

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Case No. 2010-1671

Appellee,

-vs-

On Appeal from
the Cuyahoga County
Court of Appeals, Eighth
Appellate District

CHARLES FREEMAN,

Court of Appeals
No. 92809

Appellant.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON
O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO**

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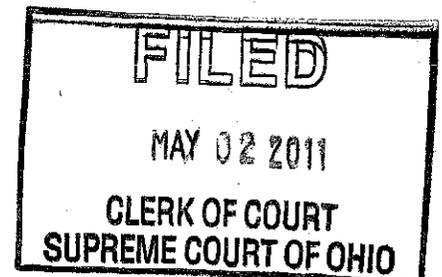


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STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year. Representation has included representing the State in cases involving sex crimes. In cases of child sexual abuse, young victims often do not timely disclose the abuse and, once reported, definitive dates on which the crimes occurred are difficult to ascertain. Often there is a pattern of abuse occurring over a long period of time. These difficulties require indictments that span a time of months or even years. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to charging sex offenders. In the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the positions advanced by the Cuyahoga County Prosecutor's Office.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural and factual history of the case set forth in the State's merit brief.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW

AN INDICTMENT IS NOT INVALID FOR APPROXIMATING THE DATE OF THE OFFENSE WHERE AN EXACT DATE AND TIME CANNOT BE ASCERTAINED PARTICULARLY WHERE TESTIMONY DIFFERENTIATES BETWEEN THE VARIOUS SEX ACTS.

A. *Valentine v. Konteh* generally

Defendant relies on the Sixth Circuit's decision in *Valentine v. Konteh* (2005), 395 F.3d 626, for his proposition that the indictment implicated his constitutional rights. *Valentine*, however, is not binding precedent on this Court. In *State v. Burnett* (2001), 93 Ohio St.3d 419, this Court noted that "[t]wo Supreme Court justices have also opined that state courts are not bound by lower federal court decisions, but that the decisions should be only persuasive." *Id.* citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 376 (Thomas, J., concurring); *Steffel v. Thompson* (1974), 415 U.S. 452, 482, fn. 3 (Rehnquist, J., concurring).

To fully address defendant's claims, it is necessary to review the facts and holding in *Valentine*. Defendant Valentine was charged with twenty counts of child rape and twenty counts of felonious sexual penetration of a minor. Each offense was alleged to have occurred between March 1, 1995 and January 16, 1996. *Valentine*, 395 F.3d at 629. Defendant was convicted on all counts and received 40 consecutive life sentences. *Id.* at 628. The District Court issued a writ of *habeas corpus* on all counts, finding the indictment violated defendant's federal due process rights to notice of the crime charged so that defendant could fairly protect himself from double jeopardy. *Id.* The Sixth

Circuit affirmed in part, holding that two counts survived the constitutional challenge to the indictment. *Id.* at 638.

The Court identified *Russell v. United States* (1962), 369 U.S. 749, as the controlling authority in its decision. *Id.* at 631. The Court stated that under *Russell*, “an indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives a defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Id.* Although the indictment in Valentine’s case met the first criterion of *Russell*, the Sixth Circuit found that it failed to meet the second two criteria. *Id.*

The Court found that the indictment did not give defendant Valentine adequate notice because there was no factual differentiation between what the Court characterized as “carbon copy” counts in the indictment. The lack of differentiation meant that, “[w]hile Valentine had legal and actual notice that he must defend against the child’s allegations of sexual abuse over a ten-month period, he was given no notice of the multiple incidents for which he was tried and convicted.” *Id.* at 634. The Court noted that the due process problems in the indictment could have been cured either before or during the trial had the trial court insisted that the prosecution delineate the factual bases underlying the forty separate allegations. *Id.*

The Court specifically rejected the defendant’s claim that the wide time frames and lack of facts identifying the location of the offense violated his due process rights. *Id.* Instead, the Court stated that the problem in Valentine’s case was that he “was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts.” *Id.* at 632. The Court went on to state that “[i]f there had been singular counts of each offense, the lack of particularity would not have presented the

same problem.” Id. The Court found that “[t]he constitutional errors in this case lie in the multiple identical counts rather than the generic statutory language or the wide time frame of the indictment.” Id. at 638. However, the Court found that the indictment was insufficient because the facts showed differentiation was possible. The Court found the prosecution could have specified the time of day, type of sexual activity and location in the house. Id. at 633-634.

