No. _____

IN THE

Supreme Court of the United States

JUAN AVENDANO, PETITIONER,

v.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, on which lower state and federal courts are openly divided, is:

Whether a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment are violated when the prosecution brings multiple, factually identical counts of the same statutory offense using carbon-copy indictments, presents general allegations at trial, and then provides indistinguishable sets of verdict forms to the jury, compelling the jury to either issue irreconcilable verdicts or convict in an "all or nothing" manner.

LIST OF ALL PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *People v. Avendano*, 226 N.E.3d 32 (Table). Docket No. 130037, Supreme Court of Illinois. Order denying petition for leave to appeal, entered January 24, 2024.
- *People v. Avendano*, 2023 IL App (2d) 220176. Docket No. 2-22-0176, Appellate Court of Illinois, Second District. Opinion and order affirming judgment below, entered September 12, 2023. Modified opinion entered October 6, 2023.
- *People v. Avendano*, No. 18-CF-516, Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois. Judgment of conviction entered May 17, 2022.

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The opinion of the Second District Appellate Court of Illinois affirming the trial court's judgment has not yet been released for publication in the Northeastern Reporter, but is published at 2023 IL App (2d) 220176. (Appendix A). A previous version of that opinion is not reported. (Appendix C). The order of the Illinois Supreme Court denying leave to appeal is reported at 226 N.E. 3d 32 (Table). (Appendix D).

JURISDICTION

The Illinois Appellate Court, Second District, affirmed the judgment below on September 12, 2023. (Appendix C). The court denied a timely petition for rehearing on October 6, 2023. (Appendix B). The same day, the court filed a modified opinion. (Appendix A). On January 24, 2024, the Illinois Supreme Court denied a timely petition for leave to appeal. (Appendix D). Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution of the United State provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

This case presents a fundamental question concerning what protections the Double Jeopardy Clause of the Fifth Amendment provides when the State prosecutes a defendant for multiple, identical counts of the same statutory crime in the same proceeding.

1. The State charged Juan Avendano with three counts of predatory criminal sexual assault of a child ("L.R."), three counts of aggravated criminal sexual abuse, and one count of indecent solicitation of a child. The three counts of predatory criminal sexual assault were identical, alleging that on or about January 1, 2016, through December 31, 2017, Avendano "touched the sex organ of L.R. with his hand for the purpose of sexual arousal of the defendant.[1]" App. 71-73.

The three counts of aggravated criminal sexual abuse were also identical to each other, alleging that, on or about January 1, 2016, through December 31, 2017, Avendano "touched the sex organ of L.R..,[sic] for the purpose of the sexual arousal of the defendant." App. 74-76.

The count of indecent solicitation was a single separate count that charged him with soliciting L.R. to perform an act of sexual conduct between January 1, 2016, and December 31, 2017. App. 77.

2. At the time of trial, Juan Avendano was a 65-year-old kindergarten teacher with a certificate in bilingual education. (R. 1713). The prosecution's main witness was a child, L.R., who had been a student of Avendano's when she was in kindergarten between the dates of August, 2016, and June, 2017. L.R. testified that Avendano put

[1] The indictments are reprinted in full as App. 71-77.

his hands in her underwear and touched her vagina with his hand "more than one time," and "every time [she] was in school." She stated that it occurred every day at the classroom's green U-shaped reading table, to which Avendano took her, alone, and sat next to her. (R. 825-27, 830, 859). She also testified that, on one occasion, he asked her to kiss him but she refused. (R. 1129, E. 49).

Avendano denied all of the allegations against him. (R. 1721, 1740-41). His teaching assistant, Claribel Marungo, testified she never saw anything concerning with his interactions with the children. (R. 1637-40). She testified that Avendano did not take L.R. or any individual child to the green reading table alone, other than perhaps two or three times a year for reading testing. When that occurred, the students did not sit next to him, they sat across the table. (R. 1628, 1636-39). Otherwise, students were only at that table in groups, perhaps once a week. (R. 1628).

After the defense rested, the judge held a jury instruction conference with the parties. The defense raised a concern that the State had changed the jury verdict forms so that they were identical and could not be distinguished from one another, and thus the jury would not be able to tell one count from another. (R. 1807-09). The State argued that the forms should remain undifferentiated, because there had been no description of three separate incidents that would qualify as the predatory acts, since it was ongoing abuse. (R. 1808). Over defense counsel's objection, the judge agreed that he would give the verdict forms without any differentiation or count numbers. (R. 1809). The following colloquy then took place:

Court: Then the verdict forms, the State's distinguishing the three. You took it away?

