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"Reasonable Particularity" in Indictments Against Child Abusers

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Notes

"REASONABLE PARTICULARITY" IN INDICTMENTS AGAINST CHILD ABUSERS

A. "Reasonable Particularity" Standard

In *State v. Mulkey*,[1] the Court of Appeals held that an indictment of child and sexual abuse crimes, which specified only that the offenses occurred sometime within a particular three-month period, was valid under the "right to be informed of the accusation" provision of the Maryland Constitution.[2] The court declined to decide whether such an indictment met the new standard of "reasonable particularity" under Maryland Rule 4-202(a);[3] such a decision would have been premature because the State had failed to meet its statutory burden of providing the accused with a bill of particulars.[4] Nevertheless, the court did list those factors that trial judges should consider when deciding whether an indictment in a child sexual abuse case is reasonably particular with respect to the time of the offense.[5]

The court's decision in *Mulkey* undoubtedly was procedurally correct; Maryland law plainly entitled Mulkey to a bill of particulars,[6] a fact that no one but the Court of Appeals recognized.[7] Moreover, the court's decision that the indictment complied with article 21 of Maryland's Constitution conforms with a compelling majority of similar cases from other states.[8] Finally, the guidelines

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1. 316 Md. 475, 560 A.2d 24 (1989).

2. "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence . . . ." MD. CONST. DECL. OF RTS. art. 21.

3. "A charging document shall contain . . . a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred." MD. R. 4-202(a).

4. *Mulkey*, 316 Md. at 489, 560 A.2d at 31.

5. *Id.* at 488, 560 A.2d at 30.

6. MD. ANN. CODE art. 27, § 461C(b) (1987). This section applies only to documents charging rape or sexual offenses. *Id.*

7. The Court of Special Appeals did not mention the statute, State v. Mulkey, 73 Md. App. 501, 534 A.2d 1374 (1988), *rev'd*, 316 Md. 475, 560 A.2d 24 (1989), nor did either party cite to it in their briefs to the Court of Appeals. Briefs of Respondent and Petitioner, *Mulkey* (No. 88-22). Arguably, however, the statute's applicability was not an issue until the Court of Appeals ruled that the dismissal of the indictment was improper. *Mulkey*, 316 Md. at 489, 560 A.2d at 31.

8. *See infra* notes 37-44 and accompanying text.

for interpreting the "reasonable particularity" standard are a useful place to begin for prosecutors, defense lawyers, and trial judges who, sadly, very likely will face many cases similar to *Mulkey*.

1. The Case.—The State filed an indictment in the Prince George's County Circuit Court that charged James Elwood Mulkey with one count of child abuse[9] and twelve counts of third degree sexual offense,[10] naming as victims two children "under age fourteen."[11] The Court of Appeals divided the counts into three groups according to the alleged time frame of the offenses.[12]

Mulkey's counsel filed two motions: one to dismiss the indictment under the reasonable particularity standard of rule 4-202(a)[13] and one demanding a bill of particulars to specify the dates, times, and locations of the offenses.[14] After a hearing, the circuit court judge dismissed the indictment, calling it a "gunshot remedy," and

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9. *Mulkey*, 316 Md. at 478, 560 A.2d at 25. The State brought the charge under MD. ANN. CODE art. 27, § 35A (1987).

10. *Mulkey*, 316 Md. at 478, 560 A.2d at 25. These counts were brought under § 464B(a)(3), which provides: "A person is guilty of a sexual offense in the third degree if the person engages in sexual contact . . . (3) With another person who is under 14 years of age and the person performing the sexual contact is four or more years older than the victim." MD. ANN. CODE art. 27, § 464B(a)(3) (1987).

11. *Mulkey*, 316 Md. at 478, 560 A.2d at 25. If the indictment was more specific about the victim's age, sex, or mental characteristics, neither the Court of Special Appeals or the Court of Appeals apparently considered such information.

12. *Id.* at 479, 560 A.2d at 26. Specifically, the counts were organized as follows:

Counts 1-5: Child abuse and four counts of sexual offense	June 1, 1982 to September 6, 1982
Counts 6-9: Four counts of sexual offense	June 1, 1983 to September 5, 1983
Counts 10-12 [sic]: Four counts of sexual offense	June 1, 1984 to September 3, 1984

Id. Clearly there is an inconsistency in the 12 counts that the court organized and the 13 total counts charged in the indictment. This difference may indicate more than a simple miscalculation. Counts 10, 11, and 12 of the indictment all stated that the offenses occurred "on or about the 1st day of June, nineteen hundred and eighty four[,] through the 3rd day of September, nineteen hundred and eighty four . . . ." Joint Record Extract at 4, *Mulkey* (No. 88-22) (bracketed comma not included in Count 11 or 12). The thirteenth count alleged a specific offense occurring "on or about the 1st day of June, nineteen hundred and eighty four, *and* the 3rd day of September, nineteen hundred and eighty four . . . ." *Id.* at 5 (emphasis added). Read literally, the last count alleges that a single act occurred on (or about) two different days. The court or the parties may have considered this a fatal error and simply declined to address the final count.

13. "A charging document shall contain . . . a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred." MD. R. 4-202(a).

14. *Mulkey*, 316 Md. at 479, 560 A.2d at 26.

ruled the motion for a bill of particulars moot.[15]

The Court of Special Appeals affirmed the dismissal.[16] It first held that the allegation of the place of the abuse, Prince George's County, was sufficiently particular to comply with rule 4-202(a).[17] It further held, however, that the "indictment was defective in that the time was not alleged with reasonable particularity."[18]

The Court of Appeals considered two substantive issues before it reversed primarily on procedural grounds. Writing for the court, Judge Blackwell first concluded that the indictment was constitutional under article 21 of the Maryland Declaration of Rights.[19] Citing federal,[20] Maryland,[21] and out-of-state[22] cases, the Court of Appeals reaffirmed " 'that a charging document must allege the essential elements of the offense charged,' "[23] and that "[h]ere, we conclude the exact date of the offense is not an essential element, and is not constitutionally required to be set forth."[24]

The court next considered the "reasonable particularity" requirement of rule 4-202(a), calling it "a second integral step in as-

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15. *Id.*

16. *Mulkey v. State*, 73 Md. App. 501, 511, 534 A.2d 1374, 1379 (1988), *rev'd*, 316 Md. 475, 560 A.2d 24 (1989).

17. *Id.* at 507, 534 A.2d at 1377-78. The Court of Appeals did not consider reasonable particularity of *place* but it did not explicitly reverse that part of the Court of Special Appeals' decision. *Mulkey*, 316 Md. at 478-79 n.3, 560 A.2d at 25 n.3.

18. *Mulkey*, 73 Md. App. at 509, 534 A.2d at 1379.

19. *Mulkey*, 316 Md. at 480-88, 560 A.2d at 26-30; *see supra* note 2.

20. *See, e.g.*, Ledbetter v. United States, 170 U.S. 606, 612 (1898) (failure to state particular day of the offense not necessarily fatal).

21. *See, e.g.*, Jones v. State, 303 Md. 323, 336-37, 493 A.2d 1062, 1069 (1985) (common law rule in short form indictments is that charging document must implicitly or explicitly allege the essential elements of the offense); Bonds v. State, 51 Md. App. 102, 107, 442 A.2d 572, 575-76 (1982) (upholding an eight-month time frame in an indictment against a sex offender).

22. *See, e.g.*, State v. Mancinone, 15 Conn. App. 251, 257, 545 A.2d 1131, 1135-36 (at least when offense is of a continuing nature, state does not have a duty to disclose information that it does not have), *certif. denied*, 209 Conn. 818, 551 A.2d 757 (1988), *cert. denied*, 109 S. Ct. 1132 (1989).

