CRIMINAL COURT OF THE CITY OF NEW YORK, KINGS COUNTY

People v. Kuffuor-Afriyie[1]
(decided July 21, 2009)

Eric Kuffuor-Afriyie was arrested and "charged with four counts of Sexual Abuse in the Third Degree . . . and one count of Endangering the Welfare of a Child."[2] He made a pre-trial motion to dismiss[3] claiming that the complaint, as supplemented by the Bill of Particulars, violated provisions of the New York Criminal Procedure Law[4] ("CPL"), "the Sixth Amendment of the United States Constitution,[5] and [Article I, Section 6 of] the New York Constitution."[6] More specifically, he contended that the accusatory instrument was defective because it did not provide him with reasonable and adequate notice of the charges, thereby hindering his ability to plead a defense or protect his double jeopardy rights.[7] Judge Gerstein of the

[1] 2008KN072116, 2009 WL 2184367, at *1 (N.Y. City Crim. Ct. 2009).

[2] *Id.* (internal citations omitted). *See also* N.Y. PENAL LAW § 260.10 (1) (McKinney 1990) ("A person is guilty of endangering the welfare of a child when: He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . . ."); N.Y. PENAL LAW § 130.55 (McKinney 2001) ("A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent . . . .").

[3] *Kuffuor*, 2009 WL 2184367, at *1.

[4] N.Y. CRIM. PROC. LAW § 100.40 (McKinney 1985) provides, in pertinent part: "An information, or a count thereof, is sufficient on its face when: The allegations . . . provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information . . . ." *See also* N.Y. CRIM. PROC. LAW § 100.45 (McKinney 1982) ("The provisions of section 200.95, governing bills of particulars with respect to indictments, apply to informations, to misdemeanor complaints and to prosecutor's informations.").

[5] U.S. CONST. amend. VI, states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."

[6] N.Y. CONST. art I, § 6, states, in pertinent part: "In any trial in any court whatever the party accused . . . shall be informed of the nature and cause of the accusation . . . . No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Kuffuor*, 2009 WL 2184367, at *1, *2.

[7] *Kuffuor*, 2009 WL 2184367, at *3.

Kings County Criminal Court[8] relied on well-established New York law when he considered the constitutional sufficiency of the accusatory instrument.[9] Analyzing the matter "on an ad hoc basis,"[10] Judge Gerstein found no violation of Kuffuor-Afriyie's statutory or constitutional rights, and denied his motion to dismiss.[11]

In August 2007, a sixteen-year-old girl[12] was sexually abused after a visit to church with her family.[13] While driving her home from choir practice between February and May of the following year, the perpetrator repeated his opportunistic lewd attacks on H.B. three more times.[14]

Kuffour-Afriyie was arrested and "charged with four counts of Sexual Abuse in the Third Degree and one count of Endangering the Welfare of a Child."[15] Following his arrest and indictment, he requested that the government produce a Bill of Particulars containing specific dates and occurrences of the alleged offenses.[16] After conducting several interviews with the complainant, the government was able to ascertain that the first offense was committed "on an afternoon after [H.B.'s] family had taken her to church, and [that] the second, third, and fourth offenses occurred after the complainant attended choir practice and the Defendant drove her home."[17] However, the government could not specify the exact dates or times of the offenses.[18] The defendant made a pre-trial motion to dismiss the complaint arguing that the accusatory instrument was overly broad because it did not afford him sufficient notice of the charges to enable him to "adequately prepare and conduct a defense," and therefore,

[8] *Id.* at *1.

[9] *See generally Kuffuor*, 2009 WL 2184367.

[10] *Id.* at *4.

[11] *Id.* at *5.

[12] *Id.* at *1, *2 n.1 (considering the age of the victim and the nature of the offense, the court attributed to the Complainant a fictitious name, "H.B."). *See also* N.Y. CIV. RIGHTS LAW § 50-b (1) (McKinney 2006) ("The identity of any victim of a sex offense . . . shall be confidential.").

[13] *Kuffuor*, 2009 WL 2184367, at *4. The complaint alleged that "the Defendant . . . touched . . . the . . . Complainant's breasts and buttocks." *Id.* at *1.

[14] *Id.* at *4.

[15] *Id.* at *2.

[16] *Id.*

[17] *Kuffuor*, 2009 WL 2184367, at *4.

