

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO, ) CASE NO.: 2006-1606  
 ) 2006-1851  
 )  
 ) Plaintiff-Appellant, )  
 )  
 ) On appeal from the Mahoning County  
 ) vs. ) Court of Appeals, Seventh Appellate  
 ) District  
 )  
 ) JOSEPH W. JONES, SR., )  
 ) Court of Appeals Case No. 05-MA-69  
 )  
 ) Defendant-Appellee. )

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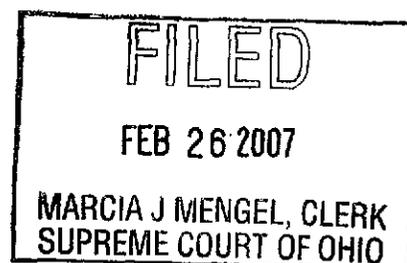
APPELLEE'S MERITS BRIEF

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## STATEMENT OF THE CASE

On August 18, 2004 Joseph W. Jones, Sr., the Defendant-Appellee, age 38, was charged with three counts of domestic violence in violation of R.C. 2919.25(A). The Complaints claimed that on, or about, August 6, 2004 Jones “did knowingly cause or attempt to cause physical harm” to three minors alleged to be “family or household members” of the Appellant.<sup>1, 2, 3</sup>

Jones entered pleas of not guilty to all three charges. On September 7, 2004 Attorney Damian A. Billak, Esq. (“Billak”) entered his appearance as Jones’ counsel of record.

Pretrial conferences were held on September 13, 2004 and October 25, 2004. Jones made a written jury demand on November 22, 2004. A final pretrial conference was held on February 14, 2005 and a jury trial was scheduled for March 11, 2005.

On March 9, 2005 Jones filed a Motion to Dismiss all three charges on the grounds that R.C. 2919.25(A) had been rendered unconstitutional by the enactment of Article XV, Section 11 of the Ohio Constitution on November 2, 2004 (which came into effect on December 2, 2004).

On March 11, 2005 Jones entered a plea of guilty to one count of domestic violence. A transcript of the proceedings before the Court on that date is part of the record on appeal (Docs. 5; 9).

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<sup>1</sup>. All three children resided in Appellant’s home at 3271 Canfield-Niles Road, Austintown, Ohio 44515-9699 together with their mother, Jackie Bayas. Appellee and the children’s mother were engaged to be married. Appellee is not the father of any of the three children.

<sup>2</sup>. The alleged “victims” of these offenses were Kristen Long, age 17, Danielle Long, age 16 and Andy Bayus, age 11.

<sup>3</sup>. The Complaint alleging domestic violence against Kristin contained the words “two counts.” However, only one charge was stated in the Complaint.

As a result of this plea the Trial Court found Jones guilty and sentenced him to serve 180 days in jail, 170 of which were suspended. Jones was ordered to serve 10 days in jail immediately. He was also ordered to pay a fine of \$150.00 plus the jury costs. Jones also was ordered to attend “anger management classes” and was to have a “psychological evaluation” following by counseling “if necessary.” Lastly, Jones was also placed on 12 months of reporting probation (Doc. 1).

Jones was taken directly to jail from the courtroom. As soon as he was released, he hired different counsel who, on March 25, 2005, filed, pursuant to Crim. R. 32.1 a “Motion to Withdraw Plea of Guilty Pursuant to Crim. R. 32.1 and a Request for Hearing.” Jones submitted a detailed Affidavit to his Motion to which a number of exhibits were attached, including letters from one of the alleged victims (Kristin Long) who admitted she had made up the whole story regarding the alleged domestic violence.

The Trial Court scheduled a hearing on Jones’ Crim. R. 32.1 Motion to Withdraw Plea of Guilty for May 19, 2005, but rescheduled it on its own motion to July 18, 2005. In the meantime, Jones filed his Notice of Appeal to the Court of Appeals for Mahoning County (on April 11, 2005) (Doc. 1).<sup>4</sup>

On July 18, 2005 the Trial Court conducted an evidentiary hearing on Jones’ Crim. R. 32.1 Motion to Withdraw Plea of Guilty. A transcript of the tape-recorded hearing is part of the

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<sup>4</sup>. On June 6, 2005 Jones filed a Motion to Stay the Appeal and to Remand the Case to the Trial Court for Consideration of [his] Post-trial Motion to Withdraw his Guilty Plea (Doc. 10). The Court of Appeals granted this motion (Doc. 12). However, the Trial Court did not conduct the evidentiary hearing on the Motion to Withdraw Plea within the time the Court of Appeals had allowed, necessitating the filing of an “Emergency Motion to Enlarge Prior Remand Order” by two weeks so the Trial Court could hear and decide the Motion to Withdraw the Guilty Plea (Doc. 15). The Court of Appeals granted the emergency motion on July 18, 2005 (Doc. 14).

record (Doc. 26-27). On July 25, 2005 the Trial Court denied Jones' Motion to Withdraw Plea of Guilty (Doc. 19, Exhibit A).

On August 10, 2005 Jones filed a Notice of Appeal from the adverse decision regarding his Motion to Withdraw Guilty Plea. Jones then filed a Motion to Consolidate the two appeals and they were considered together (Doc. 30). The appeals were fully briefed and argued together.

On July 13, 2006 the Court of Appeals reversed, the judgment of the Trial Court. The Court of Appeals found that Jones' First Assignment of Error related to non-compliance with Crim. R. 11(E) was well taken and remanded the case to the Trial Court. (The second assignment of error relating to denial of Jones' Crim. R. 32.1 Motion to Withdraw Guilty Plea was not addressed (Doc. 37-38)).

The State filed a discretionary appeal to this Court. It also filed a Motion to Certify Conflict with the Court of Appeals (Doc. 40-41). Jones filed a Memorandum in Opposition to the Motion to Certify a Conflict (Doc. 43). Nevertheless, the Court of Appeals certified a conflict by a Journal Entry dated September 20, 2006 on the following issue:

Whether a trial court complies with Crim. R. 11(E) by simply notifying a defendant of the effect of his/her plea as set out in Crim. R. 11(B) or whether the trial court complies with Crim. R. 11(E) by notifying a defendant of the maximum penalties that could result from a plea and that the defendant waives his/her right to jury trial by entering a plea, but does not notify a defendant of the effect of his/her plea.