State: I decided to take that away.

Court: Okay. So No. 28 is IPI 26.02, that's we the jury find the defendant Juan Avendano not guilty of predatory criminal sexual assault of a child. No. 29 is State's—IPI criminal number 26.05, we the jury find the defendant Juan Avendano guilty of predatory criminal sexual assault of a child. Does the defense have any objections to the way the verdict forms are now?

Defense: Yes, because the State has charged Mr. Avendano with three separate counts of predatory criminal sexual assault that happened on three separate occasions. They said it in their opening. And how is the jury going to determine between one or the other. So, yes, if you're charging three separate counts, you have to distinguish between them in some way.

Court: State.

State: Judge, there was—this was obviously ongoing abuse. There was no description of three separate incidents that would qualify as the predatory acts. I think this is just something that has to be explained to the jury in closing. I think it will be by both sides. And the defense is free to argue, you know, anything they want in that regard.

Defense: Well, it has to say and list Count 1 and list Count 2 and list Count 3.

Court: The issue is they don't know what the count numbers are. And in this case, Count 1, 2, 3, and 4 aren't here because they were severed out. So putting a count number is not going to help them at all.

Defense: They don't get a copy of the indictment when they go back?

Court: No, no, because the indictment is not evidence.

Defense: Well, so if—I mean, I've made my record. I believe that there should be some distinguishing—some way to distinguish them on the forms.

Court: So the way the evidence came out, there is no distinguishing what happened first, what happened second, what happened third like had originally been in the verdict forms. So over objection of defendant, I'm going to leave it—I'll give it as the State has it over objection for the three different

> versions–I'm sorry—the three counts of predatory criminal sexual assault of a child, which—so that's 28 through 33. And then in 34 through 39 are 26.02 and 26.05 for three different counts of aggravated criminal sexual abuse, not guilty and guilty verdict forms. Same objection?
>
> Defense: Yes.
>
> Court: I'll give it over objection. (R. 1807-10).

During closing arguments, the State argued that the abuse happened to L.R. multiple times, meaning more than three, and stated, "[I]f you don't think it happened every day, does that mean—just because of that you should find him not guilty? No." (R. 1891-92). The jury was given no other instruction or told what they should do if they believed it happened only one time or two times. After closing arguments and deliberation, the jury found Avendano not guilty of indecent solicitation of a child. They found him guilty of aggravated criminal sexual abuse and predatory criminal sexual assault. The guilty verdicts were determined by the jury's return of three copies of a verdict form that read, "We, the jury, find the defendant, Juan Avendano, guilty of predatory criminal sexual assault of a child," and three copies of a verdict form that read, "We, the jury, find the defendant, Juan Avendano, guilty of criminal sexual abuse of a child." App. 85-91.

The aggravated criminal sexual abuse charges merged into the predatory criminal sexual assault charges for sentencing. Convictions entered on three identical predatory criminal assault verdicts, and Avendano was sentenced to six years on each separate count, to be served consecutively. (C. 170, 266-272, 344); (R. 1921).

3. On appeal, Avendano argued that: (1) his three convictions for predatory criminal sexual assault violated Illinois' one-act, one-crime doctrine, representing the

double jeopardy prohibition of punishing a defendant more than once for the same crime; and (2) the three convictions violated his constitutional right to be free from double jeopardy, as the record—with undifferentiated indictments and verdict forms untethered to any specific incident—would not protect his right against double jeopardy in the event of future prosecution. (Pet. Br. p. 1). Likewise, there was no guarantee that he had not already been subjected to double jeopardy in the proceeding at hand. Avendano argued that the case was functionally identical to *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), which held that the use of carbon-copy indictments led to an "all or nothing" conviction, and violated the defendant's right to be protected from double jeopardy. (Pet. Br. pp. 29-33).

4. The Second District found that no error occurred and affirmed Avendano's convictions. The court rejected his double jeopardy argument on the basis that the State argued in opening that they would prove that the assault happened more than three times. In closing, the State argued that the assault happened every day, meaning more than three, which was sufficient to show that the jury knew there were three counts of predatory criminal sexual assault. App. 20-21; App. 55.

