IN THE SUPREME COURT OF OHIO
2008

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

MOTION OF PLAINTIFF-APPELLANT STATE OF OHIO TO STAY THIS COURT'S JUDGMENT
(EXPEDITED CONSIDERATION REQUESTED)

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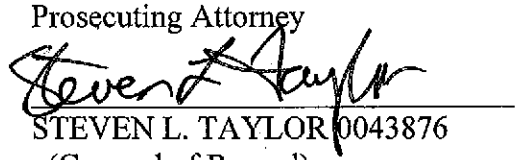
MOTION OF PLAINTIFF-APPELLANT STATE OF OHIO TO STAY THIS COURT'S JUDGMENT
(EXPEDITED CONSIDERATION REQUESTED)

For the reasons stated in the attached memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court stay its judgment issued in these cases on October 9, 2008, pending review of the State's motion for reconsideration and pending review of the State's timely petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



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MEMORANDUM IN SUPPORT

Based on a plea of guilty, defendant Veney was convicted of attempted felonious assault and an accompanying firearm specification, for which he received a five-year aggregate sentence. In a 2-1 ruling, the court of appeals vacated defendant's guilty plea and remanded for further proceedings because the trial court had not strictly complied with the requirement that the court orally advise that the State has the burden of proving guilt beyond a reasonable doubt. In addition to certifying a conflict, the court of appeals stayed its judgment pending review in this Court. Defendant has remained in prison since that time.

On October 9, 2008, this Court issued its ruling on a 4-3 vote, affirming the appellate court's ruling and thereby remanding the case to the trial court for further proceedings. The gist of the ruling by the four-justice majority is that the failure to give the oral beyond-reasonable-doubt advisement always results in a "constitutionally infirm" plea that automatically requires reversal of the plea-based conviction.

Plaintiff-appellant State of Ohio now respectfully requests a stay of this Court's judgment in these cases. The State is seeking, and will be seeking, further review.

A.

The State today has filed a motion for reconsideration. It sets forth three grounds for reconsideration. First, the majority committed obvious error in constitutionalizing the oral beyond-reasonable-doubt advisement required by Crim.R. 11(C)(2)(c). Second, the majority failed to address the State's argument that harmless-error and plain-error review of plea-advisement is required by Crim.R. 52(A) and (B) respectively. Third, the majority failed to address the prerequisites for treating error as "structural" error. The State invites the Court to review the motion for reconsideration filed herewith so that this Court can obtain a fuller understanding of the grounds for reconsideration.

The State respectfully submits that it has substantial grounds to seek reconsideration and therefore a stay is warranted under these circumstances.

The State also respectfully submits that it has substantial grounds to seek certiorari review in the United States Supreme Court. Although the granting of a writ of certiorari is rare, the State believes that the majority's constitutional ruling amounts to a

controversial extension of *Boykin v. Alabama* (1969), 395 U.S. 238, which conflicts with language in United States Supreme Court decisions limiting that decision to the three constitutional rights mentioned therein. The majority opinion also requires an oral advisement as a constitutional matter when a strong body of national case law, including prior cases of this Court, has concluded that a specific oral interrogation is not required regarding the three *Boykin* rights. The State notes that Fed.R.Crim.P. 11 requires no oral beyond-reasonable-doubt advisement, and the majority's constitutional ruling would mean that Fed.R.Crim.P. 11 is unconstitutional in that respect, which could provide a further impetus for the United States Supreme Court to grant review.

The State also believes that the majority's treatment of the error as always-reversible error conflicts with the structural-error analysis of the United States Supreme Court and conflicts with the prejudice-based inquiry for plea-advisement error approved by that Court in *United States v. Vonn* (2002), 535 U.S. 55. The majority's treatment of plea-advisement error as always reversible also would conflict with Fed.R.Crim.P. 11, which specifically provides a harmless-error rule for plea-taking errors. Fed.Crim.R. 11(h).

