

ORIGINAL

NO. 2010-1671

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 92809

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STATE OF OHIO

Plaintiff-Appellant

-vs-

CHARLES FREEMAN

Defendant-Appellee

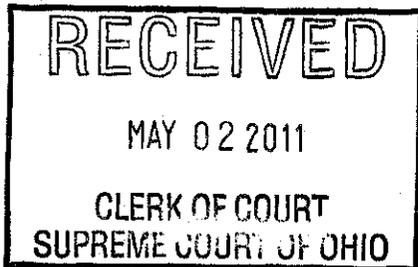
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**MERIT BRIEF OF PLAINTIFF-APPELLEE**

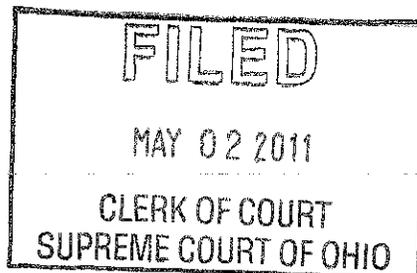
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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This matter should either be dismissed as improvidently granted or affirmed as Charles Freeman was not denied his constitutional right to notice or protection against double jeopardy. Freeman was indicted, convicted, and sentenced for multiple sex offenses that he committed against four young children: a five year old boy, a seven year old boy, an eight year old girl, and a nine year old girl. Each count was a result of a separate act committed against each of the victims during the time alleged in the indictment. Each count was delineated in the jury verdict and was supported by evidence. As Freeman's argument mainly concerns his rape convictions, those counts will be the focus of the State's response.

For the first time on direct appeal, Freeman argued that his indictment failed to adequately provide notice of the charges against him. The Eighth District Court of Appeals overruled Freeman's argument. The court found that Freeman had waived his notice argument and that the State differentiated the counts at trial. *State v. Freeman*, Cuyahoga App. No. 92809, 2010-Ohio-3714. Freeman sought review from this Court and additionally argued that his indictment also failed to adequately protect against double jeopardy.

Allowing defendants to argue these issues for the first time on appeal is bad policy. It allows defendants to sit on their rights and then potentially obtain reversals for claims that can be addressed at trial. If Freeman were unsure about counts or specificity, he must alert the State to the concern. By allowing Freeman to wait until after trial to make these claims does not allow the trial court an opportunity to correct a potential error.

Even if the notice and double jeopardy issues were raised at trial, Freeman's proposition still fails. First, there is no precedent supporting a requirement that an *indictment* provide the specificity that he requests. As he did on direct appeal, Freeman heavily relies upon the Sixth Circuit case of *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d

626 to support his argument. Primarily relying on *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038, a divided Sixth Circuit partially upheld the issuance of a writ where Valentine was convicted of multiple identical counts of sexual abuse supported only by the child-victim's estimate. The *Valentine* court did not require that the indictment alone contain such a high degree of specificity. Rather, the Sixth Circuit found that the differentiation could occur both before and during trial.

Freeman urges this Court to apply *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038, in such a manner as to require pretrial differentiation of the charged offenses. Neither *Russell* nor *Valentine* placed such a requirement on the prosecution. Rather, both cases hold that a proper review of Freeman's issue requires a review of the entire record.

To place such an initially burdensome requirement on the State in all cases does not comport with the constitutional requirements of notice. This Court has previously found that "[o]rdinarily, precise times and dates are not essential elements of offenses. Thus, the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges." *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. Lower courts throughout Ohio recognize a relaxed specificity standard for sexual offenses committed against children and both this Court and the Sixth Circuit have also recognized that a certain degree of inexactitude is permissible in cases of child-victim sex offenses. *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 239, 551 N.E.2d 1261; *Valentine*, supra. <sup>1</sup>

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<sup>1</sup> See *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, ¶17; *State v. Barnecut* (1988), 44 Ohio App.3d 149, 152, 542 N.E.2d 353; *State v. Mundy* (1994), 99 Ohio App.3d 275, 296, 650 N.E.2d 502; *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652; *State v. Egler*, Defiance App. No. 4-07-22, 2008-Ohio-4053.

Because factual specificity can be accomplished both before and during trial, there is any number of ways the State can clarify the conduct related to each charge. One method is simply by complying with the recently amended Crim. R. 16. Crim. R. 16 now requires open discovery which provides pretrial notice of specific evidentiary information relating to the charges. While discovery may not cure an indictment that is missing an essential element, it can be an effective way to provide factual specificity to a defendant. While Freeman was not tried under amended Crim. R. 16, he was provided a copy of his confession and he was informed of the anticipated testimony which would negate any claim of prejudice.

Freeman's argument should also be denied as, unlike *Valentine*, Freeman's convictions do not rest solely on mere estimates. Here, the State went to great lengths during trial to differentiate each of Freeman's convictions. Freeman was convicted of 19 separate counts of rape which correspond to different acts committed against two different victims. *Valentine* should not be expanded so that it applies to cases where differentiation has occurred.

It is unnecessary to review the issue presented in this case. Freeman was not deprived of any of his constitutional rights. His convictions are based on separate acts that were testified to by multiple witnesses and corroborated by physical evidence as well as his confession. As such, the State requests this Honorable Court either dismiss this case as improvidently granted or, in the alternative, affirm the Eighth District's decision.

