No. 21-603

In The
Supreme Court of the United States

OHIO,

Petitioner,

v.

GEORGE C. BRINKMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

RULES

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports Ohio's 88 elected county prosecutors. OPAA's mission is to assist prosecuting attorneys in the pursuit of truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and sponsors continuing legal education programs that facilitate access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in this Court accepting review over the questions presented regarding the scope of *Boykin* review and the applicability of harmless-error review. The needless reversal of convictions for claims of plea-colloquy error bears directly on the work of Ohio prosecutors, reopening cases that need not be reopened, taking up the time and effort of prosecutors on remand on cases that should be closed, and renewing for crime victims the ordeal of undergoing the criminal-justice process again in the trial court. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the

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[1] No counsel for any party authored any part of this brief, and no monetary contribution was made by any counsel or party intended to fund the preparation or submission of this brief. The OPAA notified all parties, through the parties' attorneys, of its intent to file this amicus brief more than ten days before its due date, and both parties have provided written consent for the filing of this amicus brief.

public to ridicule it." *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting Traynor, The Riddle of Harmless Error).

These concerns reach their zenith in this triple-homicide prosecution in which the defendant received three death sentences. Relying heavily on its earlier decisions in *State v. Veney*, 120 Ohio St.3d 176, 897 N.E.2d 621 (2008), and *State v. Miller*, 159 Ohio St.3d 447, 151 N.E.3d 617 (2020), the Ohio Supreme Court found that the guilty pleas were invalid even though the supplemental colloquy showed that the defendant understood all of his *Boykin* rights and that the earlier "errors" were harmless.

As is common throughout the Nation, Ohio trial courts face myriad legal requirements in handling their overburdened dockets. With courts handling numerous cases every day, mistakes are bound to occur in giving oral advisements. While such omissions can provide fodder for possible reversal of a guilty plea on direct appeal, it is also true that, in many situations, the appellate court will be able to determine that the omission of a particular oral advisement simply made no difference to the outcome of the proceedings. This is especially so when the "mistake" is actually noticed, the trial court corrects it, and the defendant and his attorneys express no reservations about the earlier mistake or about the correction and the attorneys actually express satisfaction with the correction. It takes no leap in logic to conclude that, even after the corrective colloquy, the defendant and his counsel desired that these plea-based proceedings move forward.

This Court's recent decision in *Greer v. United States*, 141 S.Ct. 2090, 2100 (2021), confirms that discrete defects in the plea-colloquy process, such as "the omission of a required warning from a Rule 11 plea colloquy," would not be structural. Amicus curiae OPAA respectfully urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court found that due process was violated when the defendant had been convicted on the basis of a guilty plea without the record disclosing that the defendant was aware of three constitutional rights: (1) the right to jury trial; (2) the right to confront witnesses; and (3) the right not to be compelled to testify against himself. The "wholly silent" record was not sufficient to comply with due process. *Id*. at 240.

The record was not "wholly silent" here. But, instead of looking at the entire record to assess the defendant's understanding of the three *Boykin* rights, the Ohio Supreme Court focused solely on the giving and timing of oral advisements. *Boykin* does not require oral advisements, and so it does not require a narrow focus on the giving and timing of those advisements to the exclusion of considering the entire record in assessing the validity of the plea.

Above and beyond what *Boykin* requires, an Ohio criminal rule requires that Ohio trial courts shall give

oral advisements to the defendant as to five constitutional rights at the time he is pleading guilty: (1) the right to jury trial; (2) the right to confront witnesses; (3) the right not to be compelled to testify against himself; (4) the right to compulsory process; and (5) the right to proof beyond a reasonable doubt. Ohio Crim.R. 11(C)(2)(c).

While *Boykin* should be treated as a distinct and separate constitutional protection, the Ohio Supreme Court has conflated *Boykin* with the requirements of the Ohio criminal rule. *Boykin* does not require oral advisements so long as the record as a whole otherwise shows the defendant's awareness of the three *Boykin* rights. But the Ohio rule *does* require oral advisements. By combining *Boykin* with the rule, the Ohio Supreme Court concludes that a plea will be "constitutionally infirm" without the five oral advisements listed in the state rule.

