IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Sup. Ct. No. 21-0215
Plaintiff-Appellee,	)	Ct. App. No. WD-19-035
-vs-	)	On Appeal from the Wood County Court of Appeals, Sixth Appellate District
ERNIE HAYNES,	)	
Defendant-Appellant.	)	

RESPONSE BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE

Ernie Haynes was indicted on February 8, 2018 in a six count indictment. Counts one and two charged Haynes's abducting J.D. (D.O.B. 1-11-2012) between December 21, 2017 and December 27, 2017. Those charges were pleaded in the alternative: the first count charged a violation of R.C. 2905.02(A)(1), and the second count charged a violation of R.C. 2905.02(A)(2), which were both felonies of the third degree. Similarly, counts three and four concerned Haynes's abducting J.H-H. (D.O.B. 12-16-2012) during the same period and charged in the same manner as for the other victims. The same holds true for counts five and six, which concerned Haynes's abducting J.H-H. (D.O.B. 4-16-2015) again, during the same period and charged in a like manner as the charges noted above. Haynes was arraigned on those charges soon thereafter. See Order on Arraignment, February 28, 2018.

After much pretrial litigation transpired, plea negotiations occurred, a plea hearing was scheduled, and the trial date was continued a number of times, a four-day jury trial was held. See generally Transcript of Jury Trial (JT), Vols. I-IV, January 22, 2019 through January 25, 2019. At the outset of the trial, the State moved to dismiss the even-numbered counts of the indictment, and the trial court re-characterized the odd-numbered counts as counts one through three for the ease of the jury. Haynes did not object to those dismissals. See JT Vol. I, at 25; Second Amended Judgment Entry on Jury Trial, April 3, 2019.

At the conclusion of the jury trial, Haynes was convicted of all charges pending against him. See JT Vol. IV, at 859-860; Second Amended Judgment Entry on Jury Trial, April 3, 2019. Before sentencing, Haynes filed a motion for acquittal followed by a motion to dismiss, which the trial court denied. See Order on Motions to Dismiss and For Judgment of Acquittal, April 4, 2019. Haynes was soon thereafter sentenced to one year of community control, which has

concluded by this point. See Judgment Entry on Sentencing: Community Control Sanctions, April 9, 2019. Haynes appealed.

Haynes raised five assignments of error. His first assignment of error argued that the State did not provide enough evidence to prove force under the abduction statute. His second assignment of error argued that the State engaged in prosecutorial misconduct when addressed the element of privilege during its closing argument. His third assignment of error argued that the trial court erred when it did not compel the State to provide a bill of particulars to Haynes. His fourth assignment of error argued that the trial court should have granted his post-trial motion to dismiss because he felt that interference with custody fit the facts of his conviction better than abduction did. His fifth assignment of error argued that his conviction was not supported by the manifest weight of the evidence because the small children he abducted went willing with him, so the State could not prove force. *See State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 23. The Sixth District found all of his assignments to be not well-taken. *See Id.*, ¶ 39, 45, 49, 53, 58-59.

Haynes then sought the jurisdiction of this Court on February 16, 2021. His first proposition of law concerned the sufficiency argument that he raised in his first assignment of error in his appeal in front of the Sixth District. His second proposition of law concerned whether a bill of particulars needs to be compelled by the trial court even in cases where open-file discovery is provided by the State. The State opposed jurisdiction on March 17, 2021. And this Court solely granted jurisdiction of Haynes's second proposition of law on April 27, 2021.

STATEMENT OF THE FACTS

As this case is largely procedural and its factual milieu is largely uncontested, the State will defer to the independent factual findings made by the Sixth District Court of Appeals. *See State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 2-20. In that regard, specifically in the interest of readability, the State will present the facts in a non-block formatted manner, but the State would be more than willing to resubmit its brief in block format, if needed.

"Ernie Haynes (hereinafter 'the defendant') is grandfather to [J.D.] (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.

"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.

"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.'

"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.'

"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.

"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.'

"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.'

"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." '

"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.

"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.

"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 on, 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.

"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.

"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.

“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.

“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. The defendant buckled them into car seats and drove them "two blocks down the street" to Shawna's for a planned visit.

"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.'

"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.

"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." *Id*., at ¶ 2-20.

ARGUMENT

INTRODUCTION

The State complies with Crim.R. 7(E) when it provides open-file discovery to the defense. As a result, there is no need for the State to file a pyrrhic, physical piece of paper captioned as a response to motion for a bill of particulars that merely recounts redundant information that the defense already possesses.

In that light, the prevailing, as well as consistent, treatment of that scenario by the district courts of appeals in Ohio, which have been presented with the abovementioned procedural facts, have held that "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." *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 49. That holding, furthermore, is far from unique in Ohio. And those holdings are sound.

