IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee	:	Case No. : 2021-0215
vs.	:	On Appeal from the Wood County Court of Appeals, Sixth Appellate District
ERNIE HAYNES	:	C.A. Case No.: 2019WD0035
Defendant-Appellant	:	

MERIT BRIEF OF APPELLANT

Counsel for Appellant:
Michael H. Stahl (0097049)
316 N. Michigan St. Ste 600
Toledo, Ohio 43604
Telephone: (419) 214-0573
Mstahl@stahlandstephenson.com

Counsel for Appellee:
Paul Dobson, Wood County Prosecuting Attorney, BY:
David Harold, 0072338
Assistant Prosecuting Attorney
Wood County Prosecutor's Office
1 Courthouse Sq.
Bowling Green, Ohio 43402
Telephone: (419) 354-9250

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Statement of the facts and the case

In a factual scenario which is markedly tragic, Ernie Haynes was charged with multiple counts of Abduction resulting from a custody dispute between himself, the children's grandfather, and the children's father after the pregnant mother died from a heroin overdose. Mr. Haynes had reason to believe that the father was also an opiate addict, as well as potentially abusive.

The circumstances were such that, in denying Mr. Haynes post-conviction motion for acquittal, the trial court stated, "[c]onsidering the unique and distinctly sad factual situation in this case it does cause the Court to wonder why the State of Ohio would pursue the criminal prosecution of a matter that might have been better handled through the Seneca County Juvenile Court. The Court will be left to ponder what purpose or end the State of Ohio had in pursuing this criminal matter." (04/04/2019 order denying post-conviction Rule 29 Motion). Little more need be stated as far as the background.

Ultimately, the Abduction convictions were upheld based upon Mr. Haynes putting the, quite willing, children in child restraint seats and driving away-as they ordinarily did.

Pertinent to this case, Mr. Haynes made a timely request for a Bill of Particulars, seeking the specific time of the accusation and the acts alleged to constitute "force" under the Abduction statute. The trial court continued a scheduled jury trial over Mr. Haynes objection. (Appendix, IIa at App. 032). Mr. Haynes moved to compel the production of a Bill of Particulars, twice, and it does

not appear that the State made a response to this motion. The trial court denied the motion on the sole basis that "The State of Ohio has a practice of providing open-file discovery. "No bill of particulars is required when the State allows open-file discovery."" (Appendix, at 031).

Following the denial, the State would open its discovery file a bit further immediately prior to two continued trial dates, and again immediately before trial and disgorge voluminous additional documentation in a piecemeal fashion. (See, Appendix, sect IIb, generally). At trial, *during closing arguments* Mr. Haynes would learn for the first time that the actual accusation against him, as far as the essential element of force, was placing his willing grandchildren in child restraint seats and driving away. (Tr. Vol. IV at 823-24). The prosecutor construed Mr. Haynes confusion at the question of putting the children in child safety seats was construed as dishonesty to avoid admitting to the use of force. (Tr. Vol. IV at 824.)

Following the convictions, Mr. Haynes made a motion to dismiss and a motion to acquit. The Motion to Dismiss could have been made prior to trial, had the prosecution provided the details of the accusation, as based upon the facts finally charged in closing arguments, Mr. Haynes argued that Interreference with Custody was the more specific charge. This was denied in the trial court and on appeal.

Convicted of three F-3 counts of Abduction, the trial court sentenced Mr. Haynes to one year of probation, which he has completed.

Argument in support of proposition of law:

Ohio Criminal Rule 7 provides that the prosecution "shall" provide a Bill of Particulars upon timely request, this provision is mandatory and is not satisfied by the prosecution's provision of discovery: moreover, when the State, upon timely request, fails to inform a criminal defendant of the specific acts the defendant is accused of committing the Due Process clause of the United States Constitution is violated and a criminal defendant is denied justice under Sect. 16, Art. I of the Ohio Constitution

I. Introduction and summary: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

The trial below was unfair. Mr. Haynes does not come to this Court asking it to create new law, or to massage an existing doctrine to his benefit in some novel manner. Instead, he asks simply that the Court enforce its own Rules as they are written, to follow its own long and vigorous precedent on this issue, and to follow the tradition of nearly 1,000 years that for the government to convict a citizen of a crime it must give notice of the specific accusation- the "particulars" that the citizen must meet at trial. *Russell v. United* States, 369 U.S. 749, 761, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *United States v. Cruikshank*, 92 U.S. 542, 558, 23 L.Ed. 588 (1875); *State v. Petro*, 148 Ohio St. 473, 481, 76 N.E.2d 355 (1947).

The deviation from the Rule here was the denial of Mr. Haynes timely request for a Bill of Particulars, and the trial court's denial of his motion to compel production of the same. (Appendix Sect. II at 031). The Indictment on each count simply tracked the statute and alleged an Abduction to have occurred between Dec.

21 and Dec. 27. See, Indictment. The timely Bill of Particulars request sought the specific date that the Abduction was alleged to take place and sought the specific act of force that Mr. Haynes was alleged to have committed, it requested no potential evidence whatsoever.

The only basis for the denial was the alleged production of "open file" discovery by the prosecution. (Appendix, sect. II at 031.) As the Court will see below, the foundation for the denial rests upon a line of Court of Appeals cases which apply inapplicable Federal precedent to Ohio procedural rules. *State v. Halleck*, 24 Ohio App.2d 74, 76, 263 N.E.2d 917 (4th Dist.1970). This alone would not have created the issue; however, another court extrapolated that error into a legal position directly contrary to the Ohio Rules of Criminal Procedure such that a mandatory provision, the issuance of a Bill of Particulars upon timely request is now denied as a matter of policy by at least one prosecutor's office. *State v. Tebcherani*, 9th Dist. Summit C.A. NO. 19535, 2000 Ohio App. LEXIS 5426, at *17 (Nov. 22, 2000); see also, *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 66.

The 4th District itself does not follow this extrapolation of Halleck. See, *e.g.*, *State v. Miniard*, 4th Dist. Gallia No. 04CA1, 2004-Ohio-5352, ¶ 23. The 11th District has specifically rejected it. *State v. Brown*, 90 Ohio App.3d 674, 682, 630 N.E.2d 397 (11th Dist.1993). The District that initially promulgated the errant precedent, the 9th District, has, following this Court's decision in *Chinn*, retreated from the position, if it has not outright overruled itself. *See*, *State v. Sarnescky*, 9th

Dist. Summit C.A. NO. 12257, 1986 Ohio App. LEXIS 5710, at *4 (Feb. 12, 1986); *State v. Chinn*, 85 Ohio St.3d 548, 568, 1999-Ohio-288, 709 N.E.2d 1166; *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 6, 42, "I write separately to address this Court's precedent on the issuance of bills of particulars, which I believe is contrary to the express terms of R.C. 2941.07 and Crim.R. 7(E) as well as the guidance handed down by the Supreme Court of Ohio.", Schafer, J., concurring.

Abandonment by its creator has not terminated the offending precedent. In fact, based upon the ruling below, and a similar ruling in the 5th District, Bills of Particulars are *automatically denied* in large parts of Ohio- no matter the timeliness of the request. As the 5th District put it, the Defendant has no right to complain that the prosecution refused to comply with a mandatory procedural rule because, "it is undisputed that Appellant was informed at the time of receipt of discovery that *the State does not provide Bills of Particulars in any criminal matter*." *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 66. Emphasis added.

It is unclear how the *Franklin* court, or the court below, defines "open file" discovery. In the Franklin case, "open file" discovery apparently does not include a full copy of a search warrant affidavit, or the disclosure of a confidential informant, as the decision also reveals that the "open file" did not include this documentation. *Id*. at ¶ 49, 52. Likewise, in this case, while there is no accusation of failure to *provide* discovery before trial, a review of the records, and trial counsel's steadfast complaints, reveals that voluminous discovery documentation was disclosed in the

days immediately prior to scheduled trial dates. (See, Appendix, Sect. IIb, generally).

This late disclosure did not simply happen once. It happened immediately before the actual trial, and it happened in the days before two prior trial dates which were continued. *Id.* In such circumstances, even if criminal discovery provided anything close to full disclosure, which it does not, one must wonder how such piecemeal discovery, delivered at the 11th hour, would take the place of specific notice of the charges.

Mr. Haynes questions the alleged need to show prejudice when the State refuses to comply with a procedural rule rooted in not only the Constitutions of Ohio and the United States, but which predates them both by many centuries. However, the rulings below make no provision for prejudice for good reason- the prejudice here is stark. For instance, once he learned of the actual basis for the felony charges during closing argument, a potential basis for a dismissal of the indictment revealed itself, which Mr. Haynes pursued both in post-conviction motion to dismiss in the trial court and on appeal. See, 03/08/2019 Motion to Dismiss. That the courts ruled against the motion does not mean that there was no prejudice in being denied the accusation needed to make it. *State v. Fowler*, 174 Ohio St. 362, 366, 189 N.E.2d 133 (1963).

More profoundly, the court below acknowledges Mr. Haynes was denied the ability to present a legitimate defense by not knowing specifically what he was

going to be accused of until closing arguments. However, since other evidence was "sufficient" to support the conviction, Mr. Haynes is out of luck.

> As we have found, the act of driving the children from the place where they were found established force in this case, and that finding is without regard to whether the children were first fastened into child safety seats. But, it is also true that the state created confusion by stressing the fact that the children were buckled into car seats before the defendant and Marcella drove away.
>
> First, it bears repeating that the state abandoned its abduction cases under Section (A)(2) which would have required it to show the defendant "restrain[ed] the liberty" of the children. Second, to the extent that the defendant was prevented from asserting R.C. 4511.81 as a defense, as he claims in his brief—because he was not told until trial that the state would identify the use of car seats as evidence of force—we find no reversible error. An appellate court cannot reverse a lower court decision that is legally correct even if it is a result of erroneous reasoning.

State v. Haynes, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 37, 38.

With all respect to the court below, the transcript is clear that the reference to the child restraint seats was in the context of asserting that act as evidence to support the use of force element under the active counts, not the dismissed counts. (Tr. Vol. IV at823-824.) While the court is correct that the word "restraint" appears in the prosecutor's statement, the *prosecutor* did not forget that the "restraint" charges had been abandoned. Instead, the prosecutor claimed to the jury, that, "[w]ell, force means some form of restraint." (Tr. Vol. IV at 823.) Moreover, the prosecutor went on to accuse Mr. Haynes of dishonesty when he expressed confusion when asked about child restraint seats, claiming Mr. Haynes dissembled to avoid "admitting to the use of force." (Tr. Vol. IV at 824.)

Setting aside the propriety of defining "force" as "restraint" in this context, the shifting of the burden here is troublesome. The notion that denying the defendant a potential defense to an accusation made in deadly earnest to the jury (R.C. 4511.81 requires the use of child safety seats), who must presume the defendant innocent and convict only where there is no reasonable doubt of guilt, is acceptable when the court finds that, in the light most favorable to the prosecution, some rational juror *might have* found an *inference* from which to convict stands due process on its head. It also illustrates why, with the bare-bones indictments Ohio presently permits, Bills of Particulars are essential irrespective to any disclosure of potential evidence in discovery.