#### **STATEMENT OF THE CASE**

In Cuyahoga County Court of Common Pleas case number 508859, Freeman was indicted by a Cuyahoga County Grand Jury in a 29 count indictment. Counts one through three charged Freeman with the Rape of Jane Doe I (later identified as P.S.), d.o.b. July 11, 1998, in violation of R.C. 2907.02(A)(1)(b). The indictment specified that Jane Doe I was

under the age of ten and that Freeman purposely compelled Jane Doe I to submit by force or threat of force. Counts four through nineteen charged Freeman with the Rape of Jane Doe II (later identified as I.S.), d.o.b. October 8, 1999, in violation of R.C. 2907.02(A)(1)(b). The indictment specified that Jane Doe II was under the age of ten and that Freeman purposely compelled Jane Doe II to submit by force or threat of force. Counts twenty through twenty-nine charged Freeman with Disseminating Obscene Matter to Juveniles in violation of R.C. 2907.31(A)(3). The indictment specified that the rape and dissemination offenses occurred between September 2007 and March 2008.

In Cuyahoga County Court of Common Pleas case number 518221, Freeman was indicted by a Cuyahoga County Grand Jury on two counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). The victim named in Count One was John Doe I (later identified as V.S.), d.o.b. December 15, 2000. The victim named in Count Two was John Doe II (later identified as T.S.), d.o.b. May 23, 2002. The indictment specified that both counts occurred in January of 2008.

The cases were joined for trial. The trial court allowed the State to amend the indictment after its case in chief. Case number CR-508859 was amended to reflect that Counts One through Nine charged Freeman with the Rape of P.S.; Counts Ten through Nineteen charged Freeman with the Rape of I.S.; and Counts Twenty through Twenty-Nine charged Freeman with Disseminating Obscene Matter to Juvenile. Case number CR-518221 was amended to reflect that V.S. was the victim in Count One of Gross Sexual Imposition to reflect that T.S. was the victim in Count Two of Gross Sexual Imposition.

Freeman was found guilty as charged and sentenced to consecutive counts of life without parole for each count of Rape. Freeman was also sentenced to five years for each count of Gross Sexual Imposition which were ordered to run consecutively to one another

and all other charges. Appellant was sentenced to 18 months on each count of Disseminating Obscene Matter to Juveniles, which was ordered to run consecutively to one another and all other charges.

Freeman filed a direct appeal with the Eighth District in which he alleged several errors. As is relevant to this appeal, Freeman claimed that his rights to a fair trial and notice were deprived when he was charged with multiple identical counts. The Eighth District found that Freeman waived his notice challenge as Freeman never objected to the sufficiency of his indictment nor did he ask for a more specific bill of particulars. *State v. Freeman*, Cuyahoga App. No. 92809, 2010-Ohio-3714, ¶36. The Eighth District further rejected Freeman's argument finding that the State differentiated each count at trial "in accordance with *Valentine [v. Konteh]* (C.A. 6, 2005), 395 F.3d 626]." *State v. Freeman*, Cuyahoga App. No. 92809, 2010-Ohio-3714, ¶37. In reviewing the record, however, the Eighth District found that some of the counts were not supported by sufficient evidence. The court vacated Freeman's convictions under counts 12 and 14-19. The remainder of Freeman's convictions were affirmed and the matter was remanded.

Freeman sought review in this Court under several different propositions of law. This Court accepted Freeman's first proposition of law and ordered briefing. The State now responds and requests this Honorable Court dismiss the instant appeal as improvidently granted or, in the alternative, find that Freeman was not denied his constitutional rights to notice, a fair trial, and protection against double jeopardy.

### **STATEMENT OF THE FACTS**

Over the course of several days, the State presented the testimony of fourteen witnesses and presented over forty exhibits to support Freeman's convictions. The evidence most notably included the testimony of the child victims, the victim's mother (who pled

guilty in connection with this case), physical evidence, and Freeman's statement wherein he confessed to five of the rapes.

Detective Thompson, the investigating detective from the Cleveland Police Department, took a written statement from Freeman. (Tr. 638, 650). Freeman admitting to having sex in front of the children, he specifically admitted to having sex in front of P.S. and I.S. on several occasions, but said that it happened less than four times.

Freeman admitted to Raping P.S. and I.S. (Tr. 654-656). Freeman denied ever vaginally penetrating P.S. or I.S., but did confess to the following:

Q: Have you ever had your mouth on either P.S. or I.S.'s vagina?

A: Yes, sir.

Q: How many times have you had your mouth on P.S.'s vagina?

A: Twice.

Q: Can you tell me how those two times occurred?

A: One of the times when P.S. came into the room while me and Maria was having sex P.S. started asking questions about what it felt like. I could not insert my penis into her vagina, but I put my tongue on her vagina in front of Maria. The same thing happened on the second occasion. Each time the mother, Maria was present. P.S. asking questions to me and her mother about the sexual experience. That's when I put my tongue on her vagina.

Q: Did you ever try to insert your penis into P.S.'s vagina?

A: Yes.

Q: How many times did you try to insert your penis into P.S.'s vagina?

A: Once.

Q: Can you tell me about the incident?

A: This is one of the times when P.S. came up to the bedroom and saw me with an erection with her mother \*\*\* but I couldn't do it, which means I didn't have an erection.

Q: Have you ever had your mouth on I.S.'s vagina.

A: Yes.

Q: How many times have you had your mouth on I.S.'s vagina?

A: Twice.

\*\*\*

Q: Have you ever tried to insert your penis into I.S.'s vagina?

A: No sir.

As the above statement indicates, Freeman confessed to multiple counts of rape against both P.S. and I.S. (Tr. 658-659).

The Singleton family consisted of Maria, the mother, and her children P.S., I.S., V.S., and T.S. Freeman first met the victims and their mother in 2007 while the family was out grocery shopping. (Tr. 252, 483). Freeman asked Maria Singleton for her telephone number and the two began dating.

