

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellant,

-v-

Christopher Barker

Defendant-Appellee.

* Case No. 2010-1448
 *
 * On Appeal from the Lucas County
 * Court of Appeals, Sixth Appellate
 * District
 *
 * Court of Appeals Case No. L-09-
 * 1394
 *

MERIT BRIEF OF APPELLEE CHRISTOPHER BARKER

STEPHEN D. LONG (0063824)
 (Counsel of Record)
 3230 Central Park West, Ste. 106
 Toledo, Ohio 43617
 (419) 842-1717
 FAX (419) 578-5504
longsteved@aol.com

ATTORNEY FOR DEFENDANT-APPELLEE
 CHRISTOPHER BARKER

EVY M. JARRETT (0062485)
 (Counsel of Record)
 Assistant Prosecuting Attorney
 Lucas County Courthouse
 Toledo, Ohio 43624
 (419) 213-4700
 FAX (419) 213-4595
ejarrett@co.lucas.oh.us

ATTORNEY FOR PLAINTIFF-APPELLANT
 STATE OF OHIO

MIKE DEWINE (0009181)
 Attorney General of Ohio

ALEXANDRA T. SHIMMER
 (0075732)
 (Counsel of Record)
 ERIK D. GALE (0075723)
 MICHAEL J. SCHULER
 (0082390)
 Assistant Attorneys General
 30 East Broad Street, 17th Floor
 Columbus, Ohio 43215
 (614) 466-8980
 FAX (614) 466-5087
alexandra.schimmer@ohioattorneygeneral.gov

COUNSEL FOR AMICUS
 CURIAE, OHIO ATTORNEY
 GENERAL MICHAEL DEWINE

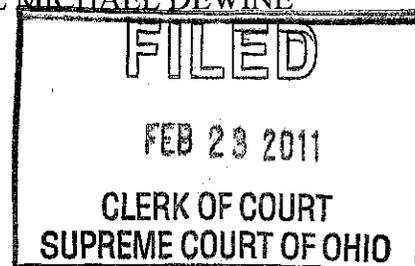


TABLE OF CONTENTS

	PAGE	
TABLE OF AUTHORITIES	iii	
INTRODUCTION	1	
STATEMENT OF THE CASE AND FACTS	4	
ARGUMENT	5	
<u>Proposition of Law 1</u> : A trial court fails to strictly comply with Crim. R. 11(c)(2)(c) when its description of constitutional rights employs language which is insufficient to convey the functional sense of the rights such that the description is not reasonably intelligible to the defendant. Use of the phrase “right to call witnesses to speak on your behalf” fails to inform a defendant of the functional sense of the right to compulsory process of witnesses.		5
<u>Proposition of Law 2</u> : Where a trial court attempts to verbally address a constitutional right during a plea colloquy, failure by the trial court to convey the functional sense of the right by the choice of ambiguous wording may not be clarified by reference to other portions of the record, including the written plea.		8
CONCLUSION	15	
APPENDIX		
Plea of No Contest, <i>State v. Barker</i> , Lucas Co. Case No. CR09-1024		A-1

TABLE OF AUTHORITIES

	Page
<u>I. Table of Cases Cited</u>	
<i>State v. Ballard</i> , (1981) 66 Ohio St. 473, 474, 423 N.E.2d 115	passim
<i>State v. Barker</i> , 6 th Dist. No. L-09-1139, 2010-Ohio-3067	2, 3
<i>State v. Cummings</i> , 11 th Dist. No. 83759, 2004-Ohio-4470	5
<i>State v. Day</i> , 8 th Dist. No. 88725, 2007-Ohio-4052	8
<i>State v. Gardner</i> , 9 th Dist. No. 08CA009520, 2009-Ohio-6505	5
<i>State v. Jordan</i> , 10 th Dist. No. 09AP-1080, 2010-Ohio-2979	14
<i>State v. Veney</i> , 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.....	passim
<u>II. Table of Other Authorities Cite</u>	
Art. I, Section 10, Ohio Const. (As amended September 3, 1912)	5
Art.VIII, §11, Ohio Const. of 1802	5
Art. I, § 10, Ohio Const. of 1851.	5
Crim.R. 1	8-9
Crim. R.11(C)(2)(c)	passim
Crim. R. 17(F)	5
Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/call	6-7
Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/compulsory	6
Sixth Amendment to the United States Constitution	5
Barbara A. Terzian, <i>Ohio’s Constitution: An Historical Perspective</i> , 51 Clev. St. L.Rev. 357, 377 (2004)	6

