

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case Nos. 07-656
07-657

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-523

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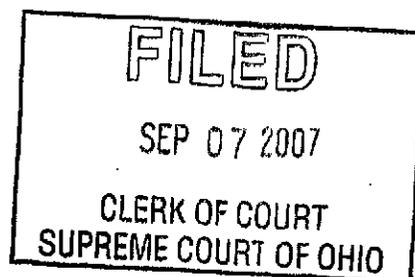


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STATEMENT OF FACTS

Defendant Thomas Veney was indicted on counts of felonious assault and kidnapping, both with one-year and three-year firearm specifications. (Trial Ct. Rec. 1) The indictment alleged that the victim was Nicole Veney and that the date of the offenses was July 8, 2004. (Id.)

After a lengthy delay due to defendant absconding while on recognizance bond, (Trial Ct. Rec. 36, 51; T. 8), defendant eventually pleaded guilty to the stipulated lesser included offense of attempted felonious assault, a third-degree felony, with a three-year firearm specification. (Trial Ct. Rec. 64-65) Defendant also pleaded guilty at the same hearing to a charge in another case of attempted failure to appear on a recognizance bond. (T. 3)

The prosecutor recited facts at the plea hearing, indicating that defendant had come home from a night of drinking and accused his wife Nicole of sleeping with his cousin. (T. 6-7) Defendant pulled out a loaded gun while in the bedroom, and while Nicole was laying next to her seven-year-old daughter, defendant held the gun on Nicole and threatened to shoot Nicole. (T. 7)

Nicole asked him to take the argument downstairs so as not to involve the daughter. (T. 7) Defendant shot the gun into a wall, and, at that point, the gun apparently jammed, thereby giving Nicole time to flee. (T. 7) Defendant followed her out of the back door of the home, and Nicole saw that he was pointing the gun at her. (T. 7) She heard more shots. (T. 7) Nicole was able to run to a nearby business to seek help. (T. 7)

Nicole's account was corroborated by neighbors who heard the shots and saw

defendant holding a gun. (T. 7)

At the plea hearing, defendant acknowledged his signature on the Entry of Guilty Plea and acknowledged that his attorney had reviewed his constitutional rights with him.

(T. 4) Defendant also stated twice that he understood the nature of this offense. (T. 3, 4)

The court addressed various constitutional rights, including the right to jury trial, and defendant said he understood that he was giving up those rights. (T. 4-5) However, the court did not expressly discuss with defendant the legal requirement that such a trial would require the State to prove its case beyond a reasonable doubt.

The Entry of Guilty Plea did discuss that right, stating, as follows:

I understand that my guilty plea to the crime specified constitute(s) both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime and this case. I further understand that by pleading "Guilty", *I waive a number of important and substantial constitutional, statutory and procedural rights*, which include, but are not limited to, the right to have a trial by jury, the right to confront witnesses against me, to have compulsory subpoena process for obtaining witnesses in my favor, *to require the State to prove my guilt beyond a reasonable doubt* on each crime herein charged at a trial at which I cannot be compelled to testify against myself, and to appeal the verdict and rulings of the trial Court made before or during trial, should those rulings or the verdict be against my interests.

(Trial Ct. Rec. 64-65; emphasis added)

At the subsequent sentencing hearing, the prosecutor stated that defendant had been incarcerated before, and the court noted defendant's extensive record. (T. 11)

The court imposed a two-year sentence for the third-degree felony and the mandatory consecutive three-year prison term for the firearm specification. (T. 13)

Defendant was granted leave to pursue a delayed appeal. (Appeal Ct. Rec. 27 & 28) Defendant filed a brief arguing that the plea was invalid because the trial court failed to advise defendant of the beyond-reasonable-doubt burden of proof to be borne by the State if the case went to trial. (Appeal Ct. Rec. 44, Brief, at pp. 2-7) Defendant also claimed that the trial court had failed to ensure he understood the nature of the charge to which he was pleading guilty. (Id. at pp. 7-8) The State opposed both arguments in its briefing. (Appeal Ct. Rec. 68, Brief, at pp. 3-8)

In a judgment and opinion filed on March 22, 2007, a two-judge majority of the Tenth District reversed the conviction, concluding that a standard of strict compliance required reversal because no oral beyond-reasonable-doubt advisement was given. *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295. Judge Sadler dissented and concluded that the pertinent standard was substantial compliance and that such standard was satisfied.

At the same time the Tenth District issued its judgment of reversal, the Tenth District unanimously certified a conflict on the issue of whether a standard of strict compliance applies. On April 6, 2007, the Tenth District granted a stay of the judgment pending the State's appeal to this Court.

The State's certified-conflict appeal was docketed in this Court as No. 07-656. The State's discretionary appeal was docketed as No. 07-657.

On June 20, 2007, this Court accepted review over both appeals. *06/20/2007 Case Announcements*, 2007-Ohio-2904.

ARGUMENT

Proposition of Law No. 1. A substantial compliance standard applies to the advisement required by Crim.R. 11(C)(2)(c) regarding the State's burden of proving guilt beyond a reasonable doubt at trial.

Proposition of Law No. 2. The failure to give the beyond-reasonable-doubt oral advisement required by Crim.R. 11(C)(2)(c) is subject to harmless-error review and does not always require reversal.

Certified Question: Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

When a felony defendant is entering a guilty plea, Criminal Rule 11(C)(2)(c) requires that the trial court address the defendant personally and advise the defendant of five constitutional rights he is forgoing by entering the plea: (1) the right to jury trial; (2) the right to confront witnesses; (3) the right not to be compelled to testify against himself; (4) the right to compulsory process; and (5) the right to require the prosecution to prove guilt beyond a reasonable doubt at a trial. The first three of these advisements are “*Boykin*” advisements because they are referenced in *Boykin v. Alabama* (1969), 395 U.S. 238. Ohio courts have generally said that there must be strict compliance with those three advisements in the sense that the court must discuss those rights in some reasonably intelligible fashion at the plea hearing. Failure to satisfy this “strict compliance” standard has usually meant automatic reversal.

The controversy in Ohio courts has centered on the non-*Boykin* rights mentioned in Crim.R. 11(C)(2)(c), i.e., the right to compulsory process and the right to proof beyond a reasonable doubt at trial. One case from this Court supports the view that the compulsory-process advisement is subject to only substantial-compliance

review, under which the entire record is reviewed to see if the error was prejudicial. *State v. Strawther* (1978), 56 Ohio St.2d 298. In a subsequent case, however, this Court stated in dicta that the compulsory-process advisement should be reviewed under the strict-compliance/reasonably-intelligible standard in the same manner as the advisements discussing the three *Boykin* rights. *State v. Ballard* (1981), 66 Ohio St.2d 473.

As for the beyond-reasonable-doubt advisement, this Court has recognized that a substantial-compliance standard applies to that advisement. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484 n. 2. However, Ohio appellate courts have split on whether a standard of strict compliance or substantial compliance should apply to the beyond-reasonable-doubt advisement. A number of the appellate districts deciding the issue have followed *Sturm*, including the Tenth District in *State v. Ellis* (1996), 10th Dist. No. 95AP-1399, and other appellate districts. *State v. Shinkle* (1998), 4th Dist. No. 98CA2560; *State v. Scott* (8th Dist. 1996), 113 Ohio App.3d 401, 406-407; *State v. Cogar* (1993), 9th Dist. No. CA-16234. Other courts deciding the issue, including the two-judge majority below, have held that the beyond-reasonable-doubt advisement should be subject to strict-compliance review. See, e.g., *State v. Higgs* (11th Dist. 1997), 123 Ohio App.3d 400; *State v. Givens* (1982), 2nd Dist. No. 7774.