[18] *Id.* at *2.

failed to protect him from a future prosecution for the same offense.[19] Also, he contended that the government's failure to particularize the date and time of the alleged offenses was unreasonable and unjustified as the government could have identified more specific dates and times if it had acted with "due diligence."[20] In opposition, the government argued that the four distinct one-month and two-month time periods,[21] amplified by other events in the Bill of Particulars, "establish[ed] a frame of reference" in determining the alleged time spans that was not unreasonably excessive as to deprive the defendant of the opportunity to prepare a defense.[22]

The court recognized the fundamental significance of the constitutional requirement " 'to be informed of the nature and cause of the accusation,' "[23] but noted that the government is not legally mandated to plead a single date when, as in this case, "time is not a[] [material] element of [the] crime."[24] Moreover, the issue of whether the time periods of the alleged misconduct as set forth in the indictment provide a criminal defendant with reasonably sufficient notice of the charges against him as to afford him his constitutional rights is left to the court's interpretation, and is generally resolved "on an ad hoc basis" by taking all relevant facts and circumstances into consideration.[25]

In reaching his conclusion, Judge Gerstein evaluated the age and intelligence of the complainant, her "ability . . . to particularize the date and time of the alleged . . . offense," the nature of the offense, and how much time had passed between the alleged criminal act and the arrest or indictment.[26] After balancing these factors,

[19] *Id.* at *3.

[20] *Id.* at *4.

[21] *Id.* at *1.

[22] *Kuffuor*, 2009 WL 2184367, at *2.

[23] *Id.* (quoting People v. Morris, 461 N.E.2d 1256, 1259 (N.Y. 1984)).

[24] *Id.* at *2. *See also* People v. Oglesby, 787 N.Y.S.2d 401, 403 (App. Div. 3d Dep't 2004) (" '[W]hen the period of time is not an essential element of any of the charged crimes, an approximation of time is satisfactory.' " (quoting People v. Johnson, 703 N.Y.S.2d 545, 546 (App. Div. 3d Dep't 2000))).

[25] *Kuffuor*, 2009 WL 2184367, at *4. *See also* People v. Sedlock, 869 N.E.2d 14, 17 (N.Y. 2007) ("[T]he 'determination of whether sufficient specificity to adequately prepare a defense has been provided to a defendant by the [accusatory instrument] and the bill of particulars must be made on an *ad hoc* basis by considering all relevant circumstances.' " (alteration in original) (quoting *Morris*, 461 N.E.2d at 1259)).

[26] *Kuffuor*, 2009 WL 2184367, at *3.

Judge Gerstein decided that two one-month and two two-month long time frames were not per se unreasonable.[27] In fact, voluminous legal authority demonstrates that comparable time periods are reasonably specific.[28] Furthermore, the indictment against Kuffuor-Afriyie contained "the nature of the charges, the conduct underlying them, the place of the crimes, the witnesses present, and the time of the offense, within a reasonably designated period."[29] Accordingly, the court held that the accusatory instrument provided adequate and reasonable notice, and therefore, comported with both "Federal and State Constitutions."[30]

In addition, the court noted that the government is under no obligation to verify the schedule of the complainant's choir practice, medical appointments, or church attendance.[31] If the defense properly investigated the facts and circumstances surrounding the allegations, it would have been "able to obtain information as to dates and times of church services and choir practice with the same ease or difficulty as would the [government]."[32] The judge reasoned that Kuffuor-Afriyie's request went "far beyond the specificity required in a Complaint or Bill of Particulars."[33] Furthermore, he equated the defendant's request with "pre-trial discovery . . . in a civil case," and refused to place such a burden on the government.[34] Therefore, he denied the motion to dismiss.[35]

A criminal defendant is entitled "to be informed of the nature and cause of the accusation" against him.[36] This right is guaranteed

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[27] *Id.* at *5.

[28] *See, e.g.*, People v. Case, 814 N.Y.S.2d 272, 273 (App. Div. 2d Dep't 2006) ("[T]wo-month intervals [in the case of rape and incest] were reasonably specific and provided the defendant with adequate notice."); *Oglesby*, 787 N.Y.S.2d at 403-4 (holding one, two, and three-month periods " 'sufficiently adequate to comport with . . . due process' . . . provid[ing] defendant with sufficient notice to prepare a defense" (quoting People v. Keefer, 692 N.Y.S.2d 233, 234 (App. Div. 3d Dep't 1999))).

