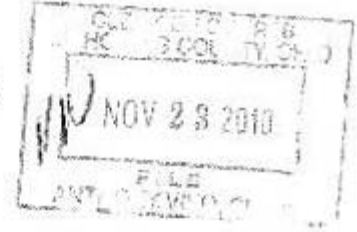


FILED UNDER SEAL

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
MAHONING COUNTY, OHIO



THE STATE OF OHIO

JUDGE William H. Wolff, Jr.

vs.

JOHN ZACHARIAH

CASE NO. 2010 CR 00800 G

AMENDED AND RESTATED BILL OF PARTICULARS FOR JOHN ZACHARIAH

The State of Ohio, through its undersigned attorneys, hereby submits its Bill of Particulars with respect to Defendant Zachariah and Counts 6, 16, 23, 35, 36, 37, 53 & 60 in the indictment relating to him.

PURPOSES AND REQUIREMENTS OF AN INDICTMENT AND A BILL OF PARTICULARS

Ohio law is clear relative to the purpose and requirements of both an Indictment and of a Bill of Particulars:

"Crim.R. 7(B) explains the structure and sufficiency requirements of an indictment: "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. (Emphasis Added) State v. Horner, Ohio Supreme Court Slip Opinion No. 2010-Ohio-3830, decided August 27, 2010.

Additionally, an indictment is sufficient if it uses the exact language of the statute, quotes the statutory section, and specifies when defendant committed the acts.

That was done here. See, Rule 7 of the Ohio Rules of Criminal Procedure. See also, R.C. §2941.05.

An indictment is not--in the State of Ohio--required to state the particular facts upon which the indictment was based¹. Insofar as the statutory elements of a crime are presented in an indictment, it is sufficient under Ohio law. Defendants can obtain the factual bases from a bill of particulars and the State's prosecutorial file pursuant to open file discovery mandates and the recently revised Ohio Criminal Rule 16. See, Ohio v. Sessler, 2007 Ohio 4931, 2007 Ohio App. LEXIS 4631 (2007).

Moreover, a criminal rule Bill of Particulars is not the equivalent of a response to a civil rule request for interrogatories:

*"A motion for a bill of particulars seeking to obtain a detailed statement of the particular means by which the state claims the defendant committed an alleged offense and a motion for discovery and inspection of the state's evidence were properly overruled. **The disclosure by the state of evidence is not a proper function of a bill of particulars**, and no problem of constitutional dimensions is raised by limiting the scope of discovery within the discretion of the trial court."* State v. Wilson, 29 Ohio St. 2d 203, 208 N.E.2d 915 (1972).

The Ohio Supreme Court has stated the Ohio rule relative to Bills of Particular and said that the purpose of giving a Bill of Particulars is "to elucidate or particularize the conduct of the accused"**"but not to provide the accused with specifications of evidence or to serve as a substitute for discovery."** (emphasis added) See, State v. Lawrinson, 49 Ohio St. 3d 238 at 239 (1990), citing State v. Sellards 17 Ohio St.

¹ Ohio Case law and Crim. Rule 7 generally track the original Ohio Revised Code statute (prior to the implementation of the Ohio Rules of Criminal Procedure), at §2941.05 therein, "Statement charging an offense" which provides that:

*"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."* (emphasis added).

3d 169, 17 OBR 410, 478 N.E. 2d 781 (1985). See, also State v. Wilson, supra. State v. Robinson, 2005 Ohio 6286, 2005 Ohio App. LEXIS 5631 (Ohio Ct. App., Lake County Nov. 25, 2005)

Even federal authorities, in interpreting the Federal Rules of Criminal Procedure, are in accord with Ohio's interpretation of its own criminal rules. Under federal law, the general purpose of a bill of particulars is to inform a defendant of the charges against him with sufficient precision to: (1) enable him to prepare his defense, (2) obviate surprise at trial, and (3) enable him to plead his acquittal or conviction in the case as a bar to subsequent prosecution for the same offense. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979).