23. *Mulkey*, 316 Md. at 481, 560 A.2d at 27 (quoting Jones v. State, 303 Md. 323, 337, 493 A.2d 1062, 1069 (1985)).

24. *Id.* at 482, 560 A.2d at 27. It is not clear whether the "exact date" is never an essential element in child or sexual abuse cases, or is not essential only in this case, or whether there is a line in between yet to be drawn. The context that precedes this quote, which discusses the general requirements of a charging document, suggests a broad interpretation, and there is nothing in the opinion to show the court intended to limit the holding to these facts. Language in a later section of the opinion, however, suggests a narrower interpretation: "Mulkey was apprised of the continuing nature of the offenses such that his defense was not prejudiced. Here, the time of the alleged offenses is not an essential element." *Id.* at 488, 560 A.2d at 30.

sessing the sufficiency of the indictment."[25] While the Court of Appeals acknowledged that the trial judge normally is in the best position to decide reasonable particularity on a case-by-case basis,[26] the court nonetheless issued a nonexhaustive list of relevant factors that a trial court should consider when faced with a defendant charged with sexual offenses against children: "1) the nature of the offense; 2) the age and maturity of the child; 3) the victim's ability to recall specific dates; and, 4) the State's good faith efforts and ability to determine reasonable dates."[27]

The Court of Appeals, however, did not apply these factors to Mulkey's case. Rather, it declared that the charging document "substantially adhered to" a general form indictment as outlined in article 27, section 461C(a),[28] and deftly noted a further, decisive provision of that section: "In any case in which this general form of indictment, information, or warrant is used to charge a rape or a sexual offense, the defendant is entitled to a bill of particulars specifically setting forth the allegations against him."[29] While a bill of particulars "[t]raditionally . . . forms no part of the indictment and cannot be applied to cure a defective indictment,"[30] the language of article 27, section 461C(b) of the Maryland Code "indicates a mandatory, unqualified intent."[31] Hence, the court held, the trial judge should have allowed the demand for a bill of particulars

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25. *Id.* at 488, 560 A.2d at 30. The reasonable particularity standard for the time and place of an offense under rule 4-202(a) replaced the "as particularly as possible standard" under former MD. R. 711(a). The Standing Committee on Rules of Practice and Procedure has suggested that "the former test is a rather stringent test, which one day may lead to trouble." *Id.* at 477-78 n.1, 560 A.2d at 25 n.1 (quoting from a 1984 letter to the Court of Appeals). With regard to certain child-victim cases, the old rule arguably was less stringent than the new one. When a sexually abused child simply is incapable of specifying the date of the offense and, as is often the case, there are no other witnesses, then a broad time range in an indictment may be stated "as particularly as possible." It nevertheless may not be "reasonably particular." *See* Bonds v. State, 51 Md. App. 102, 108, 442 A.2d 572, 575 (1982) (interpreting the "as particularly as possible" standard of former rule 711(a) to mean that "if it is impossible to be precise as to the exact date and time, [the State] is not therefore foreclosed from prosecution.").

26. *Mulkey*, 316 Md. at 488, 560 A.2d at 30.

27. *Id.* Judge Blackwell emphasized that the list was not intended to be complete: "This is not meant to serve as an all-inclusive list. We indicate these factors for the purpose of assisting trial judges in evaluating the 'reasonable particularity' requirement under the circumstances. A hearing may be necessary to fully ascertain the extent of the State's knowledge regarding these factors." *Id.*

28. *Id.* at 489, 560 A.2d at 31.

29. MD. ANN. CODE art. 27, § 461C(b) (1987).

30. *Mulkey*, 316 Md. at 489, 560 A.2d at 30.

31. *Id.*, 560 A.2d at 31.

before ruling on the motion to dismiss the indictment.[32] Further, the trial court should have used the bill of particulars to determine whether the time of the offenses was "reasonably particular."[33] The Court of Appeals thus remanded the case for the trial judge to reconsider the indictment after reviewing the bill of particulars and then reviewing all the information in light of the four new considerations.[34]

2. *Legal Background.*—The narrow issue in *Mulkey* is this: With what degree of particularity must a charging document specify the time of the offense in a child abuse or child sexual abuse case?[35] Surprisingly, that precise issue has reached the appellate level many times in recent years.[36] Defendants have sought to overturn such charging documents on a variety of legal theories that often overlap, including: failure to be informed of the accusation,[37] failure of the charging document to protect against double jeopardy,[38] failure of the charges to assure a unanimous verdict,[39] breach of various state

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32. *Id.*

33. *Id.* at 489-90, 560 A.2d at 31.

34. *Id.* at 490, 560 A.2d at 31.

35. *Id.* at 478, 560 A.2d at 25.

36. This analysis primarily considers cases decided since 1985, and selected important cases that were decided earlier. *Mulkey* is slightly unusual in that it is an attack on an indictment before trial. *Id.* at 477, 560 A.2d at 25. Most of the other cases cited herein are attacks after conviction.

37. Many of the other methods of attacking charging documents end in a conclusion that the defendant was not adequately informed of the nature of the charges. *See, e.g.*, State v. Spigarolo, 210 Conn. 359, 381-85, 556 A.2d 112, 124-25 (rejecting claim because charges sufficiently precise to meet constitutional standard), *cert. denied*, 110 S. Ct. 322 (1989); Pounds v. United States, 529 A.2d 791, 793 n.2 (D.C. 1987) (per curiam) (apparently rejecting claim because of victim's inability to recall events by specific date and time); Jackson v. United States, 503 A.2d 1225, 1227 (D.C. 1986) (same); People v. Romero, 147 A.D.2d 358, 360, 537 N.Y.S.2d 523, 524 (1989) (agreeing with defendant that five-month time frame too vague to meet constitutional standard); State v. R.A.R., 148 Wis. 2d 408, 412-13, 435 N.W.2d 315, 316 (Ct. App. 1988) (long time lapse between offenses and filing of charges combined with unspecific dates failed adequately to inform defendant of charges).

38. *See, e.g.*, State v. Rudd, 759 S.W.2d 625, 628 (Mo. Ct. App. 1988) (rejecting claim because entire record as well as extrinsic evidence may be used to determine validity of plea of abatement based on former jeopardy); State v. D.B.S., 216 Mont. 234, 240, 700 P.2d 630, 635 (1985) (rejecting claim because state barred from retrying defendant for offense against this victim for the time period in question); State v. Wurtz, 436 N.W.2d 839, 843-44 (S.D. 1989) (rejecting claim because outside evidence may be used in former jeopardy); State v. Fawcett, 145 Wis. 2d 244, 255, 426 N.W.2d 91, 96 (Ct. App.) (rejecting claim in part because state conceded that defendant could not be charged again with any sexual assault out of incident at issue), *certif. denied*, 144 Wis. 2d 955, 428 N.W.2d 553 (1988).

