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

PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR RECONSIDERATION

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PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. XI(2), and for the reasons stated in the following memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court reconsider the 4-3 decision issued on October 9, 2008.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The test generally used in ruling on a motion for reconsideration is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge* (1988), 37 Ohio App.3d 68, 68. The State respectfully submits that the majority opinion committed an obvious error in concluding that a plea is "constitutionally infirm" without an oral advisement of the right to proof beyond a reasonable doubt. The State also respectfully submits that the majority opinion failed to address two key issues: (1) whether Crim.R. 52 applies to the omission of an oral plea advisement of a constitutional right; and (2) whether the omission of the oral advisement justifies automatic reversal under "structural error" doctrine.

The State respectfully submits that there is a grave disconnect between the majority's application of "strict compliance" to the oral-advisement requirements of Crim.R. 11(C)(2)(c) and the majority's failure as an appellate court to itself strictly comply with the harmless-error and plain-error standards of review in Crim.R. 52(A) and (B). As this Court has recently reiterated, Crim.R. 52 is not optional: "In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings." *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶ 19; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 9 (same). It was fundamental error for the majority opinion not to address Crim.R. 52.

In a larger sense, the issue presents a matter of separation of powers and a matter of the majority opinion exceeding the prerogatives of this Court. Although this Court promulgated Crim.R. 11(C)(2)(c) pursuant to its rule-making authority under Article IV, Section 5(B), of the Ohio Constitution, such rules cannot expand substantive rights and are subject to disapproval by the General Assembly. The passage of Crim.R. 11(C)(2)(c) in 1973 was accompanied by the passage of Crim.R. 52, and Crim.R. 52 on its face broadly reaches "any error" the trial court might commit and "any * * * defect" and "any * * * irregularity" that might occur. The General Assembly was given no notice that Crim.R. 52 would be disregarded in cases of plea-advisement error, yet that is the effect of the majority's holding, which concludes that omission of the oral beyond-reasonable-doubt advisement always requires reversal, even in the face of information in the record, as exists here, showing that no objection was made and showing that defendant approved a written plea

indicating he was waiving the State's beyond-reasonable-doubt burden.

One doubts whether the General Assembly would have allowed Crim.R. 11(C)(2)(c) to go into effect if it had known that Crim.R. 52 would be disregarded in this way. Indeed, the General Assembly has provided its own rule of law on this topic by requiring a showing of prejudice before there will be a reversal of a conviction. R.C. 2945.83(E) ("[N]or shall any judgment of conviction be reversed in any court because of: * * * [a]ny other cause unless it appears affirmatively from the record that the accused was prejudiced thereby * * *."). Since Crim.R. 52 mandates an assessment of prejudice under harmless-error and plain-error review, that rule is consistent with the statutory command. The majority opinion here sets up an automatic-reversal rule that applies regardless of whether there was an objection, and regardless of whether prejudice occurred. Such a principle is inconsistent with Crim.R. 52 and R.C. 2945.83(E).

A. Majority Opinion Erred in Elevating Oral Advisement to "Constitutional" Requirement

The State argued that the issue was not whether the beyond-reasonable-doubt right was constitutional in nature but, rather, whether the *oral advisement* was constitutionally required. The State argued that the oral advisement was not constitutionally required because it was not amongst the narrow list of three *Boykin* rights set forth in *Boykin v. Alabama* (1969), 395 U.S. 238, and because *Boykin* does not require an oral advisement at all, even for the three *Boykin* rights.

The majority disagreed. The majority summarized the State's argument in paragraph 20 and then, in paragraph 21, "reject[ed] the state's contention."

Subsequent parts of the opinion confirm that the majority believed that the omission of the oral beyond-reasonable-doubt advisement was constitutional error. In paragraph 26, the majority concluded that, under *State v. Ballard* (1981), 66 Ohio St.2d 473, a plea is "*constitutionally infirm*" if the oral plea colloquy omits one of the five constitutional rights listed in Crim.R. 11(C)(2)(c). In paragraph 24, the majority stated that, under *Ballard* and *Boykin*, "a defendant must be apprised of certain constitutional rights * * *," and then held in footnote 3 that "the principles applicable to the '*Boykin* rights' extend to all five rights listed in Crim.R. 11(C)(2)(c) in Ohio."