The resolute consistency of the district courts of appeals, which stretches back over forty years, comes from the following understanding that is national in both its scope and application: "A motion for a bill of particulars may properly be refused if, in its nature, it is merely a request for the disclosure of evidence. Furthermore, an accused is not entitled as of right to the grant of a motion for a bill of particulars which calls merely for the legal theory of the prosecution's case. A bill of particulars is not a discovery device; rather, its purpose is simply to amplify or clarify the indictment." 41 American Jurisprudence 2d, Indictments and Informations § 146 (August 2021). This Court has long followed that nationwide approach as well. *See e.g.*, *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46, 59 O.O.2d 51 (1972), at paragraph one of the syllabus; *State v. Wilson*, 29 Ohio St.2d 203, 206-207, 280 N.E.2d 915, 58 O.O.2d 409 (1972); *State v. Wilkinson*, 17 Ohio St.2d 9, 11, 244 N.E.2d 480, 46 O.O.2d 114 (1969); *Foutty v. Maxwell*, 174 Ohio St. 35,

38, 186 N.E.2d 623, 21 O.O.2d 288 (1962); *State v. DeRighter*, 145 Ohio St. 552, 556, 62 N.E.2d 332, 31 O.O. 194 (1945); *State v. Boyatt*, 114 Ohio St. 397, 399, 151 N.E. 468, 4 Ohio Law Abs. 225, 24 Ohio Law Rep. 350 (1926)("In effect, this is what Boyatt's attorney asks us to do in this case, for the bill of particulars requested did not make more definite and certain the indictment, which was already specific. **It constituted a fishing expedition for the purpose of securing matter in defense.**" [Emphasis added]). There is no need for this Court to depart from that sound and long-held precedent.

Yet what is expressly prohibited both across the country and in Ohio is exactly what Haynes requested in his motions to compel a bill of particulars in this case, which is why the trial court denied his motions. In addition, Haynes already possessed what his motions sought. See Order, August 15, 2018. See also Motion to Compel Production of Bill of Particulars, July 23, 2018; Motion to Compel Production of Bill of Particulars, May 30, 2018; Request for Bill of Particulars, March 21, 2018. The Sixth District Court of Appeals recognized that too, which is why it held that it was proper that the trial court denied Haynes's motions to compel: "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." *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 49. That was an appropriate holding based on the facts of this case.

It should also be noted, in that regard, that the State complied with the requirements outlined by this Court's precedent where a defendant requests that the State, in a bill of particulars, list the specific times that the charged crimes occurred. *See State v. Sellards*, 17 Ohio

St.3d 169, 171, 478 N.E.2d 781, 17 O.B.R. 410 (1985). Additionally, with the sheer amount of information that was provided to Haynes through the open-file discovery process, well before the jury trial finally occurred, he is hard-pressed to show how the trial court's failure to compel the State to produce a physical piece of paper to memorialize that had complied the requirements of Crim.R. 7(E), in any way prejudiced him—given that he already possessed that which he requested in his motions. *See e.g., State v. Chinn*, 85 Ohio St.3d 548, 568-569, 709 N.E.2d 1166 (1999). In fact, a bill of particulars need not "be ordered where the information sought is within the knowledge of the defendant, or is information which he has had equal opportunity with the state of Ohio to discover." *State v. Clay*, 29 Ohio App.2d 206, 215, 280 N.E.2d 385, 58 O.O.2d 364 (4th Dist. 1972). *See also State v. Halleck*, 24 Ohio App.2d 74, 77, 263 N.E.2d 917, 53 O.O.2d 195 (4th Dist. 1970). Here, both of those prohibitive factors apply to Haynes.

Open-file discovery, as was provided in this case, complies with the requirements of both Crim.R. 7(E) and R.C. 2941.07. As the Sixth District held, "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." *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 48, quoting *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 69. More accurately, however, what the Sixth District as well as the majority of district courts of appeals are actually holding is that the State does not need to file a physical piece of paper that memorializes that it is complying with the dictates of Crim.R. 7(E) by providing open-file discovery. *See e.g., State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 46-49. This Court should hold likewise and solidify that open-file discovery satisfies Crim.R. 7(E).

COUNTER-PROPOSITION OF LAW to HAYNES'S PROPOSITION OF LAW: The State complies with Crim.R. 7(E) when it supplies open-file discovery in a case because open-file discovery provides the defendant with the nature of the offense that he or she is charged with, as described within the reports that are contained in the State's file.

This crux of this case concerns the methods by which the State may satisfy the requirements of Crim.R. 7(E) and R.C. 2941.07. It is undisputed that the State may respond to a motion for a bill of particulars by filing a document captioned as a response to a bill of particulars that clarifies certain aspects of the indictment in order to provide the defendant with notice relating to his or her crimes: such as, when those crimes occurred. *See State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781, 17 O.B.R. 410 (1985). However, that is not the only way that the State can comply with Crim.R. 7(E) and R.C. 2941.07. Several district courts of appeals have found that providing open-file discovery to the defendant complies with that rule and statute as well. *See e.g.*, *State v. Sewell*, 112 N.E.3d 1277, 2018-Ohio-2027 (2nd Dist.), ¶ 67; *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 69; *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 46-49; *State v. Miller*, 118 N.E.3d 1094, 2018-Ohio-3430 (7th Dist.), ¶ 17; *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 5-8; *State v. Burney*, 10th Dist. Franklin Nos. 15AP-197, 15AP-198, 15AP-199, 2020-Ohio-504, ¶ 54-55; *State v. Johnson*, 11th Dist. Lake Nos. 2018-L-001, 2018-L-002, 2018-Ohio-3968, ¶ 51. That is sound logic in light of this Court's precedent as well as the holdings of various district courts of appeals in Ohio as well as the federal circuit courts of appeals.

