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	:	

REPLY BRIEF OF APPELLANT

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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

Introduction to Mr. Haynes argument in reply

"As was stressed in *Gingell* at 368: '* * * No door, however remote and uncertain, ought to be closed to an accused engaged in the task of preparing a defense to a criminal charge. Clearly it is wisest to err on the side of openness and disclosure.'

The exercise of good faith on the part of the prosecution is essential in maintaining public trust and confidence in the integrity of our criminal justice system. Adherence to the above-stated rule will insure that no constitutional right of an accused to due process or a fair trial will be transgressed." *State v. Sellards*, 17 Ohio St.3d 169, 171-172, 478 N.E.2d 781 (1985), quoting, *State v. Gingell*, 7 Ohio App.3d 364, 368, 455 N.E.2d 1066 (1st Dist.1982).

The information required to be presented in a bill of particulars is not complex. The information to be provided is really only the essential facts constituting the offense charged. This is a constitutional requirement under the due process clause of the 14th Amendment as well as multiple sections of the Ohio Bill of Rights found in Article I of the Ohio Constitution. This is also nothing more than the information required to be provided to every single misdemeanor defendant in the state of Ohio pursuant to Ohio Rules of Criminal Procedure 3. As discussed in the merit brief the Federal Rules of Criminal Procedure require this information to be included in the indictment itself whereas Ohio's rules do not.

As discussed below the requirements of notice as described in the 6th Amendment are incorporated as rights "fundamental to the concept of ordered liberty" through the 14th amendment due process clause. The US constitution's 5th amendment indictment requirement is not incorporated; in fact many states do not use indictments. The core constitutional question is then the issue of notice. Under Ohio's scheme a Bill of Particulars is necessary to satisfy constitutional notice. As a failure to provide notice constitutionally required notice is a violation of federal constitutional rights such an error can only be found harmless if it is harmless beyond a reasonable doubt.

Rather than address the issues that are before the Court, the prosecution claims that Mr. Haynes, much like a petulant child, is "upset" that he was not acquitted. Acquittal is not one of the remedies requested from this Court. Despite the fact that the prosecution did not respond to either the timely request for a Bill of Particulars or either one of the two motions to compel a Bill of particulars in the trial court, somehow the prosecution claims res judicata applies to Mr. Haynes. It does not. Mr. Haynes argued to the Court of Appeals that his due process right to notice was violated by the refusal to furnish a Bill of Particulars- exactly the question here.

The prosecution claims, without support, that the due process requirement of notice is satisfied "countrywide" by discovery. In fact, this is not the case at all, and the high court of Maryland has recently examined this exact issue and come down on the side of mandatory Bills of Particulars where "short form" indictments are used. *Dzikowski v. State of Maryland*, 436 Md. 430, 82 A.3d 851, 858 (Md. 2013).

As the issues and arguments in the *Dzikowski* case are remarkably similar to this case, it is surprising that the prosecution did not attempt to distinguish it in some

manner. In any event, Maryland is not alone in requiring Bills of Particulars to achieve proper notice when the State uses "short form" or "bare bones" indictments as Ohio does, and all States, of course, are required to adhere to the due process requirement of notice- meaning that the defendant has an absolute right to know the basis of the accusation in order to prepare a defense.

As the Maryland Court of Appeals[1] observed in *Dzikowski*:

> Discovery, even open-file discovery, that includes police reports and witness statements, is not the same and cannot substitute for a legally sufficient bill of particulars. While such discovery may contain the full facts of the case, when a defendant is charged using a short form indictment, it is not, and cannot be, a substitute, or satisfy a demand, for a bill of particulars. Discovery does not particularize or relate, from the perspective of the State, the factual information contained therein to the offense charged. It is this perspective and relation of factual information to the offense charged that satisfies the form and substance of a bill of particulars.

Id. at 862.