Subject to revision, the State intends to seek certiorari review of these "questions presented":

> 1) This criminal defendant approved a written plea in which he acknowledged his understanding of various constitutional rights and in which he waived those rights, and he further acknowledged in open court that he approved the written plea and had reviewed his constitutional rights with his counsel. Did the constitutional standard under *Boykin v. Alabama* require

> that the trial court go further and provide specific oral advisements and obtain specific waivers regarding such constitutional rights?
>
> 2) The *Boykin* Court indicated that the record of proceedings must affirmatively disclose the waiver of three constitutional rights, i.e., the right against compelled self-incrimination, the right to jury trial, and the right to confront witnesses. Should the list of three *Boykin* rights be expanded to include the constitutional right to require proof beyond a reasonable doubt in a trial?
>
> 3) Assuming that an oral advisement is constitutionally required, does the failure to give such an advisement require automatic reversal when other parts of the trial record, including the defendant's written plea, show that the defendant was aware of the right to proof beyond a reasonable doubt and was waiving that right?

Of course, the State cannot predict or guarantee that the United States Supreme Court would accept review. But the State believes that there are substantial constitutional and policy implications, and a substantial conflict with other courts, that potentially could lead to the granting of certiorari review.

B.

Defendant might contend that the United States Supreme Court will lack a constitutional basis to grant review because this Court was only basing its ruling on a violation of Crim.R. 11(C)(2)(c) and not on a constitutional violation. But this argument would not withstand scrutiny, and, even if true, such argument ironically would create a greater imperative to grant reconsideration and thereby create a greater imperative to grant a stay vis-à-vis the State's motion for reconsideration.

A full and fair reading of the majority opinion shows that the majority was

basing its ruling on the belief that the omission of the oral beyond-reasonable-doubt advisement was a constitutional error. As discussed fully in the State's motion for reconsideration, the State had argued that the oral beyond-reasonable-doubt advisement was not constitutionally required, and the majority specifically rejected that argument. See ¶¶ 20, 21. The majority also twice characterized the failure to give an advisement of a constitutional right as resulting in a plea that was "constitutionally infirm." See ¶¶ 26, 29. The majority cited or quoted *Boykin* eight times in the key passages of paragraphs 24 through 30. Thus, although the majority opinion referred to Crim.R. 11(C)(2)(c), its ruling was bottomed on a finding of a constitutional violation.[1]

As fully explained in the motion for reconsideration, any retreat from that understanding would mean that the State should have won this appeal. This Court has repeatedly held that only *constitutional* error can amount to "structural error" always requiring reversal. See Motion for Reconsideration, at 7-8.

In addition, a *constitutional* infirmity necessarily must relate to legal requirements that are above and beyond a violation of a mere procedural rule. A mere violation of a state rule of criminal procedure cannot create a constitutional error, and this Court would lack the authority to pass such a rule anyway. See Motion for Reconsideration, at 8.

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[1] Although the majority's syllabus only refers to Crim.R. 11(C)(2)(c), Ohio no longer follows the syllabus rule. The law of a decision is now found in the syllabus "*and* its text, including footnotes." S.Ct.R.Rep.Op. 1(B)(1) (emphasis added). Thus, the syllabus sets forth the automatic-reversal principle – "the defendant's plea is invalid" – and the text explains why that is so, i.e., because the plea is "constitutionally infirm."

This Court's ruling must be based on more than just a violation of Crim.R. 11(C)(2)(c). If not, then the State should have won this appeal because there could be no requirement of automatic reversal.

C.

A stay is necessary to maintain the status quo pending further review of the State's motion for reconsideration and the State's petition for writ of certiorari. This Court has remanded the case for further proceedings, which would potentially include pretrial and trial proceedings on the indicted charges of felonious assault and kidnapping, both with firearm specifications. Pretrial and/or trial proceedings would be premature until all review is completed. A stay will also assure that this Court's jurisdiction to reconsider the matter is not interfered with by lower court proceedings.

As a general rule, this Court could set an appeal bond pending the outcome of the further review sought by the State. However, the State respectfully submits that the setting of an appeal bond would be unwise here. First, there can be no assurance that defendant will abide by an appeal bond, as he absconded from bail in this very case in the trial court, thereby causing a delay of over thirteen months. Defendant pleaded guilty in a related case to attempted failure to appeal on a recognizance bond because of his failure to appear in the present case.