As a point of departure, it is helpful to look at the language of rules and statutes that concern a bill of particulars. Crim.R. 7(E) states the following: "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. A bill of particulars may be amended at any time subject to such conditions as justice requires." R.C. 2941.07 appreciably states the exact same thing: "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." As a point of comparison, Fed.R.Crim.P. 7(f) states the following: "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." Finally, 18 U.S.C.A. § 3366 references the above rule: "Bill of particulars for cause; motion after arraignment; time; amendment, Rule 7(f)." And in that light both the district courts of appeals in Ohio and the federal circuit courts of appeals treat the applicable rules and statutes in the same manner: where the government provides open file discovery, a physical response to a bill of particulars need not be provided because the defendant already possesses notice of the particularities of the crimes charged through possession of the government's file.

As it relates to this specific case, the Sixth District Court of Appeals held the following, as it related to the trial court not compelling the State to respond to Haynes's requests for a bill of particulars:

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

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).

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.

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.

> *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 46-49.

And that holding is consistent with a host of appellate decisions dating back over forty years. *See e.g.*, *State v. Sewell*, 112 N.E.3d 1277, 2018-Ohio-2027 (2nd Dist.), ¶ 67; *State v. Evans*, 2nd Dist. Montgomery No. 20794, 2006-Ohio-1425, ¶ 24; *State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 69-70; *State v. Wilson*, 5th Dist. Richland No. 13CA39, 2014-Ohio-41, ¶ 23-24; *State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35; *State v. Renfroe*, 6th Dist. Lucas No. L-12-1146, 2013-Ohio-5179, ¶ 25; *State v. Miller*, 118 N.E.3d 1094, 2018-Ohio-3430 (7th Dist.), ¶ 17; *State v. Freeman*, 7th Dist. Mahoning No. 08 MA 81, 2009-Ohio-3052, ¶ 46; *State v. McQueen*, 7th Dist. Mahoning No. 08 MA 24, 2008-Ohio-6589, ¶ 24; *State v. Oliver*, 7th Dist. Mahoning No. 07 MA 169, 2008-Ohio-6371, ¶ 36-39; *State v. Brown*, 7th Dist. Mahoning No. 03-MA-32, 2005-Ohio-2939, ¶ 83-88; *State v. Pittman*, 9th Dist. Summit No. 29705, 2021-Ohio-1051, ¶ 23-24; *State v. Betts*, 9th Dist. Summit Nos. 29575, 29576, 29577, 2020-Ohio-4800, ¶ 40-44; *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 5-8; *State v. Prince*, 9th Dist. Summit No. 27651, 2016-Ohio-4670, ¶ 10-15; *State v. Ross*, 9th Dist. Lorain No. 09CA009742, 2012-Ohio-536, ¶ 20; *State v. Tebcherani*, 9th Dist. Summit No. 19535, 2000 WL 1729456 (Nov. 22, 2000), at *6; *State v. McDay*, 9th Dist. Summit No. 19610, 2000 WL 1349804 (Sept. 20, 2000), at *2; *State v. Swiger*, 9th Dist. Summit No. 14565, 1991 WL 131528 (July 17, 1991), at *8; *State v. Sarnescky*, 9th Dist. Summit No. 12257, 1986 WL 2228 (Feb. 12, 1986), at *1-*2; *State v. Hudson*, 9th Dist. Summit No. 10491, 1982 WL 5074 (June 30, 1982), at * 1; *State v. Eves*, 9th Dist. Summit No. 9811, 1981 Ohio App. LEXIS 11246 (Mar. 11, 1981), at *11-*12; *State v. Eskridge*, 9th Dist. Summit No. 9664, 1980 Ohio App. LEXIS 11114 (Aug. 27, 1980), at *4; *State v. Burney*, 10th Dist. Franklin Nos. 15AP-197, 15AP-198, 15AP-199, 2020-Ohio-504, ¶ 54-55; *State v. Johnson*, 11th Dist. Lake Nos. 2018-L-001, 2018-L-002,

2018-Ohio-3968, ¶ 51; *State v. Banks*, 11th Dist. Lake No. 2008-L-177, 2009-Ohio-6856, ¶ 9. There is no need for this Court to disturb or depart from those holdings, for they are sound.

Again, those cases recognize, as was held in *Haynes*, that "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." *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 49. That holding comports with federal law as well.

