

ORIGINAL

In the  
Supreme Court of Ohio

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

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**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL  
MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO**

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## INTRODUCTION

The trial court below sufficiently described Defendant-Appellee Barker's right to compulsory process during the plea colloquy, and therefore the Sixth District Court of Appeals erred in invalidating the plea. Further, the Sixth District erred in holding that it could not consider additional evidence in the record, such as a written plea agreement, to reconcile any perceived ambiguity in the trial court's oral plea colloquy. Accordingly, the Sixth District's decision should be reversed.

The Ohio Attorney General agrees with this Court's instruction that the preferred method of informing a defendant of his or her constitutional rights during a plea colloquy is to use the language contained in Crim. R. 11(C). *State v. Veney*, 120 Ohio St. 3d 176, 180, 2008-Ohio-5200; *State v. Ballard* (1981), 66 Ohio St. 2d 473, 479, 423 N.E. 2d 115. This Court's jurisprudence is equally clear, however, that a trial court's failure to comply literally with Crim. R. 11(C) does not invalidate a plea agreement if the record demonstrates that the trial court explained the constitutional right in a manner reasonably intelligible to that defendant. *Veney*, 120 Ohio St. at 182 (citing *Ballard*, 66 Ohio St. 2d at 473). By holding that a trial judge's use of the phrase "right to call witnesses to speak on your behalf" does not adequately explain the right to compulsory process—and by holding that additional evidence in the record, such as a written plea agreement, may not be used to reconcile any alleged ambiguity in the plea colloquy—the Sixth District elevated form and literal compliance with Crim. R. 11(C) over the substance of the dialogue between the trial judge and the accused in contravention of this Court's precedent.

The Sixth District's decision invalidating Barker's plea agreement was wrong for two reasons. First, the trial court's description sufficiently explained the constitutional right to compulsory process by using words with a commonly understood meaning. The "right to call witnesses," as defined by legal and standard dictionaries, means to summon or command the

appearance of a witness. In addition, to “call” for a witness or evidence has historically meant the same as “compulsory process.” Indeed, the word “call” is still used in two state constitutions to describe the right to compulsory process. Second, the Sixth District erred by not considering additional evidence in the record regarding the oral plea colloquy. The Sixth District’s overly-broad and rigid interpretation of this Court’s decision in *Veney* should be rejected.

For these reasons, explained more fully below, the Sixth District erred, and this Court should reverse its decision.

### STATEMENT OF AMICUS INTEREST

As Ohio’s chief law officer, R.C. 109.02, the Ohio Attorney General has a strong interest in the correct interpretation of the rules of criminal procedure and the proper legal standard for invalidating plea agreements.

### STATEMENT OF THE CASE AND FACTS

On January 7, 2009, Christopher Barker was indicted on five counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), felonies of the third degree. *State of Ohio v. Barker* (6th Dist.) (“App. Op.”), 2010-Ohio-3067, ¶ 3. The Lucas County prosecutor alleged that between February and June, 2005, Barker engaged in sexual conduct with his half-sister, who was ten years younger than him and thirteen years old at the time. Transcript of Plea Hrg. (“Tr.”) (April 22, 2009), *State v. Barker*, No. CR08-1024 Lucas County Court of Common Pleas, at 11: 6-12. The prosecutor further alleged that Barker admitted that he supplied the victim with drugs and alcohol when he had sex with her, which occurred on average of three to four times a month over a three year period. *Id.*

Barker originally entered not-guilty pleas to all five counts, which he subsequently withdrew, and instead agreed to a negotiated plea of no contest to three of the counts in the

indictment. App. Op. at ¶ 3. During the plea colloquy, the trial judge advised Barker that, by pleading no contest, he was waiving his constitutional right to compulsory process:

THE COURT: The State is recommending that Counts Four and Five will be nolle 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.

Tr. 9:9-10:2 (emphasis added).