The court found the dissent in *Valentine* more persuasive than the majority decision, noting that prohibiting the use of multiple identical counts in a single indictment would hamper the State's ability to prosecute cases where a child was the victim and could not provide details about the abuse. App. 23-24; App. 59. Finally, the court found that "the indictment, the verdict forms, and the State's arguments sufficiently informed the jury that it needed to find the defendant guilty of three separate acts of predatory criminal sexual assault." App. 55.

5. Avendano filed a petition for rehearing, arguing that neither the indictment, verdict forms, nor the State's arguments could have informed the jury, because (1) the jury never saw the indictment[2]; (2) the verdict forms were indistinguishable from each other without identifiers linking them to separate incidents; and (3) the State's vague closing reference to every day meaning "more than three" did not cure the defects. Moreover, the trial judge told the jury multiple times that closing arguments were not instructions or statements of law, stating, "Jurors, understand that the argument is not a part of the instruction." (R. 1842, 2853, 1888). The Appellate Court based its justification for affirming Avendano's convictions on the rationale that the jury should have understood them as such. (Pet. for Reh'g pp. 1-2).

Avendano argued that the appellate court also erred when it based its ruling on the dissent in *Valentine*, which noted the difficulty prosecutors would face in prosecuting crime if child victims were required to provide more details about abuse. As in *Valentine*, the issue at hand was not a lack of factual detail in the indictment—it was the fact that the counts were identical, and untethered to any specific incidents of abuse. The carbon-copy verdict forms meant that the jury had no choice but to convict him in an "all or nothing" manner. Had each statutory offense been charged only once, there would have been no issue. (Pet. for Reh'g, pp. 3-4).

6. The court modified its opinion upon denial of rehearing, but nevertheless maintained that no error had occurred. *People v. Avendano*, 2023 IL App (2d) 220176

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[2] Upon denial of petitioner's request for rehearing, the court replaced the word "indictment" with the word "charges," stating: "the charges, the verdict forms, and the State's arguments informed the jury that it needed to find the defendant guilty of three separate acts of predatory criminal sexual assault." App. 21.

(modified upon denial of petition for reh'g). App. 1; App. 35.

7. Avendano filed a petition for leave to appeal to the Illinois Supreme Court, presenting the constitutional double jeopardy question to the court, and asking it to decide whether:

> Where the State charged Juan Avendano using carbon-copy indictments and the jury instructions and verdict forms failed to instruct the jury that they were being asked to decide separate acts to support multiple convictions for predatory criminal sexual assault, he was convicted in violation of one-act, one-crime principles and deprived of his due process right to be protected from double jeopardy. (Pet'n for Leave to Appeal, at p. 9).

The Illinois Supreme Court denied leave to appeal on January 24, 2024. This petition follows.

REASONS FOR GRANTING CERTIORARI

State and federal courts are divided over whether the Double Jeopardy Clause of the Fifth Amendment permits the use of carbon-copy indictments to convict a defendant multiple times for the same statutory offense. This Court should use this case—with an uncontested set of relevant facts arising on direct review—to resolve the conflict on this question and hold that, if a defendant is exposed to multiple punishments based on indistinguishable counts of the same offense, then the Double Jeopardy Clause requires the jury to know that it should, and that it be allowed to, consider each count separately. This Court should also hold that factually-identical indictments and undifferentiated jury verdict forms, untethered to any specific incident, do not provide sufficient record to protect a defendant's right against double jeopardy in the event of future prosecution.

I. Review of the question presented is critically important to the uniform administration of the constitutional right to be protected from double jeopardy.

The Double Jeopardy Clause protects against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); U.S. Const. amend. V. The second two protections are those implicated in this case. Review would provide guidance to lower courts that continue to address this issue in myriad conflicting ways.

The State cannot bring three *successive* prosecutions against the same defendant for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Gavieres v. United States*, 220 U.S. 338 (1911). It should be just as clear that, without appropriate

safeguards, the State cannot bring three *simultaneous* prosecutions against the same defendant for the same offense, with precisely the same allegations occurring within precisely the same time frame. The appropriate safeguards are simple: the jury must be properly instructed that the counts faced by a defendant are separate, and the jury must be provided with differentiated verdict forms that would allow them to consider whether the State met its burden of proof on each separate count.