As Mr. Haynes will demonstrate below, Bills of Particulars in Ohio exist, and were developed, to provide the specifics of notice that modern Ohio indictments, which simply track the criminal statutes, do not. See, *State v. Petro*, 148 Ohio St. 473, 481, 76 N.E.2d 355 (1947); Ohio Constitution Sect. 10, Art. I. Under the Federal Rules, Ohio indictments that merely track the statute, as here, would be insufficient. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Fed. R. Crim. Pro. 7.

As such, with all due respect to the court below, the denial of a Bill of Particulars here created the situation described above, which has long been

rejected. "A cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice. . ." *Russell v. United States*, 369 U.S. 749, 766, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

Fortunately, under this Court's precedent, if the Defendant has the good fortune to be in a part of the State that continues to grant Bills of Particulars, once one is issued, though it can be amended, the State is bound to the accusation contained therein. *State v. McNicol*, 143 Ohio St. 39, 46, 53 N.E.2d 808 (1944). As recently as 2010 the Court of Appeals below overturned a Gross Sexual Imposition conviction on the grounds of insufficient evidence because, "[g]iven reasonable inferences from the other evidence presented, the act C.R. describes could be found to meet the statutory definition of gross sexual imposition. But it is not the act described under Count 2 of the bill of particulars." *State v. Schwirzinski*, 6th Dist. Wood No. WD-09-056, 2010-Ohio-5512, ¶ 36.

Moreover, just days before the filing of this brief, the Court of Appeals below issued a decision in a case involving the alleged rape of a child wherein sufficiency of the evidence was challenged, and the court's analysis began with the specifics of the charge, as found in the Bill of Particulars. *State v. Rose*, 6th Dist. Ottawa No. OT-20-018, 2021-Ohio-2371, ¶ 13. The court discussed the prosecution's detailing of

the specifics of the crime at length and found that sufficient evidence was presented to meet those specifics. *Id*. at ¶ 25.

It is unclear how the State could ever be held to the specifics of discovery, as it is likely to be contradictory, and is, without an accusation, meaningless.

It is fair to say that the past 100 years have dramatically changed the face of criminal procedure. Common law, for all intents and purposes relevant here, has been abrogated. As discussed below, criminal discovery came into being, the criminal rules were introduced, both federally and locally, the amount of information required to be in an indictment changed and a new device to secure Constitutional "notice" developed in Ohio- the Bill of Particulars. All of these developments were intended to provide greater efficiency, and greater fairness, and in many ways they succeeded. However, it must be remembered that in this time, perhaps owing to modern legal efficiency, the United States has become the world's most prolific incarcerator of persons, most of them in State custody, bar none.

It may very well be that the current provisions of the criminal rules could be revised. Indeed, it is hoped that they might be, and that the Court continues to strive, as it has in the past, to amend procedural rules to ensure fairness and justice. That sort of change, now that the Rules have been promulgated, must come from the top down, and be imposed prior to the litigation, and not permitted to percolate into existence from below to the contrary of the Rules. Such a development is nothing more than a re-invention of common law without any of its merits. If the Rules need to change, adopting the ruling below is not the way to do it.

II. Mandatory bills of particulars developed in Ohio in order to ensure adequate notice to the defendant when Ohio shifted to "short form" indictments which need only track the statute of the offense, this unique aspect of Ohio law is distinct from Federal law, and that distinction led to an errant line of cases culminating in the denial of a fair trial to Ernie Haynes

Bills of Particulars, as developed in Ohio criminal law, are an integral part of the charging instrument. *State v. McNicol*, 143 Ohio St. 39, 46, 53 N.E.2d 808 (1944); *State v. Miller*, 63 Ohio App.3d 479, 485-486, 579 N.E.2d 276 (12th Dist.1989); *State v. Nickel*, 6th Dist. Ottawa No. OT-09-001, 2009-Ohio-5996, ¶ 34.

This was not always the case. As explained below, Bills of Particulars in criminal cases are a loan from civil common law practice and are utilized to provide sufficient charge notice as the state shifted to "short form" indictments in the mid-twentieth century. See, e.g., *State v. Collett*, 58 N.E.2d 417 (Ohio 2d Dist.1944). The development of the civil rules, which require literal "notice pleading" has largely eclipsed the need for civil Bills of Particulars as the civil complaint must allege facts which, if proven, would constitute liability, and allow for motions to dismiss or for clarification. Gone are intricacies of common law civil pleading, and the Ohio Civil Rules do not contemplate a bill of particulars.

In this respect, the criminal law has developed in the opposite direction. Indictments have become less specific, not more. See, O.R.C. Sect. 2941.06, requiring only the most generic indictment information; but see, O.R.C. Sect. 2941.07, requiring a Bill of Particulars upon request or order. It was once the law of Ohio, "that an indictment must contain a complete description of the offense charged, and that it must state every circumstance of an intention, knowledge, or

action that constitutes the crime." *State v. Boyatt*, 114 Ohio St. 397, 399, 151 N.E. 468 (1926). In *Boyatt*, this Court found that, under that standard, a defendant was not entitled to a bill of particulars. See, *Id.* at 399, this was because, "[i]f the indictment does not describe the offense charged, it is subject to motion to quash. Therefore the defendant, under Ohio law, due to the requisites of the indictment, is given all that he legitimately can ask as to being apprised of the nature of the crime. It is a matter of general knowledge that persons charged with crime in this state are amply protected by our criminal procedure."

The requirements for a valid Ohio indictment would change by statute not long after the *Boyatt* decision, with the introduction of the "short form" indictment. The "short form" indictment did not provide sufficient factual notice of the accusation to meet the demands of notice under the Ohio Constitution. Because of this, "[t]o insure compliance with the terms of Section 10, Article I of the Ohio Constitution, the General Assembly in the same legislation authorizing the short form of indictment passed the provision whereby the prosecuting attorney, if seasonably requested, is required to furnish a bill of particulars setting forth more fully the details of the offense charged." *State v. Petro*, 148 Ohio St. at 481, 76 N.E.2d 355 (1947). While the section numbers have changed, this is still essentially the law of Ohio, and it is what is required by the Criminal Rules. R.C. Sect. 2941.03; R.C. 2941.07; Ohio R. Crim Pro. 7. As trial counsel argued: notwithstanding a variety of Courts of Appeals decisions, there is no opinion from this Court finding that a timely request for a bill of particulars is optional.

a. Though they are similar in structure to the Ohio Criminal Rules the Federal Rules do not permit the same sort of "short form" indictments as Ohio and as such Bills of Particulars are optional under the Federal Rules

The Federal Rules of Criminal Procedure and the Ohio Rules of Criminal Procedure are distinct entities, though they share a similar structure and general appearance. This is especially true of the respective Rule 7's regarding indictments and bills of particulars. Both depart significantly from the level of specificity and complexity required at common law. See, Fed. R. Crim. Pro. 7, Advisory Committee notes to subdivision "c"; *Russell v. United States*, 369 U.S. at 763. However, the Federal Rule maintains the requirement that an indictment must include, "plain, concise, and definite written statement of the essential facts constituting the offense charged. . .". Fed. Rule Crim. Pro. 7(c).

The Ohio Rules, by contrast, do not require any statement of facts as to the alleged conduct of the accused and Ohio indictments need merely allege a violation of a statute. See, Ohio Rules of Crim. Pro. 7. This distinction, the requirement of a factual statement in the indictment itself, is the root of mandatory Bills of Particulars in Ohio, drawn directly from the pre-rule statutes. See, *Petro*, at *Id.* Because a Federal Indictment must contain a factual statement, Constitutional notice is achieved in the indictment itself and therefore the Rule allows for discretion in granting a motion for a Bill of Particulars. With Ohio's short form indictment, Constitutional notice is not assured in the Indictment itself, when the

Defendant asks for it in a timely manner, furnishing a Bill of Particulars is mandatory. *Compare*, Fed. R. Crim Pro 7 *with* Ohio Rule of Crim Pro. 7.

This is not the only distinction between the Ohio Rules and the Federal counterpart regarding Bills of Particulars. Under Federal law, a Bill of Particulars is a true supplement which serves simply the purpose of notice, as the indictment itself contains sufficient factual assertions to satisfy the 5th Amendment requirement of Grand Jury protection. See, *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir.1989), discussing an amendment to a Federal Indictment and the Fifth Amendment considerations; see also, *Russell v. United States*, 369 U.S. 749, 769-770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), "[i]t is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment." The Court in *Russell* was not making a Constitutional determination, but rather it was interpreting an act of Congress. *Id*.

In contrast, in Ohio, "[w]here the prosecuting attorney files a bill of particulars the state is confined to the items set down therein and a verdict may not be upheld. . ." if it is predicated upon facts not asserted in the Bill of Particulars. *State v. McNicol*, 143 Ohio St. 39, 46, 53 N.E.2d 808 (1944); *State v. Nickel*, 6th Dist. Ottawa No. OT-09-001, 2009-Ohio-5996, ¶ 34. Moreover, Ohio Criminal Rule 7(D) specifically includes the Bill of Particulars along with the indictment, information and complaint in those things which may only be amended so long as they do not change the "name or identity of the crime charged." See also, *State v.*

Coffey, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35. The Federal Rule contains no such provision, these distinctions make it clear that the main point of the Bill of Particulars in Ohio is to give notice to the Defendant as to the specific accusation the Defendant must meet. Without such a provision, the Bill of Particulars would not serve its function, and the Rule would not pass constitutional muster.

Nothing in Criminal Rule 16 confines the State in any way, and it generally forbids the release of Grand Jury testimony. See, Ohio Crim R. 16. Yet the notion that the facts alleging a felony must first be passed upon by a Grand Jury is a core due process requirement which pre-dates the European colonization of North America by over 300 years. *Russell v. United States*, 369 U.S. 749, 761, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

b. By using inapplicable Federal Precedent to Inform the interpretation of Ohio's Rules, the lower courts have developed a procedural common law so profound that at least one Court of Appeals openly sanctions the denial of ALL Bills of Particulars as a matter of policy

While it might be a matter of debate whether or not the adoption of codified pleading rules has actually succeeded in its professed goal of bringing simplicity and fairness to legal process, in this case it injected confusion. This coupled with the statutory and rule-based shift from fact specific and technical Indictments at Common Law to "short form" indictments has led to the development of an errant

procedural common law in Ohio wherein the Rules established by this Court have been proclaimed void by lower courts and, apparently, prosecutor's offices.

Not long after the criminal rules in Ohio were implemented, Ohio courts, looking for precedent to interpret the new Rules, looked to the Federal Rules and associated litigation, but apparently did not perceive the distinctions discussed above. Relevant here, the Court of Appeals' use of Federal discretionary caselaw on bills of particulars to inform interpretation of Ohio's mandatory Bill of Particulars provision sowed the seeds of a procedural common law. See, e.g., *State v. Halleck*, 24 Ohio App.2d 74, 76, 263 N.E.2d 917 (4th Dist.1970); *State v. Sarnescky*, 1986 Ohio App. LEXIS 5710, *4.

This procedural common law has gained such traction that one Court of Appeals, cited favorably below, has sanctioned the rote denial of ALL Bills of Particulars. *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 66, "[h]ere, it is undisputed that Appellant was informed at the time of receipt of discovery that the State does not provide Bills of Particulars in any criminal matter."

