

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No. 10-1671  
 :  
 v. : On Appeal from the  
 : Eighth Appellate District,  
 CHARLES FREEMAN, : Cuyahoga County  
 : Case No. 92809  
 :  
 Defendant-Appellant. :

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**BRIEF OF AMICUS CURIAE  
OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLANT CHARLES FREEMAN**

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WILLIAM MASON (0037540)  
Cuyahoga County Prosecuting Attorney

KATHERINE MULLIN (0084122)  
Assistant Cuyahoga County Prosecutor  
1200 Ontario Street, 9<sup>th</sup> Floor  
Cleveland, Ohio 44113  
(216) 443-7800

**COUNSEL FOR APPELLEE,  
STATE OF OHIO**

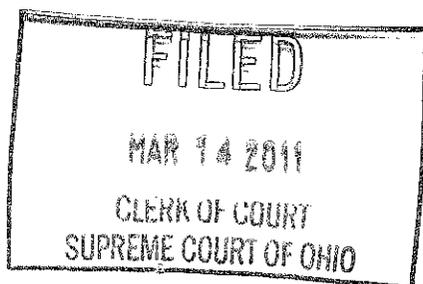
ROBERT L. TOBIK (0029286)  
Cuyahoga County Public Defender

ERIKA CUNLIFFE (0074480)  
Assistant Cuyahoga County Public Defender  
310 Lakeside Avenue, Suite 200  
Cleveland, Ohio 44113  
(216) 443-7583

**COUNSEL FOR APPELLANT,  
CHARLES FREEMAN**

CLAIRE R. CAHOON (0082335)  
Assistant State Public Defender  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-1573 – FAX  
claire.cahoon@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,  
OHIO PUBLIC DEFENDER**



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## **STATEMENT OF THE CASE AND FACTS**

Amicus adopts the statement of the case and facts set forth by Appellant Charles Freeman.

## **INTEREST OF AMICUS CURIAE**

The Office of the Ohio Public Defender (“OPD”) is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As *amicus curiae*, the OPD offers the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in this case insofar as few tenets of criminal law are most crucial to the rights of criminal defendants that notice of the charges and protections from double jeopardy. The constitutional guarantee of a fair trial is a myth without reasonable notice of the charges beyond the language of the charged statute. Moreover, without an adequate indictment detailing the charges to be defended against, a criminal defendant is completely unable to assert his or her double jeopardy protections.

## LAW AND ARGUMENT

Due process violations stemming from undifferentiated indictments must be cured pretrial in order to satisfy both the notice and double jeopardy mandates of *Russell v. United States* (1962), 369 U.S. 749, 763-64. Applying *Russell*, the United States Court of Appeals for the Sixth Circuit held in *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, 631, that multiple, undifferentiated charges in an indictment violate due process rights to notice of the charges and protections from double jeopardy. While neither *Russell* nor *Valentine* explicitly require that undifferentiated counts be cured pretrial, such a rule is consistent with the fundamental due process rights that those cases seek to protect. Moreover, a pretrial delineation is necessary to protect criminal defendants' right to indictment under the Ohio Constitution.

### **A. Undifferentiated indictment counts violate the Ohio Constitution.**

Criminal defendants in Ohio enjoy the unequivocal right to grand jury review of charges. Section 10, Art. I, Ohio Constitution. Accord R.C. 2939. This constitutional provision "provides an inalienable protection to the defendant that he will be tried on **the same essential facts** on which the grand jury found probable cause." *State v. Vitale* (1994), 96 Ohio App.3d 695, 699 (emphasis added). Accord *State v. Headley* (1983), 6 Ohio St.3d 475, 478-79; *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537 (prohibiting amendment to increase quantity of drug so as to increase penalty).

This Court has construed that right to encompass: (1) the right not to be required to run the gauntlet of trial unless and until a grand jury has determined there is probable cause to believe each element of the offense has been committed, and (2) the right to be properly notified of the charge. That right is also part of a defendant's federal and state constitutional rights to due process. *Vitale*, at 701. Accord *Ford v. Wainwright* (1986), 477 U.S. 399, 428 (O'Connor,

J., concurring) (where a state has created a liberty interest, it is constitutionally obliged to provide corresponding procedural protections).