The Ohio Supreme Court refuses to review the entire record to determine whether the defendant was sufficiently aware of the three *Boykin* rights. Instead, it looks for the presence or absence of the five oral advisements listed in the rule, and it treats any omission of those advisements as an error of constitutional dimension requiring automatic reversal.

This approach amounts to a refusal to follow the holding of *Boykin* because the Ohio Supreme Court refuses to review the record as a whole in assessing whether the record is "wholly silent."

The Ohio Supreme Court's approach also refuses to entertain harmless-error review as to the claimed plea-advisement errors. Relying on *Veney* and *Miller*, the decision in *Brinkman* below adhered to the automatic-reversal holding of *Veney*. The "traditional rule" in Ohio is that a defendant claiming error regarding plea-taking procedures must show prejudice, but the automatic-reversal rule of *Veney* is a "limited exception" to that rule. *State v. Dangler*, 162 Ohio St.3d 1, 164 N.E.3d 286, ¶¶ 13-14 (2020). As the Ohio Supreme Court emphasized below, the omission of any of the five oral advisements "cannot be deemed harmless." *State v. Brinkman*, 2021 Ohio Lexis 1458, ¶ 12 (2021), quoting *Miller*, ¶ 16.

Harmless-error analysis is a federal question when it relates to a federal constitutional right. *Chapman v. California*, 386 U.S. 18, 20-21 (1967); *Washington v. Recuenco*, 548 U.S. 212, 217-18 (2006). By relying on *Boykin*, and by elevating the claimed error to the level of a federal constitutional violation, the Ohio Supreme Court in its *Veney-Miller-Brinkman* line of cases has created the federal question of whether an omission in giving the oral advisements should be subject to harmless-error review. As discussed in Part B of the Argument, infra, this Court has jurisdiction to review this question.

Under this Court's structural-error doctrine, the Ohio Supreme Court's automatic-reversal approach is untenable. A court's failure to give an oral advisement could be rendered harmless in any number of ways, including the defendant having received the advisement

in an earlier hearing (*see United States v. Vonn*, 535 U.S. 55, 75 (2002)), the defendant having approved a written plea document containing that advisement, or, as here, the defendant having received the omitted oral advisements in a supplemental corrective colloquy.

In its automatic-reversal line of cases, the Ohio Supreme Court has not explained how such an omission could be structural. Even if the giving of an oral advisement were a constitutional requirement, the involvement of constitutional rights alone is insufficient to insulate a claimed constitutional violation from harmless-error review. The vast majority of constitutional errors are subject to harmless-error review.

The Ohio Supreme Court's requirement of automatic reversal is unsound as a matter of constitutional review. It defies common sense by refusing to recognize that the omission of an oral advisement could be rendered harmless in numerous ways, including, as here, by providing a supplemental colloquy including the advisement. Much to the detriment of Ohio prosecutors and victims, this automatic-reversal approach unnecessarily requires litigants and victims to start over even in the face of affirmative record evidence showing that the error made no difference to the defendant's decision to plead guilty.

ARGUMENT

THE DUE PROCESS STANDARD OF *BOYKIN v. ALABAMA* DOES NOT REQUIRE AN ORAL ADVISEMENT OF A CONSTITUTIONAL RIGHT, AND THE OMISSION OF ANY SUCH ADVISEMENT IS SUBJECT TO HARMLESS-ERROR REVIEW.

Under the "entire record" analysis that should apply, the defendant's guilty plea should have been upheld under the *Boykin* analysis because that analysis focuses on what the entire record shows. But, even if *Boykin* would limit its review to advisements immediately preceding the plea, the question then becomes whether the omission of such advisements would be subject to harmless-error review by reference to other matters reflected in the entire record.

A.

The Ohio Supreme Court has consistently failed to draw a distinction between what the *Boykin* federal principle requires and what its own criminal rule requires. Instead of treating these sources of law as separate, the Ohio Supreme Court has conflated the two and claimed that a plea is "constitutionally infirm" if it is not immediately preceded by oral advisements. But oral advisements are only required by the rule; oral advisements are *not* required by *Boykin*.