The prosecution here concedes that Rule 7 does in fact require the prosecution to furnish Bills of Particulars upon request. And moreover, that the language of the Rule is mandatory. The prosecution then appears to ask the Court to simply discard the language in Rule 7 to excuse the prosecution's failure to comply with what it acknowledges is a mandatory rule. This is an extraordinary argument which is not supported by even ordinary authority. There are ways to legitimately change procedural rules-ignoring the rules is not one of those ways. This is especially true when it is noted that the prosecutor's office here apparently only ignores Bill of Particulars requests when it suits their purpose, and issues them, even in cases after this one,

[1] The Maryland Court of Appeals is the State's highest court.

when the prosecution gains an advantage. See, *State v. Halka*, 2021-Ohio-149, 166 N.E.3d 707, ¶ 10 (6th Dist.).

The prosecution claims, despite Mr. Haynes already demonstrating prejudice and it not being an issue below, that there was no prejudice to Mr. Haynes by the prosecution's flouting of the rules of procedure. The prosecution then presents what it acknowledges is an insufficient example of a Bill of Particulars that it might have issued had it, in an "abundance of caution" elected to comply with the mandatory Rules of this Court. Ironically, as discussed more fully in Sect. V, had that document been furnished it would have allowed Mr. Haynes to advance, at least, an additional defense.

Of note, the prosecution relies, more than once, upon this Court's decision in *Boyatt.* However, as Mr. Haynes discussed in his merit brief, *Boyatt* was decided before the advent of "short-form" indictment and so is off point. If the common law long form of indictment used at the time of *Boyatt* were used in this case (and we point out, there is no limit to the amount of information permitted in an indictment) then there would be no issue.

"This court has decided 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)**,** emphasis added. The second part listed there, including the "action that constitutes the crime" is no longer required to be in Ohio indictments- this Court subsequently held in *Petro* that a "short form" indictment could be used when that notice was available in a mandatory Bill of Particulars. As such, the defendant's right to "to be apprised of the nature of the charge" is no longer, "amply protected by the holdings with regard to the requisites of the indictment" and the prosecution's reliance upon *Boyatt* in this regard is, at best, misplaced. *Id*.

On the whole, the prosecution has presented no real argument as to why this Court should not enforce its Rules as written. Defendant's have a right to mount a defense to the charges laid against them, and in order to do so, the defendant must know the particulars of the accusation rather than play a guessing game by trying to sort through the ever growing bulk of potential evidence provided in discovery to try to avoid a shotgun prosecution. When a defendant is denied such notice, Federal due process is implicated, and any finding of lack of prejudice must be beyond a reasonable doubt- though prejudice is glaring here.

I. The constitutional right to notice is guaranteed federally through the 14th Amendment's Due Process clause, and is expressly defined in the U.S. 6th Amendment, and in the Ohio Constitution, and that is the right that is at issue in this case- the right to notice

This is the fundamental constitutional issue at play in this case. It is complicated by the fact that, while both the Ohio and U.S. Constitutions require indictments on felony charges, both also separately require that the defendant be given adequate notice of the charges so that the defendant can prepare a defense. See, U.S. Const. Amendment V, VI; Ohio Constitution, Sect. 10 Art. I. The U.S. 5th Amend. right to grand jury indictment has not been "incorporated" as a fundamental due process right under the U.S. Constitution's 14th Amendment, but the 6th Amendment right to notice has been. *Luna v. Valentine*, 6th Cir. No. 20-5746, 2021 U.S. App. LEXIS 4049, at *10 (Feb. 11, 2021); *Richards v. Taskila*, 2020 U.S. App. LEXIS 27851, *9.

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948). This still

holds today, no matter whether it occurs in the indictment, as required by the Federal Rules, or if it occurs through a Bill of Particulars- notice of the specific charge must occur.

