

IN THE SUPREME COURT OF OHIO

STATE OF OHO)	
)	Supreme Court Case No. 2021-0215
Plaintiff-Appellee)	
)	
vs.)	Appeal from the Wood County Court of Appeals, Sixth Appellate District
)	
ERNIE HAYNES)	
)	Court of Appeals Case No. WD-19-035
Defendant-Appellant)	2020-Ohio-6977
)	
)	

BRIEF OF AMICUS CURIAE NATIONAL CHILD ABUSE DEFENSE & RESOURCE CENTER® IN SUPPORT OF APPELLANT ERNIE HAYNES

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INTRODUCTION

Defendant-Appellant Ernie Haynes' pregnant daughter died from a drug overdose December 12, 2017 leaving behind numerous children from several fathers. Three of the minor children who are the subject of this case were fathered by her live-in boyfriend, James Hill-Hernandez.¹ As the Sixth District Court of Appeals noted in its decision: "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.'" *Court of Appeals decision, State v. Haynes, 2020-Ohio-6977, ¶ 4.*

Ernie Haynes and his wife were distraught over their daughter's death and concerned about the grandchildren they were helping raise and who were in their physical custody during this period of time. They had concerns with the father of the minor children due to the father's drug and alcohol use. A dispute over custody between the Haynes and the father ensued.

Six days after the daughter's death, Ernie Haynes had dropped off the children at school and the babysitters in order to go to court to obtain a custody order. Afterwards, he picked the children up and placed them in a car seat before going home. Even though he had not been served with any paperwork showing the father had obtained a custody order, Mr. Haynes was ultimately arrested, charged and convicted in Wood County, Ohio "...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." *Court of Appeals decision, State v. Haynes,*

¹ The unborn child who died along with the Haynes' daughter was also fathered by Mr. Hernandez-Hill.

2020-Ohio-6977, ¶21.

Prior to trial, Ernie Haynes motioned for 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 as required under Criminal Rule 7(E). Specifically related to the case before this court, trial counsel requested (1) the conduct alleged to constitute the offenses of abduction and (2) what force or threat of force was used to remove the children. *See Motion to Compel Production of Bill of Particulars filed 5/30/2018*. The trial court denied that motion on the basis that "No bill of particulars is required when the state allows open-file discovery." (*See J.E.*) 8/15/2018.

The issue accepted by this Court centers on whether a trial court or, for that matter, a Court of Appeals can override the Ohio Supreme Court's rule-making authority especially when dealing with a clear, unambiguous rule that uses the word "shall" which is clearly mandatory under established Ohio case law.

However, there is a corresponding issue that this Court should clarify to the lower courts which is whether a Bill of Particulars can be satisfied if it simply restates the statutory wording of the offense. This Court has long recognized that "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). To elucidate or particularize conduct is not satisfied by simply regurgitating the statute in question.

The abduction statute, R.C. §2905.02(A)(1) provides, in relevant part, that "No person, without privilege to do so, shall knowingly by force or threat, remove another from the place where the other person is found."

In Ernie Haynes case, the State of Ohio did not disclose *until its second closing* that it was abandoning the traditional definition of "force" as elucidated by this Court in past decisions and argued a novel theory that the mere placing of a child in a car seat constituted "force" under

the law.

While the Sixth District Court of Appeals did acknowledge the State “created confusion” with this novel theory that the “force” element was met by bucking the children in car seats, they determined that it was “not reversible error” as merely driving away in the car would satisfy the “force” element. *Court of Appeals decision, State v. Haynes, 2020-Ohio-6977, ¶¶37-38.*

In recent years, there have been efforts both legislatively and with this Court to enact laws and rules to help minimize wrongful convictions.

Ohio Revised Code §2743.48 “Wrongful imprisonment civil action against state” was put into law effective March 22, 2019 to expand the ability to obtain compensation from the State of Ohio for a wrongful conviction. This came about as the numbers of exonerated Ohioans became increasingly known through media stories based on the efforts of the Ohio Innocence Project as well as others.

In February, 2020 Chief Justice Maureen O’Connor convened a new Ohio Supreme Court Task Force (on Conviction Integrity and Postconviction Review) dealing with wrongful convictions to “analyze current practices and recommend improvements to further our standards of justice.” As she stated: “We know from exoneration data that justice isn’t always served in our state and this task force would be a great first step in making improvements.”² *Court News Ohio, Feb. 13, 2020.*

In May, 2021, Gov. Mike DeWine signed into law one of the most important anti-wrongful conviction measures in the last decade. The new law requires for the first time in Ohio history law enforcement agencies to record custodial interrogations of people charged with most major felonies. This law passed unanimously in both the Ohio House and Senate.