P.S., the oldest child, was born on July 11, 1998. (Tr. 243). P.S. testified that while living at a house on Galewood Street in Cleveland, Ohio, P.S. said that she stopped going to school because "we were getting bullied." (Tr. 251). At home she would play Mortal Kombat with her siblings and Freeman. (Tr. 251). Over time, Freeman began to have the children take their clothes off while playing Mortal Kombat. (Tr. 263-264). This was confirmed by P.S.'s mother. (Tr. 487, 488). Freeman had P.S. and I.S. undress him when he came home. (Tr. 263, 493). P.S. testified that Freeman took off all of his clothes as well.

(Tr. 263). P.S. said that she was uncomfortable playing Mortal Kombat with her clothes off but that she was scared to put her clothes back on. (Tr. 264).

P.S. said that there was an incident in “mommy’s bedroom” where she watched her mother and Freeman have sexual intercourse. She said she observed “their private parts together.” (Tr. 271). While she was in her mother’s bedroom, Freeman told P.S. to take off her underwear. (Tr. 271). P.S. took off her underwear, laid on the bed, and Freeman rubbed P.S.’s “private” with his hand. (Tr. 272). P.S. said Freeman rubbed her private for a few minutes. (Tr. 272).

P.S. recalled a second incident in her mother’s bedroom that happened when “mommy was gone grocery shopping.” (Tr. 273). P.S. testified that Freeman laid her down on his bed “and put this burning stuff on my private part.” (Tr. 273). Freeman then began rubbing his private part against P.S.’s private part. (Tr. 274). She testified that this made her sad but she was scared to tell Freeman to stop. (Tr. 274).

P.S. testified about another incident that began in the bathroom with Freeman. Freeman had P.S. hold his private part while he was going to the bathroom. (Tr. 275). P.S. said that after Freeman was done “peeing,” Freeman took P.S. into P.S.’s bedroom. Freeman then rubbed “his private part on [P.S.’s] private part.” (Tr. 275). Freeman also put his mouth on her private part. (Tr. 276). She stated that Freeman did this on at least two occasions. (Tr. 276).

P.S. testified to multiple types of penetration. Freeman digitally penetrated P.S. on two different occasions, once in her bedroom and once in her mother’s bedroom. (Tr. 271-272, 281-282, 695). Freeman also made P.S. perform fellatio on him. P.S. testified to two occasions when this occurred: once in “mommy’s bedroom” and once “downstairs.” P.S. testified her sister I.S. had to do it as well. (Tr. 279). P.S. later detailed the incident in

“mommy’s bedroom.” P.S. testified that she and her siblings were playing Mortal Kombat when Freeman pulled out his private part and told them to suck it. (Tr. 281). Freeman also anally penetrated P.S. P.S. testified that Freeman rubbed his private part against her butt. (Tr. 278). P.S. testified that Appellant tried to go in and that this happened twice. (Tr. 278).

In addition to the multiple rapes, P.S.’s testimony supported Freeman’s disseminating convictions. (Tr. 281-282). The victim’s mother also confirmed that she had sex with Freeman in front of P.S. and I.S. (Tr. 491).

I.S., P.S.’s younger sister, was born on October 8, 1999. She also testified to multiple rapes. I.S. remembered that there were mornings where she would wake up and Freeman would be sitting on either her bed or her sister’s bed. (Tr. 318). After Freeman would lean in for a kiss, I.S. testified that Freeman would stick his private part into her private part. (Tr. 319). I.S. said that Freeman would put his penis into her vagina and leave it there for “like a second or 15 minutes.” (Tr. 319). I.S. also testified that Freeman would make her suck his private part. (Tr. 320). She said that this happened, “[e]very time he came downstairs and he was sitting on my bed.” (Tr. 321). She said that it happened the month before Halloween, and explained that it happened before she would get dressed for school. (Tr. 322).

I.S. also testified that she witnessed “the same thing” happen to her sister. I.S. testified that she woke up and saw Freeman rub P.S.’s chest, kiss her stomach and then stick his private into P.S.’s private. (Tr. 325). I.S. also testified that while in her mother’s bedroom she observed Freeman rub his private on P.S.’s private. (Tr. 328). Specifically, I.S. saw Freeman “put his finger in [P.S.’s private], then takes it out, and then put his penis in.” (Tr. 329).

I.S. confirmed that she also saw her mother having sex with Freeman. (Tr. 326). She said that she saw Freeman stick his private into her mother's private. (Tr. 326). I.S. also testified that she or her sister had to hold Freeman's penis while he went to the bathroom. (Tr. 330). She said this happened several times. (Tr. 330-331).

V.S. was born on December 15, 2000. (Tr. 359-360). V.S. said that the group all played Mortal Kombat together and that Appellant and his mother would be naked. (Tr. 371). V.S. testified that on one occasion when they were playing Mortal Kombat in his mother's bedroom, V.S. saw Freeman lick "all the girls' private part." (Tr. 375). V.S. also testified there came a time when Freeman touched V.S.'s private part – V.S. said Freeman grabbed it. (Tr. 377). He testified that this incident happened before Christmas and that he did not tell anybody. V.S. testified that he did not tell anybody because Freeman "said if we tell anybody he will cut our head off with a sword." (Tr. 379).

T.S. was born on May 23, 2002. (Tr. 395-396). T.S. also testified that he would play Mortal Kombat naked with his siblings, mother, and Freeman. (Tr. 406). T.S. said that everyone had to play with their clothes off because Freeman told them too. T.S. testified that he witnessed Freeman touch the girls' private parts in his mother's bedroom. T.S. specifically testified that he previously observed Freeman digitally penetrate his sisters. (Tr. 407). T.S. also witnessed Freeman rub V.S.'s private. (Tr. 408-409). T.S. testified that Freeman rubbed his (T.S.) penis on one occasion while in his mother's room. (Tr. 409).