The federal circuit courts of appeals are uniform and consistent in holding that when the government provides substantial discovery—particularly open-file discovery—a physical document captioned as a response to a bill of particulars is not needed because the action of providing the government's file to the defendant satisfies the requirements of Fed.R.Crim.P. 7(f). *See e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1192-1193 (1st Cir. 1993); *United States v. Barnes*, 158 F.3d 662, 665-666 (2nd Cir. 1998); *United States v. Urban*, 404 F.3d 754, 771-772 (3rd Cir. 2005); *United States v. Amend*, 791 F.2d 1120, 1125-1126 (4th Cir. 1986); *United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973)("Because we believe that the underlying objectives of a Rule 7(f) motion were fully satisfied by the government's voluntary disclosure of its file, we can find no abuse of the trial judge's discretion."); *United States v. Cruz*, 54 Fed. Appx. 413 (5th Cir. 2002)("When the information sought by the bill is made available to the defendants in other ways, for example by the use of 'open file' discovery as was done in this case, the district court need not order the bill."); *United States v. Vasquez*, 867 F.2d 872, 874 (5th Cir. 1989); *United States v. Martin*, 822 F.2d 1089 (6th Cir. 1987)(" If there has been full disclosure by the Government, as there was in the instant case, the need for a bill of particulars is obviated."); *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991)("The nature and operations of the 'open-file' policy is an adequate 'satisfactory form' of information retrieval,

making the bill of particulars unnecessary."); *United States v. Huggins*, 650 F.3d 1210, 1220 (7th Cir. 2011); *United States v. Lundstrom*, 880 F.3d 423, 439-440 (8th Cir. 2018); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979)("Full discovery also obviates the need for a bill of particulars."); *United States v. Higgins*, 2 F.3d 1094, 1096-1097 (10th Cir. 1993)("Mr. Higgins does not complain that he did not receive the answers he requested, only that he did not receive something designated a 'bill of particulars'."); *United States v. Diaz*, 190 F.3d 1247, 1258 (11th Cir. 1999); *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986)("Nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection."); *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)("Yet 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."). In that regard, the fact that every single federal circuit court of appeals has held that the government is not required to file a response to a motion for a bill of particulars when it provides open-file discovery or its functional equivalent—because that action already complies with Fed.R.Crim.P. 7(f)—and that a trial court does not abuse its discretion in refusing to compel one is quite telling.

In regards to the decisions cited by Haynes to encourage this Court to abandon the vast and stable precedent cited above, he cites to two isolated cases from the district courts of appeals and one repudiated case from the federal Sixth Circuit Court of Appeals. This Court should not disavow the sweeping authority in both state and federal courts that open-file discovery satisfies the requirement that the State provide the defendant with a bill of particulars. To do elsewise would be to embrace an outlier position, which has been consistently renounced.

To start, the only appellate decision in Ohio that suggests that "open door" discovery does not satisfy the requirement that the State provide a bill of particulars also held that the failure of the State to provide such was not prejudicial; therefore, a reversal of the defendant's convictions was not appropriate. *See State v. Brown*, 90 Ohio App.3d 674, 682, 630 N.E.2d 397 (11th Dist. 1993). Furthermore, that precedent has been reversed *sub silentio* by that Eleventh District when it held the following:

> Further, in this case, a bill of particulars would not have provided the defense with any additional information. It is undisputed that the Lake 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. The purpose of a bill of particulars is to inform an accused of the nature of the charges against him and the conduct of the defendant constituting the offense so that he can prepare his defense. Crim.R. 7(E). Ohio courts have repeatedly held that "[w]hen the State allows open-file discovery, * * * a bill of particulars is not required." *State v. Evans*, 2d Dist. Montgomery No. 20794, 2006-Ohio-1425, ¶ 24, citing *State v. Tebcherani*, 9th Dist. Summit No. 19535, 2000 WL 1729456, *6 (Nov. 22, 2000).
>
> *State v. Johnson*, 11th Dist. Lake Nos. 2018-L-001, 2018-L-002, 2018-Ohio-3968, ¶ 51.

Accord State v. Banks, 11th Dist. Lake No. 2008-L-177, 2009-Ohio-6856, ¶ 9.

Similarly, the other Ohio appellate case that Haynes cites in support of his argument was one where the State provided an amended bill of particulars on the day of trial, and the appellate court determined that a reversal was not appropriate because "[a] bill of particulars need not include information that is within the knowledge of the defendant or information that the defendant could discover herself with due diligence." *State v. Miniard*, 4th Dist. Gallia No. 04CA1, 2004-Ohio-5352, ¶ 23, citing *State v. Clay*, 29 Ohio App.2d 206, 215, 280 N.E.2d 385, 58 O.O.2d 364 (4th Dist. 1972) & *State v. Halleck*, 24 Ohio App.2d 74, 77, 263 N.E.2d 917, 53

O.O.2d 195 (4th Dist. 1970). And "Miniard had access to evidence supporting the amended bill through discovery", so the trial court did not abuse its discretion by allowing the State to amend its bill of particulars, which is expressly provided for in Crim.R. 11(E). *State v. Miniard*, 4th Dist. Gallia No. 04CA1, 2004-Ohio-5352, ¶ 20-26. Much like this case where Haynes had possession of the same information—absent attorney work product—that the State did, he cannot illustrate prejudice. So his conviction would be affirmed even if it was an abuse of discretion on the part of the trial court to not compel the production of a document titled as a response to a motion for a bill of particulars.

In that light, the other opinion that Haynes relies on has been roundly forsworn throughout Ohio, including the court that originally authored it. In fact, that case, *Valentine v. Konteh*, 395 F.3d 626, 629-630, 634-637 (6th Cir. 2005), concerned the sufficiency of a 40 count indictment for conduct that occurred over an eleven-month period, where the indictment did not give any differentiation for each count. Here, no allegation has been made that Haynes's indictment was in any way defective. More than that, this Court should not reanimate that discarded holding.

