No. 23-

IN THE

Supreme Court of the United States

WILFRED H.,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

TOBIAS S. LOSS-EATON
CLAIRE HOMSHER
CHARLES W. JETTY
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8427
tlosseaton@sidley.com

JEFFERY T. GREEN *
DANIELLE HAMILTON
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(240) 286-5686
jeff@greenlawchartered.com

Counsel for Petitioner

* Counsel of Record

May 24, 2024

QUESTION PRESENTED

Does a state violate due process or double jeopardy principles when it charges and convicts a defendant on multiple, identical counts, with none connected to specific factual allegations?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following post-conviction proceedings:

Wilfred H. v. *Ames,* Circuit Court of Randolph County, West Virginia, No. 19-C-64; and

Wilfred H. v. *Ames*, Supreme Court of Appeals of West Virginia, No. 22-0506.

This case also relates to the following original proceedings:

West Virginia v. *Wilfred H.*, Circuit Court of Randolph County, West Virginia, No. 14-F-117;

West Virginia v. *Wilfred H.*, Supreme Court of Appeals of West Virginia, No. 17-0170, 2018 WL 3005947; and

Wilfred H. v. *W. Virginia*, U.S. Supreme Court, No. 18-7395, 139 S. Ct. 1274 (2019).

No other proceedings in state or federal courts, or in this Court, directly relate to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Wilfred H. respectfully petitions for a writ of certiorari to review the judgment of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The unreported opinion of the West Virginia Supreme Court of Appeals is available at 2024 WL 313316 and reproduced at Pet. App. 1a–9a. The unreported opinion of the Circuit Court of Randolph County is reproduced at Pet. App. 10a-58a.

JURISDICTION

The West Virginia Supreme Court of Appeals entered judgment on January 25, 2024. Pet. App. 1a. On April 11, 2024, Chief Justice Roberts extended the time to file this petition to May 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides: "No person … shall be subject for the same offence to be twice put in jeopardy of life or limb … nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, § 2–3.

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case presents an important and recurring constitutional question on which West Virginia is a persistent outlier, openly disagreeing with other jurisdictions.

Under the Fifth and Fourteenth Amendments, an indictment must be specific enough to give adequate notice of the charges and protect against double jeopardy. See *Russell* v. *United States*, 369 U.S. 749, 763–65 (1962). Indictments with multiple factually indistinguishable, identically worded counts fail to do so: They neither provide sufficient notice to mount an adequate defense nor make clear the allegations on which the defendant cannot be tried or convicted again. *E.g.*, *Valentine* v. *Konteh*, 395 F.3d 626, 632, 635–36 (6th Cir. 2005).

But below, the West Virginia high court affirmed Petitioner Wilfred H.'s convictions on three identically worded counts of first-degree sexual assault—each alleging the exact same conduct at some point during a two-and-a-half-year period—even though neither prosecutors nor the trial court ever linked those carbon-copy counts to specific dates or incidents. It was enough, the court said, that each count included "a time period"—never mind that it was the same multi-year time period in all three. Pet. App. 5a. The West Virginia court reiterated that it had "consistently declined" to follow federal appellate precedent on this issue, thus refusing to "require greater specificity as set forth in [the Sixth Circuit's] *Valentine*" decision. *Id.* In fact, the West Virginia high court has repeatedly rubber-stamped convictions on several, dozens, or even *hundreds* of identically worded, factually indistinguishable counts.

At least two circuits and four state high courts reject West Virginia's extreme approach. Those courts emphasize the Constitution's demand that "if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts." *E.g.*, *Valentine,* 395 F.3d at 638. These other courts would not have upheld petitioner's carbon-copy convictions.

And with good reason. Without some basis to distinguish among these charges, petitioner could not properly mount a defense, as due process requires. Nor is it clear which incidents formed the basis for these convictions—or even that they are based on separate incidents at all. The convictions thus violate double jeopardy as well. While cases involving repeated sexual abuse pose special challenges in this area, other courts have appropriately addressed those concerns while still respecting defendants' constitutional rights. West Virginia must do the same.

STATEMENT OF THE CASE

A. Factual background.

In October 2014, petitioner Wilfred H. was indicted on sixty-one counts, including thirty-seven counts of first-degree sexual assault. Pet. App. 2a. Counts 1, 2, 4, 5, and 6 were identical. Each one alleged, in verbatim language, that petitioner engaged in the same conduct at some point during a period spanning two-and-a-half years:

> on, about, or *between November 16, 2007, through July 15, 2010* … did unlawfully and feloniously, and being eighteen years of age or more at the time of offense, engage in sexual intercourse or sexual intrusion with another person who was younger than twelve years of age and was not

> married to that person, to wit: the Defendant … did unlawfully and feloniously, and being eighteen years of age or more at the time of the offense, engage in oral sexual intercourse with a juvenile identified by the initials M.A.H.

