

SEXUAL VIOLENCE, COUNTING TO TWENTY, AND THE METAPHYSICS OF CRIMINAL ACTS: AN ANALYSIS OF *VALENTINE V. KONTEH*

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On January 18, 1996, an eight-year-old child told her second-grade teacher that her stepfather had been abusing her.¹ The teacher took the child to the school principal, who reported the abuse to the County Department of Family Services in Cayuhoga, Ohio.²

Over the course of the previous ten months, Michael Valentine had committed numerous acts of sexual violence against his eight-year-old stepdaughter.³ Valentine had been living with the victim and her mother since 1991, and had been married to the victim's mother since 1994.⁴ Between March 1995 and January 1996, Valentine had abused his stepdaughter on dozens of occasions, including acts of forced anal penetration, forced vaginal penetration, and forced fellatio.⁵

A Cayuhoga County grand jury issued a forty-count indictment, charging Valentine with twenty counts of child rape and twenty counts of felonious sexual penetration of a minor.⁶ The indictment indicated that all forty charged offenses occurred in the ten-month span between March 1995 and January 1996.⁷ Each rape count was identically worded, as was each count of felonious sexual penetration.⁸

During the trial, the victim testified that Valentine forced her to perform fellatio in the family living room on approximately twenty occasions; that Valentine digitally penetrated her vagina in the family living room on approximately fifteen occasions; that Valentine forced anal penetration with his penis on approximately ten occasions; and that similar incidents had also occurred in the victim's bedroom, a sibling's bedroom, and Valentine's bedroom.⁹ Based on the evidence presented, the jury convicted Valentine

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¹ *Valentine v. Konteh*, 395 F.3d 626, 629 (6th Cir. 2005).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Valentine*, 395 F.3d at 629.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

of all forty counts.¹⁰ The lower state court sentenced Valentine to forty consecutive life terms in prison.¹¹

Valentine appealed, and the Ohio Court of Appeals for the Eighth District affirmed the convictions of all twenty rape counts, as well as fifteen of the felonious sexual penetration counts, but reversed five of the convictions for felonious sexual penetration and vacated the corresponding sentences.¹² Valentine then appealed to the Ohio State Supreme Court, which denied leave to appeal.¹³

Having exhausted the state post-conviction remedies, Valentine filed a writ of habeas corpus in the federal district court for the Northern District of Ohio.¹⁴ The district court issued the writ, finding that the indictment violated Valentine's due process rights.¹⁵ Because the indictment charged two sets of identical counts (the twenty child rape counts and twenty counts of felonious sexual penetration), the district court held that Valentine had not been notified of the crimes charged with reasonable certainty.¹⁶ As a result, the district court found that Valentine could not adequately protect himself against double jeopardy, and reversed all thirty-five remaining convictions.¹⁷

This Comment reviews the decision on appeal of the Sixth Circuit in *Valentine v. Konteh*.¹⁸ It examines difficulties in the court's analysis and investigates the underlying implications of the decision. It argues the Sixth Circuit's decision implicates a troubling conceptualization of crimes of sexual violence against young children.

The circuit court reinstated two convictions (one count of child rape and one count of felonious sexual assault), reversing the district court on Counts 1 and 21 and affirming the district court on Counts 2 through 20 and 22 through 35.¹⁹ The issue before the Sixth Circuit was whether the district court appropriately issued the writ of habeas corpus. In *Williams v. Taylor*,²⁰ the Supreme Court outlined the standard for federal habeas relief: a federal court may grant the writ of habeas corpus if the state court identifies the correct governing principle from this Court's decisions but

¹⁰ *Id.*

¹¹ *Valentine*, 395 F.3d at 629.

¹² *Id.* The court reversed five convictions because "no evidence supports the additional five counts." *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Valentine*, 395 F.3d at 630.

¹⁷ *Id.*

¹⁸ Khelleh Konteh brought the appeal to the Sixth Circuit. Konteh, the warden of the prison in which Valentine was an inmate, appealed the district court's unconditional issuance of the writ of habeas corpus, which resulted in the reversal of all thirty-five remaining convictions. *Id.*

¹⁹ *Id.* at 628.

²⁰ 529 U.S. 362 (2000).

unreasonably applies that principle to the facts of the prisoner's case.²¹ The Court was careful to point out "that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."²² This standard creates a high burden for the district court. In order to grant Valentine's writ of habeas corpus, the district court may not simply find that the Ohio state appellate court erred in its application of law; its application must have been unreasonable.