Patricia Altierre, a social worker with the Cuyahoga County Department of Children and Family Service, investigated the matter. She conducted interviews with the victims and made a disposition of substantiated sexual abuse. (Tr. 477).

Ms. Renee Hotz, a forensic nurse at the University Hospital Case Medical Center, conducted a physical exam of P.S. and I.S. (Tr. 527). Ms. Holtz testified that she found

petechiae in P.S. and I.S.'s throats. Ms. Hotz testified that such findings are indicative of something being stuck down a person's throat. (Tr. 550, 555). Ms. Hotz also found evidence that something had previously caused a tear in I.S.'s vaginal area. (Tr. 557).

Mr. Edelheit, a forensic scientist with the Bureau of Criminal Identification and Investigation, testified that the presence of saliva can be detected by the presence of an enzyme called Amylase. (Tr. 572). Mr. Edelheit conducted an initial analysis of the physical evidence. With regards to the rape kit from I.S., Mr. Edelheit testified that the kit tested positive for seminal fluids on the vaginal samples and Amylase was identified on the underwear. (Tr. 580). Amylase was also detected on P.S.'s underwear, which was later submitted to BCI. (Tr. 582).

Dr. Julie Heinig, of DDC, DNA Diagnostic Center in Fairfield, Ohio, testified that although there were trace amounts of male DNA, there was no amplifiable male DNA from the vaginal swabs. (Tr. 613-614). However, Dr. Heinig testified that she was able to obtain DNA profile from her swab of I.S.'s underwear. (Tr. 615). Dr. Heinig testified that the DNA profile showed amplifiable male DNA. Comparing the DNA profile taken from the underwear, Freeman could not be excluded as a contributor. (Tr. 619, 621).

## **LAW AND ARGUMENT**

### **APPELLANT'S PROPOSITION OF LAW I: WHEN THE STATE'S CHARGING INSTRUMENT ALLEGES NUMEROUS IDENTICAL OFFENSES OCCURRING OVER AN EXTENDED PERIOD OF TIME IT VIOLATES THE ACCUSED'S RIGHTS TO NOTICE AND A FAIR TRIAL WHILE FAILING TO PROTECT AGAINST DOUBLE JEOPARDY.**

#### **I. Freeman's Argument is Waived**

As an initial matter, this Court must decide whether Freeman's argument is waived or merely forfeited by his failure to object during trial. The Eighth District found that Freeman never objected to the sufficiency of his indictment nor did he ask for a more

specific bill of particulars. *State v. Freeman*, Cuyahoga App. No. 92809, 2010-Ohio-3714, ¶36. Freeman, therefore, waived this issue on appeal.

This Court has recognized the difference between waiver and forfeiture. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23. In *Payne*, this Court stated

“Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right “cannot form the basis of any claimed error under Crim.R. 52(B).” *State v. McKee* (2001), 91 Ohio St.3d 292, 299, 744 N.E.2d 737, fn. 3 (Cook, J., dissenting); see, also, *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508. On the other hand, forfeiture is a failure to preserve an objection[.] \*\*\* [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B).” (Internal citations and quotations omitted.”

The Eighth District’s waiver analysis is supported by Crim. R. 12(C)(2) which requires defendants to object to defects in an indictment prior to trial. This Court has also found that the failure to timely object to an indictment constitutes a waiver of the issues involved. *State v. Barton*, 108 Ohio St.3d 402, 844 N.E.2d 307, 2006-Ohio-1324, ¶73.

In *State v. Horner*, 126 Ohio St.3d 466, 935 N.E.2d 26, 2010-Ohio-3830, this Court again held that the failure to object to a defect in an indictment constitutes a waiver. *Horner* at ¶46. However, this Court found that the error was still limited to a plain-error review. *Id.* *Horner* dealt with notice in the context of the lack of a mens rea element of an offense. Freeman’s indictment is not missing an element of the offense. Therefore, Freeman’s argument should be considered entirely waived.

## ***II. A Defendant’s Right to Notice***

### **A. Summary of Argument**

Freeman’s arguments rests on the separate constitutional principles of notice and double jeopardy and each argument will be addressed in turn. Freeman was not deprived of any of his constitutional rights as the state went to great lengths to differentiate Freeman’s

convictions during trial. Such method of delineation is appropriate pursuant to the authority that Freeman seeks review under. Because Freeman's argument lacks merit and because similar issues are no longer likely to arise in Ohio, the State requests this Honorable Court either dismiss the instant case as improvidently granted or, in the alternative, affirm the Eighth District Court of Appeals decision.

### **B. Ohio's Requirements for a Sufficient Indictment**

In Ohio, the necessary content of an indictment is governed both by statute and within the Criminal Rules of Procedure. Crim. R. 7(B) Nature and contents, requires that indictments (1) be signed, (2) contain a statement that the defendant has committed a public offense, (3) be signed by the prosecuting attorney, and (4) contain a statement that the defendant has committed a specified public offense. Crim. R. 7(B) expressly allows the statement to be made in the words of the applicable section of the statute, provided the words of that statute charge an offense.