Moreover, contrary to the claim that a Bill of Particulars is not part of the accusatory instrument in Ohio, an Ohio Bill of Particulars can "cure" a defective indictment, particularly when, for whatever reason, "as appellant repeatedly argues, his appeal "is not based on notice or lack thereof." *State v. Bey*, 2019-Ohio-423, 130 N.E.3d 1031, ¶ 28 (6th Dist.).

a. The State's claim that *Russell v. United States* is "no longer good law" is unsupported by caselaw; *Russell* was cited by the 6th Cir. in 2020 for the right to notice, and by the U.S. Supreme Court in 2014 for the same purpose, *United States v. Lee*, 834 F.App'x 160, 165 (6th Cir.2020); *Lopez v. Smith*, 574 U.S. 1, 5, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014)

Russell v. United States has never been overturned, and its relevant provisions about the notice required by due process are absolutely good law. *Lopez v. Smith*, 574 U.S. 1, 5, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014). It appears that the prosecution has conflated an issue concerning the markedly high degree of deference federal district courts are required to grant to state courts in Federal Habeas Corpus proceedings in the very narrow (and irrelevant to this case) context of *Valentine* with an abrogation of the right to notice. In so doing the prosecution here landed on an untenable interpretation of caselaw.

The State's claim that "*Valentine* opinion is no longer followed by the Sixth Circuit. . ." is not accurate: the 6th Circuit favorably cited *Valentine v. Konteh* for the proposition that a criminal defendant is constitutionally due, "adequate notice of the charges in order to enable him to mount a defense" as recently as **February of this year** in *Luna v. Valentine*, 6th Cir. No. 20-5746, 2021 U.S. App. LEXIS 4049, at *10 (Feb. 11, 2021). *Valentine* was also cited by the 6th Circuit in August of this year in relation to a sufficiency

challenge to an Ohio indictment. *Brandon v. Forshey*, 6th Cir. No. 20-3500, 2020 U.S. App. LEXIS 27790, at *6 (Aug. 31, 2020).

The only issue related to the *Valentine* decision that could be construed to challenge its value involves the specific issue of "carbon copy" indictments and the U.S. Supreme Court's jurisdictional interpretation of the Anti-terrorisim and Effective Death Penalty Act (ADEPA) in the context of Federal Habeas Corpus and has no bearing on any state court determination whatsoever. The issue that was raised by the 6th Circuit is very narrow:

> The Valentine court based its legal reasoning [**13] on Supreme Court cases applicable to federal indictments, *Russell*, 369 U.S. at 763-64; *Hamling*, 418 U.S. at 117-18, and a few circuit cases, including Isaac v. Grider, 211 F.3d 1269 [published in full-text format at 2000 U.S. App. LEXIS 9629], 2000 WL 571959, at *4 (6th Cir. 2000), *De Vonish v. Keane*, 19 F.3d 107, 108 (2d Cir. 1994), F*awcett v. Bablitch*, 962 F.2d 617, 618-19 (7th Cir. 1992), and Parks v. Hargett, 188 F.3d 519 [published in full-text format at 1999 U.S. App. LEXIS 5133], 1999 WL 157431, at *3 (10th Cir. 1999). Two of those cases, *De Vonish* and Fawcett, were decided before AEDPA was enacted in 1996, while *Isaac* and *Parks*—and Valentine itself—were decided before the Supreme Court issued Renico in 2010. In light of Renico's admonition that "clearly established Federal law" means relevant Supreme Court precedent and not circuit court opinions, see *Renico*, 559 U.S. at 778-79, and because "no Supreme Court case has ever found the use of identically worded and factually indistinguishable [state] indictments unconstitutional," *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting), we doubt our authority to rely on our own prior decision—Valentine—to "independently authorize habeas relief under AEDPA." *Renico*, 559 U.S. at 779. Rather, Coles must point to a Supreme Court case that would mandate habeas relief in his favor. He has not done so, and consequently, he has not demonstrated that the decision of the Ohio Court of Appeals rejecting his Sixth Amendment claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Renico*, 559 U.S. at 779.

Coles v. Smith, 577 F.App'x 502, 507-508 (6th Cir.2014).