The Court further found the “carbon copy” indictment implicated double jeopardy because Valentine would be unable to plead his convictions as a bar to future prosecutions. Id. at 634. The Court concluded that, in his initial trial, Valentine may have been punished multiple times for what may have been the same offense. Id. at 634-35. According to the Court, the Constitution demands that “if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding.” Id. at 638.

Fatal to the prosecution of Valentine was that, because the abuse occurred on such a regular basis, the eight-year-old victim could only estimate the frequency in which abuse occurred. Id. at 634. The victim testified that the defendant (1) forced her to perform fellatio in the family room on “about twenty” occasions, (2) penetrated her vagina in the family room on “about fifteen” occasions; and (3) penetrated her anus on “about ten” occasions. Id. at 629. The Court found that differentiation was possible in that the victim identified several distinct locations within the house where the abuse occurred. Id. at 633-34. Further differentiation was possible because the testimony showed that there were three distinct types of rape at issue. Id. The Court found that,

based on the record, it was also possible to differentiate the charges based on the time of day the offenses occurred. *Id.*

Although the Court stated that its opinion “did not require that indictments alleged the date, hour, and precise location of crimes,” the Court also stated that differentiation will often “reference to date ranges or time ranges or certain locations or certain actions.” *Id.* at 637. Because of the lack of differentiation in the indictment, the Sixth Circuit found that Valentine “had little ability to defend himself.” *Id.* at 633.

Here, the victims were able to distinguish the incidents and defendant admitted to some of the sex acts.

B. *Valentine* was wrongly decided.

The *Valentine* Court erred in its interpretation of what constitutes sufficient notice under *Russell*. In *Russell*, the defendants were charged under a federal statute for refusing to answer questions pertinent to the question under inquiry before a congressional committee. *Russell*, 269 U.S. at 752. However, none of the indictments identified the subject of the congressional inquiry. *Id.* Because the defendants in *Russell* faced indictments under a general statutory description, the Court found that further factual detail was required to inform the accused “of the specific offense, coming under the general description, with which he is charged.” *Id.* at 765; *Hamling v. United States* (1974), 418 U.S. 87, 117; see also *United States v. Cruikshank* (1876), 92 U.S. 542. The Court stated that “[a] cryptic form of the indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined.” *Id.* at 766. Thus, the lack of specificity affected an essential element of the offense. See *State v. Grinnell* (1996), 112 Ohio App.3d 124, 149.

Unlike the indictment in *Russell*, the indictment in *Valentine* alleged all the elements of the offense. Indeed, the Sixth Circuit found that the indictment “adequately set forth the elements of the charged offense” and defendant had “actual notice” of the crimes charged. *Valentine*, 395 F.3d at 631, 634. The Sixth Circuit extended *Russell* by concluding that significantly greater specificity is required when the State alleges a criminal act occurred multiple times. While arguably the failure to provide the specific sex acts underlying the rape charges could constitute a notice problem, the Court’s decision does not rest on the State’s failure to provide this type of notice. Rather, the Court concluded that the indictment was constitutionally deficient because the prosecution *could* have differentiated the counts based on time of day, location within the house, as well as type of sex act. *Id.* at 633-634. The Court’s conclusion has the effect of raising certain factual details to the level of criminal elements when evaluating the sufficiency of an indictment.