Federal case law interpreting Rule 7 of the Federal Rules of Criminal Procedure states that a bill of particulars should not be expanded into a device to circumvent the restrictions on pretrial discovery of specific evidence contained in Fed. R. Crim. P. 16. Cooper v. United States, 282 F.2d 527, 532 (9th Cir. 1960). See also Davis, 582 F.2d at 951 ("generalized discovery is not a permissible goal of a bill of particulars"). Where the indictment itself and the bill of particulars supplied by the government provide the defendant with adequate information with which to conduct his defense, requests for additional particulars should be denied. Harlow v. United States, 301 F.2d 361, 367-68 (5th Cir.), cert. denied, 371 U.S. 814 (1962).

Federal courts have taken into account other sources of information provided by the government, including discovery materials. United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983) (broad discovery can serve as a substitute for the "trial preparation" function of a bill of particulars). See, e.g., United States v. Feola, 651 F. Supp. 1068, 1133

(S.D.N.Y. 1987) (court considered whether the information requested had been provided elsewhere, including through discovery).

Under the federal interpretation of its rules, an indictment is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend, and second, whether it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” United States v. Middleton, 246 F.3d 825, 841-42, quoting United States v. Monus, 128 F.3d 376, 388 (6th Cir. 1997).

The government is under no obligation to “preview its case or expose its legal theory”, nor does the government have to disclose the “precise manner in which the crime charged in the indictment is alleged to have been committed.” United States v. Shoher, 555 F. Supp 346, 349 (1983), quoting United States v. Andrews, 381 F.2d 377, 377-78 (1967).

Pursuant to Rule 16 of the Ohio Rules of Criminal Procedure, the defendants in Mahoning County Common Pleas case numbers 2010 CR 00800, *et al*, have received, to date, in excess of 56,000 thousand pages of documents (a significant number of which came from the defendants themselves pursuant to grand jury subpoenas issued during the course and scope of an extensive grand jury investigation which was curtailed by the finite ending date specified by the Mahoning County general division judges, all of whom have recused themselves in these companion cases).

COUNT 6 ENGAGING IN A PATTERN OF CORRUPT ACTIVITY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that Defendant Zachariah has been charged in the indictment with a violation of R.C. §2923.32(A)(1), Engaging in a Pattern of Corrupt

Activity. The Enterprise, as that term is defined in §2923.31(C) of the Revised Code, is as specified in the indictment and the Pattern of Corrupt Activity, as that term is defined in §2923.31 of the Revised Code, is as specified in the indictment.

Defendant Zachariah's role in the Enterprise as the Director of the Mahoning County Department of Job and Family Services included meetings and conversations with one or more members of the Enterprise during the time period specified in the indictment to strategize efforts to stop or delay the move to Oakhill from the Cafaro-controlled Garland Plaza and the carrying out of such efforts or overt acts including the presentation of documents inflating the costs of the acquisition and move to Oakhill and continued efforts to stop or delay the acquisition and move to the Oakhill site by Mahoning County.

The interests and goals of the Enterprise were all focused upon the unsuccessful attempt of Anthony Cafaro, Sr. and the Cafaro-related entities in their efforts to keep the Mahoning County Department of Job and Family Services physically located at the Garland site owned by a Cafaro-controlled entity, Ohio Valley Mall Company, an Ohio limited partnership and to keep that failed attempt from becoming public. The attempt included a lawsuit captioned *State of Ohio ex rel Ohio Valley Mall Company v. Mahoning County Commissioners, et al.* (Mahoning County Case No. 06CV3032). The mission was to allow the Cafaro-controlled entity to continue to collect rent as it had for more than a decade under a month-to-month lease arrangement following the expiration of the term of a written lease dated March 19, 1987, reaping hundreds of thousands of dollars a year in rent from Mahoning County.