To start, as has been specifically and repeatedly noted by the Seventh District, 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). *See e.g.*, *State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, ¶ 78-86; *State v. Miller*, 118 N.E.3d 1094, 2018-Ohio-3430 (7th Dist.), ¶ 17-31; *State v. Moats*, 7th Dist. Monroe No. 14 MO 0006, 2016-Ohio-7019, ¶ 43-45; *State v. Adams*, 26 N.E.3d 1283, 2014-Ohio-5854 (7th Dist.), ¶ 34-36; *State v.*

Billman, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 33-36; *State v. Stefka*, 973 N.E.2d 786, 2012-Ohio-3004 (7th Dist.), ¶ 40-49; *State v. Clemons*, 7th Dist. Belmont No. 10 BE 7, 2011-Ohio-1177, ¶ 39, fn.2. *Accord Coles v. Smith*, 577 Fed.Appx. 502, 505-510 (6th Cir. 2014); *Coles v. Smith*, No. 1:10 CV 525, 2013 WL 474706 (N.D. Ohio 2013), at *3-*8; *Lawwill v. Pineda*, No. 1:08 CV 2840, 2011 WL 1882456 (N.D. Ohio 2011), at *2-*6. In fact, the Sixth District has cited to a number of the abovementioned Seventh District decisions as a rationale for not choosing to adopt the now outmoded *Valentine* decision. *See State v. Wampler*, 6th Dist. Lucas No. L-15-1025, 2016-Ohio-4756, ¶ 20-24. *Accord State v. Taylor*, 6th Dist. Ottawa No. OT-09-018, 2010-Ohio-359, ¶ 22; *State v. Nickel*, 6th Dist. Ottawa No. OT-09-001, 2009-Ohio-5996, ¶ 42-49 [both decided before *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)]. *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.

It should also be noted that this Court as well as every single appellate district in Ohio have chosen to not follow *Valentine* for a whole host of reasons—both before and after the Sixth Circuit abandoned its already limited, fact-based holding in that case. *See e.g.*, *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 114-123; *State v. Webster*, 1st Dist. Hamilton No. C-120452, 2013-Ohio-4142, ¶ 21-26; *State v. Artz*, 54 N.E.3d 784, 2015-Ohio-5291 (2nd Dist.), ¶ 30-35; *State v. Heft*, 3rd Dist. Logan No. 8-09-08, 2009-Ohio-5908, ¶ 51-58; *Billman v. Smith*, 4th Dist. Pickaway No. 91CA18, 2020-Ohio-1358, ¶ 9, fn. 3; *State v. Crawford*, 5th Dist. Richland No. 07 CA 116, 2008-Ohio-6260, ¶ 25-50; *State v. Young*, 95 N.E.3d 420,

2018-Ohio-488 (8th Dist.), ¶ 32-44; *State v. Just*, 9th Wayne No. 12CA0002, 2012-Ohio-4094, ¶ 5-9; *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, ¶ 75-82; *State v. Hendrix*, 11th Dist. Lake No. 2011-L-043, 2012-Ohio-2832, ¶ 46-53; *State v. Stanforth*, 12th Dist. Clermont No. CA2016-07-052, 2017-Ohio-4040, ¶ 38-43. This Court should continue to follow those holdings and refuse to follow the outdated opinion of *Valentine*.

Taken as a whole, appellate courts have been consistent in finding that *Valentine* didn't apply far more times than it actually did. *Valentine* didn't apply when discovery supplied the notice required to support the indicted charges. *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, ¶ 79-80. Here, there was open file discovery, so Haynes had every piece of evidence that the State had. *See e.g.*, *State v. Just*, 9th Wayne No. 12CA0002, 2012-Ohio-4094, ¶ 7. In addition, *Valentine* doesn't apply where the trial testimony and/or the exhibits provided the notice required to differentiate charges. *See e.g.*, *State v. Webster*, 1st Dist. Hamilton No. C-120452, 2013-Ohio-4142, ¶ 26; *State v. Artz*, 54 N.E.3d 784, 2015-Ohio-5291 (2nd Dist.), ¶ 34-35; *State v. Young*, 95 N.E.3d 420, 2018-Ohio-488 (8th Dist.), ¶ 43-44. Again, the open file discovery provided in this case along with the testimony and exhibits would have provided the needed notice had Haynes appealed the sufficiency of his indictment, **which he never did**.

In that light, this Court has held that issues not raised during the direct appeal may not be argued on jurisdiction to this Court. *North v. Beightler*, 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 6; *Phillips v. Irwin*, 96 Ohio St.3d 350, 2002-Ohio-4758, 744 N.E.2d 1218, ¶ 6; *State v. Lorraine*, 66 Ohio St.3d 414, 416, 613 N.E.2d 212 (1993); *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990); *State v. Broom*, 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (1988). Similarly, this Court has set forth the requirements for *res judicata* on a number of

occasions. *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967); *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). In fact, this Court has held the following:

> We have stressed that "[the] doctrine of res judicata is not a mere rule of practice or procedure inherited from more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts.***"
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> *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *Federated Dept. Stores, Inc. v. Moltie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

This Court should not eschew that precedent.