INTRODUCTION

In this Court's October 9, 2008 Decision in *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, Chief Justice Moyer began the opinion with: "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." *Id.* See, also *State v. Ballard*, (1981) 66 Ohio St. 473, 474, 423 N.E.2d 115 ("This cause presents a recurring question[.]"). Clearly, compliance with Crim. R.11(C)(2)(c) has been an oft litigated issue.

Ohio Rule of Criminal Procedure, Crim.R. 11(C)(2)(c), is a simple rule which trial court must follow to assure that defendants are "informed of their rights" as guaranteed by the United State Constitution and the Constitution of the State of Ohio and "determine that the defendant understands" the rights which they are waiving when entering a plea.

The rule requires that the trial court orally advise a defendant, before accepting a plea in a felony matter, that he or she is waiving five enumerated constitutional rights. Crim.R. 11(C)(2)(c). Where a trial court fails to comply with Crim.R. 11(C)(2)(c), it commits two errors: it fails to follow a Rule of Criminal Procedure and fails to inform a defendant that he or she is waiving the five important constitutional rights guaranteed in the United States and Ohio constitutions. The trial court must strictly comply with Crim.R. 11(C)(2)(c), and the failure to strictly comply therewith renders the defendant's plea invalid. See *State v. Veney*, supra, Syllabus. This Court has even provided trial courts with guidance as to the best method to employ to comply with the rule. See *State v. Ballard*, supra, at 479.

Among the rights which Crim.R. 11(C)(2)(c) requires, a trial court must orally inform the defendant of the right to have compulsory process for obtaining witnesses in the defendant's

favor and determining that the defendant understands said right. Of the five rights the rule addresses, the right to compulsory process for obtaining witnesses is the least understood and least familiar to the majority of the population in general.

Whereas popular culture is replete with references to “the right to trial by jury,” “the right to confront one’s accusers,” “the right to require the state to prove guilt beyond a reasonable doubt,” and “the privilege against compulsory self-incrimination,” especially through viewing television shows and movies, rarely if ever is “the right to compulsory process to obtain witnesses” touched upon in the everyday experience of the lay person.

Further, the right to compulsory process to obtain witnesses is greeted with skepticism by most defendants; defendants, who often have trouble distinguishing between the prosecution, which is “the enemy” trying to convict them, and the trial court, often find it incredible that the trial court would actually assist them in their defense by making recalcitrant witness appear at trial on their behalf.

In the instant matter, the trial court merely orally informed Mr. Barker in its plea colloquy that by entering a plea, he would be giving up his right to “call witnesses to speak on your behalf.” The Sixth Appellant District found that choice of words did not convey the functional sense of the right, which is in essence that the court would make, force, compel, subpoena, etc., witnesses to appear on Mr. Barker’s behalf if he identified them and their testimony was relevant and material (i.e. mattered to his defense). *State v. Barker*, 6th Dist. No. L-09-1139, 2010-Ohio-3067, ¶13.

“Call witnesses” does not constitute a “slight variation” from the wording employed in the rule or in the United States and Ohio constitutions. It simply does not convey the functional

sense of right to compel witnesses to testify in a manner which is reasonably intelligible to a lay person in general or this defendant in particular.

The Sixth Appellant District further held that the trial court “cannot simply rely on other sources to convey these constitutional rights.” *State v. Barker*, 6th Dist. No. L-09-1139, 2010-Ohio-3067, ¶15, quoting *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, 897 N.E.2d 621. It therefore did not allow consideration of “other sources” to determine whether the trial court otherwise complied with Crim.R. 11(C)(2)(c) and its duty to inform Mr. Barker that by entering a plea, he was waiving the five constitutional rights enumerated in the rule.