[29] *Kuffuor*, 2009 WL 2184367, at *5 (citation omitted).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Kuffuor*, 2009 WL 2184367, at *5.

[35] *Id.*

[36] U.S. CONST. amend. VI. *See also* Russell v. United States, 369 U.S. 749, 766 (1962) (condemning "[a] cryptic form of indictment" because it forces "the defendant to go to trial with the chief issue undefined," allows "his conviction to rest on one point and the affir-

by the Sixth Amendment to the United States Constitution and is an imperative part of fundamental fairness and procedural due process. Sufficiency of notice is particularly important in criminal cases because an individual's personal liberty is at stake. Courts have interpreted and analyzed the constitutional adequacy of notice under a two-pronged test.[37] First, the indictment or information must fairly and "sufficiently apprise[] the defendant of what he must be prepared to meet," thereby enabling him to present a defense against the charges.[38] Second, the charges must be sufficiently pleaded to avoid any future prosecution for the same crime, which protects the defendant against double jeopardy.[39] In *United States v. Cruikshank*, the United States Supreme Court reiterated that these goals can be achieved if the facts, and not only conclusions of law, are stated "with reasonable particularity of time, place, and circumstances."[40] In addition, the Court did not focus solely on the defendant's rights as it recognized that criminal charges pleaded with reasonable specificity benefit the government and the courts as well.[41] For over a century, federal courts have successfully employed these criteria in determining the sufficiency of the constitutional notice requirement.[42]

In 1999 the Second Circuit Court of Appeals decided *United*

mance of the conviction to rest on another," and "gives the prosecution [a] free hand on appeal to fill in the gaps of proof by surmise or conjecture"); United States v. Simmons, 96 U.S. 360, 362 (1878) ("[T]here is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him."); United States v. Cruikshank, 92 U.S. 542, 557-58 (1876) ("[T]he indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged.' " (quoting United States v. Mills, 32 U.S. 138, 142 (1833))).

[37] *Russell*, 369 U.S. at 763.

[38] *Id.* at 763. In order to meet this standard " '[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.' " *Id.* at 762 (quoting FED. R. CRIM. P. 7 (c) (1) (2009)).

[39] *Id.* at 764; *Cruikshank*, 92 U.S. at 558; Valentine v. Konteh, 395 F.3d 626, 631 n.1 (6th Cir. 2005).

[40] *Cruikshank*, 92 U.S. at 558.

[41] *Id.* ("[I]nform[ing] the court of the facts alleged . . . [allows] it [to] decide whether they are sufficient in law to support a conviction."). *See also Russell*, 369 U.S. at 769 n.15 ("[A]nother purpose served by the indictment is to inform the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts, he may be able to do so intelligently.") (citation omitted).

[42] *Cruikshank*, 92 U.S. at 558. *See also* United States v. Hess, 124 U.S. 483, 487 (1888).

States v. Walsh,[43] which concerned the sufficiency of notice, particularity in the indictment.[44] In *Walsh*, Norvin Fowlks was an inmate at Orleans County jail in Albion, New York between January 1 and 12, 1991; January 18 and February 19, 1991; and May 26, 1992 and January 20, 1993. At all times herein, John Walsh was a corrections officer at that facility.[45] According to the indictment, Walsh, standing six-foot-two-inches tall and weighing over three hundred pounds, stepped on Fowlks's "penis on a date between January 4, 1991 and March 8, 1991 . . . . [S]ometime between May 26, 1992, and December 1, 1992 . . . . [And] sometime between May 26, 1992 and July 22, 1992."[46] After a jury trial, Walsh was found guilty of the willful deprivation of a person's constitutional rights "while acting under color of law."[47] He appealed the conviction and argued, *inter alia*, that the government "failed to provide him with adequate notice of the conduct charged" and "failed to protect him against double jeopardy."[48] Walsh contended that the time periods in the indictment were overly broad and that the charges were "fatally multiplicitous and/or duplicitous."[49] The Second Circuit Court of Appeals relied upon the criteria set forth in *Russell v. United States* in determining whether Walsh was given reasonable opportunities to plead his defense and protect himself against double jeopardy.[50] After reviewing the whole record, the court found that the government's Bill of Particulars disclosed "the names of each witness to each count," explained the reason for each date range and particularized the location and the facts of each alleged act.[51] Additionally, witness testimony clearly made every count distinguishable from the others. For example, the offenses charged in the first and second counts took place in a different jail cell than the offense charged in the third count.[52] Moreover,

[43] (*Walsh II*), 194 F.3d 37 (2d Cir. 1999).