Sturm and its progeny should be followed. While errors truly prejudicing the defendant ought to require reversal, it is the rare case in which the failure to give the beyond-reasonable-doubt advisement would be prejudicial. That standard is well known even to laymen, and plea hearings are often accompanied by written plea

documents that advise the defendant of the right to proof beyond a reasonable doubt. Such defendants are also represented by counsel who have reviewed the plea documents with them and who are presumed to have given the defendant competent advice on their rights. In short, there is little chance of real prejudice from the lack of this oral advisement, but the Tenth District has imposed a standard of strict compliance that automatically requires reversal. This requirement of automatic reversal is disproportionate to the judicial error committed, and it unnecessarily requires litigants and victims to “start over” in the absence of any showing of prejudice and even in the face of affirmative evidence that the error was not prejudicial.

A.

Case law from this Court shows that a standard of strict compliance does not apply to all advisements of constitutional rights mentioned in Crim.R. 11(C)(2)(c). In *State v. Strawther* (1978), 56 Ohio St.2d 298, this Court recognized that only substantial compliance was necessary regarding the compulsory-process advisement. The Court found that an advisement regarding that right is not constitutionally required under *Boykin*. *Strawther*, 56 Ohio St.2d at 301 (“compulsory process is not declared by *Boykin* to be a constitutional right requiring a waiver to appear upon the record.”). In *Strawther*, the defendant had executed a written plea in which he waived his compulsory-process right, but the trial court had not orally advised him of that right. This Court still upheld the plea by finding substantial compliance with the rule and finding no prejudice.

In *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, this Court applied the same analysis to the beyond-reasonable-doubt advisement. In *Sturm*, the Court overturned the

plea because there had been no advisement of the right to confront witnesses, a *Boykin* right. However, the Court stated at footnote 2 that the defendant's claim of error regarding the beyond-reasonable-doubt advisement warranted different treatment:

Appellant also argues that he was not informed of his right to have the state prove his guilt beyond a reasonable doubt. While a trial court is required by Crim. R. 11(C) to inform a defendant of this right, it is not required by *Boykin v. Alabama* (1969), 395 U.S. 238. See *Id.* at 243. Therefore, such a failure would be tested by this court's cases interpreting Crim. R. 11(C). See, e.g., *State v. Stewart* (1977), 51 Ohio St. 2d 86.

Under the *Stewart* approach approved in *Sturm*, the test is one of substantial compliance. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "[A] defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." *Id.* at 108, citing *Stewart*, 51 Ohio St.2d at 93. "The test is whether the plea would have otherwise been made." *Nero*, 56 Ohio St.2d at 108.

The majority below erred in contending that the substantial-compliance ruling in *Sturm* was "dicta." The defendant in *Sturm* raised the issue, and this Court expressly ruled on the merits and held that only a standard of substantial compliance applied. To be sure, the defendant in *Sturm* won his appeal on another ground, but that ruling on a second ground does not detract from the precedential value of the actual decision on the standard of review made on the first ground.

In light of *Sturm*, the Tenth District correctly recognized in another case that the beyond-reasonable-doubt advisement required by the criminal rule "is not a *Boykin*

constitutional right * * *.” *State v. Ellis* (1996), 10th Dist. No. 95AP-1399. Accordingly, the court in *Ellis* upheld the guilty plea because there was no showing of prejudice. *Id.*

Several other Ohio courts have concluded that the test of substantial compliance applies when the trial court has omitted the beyond-reasonable-doubt advisement.

“[W]hen a nonconstitutional right is omitted, *i.e.*, one not required by *Boykin* * * *, such as the right to have the state prove guilt beyond a reasonable doubt, there must be some showing of prejudicial effect before a guilty plea may be vacated.” *State v. Flanigan* (1985), 8th Dist. No. 48318. The beyond-reasonable-doubt advisement “is mandated solely by statute and requires only substantial compliance * * *.” *State v. Cogar* (1993), 9th Dist. No. 16234. “[W]hile Crim.R. 11 requires the trial court to inform the defendant of his right to have the state prove his guilt beyond a reasonable doubt, neither *Boykin* nor *Ballard* require that statement.” *State v. Shinkle* (1998), 4th Dist. No. 98CA2560 (collecting cases applying substantial compliance standard); *State v. Scott* (1996), 113 Ohio App.3d 401, 406.

The *Strawther-Sturm* analysis is squarely on point here. Defendant executed the written plea indicating that he understood he was waiving his right to proof beyond a reasonable doubt. Defendant further orally acknowledged that he and his counsel had reviewed his constitutional rights. The facts recited by the prosecutor gave no indication that defendant would have had a reasonable-doubt defense at trial, since defendant threatened his wife, fired a shot, pursued her out of the home, pointed the gun at her, and then fired more shots, with neighbors corroborating defendant’s possession of the gun and firing the shots. The record also shows that defendant has a substantial criminal record,

which buttresses the view that defendant would have been aware of the beyond-reasonable-doubt standard through his many contacts with the criminal-justice system. There was substantial compliance here, and there was no showing that, but for the absence of the oral beyond-reasonable-doubt advisement, defendant would not have still pleaded guilty.

B.

The decision in *State v. Ballard* (1981), 66 Ohio St.2d 473, does not require a different result. The *Ballard* Court purported to extend *Boykin* to require an advisement as to the compulsory-process right. *Id.* at 477 n. 4. But, notably, not even *Ballard* purported to extend *Boykin* to the beyond-reasonable-doubt advisement.

Even as to the right to compulsory process, the *Ballard* language extending *Boykin* was dicta, since *Ballard* did not involve a failure to give the compulsory-process advisement but rather a failure to specifically advise the defendant of the jury-trial right, an undoubted *Boykin* right. In contrast, *Strawther* did involve a claimed failure to advise the defendant of the compulsory-process right, and therefore *Strawther* continues to have precedential value. Indeed, *Ballard* seemed to distinguish *Strawther* without overruling it because *Ballard* noted that the defendant in *Strawther* had executed a written waiver of the compulsory-process right. *Ballard*, 66 Ohio St.2d at 476.

C.

The majority below saw no “rational basis” for reconciling *Ballard* and *Sturm*. *Ballard* had included the compulsory-process advisement on the list of advisements requiring strict compliance, while *Sturm* had concluded that the beyond-reasonable-doubt

advisement only required substantial compliance. On the basis of the purported irreconcilability of *Ballard* and *Sturm*, the majority concluded that the strict-compliance standard of *Ballard* should control.

This analysis was greatly mistaken. *Ballard* and *Sturm* were decided on the very same day (June 24, 1981). Moreover, there was no conflict, as *Sturm* had expressly relied on *Ballard* and yet still ruled that the beyond-reasonable-doubt advisement was not required by *Boykin*. In short, *Ballard* had already taken *Sturm* into account, and *Sturm* had already taken *Ballard* into account, and so it was not the place of the Tenth District majority to elevate *Ballard* over *Sturm*.

