ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 2010-1448
Plaintiff-Appellant,	*	On appeal from the Lucas County Court of Appeals, Sixth Appellate District
-vs-	*	
CHRISTOPHER BARKER,	*	Court of Appeals Case No. L-09-1139
Defendant-Appellee.	*	

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INTRODUCTION

The present case involves the invalidation of a plea based upon a single word during a plea colloquy. During the discussion of the rights waived by entry of the plea, the trial court informed appellee that his plea would result in the relinquishment of his right to "call" witnesses on his behalf. The Sixth Appellate District found that this verbal description of the right to compulsory process of witnesses was insufficient because it failed to use words such as "power to force," "subpoena," use the "power of the court to force," or "compel." Further, the Court of Appeals held that the written plea might not be considered in the evaluation of the plea's validity because the trial "court cannot simply rely on other sources to convey these constitutional rights." *State v. Barker*, 6th Dist. No. No. L-09-1139, 2010-Ohio-3067, ¶13, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

Ohio's trial courts must strictly comply with the obligation to inform defendants of the constitutional rights waived by entry of a no contest or guilty plea. Id., syllabus. The verbal exchange between the court and the defendant serves to ensure both the finality of pleas and defendants' "full understanding" of the rights waived by pleas. *State v. Ballard*, 66 Ohio St.2d 473, 478-479, 423 N.E.2d 115. The twin goals of the plea colloquy are embodied in the language of Crim.R. 11(C)(2)(c), which imposes on the trial court the requirement of not only "informing the defendant" of the rights in question but also "determining that the defendant understands" those rights.

Invalidation of the plea under the circumstances of this case serves neither to ensure the finality of pleas nor to promote the defendant's understanding of the rights

waived by the plea. By rejecting commonly used words in favor of legal terminology that may not be understood to a lay person, the holding does not promote the defendant's full understanding of the rights to be waived by entry of a plea. By permitting a close examination of the language employed by the trial court, and excluding consideration of the written plea executed and acknowledged by appellee and his trial counsel, the holding does not promote finality of the plea. Accordingly, the State seeks reversal of the Sixth Appellate District's holding.

STATEMENT OF THE CASE AND FACTS

On January 7, 2009, appellee was indicted on five counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), all felonies of the third degree. Appellee initially entered a plea of not guilty, but he subsequently withdrew that plea and entered a plea of no contest to the first three counts of the indictment.

At his plea hearing, appellee stated that he was 28 years old, could read and write and understand English, and was not under the influence of drugs or alcohol. (Tr. April 22, 2009 at pp. 2, 8.) He stated that no threats or promises were made to induce him to enter the plea. (Id. at p. 8.)

The trial court explained to appellee that his attorney had tendered a no contest plea to three counts of unlawful sexual conduct with a minor, each of which was a felony of the third degree. The trial court also informed appellee that the prison term for each count was from one to five years, and that the sentences could be run consecutively for a total maximum prison term of 15 years. (Id. at p. 3.) Appellee acknowledged that he understood the charges and the potential prison terms attached to each, as well as the potential total sentence. He also stated that he understood that

the maximum possible fine for each of the offenses was $10,000, for a total possible fine of $30,000, and that he would be required to register as a Tier II sex offender. (Id. at p. 4.) Appellee agreed that he understood that he would be subject to a mandatory period of five years of post-release control, and that he understood the consequences of a violation of post-release control. (Id. at pp. 5-6.)

Appellee acknowledged that he understood he was relinquishing certain constitutional rights:

> THE COURT: The State is recommending that counts four and five will be nolled at the time of sentencing. I do have to ask you, do you understand when you're entering a plea you're giving up your right to a jury trial or bench trial, also giving up your right to call witnesses to speak on your behalf or question witnesses that are speaking against you. Do you understand that?
>
> A. Yes, Your Honor.
>
> THE COURT: In addition, sir, if you had gone to trial, you would have had a right to testify. If you chose not to testify, no one could have made any comment on your choice not to testify. Knowing that you had that option, sir, do you still wish to enter your plea?
>
> A. Yes, Your Honor.
>
> THE COURT: Now you're also waiving your right to have the prosecutor prove your guilt beyond a reasonable doubt on each and every element of the charge, and in all likelihood I'll be basing my finding of guilt solely on the statements made by the prosecutor as to what evidence will be presented at trial and what facts are alleged in the indictment. Do you understand that?
>
> A. Yes, Your Honor.