R.C. 2941.03 deems an indictment sufficient if jurisdictional requirements are met, that it states it was found by the grand jury, the defendant is named (or described), and the offense occurred prior to the finding of the indictment. R.C. 2941.04 permits the use of multiple counts in an indictment, and states, "a verdict of acquittal of one or more counts is not an acquittal of any other count." R.C. 2941.05 says, in pertinent part, that an indictment provides sufficient notice "if it contains a statement that the accused has committed some public offense...such statement may be made in the words of the section of the Revised Code describing the offense."

Freeman's indictments complied with Crim. R. 7(B) and relevant statutory requirements. The indictment tracked the language of the applicable portions of the Ohio Revised Code. The indictment also named Freeman and stated offenses that occurred prior to its filing.

This Court has, on multiple occasions, held that Crim. R. 7(B) authorizes indictments to track the language of the applicable statute. *State v. Landrum* (1990), 53 Ohio St.3d 107, 119, 559 N.E.2d 710, 724; *State v. Murphy* (1992), 65 Ohio St.3d 554, 583, 605 N.E.2d 884. Further, courts cannot "grant new trials based on imperfection or inaccuracy in an indictment if the charge is sufficient to fairly and reasonably inform the defendant of the essential elements of the crime." *Landrum* at 119 citing Crim. R. 33(E)(1).

Because Freeman's indictment complied with Ohio law, he was not denied his constitutional right to notice. See *State v. Bogan*, Cuyahoga App. No. 84468, 2005-Ohio-3412, ¶¶8-11 (overruling a nearly identical claim).

### **C. *Russell v. United States* & Federal Notice Requirement**

Freeman's notice was also sufficient under *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038. In *Russell*, the Court held that the sufficiency of an indictment is to be measured by whether or not the indictment: 1) "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and 2) "in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Id.* at 763-764. The due process rights in *Russell* extend to state criminal charges. *State v. Caver*, Cuyahoga App. No. 91443, 2009-Ohio-1272, ¶33; see also *State v. Sellards* (1985), 17 Ohio St.3d 169, 478 N.E.2d 781.

*Russell* stands for the proposition that some offenses must be charged with greater specificity than an indictment parroting a criminal statute's language. *U.S. v. Resendiz-Ponce* (2007), 549 U.S. 102, 109, 127 S.Ct. 782, 789. In *Russell*, the Court was asked to address an indictment against defendants who refused to answer certain questions during a congressional hearing. The Court found that the very core of the criminality of the statute in question was the "subject under inquiry of the questions which the defendant refused to answer." *Russell* at 764. In reversing the convictions, the Court stated that "what the subject actually was...is central to every prosecution under the statute [at issue]. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Id.*

The Supreme Court revisited *Russell* in *U.S. v. Resendiz-Ponce* (2007), 549 U.S. 102, 127 S.Ct. 782, and clarified that not all statutes require the level of specificity stated in *Russell*. *Id.* at 789. The Supreme Court also noted that the "promulgation of the Federal Rules of Criminal Procedure had removed the need to include detailed allegations in a criminal indictment, and consequently, in most cases, general allegations in an indictment satisfy the requirements of Due Process." *U.S. v. Senogles* (D. Minn., 2008), 570 F.Supp.2d 1134, 1144 citing *Resendiz-Ponce*.

The statutes here do not require the *Russell* level of specificity. Freeman was indicted for multiple counts of Rape, Disseminating Material Harmful to Minors, and Gross Sexual Imposition. All of the charges were the result of sexual abuse committed against four minors. Lower courts throughout Ohio have applied a relaxed specificity standard to notice

for sexual offenses committed against children.<sup>2</sup> This Court has also previously recognized that “[o]rdinarily, precise times and dates are not essential elements of offenses. Thus, the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges.” *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. Crim. R. 7(B) also does not require anything greater than tracking the language of the statutes in this case.

“Where an offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion on the matter.” *U.S. v. Simmons* (1877), 96 U.S. 360, 362. The defendant must also be “apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offence.” *Id.* It is sufficient to use the words of a statute itself where the words “themselves fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished\*\*\*.” *U.S. v. Carll* (1881), 105 U.S. 611, 612.

Freeman was not deprived of his right to notice. His indictment tracked the language of the statutes he was accused of violating. Unlike the indictment in *Russell*, the indictment in this case fully set forth all of the elements necessary to constitute the offense. Freeman was also provided a bill of particulars and discovery which further specified the nature of

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<sup>2</sup> *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, ¶17; *State v. Barnecut* (1988), 44 Ohio App.3d 149, 152, 542 N.E.2d 353; *State v. Mundy* (1994), 99 Ohio App.3d 275, 296, 650 N.E.2d 502; *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652; *State v. Egler*, Defiance App. No. 4-07-22, 2008-Ohio-4053.

the charges against him. The Eighth District properly denied Freeman's claim as his rights were not violated.

#### **D. *Valentine v. Konteh***

Freeman's argument primarily relies on the Sixth Circuit case *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626. This Court is not bound by "rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court." *State v. Burnett* (2001), 93 Ohio St.3d 419, 424, 755 N.E.2d 857.

In *Valentine*, a divided Sixth Circuit partially upheld the district courts' grant of habeas corpus to a defendant who claimed that his indictment violated his due process right to notice when it was unconstitutionally vague. *Valentine* was originally indicted with 20 counts each of child rape and felonious sexual penetration of a minor. The indictment alleged that all forty counts occurred between March 1, 1995 and January 16, 1996. *Id.* at 629.