Haynes's argument could have litigated on direct appeal, but it wasn't. So he is barred from raising it now: "A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Township*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), at the syllabus. Also, this case does not involve a void sentence; therefore, "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *State v. Fisher*, 128 Ohio St.3d 92, 102, 2010-Ohio-6238, 942 N.E.2d 332.

In the same light, Haynes never argued that the State committed any type of discovery violation in this case; thus, that argument is also barred by *res judicata* as well as this Court's abovementioned precedent that an issue not raised at the appellate level may be raised in this Court as a matter of first impression. *Accord State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 23.

It should be noted that no discovery violation occurred in this case, nor was it ever alleged either in during the trial process or on appeal. The State scrupulously provided Haynes

with material that it received during the investigation of this case, if not immediately, shortly after it received such.

To clarify the parameters of Haynes's case, he was indicted on February 8, 2018, and his jury trial was held from January 22, 2019 to January 25, 2019. Following the indictment, Haynes was arraigned on February 28, 2018, and the State provided him with a copy of his criminal record on March 19, 2018. Haynes then filed a demand for discovery and requested a bill of particulars on March 21, 2018. The first pretrial hearing was held on April 10, 2018, at which point the State supplied 115 pages of discovery to Haynes, and a jury trial date was set for July 18, 2018. Haynes provided reciprocal discovery on May 4, 2018. Haynes then filed his first motion to compel a bill of particulars on May 30, 2018. A pretrial conference was held on June 12, 2018, which confirmed that a jury trial was set for July 18, 2018. On July 3, 2018, the July 18, 2018 trial date was continued until September 5, 2018, once a speedy trial waiver was executed.

On July 23, 2018, Haynes filed a second motion to compel a bill of particulars. The trial court denied Haynes's motion to compel the production of a bill of particulars by the State on August 15, 2018, where it stated the following:

> 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.

The State thereafter provided Haynes with two discovery responses on September 4, 2018: the first contained 62 pages of discovery; the second contained 170 pages of discovery. That same day, the trial date was rescheduled to be a change of plea hearing set for September 28, 2018—with a back-up trial date set for October 16, 2018.

The plea did not come to fruition on September 28, 2018, and an October 17, 2018 jury trial was confirmed. On October 10, 2018, the State provided Haynes with three additional pages of discovery. The next day, the trial court vacated the October 17, 2018 trial date resulting from Haynes's Motion to Quash Subpoena. A briefing schedule was the established by the trial court on October 18, 2018 that concluded on November 30, 2018 to address the subpoena issue raised by Haynes. Haynes's motion was granted on December 10, 2018. A pretrial conference was then held on December 18, 2018, which set a jury trial date of January 22, 2019. On January 14, 2019, the State provided an additional 9 pages in discovery as well as filed a liminal motion, which was denied on January 18, 2019 after a hearing on said motion. The jury trial then proceeded, as noted before, from January 22, 2019 until January 25, 2019—which resulted in Haynes's conviction. So, in that regard, Haynes received 347 pages of the 359 total pages of discovery 140 days (a little over four-and-a-half months) before trial, and he received the last 9 pages of discovery a week and a day before the jury trial started. That is why a discovery violation was never alleged by Haynes at any time before his present filing with this Court.

As it relates to the observation made by Haynes that Crim.R. 7 (E) states that "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."—the State agrees. This Court has held that "shall" denotes that whatever follows it is mandatory, except in very rare circumstances. *See e.g.*, *State v. Martin*, 154 Ohio St.3d 513, 2018-Ohio-3226, 116 N.E.3d 127, ¶ 27; *State v. Noling*, 153 Ohio St.3d 108, 2018-Ohio-795, 101 N.E.3d 435, ¶ 64; *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 NE.3d 784, ¶ 22. The State does not differ with that. Crim.R. 7(E) says, "shall", which is why the State complied with that rule by providing open-file discovery.

And that is not just what the State believes to be true, it is what both state and federal appellate courts have held when faced with this exact issue, as noted above. *See e.g., State v. Franklin*, 5th Dist. Muskingum No. CT2019-0042, 2020-Ohio-1263, ¶ 70 ("In this case, a bill of particulars would not have provided the defense with any additional information. Appellant was informed of Appellee's open-discovery policy and thus had access to items such as the police reports, medical reports, and witness statements in the case. The record clearly establishes that the defendant had notice of the nature of the pending charges. Therefore, the purpose of the bill of particulars was fulfilled."); *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 49 ("[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."); *United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973)("Because we believe that the underlying objectives of a Rule 7(f) motion were fully satisfied by the government's voluntary disclosure of its file, we can find no abuse of the trial judge's discretion."). This Court should formally adopt that logic.

The purpose of a bill of particulars is notice. It is not a directive to the State to prematurely select its chosen trial strategy as to how it intends to prove its case against the defendant at trial and provide that work-product to the defendant, so he or she can acquire an acquittal by disproving that singular method of guilt—even if other equally plausible avenues to a conviction under that particular statute exists. That's gamesmanship. And this Court has repeatedly stated that that is not the purpose of the criminal rules. *See e.g., State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912, 10 O.O.3d 448 (1978); *State v. Finnerty*, 45 Ohio St. 3d 104, 107, 543 N.E.2d 1233 (1989). Indeed, in that regard, providing the entirety of the State's file to the defendant through the open-file discovery process is the antithesis of gamesmanship.

