IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO,	)	Case No. 2010 CR 00800
	)	
Plaintiff,	)	JUDGE WILLIAM H. WOLFF, JR.
	)	
vs.	)	
	)	
ANTHONY M. CAFARO, SR., *et al.*,	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF JOINT MOTION OF ANTHONY M. CAFARO, SR., THE CAFARO COMPANY, OHIO VALLEY MALL COMPANY, THE MARION PLAZA, INC., AND FLORA CAFARO TO DISMISS INDICTMENT

I. INTRODUCTION

In its Brief in Opposition to the Joint Motion to Dismiss Indictment filed by Defendants Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. (the "Cafaro Defendants") and Flora Cafaro, the State of Ohio attempts to dismiss the fact that the indictment fails to provide constitutionally-sufficient notice to these Defendants which fairly informs them of the charges *and* protects them against double jeopardy. Instead, the State excuses such failures by repeatedly invoking the mantra that an indictment need only track the language of the applicable criminal statute, and thereby avoids responding to the substantive issues raised in the Joint Motion. Nowhere in its Brief does the State explain how the skeletal charges afford these Defendants with adequate notice and protection against double jeopardy *in this particular case*. The State even attempts to trivialize the United States Supreme Court's

holding in *Russell v. United States,* 369 U.S. 749 (1962), which sets forth the standard for testing the sufficiency of an indictment under the due process provisions of the Sixth and Fourteenth Amendments. As this Reply Brief will demonstrate, the State's Brief exhibits a complete lack of concern for the fundamental rights of the Defendants; a lack of concern which is reflected in the indictment and which mandates the dismissal of the relevant counts.

II. LEGAL ARGUMENT

A. The Conclusory Averments in the Indictment Fail to Provide These Defendants With Fair Notice of the Charged Offenses.

Contrary to the State's position, it is not enough that an indictment merely track the language of the applicable statute if it fails to sufficiently apprise the Defendants of the nature and cause of the charge against them and protect against subsequent prosecutions for the same offense.

It is beyond dispute that the standard for the sufficiency of an indictment set forth in *Russell v. United States,* 369 U.S. 749 (1962), applies to criminal prosecutions under Ohio law. In *Russell,* the United States Supreme Court identified two constitutional standards by which the sufficiency of an indictment is to be measured: first, whether the indictment "contains the elements of the offense intended to be charged" and "sufficiently apprises the defendant of what he must be prepared to meet;" and second, "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. These two standards encompass three benchmarks that must be satisfied for an indictment to comply with constitutional safeguards for a defendant. Further, all three benchmarks must be met, not merely the first one, as the State contends.

The test set forth in *Russell* has been repeatedly applied by Ohio courts. "The due process rights announced in *Russell* are required not only in federal indictments, but also in state criminal charges." *State v. Ogle,* 2007 WL 2793355, 2007-Ohio-5066, ¶20 (8th Dist. Sept. 27, 2007) (quoting *Valentine v. Konteh,* 395 F.3d 626, 631 (2005)); *See also State v. Frazier,* 73 Ohio St.3d 323, 332 (1995); *State v. Carson,* 1999 WL 236095 (Ohio App. 10th Dist. Apr. 22, 1999); *State v. Wilson,* 2010 WL 4137107, 2010-Ohio-5121, ¶49 (8th Dist. Oct. 21, 2010) ("*Russell* requires that an indictment (1) contain the elements of the offense charged . . . (2) provide the defendant adequate notice of the charges against which he must defend . . . and (3) provide protection against double jeopardy by enabling the defendant to plead an acquittal or conviction to bar future prosecutions for the same offense.").