"[T]he overwhelming weight of authority no longer supports the proposition that the federal Constitution requires reversal when the trial court has failed to give

explicit admonitions on each of the so-called *Boykin* rights." *People v. Howard*, 1 Cal.4th 1132, 1175, 824 P.2d 1315 (1992). "Specific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea." *Wilkins v. Erickson*, 505 F.2d 761, 763 (9th Cir. 1974). "*Boykin* does not constitutionalize Rule 11 for state plea proceedings." *United States v. Ward*, 518 F.3d 75, 86 (1st Cir. 2008).

Given the "wholly silent" record involved in *Boykin*, an "entire record" approach would apply to assessing whether a *Boykin* reversal should occur. The inquiry into the validity of a plea considers "all of the relevant circumstances surrounding it." *Brady v. United States*, 397 U.S. 742, 749 (1970). "[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Id*. at 747 n. 4. The test is holistic in nature: "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

Accordingly, under the constitutional standard, "a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." *Howard*, 1 Cal.4th at 1175. Courts "are not limited to reviewing the transcript of the colloquy alone, * * * but may also consider the other materials and documents that comprise the record as a whole." *Ward*, 518 F.3d at 84.

This entire-record approach would especially apply when the trial court has noticed that an initial colloquy failed to include two advisements required under state law and thereupon seeks to supplement the original colloquy. In the present case, the supplemental colloquy addressed the omitted advisements, and the defense took no action to vacate the earlier plea. Instead, the defense expressed satisfaction with the supplemental colloquy.

In such circumstances, there is good reason to think that the defendant was aware of the omitted rights to begin with. The defendant here had the benefit of two counsel, who are strongly presumed to have acted competently in providing advice to the defendant on the decision whether to plead guilty. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[C]ounsel is obliged to understand the Rule 11 requirements. It is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Vonn*, 535 U.S. at 73 n. 10.

In addition, there was no indication of any surprise or uncertainty on the part of the defendant at the time of the supplemental colloquy. The defendant's counsel also affirmatively expressed their satisfaction with the supplemental colloquy.

This chain of events readily yields the inference that the defendant already had been aware of the rights in question and had already factored these and other rights into the decision on whether to plead

guilty. Rather than disregarding a supplemental colloquy like this, a *Boykin* review should embrace it as strong evidence that the plea was knowing, voluntary, and intelligent.

At the very least, this kind of supplemental colloquy should remove any reason to allow the defendant to challenge the plea-based *conviction* on appeal. The defendant and his counsel received the supplemental colloquy at a time when the defense might have asked for the proceedings to start over, and they said nothing about starting over. The defendant's counsel instead expressed satisfaction with the supplemental colloquy. In light of all of the relevant circumstances, the defense decision to allow the plea-based proceedings to reach judgment was knowing, voluntary, and intelligent, which should be sufficient to avoid a constitutional challenge to the validity of the plea-based judgment.

Due process would readily allow courts to recognize post-plea corrections. This view "concentrates plea litigation in the trial courts, where genuine mistakes can be corrected easily, and promotes the finality required in a system as heavily dependent on guilty pleas as ours." *Vonn*, 535 U.S. at 72. In discussing *Boykin*, this Court has stated that that the conviction must be reversed "when the *record of a criminal conviction* obtained by guilty plea contains *no evidence* that a defendant knew of the rights he was putatively waiving * * *." *United States v. Dominguez-Benitez*, 542 U.S. 74, 84 n. 10 (2004) (emphasis added), citing *Boykin*, 395 U.S. at 243. This phrasing would allow

the consideration of the record as a whole, as opposed to the narrow plea colloquy, and would consider "evidence" of a supplemental colloquy correcting an earlier omission, as occurred here.

Just as plain-error review would consider the entire record, *see Greer*, 141 S.Ct. at 2098, the question of whether a plea-based conviction would be allowed to stand in light of the claimed *Boykin* error would likewise consider the entire record. There would be no *Boykin* error on the trial court's part in entering judgment when the earlier omission(s) were corrected prior to judgment and the case proceeded accordingly thereafter.

B.

Respondent would likely contend that the Ohio Supreme Court in *Brinkman* based its ruling on an adequate and independent state ground by relying on its criminal rule, Ohio Crim.R. 11(C)(2)(c). But the Ohio Supreme Court's ruling heavily relied on its earlier decision in *Veney*, a decision which itself relied heavily on *Boykin* in relation to the question of whether the plea was "constitutionally infirm" in the absence of the oral advisements. The decisions in *Veney*, *Miller*, and *Brinkman* do not clearly rely on the state criminal rule as an adequate and *independent* state ground for decision.