This Court has long held as much in its precedent concerning what a bill of particulars in intended to provide as well as what is beyond its bounds. In fact, from its very first decision, this Court has held that it is proper to deny the defendant a bill of particulars where "[i]t constituted a fishing expedition for the purpose for securing matter in defense." *State v. Boyatt*, 114 Ohio St. 397, 399, 151 N.E. 468, 4 Ohio Law Abs. 225, 24 Ohio Law Rep. 350 (1926). *See also State v. Wilson*, 29 Ohio St.2d 203, 206-207, 280 N.E.2d 915, 58 O.O.2d 409 (1972). "Hence, it is clear that the purpose of a bill of particulars is not to disclose the state's evidence but simply to state specifically the nature of the offense charged." *State v. DeRighter*, 145 Ohio St. 552, 556, 62 N.E.2d 332, 31 O.O. 194 (1945). *See also State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46, 59 O.O.2d 51 (1972), at paragraph one of the syllabus ("The purpose of a bill of particulars is to set forth specifically the nature of the offense charged, not to require the state to disclose its evidence."). So its limited "purpose is to clarify the allegations in the indictment so that the accused may know with what he is charged in order to prepare his defense." *Foutty v. Maxwell*, 174 Ohio St. 35, 38, 186 N.E.2d 623, 21 O.O.2d 288 (1962).

In that light, this Court has further held—and was requested by Haynes in this case—"[i]n a criminal prosecution the state must, in response to a request for a bill of particulars or demand for discovery, supply specific dates and times with regard to an alleged offense where it possesses such information." *See State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781, 17 O.B.R. 410 (1985), at paragraph one of the syllabus. Here, as the Sixth District held, the specific dates requested by Haynes in his motions relating to a bill of particulars were provided to him through the discovery process. *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 49 ("[T]he 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."). Although, it can be posited that the specific date range of the abductions were specified in the indictment as well.

Irrespective of that, this Court requires that the defendant illustrate that he or she was prejudiced by the trial court not compelling a bill of particulars. *See State v. Chinn*, 85 Ohio St.3d 548, 569, 709 N.E.2d 1166 (1999)("While much could be said concerning Crim.R. 16 and the theory of "open file" discovery of the type authorized by local rule *** suffice it to say that our review of the record reveals that appellant suffered no prejudice in connection with the trial court's decision to adhere to Crim.R. 16 exclusively. The record is clear that appellant was in possession of much of the material that would have been available to him had the local rules been deemed applicable by the trial court. With respect to the materials that appellant allegedly did not have and to which he claimed entitlement under the local rules, appellant has utterly failed to demonstrate that he was prejudiced in any discernible way.")(Citations omitted). The same holds true here. There is not a scrap of evidence in the State's file—absent attorney work product, for which Haynes (or any defendant for that matter) has no right—that he did not possess well before trial. *See State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 48-49. So Haynes cannot prove prejudice. For he possessed all of the facts upon which his abduction charges were premised. Similarly, pursuant to a long-held federal context, he cannot show surprise. *See e.g., Wong Tai v. United States,* 273, U.S. 77, 82-83, 47 S.Ct. 300, 71 L.Ed. 545 (1927); *Dunlop v. United States*, 165 U.S. 486, 491, 17 S.Ct. 375, 41 L.Ed. 799 (1897); *Connors v. United States*, 158 U.S. 408, 411, 15 S.Ct. 951, 39 L.Ed. 1033 (1895). This case has never been about what the facts were; rather, it's been about how they were going to be proved.

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.

However, Haynes is not entitled to that, including through a State's response to a motion for a bill of particulars. For a bill of particulars need not "be ordered where the information sought is within the knowledge of the defendant, or is information which he has had equal opportunity with the state of Ohio to discover." *State v. Clay*, 29 Ohio App.2d 206, 215, 280 N.E.2d 385, 58 O.O.2d 364 (4th Dist. 1972). *See also State v. Halleck*, 24 Ohio App.2d 74, 77, 263 N.E.2d 917, 53 O.O.2d 195 (4th Dist. 1970). Here, both of those prohibitive factors apply to Haynes, as has been noted throughout.

And that mirrors how bills of particular are viewed nationally: "A motion for a bill of particulars may properly be refused if, in its nature, it is merely a request for the disclosure of evidence. Furthermore, an accused is not entitled as of right to the grant of a motion for a bill of particulars which calls merely for the legal theory of the prosecution's case. A bill of particulars is not a discovery device; rather, its purpose is simply to amplify or clarify the indictment." 41 American Jurisprudence 2d, Indictments and Informations § 146. There is no need for Ohio to abandon this sound nationwide approach.