There are other indicators that defendant is a poor bond risk. The PSI reveals that defendant was convicted of attempted CCW in 1997 and placed on probation. However, defendant's probation was revoked after he was declared an absconder.

The PSI further reveals that defendant was convicted of OMVI with high

concentration of breath in 2004. He was placed on a community control sanction for that offense, but he failed to appear for a revocation hearing and a warrant was issued for his arrest in 2005.

The PSI also indicates that defendant was placed on community control for driving under suspension in September 2004, but defendant failed to appear and a warrant was issued for his arrest just two months later.

Defendant's criminal record generally confirms that he is a poor bond risk. In addition to the convictions already mentioned, the PSI indicates that defendant has convictions for assault (1991), disorderly conduct (1993), "minor purchasing" (1993), harassment and disorderly conduct (1995), OMVI per se (1996), and no operator's license (1997). The PSI further indicates the following arrests or charges that had been dismissed or that had received some unknown disposition: criminal damaging (1991), burglary (1992), receiving stolen property (1992), disorderly conduct (2000), domestic violence, assault, and criminal damaging (2003), and non-support (2004).

The facts of the present case also show that defendant would be a danger to his family and the community if he were released on an appeal bond. 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)

The "offender's version" portion of the PSI indicates defendant admitted that he had an argument with his wife, that he retrieved a gun, and that he fired a shot into a speaker three feet from his wife. Defendant admitted that she ran from the residence, but defendant claimed that he could not recall what else happened after that because of the alcohol in his system.

As these facts show, and as defendant's record confirms, defendant would be unlikely to follow any orders attendant to an appeal bond. He is prone to drunkenness, as shown by the present case and the prior alcohol-related convictions and charges. He is also prone to assaultive and criminal-damaging type offenses. In the present case, defendant's violent and drunken propensities combined to result in defendant threatening his wife with harm with an operable firearm. It approaches a virtual certainty that defendant will engage in drunken and/or threatening behavior that will endanger others and will increase the likelihood that he would not appear for future trial court proceedings in compliance with an appeal bond. And, of course, defendant's failure to appear in the present case confirms that he will be unlikely to comply an

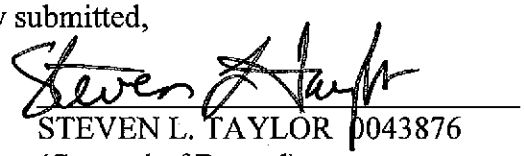
appeal bond.

The State notes that the court of appeals granted a stay of its judgment, thus reflecting its assessment that a stay is warranted.

D.

Accordingly, the State respectfully requests that this Court stay its judgment pending review of the State's motion for reconsideration and pending review of the State's petition for writ of certiorari in the United States Supreme Court. If reconsideration is denied, the State would intend to timely file the petition in the United States Supreme Court within 90 days of such denial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 15th day of Oct., 2008, 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

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2008-OHIO-5200

THE STATE OF OHIO, APPELLANT, *v.* VENEY, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Veney,* Slip Opinion No. 2008-Ohio-5200.]

Criminal procedure—Colloquy upon guilty or no-contest plea—Trial court's failure to comply strictly with Crim.R. 11(C)(2)(c) invalidates plea.

(Nos. 2007-0656 and 2007-0657 – Submitted May 7, 2008 – Decided October 9, 2008.)

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, No. 06AP-523, 2007-Ohio-1295.

SYLLABUS OF THE COURT

A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply

with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)

MOYER, C.J.

{¶ 1} Once again, we are asked to clarify the duties of the trial court in accepting pleas to felony charges and to determine the consequences of the trial court's failure to comply with Crim.R. 11. The first issue is what level of compliance is required of the trial court when it advises a defendant of the state's burden to prove guilt beyond a reasonable doubt at trial before accepting a plea of guilty or no contest. The second issue is whether a failure to advise the defendant of this right is subject to harmless-error review under Crim.R. 52.[1] We affirm the judgment of the court of appeals, holding that trial courts must strictly comply with all parts of Crim.R. 11(C)(2)(c) in conducting plea colloquies and that a trial court's failure to inform a defendant of any right in that subsection invalidates the plea.