The type of factual “differentiation” required by *Valentine* would resurrect the technical and formalized common law pleading requirements, where pleadings that failed to contain a full statement of the facts and legal theory of prosecution would be dismissed. See LaFave, *Criminal Procedure* § 19.1(a) (2nd ed. 1999). “While the formalism and detail mandated by the common law pleading rules were designed in part to provide notice to the accused, they clearly went beyond what was needed to provide notice alone.” *Id.* Pleading reforms rejected such formalism and, as the *Russell* Court stated:

This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed

because of minor and technical deficiencies which did not prejudice the accused. This has been a salutary development in the criminal law.

Russell, 369 U.S. at 763, quoting *Smith v. United States* (1959), 360 U.S. 1, 9.

Nevertheless, the *Valentine* Court found that the failure to factually differentiate each of the forty charges violated due process because defendant had “little ability to defend himself.” *Valentine*, 395 F.3d at 633. The Court failed to explain this conclusion, and conspicuously absent from the Court’s discussion is how the failure to provide the suggested factual minutiae prejudiced the defense. The Court ignored the fact that *Valentine* was living with the child-victim during the period in which the abuse occurred. *State v. Valentine* (July 17, 1997), Cuyahoga App. No. 71301. There was no dispute that defendant had daily access to the victim and, testifying in his own defense, *Valentine* denied all the allegations. *Id.* This was not a case where the accused was able to offer an alibi. Indeed, time of day and location in the house were irrelevant to the defense as defendant was asserting that he never engaged in the sexual conduct with the victim. See *State v. Carnes*, 12th Dist. No. CA2005-01-001, 2006-Ohio-2134, ¶ 22. The Sixth Circuit’s failure to address how the lack of factual differentiation prejudiced defendant further undermines its decision.

As the Court was unable to support its conclusion with legal analysis, the Court relied exclusively on its own assessment of the victim’s testimony. The Court complained that the child could only describe typical abusive behavior and could only provide estimates as to how many times the abuse occurred. *Valentine*, 395 F.3d at 632-33. The Court found it significant that the victim’s testimony could not be corroborated. *Id.* The Court concluded that multiple convictions should not stand “based solely on a

child's numerical estimate." *Id.* at 634. Yet, even their weight analysis was faulty as the Court chose to ignore the fact that the child testified that the defendant "touched her twice a day, every day of the week, and every week while she was in the second grade." *Valentine v. Huffman* (2003), 285 F. Supp. 2d 1011, 1016. The Court failed to explain how such credibility determinations affected whether defendant had sufficient notice of the charges.

Equally faulty is the Sixth Circuit's conclusion that the indictment implicated double jeopardy. The Court found that defendant would not be able to plead the convictions as a bar to future prosecutions and that "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*, 395 F.3d at 634-35. The Court's conclusion was based on their assessment that the victim's testimony could only support one occasion of rape and felonious penetration. This conclusion is not supported by law or the record.

The *Russell* Court explained that the sufficiency of the indictment may implicate double jeopardy because, if other proceedings are taken against the defendant for a similar offense, the indictment affects the extent to which the defendant may plead a former conviction or acquittal. *Russell*, 369 U.S. at 764. In *Russell*, even though the indictment failed to set forth an element of the offense, double jeopardy was not implicated. The Court noted that "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 them." *Id.* Thus, because the defendant may

rely on any part of the record of the initial prosecution to support a double jeopardy argument, the initial prosecution acts as a “blanket bar” to subsequent prosecutions. *State v. Martinez* (1996), 250 Neb. 597, 600, 550 N.W.2d 655.

The *Valentine* Court failed to address the fact that if the prosecution charged defendant with additional charges of rape and felonious penetration during that time period, the defendant had more than a sufficient record with which he could support a double jeopardy argument. The indictment in *Valentine* set forth all the elements of the crimes and set forth a specific time frame. Had defendant faced additional charges, the State would have been required to show the subsequent charges were distinct from the initial charges.