In Avendano's case, and in every case with carbon-copy charges alleging the same crime, no count requires proof of a fact that the others do not. Thus, to protect against the possibility of multiple punishments for the same crime within the same prosecution—in essence, to provide the same protections as those for successive prosecutions—the jury must consider not only whether the offense occurred, but, if it did, how many separate volitional acts of that offense occurred. Due to the multiplicity of the indictment, it is not sufficient that the jury merely find him guilty of the statutory offense. Failure to hold the State to its burden on each individual count violates double jeopardy where guilt on each count results in separate, consecutive periods of imprisonment.

Avendano's convictions contravene that principle. In order to have convicted Avendano of one instance of abuse but acquitted him of another, the jury would have to have issued verdicts–untethered to any charge—that read: "We the jury find Juan Avendano guilty of predatory criminal sexual assault," and "We the jury find Juan Avendano not guilty of predatory criminal sexual assault." These verdicts are not merely irrational and irreconcilable; they convict and acquit him of the exact same offense. App. 78-91.

Trying a defendant on multiple identical counts where there is no rational possibility for a conviction on one count and acquittal on another, runs afoul of the double jeopardy protection against multiple punishments for the same offense. In other words, the State should not have been permitted to collapse the charges into one inseverable unit for the purpose of convicting Avendano in an "all or nothing" manner, and then separate them again for the purpose of punishing him with multiple consecutive periods of imprisonment.

Likewise, three identical verdict forms, untethered either to separate incidents or the indictments, do not sufficiently clarify the nature of the convictions, such that a person would be protected from double jeopardy in the event of future prosecution. If identical verdict forms are permitted for offenses that are identically charged and unconnected to specific incidents with only generalized testimony at trial, the record does not supply sufficient explanation as to which specific offense(s) the defendant was convicted. *Valentine v. Konteh*, 395 F.3d 626, 635-36 (6th Cir. 2005).

This issue has repeatedly come before courts across the country and will likely continue to do so. Notably, at the time of the filing of this petition, another petition for writ of certiorari on this issue is filed with this Court. *Dodd v. Dotson, not reported in Fed. Rptr.*,(4th Cir. Dec. 19, 2023), *petition for cert. filed*, 2024 WL 1194680 (U.S. March 15, 2024) (No. 23-1036). *Dodd* arose in the context of federal habeas proceedings, but the underlying double jeopardy issue is the same. *Dodd v. Clarke*, 2022 WL 3587817 (E.D. Va. Aug. 22, 2022). As in the present case, defendant John Dodd was indicted using carbon-copy counts of sexual abuse of a child, and the jury forms and verdict "echoed the indictments and failed to distinguish the counts from

each other." *Dodd v. Dotson, petition for cert* at *4. This too left the jury to convict Dodd in an "all or nothing" manner. The federal district court denied Dodd's habeas claim because it found that the Sixth Circuit's decision in *Valentine* could not be considered established federal law. *Dodd v. Clarke*, 2022 WL 3587817 at *9 (citing *Renico v. Lett*, 559 U.S. 766 at 778-79 (2010)). The district court decided that, because no Supreme Court precedent existed on the issue, the lower court's decision was not contrary to established federal law and thus his petition could not be granted. *Dodd*, 2022 WL 3587817 at *9.

II. There is no Supreme Court precedent addressing the constitutionality of identically worded and factually indistinguishable indictments and "all or nothing" convictions, and lower courts are intractably divided.

Lower courts are divided over the constitutionality of allowing the State to charge and convict defendants in this manner. State courts disagree with each other and with federal courts. Federal courts openly discuss that they are waiting for direction from this Court. This issue has been a source of pervasive conflict for almost two decades, and its longstanding nature provides no reassurance that uniformity will ever be reached absent guidance from this Court.

Among federal courts, the seminal case on this double jeopardy issue was decided by the Sixth Circuit in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005). Examining the double jeopardy implications of an indictment consisting of multiple, undifferentiated, identically-worded counts of a single offense, the facts of *Valentine* are materially indistinguishable from those of the present case.

In *Valentine*, the prosecution charged the defendant with twenty counts of child rape and twenty counts of felonious sexual penetration. Each set of counts was

identically worded and alleged to have taken place during an identical time frame. *Valentine*, 395 F.3d at 628. The victim testified that she was forced to perform fellatio in the living room "about 20" times, and that the defendant digitally penetrated her vagina in the living room "about 15" times. *Id.* at 629. In the case at hand, L.R. testified that Avendano touched her vagina "every time" she was at school. (R. 830-33). The child in each case referred to a generic pattern of "typical" abuse that happened repeatedly, but without any distinction between incidents.