I. Case Background

{¶ 2} Appellee, Thomas L. Veney, was indicted on one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01 along with two firearm specifications as a result of a 2004 event involving his wife, Nicole. As stated by the prosecutor at the plea hearing, Veney had come home from a night of drinking on July 8, 2004, and accused Nicole of sleeping with his cousin. Veney pulled out a loaded gun while

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[1] The certified question accepted asks whether a trial court must strictly comply with the Crim.R. 11 requirement that it inform the defendant that by entering a felony plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt. We also accepted the state's discretionary appeal, which offers two related propositions of law: (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" and (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."

in the bedroom, held it on Nicole, and threatened to shoot her. Nicole was lying next to her seven-year-old daughter at the time. The argument eventually moved downstairs, where Veney fired a shot into the wall. Nicole then ran out of the house, and Veney followed her. Nicole saw Veney point the gun at her and heard him fire several more shots. Nicole was able to run to a nearby business to seek help. Nicole's account was corroborated by neighbors who heard the shots and saw Veney holding a gun.

{¶ 3} Veney initially entered a not-guilty plea to all charges but later entered guilty pleas to the lesser included offense of attempted felonious assault and one firearm specification. The other count and firearm specification were dismissed. The trial court accepted the pleas, found Veney guilty, and sentenced him to two years for felonious assault and three years on the firearm specification for an aggregate prison term of five years. Veney appealed, asserting that his plea was invalid because the trial court had failed to explain the nature of the charges and failed to inform him that the state had to prove him guilty beyond a reasonable doubt at trial.

{¶ 4} The Tenth District Court of Appeals reversed the judgment of the trial court because the trial court did not strictly comply with Crim.R. 11(C)(2)(c) when it failed to orally inform Veney that by entering a guilty plea he waived his constitutional right to have his guilt determined beyond a reasonable doubt at trial.[2] *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295, ¶ 16. The court of appeals vacated the plea and remanded the case to the trial court for further proceedings. Id.

{¶ 5} The court of appeals certified its judgment as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, 680 N.E.2d 1297; *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, 1993

[2] The court of appeals did not consider Veney's claim that he had not understood the nature of his charges. *Veney*, 2007-Ohio-1295, ¶ 16, fn. 4.

WL 413651; and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560, 1998 WL 546074. We accepted the certified question "[w]hether 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." *State v. Veney*, 114 Ohio St.3d 1423, 2007-Ohio-2904, 868 N.E.2d 678. We also accepted the two propositions of the state within its discretionary appeal. 114 Ohio St.3d 1425, 2007-Ohio-2904, 686 N.E.2d 697.

{¶ 6} In summary, the state argues that (1) the trial court need only substantially comply with the duty to advise the defendant of the state's obligation to prove the defendant guilty beyond a reasonable doubt at trial, (2) a flawed plea colloquy does not require automatic reversal, (3) Crim.R. 52 guides the court of appeals as it determines the consequences of the error being reviewed, and (4) under either a harmless-error or plain-error analysis, Veney's plea survives as a knowing, intelligent, and voluntary plea. Veney responds that the trial court's failure to orally advise him of the state's burden of proof as required by Crim.R. 11(C)(2)(c) is constitutional error affecting a substantial right that automatically invalidates his plea.

II. Legal Analysis

{¶ 7} We have clearly stated, "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. The United States Supreme Court has held that a knowing and voluntary waiver of the right to jury trial, the right against compulsory self-incrimination, and the right to confront one's accusers cannot be inferred from a silent record. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Crim.R. 11 was adopted in

1973, giving detailed instruction to trial courts on the procedure to follow when accepting pleas.

A. Crim.R. 11(C) Requirement for Plea Colloquy

{¶ 8} Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest. With respect to the required colloquy, Crim.R. 11(C)(2) provides:

{¶ 9} "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:

{¶ 10} "(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.

{¶ 11} "(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.

{¶ 12} "(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."