The legal test to be applied is found in *Russell v. United States*,²³ in which the Supreme Court delineated the criteria of specificity for indictments.²⁴ The majority opinion of the Sixth Circuit panel noted that *Russell* requires three elements: (1) the indictment must contain the charged offense; (2) the defendant must have adequate notice of the charges; and (3) the defendant must be protected against double jeopardy.²⁵ The question on appeal in *Valentine* is whether the Ohio appellate court unreasonably applied these criteria. If the Ohio appellate court was unreasonable in affirming the thirty-five convictions, then the writ of habeas corpus was correctly granted. If, however, the Ohio appellate court was not unreasonable (independent of whether the district court simply believes it to have been incorrect), then the writ should not have been issued and the convictions should stand.

The first element of the test is satisfied, because it is clear that Valentine's indictment contained the charged offenses for which he was later convicted. The circuit court, however, found the two other elements particularly problematic. Because the indictment contained two sets of identical, undifferentiated charges, it is not clear Valentine had adequate notice, or protection against double jeopardy.

The court of appeals recognized two concerns regarding adequate notice. First, the indictment covered a relatively broad time-frame: Valentine was charged with forty crimes covering a ten month span. No greater specificity was given with regard to the time for any of the individual crimes.²⁶ However, the Sixth Circuit was not convinced that the lack of specificity with regard to time prevented fair notice.²⁷ Several states recognize the difficulty in establishing more precise time periods, especially when the victim is a young child.²⁸ The Sixth Circuit cited Ohio state appellate court holdings, which found that "particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity."²⁹

²¹ *Id.* at 413 (O'Connor, J., concurring).

²² *Id.* at 410 (emphasis in original).

²³ 369 U.S. 749 (1962).

²⁴ *Id.* at 763-64.

²⁵ *Valentine*, 395 F.3d at 631.

²⁶ *Id.* at 632.

²⁷ *Id.*

²⁸ *Id.* at 634 n.2.

²⁹ *State v. Daniel*, N.E.2d 174, 180 (Ohio 1994).

Because of the psychological and emotional trauma inflicted upon a young child by an adult rapist, such victims can hardly be expected to recall specific dates of criminal conduct. It is clear that requiring more specificity from an eight-year-old victim—such as the victim in *Valentine*—would impose an unreasonably high burden. In many cases, such a burden would be so high that child rapists might escape prosecution with impunity. To prevent against such injustice, flexibility must be given with regard to time periods and dates, especially when the victim is of a young age.

The Sixth Circuit understood these concerns and found the broad date range to be acceptable, noting that “we must acknowledge the reality of situations where young child victims are involved.”³⁰ The court of appeals recognized that such a broad range is sometimes all that can be reasonably expected or required when the victim of sexual violence is a child. Therefore, a broad date range did not necessarily violate the requirement for adequate notice.

The circuit court also doubted that the adequate notice requirement was met because the indictment charged two sets of identical, undifferentiated crimes, thus “Valentine had little ability to defend himself.”³¹ The court noted that “the forty criminal counts were not anchored to forty distinguishable criminal offenses.”³² Because of this lack of distinction, Valentine could not defend himself against any specific offense; he could only defend against the group of charges as a whole. On this reasoning, the court observed, “[t]he jury could not have found Valentine guilty of Counts 1–5, but not Counts 6–20.”³³

The Sixth Circuit illustrated the level of differentiation required amongst multiple counts by citing several examples. For instance, the indictment could have specified different locations within the house, different sexual actions, or different times of day.³⁴ However, the indictment failed to distinguish the charges in any of these ways. Thus, the court concluded that Valentine did not receive adequate notice because he “could only successfully defend against some of the charges by effectively defending against all of the charges.”³⁵

After finding that *Russell*'s requirement of adequate notice was not met, the court considered the requirement of double jeopardy protection. The Sixth Circuit noted two double jeopardy concerns. First, it was unclear what crimes Valentine could no longer be prosecuted for. Again citing the lack of differentiation amongst the charges, the court noted that it could not “be sure what factual incidents were presented and decided by

³⁰ *Valentine*, 395 F.3d at 632.

³¹ *Id.* at 633.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 633–34.