(Doc. 44).

The State then filed a Notice of Certification of Conflict with this Court. This Court then accepted this appeal for a conflict review, and ordered briefing thereon combined with the State's discretionary appeal related to the same issue (Doc. 45-46).

## STATEMENT OF FACTS<sup>5</sup>

On August 6, 2004, Joseph W. Jones, Sr. was residing in his home in Austintown, Ohio with his fiancée, Jackie Bayus, and her three children, Kristin Long, age 17, Danielle Long, age 16, and Andy Bayus, age 11 (Jones Aff. ¶ 3). In the evening on August 6, 2004 Jones took his fiancée to her job at T & J's Lounge in Austintown, Ohio (Jones Aff. ¶ 5).

At about 8:30 p.m., Jones returned home to check on Bayus' three children (Jones Aff. ¶ 6). He discovered that the children had broken open a door to the living room (which was locked) and were watching television (Aff. ¶ 6). Jones sent them to their rooms. *Id.*

Kristin, the eldest child, gave him a hard time and said she did not want to live in his house any longer (Jones Aff. ¶ 7). Jones told her that was fine with him, that she should call her father, pack her bags, and go live with him if that is what she wanted to do. *Id.* Jones did not threaten to strike, hurt, or injure any of the three children (Jones Aff. ¶ 8). Moreover, he committed no act of domestic violence against any of the three children (Jones Aff. ¶ 9). Specifically, Jones made no physical contact with Kristen. *Id.* He did not hit her, push her, or lay a finger on her. *Id.*

Jones returned to his fiancée's place of employment (Jones Aff. ¶ 10). At about 10:20 p.m. several police officers came into T & J's Lounge and took Jackie outside (Jones Aff. ¶ 11). After a few minutes, Jones went outside to check on her. *Id.* Jones learned from the officers that

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<sup>5</sup>. These facts are taken from (1) the Affidavit of Joseph W. Jones, Jr. filed with his Motion to Withdraw Plea of Guilty and Request for Hearing filed March 25, 2005; (2) the transcript of the sentencing hearing held on March 11, 2005 (Doc. 7, cited "March 11, 2005 Tr. at \_\_\_"); and (3) the transcript of the evidentiary hearing held by the Trial Court on Appellant's Motion to Withdraw his Plea of Guilty on July 18, 2005 (Doc. 27, cited herein as "July 18, 2005 Tr. at \_\_\_").

Kristin *claimed* he hit her in the face, causing a split lip. *Id.* Jones told the officers he had done no such thing and explained that he and his fiancé had been having problems controlling Kristin. *Id.* He described exactly what had taken place in his house earlier that evening. *Id.*

Several weeks later, Jones was charged with three counts of misdemeanor domestic violence (Jones Aff. ¶ 12). Jones later learned that Austintown police had been told by the children that he had physically abused them with an electronic “fly swatter” or “bug zapper” over a period of “two years.” (Jones Aff. ¶ 13). In fact, Jones had purchased the device at Christmas 2003 but it had been broken for a number of months. *Id.*; July 18, 2005, Tr. at 10. Jones was also charged with hitting all three children with the electronic “bug zapper.” *Id.*

On August 24, 2004 a very embarrassing and incorrect story appeared in the Youngstown *Vindicator* about Jones’ supposed acts of domestic violence (a copy of that article, along with the follow-up article on March 15, 2005 was attached as Exhibit 1 to Jones’ Motion to Withdraw Plea) (Jones Aff. ¶ 14).

A Juvenile Court proceeding was initiated as a result of Kristin’s claims and the children were removed from Jones’ home (Jones Aff. ¶ 15). Jones was not a party to that action. *Id.* However, over time, Jones heard the children had recanted their stories and, in particular, had appeared at the Juvenile Court for a private interview with a magistrate and their guardian *ad litem* and each had acknowledged lying about the alleged domestic violence on August 6, 2004 (Jones Aff. ¶ 16). Each of the children acknowledged that Jones had not, in fact, committed any act(s) of domestic violence against any of the children. *Id.*

Jones informed his attorney of what he had learned and his attorney arranged to take recorded statements (with a court reporter present) on December 30, 2004 (Jones Aff. ¶ 17).

During the interview, both girls both admitted they lied and made up the claims of domestic violence. *Id.* Jones' attorney opted not to speak with Andy because he was "too young." *Id.*

In January 2005, the oldest child, Kristin, sent her mother a series of letters wherein she admitted she lied about what happened on August 6, 2004 and was remorseful about lying (Jones Aff. ¶ 18). These letters were attached to the Motion to Withdraw Plea and marked Exhibits 2, 3, 4 and 5. (The relevant admissions were highlighted in yellow). *Id.*

During each of the pretrial conferences Jones attended, his attorney told him he had "nothing to worry about" and, given the girls' statements, the charges were in all likelihood going to be dismissed (Jones Aff. ¶¶ 19-20). On March 7, 2005, just four days before trial, Billak again assured Jones he had "nothing to worry about." *Id.*

Jones appeared at Mahoning County Court No. 4 for a jury trial on Friday, March 11, 2005 (Jones Aff. ¶ 21). He was accompanied by his fiancée, Jackie Bayus. Jones learned that Danielle Long and Andy Bayus (the two younger children) had been subpoenaed by the State and were at the court along with workers from the Children's Services Board. *Id.*

Jones' attorney came into a room where Jones and his fiancée were sitting and told them he had been informed that Andy was going to "change his story" and would now claim that Jones hurt him (Jones Aff. ¶ 22). Jones was astounded by this. Jones told his attorney that he wanted to proceed to trial anyway; that did not believe this representation by Andy (as it was related to him) and that even if it was true then his attorney could easily address that matter on cross-examination in light of Andy's prior inconsistent statements. *Id.* Jones reminded his attorney there was no physical evidence that he caused, or attempted to cause, any physical injury to anyone, much less any of the three children, that he had no record of violence, and he was clearly

not guilty of any crime (Aff. ¶ 23). Jones also reminded his attorney that an alleged independent witness to the alleged domestic violence on August 6, 2004 – a next door neighbor named Deanna Fowler – had also admitted fabricating a story about hearing an alleged altercation between Jones and Kristin, and that she had told Kristin how to fake an injury to “really get [him].” *Id.* Jones came away with the impression that his attorney did not seem to listen or care what he had to say. *Id.*<sup>6</sup>