(Tr. at pp. 8-10.)

Finally, appellee acknowledged that he was satisfied with his attorney's advice, counsel and competence. (Id. at p. 7.) He said that he had reviewed the written plea

with his attorney, and he did not have any questions for the court. (Id. at pp. 12-13.) The written plea which appellee executed included the following statement:

> I understand by entering this plea I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the court to call witnesses to testify for me.

(Plea form executed April 22, 2009 and journalized May 7, 2009.) The written plea, consistent with appellee's oral statements, also acknowledged that he was "satisfied with my attorney's advice, counsel and competence." (Id.)

The prosecutor's statement of facts supporting the plea noted that the charges resulted from sexual conduct between appellee, who was between 23 and 24 during the time of the offenses, and his half-sister, who was thirteen. (Id. at p. 11.) In October, 2008, appellee's girlfriend found him and the victim naked in bed together in the girlfriend's home. Appellee later admitted during a police interview that he supplied the victim with drugs and alcohol and had vaginal, anal and oral sex with the victim on average of three to four times a month over a three year period. (Id. at p. 12.)

Appellee was sentenced to a term of four years imprisonment for each count, to be served consecutively to each other, for a total term of twelve years.

In his direct appeal, appellee claimed that he did not knowingly, intelligently and voluntarily enter his plea of no contest, because the trial court's verbal colloquy did not adequately inform him of his right to compulsory process of witnesses. The Sixth District reversed, reasoning that the trial court's use of the word "call" during its plea colloquy did not adequately convey the court's ability to compel a witness to testify, and that the written plea could not be considered in evaluating whether the trial court strictly

complied with Crim.R. 11(C)(2)(c). See *State v. Barker*, supra, 2010-Ohio-3067.

The Sixth District's holding should be reversed, because the word "call" commonly conveys a meaning of compulsion, and because any questions about the constitutional right in question were answered in the written form executed and acknowledged by appellee.

ARGUMENT

Proposition of Law No. 1: A trial court strictly complies with Crim.R. 11(C)(2)(c) when its description of a constitutional right employs language reasonably intelligible to the defendant and consistent with that constitutional right. The right to compulsory process of witnesses is sufficiently described by the phrase "right to call witnesses to speak on your behalf." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, explained.

When a defendant enters a plea of no contest in a felony case, Crim.R. 11(C)(2)(c) requires that the trial court address the defendant personally and advise him that the plea will result in the waiver of certain constitutional rights: (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. *Veney*, supra, 2008-Ohio-5200, syllabus. *Veney* unambiguously stated that a trial court must "strictly comply" with the obligation to inform a defendant of the rights listed in Crim.R. 11(C)(2)(c). Id. at ¶21.

In this case, the trial court attempted to comply with its obligation to inform appellee of the rights listed in Crim.R. 11(C)(2)(c). However, the Sixth Appellate District objected to the trial court's choice of words with respect to the description of one of

those rights. The trial court informed appellee that his plea would result in the waiver of the "right to call witnesses to speak on your behalf." The appellate court rejected that phrase, reasoning that it was insufficient to inform appellee of the trial court's authority to compel witnesses to testify on his behalf in court.

Significantly, *Veney* confirmed that strict compliance does not require the use of exactly the same wording as that employed by Crim.R. 11(C)(2)(c):

> . . . 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.

Id., at ¶27. *Veney* adhered to the established test for strict compliance, an inquiry as to whether the trial court employs language that is "reasonably intelligible" to the defendant: "Failure to use the exact language contained in Crim.R. 11(C) . . . 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.*" *Veney*, supra, 2008-Ohio-5200 ¶27, quoting *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115. Accord *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, 422 N.E.2d 853.

The "reasonably intelligible" standard supports one of the primary purposes of the plea colloquy, recognized by this Court to be the defendant's interest in "having a full understanding of what rights he waives by pleading guilty." *Ballard,* 66 Ohio St.2d at 478. The trial court's choice of wording served this goal.

The use of common words, including the word "call," instead of legal terminology, best ensures that defendants actually understand the rights forfeited by entry of a plea. "Call" is commonly recognized to be synonymous with "summon."