The State's attempt to distinguish *Russell* on its facts, and thereby, disregard its holding, must be rejected. There is no meaningful distinction between the perjury by omission charged in *Russell,* and the perjury by affirmative misstatement charged against Anthony M. Cafaro, Sr. In *Russell,* the Court held that an indictment under 2 U.S.C. §192 must identify the subject under inquiry at the time of the defendant's alleged refusal to answer, because pertinency to the subject under inquiry was "the very core of criminality" under the statute. *Id.* at 755, 764. Here, *materiality* to the subject matter under inquiry is the very core of criminality under R.C. §2921.11, because the making of a false statement under oath or affirmation in an official proceeding is perjury only if it is both "knowing" and "material," *i.e.,* "if it can affect the course or outcome of the proceeding." R.C. §2921.11(B). The State fails to explain how there is any meaningful difference between an omission in light of a duty to respond and an alleged affirmative misstatement with respect to the constitutional requirement that a criminal charge sufficiently apprise the defendant of what he must be prepared to meet and enable the court to

decide whether the facts alleged are sufficient to support a conviction. *Russell,* 369 U.S. at 768-69.

None of the cases cited in the State's Brief cast any doubt on the standard articulated in *Russell.* To the contrary, both *Hamling v. United States,* 418 U.S. 87 (1974), and *United States v. Resendiz-Ponce,* 549 U.S. 102 (2007), acknowledge and reaffirm *Russell.* In *Hamling,* the defendants challenged the sufficiency of an indictment charging them with mailing and conspiring to mail an obscene book in violation of 18 U.S.C. §1461. The Court applied the standard set forth in *Russell, i.e.,* "that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense," but found that the indictment did not suffer from the same infirmity. It held that, unlike the "very core of criminality" in *Russell* (pertinency to the subject matter under inquiry), the definition of "obscenity" under 18 U.S.C. §1461 was a legal term of art which had a set and unchanging meaning. *Id.* at 118. Therefore, no additional facts were necessary in the indictment to inform the defendants as to the charges against them. *Id.* Nothing in *Hamling* undermines the holding in *Russell.*

Similarly, in *Resendiz-Ponce,* the Supreme Court was faced with the issue of whether a person could be convicted for attempted re-entry into the country after being deported, in violation of 8 U.S.C. §1326(a), where the indictment failed to allege an overt act committed by the defendant in his attempted re-entry. Noting that the mere intent to violate a federal criminal statute is not punishable as an attempt unless accompanied by significant conduct, the Court held that an indictment alleging attempted illegal reentry under §1326(a) need not specifically allege a particular overt act because the word "attempt" encompasses both the overt act and intent elements. *Id.* Rather than disavow or limit the holding in *Russell,* the Supreme Court in

Resendiz-Ponce re-affirmed its prior rule that, although some offenses may be indicted by simply parroting the language of the statute, ***"there are crimes that must be charged with greater specificity."*** 549 U.S. at 109 (emphasis added). The Court further stated:

> A clear example is the statute making it a crime for a witness summoned before a congressional committee to refuse to answer any question "pertinent to the question under inquiry." 2 U.S.C. § 192. As we explained at length in our opinion in *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), a valid indictment for such a refusal to testify must go beyond the words of § 192 and allege the subject of the congressional hearing in order to determine whether the defendant's refusal was "pertinent." Based on a number of cases arising out of congressional investigations, we recognized that the relevant hearing's subject was frequently uncertain but invariably "central to every prosecution under the statute." *Id.,* at 764, 82 S.Ct. 1038. Both to provide fair notice to defendants and to ensure that any conviction would arise out of the theory of guilt presented to the grand jury, we held that indictments under § 192 must do more than restate the language of the statute.

Id. at 109-110. The Court's opinion expressly reaffirms its holding in *Russell* and its rule that simply tracking the statutory language may not be constitutionally-sufficient in all cases, especially cases such as this in which the indictment contains insufficient facts to indicate whether any conviction would arise out of the theory of guilt presented to the Grand Jury.

Neither the obscenity statute in *Hamling* nor the unlawful re-entry statute in *Resendiz-Ponce* bear any resemblance to the statute in *Russell* or the perjury statute in this case. Here, like the statute in *Russell,* R.C. §2921.11 requires greater specificity to distinguish between criminal conduct and otherwise innocent conduct. Only knowingly false *material* statements made under oath in an official proceeding can constitute perjury under the charged offense. Without greater specificity, there is no way to determine what statements the Grand Jurors found perjurious and whether they found them to be material to the issues in the official proceeding.