39. The unanimous verdict theory relies partially on the indictment and partially on events at trial. When the indictment is vague with regard to time, a jury conceivably

statutes,[40] denial of equal protection,[41] duplicitousness,[42] and a variety of due process theories that largely concern the inability to present an alibi or other defense.[43] These theories have succeeded

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could find all the essential elements of the offense, but not with respect to a single act. The theory also may depend on whether the law of a particular state treats the alleged offense as "continuing," and whether the court decides that an appropriate jury instruction can cure a vague indictment. Covington v. State, 703 P.2d 436, 440-41 (explaining and applying the doctrine), *rev'd*, 711 P.2d 1183 (Alaska Ct. App. 1985); *see also People v. Jones*, 51 Cal. 3d 34, 792 P.2d 643, 658, 270 Cal. Rptr. 611, 626 (1990) (in some child molestation cases, "although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described"); People v. Moreno, 211 Cal. App. 3d 776, 778-90, 259 Cal. Rptr. 800, 808-09 (1989) (concluding that jury members did not necessarily have to specify a single act to which they unanimously agreed if they agreed that defendant did *all* of the acts to which the victim testified); State v. Spigarolo, 210 Conn. 359, 388-92, 556 A.2d 112, 127-29 (noting that unanimous verdict was fundamental right that could be reviewed even though unpreserved, but upholding convictions because "defendant's conduct was in the nature of a continuing offense"), *cert. denied*, 110 S. Ct. 322 (1989); State v. Fitzgerald, 39 Wash. App. 652, 655-56, 694 P.2d 1117, 1120-21 (1985) (reversing conviction because no election of a particular act made by State and no appropriate jury instruction given).

40. *See, e.g.*, State v. Jones, 539 So. 2d 535, 536 (Fla. Dist. Ct. App. 1989) (statute requiring time and place "as definitely as possible"); People v. Naugle, 152 Mich. App. 227, 229-30, 393 N.W.2d 592, 594 (1986) ("as nearly as the circumstances will permit"); State v. Hoban, 738 S.W.2d 536, 542 (Mo. Ct. App. 1987) ("as definitely as can be done"); State v. Shaver, 233 Mont. 438, 445, 760 P.2d 1230, 1234 (1988) (same); People v. Keindl, 68 N.Y.2d 410, 416 n.2, 502 N.E.2d 577, 579 n.2, 509 N.Y.S.2d 790, 792 n.2 (1986) (indictment must contain statement that offense charged was committed "in, or on or about, a designated date, or during a designated period of time").

41. *Hoban*, 738 S.W.2d at 542 (rejecting an accused child molester's theory that he was treated "differently than defendants charged with the same crime against adult victims").

42. *See Keindl*, 68 N.Y.2d at 417-18, 502 N.E.2d at 580, 509 N.Y.S.2d at 793 ("[A]cts which separately and individually make out distinct crimes must be charged in separate and distinct counts . . . and where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous."); *see also* People v. Beauchamp, 74 N.Y.2d 639, 539 N.E.2d 1105, 541 N.Y.S.2d 977 (1989) (mem.).

43. *See, e.g.*, *People v. Jones*, 51 Cal. 3d 34, 792 P.2d 643, 656-58, 270 Cal. Rptr. 611, 624-26 (1990) (discussed *infra* at note 111); People v. Moreno, 211 Cal. App. 3d 776, 787, 259 Cal. Rptr. 800, 807 (1989) (doubting value of alibi defense for "resident child molester"); People v. Avina, 211 Cal. App. 3d 48, 55, 259 Cal. Rptr. 178, 183 (1989) (rejecting alibi and mistaken identification defenses); People v. Obremski, 207 Cal. App. 3d 1346, 1351-53, 255 Cal. Rptr. 715, 718-19 (1989) (holding that defendant was estopped to raise the issue on appeal but doubting value of alibi or wrongful identification defense for resident child molester); People v. Van Hoek, 200 Cal. App. 3d 811, 817, 246 Cal. Rptr. 352, 356 (1988) (reversing conviction because "[a] resident child molester would virtually be precluded from presenting an alibi defense to the acts unless he could account for every time he was in the presence of the victim"); State v. Blasius, 211 Conn. 455, 462-63, 559 A.2d 1116, 1119-20 (1989) (reversing dismissal of indictment because the effectiveness of an alibi defense is a factual issue); State v. Spigarolo, 210 Conn. 359, 387, 556 A.2d 112, 127 (asserting that an alibi defense may be a factor to be considered in deciding whether to grant motion for bill of particulars but refusing to

only rarely.[44]

Courts have adopted a variety of legal positions in rejecting defendants' attacks. The single most frequent rationale is that time is not an essential element in a sexual abuse case and, therefore, need not be alleged with particularity.[45] Several courts have suggested further that the range of time alleged is sufficient if it falls entirely within the applicable statute of limitations.[46] A minority of other

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overturn convictions), *cert. denied*, 110 S. Ct. 322 (1989); State v. Nunn, 244 Kan. 207, 225-27, 768 P.2d 268, 281-83 (1989) (defendant failed to show prejudice); State v. Walker, 506 A.2d 1143, 1147 (Me. 1986) (defendant not prejudiced partially because his own testimony placed him and victim alone together); *Hoban*, 738 S.W.2d at 541 (rejecting alibi theory because State could not be more specific as to date of offense); State v. D.B.S., 216 Mont. 234, 239, 700 P.2d 630, 634 (1985) (alibi defense futile because defendant had custody of victim); State v. Beermann, 231 Neb. 380, 389-92, 436 N.W.2d 499, 505-07 (1989) (reversing convictions in part because the State could have stated times with more specificity).

44. *See* Covington v. State, 703 P.2d 436, 440-41 (jury may not have agreed unanimously on any specific incident), *rev'd*, 711 P.2d 1183 (Alaska Ct. App. 1985) (not plain error); People v. Van Hoek, 200 Cal. App. 3d 811, 818, 246 Cal. Rptr. 352, 357 (1988) (imprecise charges impeded defendant's ability to mount an alibi defense and violated due process). *But cf.* People v. Fernandez, 214 Cal. App. 3d 991, 1003-05, 263 Cal. Rptr. 139, 145-46 (1989) (rejecting *Van Hoek* and collecting California cases on both sides of the issue), *review granted* No. 5013201 (Feb. 15, 1990) (Westlaw No. 19110); *Moreno*, 211 Cal. App. 3d at 787, 259 Cal. Rptr. at 807 (rejecting *Van Hoek*); *Avina*, 211 Cal. App. 3d at 55, 259 Cal. Rptr. at 183 (same); People v. Coulter, 209 Cal. App. 3d 506, 513, 257 Cal. Rptr. 391, 395 (1989) (same); *see also* State v. Garcia, 511 So. 2d 714, 716 (Fla. Dist. Ct. App. 1987) (two-year time span in an information could have been alleged with more specificity); Knight v. State, 506 So. 2d 1182, 1183 (Fla. Dist. Ct. App. 1987) (two counts containing more than three-year time frames violated Florida "as definitely as possible" rule, 10 1/2 month count upheld); *Beermann*, 231 Neb. at 393, 436 N.W.2d at 508 (State failed to inform defendant of the charges with reasonable certainty); State v. Hass, 218 N.J. Super. 133, 139-40, 526 A.2d 1156, 1159 (App. Div. 1987) (remanding for consideration of whether defendant received fair notice in light of new factors set out by state supreme court); *Beauchamp*, 74 N.Y.2d at 641, 539 N.E.2d at 1106, 541 N.Y.S.2d at 978 (holding counts of an indictment duplicitous and nine-month time frame, excluding weekends, unreasonable); *Keindl*, 68 N.Y.2d at 419, 502 N.E.2d at 581, 509 N.Y.S.2d at 794 (10-, 12-, and 16-month counts of an indictment unreasonable); People v. Romero, 147 A.D.2d 358, 361-62, 537 N.Y.S.2d 523, 525-26 (1989) (mem.) (five-month time frame unreasonably long under the circumstances and duplicitous).