In paragraph 29, the majority quotes *Boykin* for the proposition that "We cannot presume a waiver of these * * * important federal rights from a silent record," omitting the key word "three" from the *Boykin* phrase "these three important federal rights." The majority then states that, "When the record confirms that the trial court failed to perform this duty, the defendant's plea is *constitutionally infirm* making it presumptively invalid." (Emphasis added)

The State respectfully submits that the majority's constitutionalization of an oral-advisement requirement represents obvious error warranting reconsideration. This Court had already stated that an oral advisement of the beyond-reasonable-doubt right "is not required by *Boykin* * * *," see *State v. Sturm* (1981), 66 Ohio St.2d 483, 484 n. 2, and had conspicuously omitted the oral beyond-reasonable-doubt advisement from the list of advisements in *Ballard* requiring "strict compliance."

Language from various United States Supreme Court cases further indicated that the Court had not expanded the list of three *Boykin* rights. *United States v. Ruiz* (2002),

536 U.S. 622, 628-29; *United States v. Mezzanatto* (1995), 513 U.S. 196, 201; *Godinez v. Moran* (1993), 509 U.S. 389, 397 n. 7; *Parke v. Raley* (1992), 506 U.S. 20, 29. And other state supreme courts had concluded that an oral beyond-reasonable-doubt advisement is not constitutionally required. *People v. Saffold* (2001), 465 Mich. 268, 281, 631 N.W.2d 320, 328; *People v. Wade* (Colo. 1985), 708 P.2d 1366, 1369-70.

Even if the oral beyond-reasonable-doubt advisement were a *Boykin* right, the majority failed to recognize that *Boykin* does not require an oral advisement of that right. This Court has at least twice recognized that "specific oral interrogation" is not constitutionally required for even the original 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 majority opinion

did not mention these holdings from *Billups* or *Stone*.

Indeed, although paragraph 15 of the majority opinion characterized *Billups* and *State v. Strawther* (1978), 56 Ohio St.2d 298, as cases involving "Ohio's substantial-compliance standard" as applicable to the nonconstitutional notifications in Crim.R. 11(C)(2)(a) & (b), those cases both involved the failure to give one or more of the oral advisements of constitutional rights required by Crim.R. 11(C)(2)(c). Both decisions upheld pleas in the absence of all of the required advisements, and both did so based at least in part on the written plea that had been approved by the defendant. *Ballard* even discussed *Strawther* and appeared to cite it with approval.

In going beyond *Stone*, *Billups*, and *Strawther* to constitutionalize an oral-advisement requirement, the majority opinion creates a conflict with a strong body of national case law. "[T]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and knowingly." *Wilkins v. Erickson* (C.A. 9, 1974), 505 F.2d 761, 763, quoting *Brady v. United States* (1970), 397 U.S. 742, 747-48 n. 4. The question is whether the record as a whole shows the voluntary and intelligent nature of the plea; "Specific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea." *Wilkins*, 505 F.2d at 763, 764; *Fontaine v. United States* (C.A. 6, 1975), 526 F.2d 514, 516 (collecting cases; "*Boykin* does not require separate enumeration of each right waived and separate waivers as to each."); see, also, *Billups*, 57 Ohio St.2d at 37 nn. 3 & 4 (collecting cases); *Jhun v. State* (Haw. 2004), 2004 Haw. LEXIS 348 (collecting cases: "this is the prevailing view among the federal appellate courts.").

The State respectfully submits that reconsideration is necessary because the majority opinion incorrectly expands the constitutional standard under *Boykin*.

B. The Majority Opinion was a Constitutional Ruling

Defendant might try to limit the scope of the majority's ruling by contending that the majority 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. The majority specifically rejected the State's argument that the advisement was not constitutionally required, and the majority twice characterized the failure to give the advisement as resulting in a plea that is "constitutionally infirm." The majority also cited or quoted *Boykin* eight times in the key passages of paragraphs 24 through 30. Thus, although the majority also referred to Crim.R. 11(C)(2)(c), its ruling was bottomed on a finding of a constitutional violation.[1]

Any retreat by the majority from that understanding would mean that the State should win this appeal. The majority's requirement of per se reversal represents a "structural error" resolution of the case, as conceded by defendant's "structural error" arguments at pages 15 to 17 of the defense merit brief. But only *constitutional* error can amount to "structural error" always requiring reversal. As this Court stated earlier this year, "[i]f an error in the trial court is not a constitutional error, then the error is not structural error." *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶ 21.

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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."

"Although all structural errors are by nature constitutional errors, not all constitutional errors are structural." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 18. See, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 55; *Perry*, 101 Ohio St.3d 118, at ¶ 24. There must be a constitutional violation at the threshold in order for there to be a requirement of automatic reversal.