The prosecution in *Veney* had specifically argued that an oral advisement was not constitutionally required as to *Boykin* rights. The Ohio Supreme Court

summarized the prosecution's argument in paragraph 20 of *Veney* and then, in paragraph 21, "reject[ed] the state's contention."

Other parts of the *Veney* opinion confirmed that the Ohio Supreme Court believed that the omission of any of the five oral advisements was constitutional error. In paragraph 26, the *Veney* court concluded that, under *State v. Ballard*, 66 Ohio St.3d 473, 423 N.E.2d 115 (1981), a plea is "constitutionally infirm" if the oral plea colloquy omits one of the five constitutional rights listed in Ohio Crim.R. 11(C)(2)(c). In paragraph 24, the *Veney* court stated that, under *Ballard* and *Boykin*, "a defendant must be apprised of certain constitutional rights * * *," and then stated in footnote 3 that "the principles applicable to the '*Boykin* rights' extend to all five rights listed in Crim.R. 11(C)(2)(c) in Ohio."

In paragraph 29, the *Veney* court quoted *Boykin* for the proposition that "We cannot presume a waiver of these * * * important federal rights from a silent record" and then stated, "When the record confirms that the trial court failed to perform this duty, the defendant's plea is constitutionally infirm making it presumptively invalid."

In total, the *Veney* court cited or quoted *Boykin* eight times in the key passages of paragraphs 24 through 30 in reaching the conclusion that the plea was "constitutionally infirm." Although the *Veney* court also referred to Ohio Crim.R. 11(C)(2)(c), its ruling was bottomed on a finding of a constitutional violation. Given the frequent reliance on *Boykin*, and given the

reference to "federal rights" in paragraph 29, the *Veney* ruling was a *federal* constitutional ruling.

But for its emphasis on the federal constitutional underpinnings of its ruling, there are serious doubts about whether the *Veney* court would have ruled against the prosecution in that case. It was applying a "structural error" resolution to the problem, and the Ohio Supreme Court had repeatedly held that only *constitutional* errors can support a structural-error approach. *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, ¶ 55 (2006). Requiring per se reversal necessarily meant that the *Veney* court was finding a *constitutional* error.

In addition, absent a violation of constitutional dimension, the *Veney* court would have faced substantial difficulties under Ohio law in giving the oral-advisement rule such overriding significance. If the court were only addressing a violation of a state-law rule, it would have run into another criminal rule of equal station requiring that appellate courts disregard harmless errors. Ohio Crim.R. 52(A) & (B). A "mere error of state law" does not violate due process, *see Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1977), especially a mere violation of this state-law rule. *Riggins v. McMackin*, 935 F.2d 790, 794-95 (6th Cir. 1991) ("sole inquiry should have been * * * whether Riggins' guilty plea comported with the protections of due process").

Although the *Veney* court's syllabus did not refer to *Boykin* and only referred to the criminal rule, the Ohio Supreme Court had abrogated its "syllabus rule"

as of 2002, and so the text of the *Veney* decision carries just as much weight as its syllabus. *See State ex rel. Glenn v. Indus. Comm.*, 2007-Ohio-6535, 2007 Ohio App. Lexis 5730, ¶ 31 (10th Dist. 2007), quoting former Ohio S.Ct.Rep.Op.R. 1(B)(1) (eff. May 1, 2002). The *Veney* syllabus sets forth the automatic-reversal principle – "the defendant's plea is invalid" – and the text explains why that is so, i.e., because the plea is "constitutionally infirm," relying on *Boykin* repeatedly in the process.

The 2020 decision in *Miller* reaffirmed the *Veney* "strict compliance" standard and recognized that the failure to give all five oral advisements renders the plea "invalid" and subject to automatic reversal because "a failure to do so cannot be deemed harmless," and "no showing of prejudice is required." *Miller*, ¶¶ 16-17, 22.

