

No. _____

In The
Supreme Court of the United States

ROBERT JOHN DODD,

Petitioner,

v.

CHADWICK DOTSON,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Jonathan P. Sheldon
Sheldon & Flood, PLC
10621 Jones Street
Suite 301-A
Fairfax, Virginia 22030
Tel. (703) 691-8410
Fax (703) 251-0757
jsheldon@SFHdefense.com
Counsel of Record for Petitioner

QUESTION PRESENTED

Dodd was indicted on nine counts for the sexual abuse of a child fifteen years prior. Each count of the indictment was an identical carbon copy, including that each alleged that the crime happened over an identical time span. The evidence did not prove nine specific instances of abuse but gave general allegations. Dodd had a strong defense that the crime could not have happened during the first four years of the allegations. The question presented is whether trial counsel is ineffective where he failed to object on Double Jeopardy grounds to these nine identical carbon copy indictments?

In *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), the court granted habeas relief for an identical double jeopardy violation. The Supreme Court of Virginia in this case denied Dodd's state habeas petition because "there is no clearly established Supreme Court precedent addressing the constitutionality of multiple identical indictments" and a petition for habeas corpus cannot be granted without "clearly established federal law." *Dodd v. Clarke*, 2021 Va. Unpub. LEXIS 2, 2021 WL 397987 at *3.

LIST OF ALL PROCEEDINGS

- *Commonwealth v. Dodd*, No. CR1301133-01 through 09, Chesterfield Circuit Court. Judgment entered April 7, 2015 (trial).
- *Commonwealth v. Dodd*, No. 1043-15-2, Virginia Court of Appeals. Judgment entered July 5, 2016 (direct appeal).
- *Commonwealth v. Dodd*, No. 161146, Supreme Court of Virginia. Judgment entered January 30, 2017 (direct appeal).
- *Dodd v. Director*, No. CL18HC-930, Chesterfield Circuit Court. Judgment entered October 21, 2019 (state habeas).
- *Dodd v. Director*, No. 200091, Supreme Court of Virginia. Judgment entered February 4, 2021 (habeas appeal).
- *Dodd v. Director*, No. 3:21-cv-259, Eastern District of Virginia. Judgment entered August 22, 2022 (federal habeas).
- *Dodd v. Direction*, No. 22-7017, United States Court of Appeals for the Fourth Circuit. Judgment entered December 19, 2023.

TABLE OF CONTENTS

QUESTION PRESENTED	i
LIST OF ALL PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	iv
THE OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING PETITION	2
ARGUMENT	2
CONCLUSION.....	9
APPENDIX:	
Decision of the United States Court of Appeals for the Fourth Circuit Denying Appeal, filed 12/19/23	A1
Opinion of the United States District Court for the Eastern District of Virginia, filed 8/22/22	A3

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Allam v. Harry</i> , No. 1:14-CV-1940, 2017 WL 1232489 (M.D. Pa. Apr. 4, 2017).....	8
<i>Coles v. Smith</i> , 577 Fed. Appx. 502 (6th Cir. 2014)	7, 8
<i>Crawford v. Lamas</i> , No. 3:13-CV-143-KRG-KAP, 2016 WL 10908614 (W.D. Pa. Mar. 16, 2016), <i>aff'd sub nom</i> , 714 F. App'x 177 (3rd Cir. 2017)	8
<i>Gaines v. Washington</i> , No. 16-12461, 2018 WL 558766 (E.D. Mich. Jan. 25, 2018)	8
<i>United States v. Hillie</i> , 227 F. Supp. 3d 57 (D.D.C. 2017)	7
<i>Valentine v. Konteh</i> , 395 F.3d 626 (6th Cir. 2005)	5, 6, 7, 8
<i>Wampler v. Haviland</i> , No. 3:17CV2136, 2018 WL 6249681 (N.D. Ohio Nov. 29, 2018), <i>appeal dismissed</i> , No. 19-3559, 2019 WL 4296148 (6th Cir. July 8, 2019)	8
<i>Zacharko v. Harry</i> , No. 1:17-CV-501, 2018 WL 3153572 (W.D. Mich. June 28, 2018).....	8

STATE CASES

<i>Goforth v. State</i> , 70 So. 3d 174 (Miss. 2011)	7
<i>State v. Ogle</i> , 2007-Ohio-5066 (Ct. App.)	8

FEDERAL STATUTES

28 U.S.C. §§ 1257(a)	1
----------------------------	---

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. amend. V	1
U.S. Const. amend. VI	1
U.S. Const. amend. XIV	1

THE OPINIONS BELOW

The opinion of the federal district court in *Dodd v. Director*, No. 3:21-cv-259, Eastern District of Virginia. Judgment entered August 22, 2022 (federal habeas) is at App. 1.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied Dodd’s appeal on December 19, 2023. App. 21. This Court has jurisdiction under 28 U.S.C. §§ 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The United States Constitution’s Fifth, Sixth and Fourteenth Amendments provide, in part:

Fifth: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”

Sixth: “and to have the Assistance of Counsel for his defence.”