In addition, the constitutional "infirmity" discussed in the majority opinion necessarily must relate to legal requirements that are above and beyond a violation of a mere procedural rule. A "mere error of state law" is not a violation of due process. *Engle v. Isaac* (1977), 456 U.S. 107, 121 n. 21. A violation of a statutory advisement requirement does not perforce constitute a violation of due process. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 30 (statute's immigration-advisement requirement not constitutionally required); *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 38 ("written waiver provision of Crim.R. 44 is not a constitutional requirement"). Violation of Crim.R. 11 does not necessarily amount to a violation of due process. *Riggins v. McMackin* (C.A. 6, 1991), 935 F.2d 790, 794-95 (the "sole inquiry should have been * * * whether Riggins' guilty plea comported with the protections of due process."). Moreover, Crim.R. 11(C)(2)(c) cannot be construed to raise the constitutional bar for accepting such pleas because such a constitutional matter would be "substantive" and therefore would fall outside this Court's rule-making power under Article IV, Section 5(B), Ohio Constitution. *Francis*, ¶¶ 27, 29 (statute's immigration-advisement requirement creates "substantive right" that supplements and prevails over Criminal Rules).

As the foregoing shows, the majority's ruling is *expressly* based on a finding of constitutional error, and it *must be* based on such error, or else the ruling would need reconsideration. If the ruling were really based on a finding of only non-constitutional error under Crim.R. 11(C)(2)(c), then the ruling will need reconsideration because non-constitutional error cannot support the majority's requirement of automatic reversal, because the majority opinion misleads the reader into thinking that there is a constitutional basis for the decision, and because, constitutional or not, the error is subject to review under Crim.R. 52.

C. No Analysis of Criminal Rule 52

The majority acknowledged the State's argument that Crim.R. 52 should guide review of plea-advisement error and that defendant's plea should be upheld under a harmless-error or plain-error analysis. Opinion, at ¶ 6. However, the majority did not address these arguments. Those arguments should be fully addressed now.

The United States Supreme Court has applied a plain-error analysis to unobjected-to plea-advisement error under the identical federal version of Crim.R. 52(B). *United States v. Vonn* (2002), 535 U.S. 55. Moreover, there is no textual or logical reason not to apply Crim.R. 52 (A) and (B) to advisements of constitutional rights under Crim.R. 11.

This Court has recognized the relevance of Crim.R. 52(A) in the context of plea-advisement error by citing that rule. *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *Billups*, 57 Ohio St.2d at 39. *Billups* rightly stated that courts should 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.

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.; *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. Thus, Crim.R. 52(A) unqualifiedly applies to "any error" and "any defect," and Crim.R. 52(B) applies to "errors and defects" without limitation.

The majority opinion here did not address these issues, and the majority's finding of a constitutional error did not obviate applying Crim.R. 52(A) and (B). Those rules are regularly applied to claims of constitutional error.

Defendant might try to argue that the majority adequately addressed Crim.R. 52(A) and (B) by stating at one point that "the trial court plainly failed to orally inform Veney * * *", see Opinion, at ¶ 30, and by stating at another point that *Ballard* "cited *Boykin* * * * for the principles that a defendant must be apprised of certain constitutional rights 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." Opinion, at ¶

24. The problem, though, is that neither *Boykin* nor *Ballard* mention Crim.R. 52 or any equivalent provision. These cases are simply silent on how plain-error analysis applies to plea-advisement error. Although *Ballard* and its "strict compliance" approach might be perceived to be inconsistent with Crim.R. 52, such perceived implications are not precedent, since this Court is "not bound by any perceived implications" of an earlier decision. *Payne*, 114 Ohio St.3d 502, at ¶ 12. "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication." *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus.

The passage is also incorrect in claiming that *Ballard* cited *Boykin* for the proposition that "plain error results when a trial court fails to explain those rights." Neither *Ballard* nor *Boykin* in the passages in question were referring to "explain[ing] those rights." Rather, they only referred to the absence of an affirmative showing that the plea "was intelligent and voluntary." *Ballard*, 66 Ohio St.2d at 476, quoting *Boykin*, 395 U.S. at 242. The "affirmative showing" required by *Boykin* does not equate to requiring an oral advisement or a requirement to "explain those rights."

The majority's statement that the trial court "plainly failed" to give the advisement is not a faithful application of Crim.R. 52(B). The text of Crim.R. 52(B) itself requires that the error must be an error "affecting substantial rights," and so Crim.R. 52(B) does not support the majority's conclusion that automatic reversal is required without any assessment of prejudice.

In *Wamsley*, this Court recently criticized an appellate court for confusing the concepts of "structural error" and "plain error":

> **{¶ 27}** Confusing structural error and plain error, two completely separate and distinct standards, the appellate court discussed plain error while using terminology relevant only to structural error, and concluded that it had no choice but to reverse. In so doing, the appellate court failed to complete the full plain error analysis, which would have included an inquiry into whether the defendant proved that the error affected substantial rights. See *United States v. Olano* (1993), 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508. Further, we note that even if the defendant satisfies this burden, the appellate court has discretion to disregard the error and should correct it "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.