Those efforts went beyond that of permissible political speech or social discourse or legitimate taxpayer interests when members of the Enterprise began to commit acts

ultimately constituting criminal offenses including those offenses defined as Corrupt Activity under the Ohio Revised Code and included in the counts of the indictment. Defendant Zachariah's role in his association with members of the Enterprise included acts of Perjury, Bribery and Tampering with Records.

COUNT 16 CONSPIRACY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that during the period set forth in the indictment and with the purpose to commit or to promote or facilitate the commission of the crime of engaging in a pattern of corrupt activity, the Defendant did, with another person or persons associated with the Enterprise, plan or aid in planning the commission of the offense of Engaging In A Pattern Of Corrupt Activity. A substantial overt act or acts in furtherance of the conspiracy include clandestine meetings with one or more of the persons with whom said Defendant has conspired; commission and/or complicity in the commission of one or more offense(s) of Perjury, Bribery, violations of ethics laws, the receipt of or complicity in the receipt of monies with respect to any one or more of the crimes set forth in the body of this Indictment including the receipt of or complicity in the receipt of free legal services, all in connection with an effort to block the proposed relocation of Mahoning County offices to a premises commonly referred to as "Oak Hill", in violation of Section 2923.01(A)(1) of the Revised Code, a Felony of the Third Degree.

COUNT 23 CONSPIRACY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that during the period set forth in the indictment and with the purpose to commit or to promote or facilitate the commission of the crime of engaging in a pattern of corrupt activity, the Defendant did agree with another person

or persons associated with the Enterprise that one or more of them will engage in conduct that facilitates the commission of the crime of engaging in a pattern of corrupt activity . A substantial overt act or acts in furtherance of the conspiracy done by the Defendant or a person with whom said Defendant conspired, subsequent to said Defendant's entrance into the conspiracy include clandestine meetings with one or more of the persons with whom said defendant has conspired, commission and/or complicity in the commission of one or more offense(s) of Perjury, Bribery, violations of ethics laws and the receipt of or complicity in the receipt of monies with respect to any one or more of the crimes set forth in the body of this Indictment including the receipt of or complicity in the receipt of free legal services, all in connection with an effort to block the proposed relocation of Mahoning County offices to a premises commonly referred to as "Oak Hill".

COUNT 35 PERJURY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that on Thursday April 5, 2007, Defendant Zachariah testified as a witness in a deposition with respect to the taxpayer suit referenced above, captioned *State of Ohio ex rel Ohio Valley Mall Company v. Mahoning County Commissioners, et al.*, which was filed by an entity controlled by or at the direction of Anthony Cafaro Sr. The legal action was engineered to stop the purchase of Oakhill by Mahoning County and to prevent the move of the Department of Job Services from the Garland site owned by Ohio Valley Mall Company. The Defendant, at the time, was the former Director of the Mahoning County Department of Job and Family Services. He was not a named party and was testifying solely as a witness subpoenaed by the Mahoning County Board of Commissioners as a defendant in

State of Ohio ex rel Ohio Valley Mall Company v. Mahoning County Commissioners, et al., Case No. 06cv3032. During that testimony on pages 46 through 48, Defendant Zachariah was asked a number of questions relating to whether he acted with anyone to delay or impede any move from the Cafaro-controlled Garland Avenue site to Oakhill, including questions relating to the issues of air quality and mold at the then current Garland property that the Mahoning County Department of Job and Family Services had been leasing. When asked, at page 48 of his deposition:

Q: "Did you forward a copy of that letter to Mr. Cafaro?"

A: "No I did not forward it"(See STATE018688 - 018690).

Defendant Zachariah forwarded an email to Defendant Anthony Cafaro, Sr. through an email dated "01/25/2007" stating to the effect:

"Tony: This is a correspondence I received from the county regarding a notification the county received from the National Institute for Occupational Safety & Health regarding a complaint against MCDJFS on the air quality in the building. Please contact me if you have any questions. -john" (See STATE000252 - 000256).