The point of divergence, though the 4th District itself does not follow the errant precedent, of this line of cases appears to be in *State v. Halleck,* 24 Ohio App.2d 74, 263 N.E.2d 917 (4th Dist.1970). This is a case that pre-dates the adoption of the Ohio Criminal Rules in 1972. The *Halleck* case involved the alleged killing of a police chief during a jail break. *Id.* at 76. The issue before the court was not, as here, the denial of a Bill of Particulars, but rather the trial court's denial of

the defendant's motion for an "amended or supplemental" Bill of Particulars. *Id.* at 75. Halleck, in fact *was furnished* with a Bill of Particulars. *Id.* Moreover, in keeping with *Petro* without citing it, the Bill of Particulars furnished did, in fact provide the defendant with the specifics of the offense, "the amended bill stated that Eugene Markel, Chief of Police of the city of Ironton, was killed by gunfire. . .". *Id.* at 76. The court went on to analyze the issue under an abuse of discretion standard drawn from the U.S. Supreme Court case *Wong Tai v. United States*, 273 U.S. 77, 82, 47 S.Ct. 300, 71 L.Ed. 545 (1927). *Wong Tai*, though it stands for a number of U.S. Constitutional issues which are still relevant, is inapplicable to the issue at hand as it involves a fact-specific Indictment rather than Ohio's "short form" Indictment. See, *Id.* at 80-81.

In fact, the specific information that Halleck DID receive in the amended Bill of Particulars is the exact sort of information Mr. Haynes was seeking- the specific alleged conduct of the defendant comprising the offense, *i.e.*, that Halleck killed the chief by shooting him. *Halleck*, 24 Ohio App.2d at 76. Mr. Haynes only learned the State's accusation of force in closing argument. (Tr. Vol. IV at 823-24).

Moreover, the 4th District has not interpreted *Halleck* to mean "a bill of particulars is not required when the prosecution provides open file discovery." See, *State v. Miniard*, 4th Dist. Gallia No. 04CA1, 2004-Ohio-5352, ¶ 23. In fact, the 4th District complies with this Court's holding in *Sellards* that, "specific dates and times should be provided in a bill of particulars when such information is known to the prosecution.". *State v. Young*, 4th Dist. Athens Case No. 96 CA 1780, 1997 Ohio

App. LEXIS 3882, at *22 (Aug. 15, 1997); see also, *State v. Sellards,* 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). As Mr. Haynes Indictment did not provide a specific date, which he requested and which it is undisputed that the State could provide, it would appear that the 4th District caselaw, including *Halleck*, would favor reversal in this case.

While the *Halleck* case, with its confusing reliance upon Federal procedural precedent, was the point of divergence, it appears that a line of cases from the 9th District form the core of this common law. That line begins with the unreported case of *State v. Eskridge*, 9th Dist. Summit C.A. No. 9664, 1980 Ohio App. LEXIS 11114, at *4 (Aug. 27, 1980). The exact circumstances of the failure to grant a bill of particulars in *Eskridge* is unclear, the assignment of error only indicates that there was a refusal to "order a bill of particulars" it does not specify if one was timely requested (triggering the mandatory provision), or if there was a motion to compel. *State v. Eskridge*, 9th Dist. Summit C.A. No. 9664, 1980 Ohio App. LEXIS 11114, at *2-3 (Aug. 27, 1980). The court's opinion unfortunately merely states that, "[c]ounsel for Eskridge did not get a written bill of particulars." *Id*. at 4. The court's full analysis was, "[a]ll the information was contained in the indictment. In addition, the prosecutor permitted a full examination of his file by defense counsel, thus counsel could know as much about the case as the state. Under *State v. Halleck*, 24 Ohio App. 2d 74 (1970), a bill of particulars is not required here. There is no error to this second portion of assignment of error I." *Id*. This appears to be the first case to so extrapolate *Halleck*; it is perfunctory, and it appears to be a case of

truly overwhelming evidence and as such was properly unreported (at the time unreported cases had no precedential authority.)

Despite being unreported, and markedly light in analysis and even procedural posture, the 9th District would rely upon the theory expounded in the *Eskridge* case in *State v. Sarnescky*, 9th Dist. Summit C.A. NO. 12257, 1986 Ohio App. LEXIS 5710, at *4 (Feb. 12, 1986), also unreported. In *Sarnescky*, there is no question that a timely motion for a Bill of Particulars was made, and that the trial court denied a motion to compel. *Id*. at 3. The analysis offered in *Sarnescky* is very nearly word for word of that in *Halleck,* citing to the same Federal cases, rather than this Court's then recent decision in *Sellards*. Indeed, the only addition in the analysis appears to be the theory from *Eskridge*, now expressed as "where the prosecutor permitted a full examination of his file by defense counsel, a bill of particulars is not required." *Id*. *Sarnescky* appears to be the first case that can properly be described as creating a "common law" in the sense that the ruling is contrary to the rules and the relevant statutes. It is also a violation of due process under the United States and Ohio Constitutions, and violates the Ohio Constitution's specific notice provision in Sect. 10, Art. I. Sect. 10, 16, Art. I, Ohio Constitution; United States Constitution Amd. XIV, VI. The core of the error resides in the mis-application of Federal caselaw on a dissimilar rule.

Prior to the year 2000, the error in *Sarnescky* and *Eskridge* does not seem to have gained much positive attention, though it was argued by prosecutors. The 11th District remarked that, "[a]ppellee argues that the "open door" discovery policy

employed in the instant case negates any requirement of a bill of particulars because appellant had access to all the information possessed by the prosecution." *State v. Brown*, 90 Ohio App.3d 674, 682, 630 N.E.2d 397 (11th Dist.1993). This did not convince the court. "While the court's January 7, 1992 journal entry here specifies that the parties will adhere to an "open door" discovery policy, we do not agree that such policy would be sufficient to provide appellant with notice of the state's *actual theory of the case." Id.* at 682, emphasis added. Giving notice of the *theory of the case,* or stated otherwise, the *accusation* is exactly what is required by both the Ohio and United States Constitutions. See, *Petro*, at *Id.*; *United States v. Cruikshank*, 92 U.S. 542, 557-558, 23 L.Ed. 588 (1875).

In 2000, the 9th District decided *McDay* and *Tebcheriani*, both relying upon the *Sarnescky* and *Eskridge* decisions to reach the same conclusion. *State v. Tebcherani*, 9th Dist. Summit C.A. NO. 19535, 2000 Ohio App. LEXIS 5426, at *17 (Nov. 22, 2000); *State v. McDay*, 9th Dist. Summit C.A. NO. 19610, 2000 Ohio App. LEXIS 4235, at *5 (Sep. 20, 2000), finding that a failure to request a timely Bill of Particulars was not Ineffective Assistance of Counsel in part because of "open file" discovery.

Of these, the *Tebcherani* is indicative of the profound misunderstanding that underscores this line of cases. The challenge in *Tebcherani* was not to a failure to *provide* a Bill of Particulars, but rather a failure to hold the State to the *accusation* presented in the Bill of Particulars. *State v. Tebcherani*, 9th Dist. Summit C.A. NO. 19535, 2000 Ohio App. LEXIS 5426, at *16 (Nov. 22, 2000). Tebcherani claimed that

the State presented insufficient evidence to convict her of the then crime of "Felonious Sexual Penetration" as the Bill of Particulars referenced "sexual conduct". *Id.*

Based upon the court's description, this issue would appear to fall within the bounds of the accusation, as explained in *McNicol*, meaning that the notice would have been sufficient in any event. See, *State v. McNicol*, 143 Ohio St. at 46, 53 N.E.2d 808. Nonetheless, the court stated, without citation, "[t]he bill of particulars is a pre-trial discovery device intended to provide the defendant with notice of the nature of the charges levied against him to enable him to prepare a defense. It is not intended to "indict" a defendant on additional charges, or to amend the indictment." *Tebcherani, Id.* at 20-21. This is simply, and profoundly, inaccurate.

First, the statement runs contrary to Ohio R. Crim. Pro. 7(D), which only permits the amendment of the "indictment, information, complaint, or *bill of particulars*, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or *identity of the crime charged*." Ohio R. Crim. Pro. 7(D). Emphasis added. In other words, per the Rule, once issued, a Bill of Particulars in Ohio is a fundamental part of the charging document, not a discovery device. See also, *State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35. This is a functional reality that this Court has previously recognized. *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985), "A bill of particulars is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery." See also, *United*

States v. Cruikshank, 92 U.S. at 558. In no way can discovery take the place of a specific accusation, no matter how voluminous, since it will never inform the defendant of the specific charge they must meet. *Id*.

A Bill of Particulars, under Ohio law, is absolutely not a "discovery device," it is, as discussed above, instead a means by which the State is able to Constitutionally charge citizens with serious crimes without stating the specific accusation in the indictment, *Petro*, at *Id*. For it to have any meaning in that context, unlike discovery, the State must be bound to the accusation that it presents or it denies the defendant the notice needed to "meet the charge" that due process requires. *McNicol*, at *Id*. ; *Nickle*, *id*.; *Rose*, *Id*., discussing that the State met the specifics of the offenses charged as they were described in the Bill of Particulars. There is no corollary to this in criminal discovery- nothing in Rule 16 restrains the prosecution of the case in this way.

More fundamentally, the Bill of particulars does not fit into the "discovery" category, as it does not, and *should not*, present, or even describe, potential *evidence* of the accusation, it is the *accusation*. The Bill need not say, "the State will prove this by x, y, or z" but should say something to the effect of, "Defendant did x,y,z act(s), which violated statute a, b, c.". Of course, the State can provide whatever additional information that it wants, but it is not claimed that the State ought to be restricted in evidence in any way by the Bill of Particulars. This Court has already decided that particular issue.

In *State v. Chaffin*, the Defendant had sought, through a Bill of particulars, to know what test was used to verify that the "vegetation" he was caught with was marijuana. *State v. Chaffin*, 30 Ohio St.2d 13, 14, 282 N.E.2d 46 (1972). The defendant then challenged the use of a test other than that as specified in the Bill of Particulars being used as evidence to prove the malignant nature of the "vegetation." *Id.* at 14. The Court recognized the misuse of the Bill of Particulars (the issue would lie under Crim. Rule 16(K) today, if at all), and explained that the Bill of Particulars existed to meet the Constitutional requirement of "setting up specifically the nature of the offense charged." *Id.* A Bill of particulars "does not, however, require the state to disclose its evidence." *Id.* Because of this, "[n]either the state, nor the defendant, was limited by the bill of particulars to the sole running of the Duquenois test. Both parties could have run any test which could have conclusively proved the nature of the confiscated vegetation . . .". *Id.*

c. **The decision below and the 5th District's decision in *State v. Franklin* represent a complete abrogation of Ohio Crim. Rule 7, and replace Constitutionally required notice of an accusation with a deluge of potential evidence from which the defendant is expected to divine the pertinent accusation from the irrelevant chaff**

In any event, both the decision below, and the *Franklin* decision it cites are a complete repudiation of the Rule 7, with the same lack of a distinction between what one is accused of doing, and how that act will be proven. The *Franklin* decision is remarkable in that the court first acknowledges that, "[t]he purpose of a bill of particulars is to inform an accused of the nature of the offense and the conduct alleged to constitute the offense. Crim. R. 7(E)." *State v. Franklin*, 5th Dist.

Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 65. The court then explains that the local prosecutor's office simply does not provide Bills of Particulars in *any criminal case*, which is apparently acceptable because the defendant has been made aware of the "policy." *Id*. at ¶ 66.

The *Franklin* court then sets aside the general restrictions on discovery disclosure, such as the denial of Grand Jury testimony, as well as *specific instances* of withheld information it discussed earlier in its opinion to determine that "In this case, a bill of particulars would not have provided the defense with any additional information." ¶ 70. Yet it was apparently undisputed that, despite the "open file" discovery policy that takes the place of the Constitutions, Ohio law and this Court's Rules, one page of a search warrant affidavit *was not* provided in discovery. *Id*. at 40. The court's cure was to not consider that page in its ruling. *Id*. Moreover, the defense learned at trial, rather than through the "open file" discovery process that critical information in the case came from a confidential source. *Id*. at ¶ 66.

In the context it is hard to know how piecemeal discovery can be defined as "open file" unless the "open file" merely refers to the contents of the "file" the prosecutor elects to hand over to the defense, rather than the prosecutor's entire file. In any event, none of it has anything to do with the specific accusation of criminal conduct that the Bill of Particulars is intended to address.

Though the case below does not contain the discovery violations that the *Franklin* case does, it cannot be said that the prosecution cordially invited defense counsel to review the "file" at the start of the case. Instead, the prosecution, within

the bounds of the discovery rules but outside of their spirit, disclosed voluminous documentation in the days immediately prior to scheduled trial dates. This occurred multiple times due to continuances, and as such the defendant was left to shuffle through 170 pages of new "open file" discovery to try to divine when and *how* he committed the act of Abduction during the course of a week as charged in the indictment. (See, Appendix, Sect. IIb, at 031). Setting aside the Rules and the Constitution, this is just plain unfair, unjust and unconscionable in a case where even the trial judge, *after the convictions*, wondered why the case was criminally prosecuted at all.

Discovery issues aside, the case below more squarely highlights the distinction between potential evidence disclosed in discovery, and the specifics of a allegation of criminal conduct. The prosecution presented two alternate theories of culpability as to the issue of force to the jury in closing. One, a vague argument that an indistinct violation of a custody order comprised "force". (Tr. Vol. VI at 823). This appears largely to have been for the purposes of appeal. The second accusation of force theory was that,

> In this particular case the force that was used was physically removing the children and driving away. *Those children were put in child restraint seats.*
>
> You heard the defendant try to dodge that. He said, oh, they ran to the car. Did you buckle them in? Well, uh, meh, uh. Were there child seats? Yes. Did you buckle them in? He didn't want to be honest with you because he knew that would be admitting to the use of force." (Tr. Vol. IV. At 823-24) emphasis added.

We suspect that the General Assembly would be surprised to learn that the *proper use* of child restraint seats could constitute an element of a felony. Moreover, since, as the trial prosecutor acknowledged in the post-conviction hearing, neither Ernie Haynes, nor his attorney, knew that this was being used to establish an element of the offense it seems unlikely that he was "dodging" anything. As such the accusation of dishonesty is instead more likely attributable to utter confusion. With respect to the court below, it is simply not reasonable to expect a defendant, no matter the amount of information available, to defend against such a creative theory. And, as Justice Stewart described in *Russell*, if the defendant did manage to defend one allegation, without the State being held to its specific accusation, the prosecution would have a "free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell*, 369 U.S. at 766.

What is more troubling, is that this child restraint seat theory, and its accompanying accusation of dishonesty, were abandoned on appeal, undermining a key purpose of notice. This is why the provision in Rule 7 exists, and why when the, "request was timely, it was clear error for the prosecution to fail to provide a bill of particulars and for the trial court to have denied appellant's motion." *State v. Chinn*, 85 Ohio St.3d 548, 568, 1999-Ohio-288, 709 N.E.2d 1166, (Chinn's request was not timely, it must be pointed out).

Following this Court's decision in *Chinn*, the 9th District has retreated from its position in *Sarnescky*, *Eskridge*, *McDay* and *Teberchiani*, and now appears to focus on prejudice rather than discovery. *State v. Chinn*, 85 Ohio St.3d 548, 568,

1999-Ohio-288, 709 N.E.2d 1166; *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 6; *State v. Betts*, 9th Dist. Summit Nos. 29575, 29576, 29577, 2020-Ohio-4800, ¶ 40. This leaves the decision below resting on a foundation of unreported cases which have been largely repudiated by the issuing court, and without any independent analysis or even real explaination.

The issue of prejudice is outside the scope of this case, as neither the court below nor the trial court relied upon "prejudice", and rather ruled squarely upon the prosecution's provision of discovery. In any event, the prejudice in this case is abundantly clear: in addition to knowing that his proper use of child restraint seats would be used as an accusation of a felony, Mr. Haynes would have made his motion to dismiss prior to trial had he known what he was accused of doing and when. Moreover, the trial prosecutor acknowledged that he only disclosed the actual accusation in closing, claiming the accusation as "work product."

Even if the trial court would have denied the motion, then at least Mr. Haynes would have been able to fully and intelligently evaluate the misdemeanor plea the prosecution offered. In the emotionally charged circumstances of this case, such consultation, with open knowledge of the accusation is crucial.

The situation created in the Courts of Appeals by allowing the denial of timely requests for bills of particulars based upon discovery disclosures has the practical effect of situation where felony defendants are provided less notice of the accusations against them than is required to be provided to misdemeanor defendants under R. Crim. Pro. 3.

d. Discovery is not a substitute for a Bill of Particulars

This Court has discussed this issue before, albeit in the context of a prior statute pre-dating both the modern Criminal Rules and modern criminal "discovery". Quoting from the prosecutor's brief, the Court described the argument, "[i]t is obvious the defendant had knowledge of the facts and evidence of the state as to manner and means and place of the alleged offense. The record shows further that the defendant's counsel had this in their possession long before trial, in fact just a few days after the finding of the body of the deceased, a copy of the coroner's verdict and the autopsy report, wherein it specifically set forth the time, place, means and manner of death." *Petro,* at 484. But, as the Court pointed out, and as must always be the case, there were discrepancies in the details of the potential evidence that the defendant had, and, as here, the defendant had made a "seasonable" request the denial of which was reversible error. *Id*. at 485-86.

During this time, criminal (and civil) discovery was developing. A gradual shift from a forthright belief in trial by surprise to the modern notion of forthright disclosure changed criminal procedure dramatically. See, generally, (law review on discovery). Despite this, and despite numerous courts, including the court below, relying upon the notion of "open file" discovery to negate the mandatory language of Rule 7, it does not appear that the term of art is actually defined by any of these courts. Nor are there any criteria for making the factual determination that such discovery was given, and thereby the defendant's constitutional right to notice is somehow satisfied by receiving a bundle of voluminous, often contradictory, and

incomplete, potential evidence that *might* be used to support the undisclosed accusation. It appears to be sufficient if the prosecutor declares it to be so, or it is presumed. See, e.g., *Franklin*, 2020-Ohio at 66. This is even so when the defendant *does not* seek Discovery- thereby making his constitutional right to notice contingent upon accepting a contingent reciprocal duty. *Id*. While it is unlikely that a defendant would deliberately forgo discovery to avoid the reciprocal duty to disclose, but that is not a decision for opposing counsel, or the court for that matter, to make.

e. Ohio Criminal Rule 16, even in its most expansive does NOT provide "open file discovery" and instead provides only specified material and that is permitted to be withheld from the defendant under the "counsel only" provision; it is not a replacement for notice of the actual acts alleged to constitute a crime

Despite numerous courts, including the court below, relying upon the notion of "open file" discovery to negate the mandatory language of Rule 7, it does not appear that the term of art is actually defined by any of these courts. Nor is there any criteria for making the factual determination that such discovery was given, it appears to be sufficient if the prosecutor declares it to be so, or it is presumed. See, e.g., *Franklin*, 2020-Ohio at 66. This is even so when the defendant DOES NOT seek Discovery- thereby making his constitutional right to notice contingent upon accepting a contingent reciprocal duty. *Id*.

Whatever is meant by "open file" discovery, the term is certainly not literal. In every indictment presented to a Grand Jury the prosecutor's file contains sworn statements of witnesses in the case, yet that portion of the file, the Grand Jury testimony, is emphatically "closed." See, Ohio R. Crim. Pro. 16(J)(2). Beyond the vestigial secrecy of Grand Jury testimony, Rule 16

makes no claim to "open file" discovery. Instead, it carefully lists those items that the defendant ought to be entitled, lists numerous exceptions, outright denies the *defendant* any information that the prosecutor deems "counsel only," or "work product" unless the defendant can ferret out the existence of the material and challenge the claim, and is *only* active upon the defendant's request. The time for said request is the same as that for making a request for a Bill of Particulars, 21 days after arraignment. *Compare* Ohio R. of Crim Pro. 16(M) *with* Ohio Rule of Crim Pro. 7(e).

As both Discovery and a Bill of Particulars must be requested within 21 days of arraignment, it is unlikely that Discovery would be received and reviewed prior to the request for a Bill of Particulars. In fact, in this case, the request for a Bill of Particulars was not denied until after the first scheduled trial date, and hundreds of pages of discovery were provided after the Bill of particulars was denied upon the sole basis that the State provided "open file" discovery. See, Appendix IIb, generally. Even assuming that the accusation in felony cases could accurately divined from the prosecution's provision of discovery, this serves no purpose than to waste valuable resources and further over-burden the often state-funded criminal defense for no discernible purpose

III. Ohio Criminal Rule 7 is plain on its face that bills of particulars "shall" be furnished by the prosecution upon timely request: neither the Courts of Common pleas of Ohio, nor the Courts of Appeals have discretion to permit the any party to violate mandatory rules; such a violation of this Rule is not simply a violation of the notice required under the Ohio Constitution, but also a violation of Ohio "due process" in that it is a denial of "justice"

This really is a case about fairness and justice. Appellant asks only that the Court affirm its own rules, and in so doing find that a fair trial was denied in this case. Traditionally, Ohio due

process has been analyzed in accordance with federal due process. *State v. Ireland*, 155 Ohio St.3d 287, 2018-Ohio-4494, 121 N.E.3d 285, ¶ 37. However, this Court has long held that the Ohio Constitution is "a document of independent force." *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). Moreover, when this Court makes a ruling based upon rights secured in the Ohio Constitution, this Court has the final word so long as its basis is truly independent of federal analysis. See, *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Here, as argued above, both the Ohio and U.S. Constitutions require similar notice of the accusation, however, the Ohio Constitution, as written in Sect. 16, places an affirmative burden on Ohio courts to avoid the denial of justice. In the modern era, it seems that an affirmative duty to simple "justice" ought to be reiterated. Not every defendant charged with a crime is guilty, and even more are not guilty of the crime charged.

In this case, the prosecutor was adamant that a plea should be taken, but with the trial court's blessing, refused to explain what Mr. Haynes did that equated to a felony against the grandchildren he loved, and was indisputably trying to *protect.* Had he simply known what the prosecutor thought he did to constitute force against his grandchildren, he would, at the very least, have been able to have a fully informed conversation with his attorney about whether he ought to take a plea to the misdemeanor. Ohioans should not have to kneel before authority and accept whatever edict the prosecutor demands in order to avoid finding out whatever mysterious club the prosecutor has clutched behind their back at trial. That sort of process belongs in the history books of *other countries* and should never occur in Ohio. Such is not justice.

