IN THE SUPREME COURT OF OHIO

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

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

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I. Overview

The NCADRC distinguishes between the Wood County Prosecutor and the State of Ohio, not out of disrespect, but because what the Wood County Prosecutor is arguing in his Merit Brief is not followed by the vast majority of Prosecutors in this State. As a general rule, the Ohio Attorney General, the Ohio Prosecutors Association and others such as the Franklin County Prosecutor's Office almost always will do an Amicus Brief in Support of any State Prosecutor for issues accepted for full review by this Honorable Court. Their lack of Amicus support should be an indicator to this Court.

The lack of notice and refusal to give a specific Bill of Particulars as done to Ernie Haynes in the instant case has not been an acceptable practice by Prosecutors in our reviews of thousands of cases in Ohio over the past 35 years.

If this Court accepts the Counter-Proposition of Law advanced by the Wood County Prosecutor, the floodgates will open throughout the State as other Prosecutors will seize upon it to make it easier to convict people they already deem guilty by cutting back on the traditional practice of "notice" of the acts that constitute the various elements of offenses. This is a slippery slope that this Court should not allow to happen and is fundamentally unfair.

At the same time, this Court should absolutely send a message that Prosecutors and trial courts "shall", be required to follow criminal statutes and rules promulgated by this Court. Again, if the mandatory provisions of Criminal Rules 7 and 16 can be ignored according to the whims of individual Prosecutors and/or trial courts, the implications of due process of law and equal protection of law will be totally compromised. We believe this would increase the likelihood of wrongful convictions throughout the State of Ohio.

II. The Prosecutor's arguments are "Smoke and Mirrors", contain misapplication of caselaw, misrepresentation of facts, and a false interpretation of "Open Discovery".

The Wood County Prosecutors brief contain misrepresentation of caselaw, misrepresentation of facts and false statements that everything that they had was available to Ernie Haynes.

CASELAW:

Re: *Valentine v. Konteh*, 395 F.3d 626, 629-630, 634-637 (6th Cir. 2005)
Re: *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)
Re: *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)

"…the above Valentine opinion is no longer followed by the Sixth Circuit because the case that it relied upon from the Supreme Court of the United States to arrive at its holding—Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)—is no longer good law in light of Renico v. Lett, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)."

This is not true. Regarding *Renico* the 6th Circuit actually held "…"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 [*508] [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, one must point to a Supreme Court case that would mandate habeas relief in his favor. *Coles v. Smith*, 577 Fed. Appx. 502, 2014 U.S. App. LEXIS 16086, 2014 FED App. 0650N (6th Cir.), 2014 WL 4085912

Valentine's holding to "notice" of the charges was undisturbed and has been relied upon subsequent to the lone *Coles* dissent that could cause "doubt" of applying *Valentine* in habeas cases. It was not "no longer followed by the Sixth Circuit…" as alleged in the Prosecutors brief.

Re: *State v. Wampler*, 2016-Ohio-4756, 2016 Ohio App. LEXIS 2550, 2016 WL 3574571 (and virtually every other case cited as support by the Prosecutor that *Valentine* is not followed):

"Wampler also highlighted that " '[c]hallenges based on Valentine have been rejected where the testimony and/or a bill of particulars provided sufficient differentiation among the counts ***.' " Id., at ¶ 23, quoting *State v. Artz*, 54 N.E.3d 784, 2015-Ohio-5291 (2nd Dist.), ¶ 34. There is no question that the testimony in this case did such. See State v. Haynes, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 2-20" Prosecutors Brief, p. 29, ¶1.

In all of these cases cited by the Prosecutor, the clarification is where the bill of particulars or trial testimony provided sufficient evidence of differentiation of carbon copy counts.