Billak told Jones that “he was the attorney” and “he knew best” and that Jones should “plead” to one charge related to Andy and the prosecution would dismiss the other charges (Aff. ¶ 24). Jones was told he had to give Billak an answer in “two minutes.” *Id.*

Jones was angry about this state of affairs and very disappointed with Billak. After having been assured by Billak for months that he had “nothing to worry about,” Billak was now pressing him to enter a guilty plea and to serve a jail sentence. Jones didn’t understand his legal options and had no idea why Billak was “strongly recommending” that he enter a plea of guilty to the charge when, in fact, he was not guilty (Jones Aff. ¶ 25). Jones was told by Billak that if he entered the plea he would have to serve 10 days in jail, but if he proceeded to trial and was found

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<sup>6</sup>. Jones testified at the July 18, 2005 hearing that after his attorney met with the Prosecutor, his attorney came back into the room where Jones and Bayus were sitting and told him Andy was “sticking to his story” about being hit with a “bug zapper.” (July 18, 2005, Tr. at 12). Jones did not believe this statement and said it was a “lie.” *Id.* Billak told him he had two choices: If you take a plea, you will serve 10 days, but if you go to trial and lose, you will serve 180 days. *Id.* Jones had only two minutes to make this decision. *Id.* at 13. After arguing with Billak for a while – because he knew the charge wasn’t true, that he had done “nothing” and he knew Andy Bayus was “on his side” – Jones testified he was pressured into taking the “deal.” *Id.* at 13. Jones did not know what to do since he had never been to jail in his life, nor had he ever harmed a person; he was tormented by this “take it or leave it” proposition. *Id.* at 14. He eventually decided to “take the ten days, explaining he wasn’t . . . going to take 180 days, lose my job, and everything I’ve worked for in the last 20 years.” *Id.* at 14. He said he “knowingly and voluntarily” made the plea in light of the foregoing. *Id.* at 14.

guilty he would get “180 days in jail.” *Id.* Billak said this to Jones in such a way that Jones believed this was exactly what would happen, and that the Court had so indicated this to his attorney. *Id.*

Relying on the advice of his attorney, and without understanding what had gone on and/or why, Jones entered a plea of guilty to one count of domestic violence (Jones Aff. ¶ 27). Jones was sentenced to serve a 10-day jail sentence starting the same day (Jones Aff. ¶ 28). He has served the sentence (Jones Aff. ¶ 28).

When Jones appeared before the judge, the judge inquired of him about his understanding of constitutional rights. Jones said he understood he had a right to a trial to either a judge or jury and that, by entering a plea of guilty, he was waiving his right to a trial (March 11, 2005 Tr. at 3). He also acknowledged that the State of Ohio had to prove his guilt beyond a reasonable doubt. *Id.* He also understood he had a right to subpoena witnesses and to cross-examine any witnesses against him. *Id.* He likewise acknowledged he had a right to remain silent and that no one could comment upon his decision to exercise that right. *Id.* at 4. Lastly he understood that “by pleading guilty that you do put yourself on the mercy of the court regardless of what is in this plea agreement and that you could receive up to 180 days in the county jail today and a fine of up to \$1,000 in (sic) court costs.” *Id.*

Danielle Long, one of the three “victims,” testified at the July 18, 2005 hearing. She was 16 years old (July 18, 2005 Tr. at 15). She lives with the Jones and her mother, Jackie Bayus. *Id.* She was at the Court on the day of the Jones’s trial. *Id.* Danielle testified she was in a room with her brother, Andy, when the Prosecutor interviewed Andy on the morning of trial. *Id.* at 16. Jones’s attorney was also present. *Id.* She testified that she and the her siblings had made up a

“story” about Jones hitting them with a bug zapper to “get Joe in trouble.” *Id.* Her brother, Andy, the alleged “victim” of the crime for which Jones plead guilty, this “crime,” told the prosecutor the bug zapper story had been “made up.” *Id.* Danielle, she testified that Andy never told the prosecutor or defense counsel that Jones had ever hit him. *Id.* at 17. She said when the prosecutor left the room, he (the prosecutor) told young Andy he would “break his legs” if he left the room and told Danielle he would “kill her” if she let him leave. *Id.* at 18. She and Andy were afraid of the prosecutor as he “sounded serious.” *Id.*

On cross-examination, Danielle conceded she, too, had originally accused Jones of hitting her with a “bug zapper.” However, she came clean and told the truth and stated this had never occurred. *Id.* at 19. She also recalled that the prosecutor told her he would not pursue a case against Jones related to her if she had made “inconsistent statements.” *Id.* at 20. She was unequivocal in saying that Jones “never hit us.” *Id.* at 20.

Andy testified at the July 18, 2005 hearing as well.<sup>7</sup> He was then 12 years old (July 18, 2005 Tr. at 21). He remembered being at the trial on March 11, 2005. *Id.* at 24. He acknowledged that Jones was accused of hitting him and his two sisters with a “fly zapper.” *Id.* at 25. He understood he was going to have to testify at the trial. *Id.*

Andy remembered going into a room with several people, including police officers, the prosecutor, the defense attorney, and his sister, Danielle. *Id.* at 26. The prosecutor asked if the fly zapper looked familiar (it was shown to him) and Andy said it did. *Id.* Andy was asked whether he had ever been hit with the fly zapper and Andy told him “no.” *Id.* Andy said “Joe would always play around with us, acting like he would, but we would know he was just playing

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<sup>7</sup> The Court conducted a brief *voir dire* to establish whether he was competent (Tr. 21-23). The State conceded he was competent to testify. *Id.* at 22-23.

around, and that he wouldn't [hit the children with it]." *Id.* at 27.

During the conference, the prosecutor asked Andy what had occurred on August 6, 2004 (the date of the purported offense). *Id.* at 27. Andy said he had written a report that "Joe hit me with the bug zapper, but then I told him (the prosecutor) that everything was a lie, that I recant my story." *Id.* at 27.<sup>8</sup> Andy said his "story" about what had occurred on August 6, 2004 was a "lie" and said: "Joe did not hit me." He was asked: "Why did you say it then?" His answer was: "Because my sisters were telling me to lie for them." *Id.* at 27. Andy remembered the prosecutor telling him to stay in the room and that if he left he would "break [his] legs" and he remembered a threat to his sister about being "killed" if he (Andy) left the room. *Id.* at 28.