To the extent that there might be an argument that the Rule should change, such an argument is misplaced. Perhaps the Rules should change, in many ways, to preserve "justice". The way to

do that is from the top down, by changing the Rules, not by permitting them to be replaced by an uncertain and ill-defined common law.

IV. Conclusion

At the end of the day, Mr. Haynes asks the Court to find that he was denied the notice required by Ohio statute, Ohio criminal Rules, the Ohio Constitution, the U.S. Constitution, and also denied simple justice in this case. In so doing, the Court will add great clarity to an area of law unique to Ohio and thereby ensure the fair trial and justice required of Ohio Courts by the Ohio Constitution. Ohio Constitution, Sect 16, Art. I. The Court's decision, though it is hoped that it will bring clarity to the important role that Bills of Particulars play in Ohio criminal procedure, to require reversal the Court's decision need only reflect the obvious logic and judicial restraint expressed by Judge Schafer in her concurrence in the 9th District's *Jamison* case:

> I disagree with the State's argument that a trial court need not order the prosecutor to provide an original bill of particulars whenever the State provides open-file discovery. This argument fails to account for the mandatory language of R.C. 2941.07 and Crim.R. 7(e). These provisions do not provide, "Upon written request of the defendant, the prosecuting attorney shall furnish a bill of particulars, unless the prosecuting attorney provides open-file discovery." Instead, they simply require the prosecutor to furnish the bill of particulars whenever the defendant timely requests it. To adopt the State's argument, I would have to read a new clause into R.C. 2941.07 and Crim.R. 7(e) and carve out an exception that the legislative drafters did not include. Consequently, I reject the State's invitation to judicially legislate and I support the application of R.C. 2941.07 and Crim.R. 7(e) as they are written, not as the State wants them to be written.

State v. Jamison, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 44 (internal citations omitted).

For the forgoing reasons, Mr. Haynes respectfully requests that the Court adopt his Proposition of Law, find that the Criminal Rules mean what they say, and grant him relief in the form of a remand or discharge as he has already completed the sentence imposed below.

Respectfully Submitted,
/s/ Michael H. Stahl
_____
Michael H. Stahl, 0097049
Attorney for Appellant Ernie Haynes

Certificate of Service

I hereby certify that a copy of this brief was served via U.S. Mail and electronically on the day of filing, July 12, 202, to:

David Harold, 0072338
Assistant Prosecuting Attorney
Wood County Prosecutor's Office
1 Courthouse Sq.
Bowling Green, Ohio 43402
Telephone: (419) 354-9250

Respectfully,
/s/Michael H. Stahl
_____
Michael H. Stahl
Attorney for Appellant Ernie Haynes

Appendix: Section I: Opinion and Judgement Entry from the 6th District Court of Appeals being appealed

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

State of Ohio — Court of Appeals No. WD-19-035

Appellee — Trial Court No. 2018CR0070

v.

Ernie E. Haynes — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2020

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and Thomas A. Matuszak and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Michael H. Stahl, for appellant.

* * * * *

OSOWIK, J.

Introduction

{¶ 1} The defendant-appellant, Ernie Haynes, was convicted of abduction in the Wood County Court of Common Pleas for the illegal removal of his three grandsons and

sentenced to community control. On appeal, Haynes raises multiple trial-related errors, including that the state failed to present legally sufficient evidence that he removed the children "by force or threat." As set forth below, we affirm the trial court's judgment.

Facts and Procedural History

{¶ 2} Ernie Haynes (hereinafter "the defendant") is grandfather to J.H.-H. (then aged 5), J.H.-H. (also aged 5 but 11 months younger), and J.H.-H. (aged 2), all boys. The defendant is alleged to have abducted his grandsons by removing them from the place where they were found, on December 19, 2017. The record established that the defendant personally removed the two younger boys from a friend's home and drove them away in his truck. He instructed his wife, Marcella Spence Haynes (hereinafter "Marcella"), to pick the oldest boy up from school, which she did, and she removed him from the school by car.

{¶ 3} At trial, the state presented the following evidence: The mother of the boys, Jennifer Haynes, died suddenly on December 12, 2017. The evidence strongly suggests that Jennifer Haynes (hereinafter "Jennifer") died of a drug overdose. Jennifer lived in Fostoria, Ohio, in Seneca County, with James Hill-Hernandez. The unmarried couple had been in a relationship for seven years and were parents to the three boys. When she died, Jennifer was expecting their fourth child, and her death caused the infant to be born two months prematurely and with underdeveloped lungs. The infant was "life-flighted" to Toledo Children's Hospital in Lucas County and remained there until May of

2018, when he died. Jennifer was also mother to three older children, all girls. The girls were not fathered by Hill-Hernandez and are not the subject of this criminal case.

{¶ 4} Much of the testimony at trial focused on the week in between Jennifer's death and the abductions. During that time, the three boys were cared for mostly by the defendant and by family friends, John and Amanda Decker. Even before Jennifer's death, the Deckers "had the kids the majority of the time [including] during the week."

{¶ 5} The funeral was held on December 18, 2017 in Fostoria, after which the defendant "took the boys to [his] house" to change clothes. The plan was for Hill-Hernandez to "pick the boys up and take them to the hospital [in Toledo] so they could visit with their [newborn baby] brother." When Hill-Hernandez arrived, Marcella told him that "she wanted them back by [8 p.m.]" because the oldest son had school the next day. When Hill-Hernandez told Marcella that "there [was] no way" he could meet that time-table—given the distance to Toledo and back—Marcella "blew up." The defendant "changed" too and said, "no" and "that's it. Go get your other two boys and bring them in[side]." The defendant told Hill-Hernandez that "he may not have done right by his children but he's going to do right by [your] children, and nobody is going to have anything to say about it." The defendant "gave [Hill-Hernandez] the understanding that [he] had no rights over [his own] children." Hill-Hernandez "didn't want any conflict, altercations or anything," and he left, without the boys, and drove to the Toledo Hospital where he "stayed the night."

{¶ 6} The next day, December 19, 2017, Hill-Hernandez "got up early * * * and * * * drove from Toledo to Tiffin" where he filed a motion in the Juvenile Division of the Seneca County Court of Common Pleas requesting temporary legal custody of his four sons. His purpose in doing so was to "establish [his] rights as [the] children's father." A magistrate granted the motion at 2:58 p.m., that same day, and set a hearing for January 24, 2018.

{¶ 7} Hill-Hernandez began calling the defendant and Marcella to tell them that he had "obtained [his] parental rights as a father" and "I want my children." He also sent a picture of the magistrate's order to the defendant's phone. Neither the defendant nor Marcella answered their phones or responded to messages. So, Hill-Hernandez called John Decker to ask Decker to tell the defendant that he'd "like to receive [his] children." John Decker testified that he called the defendant and "said, 'look, James [Hill-Hernandez] just left [the courthouse], he's got custody papers for the kids.' And that was it. [The defendant] hung up on me."

{¶ 8} Also testifying on behalf of the state was the defendant's ex-wife (and mother of Jennifer), Shawna Haynes ("Shawna"). Shawna accompanied the defendant to the Fostoria Police Department on December 19, 2017, so that they could talk to the police "about [Jennifer's] death." When the defendant left the station, he announced that he "had to leave [and] go get the kids from John and Mandy [Decker], [because] James [Hill-Hernandez] was on his way with a court order to get the boys."

{¶ 9} Amanda Decker was caring for the two younger boys at her home, in Fostoria, when the defendant arrived. He told Amanda that "he was taking the boys," and she instructed them to "get their shoes and stuff." About 3:15 p.m., John Decker arrived home and helped the boys to get dressed. The defendant told the couple that "he didn't want James [Hill-Hernandez] to have [the children because] he didn't feel like [Hill-Hernandez] would take care of them." The defendant also said that "he was going to pick up [his oldest grandson]" from school but then "called his wife [Marcella] to have her [go] get [him]." The defendant told the Deckers that he intended to "get a lawyer and file paperwork" and that "he wasn't going to give the kids back," notwithstanding the temporary custody order. Neither Amanda nor John Decker tried to dissuade the defendant, despite Hill-Hernandez's request for help, because they "didn't want to get in the middle of it because [they] was friends with both [men.]" Amanda Decker added that it "wasn't [her] place to [say] 'no, you can't take them.'"

{¶ 10} At 3:14 p.m., Marcella Haynes picked up the oldest child from Longfellow Elementary School in Fostoria, according to the school's "sign-out sheet." The assistant secretary for the school testified that it was "very normal" for Marcella and the defendant to pick up and drop off J.H.-H. from school, and both were authorized to do so.

{¶ 11} Later that day, still December 19, 2017, a Rising Sun Police Officer escorted Hill-Hernandez to the defendant's home. Although no one answered the door, lights were on inside, and it appeared to Hill-Hernandez that someone was there.

{¶ 12} The state presented extensive testimony as to Hill-Hernandez's efforts over the coming days to regain custody of his three children. Briefly, those efforts included:

> **December 20, 2019**: Hill-Hernandez texted the defendant twice, and again, the defendant did not respond.
>
> **December 21, 2019:** Hill-Hernandez contacted the Wood County Sheriff's Department. Sheriff's deputies and Rising Sun police officers went to the defendant's home. Again, the lights were one, but no one answered the door.
>
> **December 22, 2017:** The police and Hill-Hernandez went to the defendant's home, to no avail. Also, Hill-Hernandez filed a petition for a writ of habeas corpus with the Seneca County Juvenile Court, alleging that his children were being held in contravention of the temporary custody order.
>
> **December 23, 2017**: The police returned to the defendant's home a fourth time "to make contact with [the defendant] and secure the safe return of the children [and] [y]et again no one answered the officer's knocks." (State's memorandum at 11).
>
> **December 26, 2017**: The police obtained and executed a search warrant of the defendant's home. No one was home at the time of search, and the officers gained entry by force. Using subpoenas to track the

defendant's whereabouts, the police determined that the defendant was in McComb, Ohio in Hancock County.

December 27, 2017: The juvenile court granted Hill-Hernandez's petition for a writ of habeas corpus and ordered that the children "shall be immediately returned to the Temporary Custody of James Hill-Hernandez." (Seneca Co. Court of Common Pleas case Nos. 21270037 et al). Also that day, Detective-Sergeant Joe Miller of the Wood County Sheriff's Department went to the home of Connie and Leonard Spence in McComb. Connie Spence told the detective that the defendant, Marcella and four children had been at their home for the Christmas holiday since December 22, 2017, but that they had "just left." Detective Miller left the premises but returned later that day. While talking to the Spences, Detective Miller observed a man exit the Spence's garage and get into a truck. The detective blocked the truck with his own vehicle, and, after each had identified himself, the defendant claimed that the children were not there. Ultimately, he admitted that they were inside the Spence's home, specifically in a "mother-in-law suite" attached to the garage. Detective Miller contacted the Hancock County Sherriff's Department which processed the defendant's arrest. After the defendant was taken into custody, the McComb Police Department and Detective Miller were granted entry into the Spence's home where the children were located.

{¶ 13} After learning that his children were in McComb, Hill-Hernandez "jumped" into his car and "got [his] boys back." Once reunited, he felt "relief" to know that they "were safe." Hill Hernandez testified that the defendant did not have permission to "take" the children and "keep them" as of December 19 through December 27, 2017.