Most importantly, in the purported “conflict” between *Ballard* and *Sturm*, the Tenth District majority’s method of decision was backwards. The majority had disregarded *Sturm* because it was supposedly “dicta,” when in fact it was the holding of the *Sturm* Court that the beyond-reasonable-doubt advisement only required substantial compliance. On the other hand, it *was* dicta when *Ballard* said that the compulsory-process advisement was required by *Boykin*. By standards of “precedent” versus “dicta,” the ruling in *Sturm* was more precedential than the dicta in *Ballard*.

Concededly, *Ballard* included the compulsory-process advisement on the list of *Boykin* rights in syllabus language, and at that time lower courts were not allowed to ignore syllabus language on the basis that it was “dicta.” *Smith v. Klem* (1983), 6 Ohio St.3d 16, 18. But the *Ballard* syllabus does not aid defendant here, because, although it included the compulsory-process advisement, it did not include, and thereby excluded, the beyond-reasonable-doubt advisement. The State *wins* under the *Ballard* syllabus.

The ruling in *Sturm* still could not be disregarded. *Sturm* was a per curiam opinion and therefore held as much precedential value as a syllabus. See *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 150; former Rule 1(C) of Rules for Reporting of Opinions. The Tenth District should have followed *Sturm*, as it had in the past.

D.

According to defendant, every “constitutional right” mentioned in Criminal Rule 11 requires *Ballard* strict compliance, and the beyond-reasonable-doubt standard is an undoubted constitutional right. But that was not the approach in *Sturm*, which focused on whether the beyond-reasonable-doubt *advisement* itself was constitutionally required, not on whether the advisement merely addressed a constitutional right. Other courts have agreed that a beyond-reasonable-doubt advisement is not constitutionally required, even though it addresses a constitutional right. See *People v. Saffold* (2001), 465 Mich. 268, 281, 631 N.W.2d 320, 328 (“Although we continue to recognize the importance of the presumption of innocence, we decline to elevate it to the status of the *Boykin/Jaworski* rights.”); *State v. Aranda* (Ariz. App. 1978), 574 P.2d 489, 490 (“*Boykin* * * * does not require it”); *People v. Wade* (Colo. 1985), 708 P.2d 1366, 1369-70 (no specific advisement of burden of proof constitutionally required).

This point is not free from doubt. Recent cases from this Court have seemed to support the State’s view that the standard turns on whether the *advisement*, i.e., the “right to be informed,” is constitutionally required and not just a creation of a statute or rule. See *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶ 45; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶ 12. But other language in the very same paragraphs

of those cases would support the defense view that the issue of “strict compliance” turns on whether the omitted advisement addresses a constitutional right.

In the end, the State returns to the *Sturm* analysis, which focuses on whether the advisement itself is constitutionally required. The constitutional rights addressed in Crim.R. 11(C) (2)(c) are *trial*-related rights, and an appellate court reviewing the validity of a *guilty plea* is not determining whether any of those trial rights were violated, since there was no trial implicating those rights. Those rights are necessarily a step removed from the plea-based proceeding being reviewed. What should matter in the review of a plea-based proceeding is whether any constitutionally-required advisement was omitted, as the issue in a plea-based proceeding is whether the colloquy was sufficient.

The State’s position is supported here by the decision in *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, in which this Court held that a substantial-compliance standard applied to the waiver of the constitutional right to counsel. This Court noted that a written waiver of counsel is required by rule but “the written waiver provision * * * is not a constitutional requirement, and, therefore, we hold that the courts need demonstrate only substantial compliance.” *Id.* at ¶ 38. This Court relied on *Nero* and *Stewart* to support the substantial-compliance standard. *Id.* Thus, even though the written-waiver provision was addressed to protecting a constitutional right, this Court’s analysis did not turn on the mere involvement of a constitutional right in this way, but rather on whether the written-waiver provision itself was constitutionally required. Since a written waiver was not constitutionally required to obtain a valid waiver of the right to counsel, and since the written waiver was only required by rule, the standard was substantial compliance.

Equally so here, since an oral beyond-reasonable-doubt advisement is not constitutionally required, and since the advisement is only required by rule, the standard should be substantial compliance, as *Sturm* has already held.

E.

In adding the beyond-reasonable-doubt advisement to the list of *Boykin* rights requiring strict compliance, the Tenth District majority overlooked a number of post-*Boykin* cases from the United States Supreme Court, each of which recognizes that *Boykin* is limited to the three rights mentioned therein. As stated in *Godinez v. Moran* (1993), 509 U.S. 389, 397 n. 7, “[a] criminal defendant waives *three* constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers.” (Emphasis added) In *United States v. Ruiz* (2002), 536 U.S. 622, 628-29, the Court cited *Boykin* and stated that, “[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees” because “pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one’s accusers, and the Sixth Amendment right to trial by jury.” See, also, *United States v. Mezzanatto* (1995), 513 U.S. 196, 201 (“guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one’s accusers”); *Parke v. Raley* (1992), 506 U.S. 20, 29 (“guilty plea constitutes a waiver of three constitutional rights”). As these statements show, the Court has not expanded the list of three *Boykin* rights.

Notwithstanding the *Ballard* dicta, this Court has similarly recognized that *Boykin*

is limited to the three rights listed therein. *Nero*, 56 Ohio St.3d at 107 (specifying only the three *Boykin* rights as within the “constitutional duty to inform”); *State v. Smith* (1977), 49 Ohio St.2d 261, 263 (“three constitutional rights”).

This Court has recognized that “specific oral interrogation” is not constitutionally required for even the three *Boykin* rights.

Even though, as stated in Crim. R. 11(C)(2), trial courts should in every cause ascertain the validity of waivers, of constitutional and non-constitutional rights, by specific oral interrogation of the defendant, *there is no constitutional mandate that such be done*. Numerous authorities have refused to *ipso facto* invalidate a guilty plea merely because the trial court failed to conduct a full colloquy with the defendant with regard to each of his rights, or because the court accepted a written document from the defendant as evidence that he had been apprised of and knowingly waived his constitutional rights.

State v. Billups (1979), 57 Ohio St.2d 31, 36-37 (some emphasis added; footnotes omitted).

The *Boykin* decision did not specifically require that a defendant’s rights be enumerated and explained by the trial court in all cases in order for a waiver to be knowing and voluntary. The court held only that the record must affirmatively disclose a waiver of these *three* rights in order for a guilty plea to be entered understandingly and voluntarily.

State v. Stone (1975), 43 Ohio St.2d 163, 165 (emphasis added).

The beyond-reasonable-doubt standard is simply not among the narrow list of three *Boykin* rights, and a specific beyond-reasonable-doubt oral advisement would not be constitutionally required. Written plea documentation, such as that involved in the present case, is sufficient to satisfy the *Boykin* constitutional standard of providing

evidence in the record of a knowing, voluntary, and intelligent plea.

Contrary to the assumption of the majority below, due process does not require that a plea colloquy address every constitutional right or every potential defense. As the United States Supreme Court has recognized, “Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required.” *United States v. Broce* (1989), 488 U.S. 563, 573. As confirmed by *Ruiz*, 536 U.S. at 629, “the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.”