In examining the federal right to a grand jury review, the *Russell* Court noted, “A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was.” *Id.* at 770. Without basic due process protections which the grand jury system was designed to secure, “a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.” *Id.* Without differentiation, criminal defendants cannot be sure if the charges brought against them were actually presented to and approved by a grand jury.

One area of particular concern with carbon-copy indictments is their tendency to mask multiplicity. Multiplicity occurs when a single crime has been arbitrarily divided or separated into two or more separate counts. *State v. Johnson*, Hamilton App. No. C-0801195 & C-0801196, 2009 Ohio 680, at ¶ 9 (citing *United States v. Hart* (C.A.6, 1995), 70 F.3d 854, 859 and *United States v. Nakashian* (C.A.2, 1987), 820 F.2d 549). There is a two-fold danger attendant to a multiplicitous indictment. First, it may prejudice a defendant by “causing a guilty verdict on a given count solely on the strength of the evidence on the remaining counts.” *Id.* (citing *United States v. Gibbons* (C.A.6, 1993), 994 F.2d 299, 301 and *United States v. Gullett* (C.A.6, 1983), 713 F.2d 1203, 1211-1212). Second, it may result in a double jeopardy violation by leading to multiple sentences for what is really a single offense. *Id.*; *State v. Childs* (2000), 88 Ohio St. 3d 558, 561.

But there is a third danger as well – the possibility that a grand jury was less than unanimous in returning the indictment. An indictment may only be returned if seven of the nine grand jurors concur that probable cause exists to support the allegation. Crim. R. 6(A),(F).

Thus, there must be a meeting of the minds, to a level of probable cause, of seven grand jurors as to the specific factual allegations for which a petit jury will later be required to unanimously agree beyond a reasonable doubt. See *Headley*. But, in cases such as the instant case, it is impossible to ascertain whether the grand jurors really had a meeting of the minds regarding the specific charges in each count.

**B. Undifferentiated indictment counts routinely violate the due process rights of criminal defendants throughout Ohio.**

The instant case is not an isolated incident. Ohio criminal defendants have frequently been subjected to undifferentiated, carbon-copy indictments in violation of their constitutional due process rights. Because of the failure to provide notice and double jeopardy protections pretrial, Ohio's courts of appeals have had to reverse an number of cases for undifferentiated indictments in the six years since *Valentine* was decided.<sup>1</sup>

**C. The due process rights of criminal defendants would be protected by pretrial differentiation.**

It is a well-established rule that criminal defendants must be apprised, with reasonable certainty, of the nature of the accusations against them. *United States v. Simmons* (1878), 96 U.S. 360, 362. Due process requires that an indictment provide sufficient notice to enable a criminal defendant to prepare an adequate defense. *Parks v. Bobby*, 2011 U.S. Dist. LEXIS

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<sup>1</sup> *State v. Thomas*, Cuyahoga App. No. 94492, 2011-Ohio-705; *State v. Davis*, Delaware App. No. Case No. 10CAA060042, 2011-Ohio-638; *State v. Taylor*, Ottawa App. No. Case No. 10CAA060042, 2011-Ohio-359; *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364; *State v. Chaney*, Mahoning App. No. 08 MA 171, 2010-Ohio-1312; *State v. Nickel*, Ottawa App. No. OT-09-001, 2009-Ohio-5996; *State v. Meador*, Warren App. No. CA2008-03-042, 2009-Ohio-2195; *State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129; *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010; *State v. Barrett*, Cuyahoga App. No. 89918, 2008-Ohio-2370; *State v. Shaw*, Montgomery App. No. 21880, 2008-Ohio-1317; *State v. Crosky*, Franklin App. No. 06AP-655, 2008-Ohio-145; *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066; *State v. Lawwill*, Cuyahoga App. No. 88251, 2007-Ohio-2627; *State v. Tobin*, Greene App. No. 2005 CA 150, 2007-Ohio-1345; *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321; *State v. Warren*, 158 Ohio App. 3d 288, 2006-Ohio-4104.