The Court’s double jeopardy conclusion, like its due process analysis, rests on an evaluation of the victim’s testimony. The only way for the court to conclude that the defendant may have been put in double jeopardy at his trial is to conclude that the child only described one instance of each type of sexual abuse. Not only was this conclusion contrary to the record in *Valentine*, but it also contrary to the precedent set forth in *Russell*. There is no case law that suggests that the sufficiency of the indictment for double jeopardy purposes requires a judicial assessment of the victim’s credibility. The credibility contest between the victim and the defendant ended in the jury room. The Sixth Circuit broke from clearly established precedent by assessing the victim’s testimony and then using that assessment to support their conclusions.

In the final analysis, *Valentine* uses “due process” as a guise to deter States from prosecuting sex offenders who repeatedly prey on young children. The Court specifically faults the State for prosecuting the defendant for a generic pattern of abuse rather than

forty separate abusive incidents. *Valentine*, 395 F.3d at 634. The Sixth Circuit proposes that offenders be charged with a “pattern of abuse” rather than multiple counts of the same offense. *Id.* Additionally, according to the *Valentine* Court, the prosecution should be barred from indicting and trying an “all or nothing” case. *Id.* However, most cases involving repeated sexual abuse of a child are “all or nothing” cases because, absent physical evidence, the case turns on whether the victim or victims are deemed worthy of belief by the jury. *Martinez*, 250 Neb. At 658. There is no case law supporting the conclusion that charging an offender with multiple counts of the same offense that occur over a period of time offends the Constitution. Furthermore, when an offender commits repeated criminal acts, each act is an offense for which the offender may be held accountable. The Court’s decision had no foundation in either law or logic and cannot be extended beyond its facts.

C. Time is not an essential element of rape or gross sexual imposition.

Defendant uses *Valentine* to support the proposition that the time frames in his indictment violate due process. However, *Valentine* is inconsistent on this issue. *Valentine* affirmatively rejected the defendant’s argument that the failure to provide greater detail pertaining to the time and place of the offense violated due process. Yet, *Valentine* found a due process violation for the State’s failure to factually differentiate the counts and the Court noted that the counts *could* have been differentiated by time of day and by the location within the house. In any event, there is no statute or case law supporting the *Valentine* Court’s finding that differentiation based on either time of day or precise location was required to provide an accused with sufficient notice.

Ohio statutes make it clear that when alleging time, an indictment is sufficient “if it can be understood therefrom * * * [t]hat the offense was committed at some time prior to the time of finding of the indictment * * *.” R.C. 2941.03(E). In addition, “[a]n indictment * * * is not made invalid * * * [f]or omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense.” R.C. 2941.08(B). Nor is an indictment made invalid “[f]or stating the time imperfectly.” R.C. 2941.08(C). The pertinent Criminal Rule does not require that the time of the offense be stated in the indictment. Crim.R. 7(B).

Case law is in accord. “In a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential.” *Tesca v. State* (1923), 108 Ohio St. 287, paragraph one of the syllabus. “[I]mperfectly stating the time the offense occurred does not render the indictment invalid.” *McLean v. Maxwell* (1965), 2 Ohio St.2d 226, 227. This Court has stated:

Ordinarily, 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. A certain degree of inexactitude of averments, where they relate to matters other than elements of the offense, is not per se impermissible or necessarily fatal to a prosecution.

State v. Sellards (1985), 17 Ohio St.3d 169, 171. “[T]he exact date is not essential to the validity of the conviction,” even when the defendant claims an alibi. *State v. Dingus* (1970), 26 Ohio App.2d 131, 137, aff’d (1971), 26 Ohio St.2d 141.

~~The present indictment did not violate any statutory or rule requirement. Time~~
could have been omitted from the indictment altogether. It was sufficient that the indictment indicated that the offenses occurred sometime prior to the return of the

indictment, as this indictment did. Nor could the indictment be held invalid merely because it stated the time “imperfectly” in the minds of some. Exact dates or times were not essential to proving these charges, even though the charges included allegations that the victims were under age thirteen. *State v. Madden* (1984), 15 Ohio App.3d 130, 132.