45. *See* People v. Thomas, 770 P.2d 1324, 1330 (Colo. Ct. App. 1988) ("Failure to provide a precise time is neither essential nor decisive where, as here, neither alibi nor nonaccess is a viable defense."), *cert. granted*, 1989 Colo. LEXIS 80; State v. Hoban, 738 S.W.2d 536, 539 (Mo. Ct. App. 1987) (interpreting statute providing that an indictment is not invalidated for omitting time when time is not of the essence of the offense); State v. Shaver, 233 Mont. 438, 445-46, 760 P.2d 1230, 1234-35 (1988) (rejecting a defendant's contention that time is an essential element of a child abuse offense when an alibi defense is raised). *See generally* 41 AM. JUR. 2D *Indictments and Informations* §§ 115-17 (1968).

46. Eberhardt v. State, 257 Ga. 420, 421, 359 S.E.2d 908, 909 (1987), *cert. denied*, 108 S. Ct. 1036 (1988); Vail v. State, 536 N.E.2d 302, 302-03 (Ind. Ct. App. 1989); State v. Nunn, 244 Kan. 207, 227, 768 P.2d 268, 283 (1989); State v. West, 737 S.W.2d 790, 792

courts, however, have utilized a "reasonableness test"[47] by establishing specific factors for judges to consider when they decide whether to uphold a charging document.[48] Through *Mulkey*, Maryland seemingly has joined the former with regard to the constitutional issue of a defendant's right to be informed of the accusation[49] and the latter with regard to interpretation of the reasonable particularity standard of rule 4-202(a). Because the rule, therefore, becomes the primary consideration in most cases of vague time allegations, this Note analyzes the four factors created in *Mulkey*[50] and considers some additional factors that, based on out-of-state cases, may become troublesome.[51]

3. Analysis.—a. The Four Factors.—(1) The Nature of the Offense.—The *Mulkey* court did not elaborate on any of the four factors it listed. The "nature of the offense" element is especially broad and thus difficult to submit to meaningful analysis before trial judges actually have applied it. By the court's definition, the nature

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(Tenn. Crim. App.), *appeal denied*, *id.* (1987); Perkins v. State, 779 S.W.2d 918, 924 (Tex. Ct. App. 1989). *But see* State v. Beermann, 231 Neb. 380, 393, 436 N.W.2d 499, 508 (1989) ("an information alleging the time of an offense only by reference to the period of time in a statute of limitations is insufficient as a matter of law.").

47. *See* State v. Fawcett, 145 Wis. 2d 244, 251, 426 N.W.2d 91, 94-95 (Ct. App.) (examines the apparent origin of the term "reasonableness test"), *certif. denied*, 144 Wis. 2d 955, 428 N.W.2d 553 (1988).

48. The leading case is People v. Morris, 61 N.Y.2d 290, 461 N.E.2d 1256, 473 N.Y.S.2d 769 (1984), which set out a list of factors to consider when deciding whether an indictment is reasonable, much as *Mulkey* did. *Id.* at 296, 461 N.E.2d at 1260, 473 N.Y.S.2d at 773. Cases outside of New York that follow *Morris* to some degree include: People v. Naugle, 152 Mich. App. 227, 234, 393 N.W.2d 592, 595-96 (1986); State *ex rel.* K.A.W., 104 N.J. 112, 122-23, 515 A.2d 1217, 1222 (1986); *Hass*, 218 N.J. Super. at 138-39, 526 A.2d at 1159; State v. R.A.R., 148 Wis. 2d 408, 411, 435 N.W.2d 315, 316 (Ct. App. 1988); *Fawcett*, 145 Wis. 2d at 251-53, 426 N.W.2d at 94-95.

49. *See supra* note 2.

50. Although the court did not intend the list to be all-inclusive, *see supra* note 9, much of the precedential value of the court's opinion rests in these factors. The purpose of this analysis is to show, based on similar laws from other jurisdictions, how those factors might develop and why.

51. None of the other cases interprets a statute with *Mulkey*'s "reasonable particularity" standard. Many of the cases proceed on entirely different theories and often are filed at different stages of the proceeding. In fact, the primary case that established the "rule of reasonableness" did so based upon a sixth amendment right to be " 'informed of the nature and cause of the accusation.' " *Morris*, 61 N.Y.2d at 294-95, 461 N.E.2d at 1259, 473 N.Y.S.2d at 772 (quoting U.S. CONST. amend. VI). Nevertheless, many of the cases apparently aspire to the same principle as *Mulkey*: a way to deal with the delicate problem of fairness both to the state and to the accused when the victim and principal witness may be unreliable, through no fault of their own. Moreover, the solutions set out in some of these cases are remarkably similar to *Mulkey*'s four factors. These cases, therefore, may serve as guidelines as the "reasonable particularity" standard develops.

of an offense becomes relevant in a "sexual offense case involving a child victim."[52] Perhaps the court simply intended to give trial judges broad discretion to consider the seriousness of the particular charge before requiring them to release a potential child abuser because of a defective charging document. While trial judges presumably would have this discretion anyway, the fact that the Court of Appeals spelled it out reinforces its wise position that trial judges should use these factors as broad guidelines rather than as narrow commands.[53] Beyond this, it is difficult to determine how this factor will affect the validity of an indictment until trial judges actually apply it.

(2) The Age and Maturity of the Child.—In considering the child victim's age and maturity, the court apparently acknowledged that there are significant differences in the memory and descriptive capabilities of a four-year-old and those of a thirteen-year-old. With an older victim, the state usually is able to, and perhaps should, describe more precisely when the abuse occurred.[54] Two New York cases highlight this distinction. In *People v. Morris*,[55] the New York Court of Appeals reversed the dismissal of an indictment that alleged "two sexual criminal acts over a twenty-four-day period against victims who were only five and six years old."[56] In *People v. Keindl*,[57] however, the same court overturned fifteen counts of a thirty-two count sexual abuse indictment that designated time ranges from one to sixteen months. The *Keindl* court noted that:

> [u]nlike the children in *Morris*, the victims here were between 8 and 13 years old during the time of the offenses and thus more capable than the *Morris* children of discerning, if not exact dates, at least seasons, school holidays, birthdays, or other events which could establish a frame of reference to assist them in narrowing the time spans alleged.[58]

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52. *Mulkey*, 316 Md. at 488, 560 A.2d at 30.

53. *See supra* note 27.

54. The *Mulkey* court apparently did not consider the victims' age, although one count of the indictment indicates that at least one of the victims was under fourteen. 316 Md. at 478 n.3, 560 A.2d at 25 n.3.

55. 61 N.Y.2d 290, 461 N.E.2d 1256, 473 N.Y.S.2d 769 (1984).

56. *Id.* at 296-97, 461 N.E.2d at 1260, 473 N.Y.S.2d at 773.

57. 68 N.Y.2d 410, 502 N.E.2d 577, 509 N.Y.S.2d 790 (1986).

58. *Id.* at 420, 502 N.E.2d at 581, 509 N.Y.S.2d at 794; *see, e.g.*, People v. Romero, 147 A.D.2d 358, 360-61, 537 N.Y.S.2d 523, 525 (1989) (comparing several New York cases).

Similarly, in *State v. Hass*,[59] the New Jersey Superior Court considered indictments against two victims, one of whom was between thirteen- and sixteen-years-old while the other was under thirteen.[60] The court remanded the case for reconsideration by the trial judge, distinguishing an earlier New Jersey case:

> The issue in this case is a particularly difficult one because the time frame in the indictment [approximately five months] is much shorter than that considered in *K.A.W.* and the victims, while minors, are not of such a young age as to be entitled to the same deference as would be accorded to children of "tender years."[61]

Hence, among courts that have considered carefully the victim's age as a factor, the issue results in a balancing of age against the length of time specified in the indictment. While courts have not established (and probably should not establish) firm cutoffs for either variable, they have developed some guidelines that Maryland courts may find useful.