Wampler stated that "An indictment is sufficient if it (1) contains the elements of the offenses; (2) gives the defendant adequate notice of the charges; and, (3) protects the defendant against double jeopardy." *State v. Adams*, 2014-Ohio-5854, 26 N.E.3d 1283, ¶ 28 (7th Dist.), citing *Russell v. U.S.*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). ¶ 20 (NOTE: Relying on *Russell*, id, that the Prosecutor claims is no longer valid law.)

However, "[c]hallenges based on *Valentine* have been rejected where the testimony and/or a bill of particulars provided sufficient differentiation among the counts of sexual abuse." *State v. Artz*, 2015-Ohio-5291, 54 N.E.3d 784, ¶ 34 (2d Dist.). ¶23.

This is not the part of the *Valentine* decision that involves Ernie Haynes. *Valentine* is still good caselaw in dealing with the concepts of "notice".

In fact, the *Wampler* Court determined that "The record indicates (1) that the state agreed to provide witnesses' statements to defense counsel pursuant to a protective order, (2) defense counsel told the court at a pretrial that "everybody knows what the anticipated evidence is or isn't," and (3) defense counsel was able to provide to his retained expert psychologist police reports, the

recorded interviews of the victims, reports from children's services, and hospital records, all of which provided specificity about the victims' allegations." Para 24.

This was not the case with Ernie Haynes. Defense counsel repeatedly requested the what act or acts constituted "force" under the law. The Prosecutor made an absurd argument that simply buckling a child into a legally mandated car seat constituted force. The Court of Appeals rejected that argument but then absurdly decided that simply driving away in his vehicle constituted "force".

The *Wampler* Court decided that the defendant could not make a showing of prejudice which is opposite of Ernie Haynes. With a proper notice of the what constituted force, Ernie Haynes could have moved for a dismissal for insufficient evidence and argued persuasively to the jury that the State did not prove force with its arguments.

The Wood County Prosecutor argues that "Ultimately, Haynes wanted to know what the State's trial strategy was going to be well before trial, so that he only needed to disprove one possible theory of the numerous ways in which his abduction of James Hill-Hernandez's children could be proved at trial. In that way, he could garner himself an acquittal; even though, the evidence at trial supported a conviction for abduction, but it was not in the exact way that the State originally thought that abduction would be proved when Haynes was originally indicted." Prosecutors Brief, p. 29, para 1.

The result? The jury verdict on the element of force was based upon an argument/evidence that was not legally proper OR properly noticed to Ernie Haynes---as evidenced by the Court of Appeals decision.

FACTS:

The NCADRC adopts the Appellants statements regarding the Prosecutors misrepresentations that (1) discovery satisfies "notice" as required by Due Process of law and is

common in Ohio and "countrywide; (2) the Wood County Prosecutor subjectively picks and chooses which cases to provide Bills of Particulars.

Reply to: "OPEN DISCOVERY" CLAIMS:

The Prosecutor cited to many *federal* cases for the proposition that a Bill of Particulars is not necessary when there is "Open File Discovery". Prosecutors Brief, p. 17, ¶3 through p. 18.

This is another "apples to oranges" comparison. Every one of those cases clarified that "if the indictment is sufficiently specific, or if the requested information is available in some other form, then a bill of particulars is not required". *United States v. Canino,* 949 F.2d 928, 949 (7th Cir. 1991), *United States v. Higgins,* 2 F.3d 1094, 1096-1097 (10th Cir. 1993), *United States v. Rosenthal,* 793 F.2d 1214, 1227 (11th Cir. 1986), *United States v. Mejia,* 448 F.3d 436, 446 (D.C. Cir. 2006); *United States v. Butler,* 822 F.2d 1191, 1193 (D.C. Cir. 1987). This is not the case with Ernie Haynes

It is a misnomer regarding Ohio's Open File Discovery. "Here, there was open file discovery, so Haynes had every piece of evidence that the State had." Prosecutors Brief, P. 30, ¶2. That is absolutely false.