Barker further acknowledged that he had signed a written change-of-plea form, which provides: "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.***" App. Op. at ¶ 14 (emphasis added). The trial court asked Barker if he reviewed the written change-of-plea form with his attorney, and Barker stated that he had. Tr. 12:19-12:23. The court then asked: "Do you have any questions of the Court before I proceed." Barker stated that he did not have any questions. Tr. 13:1-13:3. In accepting Barker's plea, the court determined that Barker was "advised of [his] constitutional rights" and made a "knowing, intelligent and voluntary waiver of [his] rights pursuant to Criminal Rule 11." Tr. 13:4-13:14. The court found him guilty on all three counts and also found him to be a Tier II Child Victim Offender pursuant to R.C. 2950.01, which requires him to comply with the registration requirements in R.C. 3950.03(B)(3)(a) for a period of twenty-five years. Tr. at 13:4-14; App. Op. at ¶ 3.

Barker appealed, and the Sixth District Court of Appeals reversed, holding that Barker's no contest plea was not voluntary, knowing, and intelligent because the trial court failed to properly inform Barker of his constitutional right to compulsory process under Crim. R. 11(C)(2)(c). App. Op. at ¶ 17. According to the Sixth District, because the trial court did not use the phrase

“compulsory process” or an “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—the trial court erred as a matter of law. *Id.* at ¶ 13. The trial judge’s statement that Barker was “giving up your right to call witnesses” did not “satisfy the constitutional mandate.” *Id.* The Sixth District further held that it could not rely on other sources in the record—such as the written change of plea form or the fact that Barker admitted that he reviewed the agreement with his attorney—to determine that Barker’s plea was voluntary, knowing, and intelligent. *Id.* at ¶15-16 (citing *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200).

The State of Ohio appealed. This Court granted jurisdiction to consider: (1) whether the trial court’s notification that Barker was “giving up your right to call witnesses to speak on your behalf” properly informed Barker of his constitutional right to compulsory process under Crim. R. 11(C)(2)(c); and (2) whether a reviewing court may consider additional sources in the record, such as a written change of plea form or other clarifying statements, as evidence that the defendant understood what the court meant in the plea colloquy.

This Court has not decided whether use of the phrase “right to call witnesses to speak on your behalf” in the plea colloquy sufficiently describes the constitutional right to compulsory process. Ohio’s appellate courts appear split on the issue. The Sixth District relied on *State v. Gardner* (9th Dist.), 2009-Ohio-6505, ¶ 9 (holding that “right to call witnesses to testify” does not inform the defendant that he can use the court’s subpoena power) and *State v. Cummings* (11th Dist.), 2004-Ohio-4470, ¶ 6 (same), appeal dismissed as “improvidently accepted” by *State v. Cummings*, 107 Ohio St. 3d 1206, 2005-Ohio-6506. The Ninth District, however, has also come out the other way on this issue, holding in a different case that the phrase “right to call

witnesses on your behalf” is sufficient to “inform the [defendant] in a reasonably intelligible manner of his rights to compulsory process.” *State v. Anderson* (9th Dist.), 108 Ohio App. 3d 5, 11-12, 669 N.E.2d 865, discretionary appeal not allowed by *State v. Anderson* (1996), 75 Ohio St. 3d 1494, 664 N.E.2d 1291.

Similarly, this Court has not decided whether a reviewing court may consider additional evidence in the record to reconcile any alleged ambiguity in the oral colloquy. This Court has held that a trial court may not rely on “other sources,” such as a written plea agreement, to wholly substitute for an oral colloquy when the trial court completely *omits* to inform the defendant of a constitutional right. *See, e.g., Veney*, 120 Ohio St. 3d at 29-20. Appellate courts appear split, however, on the present issue. *Cf.* App. Op. at ¶ 15 (“written plea agreement is another source, and, therefore, cannot be employed”) *with State v. Pigge* (4th Dist.), 2010-Ohio-6541, ¶ 25 (“the plea petition may be used as additional evidence that the defendant understood what the court meant . . .”); *State v. Dixon* (2nd Dist.), 2001-Ohio-7075, at ¶ 15 (“[a] written acknowledgement 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.”).