(3) The Victim's Ability to Recall Specific Dates.—This issue is similar to that encompassed in the second factor. The primary purpose for considering the victim's age and maturity seemingly is to estimate his or her ability to recall specific dates. Nevertheless, this factor is more subjective than the previous one, and the two may not always coincide. For instance, if the victim is relatively young, but can recall specific dates, "reasonable particularity" may require that the indictment specify those dates precisely. The converse, however, is more problematic for defendants. If the victim is old enough to recall specific dates, but cannot recall the times of the abuse, prosecutors no doubt will attempt to support a broadly framed indictment by invoking this factor. It remains to be seen whether Maryland courts will accept such an indictment as reasonably particular.

(4) The State's Good-Faith Efforts and Ability to Determine Reasonable Dates.—This factor may become the soul of reasonable particularity. Courts frequently write of their concern for child abuse victims and their reluctance to dismiss charges against alleged abus-

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59. 218 N.J. Super. 133, 526 A.2d 1156 (App. Div. 1987).

60. *Id.* at 135, 527 A.2d at 1157.

61. *Id.* at 139, 526 A.2d at 1159 (citing State *ex rel.* K.A.W., 104 N.J. 112, 515 A.2d 1217 (1986)).

ers on technical grounds.[62] When the prosecutor demonstrates a good-faith effort to narrow the time frame of the offense, even the "reasonableness" states appear willing to allow vague time allegations to stand.[63] Indeed, the Court of Special Appeals, when it affirmed the trial court's dismissal of Mulkey's indictment, usefully suggested that "[w]hen the State is unable, with reasonable diligence, to determine the specific time that an offense allegedly occurred, the indictment may be sufficient if the State's inability to be more specific is contained within the indictment itself."[64]

What, then, is a good-faith effort by the State? In *Morris*, a case that several states have followed,[65] the New York Court of Appeals established the following framework:

> Reasonableness and fairness demand that the indictment state the date and time of the offense to the best of the People's knowledge, after a reasonably thorough investigation has been undertaken to ascertain such information. In evaluating the possibility that a more specific date could have been obtained through diligent efforts, the court might consider, among other things: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to be discovered immediately.[66]

Thus, *Morris* demonstrates that two of the very factors that Maryland judges now may use to assess a charging document also can be invoked to assess the quality of the State's effort in drafting that document.[67]

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62. *See, e.g.*, People v. Van Hoek, 200 Cal. App. 3d 811, 818, 246 Cal. Rptr. 352, 357 (1988) ("We too are deeply concerned with the resident child molester and would like very much for each of them to be brought to justice for their appalling behavior.").

63. *See* People v. Naugle, 152 Mich. App. 227, 235, 393 N.W.2d 592, 596 (1986). For a discussion of *Naugle*, see *infra* notes 68-75 and accompanying text.

64. *Mulkey v. State*, 73 Md. App. 501, 510, 534 A.2d 1374, 1379 (1988), *rev'd*, 316 Md. 475, 560 A.2d 24 (1989). The Court of Appeals did not expressly reject or accept this part of the Court of Special Appeals' decision.

65. *See supra* note 48.

66. 61 N.Y.2d 290, 296, 461 N.E.2d 1256, 1260, 473 N.Y.S.2d 769, 773 (1984).

67. According to *Morris*, assessing the quality of the State's effort in drafting the charging document is only half of the procedure. If the judge finds the State drafted the charging document in good faith, the judge then may consider whether the time frame is reasonable:

> In making this determination, factors to be considered might include but should not be limited to the length of the alleged period of time in relation to the number of individual criminal acts alleged; the passage of time between the alleged period for the crime and defendant's arrest; the duration between the

People v. Naugle[68] provides a clear example of a good-faith effort. Naugle was convicted of five sexual offenses against his thirteen-year-old former stepdaughter; on appeal, he challenged the imprecision of the dates of the offenses in the indictment.[69] A detective testified that he questioned the victim and "encouraged her to recall some other events that she could temporally associate with the assaults."[70] The prosecution used these events "as reference points in zeroing in on the dates that these assaults happened."[71] In one instance, the victim remembered that the assault occurred on the day of a vacuum cleaner delivery, so the prosecution could pinpoint that day in the indictment.[72] In another episode, the detective concluded that the assault occurred between February 1 and March 18, 1984, after the victim specified that the assault happened about two weeks before she and her mother entered a shelter, which the mother remembered as occurring on the latter date.[73] In a third incident, the victim recalled that the "snow accumulation on the ground had melted and that her uncle had mowed the grass once or twice before they had another snowfall. The . . . incident occurred after the weather had warmed up again."[74] The detective, apparently after some weather research, narrowed this description to "between April 1, 1984, and May 20, 1984."[75] All three counts of the indictment were upheld in part because the detective's "testimony suggest[ed] that the prosecution exerted a good-faith effort to specify the dates."[76]

Two recent Florida cases demonstrate the difference a prosecutor's good-faith effort can make.[77] In *State v. Garcia*,[78] an indictment

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date of the indictment and the alleged offense; and the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id. For a discussion of some of these factors, see *infra* text accompanying notes 68-128.

68. 152 Mich. App. 227, 393 N.W.2d 592 (1986). The *Naugle* court construed the following statute: "[T]he court may on motion require the prosecution to state the time or identify the occasion [of the offense] as nearly as the circumstances will permit, to enable the accused to meet the charge." MICH. COMP. LAWS ANN. § 767.51 (West 1982).

69. *Naugle*, 152 Mich. App. at 233, 393 N.W.2d at 595.

70. *Id.* at 231, 393 N.W.2d at 595.

71. *Id.* at 232, 393 N.W.2d at 595.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* The opinion implies but does not state that these were the dates in the information. *Id.*

76. *Id.* at 235, 393 N.W.2d at 596.

77. The Florida cases interpret a rule of procedure whose language is more like that in Maryland's former rule 711(a), *supra* note 25, than that in current rule 2-402(a). The Florida rule states: "Each count of an indictment or information upon which the de-

charged various counts of sexual crimes against a minor occurred "between the 1st day of January, 1984 and the 15th day of January, 1986."[79] At a hearing on a motion to dismiss the indictment, the prosecution indicated that it knew when the abuse began and ended, plus or minus a few days.[80] The appellate court concluded, "We agree with the trial judge that the state appears to have the ability to allege, at least in two of the counts, a narrower time frame[,]"[81] and affirmed the dismissal of the indictment.[82] A different Florida appellate court distinguished *Garcia* in *State v. Jones*,[83] in which a defendant was charged with two counts of sexual battery on a five year-old, with the abuse occurring "between March 1986 and February 12, 1987."[84] The trial court dismissed the indictment even though it found that the State had acted in good faith when it specified the dates of the offenses.[85] The appellate court reversed. The court noted that in earlier cases such as *Garcia* there had been no good-faith finding by the trial court and suggested that a good-faith attempt to narrow the time frame was sufficient as long as that time frame was not prejudicial.[86]

Thus, among states in which reasonableness is a factor, a prosecutor's good-faith effort to establish the time period in which the offense occurred goes a long way toward curing a vague indictment. It is not clear that Maryland will or should require efforts as extensive as those of the *Naugle* detective,[87] but the Court of Appeals appears willing to require prosecutors to make some effort to narrow the time period of the offense. Although the Court of Appeals found that article 21 of the Maryland Declaration of Rights does not

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fendant is to be tried shall contain allegations stating *as definitely as possible* the time and place of the commission of the offense charged in the act or transaction . . . ." FLA. R. CRIM. P. 3.140(d)(3) (emphasis added); *see also* Knight v. State, 506 So. 2d 1182, 1183 (Fla. Dist. Ct. App. 1987) (interpreting the rule to require more particularity in an indictment than a three-year time span because the victim could recall her grade in school).