Much like Freeman does, *Valentine* argued that his indictment was insufficient because of the wide date range that it encompassed. The *Valentine* court rejected this argument, finding "[t]his Court and numerous others have found that fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements." *Valentine* at 632 citing *Isaac v. Grider* (C.A. 6, 2000), 211 F.3d 1269; *Madden v. Tate* (C.A. 6, 1987), 830 F.2d 194. The instant indictment includes a period of six months. Both the Sixth Circuit and other federal courts have upheld this, and greater, time frames. *Madden v. Tate* (C.A. 6, 1987), 830 F.2d 194 (six months); *Fawcett v. Bablitch* (C.A. 7, 1992) 962 F.2d 617, 618-619 (six months); *Parks v. Hargett* (C.A. 10, 1999), 188 F.3d 519 (seventeen months); *Hunter v. New Mexico* (C.A. 10, 1990) 916 F.2d 595, 600 (three years).

The *Valentine* court found that there was no evidence that the state had more specific information than what was provided to the defendant. *Valentine* at 632. Freeman was also provided with all of the specific information the state had about the abuse and his argument should be denied. See *State v. Sellards* (1985), 17 Ohio St.3d 169, 478 N.E.2d 781 (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*).

The Sixth Circuit opined “[t]he problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places...[rather, that] Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than forty separate criminal acts.” 395 F.3d at 632. As the court noted, “[o]utside of the victim’s estimate, no evidence as to the number of incidents was presented.” *Id.* at 633. The court held that the state’s failure to differentiate in its charges and in its evidence before the jury denied Valentine his due process right to notice.

In his dissent, Justice Gilman found the majority’s opinion contradictory. *Id.* (Gilman, J. dissenting) at 640. As the dissent noted, Valentine conceded that his indictment was “specific enough to satisfy the *Russell’s* first requirement that ‘the indictment contain the elements of the offense intended to be charged.’” *Id.* Similarly, the indictment in question contained all of the elements to support the various offenses.

In one of the leading books on criminal procedure, Professor LaFave discussed the application of the notice perspective to factual specificity. As Professor LaFave wrote, “even from the perspective of an innocent person, comparatively little information is needed to prepare a defense for some crimes.” Wayne R. LaFave et al., *Criminal Procedure*, Fourth Edition 901, Section 19.3(b) (Thompson West, 4<sup>th</sup> ed. 2000) (1985). Professor LaFave

provided the following example: “a charge of assault...provides enough information if it identifies who was assaulted and when and where the assault occurred. There is no need to inform the defendant of how the assault occurred\*\*\*. If the defendant wasn’t there, the manner of assault will be irrelevant to his defense, and if he was present, he will be aware of the circumstances.” *Id.*

Professor LaFave’s example is particularly enlightening in the instant matter. Freeman was provided notice of the elements of the offenses. Freeman gave a pre-indictment confession in which he admitted committing multiple counts of rape. Freeman could not have been prejudiced by the alleged deficiency because he was not taken by surprise given his awareness of the offenses.

The amount of factual specificity required varies from case to case. *Russell* involved a situation where the charge itself demanded more specificity. That is not the case here where all of the essential elements of the offense were included in the indictment. Professor LaFave suggests that there are several factors that are relevant for determining the level of factual specificity which include “the nature of the offense, the likely significance of particular factual variations in determining liability, the ability of the prosecution to identify a particular circumstance without a lengthy and basically evidentiary allegation, and the availability of alternative procedures for obtaining particular information.” Wayne R. LaFave et al., *Criminal Procedure, Fourth Edition* 900, Section 19.3(b) (Thompson West, 4<sup>th</sup> ed. 2000) (1985).

Consistent with both *Russell* and LaFave’s approach, *Valentine* allows the state to differentiate counts both before and during trial. See *Cowherd v. Million* (C.A. 6, 2008), 260 Fed.Appx. 781, 786-787 (multiple sexual offense convictions upheld where counts were delineated with trial testimony). Unlike *Valentine*, Freeman’s charges were distinguished

during trial. The 19 counts of rape were distinguished through witness testimony. The jury verdicts were differentiated. The chart below reflects the supporting testimony for each of Freeman's rape convictions as well as the jury's verdict on each count:

<b>Count</b>	<b>Victim</b>	<b>Act</b>	<b>Place</b>	<b>Witness</b>	<b>Transcript</b>
1	P.S.	Cunnilingus	Maria's room	V.S. (375)	654-659, 747
2	P.S.	Cunnilingus	P.S.'s room		276, 658, 695, 747
3	P.S.	Fellatio	downstairs	I.S. (325)	279, 695, 747
4	P.S.	Fellatio	Maria's room	I.S. (325)	279, 695, 747
5	P.S.	Anal	P.S.'s room		278, 748
6	P.S.	Digital	P.S.'s room	T.S. (407)	282, 695, 748
7	P.S.	Digital	Maria's room	I.S.(328-329)	271-72, 748
8	P.S.	Vaginal	P.S.'s room	I.S. (325, 328)	275, 658, 695, 748
9	P.S.	Vaginal	Maria's room	-	552, 695-96, 750
10	I.S.	Cunnilingus	Maria's room	V.S. (375)	375, 659, 696, 748
11	I.S.	Cunnilingus	Maria's room	V.S. (375)	375, 552, 659, 696, 749
12*	I.S.	Fellatio	I.S.'s room	P.S. (279)	320, 696, 749
13	I.S.	Fellatio	downstairs	P.S. (279)	552, 749
14*	I.S.	Digital	Maria's room	T.S. (407)	407, 696, 749
15*	I.S.	Digital			552, 749
16*	I.S.	Digital			554, 750
17*	I.S.	Anal	I.S.'s room		552, 554, 695-96, 750
18*	I.S.	Vaginal	Maria's room		658-59, 750
19*	I.S.	Vaginal	I.S.'s room		318-19, 552, 750

\*Counts which were vacated by the 8th District Court of Appeals.