While the majority below failed to address cases like *Godinez*, *Broce*, and *Ruiz*, the majority did rely on a dissent from a denial of a petition for writ of certiorari in *Johnson v. Ohio* (1974), 419 U.S. 924, in which it was opined that the three *Boykin* rights were illustrative and not exhaustive. However, the *Johnson* dissent has no value here. “While some members of the U.S. Supreme Court have suggested that the *Boykin* list is not exhaustive, they have not prevailed.” *White v. State* (Ind. 1986), 497 N.E.2d 893, 897. Even before *Sturm*, this Court had discussed the *Johnson* dissent in *Stone* and had nevertheless rejected the defendant’s contention therein that a beyond-reasonable-doubt advisement was always required. *Stone*, 43 Ohio St.2d at 164-65. *Stone* held that the trial-court record can sufficiently demonstrate a knowing, voluntary, and intelligent plea without an enumeration of every right waived. *Id.* at 169-70.

Notably, if the Tenth District's analysis is followed, Fed.Crim.R. 11 is unconstitutional, since it does not require a beyond-reasonable-doubt advisement. And if the Tenth District's analysis is carried to its logical conclusion, then Ohio's Crim.R. 11 is unconstitutional as well, as that rule lists only five of the trial-related constitutional rights, even though a defendant has many more such rights, including the right to testify, the right to be present, the right to counsel, the right to a public trial, and on and on. This approach is mistaken, as due process does not require that a plea colloquy address every constitutional right or every potential defense. "[T]here is no requirement that a defendant be presented with a laundry list of constitutional rights that are waived by a plea of guilty or that he make a separate waiver of each for the purpose of the record." *Lyles v. State* (Tex.App. 1988), 745 S.W.2d 567, 568.

F.

The decision in *United States v. Vonn* (2002), 535 U.S. 55, supports the view that a flawed plea colloquy does not automatically require reversal, even when a rule requiring an advisement of a constitutional right is violated. In *Vonn*, the pertinent rule required the court to advise the defendant of his right to counsel at trial, but the court failed to give an oral advisement. The issue was "whether a defendant who lets Rule 11 error pass without objection in the trial court must carry the burdens of Rule 52(b) or whether even the silent defendant can put the Government to the burden of proving the Rule 11 error harmless." *Id.* at 58. The *Vonn* Court concluded that "a silent defendant has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *Id.* at 59, 73-74. "A defendant's right to

review of error he let pass in silence depends upon the plain-error rule: no plain error rule, no direct review.” *Id.* at 66.

In light of *Vonn*, the strict-compliance approach misses the mark. As *Vonn* establishes, even for an advisement of a constitutional right like the right to counsel, an error regarding such advisement does not automatically require reversal, and parts of the record other than the oral plea colloquy can show that the error was harmless or not plain error.

Although the Criminal Rules require an advisement of the beyond-reasonable-doubt standard, they also mandate that appellate courts apply harmless-error and plain-error standards of review. Crim.R. 52(A) & (B). These rules are routinely applied to claims of constitutional error in the context of a trial, and there is no textual or logical reason not to apply them to advisements of constitutional rights under Crim.R. 11.

This Court has recognized the relevance of Crim.R. 52(A) in this context before by citing that rule in footnote six of the *Billups* decision. *Billups*, 57 Ohio St.2d at 39 n. 6. This Court stated in *Billups* that it wished to avoid “a regression to the exaltation of form over substance at a time when our criminal justice system is already laboring under immense burdens.” *Id.* at 38-39. “In all such inquiries, matters of reality, and not mere ritual, should be controlling.” *Id.* at 39 (internal quotation marks and brackets omitted).

The texts of Crim.R. 52(A) and (B) also support applying those rules to plea-advisement errors. Crim.R. 52(A) provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” (Emphasis added) “Read naturally, the word ‘any’ has an expansive meaning * * *.” *United States v.*

Gonzales (1997), 520 U.S. 1, 5. Unless limited, “any” means “all,” i.e., “without limitation.” *Id.*; *Citizens’ Bank v. Parker* (1904), 192 U.S. 73, 81; *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 239-40. Accordingly, the broad “any error” language of Crim.R. 52(A) easily reaches plea-advisement errors.

Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Again, the rule does not exclude plea-advisement errors and instead applies to “errors or defects” without qualification.

In determining the reach of Crim.R. 52(A) and (B), it is helpful to analogize to rules of statutory construction here. “It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent.” *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127.

“Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *.” *Brogan v. United States* (1998), 522 U.S. 398, 408. A court cannot “restrict the unqualified language of a statute to the particular evil that [the legislature] was trying to remedy -- even assuming that it is possible to identify that evil from something other than the text of the statute itself.” *Brogan*, 522 U.S. at 403. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of

statutory interpretation. An unambiguous statute is to be applied, not interpreted.”

Sears v. Weimer (1944), 143 Ohio St. 312, paragraph five of the syllabus.

In this instance, Crim.R. 52(A) unqualifiedly applies to “any error” and “any defect,” and Crim.R. 52(B) applies to “errors and defects” without limitation. Therefore, there is no textual basis upon which to exclude plea-advisement errors from the harmless-error and plain-error doctrines recognized by those rules. To exclude plea-advisement errors from these rules would require the deletion of the “any” language from Crim.R. 52(A) and/or the insertion of language in Crim.R. 52(A) and (B) excluding plea-advisement errors from those provisions.

In light of the language in these provisions, and in light of *Vonn*, which recognized the applicability of harmless-error and plain-error doctrines, this Court should follow *Vonn* and reject the “strict compliance” standard because it would automatically require reversal regardless of the presence or absence of prejudice.

G.

In the absence of a defense objection in the trial court, a plain-error standard applies on appeal. Plain error will be recognized in Ohio only if: (1) there was error; (2) the error was plain at the time it was committed; and (3) the error affected substantial rights. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27-28. Under the last criterion, the error must have clearly affected the outcome of the proceeding. *Id.* at 27, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the

syllabus. “The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *Id.* at 94. Even when the defendant satisfies the three-pronged test for plain error, appellate courts retain discretion to disregard the error because of the absence of exceptional circumstances or the absence of a manifest miscarriage of justice. *Barnes*, 94 Ohio St.3d at 27.

While the first two prongs of the plain-error standard are satisfied here vis-à-vis Crim.R. 11 error,¹ the third prong is not satisfied, as defendant cannot show that the outcome of the plea proceeding clearly would have been different if the trial court had given the oral advisement. Defendant acknowledged having reviewed the entry-of-plea form with his attorney, and the plea form advised defendant of the beyond-reasonable-doubt standard that would be applicable at a trial. See fuller discussion, *supra*, at pp. 8-9. The failure to give the oral advisement has caused no manifest miscarriage of justice and does not constitute an exceptional circumstance warranting an appellate court’s exercise of discretion to reverse. For the same reasons, defendant’s claim of error would also fail under the harmless-error standard of review.

Some might contend that plain-error review should not be used because requiring an objection from the defense to preserve plea-advisement error would detract from the trial court’s mandatory obligation under the rule to give the advisement. But the language

¹ A claim of *Boykin* constitutional error does not satisfy any of the three plain-error prongs, as there was no constitutional error, no such error was plain at the time it was committed, and defendant cannot show clear outcome-determination from the alleged constitutional error.

of Crim.R. 52(B) does not create any such exception to plain-error review, and the *Vonn*

Court correctly rejected such an argument:

The plain-error rule, [defendant] says, would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge. But, rhetoric aside, that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge, and the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on.