This case does not involve carbon copy indictments, and the point of *Russell* and *Valentine* here is the due process requirement that the defendant be given sufficient notice of the allegations constituting the offense to prepare a defense- nothing more.

b. Since the prosecution did not *respond at all* in the trial court to Mr. Haynes request for a Bill of Particulars, or *either of his motions to compel* the same, and because Mr. Haynes complained of his right to notice of the accusations against him under the Ohio and U.S. Constitutions being violated in the direct appeal, the Prosecution's res judicata claim is meritless

Though it is unclear exactly what part of Mr. Haynes argument the prosecution thinks res judicata should be applied to, the record indicates that it is the prosecution who failed to make arguments. If the prosecution wanted to raise its own proposition of law, then it should have laid the foundation for such an argument. In any event, Mr. Haynes requested the specific acts alleged and when they occurred. The specific acts alleged were not included in the short form indictment, as they sometimes are. See, *e.g.*, *State v. D.H.*, 10th Dist. Franklin No. 16AP-501, 2018-Ohio-559, ¶ 79, "[t]he indictment was sufficiently clear; it informed appellant of the date range applicable to each charge, and the specific conduct alleged. . .".

If the prosecution wishes to avoid constitutional faults undermining its verdicts, it is free to list the essential facts in the indictment itself, and then, if the notice is specific enough, it might be able to effectively *respond* to a request for a Bill of Particulars by directing the defendant to the specific acts alleged in the indictment- the constitution only requires that the specific acts alleged be given as the accusation. *Lopez v. Smith*, 574 U.S. 1, 5, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014).

In any event, the res judicata claim based upon a failure to raise issues on direct appeal must fail- Mr. Haynes argued the following below on direct:

> In this case, the prosecution acknowledges that it knew of the specific times and places that Ernie Haynes was accused of committing the charged crimes and claimed the information to be work product. TR. 03/15/19 Motion Hearing at 13.
>
> Those facts are not work-product, they are required disclosures under the Ohio Rules of Criminal Procedure, as well as being required by due process. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 60. When the prosecution is given to generating novel theories of criminal culpability, such as the proper use of legally required safety seats constituting the force element of Abduction, then it is unreasonable to expect a defendant to be able to determine what is being alleged against him, no matter the depth of discovery.
>
> A criminal defendant has a right to know the specific nature of the allegations against him, before trial. Because Mr. Haynes and his counsel, despite timely requests and motions, did not learn of the particular accusation against him as to time and place until closing arguments, Haynes was denied due process of law, his right to defend himself, and his right to a fair trial under the U.S. and Ohio Constitutions and the convictions here must be overturned.

Appellant's brief before the 6th Dist. at 14-15.

Mr. Haynes makes the same argument to this Court. The arguments made as to the narrowing of the scope of the trial based upon the accusations made in the Bill of Particulars is made not because Mr. Haynes is "upset," but rather to demonstrate the prosecution's motive for wanting to avoid furnishing Bills of Particulars. Mr. Haynes is not challenging the indictment- he is challenging the failure to follow through with the rules that satisfy the due process requirement of notice.

II. Contrary to the Prosecution's unsupported assertion that a provision of "discovery" satisfies the notice required by due process is "far from unique in Ohio" and is "countrywide" is not accurate

Mr. Haynes did not cite any cases from out-of state in his merit brief. Neither does the prosecution, however, the prosecution nevertheless claims that the notion of discovery taking the

place of the accusation is "countrywide". As this is a tertiary issue, Mr. Haynes will bring forth only the most relevant cases that undermine the prosecution's claims.

a. In Maryland, the State's high court, the Court of Appeals recently found Bills of Particulars to be required in a similar situation where the State law permitted a "short form indictment which did not provide sufficient factual notice to meet the demands of due process, *Dzikowski v. State of Maryland*, 436 Md. 430, 82 A.3d 851 (Md. 2013)

The *Dzikowski* case in Maryland is markedly similar to this one. Maryland state law, like Ohio, allows for short form indictments, and requires Bills of Particulars. *Id*. at 860. Much like this case, the specific issue at play was the specific act which comprised an element of a Maryland felony, Reckless Endangerment. *Id*. at 855. The prosecution's basis for not supplying the requested accusation was the same- it claimed discovery was sufficient, though the Maryland prosecution did at least respond in the trial court. *Id*.

