

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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**RECEIVED**  
MAR 15 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
MAR 15 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## INTRODUCTION

Appellee has identified numerous barriers to a defendant's understanding of the consequences of his plea, particularly in the courtroom in which this plea was taken. Appellee does not show that any of these barriers actually affected the entry of his plea. Rather, his arguments are premised on the potential for some disconnect to exist between the phrase "right to call witnesses to speak on your behalf" and the legally described "right to have compulsory process for obtaining witnesses." The State respectfully submits that a plea should not be invalidated based only on a potential misinterpretation of a right, particularly when that right is more fully described in a document executed by a defendant after he has the opportunity to consult with his attorney.

Further, the State submits that the trial court's description of the right in this case is just as understandable to lay persons as the formulation offered in Crim.R. 11, and that a formulation using words such as "subpoena" or "compulsory" is unlikely to overcome any of the barriers to understanding that appellee has identified. For example, appellee argues that lay individuals are unfamiliar with the right of compulsory process for obtaining witnesses, because popular culture such as television shows and movies rarely refer to the right. (Brief of Appellee at p.2.) The State does not dispute that the use of the legal formulation "the right of compulsory process for obtaining witnesses" is infrequent in popular culture.<sup>1</sup> But even assuming that the phrase "right to

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<sup>1</sup>Although not necessarily referred to as "the right of compulsory process for obtaining witnesses," the right to call witnesses is in fact often addressed in the popular media. Novels, movies and television shows are frequently premised on "the classic case of the gangster marrying his moll to prevent her from testifying against him at trial."

compulsory process" never appears in popular culture, the scarcity of the phrase hardly supports its use in a plea hearing. In fact, the scarcity of the phrase suggests that alternative phrasing may be superior in terms of ensuring the defendant understands the nature of the right he is waiving by virtue of his plea.

This Court has recognized that a "word-for-word recitation of the criminal rule" is not required, so long as the trial court "actually explains" the rights to the defendant. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶27. Crim.R. 11(C) itself requires that the trial court not only "inform" the defendant of his rights, but also "determin[e] that the defendant understands" the constitutional rights he will waive by entry of the plea. A "word-for-word recitation of the criminal rule" is unlikely to advance an explanation or any real understanding of the right in question any more than the wording used by the trial court. Simply put, the trial court's description of the right in this case as "the right to call witnesses to speak on your behalf," is as readily understandable to lay persons as the wording of Crim. R. 11, or any other phrases employing words such as "compulsory" or "subpoena."

Appellee also argues that defendants "often have trouble distinguishing between the prosecution . . . and the trial court" and do not believe that the trial court will assist them in obtaining witnesses. (Brief of Appellee at p. 2.) Any mistrust of the judicial system is unlikely to be ameliorated by the use of phrases such as the "right to compulsory process to obtain witnesses." To the contrary, such phrases may serve only to emphasize the inaccessibility of the legal system and compound any mistrust of

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See <http://lawprofessors.typepad.com/evidenceprof/2010/09/804b06-com-v-szerlong-ne2d-2010-wl-3530019mass2010.html>, accessed March 13, 2011.

the judiciary that lay persons may already harbor.

Finally, appellee criticizes the plea process in the particular courtroom involved, based on its small size and on the number of attorneys and other individuals present during plea hearings. According to appellee, the plea process is "often conducted under less than ideal circumstances." (Brief of Appellee at p. 13.) The State respectfully submits that distractions are unlikely to be remedied by use of words such as "compulsory" or "subpoena." To the contrary, any impediment to a full understanding of the consequence of the plea is best addressed by use of simple, common words during the plea colloquy, not by a recitation of the language of the rule or other phrases employing words such as "compulsory" or "subpoena."

Appellee's argument reveals the tension between the criminal defendant's interest in having a full understanding of the rights he waives by entry of his plea and society's interest in ensuring the finality of pleas. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 478-479, 423 N.E.2d 115. Finality is most readily served by allowing a written statement of the rights waived to be conclusive of the issue, at least when executed by defendant after an opportunity for consultation with his attorney. See, e.g., *Bell v. Curley* (E.D. MI, 2009), 2009 U.S. Dist. LEXIS 39640. A full understanding of the rights to be waived would be most fully served by colloquies specifically tailored to the intelligence and socioeconomic background of each individual defendant. Such a requirement would necessarily impose a tremendous burden on both the trial courts conducting the colloquies and the appellate courts reviewing the adequacy of the colloquies.

This Court's case law makes clear that finality is not of such paramount

importance that trial courts may dispense with the verbal colloquy. In order to strike a balance between both objectives, *Ballard* requires the trial court to describe the constitutional rights in a manner that is "reasonably intelligible" to the defendant. *Ballard*, supra, 66 Ohio St.2d at 480.