The critical issue in *Valentine* was not that the indictment did not provide the defendant with sufficient specificity for each individual count. The Sixth Circuit found that, had there been a single count of each of the two types of offenses contained in the indictment, the lack of particularity would not have presented the same problem. *Id.* at 632. The fatal flaw was that, within each set of identical counts, there were absolutely no distinctions made.

The Sixth Circuit explained that, during the trial, the prosecution did not attempt to lay out the factual basis for separate incidents or make any effort to disaggregate the whole of the abuse to prosecute the case as forty discrete offenses. *Id.* at 633-34. The court noted, "The jury could not have found Valentine guilty of Counts 1-5, but not Counts 6-20. Nor could the jury have found him guilty of Counts 1,3,5, and 7, but not the rest. Such a result would be unintelligible, because the criminal counts were not connected to distinguishable incidents." *Id.* at 633. In so ruling, the Sixth Circuit rejected this sort of "all or nothing" approach to conviction, and found this method of obtaining convictions to be "radically disconnected" from the core values of

our legal system.[3] *Id.* at 634, 638.

Some state high courts and federal district courts have relied on *Valentine* to hold that these types of convictions violate a defendant's right to be free from double jeopardy. *See, e.g., United States v. Hillie*, 227 F.Supp.3d 57 (D.D.C. 2017); *Goforth v. State*, 70 So.3d 174 (Miss. 2011); *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008).

In *Harp v. Commonwealth*, for example, the Kentucky Supreme Court reversed the defendant's convictions for sexual abuse, where the jury instructions on seven sexual abuse counts were identical, containing no identifying characteristics that would have required the jury to differentiate among each of the counts. A frustrated court wrote:

> We again instruct the bench and bar of the Commonwealth that in a case involving multiple counts of the same offense, a trial court is obliged to include some sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred. 266 S.W. 3d at 818.

In *Goforth v. State*, the Supreme Court of Mississippi reversed the defendant's convictions for five counts of sexual battery involving a former student, finding that the multiple, identically-worded indictments would have left her unable to assert double jeopardy in any subsequent prosecution. In reaching its decision, the court cited to *Valentine*, and followed its reasoning. *Goforth*, 70 So.3d at 189.

In *United States v. Hillie*, the defendant was indicted on multiple counts of

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[3]In a way, the case below is more disquieting than even *Valentine*. The trial court refused to permit the verdict forms to contain the count numbers at all. (R. 1807-09). Thus, Avendano was not afforded the most basic safeguard from a lay jury who may have mistakenly, but pragmatically, thought they were signing three original copies of a single guilty verdict—perhaps one copy for the defense, one for the prosecution, and one for the court.

nearly identical, generically-worded child pornography and sexual abuse offenses. 227 F.Supp.3d at 61-62. He moved to dismiss the indictments on the grounds that they failed to specify the particular conduct that formed the basis of the government's charges against him. The United States District Court for the District of Columbia held, *inter alia*, that in addition to the insufficiency of the generically-worded indictments, the substantively identical child pornography counts created a risk that the defendant might be punished more than one time in a present criminal prosecution, and would fail to protect against a second prosecution for the same offense after conviction. *Hillie*, 227 F.Supp. 3d at 63, 71, 78.

In summation of the double jeopardy concern, then-Judge, and now Justice Jackson wrote, "The bottom line is this: if a criminal indictment is going to be drafted to provide adequate notice, to preserve the role of the grand jury, and to avoid the risk of double jeopardy—as the Constitution demands—then 'the defendant, the judge, and the jury must be able to tell one count from another.'" *Hillie*, 227 F.Supp. 3d at 80 (quoting *Valentine*, 395 F.3d at 637).

The Eleventh Circuit also examined *Valentine* in *Jones v. Secretary, Dep't of Corr.*, 778 Fed. App'x 626 (11th Cir. 2019), and agreed with its reasoning. In *Jones*, the defendant was charged with two identically-worded indictments for unlawful sexual activity with a minor. At trial, the victim testified to different acts of alleged abuse. The Eleventh Circuit recognized that the evidence at trial could have supported the multiple convictions; however, the issue was not the sufficiency of the evidence. Rather, the issue was that, because of the lack of distinction in the indictments, the trial record, and the jury's verdict, Jones' multiple convictions for identically-worded counts

created a double jeopardy problem and did not protect him from future prosecution. *Jones*, 778 Fed. App'x at 637. As in *Valentine*, the court found that it could not be sure what double jeopardy would prohibit in the future because, due to the lack of precision in the trial record and lack of specificity in the verdict forms, it was unclear of which incidents he had been convicted. *Id.* The court ultimately denied habeas relief on the grounds that Jones could not show prejudice. 778 Fed. App'x at 638-39.