## ARGUMENT

### Amicus Curiae Attorney General's Proposition of Law No. 1:

*During the plea colloquy required by Crim. R. 11(C), a trial court explains the constitutional right to compulsory process in a manner reasonably intelligible to the defendant by informing the defendant that he is waiving "the right to call witnesses to speak on your behalf."*

Ohio law is well-settled that when a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. *Veney*, 120 Ohio St. 3d at 178. Ohio Crim. R. 11 was adopted to give detailed instructions to trial courts on the procedure to follow before accepting pleas of guilty or no contest. *Id.* With respect to the required colloquy, Crim. R. 11(C)(2) provides:

(2) 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:

(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.

(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.

(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.

Thus, before accepting a guilty or no-contest plea, the trial court must make the determinations and give the warnings required by Crim. R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim. R. 11(C)(2)(c). *Veney*, 120 Ohio St. 3d at 179. When

notifying a defendant of the constitutional rights at stake in Crim. R. 11(C)(2)(c), the trial court must strictly comply with the requirements in the rule. *Id.*

The strict compliance standard, however, does not require the trial court to use the precise words in the rule, and the trial court's failure to use the precise wording does not invalidate a plea. *Veney*, 120 Ohio St. 3d at 182 (“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”); *id.* (“trial court may vary slightly from the literal wording of the rule in the colloquy”); *Ballard*, 66 Ohio St. 2d at 480 (“failure to use the exact language of the rule is not fatal to the plea”). Instead, the strict compliance standard is met “*as long as the record shows that the trial court explained the constitutional rights in a manner reasonably intelligible to that defendant.*” *Veney*, 120 Ohio St. 3d at 182 (emphasis added). To require rote recitation of Crim. R. 11(C)(2)(c) would “elevate formalistic litany of constitutional rights over the substance of the dialogue between the trial court and the accused,” which this Court has consistently been unwilling to do. *Ballard*, 66 Ohio St. 2d at 480; *Veney*, 120 Ohio St. 3d at 182-83.

Thus, the standard to determine whether a trial court properly informed a defendant of his constitutional rights in Crim. R. 11(C)(2)(c) is whether the court explains those rights in a manner reasonably intelligible to that defendant. For the reasons explained below, that standard was met here, and the phrase “right to call witnesses to speak on your behalf” properly explained the constitutional right to compulsory process in a manner reasonably intelligible to Barker.

**A. The phrase “right to call witnesses to speak on your behalf” is functionally equivalent to “compulsory process.”**

To determine whether the trial judge's wording sufficiently explained the right to compulsory process in a manner reasonably intelligible to Barker, this Court should examine the

common meaning of the judge's words. The term "call" is universally defined—in both legal and standard dictionaries—as "to summon." See e.g., *Black's Law Dictionary* 196 (7th ed. 1999) (defining "call" as "to summon" or as a "request or command to come or assemble"); *Random House Webster's Unabridged Dictionary* (2001) 297 (defining "call" as "to command or request to come; summon"); *Oxford English Dictionary* (1989) 786 (defining "call" as "to summon with a shout, or by a call; hence to summon, cite; to command or request the attendance of"). Further, the term "summon" is defined as to "command (a person) by service of a summons to appear in court." *Black's Law Dictionary* (7th ed.) at 1449; see also *The Concise Oxford English Dictionary* (12th ed.)<sup>1</sup> (last visited Jan. 10, 2011) (defining "summon" as "to authoritatively call on (someone) to be present, especially to appear in a law court"). Thus, under common usage, "to call" is synonymous with "to summon," both of which mean to command or compel the attendance of someone.

In addition, as Justice Stratton explained in her dissenting opinion in a similar case, when the lower court used the word "right," the judge conveyed to the defendant that the "right" to call witnesses was a constitutional guarantee. See *State v. Cummings*, 107 Ohio St. 3d 1206, 1207, 2005-Ohio-6506 (J. Stratton, dissenting). Thus, under the everyday meaning of the lower court's words, Barker—or any reasonable defendant—would have understood that waiving his "right to call witnesses to speak on your behalf" meant that he was waiving a constitutional right—the right to command the appearance of persons to testify on his behalf.

