponce v. State*, 9 N.E.3d 1265, 1270, 1272-73 (Ind. 2014) (*Ponce II*) (emphasis added).

[8] Here, our review of the adequacy of the *Boykin* advisement includes the added layer of language translation. *Ponce II* is helpful in this regard as well:

> Courts have long recognized that "a foreign language defendant's capacity to understand and appreciate the proceedings, to participate with his counsel, to confront his accusers, and to waive rights knowingly and intelligently, is undermined without an interpreter actively participating in his defense." *United States v. Cirrincione*, 780 F.2d 620, 633 (7th Cir. 1985) (citing *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970)). Undoubtedly, the defendant is denied due process when, among other things, "what is told him is incomprehensible [or] the accuracy and scope of a translation at a hearing or trial is subject to grave doubt [.]" *Cirrincione*, 780 F.2d at 634. For this reason we have declared that a "defendant who cannot speak or understand English has [the] right to have his proceedings simultaneously translated to allow for effective participation." [*Diaz v. State*, 934 N.E.2d 1089, 1095 (Ind. 2010)] (alteration in [*Diaz*]) (quoting *Martinez Chavez v. State*, 534 N.E.2d 731, 736 (Ind. 1989) (citation omitted)). We elaborated that such

> interpretation must include "the precise form and tenor of each question propounded, and ... in like manner translate the precise expressions of the [defendant]." *Id*. at 1095 (quoting *People v. Cunningham*, 215 Mich. App. 652, 546 N.W.2d 715, 716 (1996) (quotation omitted)). This is so because the interpreter's role during a criminal proceeding is a critical one. "Language interpreters overcome the barriers and cultural misunderstandings that can render criminal defendants virtually absent from their own proceedings. Interpreters also eliminate the misinterpretation of witnesses' statements made to police or triers of fact during court proceedings." *Lynn W. Davis, et al., The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 3 (2004).

*Id*. at 1272.

[9] We begin our review of Bautista's claim by observing that the post-conviction court adopted verbatim the State's proposed findings of fact and conclusions of law; the post-conviction court did not alter the State's submission in any way, including any correction of typographical errors.[5] Our supreme court has recognized that the practice of verbatim adoption of a party's proposed findings helps trial courts deal with "an enormous volume of cases" and "keep the docket moving," and thus declined to prohibit the practice for these practical reasons. *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001). However, the court also recognized that "when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered

[5] The trial court's name was misspelled.

judgment of the trial court." *Id*. at 709. Consequently, our appellate courts "do not encourage trial courts to engage in this practice." *Dallas v. Cessna*, 968 N.E.2d 291, 296 (Ind. Ct. App. 2012) (citing *Carpenter v. Carpenter*, 891 N.E.2d 587, 592 (Ind. Ct. App. 2008)).

[10] Here, we find two significant errors in the post-conviction court's findings of fact and conclusions of law. First, the post-conviction court found that at the guilty plea hearing, the "[trial] court asked Bautista if he can understand some English and Bautista answered 'Yes, sir." Appealed Order at 2. Bautista maintains that this finding is clearly erroneous, and the State concedes that Bautista is correct that "there is no indication in the guilty plea or sentencing transcripts that [he] could understand any English." Appellee's Br. at 9 n.2. Second, the post-conviction court concluded that "[i]n light of the totality of the circumstances, Bautista *has failed to prove by a preponderance of the evidence that he did not understand* the *Boykin* rights advisement or a violation of due process." Appealed Order at 5 (emphasis added). Although generally the petitioner bears the burden of establishing grounds for post-conviction relief by a preponderance of the evidence, Bautista was not required to establish that *he did not understand* the *Boykin* rights advisement. Rather, as previously stated, "a defendant who demonstrates that the trial court failed to properly give a *Boykin* advisement

during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief."[6] *Ponce II*, 9 N.E.3d at 1270.

[11] Thus, the first order of business is to determine whether Bautista carried his burden to show that he failed to receive a proper *Boykin* advisement during his guilty plea hearing. In addressing this question, we observe that neither party disputes that the trial court's *Boykin* advisement in English was adequate, and the State does not challenge the accuracy of Bublik's English translation of DeBord's Spanish translation in Petitioner's Exhibit E, which was confirmed by a second certified interpreter. Accordingly, to determine whether Bautista

---

[6] In *Winkleman v. State*, 22 N.E.3d 844 (Ind. Ct. App. 2014), handed down six months after *Ponce II*, another panel of this Court stated,

> *Boykin* does not require that the record of the guilty-plea proceeding show that the accused was formally advised that entry of his guilty plea waives certain constitutional rights, nor does *Boykin* require that the record contain a formal waiver of these rights by the accused. *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001). Rather, *Boykin* only requires a conviction to be vacated if the defendant did not know or was not advised at the time of his plea that he was waiving his *Boykin* rights. *Id*.