Other state courts decline to follow *Valentine*, including state courts of last resort which have implicitly endorsed this manner of obtaining convictions by denying leave to appeal on the issue, allowing appellate court decisions to stand as precedential authority across states. Indeed, *Valentine* is not binding on state courts, and they are free to either adopt or disregard its reasoning. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir.1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.").

In *People v. Gurk*, 477 Mich. 883, 883-86 (Mich. 2006), a split Michigan Supreme Court denied leave to appeal in a case involving carbon-copy indictments. Writing separately in concurrence with the decision to deny leave, Justice Corrigan added his opinion that *Valentine* was wrongly decided and noted that there was no United States Supreme Court precedent on the double jeopardy issue in question. *Gurk*, 477 Mich. at 883-84 (Corrigan, J. concurring). Justice Kelly dissented from the majority, indicating that she would have granted leave on the basis that the case involved an important constitutional question. She found that the facts raised serious double jeopardy concerns, as the State had done little more than prove a single offense, yet the

defendant received five convictions and penalties as a result. Justice Kelly found *Valentine* to have been well reasoned. *Gurk*, 477 Mich. at 884-85 (Kelly, J., dissenting).

Even in Ohio, which sits within the Sixth Circuit, state courts decline to follow *Valentine*. *See, e.g. State v. Palmer*, 2021-Ohio-4639, 2021 WL 6276315, at ¶ 24 (stating that Ohio courts are not bound by *Valentine* and do not follow *Valentine*) (collecting cases).

In *Tapper v. State*, 47 So.3d 95 (S. Ct. Miss. 2010), a split Supreme Court of Mississippi upheld the defendant's child abuse convictions that were based on four identical, "form-copied" counts of abuse. Even while issuing this decision, however, the majority implored prosecutors to be as specific as possible in drafting indictments. *Tapper*, 47 So.3d at 103. Three dissenting justices would have quashed the identical indictments based on the reasoning set forth in *Valentine*. *Tapper*, 47 So.3d at ¶¶ 39-42 (Graves, P.J., Dickinson and Lamar, J.J., dissenting.). The dissenting opinion found that the identically worded counts were "constitutionally infirm." Because of the vagueness of the identical counts and the testimony at trial,"[The defendant] is, as this Court is, unable to ascertain whether he is currently being punished twice (or more for that matter) for a single act." Additionally, the child victim testified at trial that she was touched "about five" times, yet the grand jury indicted only on four. The dissent noted that if the defendant were later to be indicted on a single charge of touching, identical to the four already charged, no one, including the court, would know whether or not he had already been put in jeopardy for that fifth identical offense. *Tapper*, 47 So.3d at ¶¶ 47-49, 52 (Graves, P.J., Dickinson J.J., and Lamar, J.J., dissenting.).

The Illinois Supreme Court has never addressed this issue, and the result is that

the Illinois Appellate Court is fast creating its own line of cases on this question of federal law, without supporting authority. *See People v. Foster*, 2021 IL App (2d) 210556-U (functionally identical fact pattern as the present case, with identical indictments, general testimony, and identical verdict forms) (pet'n for leave to appeal denied); *People v. Avendano*, 2023 IL App (2d) 220176 (pet'n for leave to appeal denied); *People v. Gonsalez-Garcia*, 2023 IL App (2d) 230035-U (citing *Avendano*, 2023 IL App (2d) 220176); *see also People v. Filipiak*, 2021 IL App (3d) 220024 (noting a lack of controlling caselaw where identical indictments and indistinguishable verdict forms are used). It is this Court—not the Illinois Appellate Court—that should resolve this question.