Had the trial court compelled the State to provide a bill of particulars to Haynes, in an abundance of caution, the State's response would have stated the following for each child:

> The State of Ohio continues to maintain that, given that the provision of open-file discovery satisfies its obligation under Crim.R. 7(E) to provide a bill of particulars in this case. *See e.g., State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, ¶ 35. Nevertheless, and in no way intending to limit its use of any evidence provided in discovery to satisfy any element of any charged offense, the State of Ohio provides this response to Haynes's Request for Bill of Particulars, filed on March 21, 2018.
>
> The below information is gleaned, in total, from the discovery provided by the State of Ohio. It is the policy of the Wood County Prosecutor's Office to provide all defendants with open file discovery, as has been done in this case.
>
> Count 1: Abduction. On or about the 21st of December 2017 through the 27th of December 2017, in Wood County, Ohio, Ernie Haynes did, without privilege to do so, knowingly by force or threat, remove J.D. (D.O.B. 1-11-2012) from the place where J.D. (D.O.B. 1-11-2012) was found. In violation of Ohio Revised Code Section(s) 2905.02.(A)(1), 2905.02(C).
>
> Between December 21, 2017 and December 27, 2017, Ernie Haynes, himself, and/or in complicity with one or more other persons, did without privilege to do so knowingly, by force or threat, remove J.D. (D.O.B. 1-11-2012) from the place where he was found in Wood County, Ohio by motor vehicle to other locations, including the place where he was ultimately located at the home of Connie and Leonard Spence in McComb, Ohio.

Although based upon Haynes's argument, that likely would not have satisfied him because what he now states that he would have wished for in the State's response to his motion for a bill of particulars goes beyond the requirements of Crim.R. 7(E). This Court should recognize that too.

As can be seen by Haynes's argument, he is still upset that the trial court—on three separate occasions, the jury, and the Sixth District Court of Appeals all found that his actions constituted an abduction under Ohio law, specifically R.C. 2905.02(A)(2). See JT Vol. III, at 561-569, 791-792; JT, Vol. IV, at 859-860; Order on Motions to Dismiss and For Judgment of Acquittal, April 4, 2019; *State v. Haynes*, 6th Dist. Wood No. WD-19-035, 2020-Ohio-6977, ¶ 24-39, 54-58. Furthermore, this Court decided to not accept Haynes's first proposition of law in

his jurisdictional memorandum that concerned whether the force element of Haynes's abduction conviction was proved beyond a reasonable doubt. *State v. Haynes,* S.Ct. No. 2021-0215, 2021-Ohio-1399, Apr. 27, 2021. This Court has thus deemed that issue to now be closed.

What is left is a strictly procedural question of whether a physical piece of paper needs to be provided to a defendant and filed with the trial court that is titled a response to a motion for a bill of particulars that memorializes the fact that the State has complied with the notice-based requirements of Crim.R. 7(E) by providing open-file discovery to the defendant. In that regard, it is undisputed that if open-file discovery is not provided in a case that a response to a motion for a bill of particulars must be filed that provides a defendant with "the nature of the offense charged and of the conduct of the defendant alleged to constitute the offense." See Crim.R. 7(E). It is likewise undisputed, as noted at-length earlier, that both the district courts of appeals in Ohio as well as every single federal circuit court of appeals are uniform in deeming that open-file discovery satisfies either Crim.R. 7(E) or Fed.R.Crim.P. 7(f), and as a result, the trial court acts appropriately when it denies a defendant's motion to compel the production of a document captioned: response to a motion for a bill of particulars. This Court should cement that holding.

CONCLUSION

In plain terms, Crim.R. 7(E) requires notice, and open-file discovery provides that. So in cases where the State provides open-file discovery to a defendant, it is proper for the trial court to find that Crim.R. 7(E) has been satisfied and not compel the State to produce a piece of paper that is entitled a response to a motion for a bill of particulars, which—in essence—memorializes that fact. A defendant is in no better or worse a position when the State provides open-file discovery, and the trial court does not compel the production of a bill of particulars. Here, Haynes wants to be in a tactically better position than that the State is in, which is

understandable. In reality, what Haynes now wants the trial court to compel the State to provide through a response to motion for a bill of particulars goes well beyond what Crim.R. 7(E) actually requires be provided to a defendant. That is inappropriate and not supported by either state or federal law. This Court held long ago that it is altogether proper for a trial court to deny a defendant's motion to compel a bill of particulars where "[i]t constituted a fishing expedition for the purpose for securing matter in defense." *State v. Boyatt*, 114 Ohio St. 397, 399, 151 N.E. 468, 4 Ohio Law Abs. 225, 24 Ohio Law Rep. 350 (1926). That is exactly what Haynes attempted to do with his motions—although it is far more pronounced with his arguments raised before this Court, for the first time. And it is still prohibited. *See e.g.*, *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781, 17 O.B.R. 410 (1985). This Court should likewise and hold that the State complies with Crim.R. 7(E) when it supplies open-file discovery in a case because open-file discovery provides the defendant with the nature of the offense that he or she is charged with, as described within the reports that are contained in the State's file.

Respectfully submitted,
/s/ David T. Harold (0072338)
David T. Harold (0072338)
Chief Assistant Prosecutor

CERTIFICATION

The undersigned counsel certifies that a true and accurate copy of this response brief was served via email to counsel of record for Defendant-Appellant Ernie Haynes, Michael H. Stahl, at Mstahl@stahlandstephenson.com and the counsel for Amicus Curiae National Child Abuse Defense & Resource Center, Lorin J. Zaner, at lorinzaner@accesstoledo.com on this 31st day of August, 2021.

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