A "full plain error analysis" would include an assessment of the error under the three-pronged test for plain error set forth in *State v. Barnes* (2002), 94 Ohio St.3d 21, 27-28.

In reviewing the present case, the majority engaged in no such analysis of whether the error affected substantial rights or caused a manifest miscarriage of justice. Instead, the majority's automatic-reversal holding intentionally abjured any assessment of prejudice or justice. As a result, the "plainly failed" language in paragraph 30 cannot be taken as a true assessment of "plain error."

As addressed in the State's earlier briefing, which the State incorporates by reference here, the plea must be affirmed under plain-error and/or harmless-error review. The State particularly incorporates its discussions of *Vonn* and why it is appropriate to apply plain-error review to plea-advisement error.

The only reasonable assessment of this case is that no manifest miscarriage of

justice occurred and that defendant suffered no prejudice. Defendant Veney acknowledged that he had signed the Entry of Guilty Plea and that he had reviewed his constitutional rights with his counsel. (T. 3, 4) By signing the Entry of Guilty Plea, defendant was acknowledging that "I further understand that by pleading 'Guilty', I waive a number of important and substantial constitutional, statutory and procedural rights," including the right "to require the State to prove my guilt beyond a reasonable doubt on each crime herein charged at a trial * * *." (See Entry, at p. 1) Defendant signed both pages of the Entry.

Defendant's counsel also signed the document twice. Counsel also certified on the second page that he had counseled defendant to the best of his professional ability as to the facts and law and that defendant was "act[ing] knowingly, voluntarily, and intelligently in such matter." (Id. at p. 2)

D. No Analysis of Structural Error Doctrine

In the past several years, this Court has laid out the prerequisites to finding an error to be "structural" so as to require automatic reversal without a specific showing of prejudice. See, e.g., *Wamsley*, supra. The majority here failed to engage in any analysis of the structural-error issue. The case should be reconsidered to address the structural-error issue.

Structural-error analysis is inappropriate here because there was no objection. But even if an objection was not required, and even if an oral beyond-reasonable-doubt advisement is constitutionally required, the State adheres to its view that a violation of that requirement does not amount to "structural error." Most constitutional errors can

be harmless, and there is a strong presumption that constitutional error will be subject to harmless-error analysis. *Neder v. United States* (1999), 527 U.S. 1, 8. "[W]e have found an error to be 'structural' and thus subject to automatic reversal, only in a 'very limited class of cases.'" Id. at 8, quoting *Johnson v. United States* (1997), 520 U.S. 461, 468. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding." *United States v. Dominguez-Benitez* (2004), 542 U.S. 74, 81. A "structural" error "infects the entire" proceeding and "necessarily" renders the proceeding "fundamentally unfair." *Neder*, 527 U.S. at 8-9. The limits on characterizing error as "structural" apply to plea proceedings. See *Dominguez-Benitez*, 542 U.S. at 81.

The omission of an oral advisement does not necessarily render the plea-taking process fundamentally unfair. As shown in *Strawther*, 56 Ohio St.2d 298, at syllabus, the execution of a written plea of guilty can provide a reliable substitute showing that an oral advisement would have made no difference. See *Dominguez-Benitez*, 542 U.S. at 85 (plea agreement "tends to show that the Rule 11 error made no difference to the outcome here."). Other proceedings in the same case could show that the defendant was already advised of the matter that would have been covered by the advisement. See, e.g., *Vonn*, supra. "The omission of a single Rule 11 warning without more is not colorably structural." *Dominguez-Benitez*, 542 U.S. at 81 n. 6.

In the end, the absence of the advisement does not "infect" the entire plea-taking process so as to make it impossible to have a knowing, voluntary, and intelligent plea.

There is no reason to make this advisement error "structural" and thereby immune to harmless-error review. Courts can address the issue on a case-by-case basis to determine whether the error was harmless. See *Neder*, 527 U.S. at 14.

In this case, the omission of the oral plea advisement was harmless given defendant's approval of the written plea and given his oral statement that he and his counsel had reviewed his constitutional rights.

E. Conclusion

In light of the foregoing, the State respectfully requests reconsideration of the October 9th decision. Upon such reconsideration, this Court should uphold defendant's guilty plea.

Respectfully submitted,

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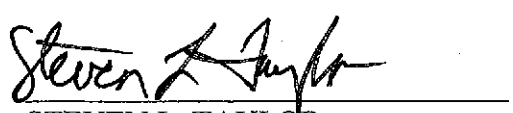
Counsel for Plaintiff-Appellant

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.



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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.