Consistent with *Valentine*, lower courts throughout Ohio have denied similar arguments when the State differentiated the charges either before or during trial.<sup>3</sup> The same reasoning should be applied to uphold Freeman's convictions.

Differentiation can also be accomplished through discovery. See *Parks v. Hargett* (C.A. 10, 1999), 188 F.3d 519 (specificity was provided during pre-trial hearing); *U.S. v. Reed* (E.D. Wisc., Aug. 23, 2010), 2010 WL 3812460 (moreover, the government is following its open file policy in this case so the defendant has additional means to ascertain more specific information about the charges against him). Freeman was provided discovery-which included his confession to five counts of rape. In light of the recent amendments to Crim. R. 16, defendants are now provided witness statements prior to trial. Because defendants are now provided open discovery prior to trial, notice of specific evidentiary information relating to the charges will no longer be an issue when the defendant has pretrial access to all of the material facts that will support his conviction.

#### ***IV. Freeman's convictions do not violate Russell's double jeopardy test.***

##### ***A. The Russell Double Jeopardy prong***

Freeman additionally argues that his indictment failed to protect him from the risk of double jeopardy. The second part of Freeman's argument relates to the last prong of *Russell* which states that the sufficiency of an indictment is to be assessed, in part, by determining whether "in case any other proceedings are taken against him for a similar offense whether

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<sup>3</sup> For just a few examples, see *State v. Chaney*, Mahoning App. No. 08 MA 171, 2010-Ohio-1312; *State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129; *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010 (upheld in part); *State v. Morgan*, Brown App. Nos. CA2009-07-029, CA2009-08-033, 2010-Ohio-1720; *State v. Crosky*, Franklin App. No. 06AP-655, 2008-Ohio-145; *State v. Voorhis*, Logan App. No. 8-07-23, 2008-Ohio-3224; *State v. Garrett*, Belmont App. No. 08-BE-32, 2010-Ohio-1550.

*the record* shows with accuracy to what extent he may plead a former acquittal or conviction.” *Russell*, 369 U.S. at 764. (Emphasis Added).

The *Russell* court-which ultimately rejected the defendant’s double jeopardy argument-was based on precedent dating back to the 1800’s which stated that while it is generally sufficient to charge an offense using a statutory description, the accused must also be apprised of the nature of the accusations against him and “plead the judgment as a bar to any subsequent prosecution for the same offense.” *U.S. v. Simmons* (1877), 96 U.S. 360, 362; see also *Bartell v. United States* (1913), 227 U.S. 427 (and that, after judgment, the defendant may be able to plead the record and judgment in bar of further prosecution for the same offense).

Applying *Russell*, the Sixth Circuit found that Valentine’s indictment also failed to protect him against double jeopardy. “If Valentine had been acquitted of these 40 charges, it is unclear what limitations would have been imposed on his re-indictment.” *Valentine*, 395 F.3d at 635. The Sixth Circuit also found that there was a chance that the charges may have resulted in double jeopardy in Valentine’s case. The *Valentine* court’s same-case double jeopardy analysis is an overly broad extension of *Russell*’s last requirement. *Russell* clearly contemplated the double jeopardy analysis to apply if the defendant is re-indicted or retried for the same offense after acquittal or conviction. *Russell* does not apply in situations where a defendant faces multiple violations of the same statute within a single case. See *State v. Clemons*, Belmont App. No. 10 BE 7, 2011-Ohio-1177 at fn.2 (it seems that double jeopardy problems should be cured if they arise in the future, not based upon their potential to arise).

Unlike *Valentine*, the counts in this case were differentiated at trial. The jury verdict clearly shows what Freeman was convicted of. Therefore, Freeman was not at risk of being placed twice in jeopardy either during the trial or should he face additional charges in the future. This was not a case of mere estimate as *Valentine* was. Each of the victims testified to specific events and Freeman confessed to a number of them.

Freeman is not at risk of being placed in jeopardy in the future. At least one court has found that a stipulation by the prosecutor that a defendant would be immune from further prosecution for sexual contact against his victim during the same time period sufficiently guarded against the risk of double jeopardy. *Fawcett v. Bablitch* (C.A. 7, 1992), 962 F.2d 617, 618-619. The Sixth Circuit disregarded this possible remedy finding that the stipulation in *Fawcett* was made before the defendant's conviction. However, a stipulation is not needed as a subsequent indictment against Freeman for the same acts he was convicted of would quickly be dismissed by a trial court. Any hypothetical argument to the contrary is not in keeping with double jeopardy precedent and would require a prospective finding of error to an indictment not yet in existence. See *Chambers v. Commonwealth* (1995), 421 Mass. 49, 653 N.E.2d 170; *Ex parte Goodbread* (1998), 967 S.W.2d 859.

### ***B. Russell Does Not Require Pretrial Differentiation***

Amicus in this case argues that *Russell* should be narrowly interpreted to require pretrial differentiation. Neither *Russell* nor *Valentine* supports this argument.

The ability to plead former acquittal or conviction is based upon a review of the entire record, not just the indictment. *Russell*, 369 U.S. at 764; see also *Wong Tai v. United States* (1927), 273 U.S. 77, 81. In *Russell*, the Supreme Court explained that the entire record is consulted: "it can hardly be doubted that the petitioners would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that

they could rely upon other parts of the present record in the event that future proceedings should be taken against him.” *Id.* This is consistent with earlier precedent from the Supreme Court which also required a review of the record to support a double jeopardy claim. See *U.S. v. Simmons* (1877), 96 U.S. 360; *Bartell v. United States* (1913), 227 U.S. 427.