Were this Court to rule that the trial court’s insufficient attempt to orally inform Mr. Barker that he was waiving his rights as mandated by Crim.R. 11(C)(2)(c) may be “cured” by reference to other matters in the record, the record below would not lead to a finding Mr. Barker was informed of the right to compulsory process in a reasonably intelligible manner.

The record indicates that the Crim.R. 11(C)(2)(c) rights were “presented” in the plea colloquy in a compound question with two other rights. Further, although Mr. Barker executed a written plea form, under less than ideal circumstances, it is only in the small print in the second to last paragraph of a two-sided written plea form where Mr. Barker was “informed” of his right to “use the power of the court to call witnesses to testify for me.”

Crim.R. 11(C)(2)(c) is clear that a trial court must orally inform a defendant of his rights in a reasonably intelligible manner. As the trial court’s oral colloquy was not reasonably intelligible to convey the functional sense of the right to compulsory process, there is no recourse to the small print on the back side of written plea form to correct the error and, in any event, the record is therefore insufficient to cure the defect.

STATEMENT OF THE CASE AND FACTS

Appellee, Christopher Barker, agrees with the statement of the case and facts as related in the Brief of Appellant, State of Ohio, with the exception of the last paragraph of said section on page 5, as it constitutes argument in that the State asserts that “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.”

As demonstrated herein, “call” does not provide the functional sense of the right to compulsory service of witnesses and a trial court may not rely on other evidence to remedy its failure to personally inform a defendant of the rights he or she is waiving by entering a plea.

For the Court’s convenience, a copy of the two-sided plea form executed by Mr. Barker is also attached hereto in the appendix, and incorporated as if written herein.

ARGUMENT

Proposition of Law 1: A trial court fails to strictly comply with Crim. R. 11(c)(2)(c) when its description of constitutional rights employs language which is insufficient to convey the functional sense of the rights such that the description is not reasonably intelligible to the defendant. Use of the phrase “right to call witnesses to speak on your behalf” fails to inform a defendant of the functional sense of the right to compulsory process of witnesses.

The initial question presented herein is whether merely informing a defendant that, by entering a plea, he or she is “giving up your right to call witnesses to speak on your behalf” constitutes only a “slight variation” in the wording mandated in Crim.R. 11(C)(2)(c), and whether said language sufficiently conveys the functional sense of the defendant’s right “to have compulsory process for obtaining witnesses in the defendant’s favor,” in a reasonably intelligent manner. The Court of Appeals for the Sixth District, herein, and the Court of Appeals for the Ninth District and Eighth District have found it does not. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, ¶ 9; *State v. Cummings*, 11th Dist. No. 83759, 2004-Ohio-4470, ¶ 5 and ¶ 6, discretionary appeal dismissed as improvidently accepted, 107 Ohio St.3d 1206, 2005-Ohio-6506.

The functional sense of the right is contained in the word “compulsory.” “Compulsory” is the word used in Crim.R. 11(C)(2). The language used in the rule tracks that used in the U.S. Constitution Sixth Amendment’s Compulsory Process Clause, which provides that a defendant shall have the right “to have compulsory process for obtaining witnesses in his favor.” Sixth Amendment to the United States Constitution. The language also tracks that used in the Bill of Rights of the Constitution of the State of Ohio uses the language to denote the right as follows:

“In any trial, in any court, the party accused shall be allowed . . . to have compulsory process to procure the attendance of witnesses in his behalf . . . [.]”

Art. I, Section 10, Ohio Const. (As amended September 3, 1912)[Emphasis added]. The same language was used in Ohio's prior constitutions. See Art.VIII, §11, Ohio Const. of 1802; Art. X, § 10, Ohio Const. of 1851.¹

The word "compulsory" is defined as an adjective meaning (1) mandatory, enforced; (2) coercive, compelling. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/compulsory>. Synonyms include mandatory, forced, imperative, incumbent, involuntary, necessary, nonelective, obligatory, peremptory and required.