Moreover, the cornerstone of the State's case apparently relates to the Defendants' exercise of their fundamental rights to petition the courts and to communicate with public

officials. Yet, the present indictment provides precious few facts upon which the Defendants or the court could determine whether the averments describe a criminal offense. "A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." *United States v. Cruikshank*, 92 U.S. 542, 558 (1975). Here, as in *Russell*, the nature of the State's apparent theory of criminality under the statutes demands greater particularity to satisfy the mandatory criteria of providing adequate notice of the charges, distinguishing between criminal conduct and wholly innocent conduct, and providing protection against double jeopardy.

The State relies too heavily on the provisions of Chapter 2941 of the Revised Code which set guidelines for indictment. Simply conforming to the sample format suggested in R.C. §2941.06 and tracking the statutory language does not relieve the State of the obligation to provide constitutionally-sufficient notice to the defendant. R.C. §2941.05 requires that each charge include particulars "sufficient to give the accused notice of the offense of which he is charged." The due process requirement of sufficient notice is clearly preserved under Ohio statutory law.

Likewise, Crim.R. 7(B) does not diminish the protections of the Sixth Amendment and Article I, Section 10 of the Ohio Constitution. Rather, it confirms them. In *State v. Childs*, 88 Ohio St.3d 558 (2000), the Ohio Supreme Court made clear that compliance with Crim.R. 7 is only one part of the standard which must be met to render an indictment valid, holding that "[t]he sufficiency of an indictment is subject to the requirements of Crim.R. 7 ***and the constitutional protections of the Ohio and federal Constitutions.***" *Id.* at 564 (emphasis added). The Court went on to quote the standard set forth in both *Hamling* and *Russell* as an additional benchmark that must be satisfied:

> An indictment meets constitutional requirements if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. * * * ***'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.'*** " *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, 621, quoting *United States v. Hess* (1888), 124 U.S. 483, 487, 8 S.Ct. 571, 573, 31 L.Ed. 516, 518).

Id. at 564-65 (emphasis added). Thus, mere compliance with the mandate of Crim.R. 7(B) is not enough. Indeed, if Rule 7(B) were interpreted to authorize such skeletal pleadings without regard as to the nature of the charge, as the State urges, than such an interpretation as applied to this indictment would render the Rule unconstitutional under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Defendants believe the Court has duty to interpret Crim.R. 7(B) in a manner "which will avoid rather than * * * raise serious questions as to its constitutionality." *Akron v. Rowland,* 67 Ohio St.3d 374, 380 (1993) (citation omitted).

Furthermore, nothing in the language of Crim.R. 7(B) could be reasonably construed to mean that, in all cases, an indictment need do nothing more than track the language of the statute. The rule explicitly states that a charge "may" be in ordinary and concise language, and "may" be in the words of the applicable statute, provided the words of that statute charge an offense. However, the rule goes on to state that an indictment must use words which "give the defendant notice of all the elements of the offense with which the defendant is charged." The provision of fair notice is the key constitutional requirement of any indictment, whether it tracks the statutory language or employs some other phraseology to set forth the elements of the offense. Where an indictment fails to provide a defendant with constitutionally-sufficient notice of the charges enabling the defendant to both prepare a defense and assert his right not to be tried more than

once for the same offense, the indictment cannot be saved merely by its rote recitation of the bare, statutory language.

