

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 2010-1671
 :
 v. : On Appeal from the
 : Eighth Appellate District,
 CHARLES FREEMAN, : Cuyahoga County
 : Case No. 92809
 :
 Defendant-Appellant. :

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

WILLIAM MASON (0037540)
Cuyahoga County Prosecuting Attorney

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender

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

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

**COUNSEL FOR APPELLEE,
STATE OF OHIO**

**COUNSEL FOR APPELLANT,
CHARLES FREEMAN**

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney

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

SHERYL L. PRICHARD (0064868)
Assistant Franklin County Prosecutor
373 South High Street, 13th Floor
Columbus, Ohio 43214
(614) 525-3555
(614) 525-6103 - FAX
slpricha@franklincountyohio.gov

**COUNSEL FOR AMICUS CURIAE,
FRANKLIN COUNTY PROSECUTOR**

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

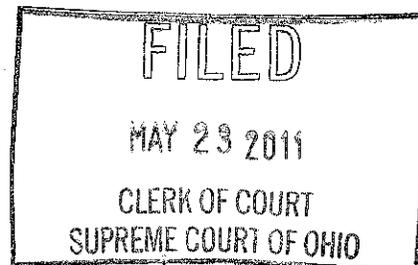


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ARGUMENT

As an initial matter, Amicus acknowledges that she inadvertently included an incorrect list of cases in a footnote, which were asserted to have been reversed under *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626. (Amicus Brief for Appellant, 4). As Amicus for the Appellee points out, many of the listed cases were not reversed on *Valentine* grounds. (Amicus Brief for Appellee, 19). The mistake was unintentional, as Amicus failed to include the correct list of more limited case law in her footnote.

In response, Amicus asks this Court to ignore the footnote in her initial brief, and instead, asks this Court to rely on the following. Ohio's courts of appeals have reversed multiple cases for undifferentiated indictments in the six years since *Valentine* was decided.¹ Those reversals were the result of the State's failure to provide sufficient notice and double jeopardy protections. Moreover, Ohio's courts of appeals have also affirmed when the State has appealed the trial-level dismissal of undifferentiated counts. Those courts found that undifferentiated counts were properly dismissed by the trial court when the State was given an opportunity pretrial to provide more specific information. Because no additional information was ever presented by the State, the counts were properly dismissed.²

Amicus for the Appellee incorrectly cites *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010, as not having been reversed under *Valentine*. (Amicus Brief for Appellee, 19).

¹ *State v. Thomas*, Cuyahoga App. No. 94492, 2011-Ohio-705; *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010; *State v. Shaw*, Montgomery App. No. 21880, 2008-Ohio-1317; *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066; *State v. Tobin*, Greene App. No. 2005 CA 150, 2007-Ohio-1345; *State v. Warren*, 168 Ohio App.3d 288, 2006-Ohio-4104; *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726.

² *State v. Nickel*, Ottawa App. No. OT-09-001, 2009-Ohio-5996, at ¶47-49 (upholding the dismissal of undifferentiated counts when "no discrete act was linked to any discrete allegation" even after the filing of a bill of particulars); *State v. Holder*, Cuyahoga App. No. 89709, 2008-Ohio-1271, at ¶11 (upholding trial-level dismissal when the defendant timely objected to undifferentiated counts and the State failed to provide additional differentiation).

The Eighth District Court of Appeals did reverse *Hilton*, in part, under *Valentine*, reversing eight rape counts, eight gross sexual imposition counts, and three kidnapping counts as undifferentiated. *Id.* at ¶31. Because the child victim in *Hilton* used general estimates about the amount of time during which the abuse occurred, the *Hilton* court held, “The use of this type of numerical estimation to support a multi-count indictment raises precisely the sort of due process violation warned against in *Valentine*.” *Id.* at ¶25.

The *Valentine* court held that multiple, undifferentiated charges in an indictment violate defendant’s due process rights to notice and protection from double jeopardy. *Valentine*, at 631. Appellant addresses notice in detail. But this Court must also find that carbon-copy indictments create an unjustifiable and unnecessary risk of violating the prohibition against double jeopardy. The Double Jeopardy Clause recognizes that the State should not “make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *United States v. Dixon* (1993), 509 U.S. 688, 696, quoting *Green v. United States* (1957), 355 U.S. 184, 187-188.