* * *

[C]ounsel is obliged to understand the Rule 11 requirements. It is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court. It therefore makes sense to require counsel to call a Rule 11 failing to the court's attention. It is perfectly true that an uncounseled defendant may not, in fact, know enough to spot a Rule 11 error, but when a defendant chooses self-representation after a warning from the court of the perils this entails, Rule 11 silence is one of the perils he assumes. Any other approach is at odds with Congress's object in adopting Rule 11, * * * to combat defendants' "often frivolous" attacks on the validity of their guilty pleas, by aiding the district judge in determining whether the defendant's plea was knowing and voluntary and creating a record at the time of the plea supporting that decision.

Vonn, 535 U.S. at 73 & n. 10. Applying the plain-error standard "enforce[s] the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States v. Dominguez-Benitez* (2004), 542 U.S. 74, 82. It also "respect[s] the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern

criminal justice system.” Id. at 82-83.

Any effort to characterize the purported error as “structural” would also be unavailing. The beyond-reasonable-doubt advisement is not constitutionally required, and only constitutional error can potentially be deemed “structural.” *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶ 55. Moreover, even structural errors can be forfeited through lack of objection and are subject to plain-error standards of review. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶ 23. Finally, “[t]he omission of a single Rule 11 warning without more is not colorably structural.” *Dominguez-Benitez*, 542 U.S. at 81 n. 6.

H.

Defendant also claimed in the Tenth District that the record was insufficient to show that he understood the nature of the charge to which he was pleading. The Tenth District did not rule on that issue. If the State’s appeals are sustained here, the case can be remanded to that court so that this issue can be addressed. In the event that this Court wishes to address this issue itself, the State hereby submits the following briefing.

“In determining whether a defendant understood the charge, a court should examine the totality of the circumstances.” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶ 56. As stated in *State v. Rainey* (1982), 3 Ohio App.3d 441, 442, which is cited with approval in *Fitzpatrick*:

In order for a trial court to determine that a defendant is making a plea with an understanding of the nature of the charge to which he is entering a plea, it is not always necessary that the trial court advise the defendant of the elements of the crime, or to specifically ask the defendant if he understands the charge, so long as the

totality of the circumstances are such that the trial court is warranted in making a determination that the defendant understands the charge. In other words, under some circumstances, the trial court may be justified in concluding that a defendant has drawn an understanding from sources other than the lips of the trial court.

In the present case, the trial court specifically asked defendant if he understood the nature of the offense, and defendant twice said yes. Specifically in regard to the guilty plea for attempted felonious assault with firearm specification, the court asked, "You understand the nature of this offense and the possible penalty?" Defendant replied, "Yes, sir." (T. 3) In regard to the guilty pleas in both cases, the court asked, "Now, you understand the nature of these offenses, the possible penalty as well?" Defendant replied, "Yes, sir." (T. 4)

Since defendant conceded that he understood, there was sufficient indication that he understood. "Where a defendant indicates that he understands the nature of the charge, in the absence of evidence to the contrary or anything in the record that indicates confusion, it is typically presumed that the defendant actually understood the nature of the charge against him." *State v. Wangul*, 8th Dist. No. 84698, 2005-Ohio-1175, at ¶ 10.

The trial court was not required to recite the elements of the offense, as there is no general requirement that the elements be recited. *Fitzpatrick*, 102 Ohio St.3d 321, at ¶ 57. Defendant's counsel is expected to advise the defendant of the various implications of his plea, see *id.*, and, notably, there is no requirement in Crim.R. 11 that the court must recite the elements of the offense before accepting the plea. It may be presumed that the source of defendant's understanding of the offense was his counsel. *Henderson v. Morgan* (1976), 426 U.S. 637, 647 ("it may be appropriate to presume that in most cases defense

counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.”).

There is no need to consult the totality of the circumstances because defendant expressly conceded he understood the offense. But even if the totality of the circumstances were to be reviewed here, the totality of the circumstances supports the validity of the plea. In addition to expressly conceding he understood the offense, defendant approved the Entry of Guilty Plea, which indicated that defendant had “reviewed the facts and law of my case with my counsel” and that defendant’s counsel had “counseled my client to the best of my professional ability with respect to the facts and law of this case,” including “diligently investigat[ing] his cause and assertions and possible defenses.” (Trial Ct. Rec. 64-65) Defendant indicated by approving the form that he understood that his guilty plea was an admission of guilt to the crime specified and that his guilty plea was a waiver of any and all constitutional, statutory, or factual defenses to the crime specified. (Id.) When the prosecutor recited the facts at the plea hearing, the defense raised no objection.

If this Court wishes to reach the merits of defendant’s understanding-nature-of-charge claim, that claim lacks merit and therefore does not provide an alternative ground for affirming the Tenth District’s flawed judgment of reversal.

I.

In summary, the answer to the certified question is “no” because strict compliance is not the standard in addressing error in failing to give a beyond-reasonable-doubt advisement. As between the standards of “strict compliance” and “substantial

compliance,” the standard is substantial compliance, and the State’s first proposition of law should be adopted.

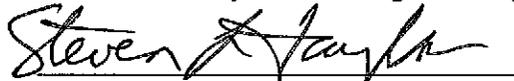
Even if the standard were “strict compliance,” such “strict compliance” would be incorrect if it would lead to automatic reversal. Plea-advisement errors are subject to harmless-error and/or plain-error standards of review depending on whether the error was sufficiently preserved in the trial court. Even after finding “error” under a “strict compliance” mode of analysis, an appellate court should still be able to conclude that the error was harmless and/or that the error does not warrant a finding of plain error warranting reversal. The State’s second proposition of law therefore should be adopted.

CONCLUSION

For the foregoing reasons, plaintiff-appellant State of Ohio requests that this Court reverse the judgment of the Tenth District Court of Appeals and remand the case to that court so that it can address defendant's argument that the record was insufficient to show that he understood the nature of the charge.²

Respectfully submitted,

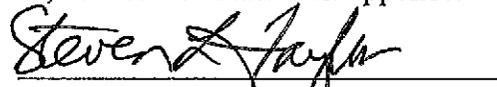
RON O'BRIEN
Franklin County Prosecuting Attorney


STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 7th day of Sept., 2007, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.


STEVEN L. TAYLOR
Assistant Prosecuting Attorney

² If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case No.

07-0657

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-523

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

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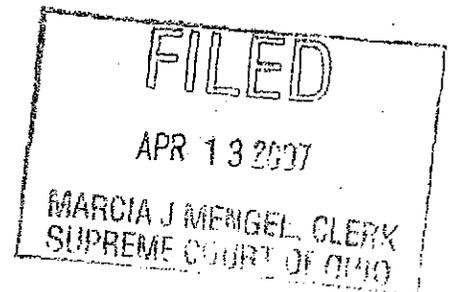
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COUNSEL FOR DEFENDANT-APPELLEE



NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

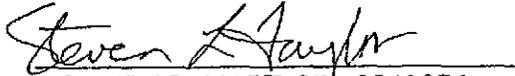
Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Veney*, 10th Dist. No. 06AP-523, on March 22, 2007.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents a substantial constitutional question, presents questions of public or great general interest, and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245

Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 13th day of April, 2007, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.

Pursuant to S.Ct.Prac.R. XIV(2)(A), a copy was also sent by regular U.S. mail on this 13th day of April, 2007, to the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case No.