The State devotes barely a paragraph of its Brief to addressing the specific deficiencies outlined in the Joint Motion to Dismiss which require the relevant charges to be dismissed. Only the perjury charges appear to be of any interest to the State, which offers the general proposition that an indictment for perjury need not identify the alleged perjurious statement or the objective truth and need not identify the proceeding or authority before which the statement was made. (Brief in Opposition p. 8.) However, the State has not identified any legal authority supporting this claim. R.C. §2941.18 states only that an indictment for perjury need not set forth "any part of a record or proceeding, or the commission or authority of the court or other authority before which perjury or falsification was committed." It says nothing about setting forth the content or nature of the alleged false statement and the context in which it was made if such particulars are required to sufficiently apprise the defendant of what he must be prepared to meet and enable him to assert his double jeopardy rights. Again, the State has failed to confront the specific defects in the charges as pled in the indictment.

The State's Brief includes no argument or explanation in response to the substantial defects associated with the bribery charges (including the failure to identify dates of payments, the valuable thing or benefit, or the improper influence) or the money laundering charge (failure to particularize the transaction). Even more tellingly, the State's Brief contains no discussion whatsoever of the defects in the Pattern of Corrupt Activity ("PCA") and PCA conspiracy charges, which completely fail to provide the Cafaro Defendants with notice of the underlying acts the State intends to prove to support a conviction. These charges are different from other criminal offenses, such as murder or arson, because a skeletal indictment which provides nothing more than the bare statutory language is not sufficient to inform the defendant as to what conduct

or activities the State intends to prove at trial. The prosecution of the Defendants is premised on unprecedented theories, such as criminalizing incidental benefits realized by litigants pursuing common legal positions or a private citizen's communication with an elected representative on matters affecting one's economic self-interest. The novel theories in this case present a critical factor which affects the liberty of the individual Defendants, yet the State pays the issue little attention. Moreover, the problem of insufficient notice is amplified in this case because the skeletal PCA and PCA conspiracy charges are dependent upon other, equally threadbare counts charging the underlying offenses. "[W]here an indictment charges a crime that depends in turn on violation of another statute, the indictment must identify the underlying offense." *United States v. Pirro*, 212 F.3d 86, 93 (2nd Cir. 2000).

By failing to address the specific defects identified in the Joint Motion to Dismiss, the State confirms those very deficiencies. Like the bare-bones indictment at issue in this case, the State's Brief offers only conclusory justifications for the missing allegations, disregarding the requirements of the United States and Ohio Constitutions like so much bothersome red tape. Rather than responding to the Defendants' arguments regarding sufficient notice, the State brushes aside those arguments, repeating *no less than ten times* the mantra that an indictment is sufficient if it "tracks the language" of the criminal statute or utilizes the sample text in R.C. §2941.06. Nowhere does the State's Brief acknowledge the "fair notice" standard or explain how simply tracking the statutory language *in this particular case* renders these charges sufficient under the *Russell* standard.

B. A Bill of Particulars Cannot Cure the Fatal Deficiencies in the Charges Against These Defendants or Protect Them From Being Convicted Based Upon Theories of Criminality That Were Never Presented to the Grand Jury.

It is well-established that where an indictment is rendered fatally defective due to the absence of essential facts, it cannot be saved by a bill of particulars. A bill of particulars does not alter or amend an indictment. Rather, it is simply a statement of additional facts known by the State which are deemed necessary to enable the accused to defend himself. "The purpose of the bill of particulars is not to provide missing pieces in the indictment, but merely to provide greater detail to the accused of the nature and cause of the charge against him." *State v. Lewis,* 85 Ohio App.3d 29, 32 (3rd Dist. 1993). "It is elementary that averments in a bill of particulars may not be used to cure fundamental defects in an indictment; on the contrary, it is granted by the trial court, in the exercise of its sound discretion, for the limited purpose of elucidating or particularizing the conduct of the accused alleged to constitute the charged offense." *State v. Gingell,* 7 Ohio App.3d 364, 367 (1st Dist. 1982).