Dictionary.com Unabridged. Random House, Inc. http://dictionary.reference.com/browse/call (accessed: August 12, 2010). This connotation of the word "call" is evident in its everyday usage. Citizens may be "called" for jury duty, a call that they may not legally ignore. Members of military reserves may be "called up" or summoned for active duty. Banks may "call in" a loan, or demand its payment. Individuals may be "on call" in their professions, meaning that they may be required to perform professional duties. Each such usage of the word "call" indicates a summons or a requirement that individuals ignore only to their legal, financial or professional peril.

The word "call" thus conveys the idea that one is required to appear or to perform. This connotation arises without the use of words such as "subpoena" or "compulsory," words that may not even be within a lay person's vocabulary:

> In addition, to "call" means to "summon." Garner, Black's Law Dictionary (8th Ed.2004) 217. Therefore, I believe that the trial court adequately conveyed the nature of this right to the defendant. In fact, I believe that the trial court's words conveyed an even clearer message than does a recitation of the right to "have compulsory process for obtaining witnesses." Crim.R. 11(C)(2)(c). The words "compulsory process," "subpoena," and "compel witnesses" have legal significance and implications that a defendant may not know or understand.

State v. Cummings, 107 Ohio St.3d 1206, 2005-Ohio-6506, ¶14, 839 N.E.2d 27, Lundberg-Stratton, J., dissenting.

The use of such legal terminology has a distinct disadvantage: as the dissenting opinion in *Cummings* accurately predicted, the use of the legal terms "subpoena" or "compulsory process" invite the argument that the defendant did not understand the right he was waiving because he did not know the meaning of the words used. Ohio's lower appellate courts have already seen precisely those arguments, based on factors

such as the defendant's intellectual limitations or youth. See *State v. Pigge*, 4th Dist. No. 09CA3136, 2010-Ohio-6541, ¶12; and *State v. Goodwin*, 8th Dist. No. 92349, 2010-Ohio-1210, ¶15.

In contrast with the Sixth District's holding in this case, other Ohio courts have upheld the validity of pleas when the trial court used the phrase "right to call witnesses" in describing the right to compulsory process. The Second Appellate District considered and found adequate a verbal description of the defendant's "right to have [his] own witnesses come in here and testify." See *State v. Ward*, 2nd Dist. No. 21044, 2006-Ohio-832, ¶12. Similarly, the Ninth District found that a trial court adequately informed a defendant of his right to compulsory process by stating "[y]ou are giving up your right to call witnesses on your behalf." *State v. Anderson* (1995), 108 Ohio App.3d 5, 12, 669 N.E.2d 865.

Courts from other jurisdictions have reached similar conclusions. See, e.g., *United States v. Adams* (C.A. 7, 2007), 256 Fed. Appx. 796, 2007 U.S. App. LEXIS 26241 (noting that "the magistrate judge informed Adams of his right to call witnesses on his behalf, and the subpoena power is implicit in this right"); and *Gomez v. State* (Tex. App. - Houston [1st Dist.] March 2, 2000), 2000 Tex. App. LEXIS 1432 (not designated for publication) (when defendant waived "the appearance, confrontation, and cross-examination of witnesses," he waived the "right to call witnesses" and thereby "effectively waived his right to compulsory process").

The language required by the Sixth Appellate District, with its focus on legal terminology, is inconsistent with the goal of informing the defendant of his rights in such

a way that he will actually understand those rights. Furthermore, the Sixth District's rigorous examination of the trial court's language undermines the second interest recognized in *Ballard*, "[t]he interest of society in the finality of guilty pleas." Essentially, the Sixth District eliminated from its consideration the common connotations of the word "call" that carry an element of authority, force or compulsion. The State respectfully submits that when the trial court uses a word carrying a common connotation consistent with the right being described, reviewing courts should not presume that the defendant does not understand that common connotation. Requiring that a constitutional right be described fully and in every conceivable way does not promote finality and is inconsistent with other Ohio cases governing plea colloquies.

Ballard itself demonstrates that trial courts need not explicitly state every conceivable aspect of a constitutional right in order to provide an adequate colloquy. In *Ballard*, the trial court did not explicitly refer to the language "right to a jury trial" in informing the defendant of his rights. The trial court informed the defendant that "neither judge nor jury could draw any inference if the appellant refused to testify," and that the defendant "was entitled to a fair and impartial trial under law." In *Ballard*, this Court did not entertain a theoretical argument that the defendant might believe that the only "fair and impartial trial" to which he was entitled was a bench trial, just as the Court should not now entertain the theoretical possibility that a defendant might interpret "call" to mean an optional request to which a witness might or might not comply.