Now, in *Brinkman*, the court has reaffirmed both *Veney* and *Miller*. *Brinkman* reiterates that the plea is "constitutionally infirm" without these five oral advisements and that an omission "cannot be deemed harmless." *Brinkman*, ¶¶ 12, 18. *Brinkman* refers to "due process" and "fundamental fairness", and it cites *Veney*, *Miller*, and *Boykin* repeatedly. *Brinkman*, ¶¶ 10, 11, 12, 16, 17, 18, 20, 21. Nothing has changed in the Ohio Supreme Court's thinking in this regard.

To be sure, the Ohio Supreme Court should not be constitutionalizing the oral-advisement requirements of a mere state-law rule. But that is what it is doing by conflating those requirements with *Boykin*. The Ohio

Supreme Court's *Veney-Miller-Brinkman* line of cases "fairly appears to rest primarily on federal law" as arising from "due process" under *Boykin*, and there is no plain statement to the contrary in these decisions making the state criminal rule an adequate and independent state ground for decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

At a minimum, the Ohio Supreme Court's analysis in *Veney*, *Miller*, and *Brinkman* would constitute an interwoven mixture of federal constitutional law and state criminal procedure. The court has determined the issue of "strict compliance" by reference to whether the plea was "constitutionally infirm." At a minimum, "[i]t appears to us that the state court felt compelled by what it understood to be federal constitutional considerations to construe its own law in the manner it did." *Long*, 463 U.S. at 1044 (internal quote marks and ellipses omitted). This interwoven constitutional ruling provides a sufficient basis for this Court to grant review. *Ohio v. Reiner*, 532 U.S. 17, 20 (2001).

C.

Beyond the question of whether *Boykin* allows review of the entire record, there remains the additional question of whether an omission of an advisement would evade harmless-error review. Although the *Veney-Miller-Brinkman* line of cases calls it "strict compliance," it would not be a matter of "compliance." At this stage of the analysis, non-compliance is a given, and an "error" is a given. But constitutional error alone does

not require reversal if the error can be shown to have been harmless.

The *Veney-Miller-Brinkman* line of cases categorically refuses to engage in any harmless-error review when there is an omission of an oral advisement listed in its rule as constitutionalized under *Boykin*. The Ohio Supreme Court takes this refusal to extreme levels.

In *Veney* itself, the trial court had omitted giving an oral advisement on the right to proof beyond a reasonable doubt. But, as discussed in the State's briefing in the Ohio Supreme Court in *Veney* (*see* State's 9-7-07 Brief, at p. 2, at www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2007/0656), and as discussed in the State's petition for writ of certiorari in *Veney* here (*see* Case No. 08-1018 (filed 2-9-09)), the defendant in *Veney* had signed a contemporaneous written Entry of Guilty Plea that provided a written advisement of the beyond-reasonable-doubt right. The defendant in *Veney* had also informed the trial court that he had signed this Entry, and the defendant had said "yes" when asked whether he had "reviewed your constitutional rights" with defense counsel.

Even despite these indications that the defendant had been aware of the beyond-reasonable-doubt right, the *Veney* court rejected the State's claim of harmless error and did not even mention the written Entry. *Compare Dominguez-Benitez*, 542 U.S. at 85 (written plea agreement setting forth substance of omitted oral

advisement "tends to show that the Rule 11 error made no difference to the outcome here").

Refusing to acknowledge contemporaneous plea documentation represents an extreme refusal to entertain harmless-error review. Other Ohio cases follow the logic of *Veney* to its draconian conclusion when the oral advisement was omitted, overturning guilty pleas even though the defendant approved plea documentation containing the omitted advisement in writing. *See*, *e.g.*, *State v. Moore*, 2019-Ohio-2764, 2019 Ohio App. LEXIS 2880, ¶ 7 (9th Dist. 2019); *State v. Fritts*, 2021-Ohio-895, 2021 Ohio App. LEXIS 889, ¶ 10 (3rd Dist. 2021); *State v. Thompson*, 2019-Ohio-5407, 2019 Ohio App. LEXIS 5477, ¶ 14 (11th Dist. 2019).

The present case provides another extreme example. The trial court conducted its supplemental colloquy with the defendant, thereby confirming that he was aware of the omitted advisements, confirming he had no questions about them, and confirming that his two counsel were satisfied with the supplemental colloquy. There was no indication of any surprise or uncertainty on the defendant's part. There was no defense motion seeking withdrawal of the earlier plea and no request to start the plea process over entirely. By all indications, the advisements had made no material difference in his decision to plead.