Thus, an indictment and a bill of particulars serve two distinct purposes. The indictment satisfies the constitutional mandate of providing the accused with "adequate notice and an opportunity to defend" and enables him to protect himself from any future prosecutions for the same offense. *State v. Sellards,* 17 Ohio St.3d 169, 170 (1985). Conversely, a bill of particulars elucidates or particularizes the defendant's conduct with respect to an otherwise valid indictment. The State attempts to blur these separate mandates by suggesting that a bill of particulars could cure the defective charges. However, that notion has been expressly rejected in Ohio.

In *State v. Silos,* 104 Ohio App.3d 23 (9th Dist. 1995), the indictment charged the defendant with conspiracy to commit aggravated trafficking in drugs. A bill of particulars was

furnished by the prosecution. The defendant moved to dismiss the indictment on the basis that, even if the state's allegations were true, his actions constituted only a violation of the drug abuse statute, not a violation of the conspiracy to violate the drug trafficking statute. *Id.* at 25. The trial court overruled the motion to dismiss, stating that "should the facts be proven at trial as stated in the Bill of Particulars, such facts charge an offense in violation of [the drug trafficking statute]." *Id.* On appeal after conviction, the Ninth District held that it was erroneous for the trial court to consider matters beyond the "face of the indictment" when ruling on the motion to dismiss. *Id.* at 26. *See also, State v. Childs,* 1998 WL 801326 (Ohio App. 2nd Dist. 1998) (where indictment failed to identify the drugs involved in the trafficking offense, the trial court could not rely on the bill of particulars to supply the missing information); *State v. Bader,* 2001 WL 688891, *2 (Ohio App. 9th Dist., 2001) (trial court erred when it dismissed the indictments, construing them in light of the state's bill of particulars); *State v. Robinson,* 2002 WL 31521501, 2002-Ohio-6150, ¶27 (4th Dist. 2002) (court could not consider alleged errors in the bill of particulars when ruling on motion to dismiss); *State v. Stout,* 2006 WL 3350770, 2006-Ohio-6089, ¶¶13-14 (3rd Dist. 2006) (rejecting prosecution's argument that the bill of particulars provided the facts missing in the indictment regarding defendant's status as a person *in loco parentis* for purposes of sexual battery offenses, and affirming the dismissal of defective counts).

Here, the State attempts to lead the Court to the conclusion that the Defendants' arguments are merely related to the degree of specificity in the charges. This is simply untrue. The charges against the Cafaro Defendants and Flora Cafaro are fundamentally defective because they fail to satisfy the three-pronged mandate of *Russell,* which is the law of Ohio. These Defendants cannot determine from the face of the indictment the nature of the offenses they are alleged to have committed, much less the underlying conduct giving rise to those

offenses. There are essential, vital facts missing from the indictment, without which these Defendants cannot begin to be fairly informed as to what they must be prepared to meet at trial.

The State's lack of appreciation for the seriousness of the Defendants' constitutional concerns is exemplified in the section of the State's Brief which purports to discuss double jeopardy, yet instead merely parrots the language of Crim.R. 7(E) regarding a defendant's right to a bill of particulars. (Brief at pp. 9-10.) The Court should be concerned that despite the State's promise to voluntarily produce bills of particulars for the Cafaro Defendants by mid-September of this year, it is now December and the bills have not been produced. After a grand jury investigation which commenced in March 2008 and was twice extended upon motion of the State, it is telling that the State has been unable to specify the basis for the charges against the Cafaro Defendants via a bill of particulars four months after they were indicted. This causes the Defendants to question whether the State's tactic is motivated by a desire to maintain a flexible, ever-evolving theory of criminality with which to prosecute these Defendants. It is precisely this dangerous possibility of prosecutorial "roaming" at trial that the Defendants pointed to in their Joint Motion to Dismiss as a significant constitutional problem supporting dismissal of the charges.

The State accurately notes that over 56,000 pages have been produced to the Defendants in the course of discovery. However, this "document dump" further illustrates why the bare-bones indictment containing no specifics as to the offenses does not provide adequate notice to these Defendants or protect them against double jeopardy. Not only is a bill of particulars not a substitute for discovery, the "document dump" by the State is not a constitutionally-adequate substitute for a valid indictment or reason to refuse to respond to the Cafaro Defendants' timely requests for greater specificity.