This case involves a trial court's efforts to describe a constitutional right in language understandable and accessible to a lay person. The words used by the trial court were "reasonably intelligible" to the defendant and should be found to be in strict compliance with Crim.R. 11(C)(2)(c) without reference to any other portion of the record. However, because the trial court did not omit a discussion of the right in question, *Veney* and *Ballard* permit the trial court's verbal description of the colloquy to be clarified by reference to the written plea executed by defendant after an opportunity to consult with his attorney. Under either alternative, the decision of the Sixth Appellate District should be reversed.

## 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.**

Appellee argues that the "functional sense" of the right to compulsory process of witnesses is contained in the word "compulsory," and that the word "call" has meanings that do not include any element of "compulsion." Appellee's argument is premised on the assumption that if a word such as "call" has meanings in addition to the relevant meaning, then it is too imprecise to satisfy the strict compliance standard applicable to constitutional rights in Crim.R. 11(C)(2)(c).

However, scrutinizing words in isolation, out of the context of the plea hearing, fails to provide an accurate gauge of the words' ability to be understood by defendants. Many of the words in the rule itself carry common meanings that vary from their legal connotations, and focusing on those meanings outside the context of a legal proceeding may lead to an absurd result. For example, the phrase "compulsory process" includes both the word "compulsory" and "process." Appellee has already indicated that "compulsory" is defined as "mandatory, enforced" or "coercive, compelling." (Brief of Appellee at p.6.) "Process" may have a host of meanings which are not legal in nature:

- 1a : progress, advance <in the process of time> b : something going on : proceeding
- 2a (1) : a natural phenomenon marked by gradual changes that lead toward a particular result <the process of growth> (2) : a continuing natural or biological activity or function <such life processes as breathing>

b : a series of actions or operations conducing to an end; especially : a continuous operation or treatment especially in manufacture  
3a : the whole course of proceedings in a legal action b : the summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders  
4: a prominent or projecting part of an organism or organic structure <a bone process> <a nerve cell process>  
5:6 conk

"Conk" is defined in turn to mean "a hairstyle in which the hair is straightened out and flattened down or lightly waved." See <http://www.merriam-webster.com/dictionary/process> (accessed March 14, 2011). Appellee's logic would permit the possible interpretation of the phrase "compulsory process" to mean "mandatory progress" or "mandatory natural phenomenon" or "mandatory series of actions or operations" or even "mandatory hairstyle."

The State does not dispute that mirroring the language of Crim.R. 11 is sufficient to meet the strict compliance standard, so that use of the phrase "compulsory process" would satisfy the requirements of Crim.R. 11. See, e.g., *State v. Ballard*, 66 Ohio St.2d 473, 479, 423 N.E.2d 115. See also *State v. Pigge*, 4th Dist. No. 09CA3136, 2010-Ohio-6541, at f.n. 3. The State does not seek to change this aspect of Ohio law, which serves the social interest in finality of pleas. *Ballard*, supra, 66 Ohio St.2d at 478. The State merely wishes to demonstrate that isolating a word such as "call" from its context in a legal proceeding will not accurately test whether participants in a plea hearing will understand the word to have some unintended connotation.

The position advanced by appellee is inconsistent with *Ballard's* holding that a plea is constitutionally infirm only when "the defendant is not informed in a reasonable manner" of the rights he will relinquish when he enters the plea. *Ballard*, 66 Ohio St.2d

at 478. Crim.R. 11 requires an explanation of constitutional rights "in a manner reasonably intelligible to that defendant." *Id.* at paragraph 2 of the syllabus. *Veney*, of course, did not overrule *Ballard's* "reasonably intelligible" standard.

Use of the word "call" is a "reasonably intelligible" description of the right to compulsory process. Pursuant to *Ballard*, the validity of the plea in this case should be upheld based on the verbal colloquy alone, and the decision of the Sixth District should be reversed, regardless of whether the written plea is considered. However, consideration of the written plea is permitted pursuant to *Ballard*, and *Veney* did not change this rule of law in cases in which the constitutional right in question was discussed, rather than wholly omitted from the plea colloquy.

**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.**

Appellee argues that *Veney* established a bright line rule that a failure of "strict compliance" with Crim.R. 11(C)(2)(c) will invalidate a plea, and the State does not quarrel with the proposition *Veney* imposes a requirement of strict compliance with the requirements of Crim.R. 11(C)(2)(c). However, the State is concerned with how "strict compliance" may be proven when, unlike *Veney*, the right in question was discussed in the verbal colloquy at the plea hearing but the defendant complains on appeal that the discussion was deficient in some manner.

*Veney's* analysis of *Ballard* is instructive, suggesting that the outcome of *Veney* depended on the complete omission of any discussion of the relevant right during the plea colloquy:

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, 20 O.O.3d 397, 423 N.E.2d 115. 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, 20 O.O.3d 397, 423 N.E.2d 115.