In the event any identically charged counts are resolved on insufficiency grounds, double jeopardy principles may forbid litigation of the counts that remain. There is no way to ascertain which conduct and count was actually insufficient. See, e.g. *Ogle*, 2007-Ohio-5066 (double jeopardy prevented mistried, undifferentiated counts from being retrial). Accord, *Dorsey v. Banks* (S.D. Ohio, 2010), 749 F. Supp.2d 715, 726 (writ conditionally granted to ascertain whether retrial on remaining counts was possible in light of Double Jeopardy clause).

Proper application of *Valentine* does not exclusively inure to the defendant’s benefit. Ohio’s courts of appeals have also reversed cases when the State has appealed the trial-level

dismissal of charges because it was not given an opportunity to correct undifferentiated counts pretrial.³ Those cases applied *Valentine* to ensure that the State had an opportunity to provide full discovery and a bill of particulars in order to differentiate the counts before facing dismissal.

Moreover, pretrial differentiation not only protects criminal defendants' rights. It makes sense for the court system as a whole. The Amicus for Appellee asserts that undifferentiated indictments can be corrected easily if only the defense would ask for a bill of particulars. (Amicus Brief of Appellee, 15-16). But a bill of particulars was requested in Mr. Freeman's case, and the State's response did not provide sufficient differentiation.

Similarly, the State argues that undifferentiated indictments are no longer at issue under the new Crim.R. 16 open discovery. (Brief of Appellee, 3, 21). But open discovery does not address concerns about the substance of grand jury proceedings stemming from undifferentiated charges. As the United States Supreme Court noted in *Russell v. United States* (1962), 369 U.S. 749, 770, the grand jury must actually determine "the question under inquiry." *Russell* was the foundation case for the Sixth Circuit's decision in *Valentine*. It underscored the importance of specificity for grand jury proceedings. If the grand jury process has not been properly conceived, then open discovery is no cure.

Moreover, without differentiation for the grand jury, the fear of multiplicity is a valid one. Without differentiation, it is impossible to know whether the grand jury agreed as to probable cause for each of the specific factual allegations. While Amicus noted this serious concern in the initial brief, neither Appellee nor Amicus to Appellee addressed that danger.

³ *State v. Davis*, Delaware App. No. 10CAA060042, 2011-Ohio-638, at ¶24-25 (reversing when the trial court sua sponte dismissed a count as duplicative pretrial without providing the State an opportunity to provide discovery or a bill of particulars); *State v. Barrett*, Cuyahoga App. No. 89918, 2008-Ohio-2370, at ¶27 (reversing when the trial court dismissed undifferentiated counts before giving the State an opportunity to link the charges).

Additionally, multiplicity amongst charges violates both the notice and due process protections afforded criminal defendants pretrial.

Additionally, Appellee cites to *United States v. Resendiz-Ponce* (2007), 549 U.S. 102, for the notion that not all statutes require a *Russell* level of specificity. (Appellee's Brief, 15). While that general idea is true, the instant case is distinguishable from *Resendiz-Ponce*, which addressed sufficiency of an indictment in light of an attempted offense. In that case, the attempted offense was illegal entry into the United States. *Id.* at 103.

The United States Supreme Court found that the indictment "implicitly alleged that the respondent engaged in the necessary overt act by alleging that he 'attempted' to enter the country." *Id.* at syllabus. *Resendiz-Ponce's* logic applies to sufficiency for indictment under an attempt of a particular crime, not the standards for indictment of all criminal offenses. Therefore, *Resendiz-Ponce* does not shed any light on the instant case, and Appellee's reliance on it is misplaced.

Ohio's courts of appeals have continued to apply the logic of *Valentine* in addressing undifferentiated counts. But the *Freeman* court failed to follow that jurisprudence in affirming some of Mr. Freeman's undifferentiated counts. A clear proposition of law from this Court applying *Valentine* would not create a new rule of law. Instead, it would provide necessary guidance to the appellate courts by definitely clarifying the constitutional implications of undifferentiated indictments.

CONCLUSION

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


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 **REPLY 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 Mullin, Assistant
Cuyahoga County Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland,
Ohio 44113, and Sheryl L. Prichard, Assistant Franklin County Prosecutor, 373 South High
Street, 13th Floor, Columbus, Ohio 43215, on this 23rd day of May, 2011.


CLAIRE R. CAHOON (0082335)
Assistant State Public Defender

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

#342844