{¶ 13} Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim. R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c). Although the constitutional and nonconstitutional portions of this colloquy are categorized separately, we have not always distinguished between the two when examining the adequacy of the court's colloquy with a defendant. In *State v.*

Caudill (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601, we noted that the provisions of Crim.R. 11(C) must "be scrupulously and literally heeded." Two standards have developed, however, depending upon which type of right is alleged to have been the subject of the court's error in advising the defendant.

B. Substantial Compliance with Crim.R. 11(C)(2)(a) and (b)

{¶ 14} Although we had initially insisted on strict compliance with Crim.R. 11(C), we began to draw a distinction between the notification of constitutional rights and the other information required to be in the colloquy in *State v. Stewart* (1977), 51 Ohio St.2d 86, 5 O.O.3d 52, 364 N.E.2d 1163. In *Stewart,* we held that with respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and 11(C)(2)(b), substantial compliance is sufficient. Id.

{¶ 15} Ohio's substantial-compliance standard was further developed in *State v. Strawther* (1978), 56 Ohio St.2d 298, 10 O.O.3d 420, 383 N.E.2d 900; *State v. Billups* (1979), 57 Ohio St.2d 31, 11 O.O.3d 150, 385 N.E.2d 1308; *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115; and *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. We explained: "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. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." (Citations omitted.) Id. at 108. To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered. Id.

{¶ 16} We have also clarified that in reviewing the totality of the circumstances, a court must determine whether the defendant understood the consequences of waiver. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. Because (1) Griggs had confessed and had signed a written guilty-plea form and (2) Griggs and his counsel assured the court that he was

aware of the rights he was waiving, we determined that the trial court had substantially complied with Crim.R. 11, even though the trial court did not orally advise Griggs that accepting the plea was a complete admission of guilt. Id. at ¶ 16, 19.

{¶ 17} Our precedent, therefore, establishes that a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.

C. Strict Compliance with Crim.R. 11(C)(2)(c)—Notification of Constitutional Rights

{¶ 18} Despite the evolution of substantial compliance as a standard for the court's nonconstitutional notifications and determinations required by Crim.R. 11(C)(2)(a) and (b), the same is not true for the constitutional rights within Crim.R. 11(C)(2)(c). In *Ballard*, we reaffirmed *Caudill*'s holding that strict, or literal, compliance was required when constitutional rights are involved. 66 Ohio St.2d at 479, 20 O.O.3d 397, 423 N.E.2d 115. Noting that the preferred procedure is for the trial court to use the language in Crim.R. 11(C), we also stated, "However, failure to [literally comply] will not necessarily invalidate a plea. The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." Id. at 479-480.

{¶ 19} Crim.R. 11(C)(2)(c) requires that the defendant be advised of the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. The first three are the three constitutional rights originally identified in *Boykin v. Alabama*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. We recognized notification of the right of compulsory process to obtain witnesses as a

fourth constitutional right in *Ballard.* 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph one of the syllabus.

{¶ 20} Although the right to be proven guilty by the state beyond a reasonable doubt is one of the five rights included within Crim.R. 11(C)(2)(c), we have never expressly accorded it the same stature as the other four. In fact, in a footnote we suggested that the explanation of the prosecution's burden of proof should be treated differently, subject to a standard of substantial, rather than strict, compliance. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, 20 O.O.3d 403, 422 N.E.2d 853, fn. 2. Because of this, the state argues that a trial court need only substantially comply with the obligation to advise a defendant of the prosecution's burden of proof because the right is not specified in *Boykin* as one that is constitutionally required.

{¶ 21} Yet, as the United States Supreme Court held the year after *Boykin*, the right to have the state prove guilt beyond a reasonable doubt is a constitutionally protected right of an accused. *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. We therefore reject the state's contention and instead hold that the duty to advise the defendant of the right to have guilt proven by the state beyond a reasonable doubt is among the duties of Crim.R. 11(C)(2)(c) with which the court must strictly comply.

D. Consequences of the Court's Failure to Strictly Comply

{¶ 22} Having found that a court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant of all five constitutional rights listed, we answer the certified question in the affirmative. Our answer to the certified question does not, however, address the consequences of the court's failure to comply. The state maintains that even if the trial court must strictly comply with Crim.R. 11(C)(2)(c) by informing Veney of the prosecution's burden of proof beyond reasonable doubt, the court's error need not automatically lead to vacation of the conviction and plea. We disagree.