{¶ 14} The defendant testified in his own defense, as did his wife, Marcella. Prior to his daughter's death, the defendant cared for his grandsons (and granddaughter, "M") in his home "every other weekend." After Jennifer died, there were "discussions" that he and Marcella would be "the main caretakers" of the children. According to the defendant, their house in Rising Sun would be the "home base," but they would "share the responsibility of watching the * * * three boys" with Hill-Hernandez.

{¶ 15} The defendant also testified about the disagreement between himself and Hill-Hernandez on December 18, 2017. According to the defendant, Hill-Hernandez arrived at his house with "drunken breath" and was acting "loud." The defendant thought Hill-Hernandez was going to "punch" him, and the defendant told him "you got to go, man." Hill-Hernandez told the defendant and Marcella, "'I don't think it's right. I don't have no right to my kids. * * * I found out I don't have no rights to them.'" Hill-Hernandez announced his intention to go "to the courts," and the defendant responded that he intended to do the same.

{¶ 16} By all accounts, Hill-Hernandez left the defendant's home that night, December 18, 2017, and his children remained in the care of the defendant.

{¶ 17} The next day, the day of the abductions, Marcella dropped off the older son at school, and the defendant took the two younger boys to the Deckers. After dropping off the children, the defendant picked up his ex-wife, Shawna Haynes, and drove to the courthouse in Tiffin to pick up "papers for emergency temporary custody" (which he prepared later from home). Next, they went to "the cop shop" to inquire about "about Jennifer['s]" death. From the police station, the defendant went to a "flea market" to attend to his business. The defendant denied that he was in a hurry to get to his grandsons. When he did arrive at the Deckers, he claims that the Deckers made disparaging remarks about his now-deceased daughter, which made him angry and upset. John Decker also said that Hill-Hernandez "'was over there filing for temporary custody,'" and the defendant responded he had just gone "over there and got[ten] the papers [to do] the same thing." When it was time to go, the defendant claimed that the two younger boys "ran" toward his truck and climbed inside on their own volition. The defendant buckled them into car seats and drove them "two blocks down the street" to Shawna's for a planned visit.

{¶ 18} The defendant agreed that John Decker called him, but he maintained that the call was made *after* he left the Decker's home and *after* he had dropped off the boys with his ex-wife. During their conversation, Decker told him that Hill-Hernandez had been granted temporary custody and that he, the defendant, should "bring the boys back." The defendant asked, rhetorically, why should he "believe anything" Decker had to say, and he demanded "an apology" for "desecrate[ing]" his daughter's name and "hung up."

The defendant then picked up his school-aged grandson from Marcella and dropped him at his ex-wife's to join the younger boys. The defendant admitted that Hill-Hernandez "sent me some texts [but] he never opened [or] looked at them.

{¶ 19} The next day, on December 20, 2017, the defendant filed for temporary custody of his grand-daughter and 4 grandsons in Seneca County. On December 21, 2017, he learned—in person from court personnel—that the juvenile court granted the motion, with respect to his granddaughter "M," but denied it as to his grandsons. That same day, the defendant hired a lawyer and paid him a $2,000 retainer fee.

{¶ 20} According to the defendant, the children remained with his ex-wife Shawna from December 19 until 22, 2017, when he and Marcella took them (and "M") to the Spences' home in McComb for a "vacation." On December 27, 2017, the defendant learned in an email from this attorney of the "bad news" that "[t]he court want[ed] the children returned [to Hill-Hernandez] immediately." The defendant claimed that they were preparing to leave McComb to return the boys to their father when he was arrested in the Spence's driveway.

{¶ 21} The defendant was indicted in Wood County on February 8, 2018, on charges of abduction—two counts as to each grandson—for a total of six counts, all third degree felonies. Thus, as to each child, the defendant was indicted under R.C. 2905.02(A)(1) and (2). Before trial, the state voluntarily dismissed the counts brought under Section (A)(2), i.e. Counts 2, 4, and 6, leaving Counts 1, 3, and 5 under Section (A)(1) to be tried.

{¶ 22} On January 25, 2019, the jury returned a guilty verdict as to each count. The defendant filed two post-trial motions: a motion to acquit on the basis that the state failed to present legally sufficient evidence of "force" and a motion to dismiss the indictment on the basis that the state should have, under R.C. 1.51, proceeded with the more specific offense of interference with custody, rather than abduction. The trial court denied the motions, which are the subjects of defendant's first and fourth assignments of error, respectively.

{¶ 23} On April 9, 2019, the trial court sentenced the defendant to one year of community control, as to each count. The defendant appealed and raises five assignments of error for review:

> I. The prosecution failed to present sufficient evidence to sustain a conviction of Abduction under O.R.C. 2905.02(A)(1) contrary to the United States and Ohio Constitutions.
>
> II. Ernie Haynes' right to a fair trial and Due Process under the Constitutions of the United States and Ohio were violated when the trial court overruled Haynes' objection to the prosecution misrepresenting the State's burden of proof in closing as to the element of privilege and permitted the prosecution to proceed to claim that the State needed only to prove that Mr. Haynes did not have any one type of privilege, rather than the plain language of the instruction that requires the defendant to be without privilege of any type.

III. The trial court erred and Mr. Haynes' right to a fair trial and due process were violated when it failed to order the prosecution to furnish a meaningful Bill of Particulars upon Haynes' motion to compel which allowed the prosecution to finally reveal the alleged time and place of the accused behavior in the prosecution's closing argument.

IV. The trial court should have dismissed the indictments based upon Haynes' post-conviction motion to dismiss because Interference with Custody was the more specific charge, and the state was required to pursue that charge.

V. Ernie Haynes' convictions are against the manifest weight of the evidence.

The state presented legally sufficient evidence of force.

{¶ 24} In his first assignment of error, the defendant argues that the state failed to present legally sufficient evidence to support his abduction convictions.

{¶ 25} Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing a challenge to the sufficiency of evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or

assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 26} The abduction statute, R.C. 2905.02, provides, in relevant part, that,

> (A) No person, without privilege to do so, shall knowingly do any of the following:
>
> (1) By force or threat, remove another from the place where the other person is found;
>
> (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear; * * *
>
> (C) Whoever violates this section is guilty of abduction. A violation of division (A)(1) or (2) of this section * * * is a felony of the third degree. * * *.

{¶ 27} As discussed, Haynes was convicted of three counts under subsection (A)(1); the charges under subjection (A)(2) were voluntarily dismissed.

{¶ 28} On appeal, the defendant claims that the state failed to present legally sufficient evidence that he abducted the children by "force or threat." The term "force" is expressly defined by statute. It "means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). In *State v. Heiney*, 6th Dist. Lucas No. L-16-1042, 2018-Ohio-3408, we discussed the components of "force" and their respective definitions:

"Any," as used in R.C. 2901.01(A)(1), is an adjective. "'As an adjective, 'any' is defined as: '[o]ne or some, regardless of kind, quantity, or number; an indeterminate number or amount.'" *State v. Euton,* 3d Dist. Auglaize No. 2-06-35, 2007-Ohio-6704, 2007 WL 4374293, ¶ 60, quoting The American Heritage Dictionary (2nd College Ed.1985) 117. "[T]he insertion of the word 'any' into the definition of 'force,' recognizes that different degrees and manners of force are used in various crimes with various victims." *State v. Lillard,* 8th Dist. Cuyahoga No. 69242, 1996 WL 273781, *6, (May 23, 1996).

"Violence" is defined, in part, as "[t]he use of physical force" or "[p]hysical force exerted for the purpose of violating, damaging, or abusing." *State v. Stevens,* 3d Dist. Allen No. 1-14-58, 2016-Ohio-446, quoting *Black's Law Dictionary* 1801 (14th Ed.2014) and *The American Heritage Dictionary* at 1350.

"Compulsion" means "[t]he act of compelling; the quality, state, or condition of being compelled." *Stevens* at ¶ 19, quoting *Black's* at 348. "Compulsion can take other forms than physical force; but in whatever form it appears* * * [i]t can best be considered under the heads of obedience to orders, material coercion, duress per minas, and necessity." *Id.*, quoting Turner, *Kenny's Outlines of Criminal Law* 54 (16th Ed.1952).

14.

> "Constraint" means "state of being checked, restricted, or compelled to avoid or perform some action." *Merriam Webster's Collegiate Dictionary* 248 (10th Ed.1996).

Heiney at ¶ 98-101. Also, although the synonyms that the legislature chose to define the term force—violence, compulsion and constaint—are "ordinarily applicable to persons rather than things," the definition applies "both to persons and things." *State v. Lane*, 50 Ohio App.2d 41, 46, 361 N.E.2d 535 (10th Dist.1976).

{¶ 29} At trial, the state presented its case of "force" as follows:

> In this particular case the force that was used was physically removing the children and driving away. Those children were put in child restraint seats. * * * But reason and common sense says but for what Marcella and the defendant did, those children would have remained where they were at. [The oldest child] would have remained at the elementary school until somebody else came to pick him up, and [the younger two] would have remained at the Deckers.

{¶ 30} In his brief, the defendant challenges the prosecution's "theory" that it "need only show that 'any' amount of force was used." Without citing any authority, he claims there is "no question" that the state must present "more than" the "ordinary force involved in picking up children from school or a baby-sitter."

{¶ 31} Force is expressly defined as "*any* violence, compulsion, or constraint * * *." (Emphasis added.) And, "a court cannot simply ignore or add words" to an

unambiguous statute. *Portage Cty. Bd. Of Commissioners v. Akron*, 109 Ohio St.3d 106, 200-Ohio-954, 846 N.E.2d 478. As we remarked in *Heiney*, the use of the word "any" to describe "force" recognizes that different degrees and manners of force are used in various crimes with various victims.

{¶ 32} For example, in *Lane*—an aggravated burglary case requiring the state to show a trespass "by, force, stealth, or deception"— the issue was whether the trial court erred by using the word "effort" rather than "violence, compulsion, or constraint" in its charge to the jury. The court found no "substantial difference between the statutory definition [of force] and that given by the trial court," and it reasoned that "the statute clearly indicates that 'compulsion * * * physically exerted' against a thing to gain entrance constitutes force. The same is true of constraint. The 'thing' in this case is a closed but locked door." *Id.* at 46.

{¶ 33} In a similar case, also involving burglary, the Second Appellate District added that the definition of force "does not provide for any measure of the physical exertion that might constitute force, but instead looks to the purpose for which the physical exertion, however slight, has been employed. If the purpose is to overcome a barrier against the actor's conduct, whether that barrier is the will of the victim or the closed but unlocked door of a home, the physical exertion employed to overcome the barrier may constitute force." *State v. Gregg*, 2d Dist. Champaign No. 91-CA-15, 1992 WL 302438 (Oct. 26, 1992) (Finding sufficient evidence that defendant used force when he "turned the knob and opened the closed door to enter [the home]; A greater degree of

physical exertion, including violence, is not necessary to satisfy the [force element."). *See also State v. Johnson*, 8th Dist. Cuyahoga Nos. 81692, 81692, 2003-Ohio-3241, ¶ 67-68 ("'[F]orce' * * * simply requires [that] effort be exerted against a person or thing.").