It is also to be noted that Ohio Rule of Criminal Procedure, Crim. R. 17, which provides for the mechanics of compelling witnesses to attend hearings or trials, provides:

(F) Subpoena for a hearing or trial. At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state.

Crim.R. 17(F). (Emphasis added). Clearly, "compulsory" is the functional sense of the right.

The word "call" does not provide the functional sense of the right to compulsory service of witnesses. When used as a transitive verb, as was done by the trial court herein, "call" can mean:

1(a)(1) :to utter in a loud distinct voice (2) : to announce or read loudly or authoritatively (3) : to announce the play-by-play of (as a football game) (b) (1) : to command or request to come or be present (2) : to cause to come (c) : to summon to a particular activity, employment, or office (d) : to invite or command to meet (e) : to rouse from sleep or summon to get up (f) (1) : to give the order for (2) : to manage by giving the signals or orders (g) (1) : to make a demand in bridge for (a card or suit) (2) : to require (a player) to show the hand in poker by

¹While not directed to the wording of Art. I, §10 of the Ohio Constitution, the convention did address issues of the use Latin legal wording in the constitution, which was a concern raised in the convention. See Barbara A. Terzian, *Ohio's Constitution: An Historical Perspective*, 51 Clev. St. L.Rev. 357, 377 (2004).

making an equal bet (3) : to challenge to make good on a statement (4) : to charge with or censure for an offense (h) : to attract (as game) by imitating the characteristic cry (i) : to halt (as a baseball game) because of unsuitable conditions (j) : to rule on the status of (as a pitched ball or a player's action) (k) : to give the calls for (a square dance) —often used with off (l) (1) : to demand payment of especially by formal notice(2) : to demand presentation of (as a bond or option) for redemption (m) (1) : to get or try to get in communication with by telephone (2) : to generate signals for (a telephone number) in order to reach the party to whom the number is assigned (3) : to make a signal to in order to transmit a message (2)(a) : to speak of or address by a specified name : give a name to <call her Kitty> (b) (1) : to regard or characterize as of a certain kind (2) : to estimate or consider for purposes of an estimate or for convenience <call it an even dollar> (c) (1) : to describe correctly in advance of or without knowledge of the event : predict (2) : to name or specify in advance <call the toss of a coin> .

Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/call>.

While the word “call” has a hint in some of its many definitions of the concept of “compulsion,” such as where it connotes the conjunctive “command or invite,” it possesses many other meanings, making the word too imprecise to convey the important constitutional right of compelling a witness’s attendance at trial in a reasonably intelligible manner.

In the popular mind, in legal proceedings “call” is usually perceived in the context of the mythical “one telephone call when arrested,” omnipresent in television police shows. In general speech, to “call” someone is often thought of in the context of a telecommunications, which hardly conveys a notion of compulsion as “to call” does not necessarily imply a required answer. A “call” with an obligatory “answer” is the function essence of the right “to have compulsory process for obtaining witnesses in the defendant's favor.” The trial court’s colloquy failed to emphasize the obligation to answer.

When a trial court uses phrases such as “the right to call witnesses to appear on his behalf,” or “the right to bring witnesses to this courtroom to testify for your defense,” the

instruction implies that the defendant can only present witnesses he is able to procure himself by his own means. This does not adequately inform a defendant of the functional sense of the right of compulsory process. See, e.g. State v. Day, 8th Dist. No. 88725, 2007-Ohio-4052, at ¶ 23.

Accordingly, as the phrase “giving up your right to call witnesses to speak on your behalf” does not constitute a “slight variation” in the wording of Crim.R. 11(C)(2)(c) and fails to sufficiently convey the functional sense of the defendant’s right “to have compulsory process for obtaining witnesses in the defendant's favor,” in a reasonably intelligent manner. As the trial court failed to strictly comply with Crim.R. 11(C)(2)(c) and advise him that by entering his plea he was waiving this important constitutional right, Mr. Barker urges the Court to affirm the decision of the Sixth Appellate District and remand the matter to the trial court for further proceedings.