Andy testified the prosecutor and Jones's trial counsel then left the room. *Id.* at 28. The prosecutor came back about 10 minutes later. *Id.* at 29. Andy was very upset when he learned Jones was going to jail. *Id.*

Andy was emphatic that he never "changed his story" on the day of the trial. *Id.* at 29. He reconfirmed that Jones had never struck him with a bug zapper. *Id.* at 29-30. Had he testified at trial, he would have said, under oath, that "Joe never hit me with [the bug zapper]." *Id.* at 30.

Jackie Bayus, Jones' fiancée also testified at the July 18, 2005 hearing as well. Andy and Danielle are her children (July 18, 2005, Tr. at 36-37). Jones is her fiancée, and was so on August 6, 2004 and on March 11, 2005 when the criminal trial was to have taken place (Tr. 37). She was at the Court on the date of trial and was with Jones the entire time. *Id.* She was present when Jones' attorney spoke with Jones the first time and told Jones that he (Billak) did not know what Andy was going to say and that Jones was "better off taking a plea." Jones told Billak in

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<sup>8</sup>. The judge asked him what "recant" meant. Andy said it meant "like you change your story. Because that's what my sister told me [the word means], recant." *Id.* at 35.

her presence that he did not want to “take a plea.” *Id.* at 38. Billak left and came back several times and, from her perspective, pressured Jones to take the plea. At one point, Billak claimed the Trial Court was “getting irritated.” *Id.* at 38. When Jones wasn’t bending, Billak represented to Jones that “Andy has changed his story” and “you better take the plea.” *Id.* at 39. Bayus then asked Billak how he knew that Andy had purportedly changed his story. He responded: “I’m Joe’s attorney. I know what’s best for him. He’s going to take the plea.” *Id.* at 39. Jones continued to debate with Billak over what was best for him. Several minutes later, Billak came back with a piece of paper and said: “I suggest you sign this.”

Bayus testified that her son told her he had informed the prosecutor that Jones had done nothing to him. *Id.* at 43. She testified that Jones was “more or less scared into taking the plea” and he took ten days in jail rather than the 180 days that had been represented he would receive if he went to trial. *Id.* at 45.

#### **ARGUMENT IN RESPONSE TO APPELLANT’S SOLE PROPOSITION OF LAW**

##### **1. OHIO R. CRIM. PROC. 11(E) REQUIRES A TRIAL COURT TO INFORM A DEFENDANT OF “THE EFFECT OF THE PLEA OF GUILTY, NO CONTEST, AND NOT GUILTY” BEFORE ACCEPTING EITHER A PLEA OF GUILTY OR OF NO CONTEST.**

Pursuant to Ohio R. Crim. Proc. 11, and consistent with this Court’s holding in *State v. Watkins*, (2003), 99 Ohio St.3d 12, 16, 788 N.E.2d 635, “[a] judge’s duty to a defendant before accepting his guilty or no contest plea is graduated according to the seriousness of the crime with which the defendant is charged.” Appellee Jones was charged with three counts of domestic violence under R.C. 2919.25(A). Each of the charges was a first degree misdemeanor, punishable by a term of imprisonment of no more than six months. R.C. 2929.21(B)(1). Accordingly, those offenses were not “serious offenses” as defined in Crim. R. 2(C) (A “serious

offense' is any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for *more* than six months.”) Rather, they are “petty offenses” as defined in Crim. R. 2(D) (A “‘petty offense’ means a misdemeanor other than [a] serious offense.”) Therefore, the provisions of Crim. R. 11(E) applied to any plea to one or more of these charges.

Crim. R. 11(E) reads, in pertinent part, as follows:

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and *shall not* accept such pleas without first informing the defendant of the *effect* of the plea of guilty, no contest, and not guilty (emphasis supplied)

The State of Ohio and the *amicus curiae*, the Ohio Attorney General, both claim that Crim. R. 11(E) does not mean what it says. They claim that the Court of Appeals for Mahoning County erroneously reversed the Trial Court’s judgment because the Trial Court did not have to comply with either the letter or the spirit of Crim. R. 11(E). The State of Ohio and the Attorney General are flatly wrong.

Crim. R. 11(E) is unequivocal in its requirement that a trial court inform a defendant of the *effect* of the pleas available to the defendant before accepting one of those pleas. The rule could not be cleared: It says that a trial court “shall not” accept either a plea of guilty or no contest “without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.”<sup>9</sup>

The record is clear that the Trial Court did not inform Jones of the effect of his guilty plea, nor did it inform him of the effect of the other pleas available to him. Accordingly, we submit that the Court of Appeals quite clearly reversed the judgment and remanded the case.

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<sup>9</sup>. Crim. R. 11(G) provides that if the court refuses to accept a plea of guilty or no contest, “the court shall enter a plea of not guilty on behalf of the defendant.”

**A. CRIM. R. 11(E) CLEARLY AND UNAMBIGUOUSLY REQUIRES A TRIAL COURT TO INFORM A DEFENDANT OF THE “EFFECT OF A PLEA OF GUILTY, NO CONTEST AND NOT GUILTY” BEFORE PLEAS OF GUILTY OR NO CONTEST CAN BE ACCEPTED.**

The reason for the requirement that the effect of pleas be explained is to ensure that defendants enter pleas with knowledge of rights that they would forgo and to create a record by which appellate courts can determine whether pleas are entered voluntarily. *State v. Griggs*, 103 Ohio St. 3d 85, 814 N.E.2d 51, 2004-Ohio-4415, ¶ 11, citing *State v. Nero* (1990), 56 Ohio St. 3d 106, 107, 564 N.E. 474 and *State v. Ballard* (1981), 66 Ohio St. 2d 473-479-490, 423 N.E.2d 115. However, the right to be informed that a guilty plea is a complete admission of guilt is not constitutional and thus is subject to review under a standard of substantial compliance. *Griggs*, *supra* at 87; *Nero*, *supra* at 107.