{¶ 34} Just as the trespass-by-force element was met in the burglary cases by demonstrating compulsion physically exerted against a thing (i.e. a door), we find that the removal-by-force element in this case was shown by demonstrating compulsion physically exerted against things. Those "things" were the controls of the defendant's truck and Marcella's car. We agree with the state that the physical act of driving the children away from the place where they were found satisfies the force element in this case. The law is clear that *any* amount of force or threat of force, however slight, against a thing, here the motor vehicles, is sufficient to support an abduction conviction.

{¶ 35} Next, the defendant argues that the state failed to show that he removed the children under "circumstances which pose[d] a risk of harm to [them] or place[d] [them] in fear." (Brief at 8 quoting Legislative Service Commission, 1973). He argues that the only evidence at trial established that the children left with their grandparents "willingly" and in the presence of other adults, who were "not alarmed." But, under Section (A)(1), the state was not required to present evidence that the removal occurred under circumstances that created a risk of physical harm to the victims or that the victims were placed in fear. Such a showing *is* required under Section (A)(2), and those counts were dismissed before trial. Moreover, to the extent that the children's willingness to leave with their grandparents raises the issue of whether the defendant was "privileged" to

remove them, we note that the defendant has not challenged the sufficiency of the state's evidence as to that element of the offense.

{¶ 36} Finally, the defendant argues that the act of "buckling" the children into child safety seats cannot establish "the sole basis" of the force element because he was required by law to use child safety seats when transporting the children. *See* R.C. 4511.81 ("Certain children to be secured in child restraint system").

{¶ 37} As we have found, the act of driving the children from the place where they were found established force in this case, and that finding is without regard to whether the children were first fastened into child safety seats. But, it is also true that the state created confusion by stressing the fact that the children were buckled into car seats before the defendant and Marcella drove away.

{¶ 38} First, it bears repeating that the state abandoned its abduction cases under Section (A)(2) which would have required it to show the defendant "restrain[ed] the liberty" of the children. Second, to the extent that the defendant was prevented from asserting R.C. 4511.81 as a defense, as he claims in his brief—because he was not told until trial that the state would identify the use of car seats as evidence of force—we find no reversible error. An appellate court cannot reverse a lower court decision that is legally correct even if it is a result of erroneous reasoning. *City of Toledo v. Schmiedebusch*, 192 Ohio App.3d 402, 2011-Ohio-284, 949 N.E.2d 504, ¶ 37 (6th Dist). That is, this court will not reverse a trial court decision that "achieves the right result for the wrong reason, because such an error is not prejudicial." *Id.* Here, the state presented

legally sufficient evidence of force irrespective of whether the children were buckled in child safety seats, and the state's reliance on them, if any, to show force is not grounds for reversal.

{¶ 39} In examining a challenge to the sufficiency of the evidence, we must consider the evidence in the light most favorable to the prosecution and determine whether a rational juror could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks* at paragraph two the syllabus. The testimony presented at trial, if believed, established that the defendant, personally and in complicity with Marcella, removed the children by force from the place where they were found. We find that the state presented legally sufficient evidence of "force" in this case. Accordingly, the defendant's first assignment of error is found not well-taken.

The trial court did not err in overruling the defendant's objection during the state's closing argument as to the element of "privilege."

{¶ 40} The test for prosecutorial misconduct in closing arguments "is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Ndiaye*, 10th Dist. Franklin No. 13AP-964, 2014-Ohio-3206, ¶ 14, quoting *State v. Smith,* 14 Ohio St.3d 13, 14, 470 N.E.883 (1984). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (Internal quotation omitted.) *Id.,* quoting *Smith v. Phillips,* 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.E.2d 78 (1982). Thus, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial. *Id.,* citing *State v. Mauer,* 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984).

{¶ 41} In his second assignment of error, the defendant alleges that the trial court erred in overruling his objection to the "prosecution misrepresenting the State's burden of proof" as to the element of privilege.

{¶ 42} To convict the defendant of abduction, "the finder of fact must [have] determine[d] that the defendant removed * * * the victim[s] by force or threat 'without privilege to do so.'" *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, ¶ 26, quoting R.C. 2905.02(A). "Privilege" is defined as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12).

{¶ 43} During closing arguments, the prosecutor said,

> Now, with respect to privilege, I'm going to visit or revisit eighth grade grammar class. I've put the definition of privilege up on the screen. * * * It says privilege means an immunity, license or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity. The only thing that matters here is the State has to prove [the defendant] didn't have one of those. It's written in the disjunctive. (Emphasis added.) Tr. at 839-840.

{¶ 44} The defendant objected, and the trial court overruled the objection. On appeal, the defendant argues that the prosecutor led the jury to believe, incorrectly, that the state only had to prove that the defendant did not have *one* of those—an immunity, license or right—to satisfy its burden of proof as to privilege. And, he maintains that,

because the error went uncorrected, there is "uncertainty" as to whether "the jury actually found [the privilege] element beyond a reasonable doubt."

{¶ 45} Terms that are undefined in a statute are accorded their common, everyday meaning. S*atterfield v. Ameritech Mobile Communications, Inc.*, 155 Ohio St.3d 463, 2018-Ohio-5023, 122 N.E.3d 144. Because the state was required to show that the defendant acted "without privilege," it was required to show that he acted without an "immunity, license, *or* right." In other words, it had to show that *none* of those applied. Blacks Law Dictionary (6th Ed. 1991) ("In some usages, the word 'or' creates a multiple rather than an alternative obligation; where necessary * * * 'or' may be construed to mean 'and.'"). While we agree that the state's comment was erroneous, we also find that it not deprive the defendant of a fair trial. First, the prosecutor cured its misstatement when he asserted, correctly, that it was the state's burden to show "beyond a reasonable doubt that the defendant did not have a privilege to do what he did," and the prosecutor then quoted the statutory definition of privilege, verbatim. Second, the trial court also provided accurate instructions on all of the elements of the offense, including privilege, and it further instructed the jury that closing arguments are not to be considered evidence. *Accord, State v. Freeman,* 8th Dist. Cuyahoga No. 91842, 2009-Ohio-5218, ¶ 16-21. Finally, the fact that the defendant is not challenging that the state presented legally sufficient that he acted without privilege militates against a finding that the misstatement prejudiced the outcome of this case. For these reasons, we find that the trial court did not

err in overruling the defendant's objection. Therefore, his second assignment of error is not well-taken. .

The trial court did not err in failing to compel the state to produce a bill of particulars.

{¶ 46} In his third assignment of error, the defendant argues that his right to a fair trial was violated when the trial court failed to order the state to furnish a meaningful bill of particulars, in contravention of Crim.R. 7(E).

{¶ 47} When the defendant makes a written request, "the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charged and of the conduct of the defendant alleged to constitute the offense." Crim.R. 7(E). "A bill of particulars has a limited purpose - to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985) .

{¶ 48} The defendant complains that, in response to his motion, the state provided a "copy of the indictment and referred to the discovery in this case." In denying the defendant's subsequent motion to compel, the trial court found that, "[t]he State of Ohio has a practice of providing open-file discovery" and "'[n]o bill of particulars is required when the state allows open-file discovery.'" *See* Aug. 15, 2018 Order, quoting *State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35. The defendant argues that *Coffey* is inapplicable because it involved an amendment to a bill of particulars, unlike this case which involves the absence of any bill. However, *Coffey* was not restricted to its facts. And, in any event, this precise issue was recently addressed in *State v. Franklin*,

5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 63-71, where the defendant filed a motion to compel a bill of particulars that included "the dates and times or the specific manner" of the offenses. On appeal, the court upheld the denial of the motion to compel, finding that "it is undisputed that the [county prosecutor's office] maintains 'open-file discovery,' pursuant to which the state provides discovery by allowing defense counsel to see all of its files regarding a case without requiring the defense to make a written request for discovery. No bill of particulars is required when the state allows open-file discovery." *Id.* ¶ 69.

{¶ 49} Likewise, the defendant in this case sought "the exact time that the offense(s) allegedly took place." It is undisputed that the state provided open file discovery, which according to it, included "a written statement by John Decker indicating [that the defendant] had come over to his home [and] had picked up two of the three children." The discovery file also included police reports, medical reports, and witness statements in the case. Thus, as in *Coffey* and *Franklin*, a bill of particulars would not have provided the defense with any additional information. Accordingly, under the facts of this case, we find that the purpose of the bill of particulars was fulfilled. Accordingly, the defendant's third assignment of error is found not well-taken.

The trial court did not err in denying the defendant's post-trial motion to dismiss.

{¶ 50} In his fourth assignment of error, the defendant argues that the trial court erred in failing to grant his post-trial motion to dismiss the indictment under R.C. 1.51.

{¶ 51} R.C. 1.51 provides that, "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." The statute "comes into play only when a general and a special provision constitute allied offenses of similar import and additionally do not constitute crimes committed separately or with a separate animus for each crime." *State v. Chippendale*, 52 Ohio St.3d 118, 120, 556 N.E.2d 1134 (1990). But, "when the offenses in question are not allied offenses of similar import, R.C. 1.51 does not preclude the offender from being charged with and convicted of both." *State v. Rivarde*, 197 Ohio App.3d 99, 2011-Ohio-5354, 966 N.E.2d 301 (12th Dist.), ¶ 11, quoting *State v. Smith*, 4th Dist. Meigs No. 09CA16, 2011-Ohio-965, ¶ 16.

{¶ 52} In his brief, the defendant baldly asserts that the state was "required to pursue" interference with custody charges against the defendant—rather than abduction—"because" the former is the "more specific charge." The defendant's claim is wholly unsupported with any legal arguments. Indeed, the defendant failed even to identify the interference statute by number or set forth its elements, much less analyze those elements so as to establish that it is an allied offense of abduction. As noted by the state, the defendant also failed to cite any case law in support of his proposition.

{¶ 53} This court is "not obligated to search the record or formulate legal arguments on behalf of the parties, because 'appellate courts do not sit as self-directed

boards of legal inquiry and research, but [preside] essentially as arbiters of legal questions presented and argued by the parties before them.'" (Other internal quotation omitted.) *Risner v. Ohio Dep't of Nat. Res., Ohio Div. of Wildlife*, 144 Ohio St. 3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 28, quoting *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 19. We find the defendant's argument—that the trial court erred in denying his post-trial motion to dismiss the indictment—not well-taken. The defendant's fourth assignment of error is found not well-taken.

The conviction was not against the manifest weight of the evidence.

{¶ 54} In his fifth and final assignment of error, the defendant argues that his conviction was against the manifest weight of the evidence.

{¶ 55} Under a manifest weight standard, an appellate court must sit as a "thirteenth juror" and may disagree with the fact-finder's resolution of the conflicting testimony. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The appellate court, "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.'" *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 56} The defendant complains that this case "revolved around the service, or lack thereof, of a temporary custody order [in Hill-Hernandez's favor], the violation of which could not result in an abduction charge." We disagree. The jury need not have concluded that the defendant had direct knowledge of the custody order in order to convict him. There was plenty of other evidence in the record to support the conclusion that the defendant knew, when he removed the children on December 19, 2018, that he did so without the consent of the children's father. That evidence included testimony that the defendant raced out of the police station to get to the children before Hill-Herndandez did, that he directed Marcella to pick up the school-aged boy before the end of the school day, that John Decker told the defendant that Hill-Hernandez "got custody for the kids," and, notwithstanding that, the defendant "wasn't going to give the kids back." Moreover, the defendant's failure to provide any credible explanation for not communicating with Hill-Hernandez over the next twelve days certainly supported the state's argument that he was, in fact, "on the lam."