The Court should reject the Sixth District's holding that a trial judge must use the words "compulsory process" or an "equivalent term" in the plea colloquy. "The underlying purpose, from the defendant's perspective, of Crim. R. 11(C) is to convey to the defendant certain

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<sup>1</sup> <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e56277>

information so that he can make a voluntary and intelligent decision whether to plead guilty.” *Veney*, 120 Ohio St. 3d at 180 (citing *Ballard*, 66 Ohio St. 2d at 479-80). The test is from the “defendant’s perspective.” If legalistic words such as “compulsory process” or “subpoena” convey the correct information to a defendant, using everyday language with commonly-accepted definitions, such as “call” or “summon,” also should convey the required information.

Instead of the Sixth District’s literal compliance standard, this Court should follow a recent decision from the United States Court of Appeals for the Sixth Circuit, which, in a case with almost identical facts, held that a trial court’s use of the phrase “call a witness” to describe the constitutional right to compulsory process in a plea colloquy should not invalidate the plea. In *United States v. Taylor* (6th Cir. 2008), 281 Fed. Appx. 467, Judge Sutton, writing for the panel, explained:

Even if the magistrate’s reference to [the defendant]s] “right to *call* witnesses on [his] own behalf,” amounts to a technical violation of Rule 11, which requires courts to advise defendants of their right “to *compel* the attendance of witnesses, moreover, that miscue does not undo the validity of the plea.

*Id.* (emphasis in original) (internal citations omitted).

This Court should reach the same conclusion. The reasonable defendant understands that waiving his “right to call witnesses to speak on your behalf” means that the defendant is waiving his right to command the appearance of persons to testify on his behalf. The trial court described the constitutional right in a manner reasonably intelligible to Barker, and the trial court’s failure to use the specific terms in Crim. R. 11(C)(2)(c) should not invalidate the plea.

**B. The historical background and meaning of the Compulsory Process Clause demonstrates that the right to compulsory process may be described as “the right to call witnesses.”**

Before drafting of the U.S. and Ohio Constitutions, the right to compulsory process was commonly referred to as the right to “call for evidence.” Given this historical background and

meaning of the Compulsory Process Clause, the Court should not adopt a view that the phrase “right to call witnesses” means something different than “compulsory process.” The two phrases are synonymous.

During the Revolutionary War period, early state constitutions specifically provided for a defendant’s right to produce witnesses in his or her favor. Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 94 (1973-74). The particular wording of the constitutional right varied from State to State, but three States guaranteed the accused the right “to call for evidence in his favour.” *Id.* (citing to Va. Dec. of Rts. Art. 8 (1776); Pa. Dec. of Rts. Art. IX (1776); Vt. Dec. of Rts. Art. X (1777)). This language was the “most popular.” Janet C. Hoeffel, *The Sixth Amendment’s Lost Clause: Unearthing Compulsory Process*, 2002 Wis. L. Rev. 1275, 1284 (2002). In fact, to this day, two state constitutions continue to use the phrase “to call for evidence” as the State’s version of their compulsory process clause. Vermont provides that “in all prosecutions for criminal offenses, a person hath a right . . . *to call for evidence in his favor.*” Vt. Const. ch. I, art. 10 (emphasis added). Likewise, Virginia’s Bill of Rights provides that “in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and *to call for evidence in his favor . . . .*” Va. Const. Art. I, § 8 (emphasis added).<sup>2</sup>

When the States began to ratify the U.S. Constitution, several States sent proposed amendments for the Bill of Rights, which included proposed versions of a compulsory process clause. Westen, 73 Mich. L. Rev. at 96. For example, North Carolina proposed that the defendant be able to “to call for evidence . . . in his favor.” *Id.* New York recommended that the

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<sup>2</sup> Thus, in Vermont and Virginia, the lower court’s description here of the right to compulsory process mirrors the language used in the state constitution and, therefore, could not invalidate a plea.

defendant be guaranteed “the means of producing his Witnesses.” *Id.* James Madison, who drafted the Sixth Amendment, ultimately decided on the language “to have compulsory process for obtaining witnesses in his favor,” in what is now referred to as the Sixth Amendment’s Compulsory Process Clause. *Id.* at 97.