[44] *Id.* at 40.

[45] United States v. Walsh (*Walsh I*), 27 F. Supp. 2d 186, 188-90 (W.D.N.Y. 1998).

[46] *Walsh II*, 194 F.3d at 40-41.

[47] *Id.* at 40.

[48] *Id.* at 41.

[49] *Id.*

[50] *Id.* at 45.

[51] *Walsh II*, 194 F.3d at 41.

[52] *Id.* at 41-43. According to witness testimony, the conduct described in the first and second counts occurred in a cell that had no toilet-sink while the offense described in the third count took place in a cell with a toilet-sink. *Id.*

the witnesses observed the victim in different body positions during two different instances of the assault.[53] Furthermore, extra details provided by the witnesses gave the defendant reasonable grounds to differentiate the separate incidents of assault and to prepare separate defenses.[54]

In *Walsh*, the court gave serious consideration to the issue of double jeopardy. Even though Walsh was more concerned about being prosecuted twice for the same crime in the same case rather than in a later prosecution, the court analyzed "the sufficiency of the indictment, because minimizing that risk is a primary aim of the sufficiency requirements."[55] Again, the court concluded that the facts provided in the indictment by the government were sufficient to ensure that the defendant was not punished twice for the same act.[56] The court used the same reasoning to conclude that the charges were not multiplicitous or duplicitous.[57] Based on this reasoning, the court concluded that the indictment and the Bill of Particulars provided the defendant with adequate notice of the charges against him, and therefore, withstood constitutional muster.[58]

In *Valentine v. Konteh*, Michael Valentine was charged with and prosecuted for "[twenty] . . . counts of child rape . . . and [twenty] counts of felonious sexual penetration" of his stepdaughter who

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[53] *Id.* The victim was lying on the floor in the third count, but in a kneeling and standing positions begging for a cigarette in the first and second counts respectively. *Id.*

[54] *Walsh II*, 194 F.3d at 41-43. The government distinguished the occurrences of criminal conduct by providing the following specifics: (1) one instance occurring following a witness's "holiday break at the Police Academy;" (2) Fowlks having "a bandage on his hand" at the time of the third incident after a visit to the medical center on June 5, 1992; and (3) the existence or absence of a toilet-sink fixture in the cell where the alleged misconduct occurred. *Id.*

[55] *Id.* at 44 n.5.

[56] *Id.* at 45.

[57] *Id.* at 46. The court noted that

> even on its face, the Indictment is not clearly multiplicitous. . . . Counts II and III are at least somewhat distinguished from one another by the body position of the victim, as well as by different, but overlapping time frames. Moreover, the evidence presented at trial confirmed that: (1) the cells in Counts II and III were different; (2) the incident alleged in Count III occurred after June 5, 1992; and (3) Fowlks was standing during the incident alleged in Count II, while he was lying on the floor during the incident alleged in Count III.

Walsh II, 194 F.3d at 46.

[58] *Id.* at 47.

was eight years old at the time of the alleged abuse.[59] The indictment alleged that the purported acts occurred during a ten-and-a-half month period.[60] After a jury convicted Valentine of "all [forty] counts [of sexual abuse], . . . [he was] sentenced to [forty] consecutive life [sentences]."[61] Valentine filed and was granted a writ of habeas corpus on the grounds that the Ohio Court of Appeals' decision that the indictment was constitutionally sufficient was " 'an unreasonable application of [] clearly established Federal law.' "[62] The crux of Valentine's challenge was that his trial and ultimate conviction were a result of a defective indictment that did not specify or distinguish the dates or the conduct of the alleged forty separate criminal acts.[63] Moreover, Valentine argued that he was unable to present an alibi defense against the vague accusations and was not protected against double jeopardy because he did not receive sufficient notice of the charges against him.[64]

The Sixth Circuit Court of Appeals gave significant weight to a criminal defendant's constitutional right to fair and adequate notice when it stated that the notice requirement applies in both federal and state prosecutions.[65] In reaching its determination, the court relied on *Russell* and *Cruikshank* for guidance.[66]

In *Valentine*, however, the court came to a different conclusion and found that the charges were not sufficiently pleaded to meet the *Russell* notice standard.[67] Notably, the court did not find a problem with "the wide date range" provided in the indictment when it

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[59] *Valentine*, 395 F.3d at 628, 629.