78. 511 So. 2d 714 (Fla. Dist. Ct. App. 1987).

79. *Id.* at 715.

80. *Id.*

81. *Id.* at 715-16.

82. *Id.* at 716.

83. 539 So. 2d 535 (Fla. Dist. Ct. App. 1989).

84. *Id.* at 536.

85. *Id.*

86. *Id.* at 537; *see also* Knight v. State, 506 So. 2d 1182, 1183 (Fla. Dist. Ct. App. 1987) (reversing two counts of an indictment, one that covered a four-year period and the other a three-year period, because "[t]he victim was able to recall before trial incidents in relation to her grade in school, but the State made no attempt to correlate the first two counts in the information to this testimony.").

87. *See* 152 Mich. App. 227, 231-33, 393 N.W.2d 592, 594-95 (1986).

require such efforts,[88] good-faith questioning of witnesses and modest attempts to verify their statements serve the laudable purpose of informing the defendant of the nature of the charges without unreasonably burdening the State.

b. Other Considerations.—Several states already have established their own lists of factors to consider to determine the particularity of an indictment against a child abuser; some of these are similar to the Court of Appeals' factors.[89] A number of the factors indicated below were taken from those lists; others were drawn from a review of applicable cases.

(1) Actual length of time specified in indictment.—A five-year time allegation is less likely to be reasonably particular than a one-month time allegation. The Court of Appeals may have considered that distinction too obvious to list. But at least one state has dismissed charging documents against child molesters merely because the time allegations were "so excessive on their face that they [were] unreasonable."[90] More importantly, explicitly listing this as a factor should encourage judges to consider the other factors in light of the actual time specified in the charging document. Thus, when the victim is particularly young, for example, even a two-year time allegation might be acceptable. When the victim is older and capable of narrowing the time of the offense, however, a one-month time frame

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88. *Mulkey*, 316 Md. at 487-88, 560 A.2d at 30; *see also supra* note 2.

89. *See supra* note 48. Probably the most concise version of these similar lists appeared in a Wisconsin case:

> (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

State v. Fawcett, 145 Wis. 2d 244, 253, 426 N.W.2d 91, 95 (Ct. App.), *certif. denied*, 144 Wis. 2d 955, 428 N.W.2d 553 (1988). In *Mulkey*, the Court of Appeals did not cite any cases in its discussion of the four factors. 316 Md. at 488, 560 A.2d at 30.

90. People v. Keindl, 68 N.Y.2d 410, 419, 502 N.E.2d 577, 581, 509 N.Y.S.2d 790, 794 (1986) (dismissing indictments that spanned periods of 10, 12, and 16 months); *see also* People v. Romero, 147 A.D.2d 358, 361, 537 N.Y.S.2d 523, 525 (1986) (mem.) (five-month time frame "unreasonable and unfair given the attending circumstances"). Other courts have accepted charging documents with longer time periods. *See* State v. Mancinone, 15 Conn. App. 251, 256, 545 A.2d 1131, 1135 (over two years), *certif. denied*, 209 Conn. 818, 551 A.2d 757 (1988), *cert. denied*, 109 S. Ct. 1132 (1989); State v. Hoban, 738 S.W.2d 536, 539 (Mo. Ct. App. 1987) (15 months).

might be reasonable while a two-year time frame might not be.[91]

(2) Whether the crime alleged is a continuing offense, or whether the indictment should have been framed that way.[92]—When the Court of Appeals reviewed the constitutionality of Mulkey's indictment, the court cited a Connecticut case in which the defendant challenged an indictment that contained two counts of risk of injury to a minor child.[93] As the Court of Appeals noted, "The Connecticut appellate court found no error in refusing to require the state to make the charging documents more specific, reasoning 'where the offense is of a continuing nature, it may be impossible to provide specific dates in the charging documents.' "[94] Yet, the fact that risk of injury to a minor child is a continuing offense does not necessarily mean that sexual abuse is, and at least one court has expressly distinguished the two.[95] The Court of Appeals apparently treated Mulkey's alleged crimes as though they were continuing offenses without explicitly deciding that they were.[96] Other states' decisions indicate some doubt as to whether the various child or sexual abuse crimes can be continuing offenses.[97] When the alleged crime is a

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91. *See supra* notes 54-61 and accompanying text.

92. *Morris* lists a similar, though not equivalent, factor: "[T]he length of the alleged period of time in relation to the number of individual criminal acts alleged." 61 N.Y.2d 290, 296, 461 N.E.2d 1256, 1260, 473 N.Y.S.2d 769, 773 (1984). Presumably, a one-count indictment covering a five-year time span would be unacceptable because the defendant has no chance to establish an alibi or related defense. Conversely, a 27-count indictment that covers 30 days would stand because the difference in establishing an alibi for 27 days rather than 30 days is not important. Where to draw the line between these two examples is problematic.

93. *Mulkey*, 316 Md. at 484, 560 A.2d at 28 (citing State v. Mancinone, 15 Conn. App. 251, 253, 545 A.2d 1131, 1134, *certif. denied*, 209 Conn. 818, 551 A.2d 757 (1988), *cert. denied*, 109 S. Ct. 1132 (1989)).

94. *Id.* at 484-85, 560 A.2d at 28 (quoting *Mancinone*, 15 Conn. App. at 257, 545 A.2d at 1135-36).

95. People v. Keindl, 68 N.Y.2d 410, 420-21, 502 N.E.2d 577, 582, 509 N.Y.S.2d 790, 794-95 (1986) (distinguishing sodomy and sexual abuse from the continuing offense of endangering the welfare of a child).

96. "Mulkey was apprised of the continuing nature of the offenses such that his defense was not prejudiced." 316 Md. at 488, 560 A.2d at 30.

97. *Cf.* State v. Spigarolo, 210 Conn. 359, 391, 556 A.2d 112, 129 (1989) (noting that "[b]ecause the state was unable to specify with greater precision the times of the alleged incidents [six specific acts likely to impair the health or morals of the victims], it necessarily proceeded under a theory that the defendant's conduct was in the nature of a continuing offense"); State v. D.B.S., 216 Mont. 234, 239, 700 P.2d 630, 634 (1985) (listing "whether a continuing course of conduct is alleged" as one of the criteria for sufficient particularity of an indictment and suggesting that when it is, further specificity is not required); *Keindl*, 68 N.Y.2d at 420, 502 N.E.2d at 581, 509 N.Y.S.2d at 794 (1986) (declining to apply the "continuous crime" theory to the crimes of sodomy and sexual abuse).

continuing offense, the time frame in the charging document necessarily will encompass a range of dates. When conviction depends upon proof of several components of a single act, however, and proof of each component at different times does not necessarily imply guilt, reasonable particularity requires a more specific time allegation.

Moreover, some Maryland authority suggests that a prosecutor has the option of making sexual abuse crimes continuing offenses by artful framing of the charging document. In *Copsey v. State*,[98] the defendant was arrested for various sex crimes against a young boy that allegedly occurred on almost a daily basis over a five-year period.[99] Copsey was convicted, but a prosecutor who was unhappy with the sentence brought new charges that covered a "shorter but included period of time."[100] Before the Court of Special Appeals considered whether the second charge placed the defendant in double jeopardy, it discussed the State's charging strategy:

> Armed with strong proof of criminal behavior generally but with little realistic way of pinpointing precise dates, the State prudently charged the appellant with a single continuing offense from January 1, 1979, through November 1, 1984. That charging option obviously facilitated the State's burden of proof. Proof of a sexual offense upon the victim at any time within the almost six-year period would suffice to sustain the charge. As a result, of course, the appellant was thereby placed in jeopardy for any sexual offense he perpetrated upon the victim at any time during that all-embracing period.[101]

When considering the reasonable particularity of a charging document, judges should consider not only whether the crime is a continuing offense, but whether the prosecution reasonably should so have framed it in the charging document.[102]

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98. 67 Md. App. 223, 507 A.2d 186 (1986).