Ohio’s law on Indictments evolved from the common-law standard of providing

² The Ohio Prosecuting Attorneys Association, which wields substantial political power at the Ohio Statehouse, decided not to participate in the task force. *Dayton Dailey News, Columbus Bureau, Laura A. Bischoff, April 18, 2021.*

detailed (long-form) indictments to a short-form standard *because the Bill of Particulars* was intended to provide the necessary information for a defendant to be able to constitutionally defend himself.

This Court should reassert the proper guidelines regarding Bills of Particular to insure that its rules and authority are respected by the lower courts, that information that *elucidates or particularizes* the conduct of the accused alleged to constitute elements of the charged offense is provided to all defendants and, in doing so, there is a lessened risk of a wrongful conviction.

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Child Abuse Defense & Resource Center™ (NCADRC), Kimberly A. Hart, Executive Director, is a non-profit, tax-exempt organization with an all-volunteer staff. Starting in 1989, the NCADRC's main emphasis has been on education of attorneys, psychologists and other professionals who deal with child abuse allegations in order to stem the onslaught of wrongful child abuse accusations/convictions that started sweeping the country in the mid-1980's. The NCADRC believes that the science and research dealing with the various issues connected to child abuse cases had been largely ignored over the years by police/child protective investigators, prosecutors, alleged child abuse "experts" who present their "beliefs" and opinions as conclusive fact, and others who assume that an allegation of child abuse is true rather than investigating to see if it is true. The result has been wrongful convictions not only in Ohio but nationally. The NCADRC was one of the first organizations to encourage and work with researchers from major universities and the National Institute of Health on separating fiction from fact on various child abuse related issues. The NCADRC has conducted 20 International Continuing Legal Education Conferences as well as working with various legal associations and groups in Ohio and nationally. The organization believes that by utilizing the science and

research dealing with child abuse issues, you can ferret-out many of the false cases. The organization was involved in providing research and guidance to Ohio attorneys Tim Young, Jay Milano, Harry Reinhart and Stu Benis in the exonerations of M. Jenny Wilcox and Dale Aldrich (1996)³³. They were declared wrongfully convicted in May, 2020 by Montgomery County Common Pleas Court Judge Mary Wiseman.

Over the past two decades, Barry Scheck of the National Innocence Project along with colleagues of various state projects have overturned convictions of hundreds of people on death row or serving life sentences who were completely innocent (through DNA testing). Unfortunately, there is not DNA testing available in most cases for child abuse (i.e. sexual). Most convictions result from a combination of an alleged victim who has been coached through various means, an alleged pseudo-expert who basically confirms what he or she was told by the alleged victim, and/or through the admission of hearsay to corroborate the alleged victim. Over the years, special laws/rules have been incorporated in the court system (supported by higher court decisions) that have allowed convictions of alleged child abusers to become easier through 404(B) exceptions, loosened hearsay exceptions, expansive time-frames in Bills of Particulars as well as expanded definitions of what constitutes “force” in child abuse allegations.

The result has been an increase in wrongful convictions of different types of convictions in Ohio and nationally. As of April 18, 2021, there have been 2,755 Americans who have been exonerated including 85 Ohioans in addition to 11 persons reviewed or pending in Cuyahoga County prosecutor’s integrity unit. *Dayton Dailey News, Columbus Bureau, Laura A. Bischoff, April 18, 2021.*

The NCADRC would encourage this Court to continue the efforts to bring justice and

³³ *State v. Aldridge et. al*, (1997), 120 Ohio App.3d 122. The State of Ohio had appealed the trial courts ruling which was upheld by the Second District Court of Appeals.

fairness to defendants in Ohio courts. This Court sets the tone for how to deal with wrongful convictions and a disregard of this Court's mandatory rules will only encourage further defiance by some of the lower courts which will result in more wrongful convictions.

STATEMENT OF THE CASE AND THE FACTS

The NCADRC adopts the Appellants Statement of the Facts, aspects of which warrant emphasis here.

First, the history of how the Bill of Particulars originated with the development of the short-form Indictment as well as the distinction between the Federal long-form Indictments should be critical in this Court's resolution of the case.