[60] *Id.* at 629. Specifically, the indictment stated that the acts "occurred between March 1, 1995 and January 16, 1996." *Id.*

[61] *Id.* at 629.

[62] *Id.* at 630 (quoting 28 U.S.C.A. § 2254 (d) (1) (1996)).

[63] *Valentine*, 395 F.3d at 630.

[64] *Id.*

[65] *Id.* at 631. *See also* Cole v. Arkansas, 333 U.S. 196, 201 (1948). The United States Supreme Court in *Cole* stated that

> [n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Id.

[66] *Valentine*, 395 F.3d at 630, 631 n.1.

[67] *Id.* at 636, 638.

agreed with the government's position that it is nearly impossible to establish the exact dates and times with specificity in sexual abuse cases involving young victims.[68] Generally, children do not remember precise dates and times, especially in cases of repeated abuse. In addition, they are emotionally traumatized, sometimes threatened, and often want to forget about the abuse instead of remembering the details. Furthermore, because of embarrassment, they do not report the abuse for a long time. In some instances, many years pass before the sexual misconduct is discovered. It is unreasonable to expect the child to remember the exact dates of the specific instances of the abuse.[69] In reaching its conclusion, the *Valentine* court made reference to several child abuse cases where broad time frames were held not to be violative of "constitutional notice requirements."[70]

Rather than dismissing the indictment based on constitutional notice standards, the court dismissed thirty-eight counts in the indictment because the government made no distinctions "within each set of [twenty] counts."[71] The forty counts contained in the indictment were simply a "carbon-copy" of two criminal charges—child rape and felonious sexual penetration.[72] Accordingly, the defendant could only be prosecuted, tried and convicted of the commission of "two criminal acts that occurred twenty times each, rather than [] forty separate criminal acts."[73] The court held that the defendant was over-convicted and was "likely subjected to double jeopardy in his

[68] *Id.* at 632.

[69] *Id.*

[70] *Id.*; *see, e.g.*, Isaac v. Grider, No. 98-6376, 2000 WL 571959, *1, *5 (6th Cir. May 4, 2000) (finding that a period of four months was sufficiently narrow to satisfy the "adequate notice" requirement); Parks v. Hargett, No. 98-7068, 1999 WL 157431, *2, *4 (10th Cir. Mar. 23, 1999) (holding that a sixteen-month time period was not overly broad, but was sufficient to satisfy the constitutional requirements "of a fair trial [and] due process"); Fawcett v. Bablitch, 962 F.2d 617, 618-19 (7th Cir. 1992) (holding that a six-month time frame "afforded [the defendant] notice sufficient to permit him to defend against the charge [of unlawful sexual contact]"); Hunter v. New Mexico, 916 F.2d 595, 597, 600 (10th Cir. 1990) (rejecting the defendant's argument that the information that charged him with criminal sexual penetration of a thirteen-year-old child during a period of three years "was deficient in failing to identify specific dates for the crimes alleged") (citation omitted); Madden v. Tate, No. 85-3061, 1987 WL 44909, *1, *1, *3 (6th Cir. Sept. 30, 1987) (finding that a six-month time period constituted "sufficient notice of the charges").

[71] *Valentine*, 395 F.3d at 632.

[72] *Id.* at 638-39.