Here, the evidence supported the essential elements of each charge and the record establishes that defendant lived with the victims. Defendant also admitted to some sex acts with the victims. Under these circumstances, defendant could not show any material prejudice. *State v. Carnes*, supra; *State v. Kerr* (Oct. 9, 1998), 11th Dist. No. 97-L-32(22-month time frame; no material prejudice; “appellant conceded that he lived with the victims in [the] apartment for the vast majority of the time frame in question”).

State v. Daniel (1994), 97 Ohio App.3d 548, is instructive on this point. In *Daniel*, the defendant had not resided with the victims but did have frequent access to the victims. This Court concluded that the defendant “ha[d] not demonstrated that a more specific date was material to the presentation of his defense.” *Daniel*, 97 Ohio App.3d at 558; see, also, *State v. Hensley* (1991), 59 Ohio St.3d 136, 142 (child victims were residents of trailer park; defendant was a resident and maintenance man in park; specific dates deemed not material to any defense theory put forth at trial). Defendant, having lived with the victims, cannot show that dates were somehow material.

D. Defendant’s reliance on *Valentine v. Konteh* is misplaced.

Even *Valentine* allows at least one charge per time frame. *Valentine* emphasized that “[i]f there had been singular counts of each offense, the lack of particularity would not have presented the same problem.” *Id.* at 632. In addition, *Valentine* allows multiple differentiated counts in a given time frame. The court only found that “[t]he

constitutional errors in this case lie in the *multiple identical* counts rather than the generic statutory language or the wide time frame of the indictment.” Id. at 638 (emphasis added).

Nevertheless, defendant tries to take *Valentine* a step further to contend that the State could not prosecute any count for any time frame where the victim cannot differentiate between the various acts of sexual abuse that were occurring during each time period. In defendant’s view, no prosecution can occur at all, *ever*, because there is a danger that it would be difficult to apply double-jeopardy analysis if a second indictment were brought. But, again, *Valentine* does not support such a result, as it allows multiple differentiated counts. And even if *Valentine* did support such a drastic result, it is not binding precedent on this Court. See *State v. Burnett* at 424 (lower federal-court opinions not binding).

There are grave doubts about the validity of *Valentine*. A criminal-law procedure will be overturned on due process grounds only if it violates some “fundamental principle of justice.” *Montana v. Egelhoff* (1996), 518 U.S. 37, 43, 58-59 (plurality and concurrence). “[C]riminal process [will be found] lacking only where it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Herrera v. Collins* (1993), 506 U.S. 390, 407-408 (internal quotation marks and citations omitted). Courts “have defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Medina v. California* (1992), 505 U.S. 437, 443.

It does not violate any fundamental principle of justice to require a defendant to defend against a finite number of counts in a given time frame. It is a well-established

principle that exact dates and times are unessential to an indictment or conviction and that time frames are allowed. *State v. Daniel* (1994), 97 Ohio App.3d 548, 556-57. Tracking the language of the statute to charge the offense is also well established and generally does not violate due process. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707.

Valentine's claims about the inability of the defendant to defend against multiple charges are a myth. An indictment of, say, twenty counts of rape in a given time frame necessarily gives the defendant notice that the State is claiming that rape occurred twenty times. His first defense can be that the evidence does not support twenty counts but only some lesser number. A defendant facing a finite number of counts in a given time frame also remains free to deny that any abuse occurred at all, and he remains free to challenge the child's credibility. Given the child's uncertainty regarding dates or times, etc., the defendant can challenge the child's memory on other aspects of the incidents. The defendant can challenge the child's delay in reporting the abuse and can pursue other defenses commonly pursued in such cases. Such defenses would include the defendant claiming that the child is a mere puppet of a vindictive adult or manipulative counselor (a defense pursued here) or that the child made up the allegation to retaliate against the defendant because of parental discipline meted out by the defendant.