According to legal scholars and historians, records do not indicate why Madison formulated the Compulsory Process Clause as he did. Richard Nagareda, *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. 1063, 1112 (1999); Robert N. Clinton, *The Right to Present a Defense: And Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 735 (1975-76); Westen, 73 Mich. L. Rev. at 98. At least one legal scholar has concluded that Madison’s unique phrasing suggests that he wished to fashion a “neutral version that would satisfy the various States without adopting the language of any existing statute or recommendation.” *Id.* at 97-98. Most legal scholars agree that because there was essentially no debate over Madison’s wording, the States must have thought the meaning of the Compulsory Process Clause was similar to that of the state constitutions. Clinton, 9 Ind. L. Rev. at 737; Nagareda, 97 Mich. L. Rev. at 1112 (“[I]f contemporary observers had understood the Bill of Rights to mandate sweeping change in the then-existing law of evidence, one would have expected them to say something. They did not.”).

The U.S. Supreme Court agrees with the view that the meaning of the Compulsory Process Clause is the same meaning from the original state constitutions. As Chief Justice Taney observed, the principles in the Sixth Amendment—including compulsory process—were early understood to be “substantially the same with those which had been previously adopted in the several States.” *United States v. Reid* (1851), 53 U.S. 361, 363-64 (overruled on other grounds by *Rosen v. United States* (1918), 245 U.S. 467, 471); *see also Taylor v. Illinois* (1988), 484 U.S.

400, 407-408 (explaining that the U.S. Supreme Court has “consistently” given the Compulsory Process Clause the meaning “reflected in contemporaneous state constitutional provisions”).

There is no suggestion that Madison settled on “compulsory process” instead of “to call for evidence” because—as the Sixth District held below—that “to call witnesses” is not equivalent to “compulsory process.” See App. Op. at ¶ 13. Accordingly, there is no reason to conclude that “to call witnesses” has a different meaning than “compulsory process,” especially given the historical background and meaning of the Compulsory Process Clause.

In fact, the U.S. Supreme Court still uses the word “call” when describing the right to compulsory process. See, e.g., *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527, 2534 (“[T]he Compulsory Process Clause guarantees a defendant the right to *call* witnesses ‘in his favor.’”) (emphasis added); *Rock v. Arkansas* (1987), 483 U.S. 44, 52 (“The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to *call* ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.”) (emphasis added).

Accordingly, the Sixth District’s conclusion that “to call witnesses” cannot satisfy the “constitutional mandate” ignores the meaning and historical context of the Compulsory Process Clause. If the Compulsory Process Clause originated from state constitutions, which described the right as one to “to call for evidence,” this Court should not hold that the “right to call witnesses to speak on your behalf” is not equivalent to, or does not adequately describe, the right to compulsory process. Given the historical background, the trial court’s description below should not invalidate Barker’s plea.

**Amicus Curiae Attorney General's Proposition of Law No. 2:**

*When the trial court addresses all of the constitutional rights listed in Crim. R. 11(C)(2)(c) in the oral plea colloquy, a reviewing court—in determining whether the defendant knowingly, voluntarily, and intelligently entered the plea—may consider additional evidence in the record, such as a written plea agreement or other statements to the trial court, to reconcile any ambiguity in the oral plea colloquy.*

Barker's change of plea form provides: "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." App. Op. at ¶ 14. During the plea colloquy, the trial judge asked Barker if he reviewed the change of plea form with his attorney, and Barker stated that he had. Tr. 12:19-12:23. The court then asked: "Do you have any questions of the Court before I proceed?" Barker stated that he did not have any questions. Tr. 13:1-13:3. Citing to *Veney*, the Sixth District held that this record evidence is essentially irrelevant because strict compliance prohibits a reviewing court from considering sources beyond the oral colloquy. App. Op. at ¶ 15. The Sixth District's reliance on *Veney* is misplaced. The facts and reasoning of *Veney* are distinguishable, and this Court should clarify that a reviewing court may consider additional evidence in the record to reconcile or supplement any ambiguity in the oral plea colloquy.