Proposition of Law 2: Where a trial court attempts to verbally address a constitutional right during a plea colloquy, failure by the trial court to convey the functional sense of the right by the choice of ambiguous wording may not be clarified by reference to other portions of the record, including the written plea.

The second issue presented herein is what is the effect of the trial court’s failure to comply with the mandates of Crim.R. 11(C)(2)(c) and adequately convey the functional sense of the right to have compulsory process for obtaining witnesses in the defendant's favor in a reasonably intelligible manner during the plea colloquy.

The conduct of felony criminal proceedings is governed by the Ohio Rules of Criminal Procedure. The Ohio Rules of Criminal Procedure, Crim.R. 1 provides, in part:

(A) **Applicability.** These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in division (C) of this rule.

(B) Purpose and construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

Again, Ohio Rule of Criminal Procedure, Crim.R. 11(C)(2), provides, in part:

"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:

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to * * *, to have compulsory process for obtaining witnesses in the defendant's favor[.]”

[Emphasis added].

It is a simple rule which trial courts must follow when exercising their criminal jurisdiction to assure that defendants are “informed of their rights” as guaranteed by the United State Constitution and the Constitution of the State of Ohio and “determine that the defendant understands” the rights which they are waiving when entering a plea. Again, it is a Rule of Criminal Procedure which, if followed, satisfies the trial court’s duty to adequately inform a defendant of the constitutional rights he or she is waiving.

This Court has stated that: “The best method of informing a defendant of his constitutional rights is to use the language contained in Crim.R. 11(C), stopping after each right and asking the defendant whether he understands the right and knows that he is waiving it by pleading guilty. We strongly recommend such procedure to our trial courts.” *State v. Ballard*, (1981) 66 Ohio St.2d 473, 479, 423 N.E.2d 115. See, also *State v. Veney*, 120 Ohio St. 3d 176, 180, 2008-Ohio-5200, 897 N.E.2d 621.

In *Veney*, this Court established a bright-line: When a trial court fails to strictly comply

with its Crim.R. 11(C)(2)(c) duty, the defendant's plea is invalid. *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Syllabus.

Here, by its choice of ambiguous wording, the trial court varies more than slightly from the language set forth in Crim.R. 11(C)(2)(c) and failed to adequately convey the functional sense of the right to have compulsory process for obtaining witnesses in the defendant's favor during the plea colloquy in a reasonably intelligible manner. The plea colloquy of the trial court was, in part, as follows:

THE COURT: The State is recommending that counts four and five will be nolleed 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 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.

(Tr. at pp. 8-10.)

In addition to its use of ambiguous language in its attempt to advise Mr. Barker of his right to compel witnesses to testify on his behalf, the trial court did not follow this Court's strongly suggested advice as to the best method of complying with its duty under Crim.R. 11(C)(2)(c), and thereby informing Mr. Barker of his constitutional rights. Not only did the trial court fail to use the language contained in Crim.R. 11(C)(2)(c), it also did not stop after each right and inquire of Mr. Barker's understanding thereof and assuring his waiver thereof. The trial court asked Mr. Barker a compound question in its colloquy. Note the query at the end of trial court's colloquy, "Do you understand that?" The query begs the question, "what is the 'that' which Mr. Barker purportedly understood?" The colloquy contains five questions.

Therefore, pursuant to *Veney*, supra, as the trial court failed to strictly comply with

Crim.R. 11(C)(2)(c), the decision of the Sixth District Court of Appeals should be affirmed and the matter remanded to the trial court for further proceedings.

The next question presented to the Court is whether *Veney*, supra, overruled Syllabus 2 of *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. The State and *Amicus* argue that, where a trial court fails to follow Crim.R. 11(C)(2)(c), a plea should not necessarily be vacated where the record shows that the trial court explained the rights to the defendant in a manner reasonably intelligible to the defendant through other sources in the record, citing *State v. Ballard*, supra.

The State and *Amicus* distinguish *Veney* from the facts of the instant matter, pointing out that *Veney* involved a situation where a trial court completely omitted a right enumerated in Crim.R. 11(C)(2)(c) in its oral colloquy, whereas in the instant matter, the trial court gave an “imperfect” colloquy.