07 - 0656

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-523

**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

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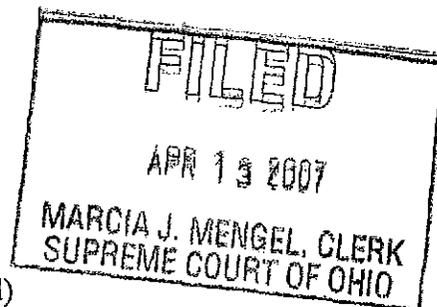
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**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on March 22, 2007, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. Veney*, 10th Dist. No. 06AP-523, on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio Constitution:

Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

Attached are the Tenth District journal entry certifying the conflict (attached, A-1), the Tenth District opinion (attached, A-2), and the conflicting appellate opinions in *State v. Shinkle* (1998), 4th Dist. No. 98CA2560 (attached, A-11), *State v. Scott* (8th Dist. 1996), 113 Ohio App.3d 401, 406-407 (attached, A-15), and *State v. Cogar* (1993), 9th Dist. No. CA-16234 (attached, A-22).

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 13th day of April, 2007, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.

Pursuant to S.Ct.Prac.R. XIV(2)(A), a copy was also sent by regular U.S. mail on this 13th day of April, 2007, to the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

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FRANKLIN COUNTY, OHIO

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 06AP-523
v.	:	(C.P.C. No. 04CR07-4791)
	:	
Thomas L. Veney,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 22, 2007, appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellant.

KLATT & PETREE, JJ.

By William A Klatt
Judge William A. Klatt

ON COMPUTER 12

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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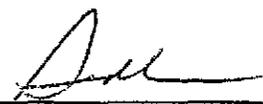
State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 06AP-523
 : (C.P.C. No. 04CR07-4791)
 Thomas L. Veney, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

JOURNAL ENTRY

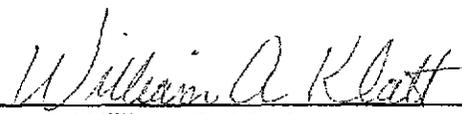
This court, sua sponte, certifies the judgment in this case rendered on March 22, 2007, as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560. Pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

It is so ordered.



Judge Lisa L. Sadler, Presiding Judge



Judge William A. Klatt



Judge Charles R. Petree

PH

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FRANKLIN COUNTY
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 06AP-523
 : (C.P.C. No. 04CR07-4791)
 Thomas L. Veney, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. STEVEN L. TAYLOR
 FR CO PROSECUTORS OFC
 373 S HIGH STREET
 13TH FLOOR
 COLUMBUS, OH 43215

O P I N I O N

Rendered on March 22, 2007

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Thomas L. Veney, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. Because the trial court did not comply with Crim.R. 11(C) when it accepted appellant's guilty plea, we vacate that judgment and remand the matter for further proceedings.

{¶2} On July 16, 2004, a Franklin County Grand Jury indicted appellant for one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01. Both counts contained firearm specifications pursuant to R.C.

2941.141 and R.C. 2941.145. The charges arose out of a domestic altercation between appellant and his wife. Appellant initially entered a not guilty plea to the charges but subsequently entered a guilty plea to the lesser included offense of attempted felonious assault in violation of R.C. 2923.02 as it relates to R.C. 2903.11, and one firearm specification.¹ The trial court accepted appellant's guilty plea, found him guilty, and sentenced him accordingly.

{¶3} Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED WHEN IT FAILED TO COMPLY WITH CRIM.R. 11 BY INFORMING THE DEFENDANT THAT THE STATE WAS REQUIRED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT AND BY FAILING TO PROPERLY ASCERTAIN THAT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGE AGAINST HIM.

{¶4} In his lone assignment of error, appellant contends that the trial court did not comply with Crim.R. 11(C) when it failed to inform him that by entering a guilty plea, he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt standard" at trial. We agree.

{¶5} Crim.R. 11(C) governs the procedure that a trial court must follow before accepting a guilty plea. Crim.R. 11(C)(2) provides:

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:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

¹ The trial court dismissed the remaining charges and specifications.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶6} A trial court need only substantially comply with the non-constitutional requirements contained in Crim.R. 11(C)(2)(a) and (b). *State v. Thomas*, Franklin App. No. 04AP-866, 2005-Ohio-2389, at ¶10. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶7} Although substantial compliance is sufficient for the non-constitutional requirements set forth in Crim.R. 11(C)(2)(a) and (b), a trial court must strictly comply with the critical constitutional requirements referenced in Crim.R. 11(C)(2)(c). *State v. Carter*, Franklin App. No. 02AP-294, 2002-Ohio-6967, at ¶11, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus. Although strict compliance is required, a trial court is not required to use the exact language contained in Crim.R. 11(C)(2)(c). The trial court must explain the constitutional rights that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant. *Ballard*, paragraph two of the syllabus; *State v. Anderson* (1995), 108 Ohio App.3d 5, 11; *Carter*. What constitutes the

critical constitutional requirements in Crim.R. 11(C)(2)(c) lies at the heart of the issue presented in the case at bar.

{¶8} It is undisputed that the trial court failed to inform appellant that by entering a guilty plea he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt" standard, a right listed in Crim.R. 11(C)(2)(c). The state contends, however, that the trial court must only substantially comply with the requirement that it inform appellant of this constitutional right, and that it did so when appellant signed a guilty plea form indicating that he waived this right. We disagree.

{¶9} In *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, the United States Supreme Court held that before accepting a guilty plea, a trial court must inform a criminal defendant of the constitutional rights he waives by entering a guilty plea. *Id.* at 243. The rights identified in *Boykin* were: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. *Id.* These three constitutional rights are among those listed in Crim.R. 11 (C)(2)(c). Therefore, a trial court must strictly comply with the requirement that it inform a defendant of these constitutional rights prior to accepting a guilty plea. *Ballard.*

{¶10} The right to have the state prove guilt beyond a reasonable doubt is a constitutionally-protected right of a criminal defendant. See *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068; *State v. Higgs* (1997), 123 Ohio App.3d 400, 406; *Beachwood v. Barnes* (Oct. 25, 2001), Cuyahoga App. No. 78841 (O'Donnell, J., concurring). At the time *Boykin* was decided, there was apparently some question regarding whether the reasonable doubt standard was a constitutional right. See *Winship*; see, also, *State v. Scott* (1996), 113 Ohio App.3d 401, 406 (stating that

reasonable doubt standard was a statutory right). The Court in *Winship*, however, made it clear that the standard was constitutionally based. *Id.* at 364. ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt * * *"). The Court decided *Winship* one year after it decided *Boykin*. If *Winship* had been decided before *Boykin*, it is possible that the constitutional right to have guilt proven beyond a reasonable doubt may have been included in the *Boykin* rights. See *Barfell v. State* (Ind.App.1979), 399 N.E.2d 377, fn. 11. In fact, the author of the *Boykin* opinion later wrote that the right to have guilt proved beyond a reasonable doubt is also involved when a defendant enters a guilty plea. *Johnson v. Ohio* (1974), 419 U.S. 924, 926, 95 S.Ct. 200 (Douglas, J., dissenting) (the three constitutional rights identified in *Boykin* were illustrative and not exhaustive). See, also, *State v. Mallon* (Dec. 17, 1999), Trumbull App. No. 98-T-0032 (noting that the list of constitutional rights in *Boykin* were illustrative, not exhaustive).