COUNT 36 PERJURY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that in that same April 5, 2007 deposition under oath, Defendant Zachariah testified at length relative to whether he spoke to Anthony Cafaro, Sr. about the move to Oakhill but the character and tone of Defendant Zachariah's responses were to the effect that his efforts were directed mainly at fixing the Cafaro-controlled Garland location. See deposition pages 53 & 54. However, at page 85 the question and response reflect otherwise.

Q: "Were you ever asked by anybody to delay the project or sabotage it?",

A: "No"

(See STATE018695 - 018696; STATE018727)

There were a number of instances where Defendant Zachariah aided Anthony Cafaro, Sr.'s efforts to sabotage or otherwise thwart the contemplated move from Garland to Oakhill. For example, Defendant Zachariah called and met with Anthony Cafaro, Sr. on multiple occasions to discuss how to stop any move of Mahoning County Job and Family Services to Oakhill:

- There is a 2/2/2006 call to "strategize". (See STATE013033);
- There is a 2/13/2006 follow-up meeting with Defendant Zachariah, Commissioner McNally and Anthony Cafaro, Sr. on stopping the move; (See STATE000049);
- On 5/17/2006 Defendant Zachariah met with Anthony Cafaro, Sr. regarding impediments to the county moving, such as the cost of moving a Northwoods computer system; (See STATE000132);
- On 5/25/2006 Defendant Zachariah met with Anthony Cafaro, Sr. to report what had occurred at a Mahoning County Commissioner's meeting where Commissioners Luidt and Traficanti had indicated authority to give the county administrator authority to make an offer relative to Oakhill; (See STATE000149, STATE011737 - 011739);
- On 6/20/2006, Defendant Zachariah called Anthony Cafaro, Sr. to report meeting with Russ Cook and the contents of the county administrator's earlier meeting with Defendant Zachariah; (See STATE000167, STATE000172-000173);
- On 7/6/ 2006 Defendant Zachariah meets with Anthony Cafaro, Sr. to report the results of meeting with the county commissioners relative to the letters of

Commissioner McNally and Defendant Zachariah discouraging a move to Oakhill. The final drafts of those letters were dated July 6, 2006 and July 18, 2006. (See STATE000177-000178; STATE000188-000195; STATE011538-011543; STATE013120-013123; STATE013133 - 013139);

- On 8/8/2006, Defendant Zachariah met with Anthony Cafaro, Sr. to discuss relocation costs. (See STATE000207);
- On 10/4/2006, Defendant Zachariah met with Anthony Cafaro, Sr. regarding the delay of the project; (See STATE000235);
- On 1/16/2007, Defendant Zachariah met with Anthony Cafaro, Sr. relative to delay with plans in the building commission. (See STATE000248);
- On 1/22/2007, Defendant Zachariah reported on plans and building commission and inflated costs of move and renovations to Oakhill; (See STATE000249-000251); and
- On 2/15/2007 Defendant Zachariah met with Anthony Cafaro, Sr. reporting his resignation as director and discusses his assistance with Cafaro relative to the argument to prevent or delay a move to Oakhill. (See STATE000261-000262).

COUNT 37 PERJURY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that in the same April 5, 2007 deposition under oath, the Defendant Zachariah testified further.

Q: "How did Mr. Cafaro even know this letter existed?"

A: "That I don't know". (See STATE018739)

Q: "You don't know how he knew that."

A: "I don't know that."

Q: "You didn't inform him of it?"