Fourteenth: “No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

STATEMENT OF THE CASE

1. Dodd was charged with nine crimes by indictment: three identical carbon copy counts of sodomy, three identical carbon copy counts of

indecent liberties, and three identical carbon copy counts of sexual abuse, all occurring between the identical dates of 1990-1999. JA 2-9.¹

2. Kyle Dodd alleged that during the 1990's his stepfather Robert Dodd repeatedly sexually abused him. Kyle generally described the abuse but did not provide three specific instances for each of the three alleged crimes.

3. Kyle testified that the abuse began when he moved into the downstairs bedroom. JA 195–205, 250–52; *see also* JA 187–89, 267, 409, 411. Dodd presented definitive evidence that Kyle did not move to the downstairs bedroom until 1994, proving that the abuse could not possibly have happened during at least 4 of the 9 alleged years. JA 371; *see also* JA 168, 411, 574–75.

REASONS FOR GRANTING THE PETITION

The lower courts need guidance on when identical carbon copy indictments violate the Double Jeopardy clause.

ARGUMENT

4. Dodd's three counts for each of the three crimes are indistinguishable from each other. Each count uses the same language and covers the same date range. JA 1-9. No part of the indictment, no amendment to the indictment, no bill of particulars,

¹ "JA" refers to the joint appendix file in the Supreme Court of Virginia on the state habeas appeal.

no jury instruction, and no verdict forms exist to differentiate these counts from each other.

5. At trial, the evidence further failed to distinguish the counts. JA 179–247 (Kyle’s direct testimony). Kyle testified generally and not specifically, and the prosecution provided no evidence that would have enabled the jury to differentiate the counts or determine what facts applied to each of the counts. *Id.* The questions asked were not about what Dodd did, but what he “would” do. *Id.* at 193. And so, Kyle answered what Dodd “regularly . . . would” do. *Id.*

6. Kyle’s allegations of abuse were almost entirely limited to a 12-page portion of the transcript described above. *Id.* at 193–205. When the prosecution asked “when” these things would happen, Kyle answered “late at night.” *Id.* at 205.

7. To establish that each of the three crimes happened more than once, the prosecution did not ask Kyle to describe three different specific events, but instead asked “did that happen on more than one occasion?” *Id.* at 193. And Kyle answered, “it was pretty regular.” *Id.* Did it happen on a “regular basis?” *Id.* at 197. “How long did this all go on?” *Id.* at 201.

8. During closing arguments, neither the defense nor the Commonwealth ever discussed the facts supporting the different charges, because that would have made no sense—the testimony at trial was general, not specific, and the charges were identical. JA 528–32 (Commonwealth discussing the

aggravated sexual battery charges but not describing three crimes); JA 532–35 (Commonwealth discussing the sodomy charges but not describing three crimes); JA 535 (Commonwealth discussing the indecent liberty charges but just referring back to the aggravated sexual battery discussion).

9. Finally, the jury instructions and verdict echoed the indictments and again failed to distinguish the counts from each other. In fact, when the trial judge read the instructions to the jury, he *only read one for each type of offense* (sodomy, indecent liberties and aggravated sexual battery). *See, e.g.*, JA 522.

10. Understandably, shortly into deliberations the jury asked: “we’re confused . . . they’re exactly the same. So, if we find one the same [sic], the other two are the same because there’s nothing we could find that differentiated any of the three in each group.” JA 617.

11. It was clear that the jury would either convict Dodd of all of the counts or none of the counts—it would have been an unintelligible result if the jury had convicted Dodd of a subset of counts for each of the three crimes charged. There was insufficient specificity in the indictment, the trial record, or the verdict to enable Dodd to plead convictions or acquittals as a bar to future prosecutions. The undifferentiated counts in this case resulted in the probability that Dodd actually was subject to Double Jeopardy at his trial by being punished multiple times for the same offense.

12. Trial counsel knew that Kyle's testimony would be general and not specific. Trial counsel also knew that they would be able to provide definitive evidence that Dodd could not have committed the crimes during almost half of the alleged 1990-1999 time frame. Because the Double Jeopardy issue and the harm to Dodd going to trial on identical indictments was obvious, trial counsel was ineffective for failing to object to the indictments. Dodd argued in the state court and maintains here that there is nothing unique to a double jeopardy claim based on identical indictments – its simply an inquiry into the likelihood that the defendant's double jeopardy rights were violated.

13. In *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), the defendant was tried and convicted for the sexual abuse of his stepdaughter. Like in Dodd's case, the allegations came years after the abuse, spanned a long period, and the defendant was charged by multiple undifferentiated counts. *Id.* at 629.

14. Valentine was convicted of all counts and filed a federal habeas petition challenging his convictions on Double Jeopardy grounds. *Id.* at 629–30. The Sixth Circuit held that “the multiple, undifferentiated charges in the indictment violated Valentine's rights to notice and his right to be protected from double jeopardy.” *Id.* at 631.