As here, multiple possible inferences could be drawn from the potential evidence provided in discovery. *Id*. at 865. The Maryland Court's ultimate analysis is as follows:

> The State's obligation to furnish a bill of particulars upon the defendant's demand where a short form indictment is used, is not dependent upon or related to the complexity of the facts underlying the case, or the amount of effort that an accused person would need to put forth, in the absence of a bill of particulars, to determine what conduct constitutes the crime with which he is charged. The information requested by the petitioner was that which the State, had it used a traditional charging document, would have been constitutionally required to furnish. Were we to conclude otherwise, we would effectively permit the State to circumvent the obligations imposed upon it by the State Constitution through the use of a statutory short form charging document, which, by the terms of the legislation authorizing it, shows the Legislature's intent to avoid such circumvention.

Id.

This same circumvention is being attempted here, and it is equally untenable.

b. Many other States, such as New York and Michigan, require Bill of Particulars where short form, or bare bones indictments are used, and all states must provide adequate notice no matter what system is used

"Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged." Mich. Comp. Laws § 767.44, setting up statutory short form indictment language and, like Ohio, requiring a Bill of Particulars upon request.

The State of New York also permits short form indictments and requires Bills of Particulars.

> In the new chapter of the Code of Criminal Procedure which authorized simplified indictments, the Legislature has provided a new method of protecting the rights of an accused. No longer may the court grant or withhold a bill of particulars in its discretion. Now the Legislature has commanded that "upon the arraignment of the defendant, or at any later stage of the proceedings, the court shall, at the request of the defendant, direct the district attorney to file a bill of particulars of the crime charged." (Code Crim. Pro. § 295-g.) It must state such particulars as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged.

People v. Bogdanoff, 254 N.Y. 16, 24 (N.Y. 1930). See also, *Jelinek v. Costello*, 247 F.Supp.2d 212, 268 (E.D.N.Y.2003), "The New York Court of Appeals has explained, for example, that an indictment that sets forth little about the nature of the crime the defendant is accused of committing may nonetheless pass constitutional muster because the defendant has a statutory right to demand a bill of particulars."

III. Not only is the denial of Bills of Particulars not "countrywide", many prosecutors' offices around Ohio issue Bills of Particulars, and in fact the prosecutor in question here apparently issues Bills of Particulars in select cases, as it has done so in cases prosecuted *after* this one, *State v. Halka*, 2021-Ohio-149, 166 N.E.3d 707, ¶ 10 (6th Dist.)

A review of recent caselaw across the districts indicates that Bill of Particulars are frequently issued, casting doubt on the ubiquity of the practice of refusing to grant them. See, *e.g.*, *State v. Gates*, 6th Dist. Sandusky No. S-17-045, 2018-Ohio-1875, ¶ 13, using Bill of Particulars to determine if offenses were allied; *State v. Buck*, 2017-Ohio-8242, 100 N.E.3d 118, ¶ 71 (1st Dist.), "The essential elements of kidnapping and the conduct of the defendants were sufficiently spelled out in the bill of particulars."; *State v. Rings*, 2020-Ohio-4342, 158 N.E.3d 125, ¶ 33 (4th Dist.), fn. 3.

In fact, it is difficult to determine what Districts have adopted the "discovery equals notice" position, as the issuance of Bill of Particulars upon request seems the norm, rather than the exception. In any event, the 3rd District does not appear to have sanctioned this theory as it admonishes defendants "[w]hen no bill of particulars or an inadequate bill of particulars is filed, a defendant should file a motion to compel compliance with the request." *State v. Glass*, 3d Dist. Paulding No. 11-18-07, 2018-Ohio-5060, ¶ 4. According to the 6th District below, such a motion would be pointless.

In any event, the same prosecutor's office who prosecuted Mr. Haynes later issued a Bill of Particulars to a defendant, laying out a claim of complicity with some unspecific South American Drug cartel based upon nothing more than the defendant's possession and sale of cocaine. See, *State v. Halka*, 2021-Ohio-149, 166 N.E.3d 707, ¶ 10 (6th Dist.). This caused the defendant to make a motion in limine. *Id*. It is unclear what criteria the prosecution uses to

determine what defendants are entitled to a Bill of Particulars and which are not, but the law requires them to be furnished to all defendants.