It is not only state courts that require guidance. Federal district courts are also in conflict with each other and openly discuss that they are waiting for direction from this Court. Thus, substantive review of this double jeopardy issue remains elusive as many federal courts decline to reach the merits after determining it unsuitable for habeas review due to the lack of precedent from this Court. *See, e.g.*, *Allam v. Harry*, No. 1:14-CV-19402017, 2017 WL 1232489, *3 (M.D. Pa. Apr. 4, 2017) ("Until the Supreme Court promulgates a rule like that 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, *1 (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."); *Wampler v. Haviland*, No. 3:17CV2136, 2018 WL 6249681, *16 (N.D. Ohio Nov. 29, 2018), *appeal dismissed*, No. 19-3559, 2019 WL 4296148 (6th Cir. July 8,

2019); *Zacharko v. Harry*, No. 1:17-CV-501, 2018 WL 3153572, *3 (W.D. Mich. June 28, 2018).

Post-*Valentine*, even the Sixth Circuit acknowledged, in the context of federal habeas proceedings, that "no Supreme Court case has ever found the use of identically worded and factually indistinguishable indictments unconstitutional." *Coles v. Smith*, 577 F. App'x 502, 507-08 (6th Cir. 2014) (citing *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting)). This is the clarification petitioner seeks.

Absent precedent from this Court, this federal issue will be intolerably left to the vicissitudes of individual state courts. The extent to which the Double Jeopardy Clause protects a defendant when they are charged using identically worded and factually indistinguishable indictments is an important question of constitutional law that has not been, but should be, settled by this Court.

III. This case presents an ideal vehicle for resolving the conflict.

For three reasons, this case is a particularly suitable vehicle for resolving the constitutionality of indistinguishable indictments and verdict forms resulting in "all or nothing" convictions, and the double jeopardy violations arising therefrom.

First, this case arises on direct review, and possesses none of the complications that often accompany habeas cases. The relevant facts are not in dispute. The State acknowledged on the record that, in the testimony presented at trial, "[t]here was no description of three separate incidents that would qualify as the predatory acts." (R. 1808). They also acknowledged that they intentionally removed any distinction from the verdict forms. The defense confronted the court with the serious potential for juror confusion posed by identical verdict forms and asked that they be differentiated. Thus,

the court was aware of the issue, yet intentionally allowed the jury to be given verdict forms that did not provide count numbers or indicate that each represented a separate and individual act that the State must prove beyond a reasonable doubt. App. 14. (R. 1807-10).

Second, petitioner properly presented his constitutional claim in the state court system. The double jeopardy issue was brought before the Appellate Court and Illinois Supreme Court under both federal and state constitutional protections. Additionally, under state law, Illinois double jeopardy protections are coextensive with federal double jeopardy protections. U.S. Const., amend. V; U.S. Const. amend XIV; Ill. Const. 1970, art. I, § 10; *In re P.S.*, 175 Ill. 2d 79, 91 (1997) ("[T]he double jeopardy clause of our state constitution is to be construed in the same manner as the double jeopardy clause of the federal constitution."). Illinois's one-act, one-crime doctrine is used to enforce the third prohibition of double jeopardy, which is that a person should not suffer multiple punishments for the same offense. *People v. Price*, 369 Ill. App. 3d 395, 404 (Ill. 2006). The Appellate Court recognized and ruled on this as part of the double jeopardy argument in its opinion. App. 21. The Appellate Court analyzed the case within the state and federal constitutional framework, addressing both state and federal law cited by petitioner, including *Valentine v. Konteh*. App. 15-24. The Illinois Supreme Court denied leave to appeal, allowing the Appellate Court's published decision to stand, and placing the constitutional issue squarely before this Court. App. 70.

Finally, the Appellate Court wrongly decided the question presented and the answer will determine the outcome of Avendano's case. There are no alternative

holdings or grounds for affirmance passed on by the court below that would interfere with this Court's review. If this Court holds that the way in which Avendano was convicted violated his right to be protected from double jeopardy, he would obtain meaningful relief in that two of his three convictions must be vacated, and with them the corresponding consecutive sentences. *Valentine*, 395 F.3d at 638. Double jeopardy would bar the State from re-trying him on those counts.

Additionally, because federal courts decline to reach the merits of this issue by denying habeas petitions on the grounds that there is no ruling from this Court finding identically worded and factually indistinguishable indictments unconstitutional, this case presents an unusual opportunity to resolve this fundamental question because it arises on direct appeal. See *Coles v. Smith*, 577 F. App'x 502, 507-08 (6th Cir. 2014) (citing *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting)).

IV. A defendant's right to be protected against double jeopardy is not contrary to the State's interest in prosecuting crime.