Even though time frames can effectively prevent the defendant from pursuing an alibi defense, alibi has never been a good defense when the defendant has repeated access to the child. *D.B.S.*, 700 P.2d at 634 (alibi would be "futile gesture" when defendant had custody of child). In any event, "a defendant has no due process right to a reasonable opportunity to raise an alibi defense." *State v. Lozza* (1993), 71 Wash.App. 252, 259, 858

P.2d 270, 275. Defendant never filed a notice of alibi and would be unable to show material prejudice on these grounds. *State v. Stepp* (1997), 117 Ohio App.3d 561, 566.

Defendant is in a particularly poor position to mount an alibi defense or any other defense, since he admitted that some sexual incidents occurred. To be sure, defendant admitted he put his mouth on P.S.'s vagina twice in the presence of her mother, tried to insert his penis into P.S.'s vagina once, had his mouth on I.S.'s vagina twice and had sex with Maria in front of P.S. and I.S. between five and ten times. In any event, defendant's admissions show that this case would not be about alibi – defendant clearly had repeated access to the victims – but rather about credibility. The indicted time frames do not prevent defendant from pursuing a “they are not credible” defense.

No principle of due process requires that the facts of the crime or the testimony of the victim be conducive to any and all possible defenses. The Constitution “guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *United States v. Owens* (1988), 484 U.S. 554, 559 (internal quotation marks omitted). A witness' lack of memory does not deprive the defendant of a fair trial, as the defense still “has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, * * * and even (what is often a prime objective of cross-examination * * *) the very fact that he has a bad memory.” *Id.* at 559. “The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons * * *.” *Id.* at 660. When armed with an indictment charging a finite number of counts, armed with discovery and the opportunity to obtain a bill of

particulars, and armed with the power of cross-examination and compulsory process, the defense will have ample opportunity to defend.

As for *Valentine's* contention that multiple undifferentiated counts will possibly violate double jeopardy by resulting in multiple punishments for the same crime, it is difficult to fathom that assertion, as *Valentine* does not explain it. The fact remains that some defendants will sexually abuse their victim in the same place and in the same way over and over again. Punishing them for twenty crimes when the evidence shows there were twenty crimes is simply not punishment for the "same offense" under double jeopardy principles. Double jeopardy does not compel *Valentine's* "solution," which is a grant of immunity for nineteen of the twenty crimes.

Valentine also erred in contending that "carbon copy" counts can prevent defendants from proving a double jeopardy bar in a future prosecution. According to *Valentine*, if the indictment sets forth undifferentiated rape charges for a particular time frame, a court in the future will be unable to determine whether a double jeopardy claim has merit. However, these concerns rely on a false dilemma. There is no requirement that a double jeopardy claim be litigated solely by the four corners of the indictment. In fact, the entire record would be before a court addressing a double jeopardy issue, including the transcript of the first trial. *Russell v. United States* at 764; *State v. Brozich* (1923), 108 Ohio St. 559, 563. By looking at the indictment, the testimony, and the jury instructions in the first trial, a court should have no difficulty in determining whether a defendant had been previously placed in jeopardy for the same offense. See *State v. Gifford* (Me. 1991), 595 A.2d 1049, 1051-52.

In addition, the problem of undifferentiation is solved by recognizing a rebuttable double jeopardy bar that would apply to the second prosecution. *State v. Martinez* 250 Neb. at 601, 550 N.W.2d at 658. A defendant tried on multiple undifferentiated counts of rape in a certain time period would be rebuttably presumed to have been in jeopardy on all acts of rape in that time period, and the State would be able to proceed on another count of rape in that time period only if it could prove that the defendant was not in jeopardy for such rape in the first trial. This rebuttable presumption removes any dilemma, as the prosecution is allowed to proceed to at least one trial, and uncertainty created by the absence of differentiation in the first trial would be resolved in the defendant's favor if a future prosecution would be brought.