Second, the misapplication of *State v. Halleck*, 24 Ohio App.2d 74, 263 N.E.2d 917 (4th Dist.1970) by the Ninth District Court of Appeals in several cases resulted in that district evolving to a standard that bills of particulars are no longer required. *State v. Eskridge*, 9th Dist. Summit C.A. No. 9664, 1980 Ohio App. LEXIS 11114, at *4 (Aug. 27, 1980); *State v. Sarnesky*, 9th Dist. Summit C.A. NO. 12257, 1986 Ohio App. LEXIS 5710, at *4 (Feb. 12, 1986); *State v. McDay*, 9th Dist. Summit C.A. NO. 19610, 2000 Ohio App. LEXIS 4235, at *5 (Sep. 20, 2000); *State v. Tebcherani*, 9th Dist. Summit C.A. NO. 19535, 2000 Ohio App. LEXIS 5426, at *17 (Nov. 22, 2000).

Recently, that Ninth district has evolved to rely on a "prejudice" determination to determine whether it is error not provide a requested Bill of Particulars. That was not considered by the trial court or court of appeals in the instant case. The 9th District has retreated from its position in *Sarnesky*, *Eskridge*, *McDay* and *Teberchiani*, and now appears to focus on prejudice rather than discovery. *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.

Thirdly, the particular facts of this case foreshadow the scope of its potential impact.

This Court's rule-making authority would be undermined and/or circumvented if lower courts can ignore mandatory rules by simply arguing that the defendant has to show prejudice when the State of Ohio chooses to not provide mandated discovery. This will cause non-uniformity between the various courts and violate equal protection of the law. A slippery slope will entail in which other rules promulgated by this Court could be ignored. This cannot stand.

LAW AND ARGUMENT

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. The word "shall" is mandatory in meaning and Ohio caselaw dealing with statutory construction is applicable to wording and intent under Ohio Criminal Rules

"Shall" is defined as "will have to" and is "used to express a command or exhortation" and "to express what is mandatory." Webster's Third New International Dictionary 2085 (2002). Courts have traditionally applied the same connotation to "shall" when interpreting statutes and the duties they impose. E.g., *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428 (1947) ("The word 'shall' is ordinarily '[t]he language of command'."), quoting *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818 (1935); *Stephan v. State Veterinary Med. Bd.*, 113 Ohio App. 538, 543 (1st Dist. 1960) ("[T]he ordinary meaning of the word 'shall' is mandatory."); see generally Bryan A. Garner, *A Dictionary of Modern Legal Usage*, at 502 (1987) (describing the typical legal usage of "shall" as "ordinarily connot[ing] language of command"). *State v. Swihart*, 2013-Ohio-4645, 3rd Dist

Under the statutory rules of construction, the word shall is usually interpreted in its ordinary usage; the use of the word shall makes the provision in which it is used mandatory, especially when used frequently. *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-

Ohio-622, ¶16, citing *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 107. However, there are instances where the word shall may be construed as permissive rather than mandatory. *Dorrian*, 27 Ohio St.2d 102, paragraph one of the syllabus. Such construction can only occur when there is “a clear and unequivocal legislative intent” that the word shall is to receive a construction other than its ordinary usage. Id. ¶22 *State v. Yeager*, 2010-Ohio-3162.

When the State of Ohio went to short-form Indictments in 1944, the General Assembly included a provision in its legislation that *requires* the prosecuting attorney to provide a Bill of Particulars if properly requested by the defendant. *State v. Petro*, 148 Ohio St. 473, 481, 76 N.E.2d 355. This is still the controlling law in Ohio and is *required* by R.C. §2941.03; R.C. §2941.07; Ohio Crim.R. 7. This Court has never affirmed whether a Bill of Particulars is mandatory under the law or criminal rules and it should provide that clarity to the lower courts

An "open door" discovery policy does not excuse the prosecutor from providing a bill of particulars. The State is required to provide necessary information even if it discloses the prosecution's actual theory of the case. *State v. Gaines* (1994), 66 Ohio Misc. 2d 149.

II. A Bill of Particulars must be meaningful, not just a restatement of the Indictment if that Indictment does not define the specific conduct supporting each element of the offense.