Pet. App. 59a (emphasis added).

The parties then stipulated to a bill of particulars. It distinguished counts 1 and 2 from the other identical counts. But it offered no clarity as to counts 4, 5, and 6, again alleging the same conduct during the same wide date range:

> The State of West Virginia is alleging that the Defendant … did engage in contact between his sex organ and the mouth of the victim, M.A.H. … thereby constituting sexual intercourse as defined by West Virginia Code, on at least three different occasions occurring between November 16, 2007 and July 15, 2010.

Pet. App. 87a.

The case proceeded to trial in January 2016, during which the state dismissed some other charges. But the jury could not reach a unanimous verdict, so producing a mistrial. Pet. App. 2a.

A second trial followed in August 2016. The identical Counts 4, 5, and 6 remained. At trial, the victim testified to the alleged sexual assaults with a broad brush, recounting "typical abusive behavior" over a three-year period. Pet. App. 40a. Her testimony did not provide distinct factual bases for the identically worded counts. She never described any specific incidents or referred to particular dates or narrower time periods. Pet. App. 90a–91a.

During deliberations, the jury submitted a written question asking why the charges related to the iden-

tical counts "read the same." Pet. App. 2a. In response, the trial court largely parroted the stipulated bill of particulars, explaining that the identical counts charged three occurrences of sexual intercourse as "defined by contact between the sex organ of the [petitioner] … and the mouth of [M.A.H.], and that such contact occurred on or about or between November 16th, 2007, and July 15th, 2010." Pet. App. 3a. The court also "provided a hypothetical example of speeding multiple times during a month and how that would be reflected with three charges having identical language in an indictment." *Id.* The jury convicted petitioner on five counts of first-degree sexual assault, including all three identically worded counts. It did not reach a verdict on the remaining counts. *Id.*

On direct appeal, petitioner pressed various procedural and evidentiary arguments, but did not raise the constitutional issues presented by his indictment. The state high court affirmed, see *State* v. *Wilfred H.*, No. 17-0170, 2018 WL 3005947, at *9 (W. Va. June 15, 2018), and this Court denied certiorari, 139 S. Ct. 1274 (2019).

B. The proceedings below.

Petitioner sought state habeas relief. He was then appointed counsel, who raised constitutional challenges to identically worded counts. Pet. App. 3a. The trial court denied relief.

The state high court again affirmed. It reviewed *de novo* the argument that "counts 4, 5, and 6 of the indictment, which contained identical charging language, were constitutionally insufficient due to a lack of specificity." Pet. App. 4a. Citing its own precedent, the court declared that "[a]n indictment need only meet minimal constitutional standards." Pet.

App. 5a. Those standards are met if the indictment "substantially follows the language of the [state criminal] statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." *Id.*

The indictment passed this lenient test. The identical counts "substantially follow[ed] the language of the relevant statutes," "identified the victim," "described the sexual offenses at issue," and "set out a time period for the offenses"—"November 16, 2007, through July 15, 2010." Pet. App. 5a. This "detail" sufficed to address any due process and double jeopardy concerns, though the court did not explain how. *Id.* Nor did the court's analysis address the jury's confusion about the multiple identical counts or the trial court's response. See *id.*

The West Virginia court thus refused to "require greater specificity as set forth in *Valentine* v. *Konteh*, 395 F.3d 626 (6th Cir. 2005)." Pet. App. 5a. The court noted that it had "consistently declined to do so," instead adopting "the dissent in *Valentine*" as correctly stating the law. *Id.* (citing *Ballard* v. *Dilworth*, 739 S.E.2d 643, 649–51 (W. Va. 2013) (per curiam)).

REASONS FOR GRANTING THE PETITION

I. Courts of appeals and state high courts are openly split on the question presented.

Under *Russell* v. *United States*, indictments must (1) contain the elements of the charged offense, (2) give adequate notice of the charges, and (3) protect against double jeopardy. 369 U.S. at 763–65.

Yet the West Virginia high court—in open disagreement with other jurisdictions—has repeatedly upheld indictments with multiple, identically worded counts. It has done so even when prosecutors provide no clarifying information at trial to link those counts to particular factual allegations. Thus, it routinely allows prosecutors to charge, and juries to convict, defendants on these carbon-copy counts with no realistic way to tell the charges apart or determine which counts align with what conduct. See, *e.g.*, *Dilworth*, 739 S.E.2d at 645 (ten identical counts); *Gerald S.* v. *Ballard*, No. 14-0156, 2015 WL 1235949 at *3 (W. Va. Mar. 16, 2015) (same); *State* v. *Michael H.*, No. 12-0253, 2013 WL 1632124 at *1–2 (W. Va. Apr. 16, 2013) (twenty-two identical counts in four different categories). Indeed, the West Virginia court recently upheld a *516-count* carbon-copy indictment with no accompanying bill of particulars or explanation linking the counts to specific factual allegations at trial. *State* v. *David S.*, No. 22-0113, 2023 WL 6012817, at *1–2 (W. Va. Sept. 15, 2023).