In any event, it is extreme overkill to throw out every indictment of sexual abuse having a time frame merely because there is a remote chance that the victim would later recount previously-unmentioned abuses. A statute or an indictment should not be found unconstitutional based on a worst case scenario that may never occur. See *Ohio v. Akron Center* (1990), 497 U.S. 502, 514.

The alternative is no prosecution at all in such cases, a result which absurdly rewards the defendant with a self-created immunity from all prosecution. Such offenders often target victims of tender age for the very reason that such victims are easily intimidated, will not report the abuse right away, and will have difficulties detailing the abuse.

As stated by this Court in *State v. Hensley*:

Statutes and case law in Ohio, as well as the rest of the country, seek to protect and ensure the safety of children of tender age. It is common knowledge in child sex abuse

cases that the victims often internalize the abuse, and in some instances blame themselves, or feel somehow that they have done something wrong. Moreover, the mental and emotional anguish that the victims suffer frequently inhibits their ability to speak freely of the episodes of abuse.

Hensley, 59 Ohio St.3d at 138-39. “[I]t would pervert justice to impose on those whom the Criminal Code seeks to protect the responsibility to know the exact criminal nature of such conduct.” *Id.* at 139.

It would be an equal perversion of justice to bar prosecution altogether when those child victims are unable to differentiate counts within a time frame. The counts in some cases simply may not be capable of differentiation if the defendant committed the crimes in the same location and in the same way each time. And even when differentiation might have been possible, the defendant-induced delays in reporting the abuse will often cause the child to forget the differentiating details, thereby depriving law enforcement of the ability to gather more specific information regarding the dates for such abuse.

As stated by the Nebraska Supreme Court in *Martinez*:

Because sexual assaults on minors are typically unwitnessed, and because such assaults can leave little or no physical evidence, a prosecutor is often resigned to basing the State's case on the testimony of the minor victim. Yet, young victims are often unsure of the date on which the assault or assaults occurred. A child who has been assaulted repeatedly may have no meaningful reference point of time or detail by which to distinguish one specific act from another. This is particularly true when a child has been assaulted on a regular basis and in a consistent manner. The more frequent and repetitive the assaults and the younger the victim, the more this problem is exacerbated, and the prosecutor's ability to prove specific acts through the victim's testimony decreases accordingly.

Martinez, 250 Neb. at 600, 550 N.W.2d at 658

If the offender could avoid all prosecution because the child cannot differentiate repeated acts of abuse, then the bar will be set far too high to allow effective prosecution of most cases of child sexual abuse. “That result would effectively insulate the most vicious offenders – those who assault the youngest children the most times and who traumatize their victims most severely. Such a policy is by every definition unconscionable * * *.” *Id.* at 601, 550 N.W.2d at 658. “[T]he Constitution protects against invasions of individual rights, [but] it is not a suicide pact.” *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 160. *Valentine* does not provide any basis for reversal.

E. Amicus curiae Ohio Public Defender’s arguments are without merit.

Amicus curiae Ohio Public Defender claims that Ohio courts have reversed many cases for “undifferentiated indictments in the six years since *Valentine* was decided.” The cases cited by amicus curiae were not all reversed pursuant to *Valentine* as amicus curiae suggests. *State v. Taylor*, 6th Dist. No. OT-09-018, 2011-Ohio-359 (Reversed due to a sentencing issue, not based on *Valentine*); *State v. Chaney*, 7th Dist. No. 08 MA 171, 2010-Ohio-1312 (Reversed due to prosecutions comment on post-arrest silence of defendant); *State v. Meador*, 12th Dist. No. CA2008-03-042, 2009-Ohio-2195 (No violation of *Valentine*, reversed due to other acts evidence being admitted); *State v. Coles*, 8th Dist. No. 90330, 2008-Ohio-5129 (GSI counts reversed due to insufficiency of evidence, no *Valentine* problem where there was sufficient testimony at trial to differentiate between counts); *State v. Hilton*, 8th Dist. No. 89220, 2008-Ohio-3010 (No *Valentine* issue where victim differentiated between incidents; reversal based on