Again, *Veney* established a bright-line: When a trial court fails to strictly comply with its Crim.R. 11(C)(2)(c) duty, the defendant’s plea is invalid. *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Syllabus.

In its Brief, the State complains that holding a trial court to a strict compliance standard with regard to its Crim.R. 11(C)(2)(c) duty makes the requirements of accepting a plea in a felony matter more stringent than in a capital plea, comparing Crim.R. 11(C)(2)(c) with Crim.R. 11(C)(3). The requirements of Crim.R. 11(C)(3) are in addition to those of Crim.R. 11(C)(2)(c) by the plain reading of Crim.R. 11. Additionally, while Crim.R.11(C)(2)(c) instructs trial courts to “first address the defendant personally,” Crim.R. 11(C)(3) only mandates that “the court shall advise the defendant.” Therefore, while compliance to Crim.R. 11(3) can be demonstrated by a

written form executed by a defendant, Crim.R.11(C)(2)(c) cannot, as the rule requires the defendant to be addressed personally.

In the event this Court finds the distinction relevant and rules that recourse can be had by applying a substantial compliance “totality of the circumstances” test in situations of an imperfect plea colloquy, the record in this case does not show that the trial court otherwise complied with Crim.R. 11(C)(2)(c) by otherwise informing Mr. Barker of his right to compel witnesses to testify on his behalf in a reasonably intelligible manner.

In its Brief, the State points out that Mr. Barker executed a plea form. It is to be noted that there exists no rule or statute mandating the use of such a form. Regardless, said form, in the second to last paragraph on the second page of the double-sided document, reads:

“I understand by entering this plea I give up my right to a jury 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. . . [.]”

See Plea of No Contest, reverse side.

The form was executed and acknowledged before the trial court by Mr. Barker.

Clearly, the language employed on the plea form does not track that used in Crim.R. 11(C)(2)(c) and, while said language comes closer to conveying the functional meaning of the right, to compel witnesses to testify on behalf of a defendant, it is still somewhat ambiguous, as the nature of the power of the court a defendant could use is left somewhat vague.

Additionally, the timing of the preparation of the form and the circumstances of its execution are relevant to any inquiry as to “totality of the circumstances.” The normal practice in the Lucas County Court of Common Pleas is that, once the trial court is informed that a plea agreement has been reached, a plea form is prepared by the criminal bailiff, normally on the day

of the plea hearing. Plea hearings normally are taken on the trial judge's criminal docket day. Also occurring during the criminal docket are criminal arraignments, pretrials, other pleas and sentencings in other cases. Where a plea is to occur, a defendant and his counsel review the form, usually in the courtroom, as the form is usually just freshly prepared. Where a defendant is in custody, the plea form is reviewed with counsel in the jury box in the courtroom where the defendant, who is shackled, sits with the other "in-custodies," who are also packed into the box. The review of the form is rarely done in private and often occurs with distractions occurring simultaneous with the attempt to review. Bluntly, the review of the plea form between defendants and their attorneys are often conducted under less than ideal conditions.²

Under the above condition, the executed written plea form is not a strong source to point to for the proposition that through the document, the trial court informed Mr. Barker of his constitutional rights in a reasonably intelligible manner.

Another "source" the State points to for the proposition that Mr. Barker was informed of his constitutional rights in a reasonably intelligible manner is Mr. Barker's acknowledgment that he had reviewed the written plea form with his counsel. Given the less than ideal conditions in which the review of the document occurred, in open court while sitting shackled in a jury box with other in-custody defendants while other court proceedings were occurring, this "source" also does little for the proposition that, by speaking with his counsel about the written form, the trial

²It is further to be noted that the particular courtroom in the Lucas County Court of Common Pleas where Mr. Barker entered his plea is the smallest courtroom in the complex and that on criminal docket days, there is rarely sufficient seating in the particular courtroom to allow for all persons with business before the court to physically fit into the courtroom. Significant overflow is often consigned to the hallway outside the courtroom. Additionally, often, the jury room is occupied by "overflow" attorneys.

court informed Mr. Barker of his constitutional rights in a reasonably intelligible manner.