[73] *Id.* at 632.

initial trial."[74] The Sixth Circuit Court of Appeals set aside Valentine's conviction of thirty-eight undifferentiated counts, but sustained his conviction on the two counts that were sufficiently pleaded and proven at trial.[75]

Judge Ronald Lee Gilman dissented from part of the majority's opinion and heavily criticized its reasoning.[76] He viewed child sexual abuse offenses as having a continuing nature.[77] As such, under the majority's holding, the offenders could not be prosecuted and tried for multiple sexual acts committed against children unless the victim could remember the date, time, and specific details for each incident.[78] According to Judge Gilman, "[s]uch an outcome is contrary to judicial precedent and is not constitutionally required."[79] Also, in response to the government's case, Valentine could have presented an alibi "about his daily whereabouts or . . . his relationship with the little girl" to the jury.[80] With respect to the double jeopardy claim, Judge Gilman noted that it applies only to future prosecutions for the same conduct and not to identical charges in the same indictment.[81] Finally, Judge Gilman viewed the majority's position that the defendant committed only two criminal acts as repugnant to common sense and public policy.[82] Such reasoning "fails to appreciate the harm done to the victim from each successive criminal act."[83]

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[74] *Id.* at 636.

[75] *Id.* at 628-29, 638-39.

[76] *Valentine*, 395 F.3d at 639 (Gilman, J., concurring in part and dissenting in part).

[77] *Id.* at 640.

[78] *Id.* at 641.

[79] *Id.*

[80] *Id.* ("The effect of failing to recall time and place details is a matter appropriately assessed by the jury, not a per se rule.").

[81] *Valentine*, 395 F.3d at 642.

[82] *Id.*

[83] Phil Telfeyan, Comment, *Sexual Violence, Counting to Twenty, and the Metaphysics of Criminal Acts: An Analysis of* Valentine v. Konteh, 29 HARV. J.L. & GENDER 493, 499 (2006). The author discusses the continuing nature of sexual abuse in the context of the *Valentine* case when he states:

> 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.

Id.

New York courts have developed a better-structured framework for determining the degree of particularity of charges that is needed in an accusatory instrument to withstand constitutional scrutiny. The principal element of the analysis is whether the government conducted a reasonably diligent and thorough investigation in an effort to ascertain specific information as to the dates, times, and other details of the alleged offense.[84] In *People v. Morris*, the New York Court of Appeals utilized a "reasonableness test" instead of a bright-line rule and advanced a non-exclusive list of factors for courts to consider when evaluating the government's effort in providing adequate notice.[85] First, the court stated that "the age and intelligence of the victim and other witnesses" are of great importance.[86] Second, the courts should look at all of "the surrounding circumstances."[87] Finally, the court noted that "the nature of the offense" alleged plays an integral role in the analysis.[88]

In *Morris*, the defendant was indicted "for rape and sodomy, each in the first degree."[89] The government alleged that the defendant had sexual intercourse with a six-year-old child who lived in his home, and engaged in deviate sexual intercourse with his own five-year-old daughter in November 1980.[90] The government subsequently filed a Bill of Particulars, which narrowed the dates of the criminal acts and specifically stated the location where they were committed.[91] In response to the government's alibi demand, Morris maintained that he could not provide an alibi because he did not know what specific dates and times to provide.[92] Shortly thereafter, he "moved to dis-

[84] *Kuffuor*, 2009 WL 2184367, at *3. *See also Morris*, 461 N.E.2d at 1260 ("Reasonableness and fairness demand that the indictment state the date and time of the offense to the best of the [government's] knowledge, after a reasonably thorough investigation has been undertaken to ascertain such information.").

[85] *Morris*, 461 N.E.2d at 1260.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1257.

[90] *Morris*, 461 N.E.2d at 1257.

[91] *Id.* The Bill of Particulars specified that the acts of rape and sodomy occurred at the defendant's residence " 'on or about and between Friday, November 7, 1980 and Saturday, November 30, 1980.' " *Id.*

[92] *Id.* at 1258.

miss the indictment."[93] He based his argument on the fact that the time span of the alleged crimes was overly broad. More specifically, he claimed that such deficiency "deprived [him] of adequate notice guaranteed under the Federal and State Constitutions," denied him the ability to present a defense, and stripped him of his constitutional double jeopardy rights.[94] Both the Cattaraugus County Court and the Appellate Division, Fourth Department, agreed with the defendant's propositions and dismissed the criminal action against him.[95] However, the New York Court of Appeals reversed and reinstated the indictment.[96] The court reasoned that the victims, who "were only five and six years" of age, would be unlikely to provide the specific dates and times involved.[97] Additionally, both children "resided in the defendant's home," which made it increasingly difficult for the government to delineate one day from another.[98] Furthermore, rape and sodomy are the crimes likely to reoccur and unlikely "to be discovered immediately."[99] Based on these factors, the court held that the government exerted diligent efforts in ascertaining the relevant dates and times of the criminal acts.[100]