IV. The Prosecution repeatedly claims that Mr. Haynes had all of the evidence that the State had, yet ignores Mr. Haynes arguments that belie that claim

`Unlike many States, Ohio's Grand Jury secrecy rules generally prohibit Defendant's access to Grand Jury testimony- one piece of evidence, pertinent to the accusation, that the prosecution had that Mr. Haynes did not. Moreover, the Prosecution does not specifically define "open-file" discovery, but defends the brazen discovery gamesmanship played by the trial prosecutor in this case as being within the rules- which is *accurate- it is within the rules*- and underscores the need for a specific factual allegation.

The prosecution simply asserts that Mr. Haynes had all of the information that the prosecution had, but this confuses the issue. The prosecution conflates "notice" with "knowledge", where in fact notice of the accusation requires a disclosure of the criminal acts comprising the accusation, and "knowledge" is merely the provision of a basket of potential evidence, it fails to provide the defendant with the notice necessary to prepare a defense.

V. Had Mr. Haynes been issued the inadequate Bill of Particulars that the prosecutor now proposes, he would have been able to take numerous specific actions which would have lead to a different outcome

The issue of prejudice in this case is an interesting one. As a threshold matter Mr. Haynes questions if any sort of harmless error analysis ought to be applied. This is a matter of notice which is endemic to the entire trial and is one of the core requirements of a fair trial. We point out that issue of prejudice it was not part of the decision below and that Mr Haynes has already been able to show prejudice through his inability to take action in filing pre-trial motions.

In any event this is a constitutional error under the United States Constitution as well as the Ohio Constitution, and as such the harmless error analysis as described in *Chapman v. California* must be applied. The Court must find the error to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). However, this sort of error, striking as it does at the core of those things required for there to be a fair trial, should never be considered "harmless" and instead should be treated as a "structural error" requiring reversal. *Id*. The Maryland Court of Appeals applied the "harmless beyond a reasonable doubt" standard to the issue in *Dzikowski*, and that Court's analysis is particularly helpful. "The abnegation of a particular rule upon which the defense intended to rely may often inflict more damage than initially apparent; a meritorious line of defense may be abandoned as a result; an important witness may not be called; strategies are often forsaken. The future course of the trial inevitably must be changed to accommodate the rulings made." *Dzikowski*, 82 A.3d at 866. The Court's case specific analysis is helpful:

> As we have seen, the essential purpose of a charging document is to notify the defendant of the scope of evidence for trial. It is possible that the petitioner was prejudiced when the trial court permitted the State to proceed upon a factual basis, on which it did not rely, or even acknowledge, in the indictment, in the bill of particulars it filed and throughout the first half of the trial. Under these circumstances, we cannot conclude beyond a reasonable doubt that the trial court's error in overruling the petitioner's exceptions was harmless. The reason is that the record demonstrates that all parties began the trial assuming that the more serious act of leaving an impaired, and possibly unconscious, man lying in the road, served as the factual focal point of all of the charges against the petitioner. Had the State notified the petitioner that the basis for the reckless endangerment charge was the "timed push," and not the knockdown punch that, objectively, more directly related to the victim's death, or that both events were the bases for its reckless endangerment charge, the petitioner may have adopted a different strategy at trial or otherwise altered his preparations (i.e. he may have identified different witnesses, possibly expert witnesses, or possibly altered

> the focus of his cross-examinations). We simply cannot reasonably predict with the degree of certainty required, what impact proper notice from the State would have had on the evidence available to the jury and/or the consideration it might have given that evidence.

Id. at 866-67.