The rare circumstances where the “totality of the circumstances” may show that a defendant was informed of his or her constitutional rights in a reasonably intelligible manner are best illustrated in *State v. Jordan*, 10th Dist. No. 09AP-1080, 2010-Ohio-2979. In *Jordan*, before accepting a plea, the trial court in its plea colloquy informed the defendant, “Do you understand that you would have the right to call witnesses on your behalf.” *Id.* at ¶ 6. In overruling the assignment of error related to the trial court’s failure to strictly comply with Crim.R. 11(C)(2)(c), the Tenth District Court of Appeals stated that while standing alone, the error would have merit, in the specific case, the defendant had signed a written guilty plea form which contained the language that the defendant had the right to “compulsory subpoena process for obtaining witnesses,” which he reviewed with counsel **and** that preceding the “formal” plea colloquy, the right to compel the attendance of witnesses to appear through the use of subpoenas was discussed between defense counsel and the defendant on the record in open court. *Id.* at ¶¶ 8-9.

Unlike *Jordan*, in the instant matter, the record of the proceedings below merely show that Mr. Barker was given an insufficient warning with regard to his right to “compulsory subpoena process for obtaining witnesses,” he executed a double-sided plea form which gave the warning on the second page, second to last paragraph, and Mr. Barker represented he had reviewed the form with counsel. There are no further “sources” existent indicating that Mr. Barker was informed of his right to compulsory process to obtain witnesses and no demonstration that he understood the right, such as a discussion on the record between Mr. Barker and his counsel related to subpoenaing witnesses.

Therefore, even should this Court review the “totality of the circumstances” of the taking

of Mr. Barker's plea, the decision of the Sixth District Court of Appeals should still be upheld.

IV. CONCLUSION

The trial court committed two errors in its attempt to take Mr. Barker's plea in the instant matter. The trial court failed to strictly comply with the dictates of Crim.R. 11(C)(2)(c) prior to accepting Mr. Barker's pleas and failed to inform him of his constitutional right to compel the testimony of witnesses on his behalf in a reasonably intelligible manner.

Had the trial court strictly complied with the mandate of Crim.R. 11(C)(2)(c), it would have, in the same stroke, advised Mr. Barker of the constitutional rights he was waiving. Pursuant to *Veney*, supra, Mr. Barker's plea was invalid and the decision of the Sixth District Court of Appeals should be affirmed.

Should the Court find that, where a plea colloquy pursuant to Crim.R.11(C)(2) is given imperfectly, compliance with the trial court's duty to inform a defendant of the constitutional rights he or she is waiving by entering a plea may be demonstrated by other sources, in the instant matter, insufficient other sources exist to demonstrate that Mr. Barker was informed of his right "to have compulsory process for obtaining witnesses in the defendant's favor," in a reasonably intelligent manner. Therefore, the decision of the Sixth District Court of Appeals should still be affirmed.

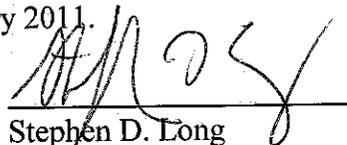
Respectfully submitted,



Stephen D. Long
Attorney for Defendant/Appellee

CERTIFICATION

This is to certify that a copy of the foregoing was delivered by person to Evy M. Jarrett, Assistant Lucas County Prosecutor, Courthouse, 700 Adams St., Toledo, Ohio 43624, and by U.S. mail to Alexandra T. Schimmer, Chief Deputy Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio, on this 22nd day of February 2011.

A handwritten signature in black ink, appearing to read 'S. Long', written over a horizontal line.