Similar reasoning is also apparent in cases rejecting the notion that every ramification of a constitutional right must be explained in detail in order to have a valid

plea hearing. For example, the Eighth District has found that a reference to the "right to remain silent" is sufficient to encompass the privilege against self-incrimination, despite the deendant's argument that the phrase did not sufficiently inform the defendant that the prosecution could not comment upon his failure to testify. See *State v. Flynn*, 8th Dist. No. 93588, 2010-Ohio-3191, ¶8-10. Similarly, the Seventh District has considered a plea colloquy in which the trial court stated that the defendant could not be convicted unless the jurors were "unanimously convinced beyond a reasonable doubt of each element of this offense" without stating that the prosecution had the burden of proof. The Seventh District found that the "trial court did inform Elmore of the state's burden, in a manner reasonably intelligible to him, notwithstanding the omission of identifying the state by name." *State v. Elmore*, 7th Dist. No. 08-JE-36, 2009-Ohio-6400, ¶13-15.

The State respectfully submits that the reasoning of *Ballard*, *Flynn* and *Elmore* all analyze the trial court's language in a fundamentally different manner than the Sixth District analyzed the plea colloquy in this case. Rather than requiring a full explanation of each aspect of the right at issue, *Ballard*, *Flynn* and *Elmore* all validated colloquies under the "reasonably intelligible" standard. Application of that standard to the phrase "call witnesses on your behalf" should similarly have resulted in approval of the colloquy in this case.

This Court has observed that a principle interest served by the plea colloquy requirement is informing the defendant of the rights that he will waive by entry of a plea. Moreover, on several occasions this Court has rejected the notion that the words of Crim.R. 11 be tracked precisely, and this Court has never required that trial courts

employ a scripted recitation of rights. Yet the holding of the Sixth District invites trial courts to do precisely that. If a plea colloquy may be invalidated by virtue of the use of one word--particularly a word that has shades of meanings consistent with the legal right in question--then a script-driven colloquy is a likely outcome. Any such rote recitation of rights will add little to the defendant's actual understanding of the rights waived by entry of a plea of no contest. Accordingly, the State urges that the decision of the Sixth Appellate District be reversed on grounds that the terminology employed by the trial court strictly complied with the requirements of Crim.R. 11(C)(2)(c).

Second Proposition of Law: When the trial court verbally addresses a constitutional right during a plea colloquy, an ambiguity in wording may be clarified by reference to other portions of the record, including the written plea.

In addition to the trial court's verbal statements during the colloquy, appellee had the benefit of notices contained in the written plea. The written plea, executed by appellee and his counsel, acknowledged relinquishment of his right to a trial by jury "where I could use the power of the court to call witnesses to testify for me." The Sixth Appellate District chose to disregard the written plea, reasoning that this Court's holding in *Veney* precluded consideration of anything other than the verbal colloquy. That holding ignored this Court's prior holding in *Ballard*, as well as key factual distinctions between *Veney* and *Ballard*.

In *Ballard,* this Court noted that the trial court "may not relieve itself of the requirement of Crim.R. 11(C) by exacting comments or answers by defense counsel as to the defendant's knowledge of his rights." Id. at 481. However, a reviewing court may consider "such a colloquy . . . in the totality of the matter." Id. *Ballard* thus stands for

the proposition that if the trial court ascertained that defense counsel advised the defendant of his rights, a reviewing court may consider this as a factor in determining whether the totality of the circumstances supports the trial court's finding that the defendant knowingly, intelligently, and voluntarily entered the plea. Id.

In this case, of course, appellee executed a statement confirming that his plea would waive his right to "use the power of the courts to call witnesses," and he further confirmed that he had discussed the form with his counsel. *Ballard* would permit consideration of the plea form and the defendant's testimony that he reviewed the plea form with his counsel.

Significantly, *Veney* did not overrule or limit *Ballard.* To the contrary, *Veney* cited *Ballard* with approval and extended its "reasonably intelligible" standard to the right at issue in that case. *Veney*, supra, ¶27.