Other parts of the record confirm this. The defendant had the benefit of two counsel, who are strongly presumed to have provided competent advice in advising the defendant on the decision to plead guilty. Also,

the defendant had made a full confession, and the evidence of his guilt was overwhelming. In his unsworn statement to the three-judge panel during the penalty phase, the defendant stated that he deserved to die but that he was asking for mercy. (Tr. 688) At the conclusion of the case, the defendant had conceded on the record that "early on in this case" he had planned on *not* appealing from his sentencing. (Tr. 1047-48) Even while challenging the validity of the plea on appeal, the defense was touting the guilty plea as substantial mitigating evidence through acceptance of responsibility. (*See* 4-29-20 Brief of Defendant, p. 7, at www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/0303).

All of this shows that the defendant's guilty plea was prompted by significant strategic considerations related to the desire to accept responsibility for his crimes and the desire to throw himself on the mercy of the court. The very point of this strategy would have been to accept responsibility outright and *not* dispute the overwhelming evidence. The defendant had no "reasonable doubt" defense, and the right to confrontation would not have been productive toward any hope of a favorable outcome on guilt. "[I]t is hard to see here how the warning could have had an effect on [the defendant's] assessment of his strategic position." *Dominguez-Benitez*, 542 U.S. at 85.

The omission of the confrontation and beyond-reasonable-doubt advisements made no difference to this strategic approach. Indeed, if defendant had been reluctant in any way to accept guilt, the oral advisements initially given on the right to jury trial and

compulsory process would have been sufficient on their own to stir such hesitancy into active resistance to entering the plea.

This was all further confirmed by the defense satisfaction with the supplemental colloquy. It was still full speed ahead on the acceptance-of-responsibility approach even after the supplemental colloquy. Very likely, the defendant had been personally aware of the confrontation and beyond-reasonable-doubt rights as a result of his pre-plea consultations with his counsel anyway.

Federal courts apply harmless-error review to claimed plea-colloquy errors, and such review considers the entire trial-court record, not just the colloquy closest to the moment the defendant enters the plea. *Vonn*, 535 U.S. at 61-62, 74. "[A] reviewing court may consult the whole record when considering the effect of any error on substantial rights." *Id*. at 59.

Under the Ohio Supreme Court's approach, however, other parts of the record – such as the supplemental colloquy here – are not even considered. Reversal is automatic, and the court categorically refuses to entertain harmless-error review, emphasizing that the error "cannot be deemed harmless." *Brinkman*, ¶ 12, quoting *Miller*, ¶ 16.

D.

Even though the Ohio Supreme Court forswore any review for harmlessness, the defense would likely

point to certain statements by the court as indicating that there was prejudice. For example, the Ohio Supreme Court noted that "[a]t no point did the trial court ask Brinkman to reenter his guilty plea." *Brinkman*, ¶¶ 7, 22. But this would have been an empty formalism that the harmless-error inquiry would not require. The defendant *already* had entered the guilty plea, and so there would have been no need to reenter it when, by all indications, the defendant and his two attorneys were satisfied with the supplemental colloquy and wanted to move ahead.

In criticizing the trial court and counsel, the *Brinkman* court also noted that the supplemental colloquy "provided Brinkman with the bare minimum" and "did not engage Brinkman in a full Crim.R. 11(C)(2) colloquy." *Brinkman*, ¶ 22. But these were nonsequiturs and would not negate the applicability of harmless-error review. The "bare minimum" statement actually *confirms* that the oral advisements in the supplemental colloquy would have been sufficient (if they had come earlier) because they met the "minimum" requirements. Also, the trial court's failure to address *other* parts of the colloquy under Ohio Crim.R. 11(C)(2) would have had zero bearing on whether the supplemental colloquy cured the omissions as to the constitutional rights listed in Ohio Crim.R. 11(C)(2)(c).

The Ohio Supreme Court also noted that the trial court "never asked Brinkman during the second colloquy whether he still wished to plead guilty." *Brinkman*, ¶ 17. While this observation would be relevant to the harmless-error analysis, this point would

not be controlling to the exclusion of all other indicia of harmlessness. The indicia of the defendant's desire to move forward based on the guilty pleas were overwhelming at every point thereafter. The fully-advised defendant and his counsel repeatedly allowed the plea-based proceedings to move forward toward the findings of guilt, through the penalty phase, and toward the final sentencing and judgment.