Stephen D. Long
Attorney for Defendant/Appellee

APPENDIX

*No Contest plea

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio,

* Case No. G-4801-CR- 09-1024

FILED
LUCAS COUNTY
Plaintiff

vs. 2009 MAY -7 P 4: 36

* Plea of No Contest

CHRISTOPHER BARKER
Defendant
COMM. PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

* Hon. STACY L. COOK

I withdraw my former not guilty plea and enter a plea of No Contest to the offense of (count, offense, R.C. section, and degree of felony/misdemeanor):

COUNT	OFFENSE & R.C. SECTION & DEGREE	BASIC PRISON TERM	POSSIBLE FINE
<u>1</u>	<u>Unlawful Sexual Conduct with a Minor</u> <u>R.C. 2907.04(A)&(B)(3) F-3</u>	<u>1 - 5 years</u>	<u>up to \$10,000</u>
<u>2</u>	<u>Unlawful Sexual Conduct with a Minor</u> <u>R.C. 2907.04(A)&(B)(3) F-3</u>	<u>1 - 5 years</u>	<u>up to \$10,000</u>
<u>3</u>	<u>Unlawful Sexual Conduct with a Minor</u> <u>R.C. 2907.04(A)&(B)(3)</u>	<u>1 - 5 years</u>	<u>up to \$10,000</u>

I understand the MAXIMUM penalty COULD be: a maximum basic prison term of up to 15 years of which 0 is mandatory, during which I am ~~NOT~~ eligible for judicial release or community control. The maximum fine possible is \$ 30,000 of which \$ 0 is mandatory. Restitution, other financial costs and registration as a Tier II sex offender is possible in my case. If I am now on felony probation, parole, or community control, this plea may result in revocation proceedings and any new felony sentence may be imposed consecutively.

I know any prison term stated will be the term served without good time credit. If I am sentenced to prison for a felony 1 or a felony sex offense, after my prison release I will have 5 years of post-release control under conditions determined by the parole board. If I am sentenced to prison for a felony 2 or a felony 3 which involved causing or threatening physical harm, I will have mandatory post release control of 3 years. If I receive prison for a felony 3, 4, or 5, I may be given up to 3 years of post release control. If I violate conditions of supervision while under post release control, the parole board could return me to prison for up to nine months for each violation, for a total of 50% of my originally stated term. If the violation is a new felony, I could receive the greater of one year or the time remaining on post release control plus a prison term for the new crime.

4/22/09
Date

Chris Barker
Signature of Defendant

E-JOURNALIZED

MAY 09 2009

*No Contest plea

If I am eligible for and am granted community control at any point in my sentence, and if I violate any of the conditions imposed, I could be given a longer period under court control, greater restrictions, or a prison term from the basic range. Community control could last five years. I understand R.C. 2901.07, may require upon conviction, that I submit a DNA sample.

I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice, counsel and competence. I am not now under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement, stated entirely as follows:

State will recommend a Nolle as to Counts 4 & 5 at the time of sentencing.

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. I know at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify. I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt on every element of each charge.

By pleading no contest, I understand the Court will decide my guilt on the offenses to which I have pled based upon the facts as set forth in the indictment and upon the statement by the prosecutor about the evidence which would have been presented at trial. I know the judge may either sentence me today or refer my case for a presentence report. I understand my right to appeal a maximum sentence, my other limited appellate rights and that any appeal must be filed within 30 days of my sentence. I understand that under federal law, as a result of a felony conviction or a misdemeanor offense of violence conviction against a family or household member, I may never be able to ship, use, receive, purchase, own, transport, or otherwise possess a firearm or ammunition and violation is punishable as a felony offense. I understand that if I am not a U.S. citizen, conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. I enter this plea voluntarily.

Signed and Dated: 4/22/09

Chris Borken
Signature of Defendant

Jane E. Roman
Attorney for Defendant

[Signature]
Assistant County Prosecutor

[Signature]
Court Reporter

JUDGMENT ENTRY OF GUILTY

The Court finds the defendant was advised of all constitutional rights, understanding nature of charge, effect of plea, maximum penalty involved, and made a knowing, intelligent, and voluntary waiver of those rights pursuant to Crim. R.

11. The plea is accepted and ordered filed. The Court finds defendant GUILTY of each offense to which defendant has entered this plea. A sentencing hearing is scheduled on May 5 at 1:00. Bond is And.

4/22/09
Date

FILED
LUCAS COUNTY

[Signature]
Judge