A: "I did not." (See *STATE018739*)

However, on Saturday, July 15, 2006 at 13:17, Defendant Zachariah emailed a draft response to Commissioner McNally and asks him to review and critique the draft letter. On Sunday, July 16, 2006 Commissioner McNally forwarded the letter to counsel for the Cafaro Company and Ohio Valley Mall, Ulmer Berne noting that it is the draft response from Defendant Zachariah. The draft was originally addressed back to Commissioner McNally but the final is addressed to the county administrator, George Tablack. Then, on July 21, 2006, Defendant Zachariah emails Anthony Cafaro, Sr. and includes a copy of the final letter dated July 18, 2006. (See *STATE013126 - 013132*; *STATE013133 - 013139*; *STATE000188 - 000195*).

COUNT 53 BRIBERY

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that on or about the dates enumerated in the indictment, and in conjunction with his testimony in his April 5, 2007 deposition, Defendant Zachariah, in connection with his being subpoenaed and sworn as a witness in an official proceeding, knowingly solicited and/or accepted for himself or another person, by or through James Dobran, an attorney representing Cafaro interests, a valuable thing or benefit: legal services resulting in a billing for said legal services by outside counsel and the payment of legal fees incurred in connection with *State of Ohio ex rel Ohio Valley Mall Company v. Mahoning County Commissioners, et al.*

On four (4) separate occasions from May 5, 2007 through August 17, 2007, payments were made from a checking account with the checks bearing the captioned

letterhead of "The Cafaro Company" payable to the outside law firm representing Zachariah. The general ledger accounting records support that the legal fees were charged to the Garland Plaza, an affiliated entity of the Cafaro Company. (See STATE 01245-01262, 23718, 23741, 23761, and 23847). On at least one occasion, James Dobran, an attorney representing Cafaro interests copied Anthony Cafaro, Sr. in an e-mail, dated June 4, 2007, directing the preparation of a check to Zachariah's counsel. (See STATE 01258). The legal fees of approximately \$7,500 were incurred prior to his deposition testimony and exceeded \$20,000 prior to the civil trial in July 2007.

The legal fees were incurred and paid in connection with Defendant Zachariah's deposition testimony and potential trial testimony in *State of Ohio ex rel Ohio Valley Mall Company v. Mahoning County Commissioners, et al.*, Case No. 06cv3032. (See STATE000272; STATE000515-000516; STATE000536-000537; STATE000555-000556; STATE000614-000615; STATE002672; STATE002682-002686; STATE002702-002711)

As stated above, the receipt of free legal services and/or the fees to which said services relate improperly influenced the Defendant Zachariah manifesting in false testimony under oath in an official proceeding, the deposition.

COUNT 60 TAMPERING WITH RECORDS

The State of Ohio incorporates statements made with respect to the other counts contained herein and further submits that during the time frame set forth in the indictment, Defendant Zachariah as the Director of Jobs and Family Services for Mahoning County, with a purpose to defraud or knowing that he was facilitating a fraud, did utter a writing or record, knowing it to have been falsified or otherwise tampered with as provided in §2913.42(A)(1). The writing or record was kept by or belongs to the


County of Mahoning and was false. The writing or record including false statements as to the costs of the acquisition and relocation of the Mahoning County Jobs & Family Services to Oakhill relative to things such as amount of work stations, wiring and other/or equipment and space needed for the move thereby artificially increasing the projected costs associated with an evaluation of any move by Mahoning County from the Garland site to Oakhill. The writing or record include drafts as well as final form of a draft letter of Defendant Zachariah to Commissioner McNally and a final version of such letter dated July 18, 2006 from Defendant Zachariah to the county administrator and includes the documents used to generate the costs associated with the letters. (See STATE013126 - 013132; STATE013133 - 013139; STATE000188 - 000195).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the forgoing Bill of Particulars has been served via electronic mail this 22nd day of November, 2010 upon Defendant Zachariah in care of his attorney at his address appearing on the attached distribution list and shall also be filed with counsel for the defendants charged by way of common indictment and filed with the court via their respective addresses appearing on said distribution list and through the same method of delivery.



David P. Muhek

State of Ohio vs Anthony Cafaro, Sr., et al.
Case No. 10 CR 0800, et seq.

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