Crim. R. 11(E) unambiguously says a court “shall not” accept such pleas without informing the defendant of the effect thereof. The word “shall” (and, we submit, the corollary imperative “shall not”) can only be reasonably construed to make the requirement mandatory. See, *Dennison v. Dennison* (1956), 165 Ohio St. 146, 134 N.E.2d 574 and *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834. Certainly the language in the rule is not reasonably susceptible to being construed as merely optional or discretionary. Rather, the rule should can only be fairly construed and applied as it is written, *i.e.* that trial courts *must* explain the effects of the various pleas available to a defendant in regard to a petty offense, prior to accepting a plea of guilty or no comment.

Ohio R. Crim. Proc. 1(B) supports this analysis. It provides that the Ohio Rules of Criminal Procedure apply to “the just determination of *every* criminal proceeding.” (Emphasis supplied.) Crim. R. 1(C) narrowly provides for exceptions only” to the extent that they would by

their nature be clearly inapplicable.” Certainly Crim. 11(E) is not by its nature inapplicable to a case such as the one at bar.

In *State v. Watkins, supra* this Court touched on the precise issue under consideration in this appeal. In that case the defendant was charged with operating a vehicle under the influence of alcohol (“OVI”). The defendant was informed by the trial court of the availability of a no contest plea before that plea was made and accepted. *Id.* at 13. On appeal, the defendant argued that the trial court erred by not also engaging in a colloquy required by Crim. R. 11(C), *viz.* that the court advise the defendant that he or she was waiving the right to a jury trial; of the right to confront witnesses; of the right to compulsory process for obtaining witnesses; of the right against self-incrimination; and of the right to require the state to prove the defendant’s guilt beyond a reasonable doubt. The Court of Appeals for Greene County held that such a colloquy was not necessary and this Court affirmed.<sup>10</sup> *Id.* at 17.

Pertinent to the case at bar, this Court noted that, in any event, a trial court was obligated to inform the defendant of the effect of his or her plea. *Id.* at 15. This is precisely what the Trial Court did *not* do in this case, resulting in reversal of the judgment and a remand to the Trial Court.

**B. THE REQUIREMENT OF CRIM. R. 11(E) THAT A DEFENDANT BE INFORMED TO THE EFFECT OF THE THREE PLEAS AVAILABLE UNDER THAT RULE IS NOT SATISFIED BY MERELY INFORMING A DEFENDANT OF CERTAIN CONSTITUTIONAL RIGHTS HE OR SHE MAY BE WAIVING.**

The State’s sole proposition of law confuses Crim. R. 11(C) and 11(E). The State argues that if a court informs “a defendant of the rights he/she waives upon entering a plea, and of the

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<sup>10</sup> The Court of Appeals held that Crim. R. 11(E) did not apply but that Traf. R. 10(D) did. Nevertheless, it found the rules to be identical.

minimum and maximum sentences he/she may receive upon being found guilty,” then Crim. R. 11(E) is “substantially” satisfied (State’s Brief at 3). This is clearly wrong. On its face Crim. R. 11(E) requires a trial court to explain the “effect of the plea of guilty, no contest, and not guilty” as a condition of accepting either a guilty or a no contest plea. This is quite different than a Crim. R. 11(C) colloquy as to what constitutional rights may be waived or given up.

The State of Ohio, not unlike the Attorney General, seems fixated on the fact that Jones did not enter a plea of no contest. They claim that there was thus no point in telling him he *could* enter such a plea and the effect thereof.

The State and *Amicus* miss the point. The rule requires a trial court to so inform a defendant so he or she can make a rational decision.

Even if the rule is not so construed, the record shows that the effect of Jones’ guilty plea was likewise never explained to him. The record shows that the trial judge conducted a colloquy with the Defendant on the record. Before asking the Defendant whether he understood certain constitutional rights that he was giving up, the Trial Court said:

Mr. Jones, before I can accept any pleas from you, I need to go through your rights with you to make sure you understand your rights and then knowingly you waive those rights.

(March 11, 2005, Tr. 2). It is important to note that the trial judge did *not* say he was obligated to explain the effect of the pleas of guilty or no contest which were available to the Defendant. Further, as pointed out below, the trial judge never explained the effect of either or both pleas, a failure which properly resulted in the Court of Appeals reversing the judgment and remanding the case.

The trial judge then engaged in a Crim. R. 11(C) colloquy with the Defendant wherein

Jones was asked if he understood the following: (1) that he had “a right to have a trial in this matter and the trial can be held in front of either a jury or a judge?” (March 11, 2005 Tr. 2-3); (2) that he was “giving up that right to the jury that you and your attorney demanded;” *Id.* (3) that he understood that “at trial the State of Ohio would have been required to prove your guilt beyond a reasonable doubt;” *Id.* (4) that he “had the right to subpoena witnesses for you and the right to cross examine any against you;” *Id.* at 3; (5) that “at that trial you would have had the right to testify yourself or to remain silent, and had you chosen to remain silent that no one would have been allowed to comment on that fact”; *Id.* and (6) that by pleading guilty that you do put yourself on the mercy of the court regardless of what is in this plea agreement and that you could receive up to 180 days in the county jail today and a fine of up the \$1,000 in court costs.” *Id.* The Trial Court asked Jones if he wanted to give up the rights described to him, to which Jones tepidly responded: “Yeah, I guess.” (March 11, 2005, Tr. 3).

Notably, indeed and critically missing from the record is any description by the Trial Court of the *effects* of pleas of guilty or no contest, or both, as Crim. R. 11(E) clearly *requires*. The trial judge simply failed to describe the *effect* of either or both of the two pleas. This was correctly recognized to be reversible error.

The effect of the pleas of guilty and no contest are clearly spelled out in Crim R. 11(B) as follows:

**Effect of guilty or no contest pleas.** With reference to the offense or offenses to which the plea is entered: (1) The plea of guilty is a complete admission of the defendant’s guilt; (2) The plea of no contest is not an admission of defendant’s guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding (bolding in original).

It would be neither onerous nor problematic for the Trial Court to have informed Jones of the

effects of these pleas. What's more, the argument that doing so would somehow "upset the expectations of municipal court judges, prosecutors and defense attorneys across the state with regard to misdemeanor pleas" is frivolous (Amicus Brief at 1). The rule clearly requires such and has since its inception on July 1, 1973.