The court then proceeded with the inquiry of whether the period of time provided in the accusatory instrument was reasonable.[101] The determination of this question required the court to consider a number of factors, which include:

> [(1)] [T]he length of the alleged period of time in relation to the number of individual criminal acts alleged; [(2)] the passage of time between the alleged period for the crime and [the] defendant's arrest; [(3)] the duration between the date of the indictment and the alleged offense; and [(4)] the ability of the victim or complaining witness to particularize the date and time

[93] *Id.*
[94] *Morris*, 461 N.E.2d at 1258.
[95] *Id.*
[96] *Id.* at 1261.
[97] *Id.* at 1260.
[98] *Id.*
[99] *Morris*, 461 N.E.2d at 1260.
[100] *Id.*
[101] *Id.*

of the alleged . . . offense.[102]

The evidence showed that the "[d]efendant was arrested [twelve] days after the end of the [alleged] period," and was indicted five months after the alleged criminal conduct occurred.[103] In addition, since "[t]he dates [were] not material elements of the crimes," the court rightfully concluded that a twenty-four day period was not per se unreasonable.[104]

The standards and factors articulated in *Morris* have since been widely adopted and applied in similar cases not only in New York but also in other jurisdictions.[105] A large number of cases that followed *Morris* have benefited from Judge Cook's decision.

In *People v. Keindl*, the defendant was "[c]harged in a [thirty-two]-count indictment with . . . sodomy, sexual abuse and endangering the welfare of a child."[106] The defendant's eight, nine and eleven-year-old stepchildren complained of sexual abuse that occurred for "approximately three years."[107] The children testified that their stepfather would generally come into their bedroom between three and six o'clock in the morning, wake one of them, and force a sexual act on that child.[108] The acts were also committed in the afternoon and in the evening when the mother was not home.[109] All of the alleged acts took place inside the house.[110]

Following a jury trial, Keindl was convicted of only twenty-

[102] *Id.*

[103] *Id.*

[104] *Morris*, 461 N.E.2d at 1260. *But see Sedlock*, 869 N.E.2d at 15-17 (finding a seven-month time frame in the allegations of the forcible touching of a sixteen or seventeen-year-old intelligent boy was unreasonable); People v. Beauchamp, 539 N.E.2d 1105, 1106 (N.Y. 1989) (holding a period greater than nine months excessive, because of the young ages of the victims and regardless of the government's diligent efforts); People v. Aaron, 850 N.Y.S.2d 790, 792 (App. Div. 4th Dep't 2008) (stating that twelve months for a charge of sexual abuse in the third degree of a thirteen or fourteen-year-old victim was unreasonable, but a four-and-one-half-month period was not excessive).

[105] *See, e.g.*, People v. Van Hoek, 246 Cal. Rptr. 352 (Ct. App. 1988); State v. Mulkey, 560 A.2d 24 (Md. 1989); People v. Naugle, 393 N.W.2d 592 (Mich. Ct. App. 1986); State v. Hass, 566 A.2d 1181 (N.J. Super. Ct. Law Div. 1988).

[106] 502 N.E.2d 577, 578 (N.Y. 1986).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

six of the thirty-two counts contained in the indictment.[111] After the appellate division affirmed his conviction, Keindl appealed to the New York Court of Appeals claiming that the indictment failed to state the time of the alleged criminal acts with sufficient specificity.[112] The twenty-six counts charged the defendant with offenses that occurred during a two-year period.[113] Although the government was able to narrow several counts to one month and six weeks, it could not specify the number of acts because, according to the children, the abuse would take place three to four times a week.[114]

The crux of the government's argument was a "continuing crime" theory, but the court refused to apply it.[115] The court concluded that sodomy and sexual abuse are "single act" crimes.[116] Therefore, they do not fit within the "continuing crime" category.[117] On the other hand, the crime of "[e]ndangering the welfare of a child . . . is a crime that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time."[118] Accordingly, the court dismissed the fifteen counts of sodomy and sexual abuse that were not pleaded with specificity, but sustained "those counts charging the [defendant with] the crime of endangering the welfare of a child."[119]

Twenty-three years after *Morris*, the New York Court of Appeals was presented with a similar issue in *People v. Sedlock*, which involved forcible sexual touching.[120] In *Sedlock*, the defendant argued for dismissal of the information against him on the grounds that it failed to provide him with proper "notice of the charge[s]" and pre-

[111] *Keindl*, 502 N.E.2d at 579 ("The jury acquitted [Keindl] of six counts of sodomy.").