The facts of this case are more similar to those of *Ballard* than to the facts of *Veney.* In *Ballard*, the issue was whether the trial court had properly informed the defendant of his right to a jury trial, by stating that "neither judge nor jury could draw any inference if the appellant refused to testify," and that the defendant "was entitled to a fair and impartial trial under law." In contrast, *Veney* involved no discussion of the right whatsoever during the plea colloquy--the trial court plainly "**failed** to orally inform" the defendant of the right in question. Id. at ¶30 (emphasis added). Under those circumstances, "the court cannot simply rely on other sources to convey these constitutional rights." Id. at ¶29.

As in *Ballard*, and unlike the situation described in *Veney,* in this case, the trial

court did not "simply" rely on the written plea. Rather, the trial court engaged in a full plea colloquy with appellee and specifically addressed the right of compulsory process of witnesses. The State submits that even if the trial court's description of the right was somehow technically deficient in its choice of wording, the "totality of the circumstances" test set forth in *Ballard* permits reference to the entire record, not just the verbal colloquy, when there was a discussion of the right in question.

The distinction between this case and the facts described in *Veney* is material. Ohio's appellate courts have frequently held that a written plea agreement may not be relied upon when the right is entirely omitted from the plea colloquy, but when a discussion of the right does occur, the written plea may be used to clarify the colloquy. See, e.g., *State v. Green*, 7th Dist. No. 02CA217, 2004-Ohio-6371, ¶15 ("[o]ral ambiguities in the oral colloquy can be reconciled in some cases by a written acknowledgment of the plea and waiver of the trial rights," although "the writing does not substitute for an oral exchange when it is **wholly omitted**"); *State v. Dixon*, 2d Dist. No. 01CA17, 2001-Ohio-7075, at [*7] ("[a] written acknowledgment of a guilty plea and a waiver of trial rights executed by an accused can, in some circumstances, reconcile ambiguities in the oral colloquy that Crim.R. 11(C) prescribes"). Accord *State v. Ballard*, 6th Dist. Nos. L-04-1070, L-05-1070, L-05-1027, 2006-Ohio-1863, ¶14. Although *Green*, *Dixon* and *Ballard* predated *Veney*, similar reasoning has been followed in the wake of *Veney*. See *State v. Jordan*, 10th Dist. No. 09AP-1080, 2010-Ohio-2979, ¶9 ("The record, taken as a whole, clearly indicates that Jordan knew the particulars about how defense witnesses would be made available"). Accord *State v.*

Nicholas, 11th Dist. No. 2009-P-0049, 2010-Ohio-1451, ¶20 (considering a written plea as well as plea colloquy in assessing defendant's claim that he was not informed of his right of compulsory process).

This same reasoning has been apparent in the evaluation of claims that the trial court failed to state explicitly that certain rights were being waived. Where the waiver was obvious in the remaining portion of the record, such claims have been rejected. See *State v. McKenna*, 11th Dist. 2009-T-00334, 2009-Ohio-6154, ¶69 (considering a query directed toward defendant's counsel as well as a written guilty plea, signed by McKenna, stating that "he was advised that by pleading guilty, he is 'waiving (giving up)' certain constitutional rights"); and *State v. Quinones,* 6th Dist. No. OT-09-013, 2010-Ohio-469, ¶20 (considering colloquy and written plea in determining that defendant was not only informed of his rights, but that he understood that he was waiving those rights by entry of his plea).

Interestingly, Crim.R. 11(C)(2)(c) is similar in wording to Crim.R. 11(C)(3), which requires that before accepting a plea of guilty or no contest to a charge of aggravated murder, the court shall "advise the defendant" that his plea will waive the right to a jury trial, and "determine that the defendant understands the consequences of the plea." However, this Court has explicitly held that the trial court need not "interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial" and "'[t]he Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel." See *State v. Ketterer*, 111 Ohio St.3d 70,

2006-Ohio-5283, 855 N.E.2d 48, ¶65 ("*Ketterer I*"), quoting *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus. A "complete or technical understanding of the jury trial right" is not required "in order to knowingly and intelligently waive it." *Ketterer I*, supra, 2006-Ohio-5283, ¶68.

This Court has recognized that trial courts "must conduct proceedings in capital cases with a strict level of care that comports with their unique status." *State v. Ketterer*, 126 Ohio St. 3d 448, 464, ¶78, 2010-Ohio-3831, 935 N.E.2d 9, quoting *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746, 911 N.E.2d 862, ¶23. When a waiver of a constitutional right may be sufficiently proven by a written document in a capital case, then a verbal discussion of a right should be capable of clarification by reference to a written document "signed by the defendant, filed with the court, and made in open court, after . . . opportunity to consult with counsel." *Ketterer I*, supra, ¶65. An interpretation of *Veney* that precludes reference to the written plea thus places a plea in a non-capital case on higher footing than a waiver of a jury trial in a capital case.