The Defendant does not receive Grand Jury testimony nor Prosecutor "work product" nor "non-disclosure evidence" and Marsy's Law objections that are upheld by the trial court. Crim.R.'s 6(E), 16(J)(2), 16(J)(1), 16(D), 16(J), 16(L). Just the Grand Jury testimony alone—required by Federal Rules of Discovery—should have presented Ernie Haynes with what act constituted the force element---a finding that should have been made by the Grand Jury in order to indict.

CONCLUSION TO II

The Wood County Prosecutor's arguments are a combination of "Smoke and Mirrors" as well as a confabulation of legal concepts and caselaw. He makes grand, sweeping statements that

have no basis in fact. This Court should scrutinize these sweeping statements and not assume any statement is accurate.

III. The refusal to follow the statute and mandatory criminal rules will lead to chaos and undermines justice. This will lead to "trial by ambush" which is what the Criminal Rules and this Court rejected with the new Discovery Rules of 2010.

Ohio R.C. 2941.07 provides "Upon written request of the defendant made not later than five days prior to the date set for trial, or upon order of the court, the prosecuting attorney **shall** furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense." (emphasis added)

Crim.R. 7(E) provides "When the defendant makes a written request within twenty-one 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. (emphasis added)

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. *Staff Notes (July 1, 2010 Amendments).*

Compliance with Crim.R. 16 eliminates, at least to some degree, trial by ambush by preventing surprise and the secreting of evidence favorable to one party. Baldwin's Ohio Criminal Law (3d Ed.), Section 49.3.

The Supreme Court of Ohio has stated that the overall objective of the discovery rules is "'is to remove the element of gamesmanship from a trial'" and "to prevent surprise and the secreting of evidence favorable to one party." (Citation omitted.) *Lakewood v. Papadelis*, 32 Ohio St.3d 1,

3, 511 N.E.2d 1138 (1987), quoting *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978). "Compliance with Crim.R. 16 eliminates, at least to some [**14] degree, trial by ambush[.]" (Citation omitted.) *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, 939 N.E.2d 218, ¶ 75 (2d Dist.).

If the State of Ohio can suddenly ignore **mandatory** language enacted by the Ohio General Assembly and by this Court in regards to Bills of Particulars, a slippery slope will entail with this case being cited by future parties for refusing to follow laws and rules. The resulting chaos is evident and cannot be tolerated.

IV. Allowing the State to fail to delineate the acts that constitute elements of an offense creates situations of improper "Judicial Fact-finding" by Courts of Appeal as in this case.

Judicial fact-finding is allowable in limitations to some areas of law such as sentencing. *Apprendi v. New Jersey*, 530 U.S. 466; *Blakely v. Washington*, 542 U.S. 296; *Oregon v. Ice*, 555 U.S. 160; *State v. Foster*, 109 Ohio St. 3d 1; *State v. Hand*, 2016-Ohio-5504, 149 Ohio St. 3d 94, 73 N.E.3d 448; *State v Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160.

The caselaw is clear that any fact that increases a penalty beyond the statutory maximum had to be found by a jury and proved beyond a reasonable doubt. The same is even more critical regarding fact-finding for an element of an offense.

In Ernie Haynes case, **at best** the jury believed force simply entailed the buckling into the car seat of the child. This was false and rejected by the Court of Appeals. Yet, their judicial fact-finding of force being the driving away in the vehicle upsurged the role of the jury and should be rejected by this court.

With the 6th District Court of Appeals decision, the State can simply fail to articulate acts that constitute an element of an offense, argue an improper or nonapplicable act as full-filling the

element and rely on the Court of Appeals to fact-find for that element---even though it was never alleged by the State. This is unacceptable and dangerous.

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.*

Ernie Haynes did not receive justice in this case. The Wood County Prosecutor's should have been required to delineate what the "force" was before trial and, as a minimum, before making its fallacious assertion of force during its second closing. The principle is "fairness" and not the rejected "trial by ambush" acts that this Court disapproves of.

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 20th day of September, 2021 to both:

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