{¶ 23} To properly frame this issue, we must review *Ballard*, which marked the first time that we explicitly made the connection between the strict-compliance standard and the constitutional rights in Crim.R. 11(C)(2)(c); it provides valuable insight into how the standard works in practice.

{¶ 24} In *Ballard*, we cited *Boykin v. Alabama* (1969), 395 U.S. 238, 242–243, 89 S.Ct. 1709, 23 L.Ed.2d 274, for the principles that a defendant must be apprised of certain constitutional rights[3] before his or her plea may be considered intelligent and voluntary and that plain error results when a trial court fails to explain those rights. *Ballard*, 66 Ohio St.2d at 476–477, 20 O.O.3d 397, 423 N.E.2d 115.

{¶ 25} However, we found a split of authority on the issue of "whether the complete omission of a *Boykin* constitutional right alone is cause to nullify a guilty plea." *Ballard* at 477. Some courts held that the "failure to mention, in any manner, a *Boykin* right does not necessarily result in an involuntary and unknowing guilty plea"; others "held that for a guilty plea to be voluntarily and intelligently entered, the defendant must be informed that he is waiving his *Boykin* rights." Id. at 477–478.

{¶ 26} We adopted the latter view: "[A] guilty plea is *constitutionally infirm* when the defendant is not informed in a reasonable manner at the time of entering his guilty plea of his [*Boykin* rights]." (Emphasis added.) *Ballard* at 478. We then crystallized this concept in the syllabus with unarguably mandatory language: "Prior to accepting a guilty plea from a criminal defendant, *the trial court must inform the defendant that he is waiving his* [*Boykin* rights]." (Emphasis added.) Id. at paragraph one of the syllabus.

{¶ 27} This requirement is tempered only slightly by the second paragraph of the syllabus: "Failure to use the exact language contained in Crim.R.

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[3] In view of our holding in this case, the principles applicable to the "*Boykin* rights" extend to all five rights listed in Crim.R. 11(C)(2)(c) in Ohio.

11(C), in informing a criminal defendant of his [*Boykin* rights], is not grounds for vacating a plea *as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant*." (Emphasis added.) *Ballard*, 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph two of the syllabus, modifying *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601. With that holding, we recognized that a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.

{¶ 28} We look to the record to determine whether a trial court strictly complies with this duty. Id. at 481. Following this rule, we upheld Ballard's plea even though the trial court failed to specifically mention the right to a jury trial by name, because the trial court did inform Ballard that " 'neither the Judge nor the jury' " could draw any inference if Ballard refused to testify and that he " 'was entitled to a completely fair and impartial trial under the law.' " Id. at 479, fn. 7, and 481.

{¶ 29} Thus, pursuant to the strict-compliance standard set forth in *Ballard*, the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid. Although the trial court may vary slightly from the literal wording of the rule in the colloquy, the court cannot simply rely on other sources to convey these rights to the defendant. "We cannot presume a waiver of these * * * important federal rights from a silent record." *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. When the record confirms that the trial court failed to perform this duty, the defendant's plea is constitutionally infirm, making it presumptively invalid. See *Ballard*, 66 Ohio St.2d at 481, 20 O.O.3d 397, 423 N.E.2d 115; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12.

{¶ 30} In the present case, it is undisputed that the trial court plainly failed to orally inform Veney of his constitutional right to require the state to prove his guilt beyond a reasonable doubt. This failure to strictly comply with Crim.R. 11(C)(2)(c) renders Veney's plea invalid. We therefore affirm the holding of court of appeals in this regard and remand the matter to the trial court for further proceedings.

III. Conclusion

{¶ 31} We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid.

{¶ 32} We answer yes to the certified question and agree with the court of appeals that the trial court must strictly comply with Crim.R. 11 in advising a defendant of constitutional rights. Because the trial court did not inform Veney that he had a right to be found guilty only upon proof beyond a reasonable doubt, it failed to strictly comply with Crim.R. 11(C)(2)(c), and his plea is therefore invalid.