15686, at \*13. Ensuring that differentiation takes place pretrial would also guarantee that a defendant's conviction be supported by sufficient evidence. To do otherwise "gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell*, at 766. See, e.g., *Cole v. Arkansas* (1948), 333 U.S. 196, 201-02 (holding that a defendant may only stand convicted of what the evidence can support).

Delineating the differences among the counts during trial or at trial's conclusion does not provide sufficient notice of the charges to satisfy due process. As the dissent in Mr. Freeman's direct appeal pointed out, "Notice during or at the conclusion of trial is no kind of notice at all." *State v. Freeman*, Cuyahoga App. No. 92809, 2010-Ohio-3714, at \*\*29 (McMonagle, J. dissenting). Differentiation of the charges at or after trial only serves to address a defendant's double jeopardy claims relating to subsequent, future prosecution. *Id.*

But providing differentiation during trial or at its conclusion does nothing to give a defendant notice of the charges. The notice requirement of due process is about enabling defendants to mount a cogent defense. "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined." *Russell*, at 766.

By way of analogy, holding that undifferentiated counts can be cured during trial is like holding that a criminal defendant is not entitled to discovery until the trial is already underway. Both differentiated indictments and full discovery serve to inform a criminal defendant of the nature of the charges against him or her. Both seek to prepare the defendant for trial on the charges. Logically, both must be provided pretrial in order to have any actual meaning or import to the accused.

Additionally, curing undifferentiated charges during trial or at trial's end provides no protections from double jeopardy within the trial. A criminal defendant would have no way to

know if he or she stood convicted of multiple charges for what was actually one act. As the *Valentine* court pointed out, “the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense.” *Valentine*, at 634-35. See, also, *Isaac v. Grider*, 2000 U.S. App. LEXIS 9629, at \*14 (finding that the identical charges introduced the risk of double jeopardy at trial). In other words, an undifferentiated indictment cannot be cured during trial, because such a fix still hobbles the defendant’s ability to assert double jeopardy protections related to the instant trial.

**D. Pretrial differentiation would also benefit the prosecution and the court system.**

A narrow interpretation of *Russell* to require pretrial differentiation satisfies due process for defendants, but it also protects courts and prosecutors. The United States Supreme Court pointed out that collateral benefit in *Russell*, stating that such a rule makes “it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task.” *Russell*, at 769. The notice requirement’s purpose, in part, is to “inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.” *United States v. Cruikshank* (1875), 92 U.S. 542, 558.

Without sufficient notice, courts cannot be expected to perform adequate and intelligent judicial review and to navigate around double jeopardy. Instead, trial courts would have the impossible task of attempting to sort out which evidence links to which counts. When cases have to be re-tried because of faulty indictments, victims suffer. And, as the *Russell* Court noted, ensuring that trial courts can make enlightened judgments benefits not only the defendant but also the prosecution, as intelligent judgments are also lasting ones. *Id.* at 769.

## CONCLUSION

In the end, this Court should interpret the right to indictment so as to advance the fair and efficient administration of justice. R.C. 2901.04. Pre-trial differentiation accomplishes these goals. Therefore, this Court should reverse the court of appeals' ruling and adopt the instant proposition of law by holding that undifferentiated charges in an indictment must be cured pretrial in order to satisfy the requirements of due process.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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CLAIRE R. CAHOON (0082335)

Assistant State Public Defender

250 East Broad Street – Suite 1400

Columbus, Ohio 43215

(614) 466-5394

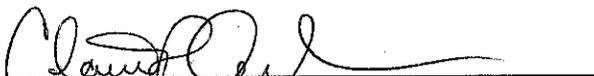
(614) 752-5167 – Fax

claire.cahoon@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,  
OHIO PUBLIC DEFENDER**

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT CHARLES FREEMAN** has been served via regular U.S. mail upon Katherine Mullins, Assistant Cuyahoga County Prosecutor, The Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 14th day of March, 2011.



CLAIRE R. CAHOON (0082335)  
Assistant State Public Defender

**COUNSEL FOR AMICUS CURIAE,  
OHIO PUBLIC DEFENDER**

#338587