Here, the prosecution only settled upon a specific factual accusation *after* the Court of Appeals found sufficiency. Would trial strategy have been impacted had Mr. Haynes known the criminal act he was alleged of committing was simply driving away with his grandchildren in the car as the prosecution now asserts in its "abundance of caution" post-appeal Bill of Particulars? It is hard to imagine how it would not be- for one thing, counsel might have challenged whether such facts actually charged an offense under Ohio R. of Crim. Pro. 12(c). Even if such a motion failed, that finding would have satisfied counsel's concerns about how sufficient evidence would be produced to sustain a conviction and may very well have then lead to a plea in the case. Resolving cases by plea agreement is now an accepted practice, and counsel may be ineffective for failing to advise a client to enter a plea. *Lafler v. Cooper*, 566 U.S. 156, 164, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). Yet, in a case like this where the factual allegation as to one of the elements of the crime is markedly subtle, counsel cannot effectively advise the client about a plea without knowing the specific accusation. Mr. Haynes could have hardly argued ineffective assistance for counsel's failure to divine the prosecution's factual allegations, when the prosecution itself did not finally agree on the matter until the case was before this Court. The prosecution argues for a guessing game, the people of Ohio deserve better that from their criminal procedure.

Contrary to the prosecution's assertions, nothing limits the prosecution to furnishing only one means by which the defendant might be accused of violating the law. However, since the

prosecution now relies *only* upon the notion that driving away with happy and consenting grandchildren in the vehicle constitutes a felony, two issues arise. First, the prosecutor's comments accusing Mr. Haynes of dishonesty in answering questions related putting the children in child safety seats to avoid admitting to a use of force would have been grounds for a mistrial and or a finding of prosecutorial misconduct as that is not one of the things that Mr. Haynes was accused of doing. Counsel, as in the *Halka* case, could have objected to the relevancy of the questioning about car seats at all. *State v. Halka*, 2021-Ohio-149, 166 N.E.3d 707, ¶ 44 (6th Dist.), fn. 3.

The second issue is evidentiary. Had Mr. Haynes known the actual accusation, whether it be the car seats or the driving, he could have presented a defense. Based upon the facts presented here by the prosecution, the children's father had left them in the temporary care of Mr. Haynes and his wife. That temporary custody was not revoked by the father prior to "the day of the abductions." According to the prosecution's version of the facts presented to this Court:

> 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.
>
> 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."

Appellee's brief at 8-9.

There is no question that the children were willing to go with their grandparents, and that was argued at trial. However, had Mr. Haynes known that the "day of the abductions" was that day, while the children were still in his care after the father left them there the night before he could have raised the defense of privilege by the consent not only of the children but of the *father*. Consent has been found to be privilege, and even if, arguendo, the children's consent was not sufficient due to age, certainly such a privilege must apply when the parent entrusts the children to a grandparent. *State v. Chafin*, 5th Dist. Fairfield No. 2019 CA 00014, 2019-Ohio-5306, ¶ 33. It is the province of the jury to determine facts of such a defense in the context of a presumption of innocence, not a Court of Appeals viewing the facts in the light most favorable to the prosecution.

In any event, while the prejudice to Mr. Haynes is stark, and not limited to the above, this issue ought not be decided upon prejudice. The Rule, as the prosecution concedes, is mandatory, not following it ought not be excused. Moreover, the right to notice of the specific accusation is so fundamental to fairness that no legitimate trial can proceed without it. Perhaps Ohio would be better served with a rule like the federal one which requires the essential facts to be alleged in the indictment, but that is not before the Court. Respectfully, neither is the prosecution's creative "counter-proposition of law." Notice is not only a Federal Right, but is a principle secured by Ohio due process as well and specified in the Ohio constitution. Allowing such a denial of notice as is seen here would be a denial of justice under the Ohio Constitution and cannot be tolerated.

VI. Conclusion

Mr. Haynes respectfully asks that this Court reverse his conviction in this matter, and grant whatever other relief that the Court finds appropriate. Mr. Haynes also hopes that the Court will take this opportunity to elaborate on this important issue and provide through guidance to the courts below.

Respectfully Submitted,
/s/ Michael H. Stahl

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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, September, 20, 2021:

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Respectfully,
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