{¶ 57} Finally, the defendant complains that his civil attorney "pick[ed] fights with the police detectives * * * for no apparent reason." Defendant's complaint, even if true, does not cast doubt on the weight of the evidence. Further, he bears at least some of the responsibility for his lawyer's bravado, given that the defendant failed to tell him a critical fact at the time he was retained, namely that the juvenile court had already granted Hill-Herndandez temporary custody.

{¶ 58} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Jackson*, 2d Dist. Greene No. 2018-CA-37, 2019-Ohio-2130, ¶ 24. Based on this evidence, it cannot be said that the jury clearly lost its way and created a manifest miscarriage of justice. Based upon the evidence presented in this case, we cannot say that the verdict was against the manifest weight of the evidence. Therefore, the defendant's fifth assignment of error is not well-taken.

Conclusion

{¶ 59} As set forth herein, the defendant's assignments of error are found not well-taken. Accordingly, the April 9, 2019 judgment of the Wood County Court of Common Pleas is affirmed, with costs ordered to be paid by the defendant pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCUR.
JUDGE

Appendix: Section II: trial court judgement entry denying the request for a Bill of Particulars

IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

v.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew L. Reger

ORDER

This matter is before the Court on Defendant, Ernie Haynes' Motion to Compel Production of Bill of Particulars, filed on July 23, 2018.

The State of Ohio has a practice of providing open-file discovery. "No bill of particulars is required when the state allows open-file discovery." *State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35. Accordingly, the Court finds Defendant's Motion to Compel Production of Bill of Particulars not well-taken and denied.

IT IS SO ORDERED.

Judge Matthew L. Reger

cc: Thomas Matuszak, Esq.
Scott T. Coon, Esq.

Appendix II a: trial court order continuing jury trial over defense objection

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,	*	Case No. 2018CR0070
Plaintiff,	*	Judge Matthew L. Reger
vs.	*	**ORDER CONTINUING JURY TRIAL**
Ernie E. Haynes,	*	
Defendant.	*	

This case came before the Court on the 2nd day of July, 2018, on the State's motion to continue the jury trial in this case to another date that is mutually-convenient for the Court and the parties.

Having considered the arguments of counsel, and for good cause shown, the Court finds the motion to be well taken and grants it accordingly.

THE COURT FINDS that the basis of the State's motion is "reasonable" as that term is used in RC 2945.72(H): three of the State's key witnesses will be unavailable for the trial as currently scheduled; two witnesses will be on preplanned vacations and one witness is due to give birth.

IT IS THEREFORE ORDERED that the jury trial, which had been scheduled for July 18, 2018, reserving two days, is hereby vacated and rescheduled for September 5, 2018, at 8:30 a.m., in Courtroom One of the Wood County Common Pleas Court. Two days have been reserved for trial. Counsel shall notify the Court at least ten days in advance of the trial if this matter is resolved by means of a negotiated plea. Any motions in limine must be filed no later than 48 hours prior to the trial.

IT IS FURTHER ORDERED that speedy trial time shall be tolled from July 18, 2018, until commencement of the new jury trial date of September 5, 2018.

Bond is continued on the condition that Defendant appear in this court on September 5, 2018.

Judge Matthew L. Reger

cc: Prosecutor – Thomas Matuszak
Defense Counsel – Scott Coon
Wood County Sheriff

JOURNALIZED
JUL 03 2018

Appendix II b: trial court order continuing subsequent jury trials, and State's post Bill of Particulars denial notices of supplemental discovery

O

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2017-CR-0070

PRETRIAL CONFERENCE ORDER

Judge Matthew L. Reger

This cause came before this Court on the 4th day of September, 2018, for a recorded pretrial conference. Appearing this day were Thomas Matuszak, Esq. on behalf of the State of Ohio and the Defendant Ernie E. Haynes with his counsel, Scott Coon, Esq.

Discussions were held regarding various issues including Defendant's Motion for an additional juror questionnaire and to individually voir dire any juror who has been involved in child custody litigation. Following said discussions, the State of Ohio moved to continue the September 5, 2018 trial date. The Defendant did not object and the Court granted the motion.

Following further discussions, a pretrial conference/change of plea was scheduled for **September 28, 2018 at 11:15 a.m.** and a jury trial established for **October 16, 2018 with three (3) days reserved**. Speedy trial time is hereby tolled and the Defendant's Motion shall be held in abeyance until the next trial date. Bond continued.

Judge Matthew L. Reger

xc: Prosecutor – Thomas Matuszak
Defense counsel – Scott Coon

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew Reger

STATE'S NOTICE OF PROVISION OF SUPPLEMENTAL DISCOVERY RESPONSE

On September 4, 2018, the State of Ohio provided a supplemental discovery response to defense counsel via the Matrix portal, which contained 62 Matrix pages.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was provided to the Defense Attorney: Scott T. Coon, 100 S. Main Street, Bowling Green, OH 43402, on September 4, 2018.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew Reger

STATE'S NOTICE OF PROVISION OF SUPPLEMENTAL DISCOVERY RESPONSE

On September 4, 2018, the State of Ohio provided a supplemental discovery response to defense counsel via the Matrix portal, which contained 170 Matrix pages (certified copies of court documents).

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was provided to the Defense Attorney: Scott T. Coon, 100 S. Main Street, Bowling Green, OH 43402, on September 4, 2018.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,	*	Case No. 2018CR0070
Plaintiff,	*	Judge Matthew L. Reger
vs.	*	**ORDER VACATING TRIAL DATE AND SETTING DATES**
Ernie E. Haynes,	*	
Defendant.	*	

This case came before the Court on the 11th day of October, 2018, on the Court's own Motion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the previously established hearing on Defendant's Motion to Quash Subpoena in this case of October 16, 2018, is hereby rescheduled to October 18, 2018, at 8:30 a.m.

IT IS FURTHER ORDERED that the jury trial in this case previously scheduled for October 17, 2018, reserving three days is hereby vacated. Counsel shall contact the Court at their earliest convenience to reschedule the jury trial.

Bond is continued on the condition that Defendant appear in Court on October 18, 2018.

Judge Matthew L. Reger

cc: Prosecutor – Thomas Matuszak
Defense Counsel – Scott Coon

O

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew Reger

STATE'S NOTICE OF PROVISION OF SUPPLEMENTAL DISCOVERY RESPONSE

On October 9, 2018, the State of Ohio provided a supplemental discovery response to defense counsel via the Matrix portal and regular U.S. Mail, which contained 3 Matrix pages via the Matrix portal, and 1 DVD via regular U.S. Mail.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was provided to the Defense Attorney: Scott T. Coon, 100 S. Main Street, Bowling Green, OH 43402, on October 9, 2018.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,	*	Case No. 2018CR0070
Plaintiff,	*	Judge Matthew L. Reger
vs.	*	**ORDER VACATING TRIAL DATE AND SETTING DATES**
Ernie E. Haynes,	*	
Defendant.	*	

This case came before the Court on the 11th day of October, 2018, on the Court's own Motion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the previously established hearing on Defendant's Motion to Quash Subpoena in this case of October 16, 2018, is hereby rescheduled to October 18, 2018, at 8:30 a.m.

IT IS FURTHER ORDERED that the jury trial in this case previously scheduled for October 17, 2018, reserving three days is hereby vacated. Counsel shall contact the Court at their earliest convenience to reschedule the jury trial.

Bond is continued on the condition that Defendant appear in Court on October 18, 2018.

Judge Matthew L. Reger

cc: Prosecutor – Thomas Matuszak
Defense Counsel – Scott Coon

O

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew Reger

STATE'S NOTICE OF PROVISION OF SUPPLEMENTAL DISCOVERY RESPONSE

On October 9, 2018, the State of Ohio provided a supplemental discovery response to defense counsel via the Matrix portal and regular U.S. Mail, which contained 3 Matrix pages via the Matrix portal, and 1 DVD via regular U.S. Mail.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was provided to the Defense Attorney: Scott T. Coon, 100 S. Main Street, Bowling Green, OH 43402, on October 9, 2018.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

O

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

State of Ohio,

Plaintiff,

vs.

Ernie E. Haynes,

Defendant.

Case No. 2018CR0070

Judge Matthew Reger

STATE'S NOTICE OF PROVISION OF SUPPLEMENTAL DISCOVERY RESPONSE

On January 13, 2019, the State of Ohio provided a supplemental discovery response to defense counsel via the Matrix portal, which contained 9 Matrix pages.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was provided to the Defense Attorney: Scott T. Coon, 100 S. Main Street, Bowling Green, OH 43402, on January 14, 2019.

Thomas A. Matuszak (0067770)
Assistant Prosecuting Attorney

Appendix: Section IIIa: Ohio Rule of Criminal Procedure 7

Ohio Rule of Criminal Pro. 7

RULE 7. The Indictment and the Information

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed in accordance with Crim. R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.
(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint,or to cure a variance between the indictment, information, or complaint and the proof, thedefendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.
(E) Bill of particulars. When the defendant makes a written request within twentyone days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense.
A bill of particulars may be amended at any time subject to such conditions as justice requires.
[Effective: July 1, 1973; amended effective July 1, 1993; July 1, 2000.]

Federal Rule of Criminal Pro. 7

Rule 7. The Indictment and the Information
(a) When Used.

(1) Felony. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.

(2) Citation Error. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) Surplusage. Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(e) Amending an Information. Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Appendix: Section III b: Ohio Rule of Criminal Procedure 16

Ohio R. Crim Pro. 16

Rule 16 - Discovery and Inspection

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:
(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
(5) The interests of justice require non-disclosure.
Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.
(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.
(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.
(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an in camera hearing conducted seven days prior to trial, with counsel participating.
(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.
(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.
(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.
(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.
(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.
(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. A public records request made by the defendant, directly or indirectly, shall be treated as a demand for discovery in a criminal case if, and only if, the request is made to an agency involved in the prosecution or investigation of that case. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:
(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
(2) Results of physical or mental examinations, experiments or scientific tests;
(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
(4) All investigative reports, except as provided in division (J) of this rule;
(5) Any written or recorded statement by a witness in the defendant's case-in- chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.
(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be

commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.
(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:
(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;
(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.
(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.
(L) Regulation of discovery.
(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.
(2) The trial court specifically may regulate the time, place, and manner of a pro se defendant's access to any discoverable material not to exceed the scope of this rule.
(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.
(4) To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, the trial court shall allow an alleged victim of the crime, who has so requested, to be heard regarding objections to pretrial disclosure.
(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.
Ohio. Crim. R. 16

Appendix: Section IV a: Ohio Constitution, Sect. 10, Art. I

Ohio Constitution, Sect. 10, Art. I:

Trial for Crimes; Witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Appendix: Section IV b: Ohio Constitution, Sect. 16, Art. I

Appendix: Section IV d: United States Constitution Amendment XIV

U.S. Constitution Amd. XIV

Redress for Injury; Due Process

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Appendix: Section IV e: United States Constitution Amendment V

U.S. Constitution Amd. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.