{¶11} In *Ballard*, the Supreme Court of Ohio added a fourth constitutional right that must be strictly explained to a defendant entering a guilty plea: the right to compulsory process. *Id.* at paragraph one of the syllabus. This constitutional right is the fourth of the five constitutional rights listed in Crim.R. 11(C)(2)(c). The *Ballard* court noted that the constitutional right to compulsory process was not named in *Boykin* as a right that a trial court must explain to a defendant. The court, however, reasoned that because the right to compulsory process was a trial right guaranteed by the United States Constitution, just like the trial rights named in *Boykin*, a trial court must also inform a defendant of that constitutional right prior to accepting a guilty plea, notwithstanding the fact that it was not

identified in *Boykin*. *Id.* at fn. 4. It is well-established that a state court may provide more constitutional safeguards than federal courts. *Higgs*, at 406, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, paragraph one of the syllabus.

{¶12} On the same day the Supreme Court of Ohio decided *Ballard*, it also decided *State v. Sturm* (1981), 66 Ohio St.2d 483. *Sturm* also involved a trial court's obligation pursuant to Crim.R. 11 to advise a criminal defendant of constitutional rights waived by a guilty plea. In that case, the court held that the trial court failed to inform Sturm of his constitutional right to confront his accusers, a right expressly identified in *Boykin*. Therefore, the court vacated Sturm's plea and remanded the case.

{¶13} In a footnote, however, the court noted that Sturm also argued that his plea should be vacated because the trial court failed to inform him of his right to have his guilt determined under a beyond a reasonable doubt standard. *Id.* at fn. 2. Although not the basis of the court's decision, the court stated that "[w]hile a trial court is required by Crim.R. 11(C) to inform a defendant of this right, it is not required by [*Boykin*]." *Id.* Thus, the court reasoned, because *Boykin* did not mention the constitutional right to have guilt proven beyond a reasonable doubt, a trial court would only have to substantially comply with that requirement. *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86 (requiring only substantial compliance with non-constitutional requirements of Crim.R. 11).

{¶14} The reasoning expressed in footnote two of *Sturm*, while only dicta, is inconsistent with the rationale underlying the *Boykin* and *Ballard* decisions. Crim.R. 11(C)(2)(c) identifies five constitutional rights of which a trial court must inform a defendant before accepting a guilty plea. *Ballard* expressly requires a trial court to strictly explain four of these constitutional rights to a defendant before accepting a guilty plea,

notwithstanding the fact that *Boykin* did not expressly identify all four of these constitutional rights. We see no rational basis for treating a defendant's constitutional right to have his or her guilt determined under a beyond a reasonable doubt standard any differently.

{¶15} Accordingly, we hold that a trial court must strictly comply with the constitutional requirements in Crim.R. 11(C)(2)(c) and explain all of the constitutional rights listed in the rule that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant, including the right to have the state prove guilt beyond a reasonable doubt. *Higgs*.² Other courts have reached the same conclusion. See *State v. Green*, Mahoning App. No. 02CA-217, 2004-Ohio-6371, at ¶11; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082, at ¶27; *Mallon*, supra; *State v. Givens* (Sept. 16, 1982), Montgomery App. No. 7774.³

{¶16} In this case, the trial court failed to inform appellant of his right to have his guilt determined under a beyond a reasonable doubt standard. Thus, the trial court did not strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) when it accepted appellant's guilty plea.⁴ Appellant's lone assignment of error is sustained, and

² For the reasons previously stated, we disagree with this court's analysis in *State v. Ellis* (June 20, 1996), Franklin App. No. 95APA10-1399. In that case, this court considered whether the trial court informed a defendant of the right to have guilt proven beyond a reasonable doubt. This court, citing *Sturm*, simply questioned whether the right was identified in *Boykin*, and because it was not, required a trial court to substantially comply with the rule. Identification of a right in *Boykin* is not sufficient, per *Ballard*, to determine a trial court's obligations pursuant to Crim.R. 11(C)(2)(c). See, also, *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428 (requiring substantial compliance).

³ Other courts only require substantial compliance with the requirement that a defendant be advised of the right to have the state prove guilt beyond a reasonable doubt. See *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234; *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560; *Scott*, supra, at 406-407.

⁴ Because of this determination, appellant's claim that he did not understand the nature of the charges when he entered his guilty plea is moot. App.R. 12.

the judgment of the Franklin County Court of Common Pleas is vacated. The matter is remanded to the trial court for further proceedings.

Judgment vacated and cause remanded.

PETREE, J., concurs.
SADLER, P.J., dissents.

SADLER, P.J., dissenting.

{¶17} I do not minimize the importance of informing a defendant of the state's burden of proving guilt beyond a reasonable doubt. Clearly, if appellant had not been informed of that burden at all during his sentencing, vacation of his guilty plea would be required, but that is not the case here. I disagree with the majority's conclusion that the trial court was required to strictly comply with Crim.R. 11 regarding the state's burden, and would instead apply the test of substantial compliance to this case.

{¶18} Neither the United States Supreme Court after its decision in *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; nor the Ohio Supreme Court after its decision in *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, has taken the opportunity to expand the list of critical constitutional rights requiring strict adherence to Crim.R. 11(C) to include the right to require the state to prove guilt beyond a reasonable doubt. In fact, the Ohio Supreme Court, albeit speaking by way of a footnote, has stated that a court's communication of the right to have the state prove guilt beyond a reasonable doubt is not subject to strict compliance with Crim.R. 11 under *Boykin*. *State v. Sturm* (1981), 66 Ohio St.2d 483, 422 N.E.2d 853, at fn. 2.

{¶19} Moreover, we have held in two cases that a trial court's failure to strictly comply with Crim.R. 11 by informing a defendant of the right to have guilt proven beyond a reasonable doubt does not establish that the defendant's guilty plea was not entered

knowingly, intelligently, and voluntarily, thus applying a substantial compliance test to a trial court's compliance with this requirement. *State v. Ellis* (June 20, 1996), Franklin App. No. 95AP10-1399, LEXIS 2522; *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428, LEXIS 2175.

{¶20} For those portions of Crim.R. 11 to which the substantial compliance test applies, the proper method for analyzing the issue is whether, under the totality of the circumstances, the defendant properly understood the charges and the rights he was waiving, and whether the defendant suffered any prejudice from the trial court's omission specifically informing appellant of the right to have guilt proven beyond a reasonable doubt. In this case, the plea form appellant signed did identify the right to have guilt proven beyond a reasonable doubt as one of the rights appellant was waiving by signing the form. The record shows that the trial court asked appellant if he had read the form and discussed it with his attorney, and that appellant indicated he understood the rights he was waiving. I believe this was sufficient to establish that appellant's plea was made knowingly, intelligently, and voluntarily.

{¶21} Since I cannot join the majority's conclusion that appellant's plea was rendered involuntary by the procedure followed by the trial court in his sentencing, I respectfully dissent.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION - GENERAL DIVISION

State of Ohio

Plaintiff,

vs.