³⁵ *Valentine*, 395 F.3d at 633–64.

this jury.”³⁶ Because of the lack of specificity of the charges, it was unclear *what* Valentine was convicted of. As a result, he may not be protected in the future from prosecution of the same offenses. The state argued in response that it would stipulate that Valentine would not be indicted for child rape or felonious sexual assault within the time period for which he was already tried, but the court was not persuaded by this stipulation.³⁷

The court cited a second double jeopardy concern: “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.”³⁸ The Sixth Circuit concluded that, due to lack of specificity and differentiation of the charges, *Russell*’s requirements for both adequate notice and double jeopardy protection were violated. Thus, the district court appropriately granted the writ of habeas corpus. However, the Sixth Circuit noted that the writ should not have been granted as to Counts 1 (the first child rape count) and 21 (the first felonious sexual penetration count). The concerns regarding the repeated counts were not present with the initial counts, because “[t]he prosecutor presented substantial evidence of ongoing abuse, against which Valentine had notice and opportunity to defend.”³⁹

In dissent, Judge Gilman argued that the majority inappropriately applied the standard from *Williams v. Taylor*. His opinion stressed that a writ of habeas corpus should only be granted if the state court’s decision was unreasonable.⁴⁰ The majority simply applied the law from *Russell* to *Valentine*, instead of determining whether the state court’s application was unreasonable.

The arguments raised in the dissent expose some of the fundamental flaws in the reasoning employed by the majority. As Gilman points out, the standard for granting a writ of habeas corpus is that the state court applied the law unreasonably, not simply incorrectly.⁴¹ The Supreme Court, in *Williams*, explained that the writ can be granted “if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.”⁴² Rather than allowing district courts broad discretion in granting writs of habeas corpus, the Court in *Williams* makes it clear that the unreasonableness of a state court decision must reach the level of a direct contradiction of the Supreme Court based on indistinguishable facts.

The dissent in *Valentine* emphasizes this point, noting that “no Supreme Court case has ever found the use of identically worded and factu-

³⁶ *Id.* at 635.

³⁷ *Id.*

³⁸ *Id.* at 634–35.

³⁹ *Id.* at 637.

⁴⁰ *Valentine*, 395 F.3d at 641 (Gilman, J., dissenting).

⁴¹ *Williams*, 529 U.S. at 410.

⁴² *Id.* at 412.

ally indistinguishable indictments *unconstitutional*.⁴³ Here, the dissent demonstrates that the decision by the Ohio appellate court (which upheld the remaining thirty-five convictions) does not directly conflict with any Supreme Court precedent. Lacking any such direct conflict, it is difficult to argue that the Ohio appellate court decision was unreasonable. There is no Supreme Court decision with materially similar facts to this case, making it likely that reasonable results could be found. While it may be *incorrect* to conclude that Valentine was given adequate notice, it is not entirely *unreasonable*. After all, given the facts (as found by the jury) that Valentine committed forty criminal acts, it is plausible that he knew precisely what crimes were referred to in the charges against him.

Additionally, the argument that Valentine was protected from double jeopardy is *not* unreasonable, though it may be incorrect. It is reasonable to conclude that, because the prosecution stipulated it would not charge Valentine with crimes during the interval in question, Valentine was not in danger of double jeopardy. The dissent does not necessarily maintain that these are *correct* arguments—only that they are *reasonable*. Because the standard is only that of reasonableness, the dissent's position is convincing.

Implicit in the majority's reasoning is a deeper confusion about the nature of criminal conduct that has disturbing repercussions for the prosecution and deterrence of repeated child sexual abuse. Although the majority asserts that it is applying existing legal precedent in the *only* reasonable way, such an assertion is suspect given the reasonableness of a contrary application. Fundamental to the majority opinion is a particular conceptualization of crime. The opinion makes several provocative statements on the nature of crime. In announcing the court's opinion, the majority writes, "we regard the 20 child rape counts as charging one crime and the 20 penetration counts as charging another single crime."⁴⁴ Valentine was convicted of forty counts of sexual violence, yet the majority believes that he was only charged with two crimes. Although the jury found that Valentine in fact committed twenty distinct acts of child rape, the majority views these twenty acts as "one crime."

This result is counterintuitive because each time Valentine raped his stepdaughter, the act was a unique crime. The majority, however, did not agree, stating that, "Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts."⁴⁵ This idea may be inconsistent with the conceptual understanding of a criminal act.⁴⁶ For the majority, the act of child rape is *one* criminal act that occurred twenty times.

⁴³ *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting) (emphasis in original).

⁴⁴ *Id.* at 629.

⁴⁵ *Id.* at 632.

⁴⁶ WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 208–13 (2003) (explaining the standard correspondence between one crime and one criminal act).