**C. THE CASE LAW CITED BY THE STATE OF OHIO DOES NOT STAND FOR THE PROPOSITION THAT CRIM. R. 11(E) DOES NOT MEAN WHAT IT SAYS.**

The State cites the case of *State v. Raby*, Greene App. No. 2004-CA-88, 2005 WL 1707027, 2005-Ohio-3741 for the proposition that Crim. R. 11(E) merely requires that a defendant be informed of the maximum penalties that could result from a plea and a waiver of the right to a trial by jury that results therefrom (State's Brief at 3). The defendant in that case was charged with furnishing alcohol to a minor, a "petty offense" under Crim. R. 11(E). At the arraignment, the defendant expressed a desire to plea guilty and, after a colloquy, the trial court accepted that plea. *Raby, supra* at ¶ 2. The colloquy did *not* include a description of the effect of the plea as Crim. R. 12(B) defines such; however, it did include a description of some of the rights that the defendant was giving up by entering the plea. The court of appeals reversed, finding that the trial court had not informed Raby of his right to a trial by jury and thus found that the colloquy did not satisfy Crim. R. 11(E). *Id.* at ¶ 30. Raby did not raise the issue of whether the trial court erred by failing to inform him of the effect of his guilty plea, or the issue of whether a plea of no contest was also available to him and should have likewise been explained. Thus, *Raby* is not apposite or helpful in deciding the issue before this Court.

The State nevertheless argues that it "makes sense" and that it would be "good policy" to simply ignore Crim. R. 11(E) and merely require a trial court to review the constitutional rights that a defendant is giving up before accepting a plea of guilty or no contest (State's Brief at 4).

Indeed, the State argues that “the balance of the information” (presumably, the various he pleas which are available and the effect of those pleas) are just “non-critical and non-constitutional” and, therefore, the “omission thereof hardly qualifies as constitutional, reversible error.” (State’s Brief at 4).

This argument is unmistakably reckless. First, it ignores the fact that Crim. R. 11(E) says what it means, and means what it says. Further, it ignores the fact that the rule was written to “ensure that defendants enter pleas with knowledge of rights that they would forgo” and to “create[] a record by which appellate courts can determined whether pleas are entered voluntarily.” *Griggs, supra* at ¶ 11. Moreover, informing a defendant of the plea options available to him (or her) is hardly “non-critical” information that may be cavalierly ignored. Certainly understanding the plea options available and the effect of those pleas is as important to a system of justice as is understanding what constitutional rights may be given up if any such plea is entered.

Even the State recognizes that “the purpose of Criminal Rule 11 is to ensure that the defendant entering a plea of guilty does so knowingly, with the understanding that he is waiving his critical constitutional rights.” *State v. Lane*, Cuy. App. No. 37066, 1978 WL 217834, \* 1, unreported, citing *State v. Younger* (1975), 46 Ohio App.2d 269, 271, 349 N.E.2d 322. It should go without saying that part of a “knowing” plea is knowledge of the options available and the effect thereof. Not only is this not difficult to do, it is required by Crim. R. 11(E).

**D. CRIM. R. 11(E) REQUIRES NOT ONLY THAT THE EFFECT OF THE PLEA BEING ENTERED BE EXPLAINED, BUT THAT THE EFFECT OF THE OTHER TWO PLEAS AVAILABLE UNDER THE RULE LIKEWISE BE EXPLAINED.**

The State of Ohio and the Attorney General focus on the fact that Appellee entered a plea

of guilty to the charge, rather than a plea of no contest, and thus argue that there was no obligation for the Trial Court to inform the Defendant of the effect of a plea of no contest (State's Brief at 4-5; Attorney's General's Brief at 1, 6-8). Crim. R. 11(E), however, plainly requires that, before accepting a plea of guilty or not guilty to a "petty offense," a trial court must first inform the defendant of the "*effect of the plea of guilty, no contest, and not guilty.*" (Emphasis supplied.) The rule is not written in the disjunctive; rather, it is written conjunctively and thereby requires a trial court to inform a defendant of the effect of the three pleas available.<sup>11</sup> The rule does not say that before accepting a plea of guilty or no contest, the court must explain the effect of the particular plea which the defendant intends to enter. Why not? The rule quite plainly is intended to give a defendant information from which he or she can decide whether a plea of guilty or no contest would be most appropriate or advisable. This is hardly a novel proposition or one which would impose heretofore immense burdens upon a trial court. Indeed, all a trial court need do is explain what Crim. R. 12(B) clearly states.

The State claims that Appellee's argument in this regard is "unique." (State's Brief at 4). There is nothing unique about applying the plain meaning of a criminal rule of procedure to the facts of a case. The record clearly shows that nothing was said to the Defendant by the Trial Court as to the pleas which were available to him or about the effect of any such pleas. Not only was the effect of a guilty plea not explained, the availability and effect of a no contest plea was not even *mentioned*.

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<sup>11</sup>. In contrast, Crim. R. 11(C)(2) is written in the disjunctive: "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty *or* no contest without first addressing the defendant personally and doing all of the following . . . (b) Informing the defendant of, and determining that the defendant understands the effect of the plea of guilty *or* no contest . . ."

Jones entered a plea of guilty to the offense. This plea precluded him from challenging the validity of the domestic violence conviction on appeal. The record shows that Defendant had challenged the charge in a pre-trial motion on the basis that the “victim” was not a family or household member related by birth, but was, instead, his fiancée’s son. Defendant asserted that he could only be convicted of domestic violence if his alleged conduct was directed at a “family or household member” as those terms are defined in R.C. 2919.25(E)(1). In light of the amendment (then recent) to Article XV, Section 11 of the Ohio Constitution, Jones asserted that the minor children of his fiancée were not, by law, “family or household members,” if his fiancée was similarly not herself a family or household member.<sup>12</sup> However, by pleading guilty Defendant gave up his ability to raise this issue on appeal. See, *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (“when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea”, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235).

What’s more, by entering a plea of guilty, Jones subjected himself to civil liability to the alleged victim.