Since the leading case of *State v. Ballard* in 1981, this Court has long recognized that a trial court's failure to literally comply with Crim. R. 11(C) will not necessarily invalidate a plea because the "colloquy may be looked to in the *totality of the matter*." *Ballard*, 66 Ohio St. at 481 (emphasis added). That is, the focus for a reviewing court should be on "whether *the record* shows that the trial court explained or referred to the right in a manner reasonably intelligible to that defendant." *Id.* (emphasis added). In *Veney*, the Court was presented with a set of facts where the trial court "plainly failed to orally inform [the defendant] of his constitutional right to require the state to prove his guilty beyond a reasonable doubt" because the trial court *completely*

omitted any discussion of the constitutional rights in its Crim. R. 11(C) oral colloquy. *Veney*, 120 Ohio St. 3d at 183. Accordingly, this Court invalidated the plea, explaining that a reviewing court “cannot simply rely on other sources to convey these rights to the defendant.” *Id.* at 182.

This Court’s decision in *Veney* did not repudiate the totality-of-the-circumstances approach from *Ballard* but, instead, is limited to the situation where a trial court omits any discussion of a constitutional right in the oral plea colloquy. Thus, the Sixth District was wrong to conclude that *Veney* precludes a reviewing court from looking to “other sources” as additional evidence to determine whether a trial court adequately advised a defendant of his constitutional rights. Clearly, after *Veney*, a written plea form, by itself, cannot suffice as a waiver of a defendant’s constitutional rights when the trial judge fails to mention a constitutional right in the plea colloquy. However, when a trial judge addresses all of the constitutional rights in the oral plea colloquy, a reviewing court should be permitted to consider additional record evidence to reconcile any alleged ambiguity in the oral colloquy. This view has been adopted not only by several Ohio courts of appeals, *see, e.g., State v. Dixon* (2nd Dist.), 2001-Ohio-7075, at ¶ 15; *State v. Pigge* (4th Dist.), 2010-Ohio-6541, ¶ 18, 25; *State v. Green* (7th Dist.), 2004-Ohio-6371, ¶ 13-16; *State v. Jordan* (10th Dist.), 2010-Ohio-2979, at ¶ 8-9, but also by the U.S. Court of Appeals for the Sixth Circuit. *United States v. Taylor* (6th Cir. 2008), 281 Fed. Appx. 467, 469 (upholding plea for multiple reasons, including reliance a signed plea agreement).

Accordingly, this Court should reject the unduly rigid approach adopted by the Sixth District. If the Sixth District determined that the trial court’s oral colloquy in this case was somehow inadequate, the appellate court should have examined the entire record—including the executed plea change form and other questioning from the judge—to supplement the oral colloquy. The Sixth District should not have accepted Barker’s disingenuous argument that the

trial court did not refer to the right of compulsory process in a manner that was reasonably intelligible to him when the record demonstrates that the trial judge's oral colloquy informed Barker of his right to call witnesses and Barker signed a written plea agreement, which he also reviewed with his attorney, that stated that he "could use the power of the court to call witnesses." App. Op. 14. Looking to the totality of the circumstances, which continues to be permitted by the seminal *Ballard* case, the record is clear that Barker knowingly, intelligently, and voluntarily waived his right to compulsory process, and his plea should not have been invalidated.

### CONCLUSION

For the foregoing reasons, the Attorney General asks this Court to reverse the Sixth District's decision and hold that the record demonstrates that the trial court explained Barker's constitutional right to compulsory process in a manner reasonably intelligible to the defendant.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

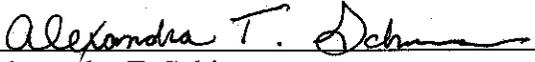
I certify that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Attorney General in Support of Appellee State of Ohio was served by U.S. mail this 21st day of January, 2011 upon the following counsel:

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