"Where the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must 'descend to particulars.'" *United States v. Sullivan*, 919 F.2d 1403, 1411 (10th Cir. 1990) (quoting *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 8 L.Ed.2d 240 ... (1962)); *see also Hamling v. United States*, 418 U.S. at 117-18, 94 S.Ct. 2887 ("[t]he 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."). *Valentine v. Konteh*, 395 F.3d 626, 633 (6th Cir.

2005) citing *Parks v. Hargett*, 1999 WL 157431 (10th Cir. 1999) at *3.

State v. Simmans (1970), 21 Ohio St. 2d 258 -- Syllabus: "An indictment which employs fully the words of the statute describing the offense will support the conviction of the accused where no bill of particulars is requested or where no objection to the sufficiency of the indictment is interposed before submission of the case to a jury. (*Kennedy v. State*, 34 Ohio St. 310, overruled.)"

The second prong of the development of the Bill of Particulars in Ohio was that the Legislature and this Court's rules were to insure "that more fully the details of the offense charged" would be provided in a Bill of Particulars. However, Ohio courts have allowed prosecutors to simply recite the language of the offense from the statute as giving proper notice in most cases.

Defendants are entitled to a detailed, meaningful Bill of Particulars to effectuate his State and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Defendant is entitled to notice of the crimes with which he is charged. Ohio has established Ohio R. Crim. P. 7(E) to further effectuate this right. Assuming, *arguendo*, that this procedure itself does not emanate directly from clear constitutional provisions, nevertheless, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The State of Ohio's procedure for providing a detailed Bill of Particulars must comport with the constitutional requirements of due process.

This Courts pronouncement in *Simmans. i.d.*, is inapplicable authority to refuse an

issuance of a Bill of Particulars where one is requested and/or notice is insufficient from just a parroting of the statute: "An indictment which employs fully the words of the statute describing the offense will support the conviction of the accused where *no bill of particulars is requested or where no objection to the sufficiency of the indictment is interposed* before submission of the case to a jury. (*emphasis added*).

III. The refusal of the trial court to order the State to provide a meaningful Bill of Particulars could lead to wrongful convictions especially when applied to child related cases where special considerations have already contributed to wrongful convictions.

A 2020 study by the National Registry of Exonerations delineated leading causes of wrongful convictions that have led to exonerations. While there is not a "Bill of Particulars" category, it is important to note that official misconduct occurred in 54% of these cases which includes both police and prosecutors. That rate increases for more serious and severe crimes. Brady violations tend to be the most common form of misconduct, and the National Registry of Exonerations has found concealed exculpatory evidence in 44% of exoneration cases.

The National Registry of Exonerations has found perjury and false accusations in 57% of exoneration cases. Perjury and false accusations often occur when a witness has an incentive to lie, including ill-will toward the accused.

Contrary to common belief, exonerations are not simply DNA related and primarily of murder convictions. Of the 28 cases of exoneration led by the Ohio Innocence Project, 9 included rape cases, primarily with children. *Ohio Innocence Project Library, "Contributing Factors"*, 6-2-2020. Of the total 85 wrongful convictions in Ohio, approximately 40% are connected to rape cases. *Columbus Journal-News, Laura A. Bischoff, April 18, 2021*

The State of Ohio has enacted many laws and court rules to make it easier to convict defendant's accused of sex related crimes particularly in cases with alleged child victims. The

offset is that this has increased the number of cases where wrongful convictions have occurred.

Bill of Particular time-frame expansion, expanded and residual hearsay exceptions, 404(B) exceptions and a long history of the Ohio courts expansion of what constitute “force” have eroded historical protections against wrongful convictions. This Court should be wary of allowing the State to refuse to issue meaningful Bills of Particular. The fact that the Ohio Prosecutors Association has refused to participate in the Chief Justices’ Task Force and, in fact, made statements challenging the magnitude of wrongful convictions should give this Court pause in giving prosecutors the ability to stifle proper notice of the conduct that is the basis of the charges defendants face. *Dayton Dailey News, Columbus Bureau, Laura A. Bischoff, April 18, 2021*

Conclusion

This Court should do two things to provide guidance to the lower courts. First, issue a clear decision that requested Bills of Particulars are required. “Shall” is mandatory.

Second, this Court should reaffirm that Bills of Particular are a supplement to the Indictment, that a regurgitation of the statute or equivalent generic language does not suffice and that a *meaningful* disclosure by the prosecution of the conduct that constitutes each element of the offense is *required*.

Respectively submitted,

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