THOMAS L. VENNEY
Defendant:

Case No.:

0414791

Indictment for:

FELONIOUS ASSAULT (F) ORC 2903.11
w/ 2 FIREARM SPECS (3 YR. & 1 YR.)
KIDNAPPING (F) ORC 2905.01
w/ 2 FIREARM SPECS. (3 YR. & 1 YR.)
2 COUNTS TOTW

FEB - 2 AM 9:29
CLERK OF COURTS

ENTRY OF GUILTY PLEA

I, THOMAS L. VENNEY, Defendant in the above-styled case, am being represented by MADRY ELLIS, as legal counsel. My Constitutional and Statutory rights have been explained to me by the Court and by my counsel. I have reviewed the facts and law of my case with my counsel. I now desire to withdraw my previously entered general plea of "Not Guilty" and I now plead "Guilty" to THE STIPULATED LESSER INCLUDED OFFENSE OF ATTEMPTED FELONIOUS ASSAULT, ORC 2923.02 AS IT RELATES TO ORC 2903.11, A FELONY OF THE THIRD DEGREE WITH THE THREE YEAR FIREARM SPECIFICATION

I understand that my guilty plea to the crime(s) specified constitut(e)s both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime(s) and this case. I further understand that by pleading "Guilty", I waive a number of important and substantial constitutional, statutory and procedural rights, which include, but are not limited to, the right to have a trial by jury, the right to confront witnesses against me, to have compulsory subpoena process for obtaining witnesses in my favor, to require the State to prove my guilt beyond a reasonable doubt on each crime herein charged at a trial at which I cannot be compelled to testify against myself, and to appeal the verdict and rulings of the trial Court made before or during trial, should those rulings or the verdict be against my interests.

I understand the maximum prison term(s) for my offense(s) to be as follows: 5 YEARS ODRC, PLUS THE 3-YEAR FIREARM SPECIFICATION

I understand that the prosecution and defense jointly recommended to the Court (sentence(s) of R.C. 2953.08(D)) _____

Place an X in the appropriate box(es)

If the Court finds me guilty of a Repeat Violent Offender Specification (R.C. 2941.149) and the Court imposes the maximum prison term(s) for the underlying offense(s); or guilty of a violation of R.C. 2925.03, 2925.04, or 2925.11 that requires a ten-year prison term; or guilty of a Major Drug Offender Specification (R.C. 2941.1410) that requires a ten year prison term(s) for the underlying offense(s); or guilty of R.C. 2923.32 when the most serious offense in the pattern is a first degree felony that requires a ten-year prison term; or guilty of an attempted forcible violation of R.C. 2907.02 with the victim being under 13 years of age that requires a ten-year prison term; I understand that the Court may impose an additional prison term of 1-10 years to each term.

I understand that R.C. 2929.13(F) requires mandatory prison term(s) for the following offenses and that I will not be eligible for community control sanctions, judicial release, or earned days of credit in relation to this/these term(s) _____

I understand that R.C. 2929.13(D) establishes a presumption in favor of a prison term for the following offense(s): _____

I understand that the Court may impose community control sanctions upon me. If I violate the conditions of such community control sanctions or the condition under R.C. 2951.02(C)(1b), I understand that the Court may extend, up to five years, the time for which I am subject to community control sanctions, impose more restrictive sanctions, or imprison me for up to the maximum term(s) allowed for the corresponding offense(s) as set forth above.

DEFENDANT

Thomas Venney

ATTORNEY FOR DEFENDANT

Madry Ellis

If the Court imposes a prison term, I understand that the following period(s) of post-release control is/are applicable:

Place an X in the appropriate box(es)		Place an X in the appropriate box(es)	
..... Five Years - Mandatory	<input type="checkbox"/>	F-3 without Cause or Threat of Physical Harm	Up to Three Years - Optional <input checked="" type="checkbox"/>
by Sex Offense	Five Years - Mandatory <input type="checkbox"/>	F-4	Up to Three Years - Optional <input checked="" type="checkbox"/>
..... Three Years - Mandatory	<input type="checkbox"/>	F-5	Up to Three Years - Optional <input checked="" type="checkbox"/>
with Cause or Threat of Physical Harm	Three Years - Mandatory <input checked="" type="checkbox"/>		

I understand that a violation of post-release control conditions or the condition under R.C. 2967.131 could result in more restrictive non-prison sanctions, a longer period of supervision or control up to a specified maximum, and/or reimprisonment for up to 180 months. The prison term(s) for all post-release control violations may not exceed one-half of the prison term originally imposed. I understand that I may be prosecuted, convicted, and sentenced to an additional prison term for a violation that is a felony. I also understand that such felony violation may result in a consecutive prison term of twelve months or the maximum period of unserved post-release control, whichever is greater. Prison terms imposed for violations or new felonies do not reduce the remaining post-release control period(s) for the original offense(s).

I understand that each felony count to which I am pleading guilty corresponds with the following fines (R.C. 2929.18):

Place an X in the appropriate box(es)		Place an X in the appropriate box(es)	
Aggravated Murder	Up to \$25,000 <input type="checkbox"/>	F	Up to \$10,000 <input checked="" type="checkbox"/>
Murder	Up to \$15,000 <input type="checkbox"/>	F-4	Up to \$5,000 <input checked="" type="checkbox"/>
F-1	Up to \$20,000 <input type="checkbox"/>	F-5	Up to \$2,500 <input type="checkbox"/>
F-2	Up to \$15,000 <input type="checkbox"/>		

For F-1, F-2, or F-3 Drug Offenses (violations of R.C. 2925, 3719, or 4729) - Mandatory Fine of at Least One-Half of the Maximum for Underlying Offense

For Offenses Subject to R.C. 2929.25 - Optional Fine of Not More Than \$1 Million Dollars

For Offenses Subject to Organizational Penalties under R.C. 2929.11 - Mandatory Fines as Follows

I understand that the Court may also require me to pay costs, restitution, day fines, and/or costs of all sanctions imposed upon me. I understand that the imposition of financial sanctions would constitute a civil judgment against me. (R.C. 2929.18)

I understand that I am (am not) subject to mandatory driver's license suspension for not less than six months nor more than five years.

I understand that the Court upon acceptance of my pleas of "Guilty" may proceed with judgment and sentence. I hereby certify that no person has threatened me, promised me leniency, or in any other way coerced or induced me to plead "Guilty" as indicated above; my decision to plead "Guilty" is being made completely and without reservation of any kind upon the mercy of the Court with respect to punishment, represents the free and voluntary exercise of my best judgment. I am completely satisfied with the Court's representation and advice I have received from my counsel. I understand that I can appeal as a matter of course and sentence within thirty days of the filing of my judgment of conviction.

I am a citizen of the United States of America. I understand that, if I am not a citizen of the United States, I have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, and the laws of the United States.

DEFENDANT: Thomas Verney

I hereby certify that I have counseled my client to the best of my professional ability with respect to the facts and law of this case. I have also diligently investigated his/her case and defenses and possible defenses. I represent my client is competent to proceed to change his/her plea(s), as indicated hereinabove, and, in my opinion, that he/she acts knowingly, voluntarily, and intelligently in such matter.

ATTORNEY FOR DEFENDANT: Nady C. Ellis

The Court, being fully advised as to the facts, hereby accepts the defendant's plea(s) of "Guilty," entered hereinabove, as voluntarily and intelligently made, with full knowledge of its consequences under, including waivers of all applicable rights and defenses and understanding of maximum penalties. Upon recommendation of the Prosecuting Attorney, it is hereby accepted that the Court hereby enters a Nolle Prosequi as to Counts 1 AND THE REMAINDER

PLEA SPECIFICATIONS

[Handwritten signatures and dates]
 2/1/06
 2/1/06

JUDGE: [Signature]
 Date: 2-1-06

CrimR 11. Pleas, Rights Upon Plea.

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) 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.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) 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:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

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

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. 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. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

HISTORY: Amended, eff 7-1-76; 7-1-80; 7-1-98

CrimR 52. Harmless Error and Plain Error.

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.