99. *Id.* at 226, 507 A.2d at 187.

100. *Id.*

101. *Id.* at 226-27, 507 A.2d at 188. The Court of Special Appeals dismissed the second set of charges on double jeopardy grounds. *Id.* at 234-35, 507 A.2d at 191-92.

102. *See also* State v. Boozer, 304 Md. 98, 112, 497 A.2d 1129, 1136 (1985) (noting that the effect of charging a sexual crime under the statutory short form, currently codified at MD. ANN. CODE art. 27, § 461C (1987), "limits the State to a single conviction and punishment for conduct within the section specified, even though more than one offense embraced by that section may have been committed.").

(3) Whether the accused was a resident of the victim's home or had frequent access to the victim.—Child sexual abuse crimes often are committed by someone with frequent unsupervised access to a child.[103] California courts have considered numerous cases that concern what they call "resident child molesters," that is, "a person who either resides in the same home with the minor or has unchecked access to the child and repeatedly sexually molests the child over a prolonged period of time."[104] While the California cases generally concern unanimous verdict theories,[105] they are instructive in determining the reasonable particularity of a charging document.

In *People v. Van Hoek*,[106] a California appellate court sided with the defendant on key issues:

> A serious problem with the vague charges and the testimony upon which they are based is that the defendant's ability to defend is severely hampered. A "resident child molester" would virtually be precluded from presenting an alibi defense to the acts unless he could account for every time he was in the presence of the victim. In the instant case, defendant, because he was the victim's father and lived in the household, has no idea what specific time or specific act he has to defend against. The defendant would virtually have to account for every day of the last five years during which he had contact with C. [the child victim] to enable him to present any kind of alibi defense.[107]

But subsequent cases have criticized *Van Hoek* fervently. *People v. Obremski*[108] is probably the best example of the opposing logic:

> *Van Hoek* is incorrect because it attempts to fit the crime to the defense instead of fitting the defense to the crime. In cases where the child molester lived with the victim for an

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103. *See* State *ex rel.* K.A.W., 104 N.J. 112, 119, 515 A.2d 1217, 1220 (1986) ("the Attorney General reminds us of the depressing statistic that in New Jersey 67.8% of all children who are molested are related to the molester."); *see also* D. FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 90 (1984) ("Virtually all studies of sexual abuse have shown that strangers make up only a minority of persons who offend against children.").

104. People v. Van Hoek, 200 Cal. App. 3d 811, 814 n.1, 246 Cal. Rptr. 352, 354 n.1 (1988).

105. *See supra* note 39.

106. 200 Cal. App. 3d 811, 246 Cal. Rptr. 352 (1988).

107. *Id.* at 817, 246 Cal. Rptr. at 356; *see also* People v. Vargas, 206 Cal. App. 3d 831, 845-47, 253 Cal. Rptr. 894, 901-02 (1988) (following *Van Hoek* and reversing convictions on unanimous verdict ground), *review denied, id.* (Apr. 5, 1989); People v. Atkins, 203 Cal. App. 3d 15, 19-23, 249 Cal. Rptr. 863, 865-68 (1988) (*Van Hoek* judge apparently followed that case by reproducing a section of it).

108. 207 Cal. App. 3d 1346, 255 Cal. Rptr. 715 (1989).

> extensive, uninterrupted period and therefore had continual day and night access to the vulnerable child, neither alibi or wrongful identification is likely to be a reasonable defense. If the victim of a resident molester is able to testify only to a general sexual interaction with the molester, the molester himself is likely to be similarly handicapped in eliciting from his memory specific details concerning the date, time and place of his activities during the years of his residence with the victim. Forcing the prosecution to an election in this factual situation achieves the anomalous result of subjecting to prosecution only those defendants who select victims with better memories or who are one act offenders.[109]

While the logic of *Obremski* may be flawed,[110] it appears to achieve a better balance than *Van Hoek*, which truly could preclude prosecution of certain molesters simply because they chose victims with poor memories.[111] Additionally, the fact that the accused was a resi-

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109. *Id.* at 1353, 255 Cal. Rptr. at 719-20 (citations omitted). For cases criticizing or rejecting *Van Hoek*, see People v. Fernandez, 214 Cal. App. 3d 991, 1003, 263 Cal. Rptr. 139, 145-46 (1989) (collecting all California cases on the *Van Hoek* issue), *review granted and opinion superseded by*, 786 P.2d 892, 266 Cal. Rptr. 834 (1990); People v. Moreno, 211 Cal. App. 3d 776, 787, 259 Cal. Rptr. 800, 807 (1989); People v. Avina, 211 Cal. App. 3d 48, 55, 259 Cal. Rptr. 178, 183 (1989); People v. Coulter, 209 Cal. App. 3d 506, 513, 257 Cal. Rptr. 391, 395 (1989); *see also* State v. Brass, 781 S.W.2d 565, 568 (Mo. App. 1989) (alibi or nonaccess defense not viable because defendant lived in same house with victim).

110. A victim presumably can help the prosecution by identifying at least two points: (1) who committed the crime, and (2) when the individual committed it. By its claim that alibi and wrongful identification are not reasonable defenses for resident defendants, *Obremski* comes close to assuming that point (1) is given, and because point (1) is given, point (2) is relatively unimportant. The accused, of course, wants to use point (2) to prove that point (1) is *not* given. And surely it would be small consolation to a wrongfully identified defendant, who in fact was out of town on the day that the victim was molested, to learn that the victim simply was too young to recall the date more specifically.

111. As this article was going to press, the California Supreme Court resolved this issue in favor of *Obremski* in the pivotal case of People v. Jones, 51 Cal. 3d. 34, 792 P.2d 643, 270 Cal. Rptr. 611 (1990) (in bank), *modified*, No. S010191 (Aug. 28, 1990) (1990 Cal. LEXIS 2642). In *Jones*, not only were the child-victims unable to pinpoint the date of the abuse, they also were unable to testify specifically about the facts of any one incident. The court saw these "generic" charges and testimony as potentially implicating two federal constitutional rights of a defendant: The right to notice of the charges, and the right to present a defense.

First, the court apparently approved of the view that "the defendant has no right to notice of the specific time or place of an offense, so long as it occurred within the applicable limitation period." 792 P.2d at 656, 270 Cal. Rptr. at 624. It then concluded that "given the availability of the preliminary hearing, demurrer and pretrial discovery procedures, the prosecution of child molestation charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the

dent in the victim's home may reduce the likelihood that the victim can recall specific dates. As one court noted, "The events blur."[112]

Hence, a reasonably particular indictment perhaps may be less specific when the accused lived with the victim. But courts should be careful to distinguish cases in which the molester was not a resident, lest they foreclose a legitimate opportunity for a defendant to raise an alibi defense.[113] The dissent in a Missouri case vividly highlights the difference between resident and nonresident defendants. In *State v. Hoban*,[114] a defendant was charged with sexual crimes in a three-count indictment.[115] The first count named a specific date of the offense, the other two stated only "between June 1983 and Sep-

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charges against him." 792 P.2d at 657, 270 Cal. Rptr. at 625. *See supra* note 46 and accompanying text.