Knowing full well that Jones suffered prejudice by virtue of the Trial Court’s substantial non-compliance with Crim. R. 11, the State recklessly claims Jones actually “knew of his right to

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<sup>12</sup>. See, *City of Cleveland v. Voies*, (March 23, 2005), Clev. Muni. Ct. 2005 CRB 002653, 2005 WL 1940135, unreported; *State v. Burk* (March 23, 2005), Cuy. C.P. No. CR462510, 2005 WL 786212, unreported; cf. *State v. McIntosh* (April 18, 2005), Mont. Co. C.P. 2004 CR 4712, 2005 WL 1940099, unreported, and *State v. Newell*, Stark App. No. 2004CA00264, 2005 WL 1364937, 2005-Ohio-2848, unreported.

plea no contest and the effect of a no contest plea at the time he entered his plea” because he supposedly was told of his plea options at the time of his *arraignment* (State’s Brief at 4-5). There is nothing in the record that supports this assertion; indeed, the State’s only basis for claiming such is to argue that such would be “common practice.” (State’s Brief at 5).

Further, the State claims that since Jones signed a “Rule 11 form,” he allegedly knew of this right to enter a plea of “no contest.” The “Rule 11” form is actually the Final Judgment dated March 11, 2005 wherein the words “no contest” appear as blank on a pre-printed form where the Trial Court wrote the type of plea that a defendant entered. It is a bridge too far to conclude that this form somehow satisfied Crim. R. 11(E)’s requirement.

The record shows what the Trial Court *actually said* to Jones on March 11, 2005: In fact, the Trial Court said absolutely *nothing* about the effect or availability of a no-contest plea, contrary to the express requirement of Crim. R. 11(E).

**E. THE ATTORNEY GENERAL’S ARGUMENT THAT THE DECISION BELOW WILL ACT AS A “GET OUT OF JAIL” FREE CARD IS PREPOSTEROUS.**

The Attorney General of Ohio entered the fray in this case by filing an *amicus* brief on the last day it could. In his brief, the Attorney General claims that the decision of the Court of Appeals will “upset the expectations of municipal court judges, prosecutors and defense attorney across the [S]tate with regard to misdemeanor pleas” and will now require “magic language” to be spoken about “the effect of a plea of guilty or no contest.” (Attorney General’s Brief at 1). The Attorney General also asserts that the Court of Appeals’ decision will act as a “get out of jail free card for misdemeanor defendants who are unhappy with their sentences after they plead guilty.” (Attorney General’s Brief at 1-2).

The Attorney General also incredibly claims that by telling a defendant of the pleas

available to him or her and the effects of those pleas, this will “confuse criminal defendants rather than help them.” (Attorney General’s Brief at 8). Indeed, he even claims that even the “most literate and intelligent criminal defendants might be confused by including this additional information.” *Id.* at 9.

These arguments not only defy logic and reason, but they are contrary to this Court’s recognition in *Griggs* that the reason defendants must be told of the effect of his or plea is to ensure that they “enter pleas with knowledge of rights that they would forgo” and to “create[] a record by which appellate courts can determine whether pleas are entered voluntarily.” *Id.* at ¶ 11.

The Attorney General even argues that, because trial courts may not comply with the law, the number of misdemeanor defendants who can withdraw their guilty pleas simply “because of a trial judge’s technical error” will increase, thus adversely affecting the “interest of society in the finality of guilty pleas.” (Attorney General’s Brief at 9, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, 478, 423 N.E.2d 115). This argument is about as baseless as it gets. Surely the trial courts of this state can and most often do comply with the law, and equally surely the interests of justice in a particular case outweigh some “societal interest” in the “finality” of guilty pleas.

Notwithstanding the Attorney General’s ill-considered rhetoric, it is obvious that the decision below will wreak none of the havoc asserted and will, instead, ensure that trial courts are true to their obligations under the law.

The Attorney General urges this Court to adopt a “substantial compliance” standard with respect to compliance with Crim. R. 11(E) (Attorney General’s Brief at 6). The Attorney General says this means that a defendant merely must be told of the maximum penalties he or she is facing and that he or she will lose the right to a jury trial if a plea of guilty is made (Attorney General’s

Brief at 2; 6-7). This position is directly contrary to the letter and intent of Crim. R. 11(E) and is wholly unjustified.

The cases from the Tenth Appellate District which the Attorney General cites for his incorrect proposition do not discuss the meaning of the language in Crim. R. 11(E). The two cases cited in the *Amicus* brief do hold that a trial court substantially complies with Crim. R. 11(E) by notifying the defendant of both the maximum penalties that could result from the plea and the waiver of the right to a jury trial that results from the plea. See, *State v. Horton-Alomar*, Fran. App. No. 04 Ap-744, 2005 WL 736229, 2005-Ohio-1537, ¶ 10, appeal not allowed, 106 Ohio St.3d 1507, 833 N.E.2d 1249, 2005-Ohio-4605 and *City of Columbus v. Simmons*, Fran. App. No. 99AP-310, 1999 WL 1262059, unreported. However, the appellants in neither case raised the question of whether the trial court failed to inform the defendant of the effect of his plea, nor did either raise the question of whether the rule actually requires – as it does – that a trial court inform the defendant of the *effect* of the plea of guilty, no contest, and not guilty.” (Emphasis supplied.) In fact, neither case addresses the certified issues being considered by this Court.

**F. THE ATTORNEY GENERAL’S ANALYSIS OF *WATKINS* AND *GRIGGS* IS MISTAKEN.**

The Attorney General takes issue with the Court of Appeals as to its reliance upon, and interpretation of, this Court’s decision in *Watkins, supra*. This Court unanimously held in *Watkins* that a trial court complies with its obligations under Traf. R. 10(D) (which is nearly identical to Crim. R. 11(E)), by informing a defendant in an OVI prosecution of the effect of the pleas of guilty, no contest and not guilty as described in Traf. R. 10(B) (which is nearly identical to Crim. R. 11(B)). *Id.* at 17. The Court framed the issue in *Watkins* as “whether a trial judge

must inform a defendant of anything *more* than the Traf. R. 10(B) description of the effect of a guilty or no contest plea to meet the Traf. R. 10(D) requirement of “informing the defendant of the effect of the plea.” (Emphasis supplied). *Id.* at 15. The Attorney General claims that *Watkins* did not hold that telling a defendant of the effects of the plea options as Traf. R. 10(B) requires should be the “only way to comply with” Traf. R. 10(D) (here, Crim. R. 11(E)) (Attorney General’s Brief at 7).