In affirming Avendano's convictions in the case below, the Appellate Court focused on a point of law not at issue in the present case—the specificity of the facts in the indictment—in ruling that prohibiting multiple identical charges in a single indictment would hamper the State from prosecuting crimes where a child victim is the sole witness. App. 24. (citing *Valentine*, 395 F.3d at 640-41, Gilman, J., dissenting in part). The court ignored Avendano's repeated entreaties that extensive factual detail was neither necessary nor requested as a remedy to the double jeopardy violation in his case. (Pet. for Reh'g at p. 3).

Requiring courts and the prosecution to place some identifier within each count

and verdict form when seeking to obtain multiple convictions from identical charges is an extraordinarily low bar and does not demand further detail from a child victim. Indeed, the United States District Court for the District of Columbia recognized this point in *United States v. Hillie*, 227 F.Supp.3d 57 (D.D.C. 2017). "Notably, the requirement that the government provide sufficient facts to establish the nature of the different offenses and to differentiate one count from another does not, by any means, demand high levels of exactitude . . . ." 227 F.Supp.3d at 79-80. It does not prevent the State from alleging identical instances of a crime so long as they make it clear that the counts are separate and provide verdict forms that permit them to be considered separately. This could be as simple as indicating that there is a "first separate and distinct act," a "second separate and distinct act," and a "third separate and distinct act" in the charging documents. The prosecution may present their case by differentiating incidents, the court may instruct the jury that it must consider whether the State has proven each discrete, individual act beyond a reasonable doubt, and give verdict forms that reflect the same. The jury must know to consider each count individually, and be allowed to issue compatible verdicts, regardless of the outcome of their deliberations on each iteration of the charge. This protection for defendants causes little burden, and yet prosecutors in Illinois and states across the country repeatedly seek all-or-nothing convictions instead, and courts erroneously uphold those convictions. *See Valentine*, 395 F.3d at 637 (noting that differentiation does not require overly-burdensome precision, and is "quite possible without exacting specificity.").

Another remedy may be legislative: states may elect to pass laws criminalizing course-of-conduct behavior in sexual assault cases, with correspondingly harsher

punishment than that of single-act convictions. Some states have done this. Illinois has not.

Writing in one decision, the Court of Appeals of New Mexico found that the remedy for increased punishment for ongoing course of conduct is not to violate a defendant's constitutional rights with carbon-copy indictments; rather, the remedy may be legislative action to provide greater punishment for ongoing conduct. *State v. Dominguez*, 143 N.M. 549, 554 (N.M. Ct. App. 2007) (finding that the state must either charge ongoing conduct as a single offense, or provide evidence of distinct offenses which would support multiple counts); *Valentine*, 395 F.3d at 634 ("States have the authority to enact criminal statutes regarding a 'pattern' or a 'continuing course' of abuse. They do not have the power to prosecute one for a pattern of abuse through simply charging a defendant with the same basic offense many times over."). For example, the New York State legislature has criminalized a "course of sexual conduct against a child in the first degree." N.Y. Penal Law § 130.75 (McKinney 2020). The California legislature has done the same. Cal. Penal Code § 288.5 (West 2020).

These legislative enactments do away with many of the difficulties present in prosecuting persons who engage in repetitive or continuous child abuse, as discussed by the dissent in *Valentine* and the majority in the present case. A continuous-course-of-conduct crime for child sex abuse is a well recognized exception to the rule that jurors must agree on the individual acts committed by a defendant before convicting him. In such a case, the jury does not have to agree which or how many specific acts occurred, because it is not the specific act that is criminalized. Rather, the *actus reus* of a continuing-course-of-conduct crime is a series of acts occurring over a substantial

period of time, and the agreement required for a conviction is that the defendant engaged in the charged conduct. *See State v. Fortier*, 740 A.2d 1243, 1249-50 (N.H. 2001) (*citing Richardson v. United States*, 526 U.S. 813 (1999). These are examples of remedies which do not violate a defendant's constitutional rights. None require further burden to a child victim or the State's interest in prosecuting crime. They provide defendants the protection envisioned by the Fifth Amendment of the United States Constitution.

Due to the importance of the constitutional question presented and the widespread conflict among courts below, this Court should grant review.

CONCLUSION

For the foregoing reasons, petitioner, Juan Avendano, respectfully prays that this Court grant certiorari to decide the question presented.

Respectfully submitted,

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