Finally, the State notes that permitting consideration of the whole record, rather than only the record of the plea colloquy, was endorsed by the United States Supreme Court when a court failed, before accepting the defendant's guilty plea, to advise the defendant of his right to counsel as required by Rule 11 of the Federal Rules of Criminal Procedure. See *United States v. Vonn* (2002) 535 U.S. 55, 75-76, 152 L. Ed. 2d 90, 122 S. Ct. 1043, 1055.

Vonn is in accordance with the law of the federal courts as well as a significant number of state courts. An examination of the authorities cited in *Ballard* is instructive.

In *Ballard,* this Court analyzed the split among jurisdictions applying *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. *Boykin* itself did not specify that the defendant must be verbally informed of the constitutional rights waived, and *Ballard* noted that some courts interpreted *Boykin to* require "guilty pleas to be no more than voluntarily and knowingly entered," so that "failure to mention, in any manner, a *Boykin* right does not necessarily result in an involuntary and unknowing guilty plea." On the other hand, some courts held "that for a guilty plea to be voluntarily and intelligently entered, the defendant must be informed that he is waiving his *Boykin* rights." *Ballard*, of course, chose to follow the latter view. *Ballard*, 66 Ohio St.2d at 477-78.

Of the jurisdictions listed in support of the latter view, several permit consideration of the entire record, including any written plea. See, e.g., *Bowens v. State* (1990), 570 So.2d 844, 847, 1990 Ala. Crim. App. LEXIS 1060 (considering a written form as well as a plea colloquy in determining whether a defendant's plea was knowing and voluntary); *State v. Boone* (Iowa 1980), 298 N.W.2d 335, 338 ("When constitutional safeguards are involved, our method of review is to make an independent evaluation of the totality of the relevant circumstances shown by the entire record. . ."). Accord *State v. Jackson* (La.App. 1 Cir. 2008), 994 So. 2d 156 (noting that "[e]verything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred"); and *People v. Mosby* (2004), 33 Cal. 4th 353,

361, 92 P.3d 841 ("Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances").

Similarly, *Ballard* cited Michigan authority with approval, but even that authority distinguishes between an omission of any discussion of a constitutional right and an "imprecise recital" of a constitutional right, the latter of which does not necessarily require reversal. See, e.g., *In re Guilty Plea Cases* (1975), 395 Mich. 96, 122, 235 N.W.2d 132 (noting that so long as the accused recognizes that "he waives his right to a trial," the "omission of one or another of these rights, other than a *Jaworski [Boykin]* right, or the imprecise recital of any such right, including a *Jaworski [Boykin]* right, does not necessarily require reversal").

The Sixth District employed a restrictive interpretation of *Veney* that is inappropriate in light of the continuing validity of *Ballard*. That interpretation is more considerably more restrictive than this Court's interpretation of comparable language contained in Crim.R. 11(C)(3), as well as case law from federal courts and other state courts permitting consideration of the entire record in evaluating the validity of a plea, particularly where the constitutional right was discussed in the verbal colloquy. The State therefore asks that the decision of the Sixth Appellate District be reversed in consideration of the entire record of this matter.

CONCLUSION

This Court has previously criticized the elevation of a "formalistic litany of constitutional rights over the substance of the dialogue between the trial court and the accused." *Ballard,* supra, 66 Ohio St.2d at 480. The invalidation of a plea based on the choice of a single word does not comport with this philosophy, particularly when that word is readily understandable to lay persons and when the defendant executed a written acknowledgment of the waiver of his rights with the opportunity to discuss it with counsel. The decision of the Sixth Appellate District should be reversed, and the judgment entry of the trial court reinstated.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via facsimile and ordinary U.S. Mail this 24th of January, 2011, to Stephen D. Long, attorney for defendant-appellee, at 3230 Central Park West, Ste. 106, Toledo, Ohio 43617.

Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1448

STATE OF OHIO,	*	Case No.: _____
	*	C.A. Case No.: L-09-1139 C.P. Case No.: CR 08-1024
Appellant,	*	APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS,
-vs-	*	SIXTH APPELLATE DISTRICT
CHRISTOPHER BARKER,	*	
Appellee.	*	

NOTICE OF APPEAL OF THE STATE OF OHIO

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Evy M. Jarrett, #0062485 (Counsel of Record)
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COUNSEL FOR APPELLEE, CHRISTOPHER BARKER

FILED
AUG 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
AUG 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant the State of Ohio hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-09-1139 on June 30, 2010.

The case raises a substantial constitutional question and a matter of public or great general interest. See S.Ct.Prac.R.II, §2(B)(iii) and (v).

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Evy M Jarrett
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellant

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 16th day of August, 2010, to Stephen D. Long, 3230 Central Park West, Suite 106, Toledo, Ohio 43617, and to the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

Evy M Jarrett
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellant

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2010 JUN 30 A 8:05
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Christopher Barker

Appellant

Court of Appeals No. L-09-1139

Trial Court No. CR0200901024

DECISION AND JUDGMENT

Decided: JUN 30 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, appellant, Christopher Barker, sets forth the following assignment of error:

{¶ 2} "THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S NO CONTEST PLEA WITHOUT ENSURING THAT THE PLEA

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LUCAS COUNTY IMAGING SYSTEM
JOURNALIZED: 6/30/2010
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WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED AND DID NOT COMPLY WITH CRIM.R. 11(C)(2)(c)."

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{¶ 3} On January 7, 2009, appellant was indicted on five counts of unlawful sexual conduct with a minor, all violations of R.C. 2907.04(A) and felonies of the third degree. He entered not guilty pleas to all five counts. Subsequently, however, he withdrew his guilty pleas and entered pleas of no contest to three of the counts in the indictment. The court found him guilty on all three counts and, after holding a sentencing hearing, sentenced appellant to four years in prison on each count, to be served consecutively for a total of 12 years in prison. The court below also found appellant to be a Tier II Child Victim Offender pursuant to R.C. 2950.01 and ordered him to comply with the registration requirements found in R.C. 2950.03(B)(3)(a) for a period of 25 years.

{¶ 4} In his sole assignment of error, appellant asserts that the entry of his no contest plea was not voluntary, intelligent, and knowing because the trial judge failed to fully comply with the requisites of Crim. 11(C), which reads:

{¶ 5} "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:

{¶ 6} "(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.

{¶ 7} "(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.

{¶ 8} "(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." (Emphasis added.)

{¶ 9} Because the rights contained in Crim.R.11(C)(2)(a) and (b) are not constitutional rights, a trial court need only "substantially comply" with its duty to inform the defendant of his rights under these sections. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14. On the other hand, the rights articulated in Crim.R. 11(C)(2)(c) are constitutional in nature. Accordingly, a trial court must strictly comply with its obligation to inform the defendant of his rights under that section. Id. at ¶ 19-21. Strict compliance does not mean that the a court must use the exact wording found in Crim.R. 11(C)(2)(c) during the colloquy; it "may vary slightly, but the court cannot simply rely on other sources to convey these rights to the defendant." Id. at ¶ 29.

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{¶ 10} Appellant urges that the common pleas judge failed to notify him of his right to compulsory process to obtain witnesses because she did not inform him of the fact "that he could compel any such witnesses to attend and testify on his behalf, which is the crux of the constitutional right to subpoena." The relevant portion of the Crim.R. 11 colloquy between appellant and the trial court judge is as follows:

{¶ 11} "THE COURT: The State is recommending that Counts Four and Five will be nolled at the time of sentencing. I do have to ask you, do you understand when you're entering a plea you're giving up your right to a jury trial or bench trial, also *giving up your right to call witnesses to speak on your behalf* or question witnesses that are speaking against you [?] Do you understand that?"

{¶ 12} "A. Yes, Your Honor." (Emphasis added.)

{¶ 13} Although a court does not necessarily have to employ the term "compulsory process" during the Crim.R. 11 colloquy, it must use some equivalent term such as the defendant has the "power to force," "subpoena," use the "power of the court to force," or "compel" a witness to appear and testify on a defendant's behalf. See *State v. Neeley*, 12th Dist. No. 2008-Ohio-034, 2009-Ohio-2337, ¶ 29. Here, the trial court did not use any of these terms when informing appellant that he was giving up the right to compel witnesses to testify on his behalf. The ability "to call witnesses" simply does not satisfy the constitutional mandate. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, ¶ 9, quoting *State v. Smith*, 8th Dist. No. 92320, 2009-Ohio-5692, ¶ 35. See, also, *State v. Cummmings*, 107 Ohio St.3d 1206, 2005-Ohio-6506 (declining to accept

jurisdiction over a case in which the Eighth Appellate District Court determined that the phrase "right to call witnesses" was not the equivalent of the right to use compulsory process for obtaining witnesses in a defendant's favor.)