The Attorney General’s suggested alternative is wholesale disregard of the plain meaning and mandatory language of Crim. R. 11(E). Under the guise of “substantial compliance” the Attorney General asks this Court to read out of Crim. R. 12(E) any requirement that a trial court actually tell a defendant of the pleas which are available to him or her, and the effect thereof. This is not “substantial compliance” with the rule. Calling a spade a spade, it is absolute non-compliance.

The Attorney General cites *State v. Francis*, 104 Ohio St. 3d 490, 820 N.E.2d 355, 2004-Ohio-6894 for the proposition that only substantial compliance is required. *Francis* stands for the proposition that “a criminal defendant’s right to be informed of a specific non-constitutional feature of a plea, pursuant to Crim.R. 11, prior to a trial court’s acceptance of the defendant’s plea is subject to review under a substantial-compliance standard.” *Id.* at ¶ 45, citing *State v. Griggs*, 103 Ohio St.3d 85, 814 N.E.2d 51, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12, which cited *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474. However, as discussed above, “substantial compliance” does not mean that a trial court is free to ignore the very essence of the rule.

The Attorney General further quarrels with the Seventh Appellate District’s decision,

claiming that it runs afoul of a “presumption” that lawyers inform their clients of the advantages and disadvantages of plea options (Attorney General’s Brief at 7). While hopefully this is ordinarily the case, this presumption does not justify ignoring the rule. The failure to inform Jones of his options and the effects thereof in this case led to a disaster for him, one which should never have happened and which would never have happened had the Trial Court complied with the law by taking just a moment to inform him the effect of the pleas which were available as Crim. R. 11(E) requires.

The Attorney General also argues that the Seventh Appellate District’s “approach runs contrary to *State v. Griggs, supra.*” (Attorney General’s Brief at 8). This argument is likewise wide of the mark. In *Griggs*, this Court addressed whether a failure to inform a Defendant who plead guilty to voluntary manslaughter and burglary that his guilty plea was a “complete admission of defendant’s guilt” should result in reversal. The Court held it should not, relying on the fact that Defendant signed a document entitled “Finding on Guilty Plea to Amended Indictment” in which he admitted committing the two crimes for which he was found guilty, he and his counsel assured the court that he understood the document, and the record contained a recitation of facts establishing his guilt. Under these circumstances, the “effect of his plea as required by Crim. R. 11 [was] presumed not to be prejudicial.” *Id.* at 89.

However, none of the facts in the case at bar suggest that a presumption that the failure to comply with Crim. R. 11(E) was not prejudicial. Indeed, the exact opposite is true.

In *Nero, supra*, this Court observed that failure to inform a defendant of non-constitutional rights would not invalidate a plea in a felony case unless the defendant thereby suffered

prejudice.” *Id.* at 108.<sup>13</sup> The test for prejudice is “whether the plea would have otherwise been made.” *Id.* Appellee has demonstrated clear prejudice in this case and that he would not have entered a guilty plea had he known of the availability, and understood the effect of, a no contest plea.

**G. THE ATTORNEY GENERAL’S CLAIM THAT JONES DID NOT DEMONSTRATE PREJUDICE AS A RESULT OF THE TRIAL COURT’S NON-COMPLIANCE WITH CRIM. R. 11(E) DOES NOT PASS MUSTER.**

The Attorney General points out that at the hearing on Jones’ Crim. R. 32.1 Motion to Withdraw Guilty Plea he did not assert that non-compliance with Crim. R. 11(E) justified withdrawal of the plea. This argument is meritless. The standard for withdrawing a guilty plea after sentencing is to correct a “manifest injustice.” *Id.* Such a motion is not a substitute for an appeal on questions of law, such as whether a trial court erred by not complying with Crim. R. 11(E). *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905. Thus, the Defendant’s Motion to Withdraw Plea of Guilty Pursuant to Crim. R. 32.1 addressed the substantive reasons why Defendant was not guilty of the charge and how, and why, he had been coerced into pleading guilty to one of the charges, despite his innocence.

**H. THERE IS NO MERIT TO THE ATTORNEY GENERAL’S CLAIM THAT THE ONLY PROPER REMEDY WOULD BE TO REMAND THIS CASE SO THAT JONES COULD ENTER A PLEA OF NO CONTEST AND THEN BE SENTENCED AGAIN.**

The Attorney General claims that, were this Court to remand this case, it should only do so

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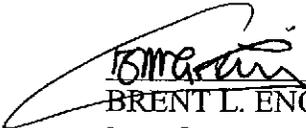
<sup>13</sup>. The Attorney General has observed that this Court has never before held that a misdemeanor defendant challenging non-compliance with Crim. R. 11(E) must demonstrate “prejudice.” (Attorney General’s Brief at 11). The Attorney General says that there is no “logical reason to dispense with the prejudice requirement.” However, a bright line rule requiring compliance with Crim. R. 11(E) would, in fact, be beneficial since many criminal defendants would have a hard time demonstrating some tangible “prejudice” and such would cause extensive litigation where none is really necessary.

with instructions to permit the Defendant to enter a plea of no contest and to have him resentenced. This is wholly incorrect. The Trial Court failed to comply with Crim. R. 11(E) to Defendant's prejudice and the Court of Appeals ordered the case remanded. This means that no plea has yet been entered. Under Crim. R. 11(E), the Defendant is entitled to be informed of the effects of all three pleas available to him, including a plea of *not guilty*. There is no cause for precluding him from this selecting option upon remand.

### CONCLUSION

For each of the foregoing reasons, Joseph W. Jones, Sr. respectfully requests that the Supreme Court of Ohio affirm the Judgment of the Court of Appeals for Mahoning County, Ohio, Seventh Appellate District.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

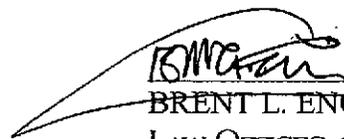
I hereby certify that a true and complete copy of Appellee Joseph W. Jones, Sr.'s Merits Brief was served by first class U.S. Mail, postage prepaid, upon the following counsel of record on this ~~26<sup>th</sup>~~ day of February 2007:

PAUL GAINS  
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