The Ohio Supreme Court has recognized that "inexactitude, even where the state is simply unable to comply with times and dates more specific than those found in the indictment, may also prove fatal to prosecution. Such would be the case if the absence of specifics truly prejudices the accused's ability to fairly defend himself." *Sellards,* 17 Ohio St.3d at 172. Thus, whether the absence of specifics renders a particular indictment invalid depends upon the facts of the case. Here, the bribery, perjury, PCA and money laundering charges are fatally defective for lack of specific dates, contexts, and other facts which could place the relevant transactions in a context that enables the Defendants to be apprised of what they must be prepared to meet at trial. If the prosecution either cannot or will not aver these essential elements in the indictment, then no bill of particulars can be issued, and the charges as a matter of law must be dismissed because they state no offenses. *See State v. Warden,* 2004 WL 2690156, 2004-Ohio-6306, ¶47 (6th Dist., Nov. 24, 2004) (internal citations omitted) (A "defective indictment . . . cannot be saved by a bill of particulars ' * * * since a defendant cannot be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.'").

C. Authority Exists in Ohio for the Use of a Heightened Pleading Standard Pursuant to the Supreme Court's *Twombly* and *Iqbal* Decisions.

The State argues that the "plausibility" standard for civil pleadings articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), has not been adopted by any Ohio court. This is not true. Both the Eighth and Ninth District Courts of Appeal have embraced the *Twombly* standard. *See Vagas v. City of Hudson,* 2009 WL 4981219, 2009-Ohio-6794, ¶13, fn. 1 (9th Dist. Dec. 23, 2009) (applying the "plausibility" standard and noting that "the pleading requirements under Fed.R.Civ.P. 8(a) and Civ.R. 8(A) are virtually identical" and "the Ohio Rule was based on the Federal Rule"); *Fink v. Twentieth Century Homes, Inc.,* 2010 WL 4520482, 2010-Ohio-5486,

¶24 (8th Dist. Nov. 10, 2010); *Parsons v. Greater Cleveland Regional Transit Auth.*, 2010 WL 323420, 2010-Ohio 266, ¶11 (8th Dist. Jan. 28, 2010); *Williams v. Ohio Edison*, 2009 WL 3490945, 2009-Ohio-5702, ¶15 (8th Dist. Oct. 29, 2009); *Gallo v. Westfield Nat. Ins. Co.*, 2009 WL 625522, 2009-Ohio-1094, ¶9 (8th Dist. Mar. 12, 2009).

The State's tortured argument regarding the *Erie* Doctrine and the power of federal courts completely misses the point. The Defendants do not contend that the Federal Rules of Civil Procedure apply here. However, the fact that the Supreme Court has raised the civil pleading standard to include a "plausibility" component, thus giving federal civil defendants rights that go above and beyond those afforded to criminal defendants whose very liberty is at stake, is a factor worth considering under these circumstances. Simply put, the Cafaro Defendants are being prosecuted under a 73-count indictment which would never pass muster as a federal or state civil pleading. That fact, combined with the lack of fair notice provided to these Defendants, the refusal or inability of the State to specify the underlying conduct giving rise to the offenses, the real risk of prosecutorial "roaming" at trial, the State's strategic dump of over 56,000 documents, and the failure of the indictment to permit the defense of double jeopardy to be raised in future proceedings, is enough to create a "perfect storm" of constitutional violations that more than justifies dismissal of the charges.

III. CONCLUSION

For all of the reasons set forth in this Reply Brief and in the Defendants' Joint Motion to Dismiss the Indictment, the counts of the indictment against Defendants Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marion Plaza, Inc. and Flora Cafaro must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion for Leave to File Reply Brief, Instanter, in Support of Joint Motion of Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marion Plaza, Inc. and Flora Cafaro to Dismiss Indictment* has been served via email this 30th day of November, 2010 upon:

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