The implications of this conception of crime are severe, from the perspective of both the victim and the rapist. Viewed from the perspective of the victim, saying that Valentine committed only “one crime” disregards the repeated abuse that the victim endured. The majority insists on specification, suggesting differentiation between charges regarding time of day, location in the house, or sexual act. But it is possible that many of these variables were in fact constant. Although the specific details in this case are largely unavailable due to the victim’s difficulty in recalling specifics, it is not difficult to imagine a consistent pattern of a child rapist. Because Valentine lived with his victim and her mother, he may have developed a routine. It is possible that his multiple acts of rape all occurred at the same time of day. Perhaps each act of rape occurred in the same room, or in the same manner.

But even with some repeating variable, would we be inclined to say that only one crime was committed? From the victim’s perspective, each criminal act is a new and separate violation.⁴⁷ Each rape generates its own physical, psychological, and emotional harms.⁴⁸ The majority in *Valentine* ignores this, implying instead that twenty rapes only count as twenty separate crimes if the circumstances of each are different. At several points in the decision, the majority cites to cases where differentiation between crimes was made because of different victims.⁴⁹ While such differentiation is feasible when there are multiple victims, the evidence in this case precludes such differentiation.

The decision effectively gives greater weight to crimes committed against different victims than to multiple crimes committed against the same victim. Had Valentine raped twenty different children (even if at the same place, in the same manner, and at the same time of day) the majority would agree that there were twenty distinct criminal acts. But because Valentine in fact raped only one victim twenty separate times, the majority finds that there was only one criminal act.

This decision fails to appreciate the harm done to the victim from each successive criminal act. From the victim’s point of view, it was not one criminal act. Just as the first rape resulted in unimaginable injuries, both physical and non-physical, so too did the second rape, and the third rape, and each subsequent rape. By regarding Valentine’s conduct as a single crime, the majority ignores the immense harm done to the victim. Thus, from the victim’s perspective, the majority’s analysis is deeply troubling.

Although the majority insists that it is applying the law in the only reasonable manner, it also fails to capture the nature of criminal conduct from the assailant’s perspective. Each successive forcible act of sexual

⁴⁷ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 42 (1992).

⁴⁸ *Id.*

⁴⁹ See *Valentine*, 395 F.3d at 636 (discussing sexual abuse of three victims) (citing *Isaac v. Grider*, 211 F.3d 1269 (Ky. 2000)); *id.* at 637 (discussing sexual offenses against two victims) (citing *Madden v. Tate*, 830 F.2d 194 (Ohio 1987)).

violence was a distinct act. The jury found that he committed forty acts of sexual violence; Valentine abused his eight-year-old stepdaughter on forty separate occasions. There was not just one moment of abuse, as the majority opinion implies. Valentine chose, on forty separate occasions, to abuse his stepdaughter, and each act required a separate intention.

The majority opinion disregards each of these unique choices and blurs them into a single articulation by stating that Valentine committed only one criminal act of child rape and one criminal act of felonious sexual penetration.⁵⁰ To say that Valentine committed a single criminal act for each category of abuse is to deny his exercise of free choice on each of the other thirty-eight occasions. The only way to fully recognize his continued intentions and decisions to act is to hold him responsible for each and every one of his criminal acts. By convicting Valentine of forty acts of sexual violence, the Ohio jury recognized his repeated decisions to violate his victim, and held him to the level of responsibility dictated by his chosen course of action. The Sixth Circuit, however, refused to hold him responsible for *each* of his criminal choices.

Moreover, the majority failed to distinguish Valentine from a child rapist who in fact only committed one crime. But Valentine is a serial rapist. He sexually abused his stepdaughter forty times in various ways, yet he was sentenced as if he only committed two sexual offenses. This result eliminates any deterrence effects after a perpetrator has committed the first rape. As long as the court convicts him of only one count, the additional harm inflicted on victims by Valentine, and other serial rapists, will go undeterred and unpunished.

By holding Valentine accountable for only one count of child rape and one count of felonious sexual assault, the Sixth Circuit ensured that “Valentine c[ould] not be subsequently charged with the same crimes against the stepdaughter during the stated period.”⁵¹ Thus, Valentine will never be held responsible for those thirty-eight acts of sexual violence. The majority adopted what it decided was the only “reasonable” legal solution. Reasonable or not, the holding in *Valentine* has troubling implications for what constitutes a crime, especially in cases of repeated sexual violence against young children.

⁵⁰ *Id.* at 629.

⁵¹ *Id.*