Judgment affirmed
and cause remanded.

PFEIFER, O'CONNOR, and O'DONNELL, JJ., concur.

LUNDBERG STRATTON, LANZINGER, and CUPP, JJ., concur in part and dissent in part.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 33} I agree with the portion of the syllabus that mandates that trial courts when conducting plea colloquies must strictly comply with all parts of Crim.R. 11(C)(2)(c), including informing defendants of the right to be found guilty only upon proof beyond a reasonable doubt; I disagree with the portion of the syllabus that addresses the consequence of lack of strict compliance. I respectfully dissent from the majority's holding that a trial court's failure to strictly comply with Crim.R. 11(C)(2)(c) requires vacation of the plea and conviction without regard to contrary evidence in the record that the plea was entered knowingly and voluntarily despite the trial court's omission.

{¶ 34} We have held that when a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid "*under a presumption* that it was entered involuntarily and unknowingly." (Emphasis added.) *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242–243, 89 S.Ct. 1709, 23 L.Ed.2d 274. This court has never held, until today, that this presumption is irrebuttable or that a plea must be vacated automatically when the trial court fails to orally explain a constitutional right.

{¶ 35} Interpreting Crim.R. 11(C)(2)(c) as an absolute rule for which imperfect compliance should lead to automatic vacation of a plea in every case, the majority cites *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115. But the majority's reasoning seems to conflate a single missing oral advisement with the entirely "silent record" referred to *Boykin*. *Ballard*, however, did not foreclose an opportunity for the state to show that there was not a silent record with respect to *Boykin* rights. Just as the state is allowed to rebut the presumption that a warrantless search is unreasonable, the state should be able to rebut the presumption that a plea is involuntary and unknowing when a judge fails to mention one of the constitutional rights in Crim.R. 11(C)(2)(c).

{¶ 36} Allowing the state the chance to rebut the presumption that a defendant has been prejudiced does not confuse the standards of strict compliance and substantial compliance. The majority recognizes that under the substantial compliance standard, the burden is on the *defendant* to show prejudice, which means showing that the plea would otherwise not have been entered. *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474. A requirement that the *state* must overcome a presumption of the plea's invalidity when the trial court does not strictly comply with Crim.R. 11(C)(2)(c) means that the defendant need no longer show prejudice. The state simply is given an opportunity to establish through other evidence in the record that the defendant's plea was still knowing and voluntary.

{¶ 37} Moreover, federal law does not require automatic vacation of a plea when a judge fails to inform a defendant of a *Boykin* right. See *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. Instead, the court reviews the entire record—including written pleas and statements that constitutional rights were reviewed with counsel—to determine whether the defendant understood and voluntarily made the plea. Id. at 74-75. We have previously adopted this rule in *Ballard*, acknowledging that when determining whether a defendant was adequately informed of his constitutional rights under Crim.R. 11, a court must review the entire record and not just determine whether the judge recited the exact language in the rule. 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph two of the syllabus.

{¶ 38} To the contrary, the majority opinion now concludes that strict compliance brooks no mistakes by the trial court in its oral recitation to the defendant. In its overly formalistic view of the consequences of failure to strictly comply with Crim.R. 11(C)(2)(c), the majority rejects the idea that a trial court may have informed a defendant of his or her constitutional rights in a number of ways, including written materials that have been reviewed with counsel and signed and assented to in open court. The trial court's overriding obligation has

been to ensure that a plea is entered in a knowing and intelligent manner. *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. But now, the majority's holding will invalidate convictions based upon a single omitted oral statement of the trial court, no matter whether the record would otherwise show that the defendant understood and appreciated all constitutional rights being waived.

{¶ 39} Because I disagree with these draconian consequences as applied to every case, I respectfully dissent. I would hold that the state should have an opportunity to rebut the presumption that a plea is unknowing and involuntary with evidence from the entire record.

LUNDBERG STRATTON and CUPP, JJ., concur in the foregoing opinion.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

Yeura R. Venters, Franklin County Public Defender, and John W. Keeling, Assistant Public Defender, for appellee.