classification of defendant as a sexual predator); *State v. Barrett*, 8th Dist. No. 89918, 2008-Ohio-2370 (State prevailed in its appeal because the trial court should not have dismissed counts based on *Valentine*); *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145 (Partial reversal due to *Pelfrey* and sufficiency, not *Valentine*); *State v. Lawwill*, 8th Dist. No. 88251, 2007-Ohio-2627 (Remanded for resentencing, not based on *Valentine*); *State v. Yaacov*, 8th Dist. No. 86672, 2006-Ohio-5321 (Testimony distinguished events such that convictions were affirmed, only reversed for resentencing because the court relied on severed provisions of the statute).

In *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, the Court reversed only because the “trial court failed to address the mandatory issue of court costs.” *Id.* at 619. With respect to a *Valentine* argument, the Court found:

The evidence showed that Lukacs committed numerous offenses against the victim. The separate counts of the indictment involved separate acts, not multiple counts involving the same act. Again, the state could not have been more specific regarding the dates, given the young age of the victim and her revelation about numerous acts of abuse over an extended period of time. The lack of specificity did not rise to the level of a due-process violation, particularly given that Lukacs did not raise a date-specific defense, such as an alibi defense. He home schooled the children and never denied being home alone with the children during the time period described in the indictment. His defense was that the abuse never occurred and that the children had been coached to fabricate the allegations against him. Consequently, Lukacs was not prejudiced by the state's failure to allege more specific dates, and we overrule his fifth, seventh and eighth assignments of error.

Id. at 615-16.

The facts of the some of the cases cited by Amicus Curiae Ohio Public Defender are distinguishable from this case in many instances. See e.g. *State v. Thomas*, 8th Dist.

No. 94492, 2011-Ohio-705 (Where victim testified that the sexual acts occurred “almost everyday” without any further detail or corroborating testimony, the Court found that there was no evidence to distinguish any of the incidents.); *State v. Davis*, 5th Dist. No. 10CAA060042, 2011-Ohio-638 (State prevailed in appealing the trial court’s dismissal of one count of the indictment where the court felt it was duplicitous); *State v. Ogle*, 8th Dist. No. 87965, 2007-Ohio-5066 (No retrial on mistried rape counts where no differentiation between counts existed); *State v. Tobin*, 2nd Dist. No. 2005 CA 150, 2007-Ohio-1345 (Where testimony distinguishes some incidents, conviction is proper on those counts).

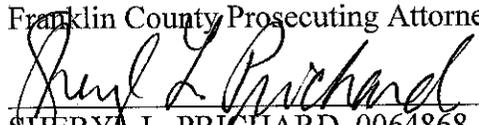
Here, the victims described some incidents such that they could be distinguished. The victims’ mother also added support to this testimony along with defendant’s admissions. The Eighth District Court did vacate the convictions on some counts but also noted that closing arguments and the jury forms offered distinctions regarding the remaining counts and upheld the convictions. *State v. Freeman*, 8th Dist. No. 92809, 2010-Ohio-3714, ¶¶ 37-38. The Eighth District Court acted in accordance with Ohio law and the convictions should be affirmed.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien urges that this Court affirm the judgment of the Eighth District Court of Appeals in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 2nd day of May, 2011, to the following known counsel involved in the case: (1) Katherine Mullin, Assistant Prosecuting Attorney, Office of the Cuyahoga County Prosecutor, 1200 Ontario St., 9th floor, Cleveland, Ohio 44113; (2) Erika Cunliffe, Assistant Cuyahoga County Public Defender, Office of the Cuyahoga County Public Defender, 310 Lakeside Ave. Suite 200, Cleveland, Ohio 44113; (3) Claire Cahoon, Assistant State Public Defender, Office of the Ohio Public Defender, 250 East Broad St., Suite 1400, Columbus, Ohio 43215, counsel for amicus curiae.


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