The *Jones* court also rejected the assertion that generic charges and testimony constitutionally impaired a defendant's right to present a defense. First, the court suggested that an alibi or mistaken identity defense is rarely viable in resident child molester cases. *Id.*; *see also infra* notes 113-124 and accompanying text. Second, the court found that generic charges and testimony do not entirely negate the possibility of raising an alibi defense: "the fact that the defendant has established an alibi covering some of the time periods alleged in the information could significantly undermine the victim's testimony as to the remaining counts." *Id.* Finally, the court noted that even without an opportunity to present an alibi defense, defendants have ample defenses available. The court suggested that defendants press the credibility issue by "taking the witness stand and directly denying any wrongdoing," *id.*, or introduce expert character evidence suggesting that they had no capacity for molestation, *id.*, or cross-examine the child-victims to show evidence of past fabrications or to suggest various innocent explanations of the victims' knowledge. 792 P.2d at 658, 270 Cal. Rptr. at 626.

Two justices dissented. Concerning the right to present a defense, the dissenters suggested that generic testimony hindered not only an alibi defense but also the credibility defense advocated by the majority, particularly in cases involving child victims:

> The person faced with generic testimony . . . can make only the most generalized attack on his accuser's credibility. Unable to cross-examine the child as to the details of the molestation, he can never show, for example, that these details render the child's story physically impossible, or highly unlikely, or contradictory. The trial strategems recommended by the majority are of dubious value: whereas a lack of specificity in an adult witness would likely raise questions about his credibility, a child witness's vagueness may well be seen by the jury as reflecting simply a lack of cognitive or expressive development. And generalized character testimony may be given little weight by a jury impressed by an earnest child victim/witness.

792 P.2d at 665, 270 Cal. Rptr. at 633 (Mosk, J., dissenting) (footnote omitted). *See also infra* notes 113-123 and accompanying text.

112. State *ex rel.* K.A.W., 104 N.J. 112, 123, 515 A.2d 1217, 1223 (1986).

113. Whether the accused in *Mulkey* was a resident child molester was not at issue. A sample count of the indictment suggests that he could have been: "James Elwood Mulkey . . . *having responsibility for supervision* of [J.A.S.], a minor child under the age of eighteen years, did cause abuse to said minor child . . . ." *Mulkey*, 316 Md. at 478 n.3, 560 A.2d at 25 n.3 (emphasis added).

114. 738 S.W.2d 536 (Mo. Ct. App. 1987).

115. *Id.* at 539.

tember 1984."[116] The defendant, a neighbor of the victim, was acquitted on the first two counts and convicted on the third.[117] On appeal, he asserted that it was impossible for him to establish an alibi defense over a fifteen-month period.[118] The majority rejected this argument.[119] A dissenting judge, who considered the facts in more detail, pointed out that the defendant was acquitted of the first charge partly because he established an alibi for the date alleged.[120] In contrast, the third count required him to establish his absence over an unreasonably long period.[121] The judge noted, "I have found no case in which a time period comparable to this has been allowed against a person who was not a resident or frequent visitor in the victim's home."[122] Indeed, perhaps the prosecution would have won a conviction on the first count as well if it had specified the time frame more vaguely. *Hoban* suggests that an alibi defense is too important to allow the prosecution to have de facto control over a defendant's ability to invoke it.[123]

Thus, the issue of whether the accused was a resident is largely a consideration of the plausibility of an alibi or related defense. When the accused is neither a resident nor has frequent unsupervised access to the victim, an alibi defense is more likely to be plausible, and a reasonably specific indictment ought to give the accused a chance to establish such a defense.

(4) Whether the accused actually claims an alibi defense.—A New Jersey court added "alibi defense" as a consideration to the *Morris* factors.[124] Several other courts have vigorously rejected it.[125] It

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116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 541.
120. *Id.* at 545 (Smith, J., dissenting).
121. *Id.* at 546.
122. *Id.* at 548.
123. *But see People v. Jones*, 57 Cal. 3d 34, 792 P.2d 643, 656-58, 270 Cal. Rptr. 611, 624-26 (1990) (discussed *supra* at note 111).
124. State *ex rel.* K.A.W., 104 N.J. 112, 123, 515 A.2d 1217, 1223 (1986) ("[T]o the extent the juvenile or criminal defendant makes known his defense—here, non-involvement, supplemented by an alibi for a brief period during the 20-month span—that too may be placed in [sic] the scales."); *see* People v. Morris, 61 N.Y.2d 290, 296, 461 N.E.2d 1256, 1260, 473 N.Y.S.2d 769, 773 (1984) (factors).
125. *See* Vail v. State, 536 N.E. 302, 303 (Ind. Ct. App. 1989) (asserting that "whether or not the state complied with the requirements of the alibi statute . . . has nothing to do with whether the information was sufficient to charge an offense."); People v. Naugle, 152 Mich. App. 227, 234, 393 N.W.2d 592, 596 (1986) (stating that "we do not believe that [an intention to assert an alibi defense] must necessarily militate in favor of either requiring specificity or dismissing the charges against a defendant. . . . A defendant

seems very unlikely that a court would dismiss a time-range indictment merely because a defendant asserted an alibi defense. Perhaps a better consideration is an expansion of the factor discussed above, that is, whether the asserted defense is reasonable under the circumstances. An alibi defense is not reasonable, for instance, when the accused lived with the victim and allegedly molested her over a long period of time. It may be reasonable, however, when there were few instances of abuse and the accused had very limited access to the victim.

(5) Length of time since the abuse occurred.—Elapsed time as a factor was listed in *Morris*[126] and applied by *R.A.R.*[127] In the latter case, the time frames of four counts of an indictment were very similar to those alleged in *Mulkey*.[128] But the court decided that the charges were not sufficiently definite because over five years had elapsed between the last offense and the filing of the complaint, and considerably more time between the first and last offenses.[129] While a lapse this long occurs only rarely, it may be worth remembering should it happen in Maryland. It is one thing for a defendant to remember what he was doing last summer, but it is quite another to remember a summer five years past.

4. Conclusion.—The Court of Appeals has made a prudent first step toward establishing standards for trial judges to use when they review time-of-offense allegations against child abusers.[130] Vague time frames have generated a burst of litigation in recent years.[131] Many of the theories defendants have used in other states have yet to be tested in Maryland. The court's standards, carefully applied, could pre-empt costly mistakes by prosecutors while still assuring fairness for the accused.

There is much to learn from the mistakes of others, and Maryland would do well to consider both the problems manifested in out-of-state litigation and the solutions that some courts are testing.

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would simply have to make the assertion of alibi in order to escape prosecution once it became apparent that a child was confused with respect to the date of a sexual assault.").

126. 61 N.Y.2d 290, 296, 461 N.E.2d 1256, 1260, 473 N.Y.S.2d 769, 773 (1984).

127. 148 Wis. 2d 408, 411-12, 435 N.W.2d 315, 316-17 (Ct. App. 1988).

128. "The complaint alleged that the first and second charges occurred 'during the spring of 1982,' the third 'during the summer of 1982' and the fourth 'during the summer of 1983 . . . .' " *Id.* at 409, 435 N.W.2d at 315-16.

129. *Id.* at 412, 435 N.W.2d at 317.

130. *Mulkey*, 316 Md. at 488, 560 A.2d at 30.

131. *See infra* notes 37-44.

In a time when one or more of every ten girls is molested,[132] and when false accusations of molestation are not unknown,[133] courts ought to be prepared to deal swiftly and judiciously with those accused of the offense.

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132. The actual figure is hard to pinpoint. *See* D. FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 1-2 (1984).

133. *See, e.g.*, Ackerman, *Child Sexual Abuse: Bona Fide or Fabricated?* 1 AM. J. FAM. L. 181 (1987); Schuman, *False Accusations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1986).