It is interesting to note, however, that the Ohio Supreme Court *still* would have reversed the guilty pleas even if the defendant had said he still wished to plead guilty. Reversal is automatic, and the court refuses to entertain any harmless-error approach. Given that the Ohio Supreme Court will not entertain harmless-error review even in light of *contemporaneous* plea documentation showing harmlessness, a defendant's post-plea statement that he still wished to plead guilty after a supplemental colloquy would not pass muster either.

E.

The Ohio Supreme Court's automatic-reversal approach amounts to the determination that plea-advisement error is "structural error." But omitting a plea advisement is not colorably structural, *see Dominguez-Benitez*, 542 U.S. at 81 n. 6, and harmless-error scenarios can be readily envisioned. One example occurred in *Veney* itself, in which the use of contemporaneous plea documentation containing a written advisement should have been sufficient to render harmless the omission of the oral advisement. In the

present case, the supplemental colloquy correcting the omission is yet another example.

Most constitutional errors will be subject to harmless-error review. *Neder*, 527 U.S. at 8. "Structural error" applies only to a "very limited class of cases" in which the legal error infects the entire process and necessarily renders the proceeding fundamentally unfair, without which the proceeding cannot reliably serve its function as a vehicle for determining guilt or innocence. *Neder*, 527 U.S. at 8-9.

As this Court recently emphasized, "discrete defects in the criminal process – such as the omission of a single element from jury instructions or the omission of a required warning from a Rule 11 plea colloquy – are not structural because they do not '*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Greer*, 141 S.Ct. at 2100 (quoting *Neder*) (emphasis in *Neder*).

The absence of an advisement by the court does not necessarily "infect" the entire plea-taking process so as to make it impossible to have a guilty plea that reliably reflects actual guilt. Courts should be allowed to consider "any record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any Rule 11 error." *Dominguez-Benitez*, 542 U.S. at 84.

There is no reason to make plea-advisement error "structural" and thereby immune to all harmless-error

review. Courts can address the issue on a case-by-case basis to determine whether the omission of an oral advisement was harmless. *See Neder*, 527 U.S. at 14.

In the present case, any constitutional error in initially omitting these oral advisements was cured by the supplemental colloquy, and its harmlessness is shown by all of the surrounding circumstances. The Ohio Supreme Court should have found the error to be harmless, instead of applying its across-the-board automatic-reversal standard.

F.

Ohio prosecutors respectfully urge this Court to correct the Ohio Supreme Court on these questions related to the scope of *Boykin* review and the applicability of harmless-error review. The Ohio Supreme Court's current flawed approach is tethered to a misapprehension that *Boykin* prevents a review of the entire record and that automatic reversal is compelled because constitutional rights are involved. This Court's review would cut that tether, thereby allowing the Ohio Supreme Court to address its own state-law criminal-rule advisement requirements without the mistaken conflation of *Boykin* getting in the way.

When acting solely as a matter of state law, the Ohio Supreme Court readily could change course and dispense with its draconian automatic-reversal approach. It would be free to recognize that the oral-advisement requirements of its rule go above and

beyond what *Boykin* requires, and it would be able to recognize that violating the state-law rule does not create an error of constitutional dimension. It could apply its traditional rule that the defendant must show prejudice in regard to a plea-taking error. It also could readily apply the harmless-error and plain-error standards set forth in its own rules. These are very-real possibilities that could flow from this Court's review of the questions presented.

Absent review by this Court, however, Ohio prosecutors and victims face a perpetual loop of *Veney*-based error in Ohio's appellate courts. In this perpetual loop, Ohio prosecutors are precluded from obtaining the *Boykin* review of the entire record that should take place. Prosecutors will also be indefinitely hindered by the refusal of Ohio appellate courts to entertain harmless-error review. Review by this Court would settle these oft-recurring points of federal law, would close this perpetual loop, and thereby would foster the development of state law as well, all to the benefit of Ohio courts, prosecutors, and victims.

CONCLUSION

In light of the foregoing, amicus curiae Ohio Prosecuting Attorneys Association respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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