*Id*. at 851*, trans. denied* (2015). *See also James v. State*, 130 N.E.3d 1186, 1190 (Ind. Ct. App. 2019) (relying on *Dewitt*), *trans. denied*. We observe that *Dewitt*, the case cited in *Winkleman*, was handed down three years before *Ponce II*, and that *Winkleman* did not cite *Ponce II*. *Dewitt* is not necessarily in conflict with *Ponce II*, but by failing to recognize *Ponce II*, the *Winkleman* court failed to properly apply the burden of proof articulated in *Ponce II*. Specifically, the *Winkleman* court concluded that "Winkleman has failed to establish on this record that he did not know he was waiving his *Boykin* rights." 22 N.E.3d at 852. However, under *Ponce II*, a defendant does not bear the burden to establish that he did not know he was waiving his *Boykin* rights; rather "a defendant who demonstrates that the trial court failed to properly give a *Boykin* advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief." 9 N.E.3d at 1270. "[O]nce the defendant demonstrates that the trial court did not advise him that he was waiving his *Boykin* rights by pleading guilty, the burden shifts to the State to prove that the petitioner nonetheless knew that he was waiving such rights." *Id*. at 1273. Although *Ponce II* was a post-conviction case and *Winkleman* was a direct appeal, we fail to see why the burden of proof applied when evaluating a *Boykin* claim should be any different.

received an adequate *Boykin* advisement, we must evaluate DeBord's Spanish translation provided at the guilty plea hearing.

[12] Before doing so, we address the State's argument that "[Bautista] was the only witness who could have provided evidence that DeBord's translation was so inaccurate that [he] did not understand the substance of his *Boykin* rights[,]" and "[his] failure to present evidence in this regard supports the post-conviction court's judgment that [h]e did not meet his threshold burden." Appellee's Br. at 12. On this record, we disagree that Bautista's testimony was necessary to meet his threshold burden. Indeed, in *Ponce II*, our supreme court concluded that Ponce met his threshold burden where he had not testified at his post-conviction hearing.

[13] Ponce filed a PCR petition arguing that his plea was not entered knowingly, intelligently, and voluntarily because the court-appointed interpreter failed to accurately translate his *Boykin* rights. 9 N.E.3d at 1269. Ponce did not testify at his post-conviction hearing, but a chart of the trial court's advisement and the Spanish translation given to Ponce at his guilty plea hearing was admitted. *Ponce v. State*, 992 N.E.2d 726, 731 (Ind. Ct. App. 2013) (*Ponce I*), *vacated by* 9 N.E.3d 1265. After the post-conviction court denied Ponce relief, and the Court of Appeals affirmed the denial, our supreme court accepted transfer. *Ponce II*, 9 N.E.3d at 1269-70. In determining whether Ponce carried his burden to show that he failed to receive an adequate *Boykin* advisement, our supreme court considered the aforementioned chart. *Id*. at 1271-72. The court concluded that the Spanish interpretation of the *Boykin* advisements was wholly

inadequate and that "[h]ad the trial court uttered the words relayed to Ponce by the interpreter, we doubt that a court of review would hesitate to declare that Ponce had not been given his *Boykin* advisements." *Id*. at 1272. Therefore, the court concluded that Ponce met his burden to demonstrate that his guilty plea hearing was not conducted in accordance with *Boykin*. *Id*.

[14] We do not find Bautista's failure to testify fatal to his claim because Petitioner's Exhibit E, Bublik's English translation of DeBord's Spanish translation that Bautista heard at his guilty plea hearing, provides us with a sufficient basis to determine whether he received an adequate advisement of his *Boykin* rights. As noted, *Boykin* requires that a defendant be informed of the right to a trial by jury, the right to confront witnesses against him, and the right against compulsory self-incrimination. A court is not required to use "specific or precise words" in its advisement of *Boykin* rights, but "the advisement must meaningfully convey the substance of the right." *Stamm v. State*, 556 N.E.2d 6, 8-9 (Ind. Ct. App. 1990). Further, "occasional lapses in translation will not render a proceeding fundamentally unfair." *Diaz*, 934 N.E.2d at 1095.

[15] Here, we conclude that the Spanish translation of the right to confrontation failed to accurately reflect the trial court's advisement and meaningfully convey the substance of that right. DeBord told Bautista he had the right to "ask questions and call witnesses in this case, and if you want witnesses to do-help in this case, they can call you and make the witness in this case." Ex. Vol. 3 at 108. The post-conviction court found as follows:

> 5. This Court further does not find a violation of the confrontation clause. Though the translated advisement does not "mirror" verbatim the court's colloquy, it advised Bautista he could "*ask questions*" "*call witnesses*" and ["]*have help calling witnesses*." The court finds the translation not deficient.