{¶ 14} Appellee points out, however, that the change of plea form reads, in relevant part: "I understand by entering this plea I give up my right to a jury trial or court trial, where I could see and have my attorney question me, and where I could use the power of the court to call witnesses to testify for me." Appellee further argues that at the change of plea hearing, the trial court asked appellant whether he had an opportunity to review the change of plea form with his attorney before signing it. Because appellant replied that he had done so, and both he and his trial counsel signed that form, appellee contends that the trial court satisfied the constitutional imperative set forth in Crim.R. 11(C)(2)(c). We disagree.

{¶ 15} The *Veney* majority plainly states that "the court cannot simply rely on other sources to convey these constitutional rights." We find that written plea agreement is another source, and, therefore, cannot be employed to satisfy the constitutional mandate in Crim. R. 11(C)(2)(c). This conclusion is bolstered by the partial concurrence and partial dissent in *Veney* authored by Justice Lanzinger, joined by Justices Lundberg, Stratton, and Cupp. Justice Lanzinger notes that the failure of a trial judge to explain the constitutional rights in Crim.R. 11(C)(2)(c), is a presumption, but has never been held to be an irrebuttable presumption. Id. at ¶ 34. Calling the view of the majority "formalistic," she finds that an appellate court must "review the entire record, including

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written materials that have been reviewed with counsel and signed and assented to in open court." Justice Lanzinger then concludes that the holding of the majority "will invalidate convictions based upon a single omitted oral statement of the trial court." Id. at ¶ 38.

{¶ 16} Accordingly, we are required to reject the state's argument, and find that Barker was not properly informed of his constitutional rights under Crim.R. 11(C)(2)(c). Therefore, his no contest plea was not voluntary, knowing, and intelligent, and his sole assignment of error is found well-taken.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is reversed and remanded to that court for further proceedings consistent with this judgment. Appellee, the state of Ohio, is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. JUDGE

Mark L. Pietrykowski, J. JUDGE

Arlene Singer, J. JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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LUCAS COUNTY

2009 MAY -7 P 4: 36

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff.	*	CASE NO: G-4801-CR-0200901024-000
v.	*	JUDGMENT ENTRY
CHRISTOPHER BARKER Defendant.	*	JUDGE STACY L COOK

* * * * * * *

On May 05, 2009 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter LYNETTE SHINDORF, defense attorney JANE ROMAN and the State's attorney JENNIFER LAMBDIN were present as was the defendant CHRISTOPHER BARKER, who was afforded all rights pursuant to Crim.R. 32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

The Court finds on April 22, 2009 the defendant entered a plea of No Contest and was found guilty by the Court of Count One, Count Two, and Count Three each being the offense of Unlawful Sexual Conduct with a Minor, each a violation of R.C. 2907.04(A)&(B)(3), each a felony of the 3rd degree.

The Court further finds the defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11.

It is ORDERED that defendant serve a term of 4 (four) years in prison as to each count to be served consecutive to each other for a total incarceration period of 12 (twelve) years.

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Defendant, having been convicted of or plead guilty to a sexually oriented offense and or child victim offense as defined in ORC 2950.01 the Court finds the Defendant is a Tier II Child Victim Offender and is required to comply with the requirements outlined in the Explanation of Duties to Register given to the defendant in writing, in open court, for 25 years with in-person verification every 180 days. The Clerk of Court is Ordered to forward a copy of the completed Explanation of Duties to Register to the Bureau of Criminal Investigation, to the sheriff of the county where the offender expects to reside, and if the offender is being sentenced to prison or other type of confinement, to the sheriff of the county in which the offender is sentenced pursuant to O.R.C. 2950.03(B)(3)(a).

Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28.

Pursuant to the request of the State of Ohio a nolle prosequi is entered as to Count Four and Count Five.

Defendant is ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution.

JUDGE STACY L COOK

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