[112] *Id.* 578, 579.

[113] *Id.* at 580-81 ("For example, count [seven] charge[d] sodomy in the first degree by forcible compulsion . . . occurring over a period of approximately one year between August 1, 1981 and July 21, 1982."). Other counts alleged considerably shorter periods of time. *Id.*

[114] *Id.*

[115] *Keindl*, 502 N.E.2d at 581. The court explained that "[t]his theory would permit repeated acts of sexual molestation on young children within the family to be treated as 'one continuous crime' . . . ." *Id.* This is exactly what Judge Gilman was so disturbed about in the *Valentine* case. *See Valentine*, 395 F.3d at 641.

[116] *Keindl*, 502 N.E.2d at 582.

[117] *Id.*

[118] *Id.* (citation omitted).

[119] *Id.*

[120] *Sedlock*, 869 N.E.2d at 15.

vented him from "adequately prepar[ing] a defense."[121] Again, the court analyzed the sufficiency of the notice under the good-faith test furthered in *Morris*.

The defendant in *Sedlock* "was convicted of forcible touching" and sentenced to one year imprisonment.[122] The information charged Sedlock with the inappropriate touching of a seventeen-year-old boy,[123] whom he had befriended while working as a "scoutmaster for a Boy Scout troop."[124] Their relationship developed to the extent that the boy moved into the defendant's home and resided there "from December 2002 to July 2003."[125] The defendant was accused of forcibly touching the boy's private parts on at least one occasion during the one year and six months that the boy had lived with him.[126] The information did not provide any further specifics.[127] The court recognized that *Morris* requires the government to conduct " 'a reasonably thorough investigation,' " and provide the specifics of the charged criminal act " 'to the best of [its] knowledge.' "[128] In reaching its conclusion, the court recognized that the government had ample opportunity to narrow the time frame as the victim who provided the government with the information about the alleged abuse was an intelligent sixteen or seventeen-year-old child at the time the offense was committed. Based on the government's failure to narrow the time period, the court held that "seven months cannot be deemed reasonable when weighed against the imperative notice rights of the defendant."[129]

In *People v. Case* the Appellate Division, Second Department, evaluated the same factors when the government charged the defendant with a particular crime over a "specified two-month period."[130] In holding that a two-month period was "reasonably specific and provided the defendant with adequate notice" the court consi-

[121] *Id.* at 16.
[122] *Id.*
[123] *Id.* at 15-16.
[124] *Id.* at 15.
[125] *Sedlock*, 869 N.E.2d at 15.
[126] *Id.*
[127] *Id.* at 15-16.
[128] *Id.* at 17 (quoting *Morris*, 461 N.E.2d at 1260).
[129] *Id.*
[130] 814 N.Y.S.2d 272, 273 (App. Div. 2d Dep't 2006).

dered the age and intelligence of the complainant, the repetitive nature of the offenses, and "the continuous and long-term nature of the abuse."[131]

It is apparent that courts have been reluctant to draw a bright line as to what time frame is sufficient to satisfy the constitutional notice requirement. The importance of the individual's right to fair and adequate notice of the charges sometimes pre-empts the government's attempts to punish criminal defendants, mainly child abusers. New York made a prudent step in establishing a more definite standard to rely on when evaluating "time-of-offense allegations." Under the United States Constitution, it is still unclear what is considered reasonable notice so that the defendant has the opportunity to defend against the charges and avoid double jeopardy. It seems that federal courts lack such a guideline, which is why the court in *Kuffuor-Afriyie* did not even look at federal precedent for guidelines but instead relied on New York jurisprudence.[132] Although the court might have avoided scrutinizing the issue under federal standards because if it found that the one and two-month periods were sufficiently narrow under the New York standard, it would most certainly have come to the same conclusion if it had applied the broader federal test. Therefore, such scrutiny was unnecessary.

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[131] *Id.*

[132] *See generally Kuffuor II*, 2009 WL 2184367.