Appealed Order at 4.

[16] The Sixth Amendment's Confrontation Clause provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." "The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him." *Harris v. State*, 964 N.E.2d 920, 924 (Ind. Ct. App. 2012) (quoting *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006)), *trans. denied*. Although DeBord's translation informed Bautista that he could ask questions, it failed to specify to whom Bautista may ask questions. Indeed, the translation fails to make any mention of the witnesses against him or use other words that would convey a similar meaning, and therefore it does not effectively communicate that Bautista has the right to confront or cross-examine the witnesses against him.

[17] Accordingly, we conclude that Bautista carried his initial burden of demonstrating that at the guilty plea hearing he was not properly advised of his right to confront the witnesses against him. The burden then shifted to the State to show that the record as a whole nonetheless demonstrated that Bautista understood this right and that he was waiving it by pleading guilty. We note that the State did not present any evidence at the post-conviction hearing. On

appeal, the State argues only that we should find that Bautista was meaningfully advised and does not argue that even if he was not, the record as a whole demonstrates that he understood this right and that he was waiving it. An appellee's failure to respond to an issue raised by the appellant is, as to that issue, the same as failing to file a brief. *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002).

> This failure does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required. However, counsel for appellee remains responsible for controverting arguments raised by appellant. For appellant to win reversal on the issue, he must establish only that the lower court committed prima facie error. Prima facie means at first sight, on first appearance, or on the face of it.

*Id*. (citations omitted).

[18] Here, the post-conviction court concluded as follows:

> 6. Bautista's counsel affirms that DeBord translated at attorney-client meetings and during court hearings. The plea agreement was signed on the same day as the guilty plea hearing. Bautista lays no claim that the written plea agreement which he and counsel signed was not properly translated by De[B]ord. This Court presumes counsel would have gone through the document thoroughly with Bautista with De[B]ord translating. The plea agreement contained all the rights required by *Boykin*. While a signed waiver of rights may not be sufficient to satisfy *Boykin* advisement requirements when a trial court asks only a few perfunctory questions, none of which specifically addresses the rights being waived, *Ponce*, 992 N.E.2d 726, 729 at 213 [sic] quoting [*Lime v. State*, 619 N.E.2d 601, 605 (Ind. Ct. App. 1993),

> *trans. denied* (1994)]. Such was not the case during Bautista's guilty plea hearing. Bautista's [sic] was advised of his required constitutional rights twice on the same day by way of his plea agreement and through the plea dialogue conducted by the court. The evidence before this Court does not establish that Bautista did not understand the terms of his plea agreement nor is there evidence that Bautista did not understand his *Boykin* rights. Bautista acknowledged his *Boykin* rights in the plea agreement and then during the guilty plea hearing.

Appealed Order at 4-5.

[19] One of the cases cited in this conclusion, *Ponce I*, 992 N.E.2d 726, was vacated by *Ponce II*, 9 N.E.3d 1265. In addition, the language cited from *Ponce I* is not from this Court's discussion but from the post-conviction court's judgment that was reversed in *Ponce II*, 9 N.E.3d 1265. Furthermore, the conclusion improperly relies on a presumption that counsel would have gone through the document thoroughly with Bautista with DeBord translating. It also relies on the notion that Bautista was properly advised of all three *Boykin* rights during the guilty plea hearing, which we have already found clearly erroneous. Finally, as previously noted, it fails to acknowledge that the State is required to affirmatively show that the record as a whole demonstrates that Bautista understood his rights and that he was waiving them by pleading guilty. Although Bautista answered yes when asked if he understood his rights, "one may fully understand and even acknowledge to others an understanding of what is in actuality an inaccurate interpretation of the proceedings." *Ponce II*, 9 N.E.3d at 1271. "Put another way, one can understand perfectly the words

spoken by an interpreter who tells you the wrong thing." *Id*. (quoting *Diaz*, 934 N.E.2d at 1095).

[20] In conclusion, Bautista carried his initial burden of demonstrating that he failed to receive an adequate advisement at the guilty plea hearing that he had the right to confront and cross-examine the witnesses against him, and the State failed to show that the record as a whole nonetheless demonstrated that Bautista understood this right and that he was waiving it by pleading guilty.[7] Accordingly, Bautista's guilty plea must be vacated. Therefore, we reverse the judgment of the post-conviction court and remand with instructions to vacate his guilty plea.

[21] Reversed and remanded.

Najam, J., and Riley, J., concur.

[7] Because we reverse on this ground, we need not address Bautista's arguments regarding the other two *Boykin* rights.