15. The Sixth Circuit explained that the “problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places. If there had been singular counts

of each offense, the lack of particularity would not have presented the same problem. Instead, the problem is that within each set of 20 counts, there are absolutely no distinctions made.” *Id.* at 632. So, “Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts.” *Id.* And like in Dodd’s case, “[i]n its charges and in its evidence before the jury, the prosecution did not attempt to lay out the factual bases of each separate incident that took place.” *Id.* “Instead, the 8-year-old victim described ‘typical’ abusive behavior by Valentine and then testified that the ‘typical’ abuse occurred twenty or fifteen times.” *Id.* at 633.

16. The problem with being indicted and tried this way is “it would have been incredibly difficult for the jury to consider each count on its own.” *Id.* The Sixth Circuit noted that the jury hardly could have found Valentine guilty of some counts, but not the rest, “[s]uch a result would be unintelligible, because the criminal counts were not connected to distinguishable incidents.” *Id.* The Sixth Circuit concluded that because the criminal counts were not anchored to distinguishable criminal offenses, “Valentine had little ability to defend himself.” *Id.*

17. The Sixth Circuit’s remedy in *Valentine* was to leave in place one conviction for rape and one for sexual penetration, and to dismiss the remaining 38 counts. *Id.* at 638–39.

18. In a later case the Sixth Circuit found that because there was no United States Supreme Court precedent on the issue, that it should not be the

basis for federal habeas relief. *Coles v. Smith*, 577 F. App'x 502, 507-08 (6th Cir. 2014) (citing *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting)).

19. The Supreme Court of Virginia in this case denied Dodd's state habeas petition because "there is no clearly established Supreme Court precedent addressing the constitutionality of multiple identical indictments" and a petition for habeas corpus cannot be granted without "clearly established federal law." *Dodd v. Clarke*, 2021 Va. Unpub. LEXIS 2, 2021 WL 397987 at *3. The court stated that because there was no controlling law, trial counsel would have "likely failed" in his Double Jeopardy claim. *Id.*

20. The federal district court denied Dodd's habeas claim because it found, citing to *Coles*, that the Supreme Court of Virginia's decision was not contrary to United States Supreme Court law. *Dodd v. Clark*, No. 3:21-cv-259, Doc. 13 at 14 (E.D. Va. Aug. 22, 2022).

21. Other courts have found that being tried on identical indictments can be a violation of Double Jeopardy. *See United States v. Hillie*, 227 F. Supp. 3d 57, 78–9 (D.D.C. 2017) (holding that the "various substantively identical child pornography counts . . . create a risk that the defendant" would be punished multiple times "for the same offense in the present criminal prosecution, if the case proceed[ed] to trial"); *Goforth v. State*, 70 So. 3d 174, 189–90 (Miss. 2011) (finding that an indictment containing multiple identical counts that did not differentiate among those counts "failed to protect" the defendant's "right against double jeopardy in the

event of future prosecution”); *State v. Ogle*, 2007-Ohio-5066 (Ct. App.) ¶¶ 5, 23 (finding, in a case where the State indicted the defendant on “three carbon-copy rape counts” and the defendant was acquitted on two counts of rape but a mistrial declared on the third, that “[n]o part of the indictment, no amendment to the indictment, no bill of particulars, no jury instruction and no verdict forms exist to differentiate these counts one from the other such that a court in a second trial would be able to discern whether there had been a previous finding of not guilty as to the alleged act” and thus retrial for the third rape count “would violate double jeopardy”).

22. At least four other courts in the Sixth Circuit have followed *Coles* and declined to provide habeas relief on the same issue in the absence of clear law from this Court. *See Gaines v. Washington*, No. 16-12461, 2018 WL 558766 (E.D. Mich. Jan. 25, 2018); *Zacharko v. Harry*, No. 1:17-CV-501, 2018 WL 3153572 (W.D. Mich. June 28, 2018); *Wampler v. Haviland*, No. 3:17CV2136, 2018 WL 6249681 (N.D. Ohio Nov. 29, 2018), *appeal dismissed*, No. 19-3559, 2019 WL 4296148 (6th Cir. July 8, 2019).

23. Other jurisdictions have followed *Coles* and noted that the absence of direction from this Court precludes federal habeas relief. *See Allam v. Harry*, No. 1:14-CV-1940, 2017 WL 1232489 (M.D. Pa. Apr. 4, 2017) (“Until the Supreme Court promulgates a rule like that found in *Valentine*, it is not clearly established that Petitioner’s charging instrument was constitutionally deficient.”); *Crawford v. Lamas*, No. 3:13-CV-143-KRG-KAP, 2016 WL 10908614

(W.D. Pa. Mar. 16, 2016), *aff'd sub nom.*, 714 F. App'x 177 (3d Cir. 2017) (“Valentine itself does not represent federal constitutional law as determined by the Supreme Court, which is what AEDPA requires.”).

24. Because numerous courts are in conflict with each other and many discuss that they are waiting for direction from this Court, this Court should grant the petition and state that identical indictments clearly violate Double Jeopardy and it is deficient performance to fail to object to such an indictment.

CONCLUSION

25. The petition for writ of certiorari should be granted.

/s/ Jonathan P. Sheldon
Counsel of Record
Sheldon & Flood, PLC
10621 Jones Street
Suite 301-A
Fairfax, Virginia 22030
Tel. (703) 691-8410
Fax (703) 251-0757
jsheldon@SFHdefense.com