*Valentine* itself also allows for differentiation during trial. The Sixth Circuit repeatedly considered the entire record when responding to Valentine’s claims. “The indictment, the bill of particulars, and even the evidence at trial failed to apprise the defendant of what occurrences formed the basis of the criminal charges he faced.” *Valentine*, 395 F.3d at 634. “The due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the forty separate incidents either *before or during the trial.*” *Id.* (Emphasis Added).

The Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 444, 683 N.E.2d 1112. Courts are instructed to review the entire record in order to determine whether collateral estoppel applies. Courts must “examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.” *In re Burton*, Hamilton App. No. C-040244, 2005-Ohio-2210, ¶12 citing *Dowling v. United States* (1990), 493 U.S. 342, 350, 110 S.Ct. 668.

Pretrial differentiation is not proper because precedent dictates that a review of the record is necessary. The State respectfully requests this Honorable Court not create a new rule of law inconsistent with well-established Supreme Court precedent.

In summary, Freeman was not at risk of double jeopardy during trial as his counts were properly delineated. Freeman is also not at hypothetical risk of double jeopardy in the future. As such, the State requests this Honorable Court either dismiss the instant appeal or affirm the Eighth District's decision.

**CONCLUSION**

The State respectfully requests this Honorable Court dismiss this appeal as improvidently granted or in the alternative affirm the Eighth District Court of Appeals decision.

Respectfully submitted,

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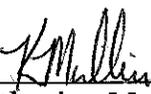
**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 29<sup>th</sup> day of April, 2011 to:

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs &amp; Annos)

→ **Crim R 7 The indictment and the information****(A) Use of indictment or information**

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

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

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

**(B) Nature and contents**

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

**(C) Surplusage**

The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or

information.

**(D) Amendment of indictment, information, or complaint**

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

**(E) Bill of particulars**

When the defendant makes a written request within 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.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-93, 7-1-00)

Current with amendments received through 2/1/11.

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs &amp; Annos)

→ **Crim R 12 Pleadings and motions before trial: defenses and objections****(A) Pleadings and motions**

Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

**(B) Filing with the court defined**

The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

- (1) The complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.
- (2) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.
- (3) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.
- (4) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

**(C) Pretrial motions**

Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

- (1) Defenses and objections based on defects in the institution of the prosecution;
- (2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);
- (3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.
- (4) Requests for discovery under Crim. R. 16;
- (5) Requests for severance of charges or defendants under Crim. R. 14.

**(D) Motion date**

All pretrial motions except as provided in Crim. R. 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

**(E) Notice by the prosecuting attorney of the intention to use evidence**

(1) *At the discretion of the prosecuting attorney.* At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

(2) *At the request of the defendant.* At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

**(F) Ruling on motion**

The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the

jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

**(G) Return of tangible evidence**

Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

**(H) Effect of failure to raise defenses or objections**

Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

**(I) Effect of plea of no contest**

The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

**(J) Effect of determination**

If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

**(K)** When the state takes an appeal as provided by law from an order suppressing or excluding evidence, or from an order directing pretrial disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-80, 7-1-95, 7-1-98, 7-1-01; 7-1-10)

Current with amendments received through 2/1/11.

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs &amp; Annos)

→ **Crim R 16 Discovery and inspection**

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

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

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered

to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

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

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

**(D) Prosecuting Attorney's Certification of Nondisclosure.** If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

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

**(E) Right of Inspection in Cases of Sexual Assault.**

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

**(F) Review of Prosecuting Attorney's Certification of Non-Disclosure.** Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

**(G) Perpetuation of Testimony.** Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-

examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

**(H) Discovery: Right to Copy or Photograph.** If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

**(I) Witness List.** Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

**(J) Information Not Subject to Disclosure.** The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

**(K) Expert Witnesses; Reports.** An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

**(L) Regulation of discovery.**

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

**(M) Time of motions.** A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-10)

Current with amendments received through 2/1/11.

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**C**

Baldwin's Ohio Revised Code Annotated Currentness  
 Rules of Criminal Procedure (Refs & Annos)  
 → **Crim R 33 New trial**

**(A) Grounds**

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

**(B) Motion for new trial; form, time**

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days

from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

**(C) Affidavits required**

The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

**(D) Procedure when new trial granted**

When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

**(E) Invalid grounds for new trial**

No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

- (1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.
- (2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;
- (3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;
- (4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;
- (5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

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**(F) Motion for new trial not a condition for appellate review**

A motion for a new trial is not a prerequisite to obtain appellate review.

CREDIT(S)

(Adopted eff. 7-1-73)

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs &amp; Annos)

Chapter 2941. Indictment

Indictments and Informations

→ **2941.03 Sufficiency of indictments or informations**

An indictment or information is sufficient if it can be understood therefrom:

(A) That it is entitled in a court having authority to receive it, though the name of the court is not stated;

(B) If it is an indictment, that it was found by a grand jury of the county in which the court was held, of [*sic.*] if it is an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;

(C) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;

(D) That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

(E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13437-2)

Current through 2011 Files 1 - 6, 8, 10, and 12 of the 129th GA (2011-2012), apv. by 4/13/11, and filed with the Secretary of State by 4/13/11.

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Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2941. Indictment

Indictments and Informations

→ **2941.04 Two or more offenses in one indictment**

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13437-3)

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Title XXIX. Crimes--Procedure (Refs & Annos)  
    Chapter 2941. Indictment  
        Indictments and Informations  
            → **2941.05 Statement charging an offense**

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

CREDIT(S)

(126 v 392, eff. 3-17-55; 1953 H 1; GC 13437-4)

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