*Veney*, supra, ¶25 (emphasis added). *Ballard* adopted the latter rule that the defendant must be informed that he waives constitutional rights through a plea. *Veney* extended that rule of law to require trial courts to include in the plea colloquy a description of the right to require the State to prove guilt beyond reasonable doubt.

*Veney* did not purport to affect *Ballard* in cases in which the trial court discusses a constitutional right, but the defendant complains on appeal that the discussion was deficient in some respect or another. In these cases, *Ballard* permits an ambiguity in the trial court's verbal colloquy to be clarified by reference to other portions of the record: "Although 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, such a colloquy may be looked to in the totality of the matter." *Ballard*, supra, 66 Ohio St.2d at 481.

An interpretation of *Veney* as applying only to the complete omission of a discussion of a constitutional right and permitting consideration of other evidence of a defendant's knowing waiver of his constitutional rights is consistent with the view followed by many other jurisdictions:

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, 385 N.E.2d 1308 (footnotes omitted).

The State acknowledges appellee's criticism of the written plea in this case, as "somewhat ambiguous, as the nature of the power of the court" is "somewhat vague." (Brief of Appellee at p. 12.) The written plea form stated "I understand by entering this plea I give up my right to a jury trial or court trial . . . where I could use the power of the court to call witnesses to testify for me." At least one District of the Court of Appeals has specifically upheld an identical description of the right of compulsory process when it was offered in a verbal colloquy. See, e.g., *State v. Neeley*, 12th Dist. No. CA2008-08-034, 2009-Ohio-2337, ¶30. The State respectfully submits that the written plea's description of the right includes precisely the element of "power" or compulsion that appellee complains was absent from the verbal colloquy in this case.

Moreover, the facts of this case are nearly identical to another *Ballard* case, a Sixth District case in which the trial court stated "[y]ou can call witnesses on your own behalf," language nearly identical to the language employed by the trial court in this case. See *State v. Ballard*, 6th Dist. Nos. L-04-1070, L-05-1070, L-05-1027, 2006-Ohio-1863, at ¶13. The written plea included language identical to that included in the written plea in this case: "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." *Id.* at ¶15.

In considering the case, the Sixth District recognized that the Eighth Appellate

District "requires a trial judge to use such terms as 'summoned,' 'subpoenaed,' 'forced,' and 'required,'" when describing the right to compulsory process. *Id.* at ¶13. However, the Sixth Appellate District explicitly declined to adopt this view. Instead, the Court adopted the approach followed by the Second District, holding that "[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." *Id.* at ¶14, citing *State v. Dixon*, 2d Dist. No. 01CA17, 2001-Ohio-7075; *State v. Green*, 7th Dist. No. 02CA217, 2004-Ohio-6371, ¶15.

The Sixth Appellate District concluded in *Ballard* that "[w]e are satisfied that the phrase 'use the power of the court' when combined with the oral statement that appellant was relinquishing his right to call witnesses on his behalf reconciles an ambiguity, if any, in the Crim.R. 11(C)(2) colloquy" and that "we find the trial court properly informed appellant of the fact that he was waiving his constitutional right to compel witnesses to testify on his behalf."

The State respectfully submits that *Veney* has not changed the landscape of Ohio law so severely that the use of a single word should invalidate a plea hearing. In this case, as in the Sixth District's earlier decision in *Ballard*, consideration of the written plea should be permitted in order to reconcile any ambiguity in the verbal colloquy. And as in the Sixth District's earlier decision in *Ballard*, consideration of the colloquy in light of the written plea compels the conclusion that the colloquy satisfied the requirements of the Crim.R. 11(C)(2). The State therefore seeks reversal of the Sixth District's decision in the present case and reinstatement of the trial court's judgment.

## CONCLUSION

In *Veney*, several members of this Court expressed concern that the decision might be used to "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." *Veney*, supra, 120 Ohio St.3d at 185 (Lanzinger, J., dissenting, joined by Cupp, J., and Lundberg-Stratton, J.) (emphasis added).

The Sixth District has extended *Veney* beyond even this contemplated scenario, in order to invalidate a conviction based not upon a "single **omitted** oral statement" but upon the use of a single word in the description of a constitutional right. An interpretation of *Veney* as precluding reference to a written document, even when a constitutional right was discussed during the oral colloquy, "represents a regression to the exaltation of form over substance at a time when our criminal justice system is already laboring under immense burdens." *Billups*, supra, 57 Oho St.2d at 36-37. The State therefore requests that this Court reverse the Sixth District's decision and reinstate the trial court's judgment entry.

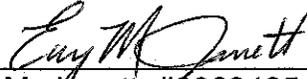
Respectfully submitted,

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**CERTIFICATION**

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 15<sup>th</sup>  
day of March, 2011, to Stephen D. Long, 3230 Central Park West, Ste. 106, Toledo,  
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