These outlier decisions reason that an indictment need only state the charged offense, the offense conduct, and "a time period"—no matter how long. Pet. App. 5a. In so holding, the West Virginia court has repeatedly refused to "require greater specificity as set forth in" precedent from other jurisdictions. *Id.* Indeed, at least two circuits and four states would have vacated the duplicative convictions here.

The Sixth Circuit. The leading case in this area is the one the court below has consistently rejected, *Valentine*, 395 F.3d 626. The Sixth Circuit held there that indictments that fail to link multiple "carbon-copy" counts to identifiable offenses violate defendants' due process rights and "likely subject[]" them to double jeopardy at trial. *Id.* at 632, 636. *Valentine*

considered the sufficiency of a forty-count indictment charging twenty identical counts of child rape and twenty identical counts of felonious sexual penetration of a minor. Neither the indictment nor the bill of particulars furnished further information to differentiate the counts. Even at trial, the prosecution did not attempt to establish the factual bases of the forty separate incidents that allegedly took place.

The Sixth Circuit concluded that because the indictment and subsequent prosecution made "absolutely no distinctions" within each set of 20 counts, it failed to satisfy *Russell*'s second and third prongs. *Id.* at 632. Valentine was effectively "prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts." *Id.* He thus lacked both "adequate notice to defend himself" and "sufficient protection from double jeopardy." *Id.* at 636. Further, the lack of differentiation between the counts left "uncertainty as to what the trial jury actually found." *Id.* If the jury had acquitted Valentine, for instance, it would have been "unclear what limitations [were] imposed on his re-indictment." *Id.* at 635.

The Fifth Circuit. The Fifth Circuit likewise rejects carbon-copy indictments as constitutionally deficient. In *United States* v. *Panzavecchia*, the court evaluated an indictment charging the defendant with three identically worded counts of passing counterfeit $10 bills with intent to defraud. 421 F.2d 440, 440–41 (5th Cir. 1970). Before the district court, the government had presented evidence that the defendant committed "three separate utterings occurring at different places and different times of the same day." *Id.* at 441. Upon Panzavecchia's motion, the government was ordered to produce a bill of particulars. But the bill of particulars failed to provide infor-

mation establishing the facts of each offense. *Id.* at 442. A jury found him guilty on two of the three counts.

The Fifth Circuit reversed and dismissed the indictment: "While a Bill of Particulars can solve evidentiary problems," the court explained, "it cannot unlock the Grand Jury's mind and cure a defective indictment." *Id.* By failing "to reveal which counts the Grand Jury intended to apply to which offenses," the indictment "imperiled" any future pleas of former acquittal or conviction. *Id.* To obviate double jeopardy problems, the Fifth Circuit required that indictments "set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged." *Id.* at 441.

Kentucky. In *Dunn* v. *Maze*, the Supreme Court of Kentucky foreclosed the possibility of a new trial premised upon a carbon-copy indictment. 485 S.W.3d 735, 750 (Ky. 2016). The defendant was prosecuted for seven counts of first-degree sodomy with a minor. All counts of the indictment and the jury instructions read identically, and Dunn was convicted on five counts. After his conviction was vacated and remanded for a new trial, Dunn filed a petition for a writ of prohibition in the intermediate appellate court seeking to bar his retrial, claiming it would subject him to double jeopardy. *Id.*

The Supreme Court of Kentucky agreed. Relying on *Valentine*, the court noted that "[t]he core problem when identical, generic counts are used is that 'we cannot be sure what factual incidents were presented and decided by this jury." *Id.* at 748 (quoting *Valentine*, 395 F.3d at 635). Carbon-copy indictments and jury instructions pose a "two-fold" due process problem: they fail to give defendants adequate notice of their charges, and they fail to provide adequate pro-

tection against double jeopardy in the future. *Id.* (citing *Valentine*, 395 F.3d at 631–32, 634–35). Verdicts from trials infected with these problems render courts unable to determine which acts the jury found the defendant guilty of and which acts the defendant was acquitted of. *Id.* Accordingly, Dunn's conviction on all counts was vacated. *Id.* at 749.

Mississippi. The Supreme Court of Mississippi also rejects carbon-copy indictments, on double jeopardy grounds. In *Goforth* v. *State*, the defendant was indicted on five identically worded counts of sexual battery. 70 So. 3d 174, 188 (Miss. 2011). At trial, jury instructions failed to differentiate the counts. The jury acquitted Goforth on three counts and found her guilty on two counts.

The state high court reversed. It held that "as in *Valentine,* the multiple, identically worded counts in the indictment … failed to protect Goforth's constitutional right against double jeopardy in the event of future prosecution. *Id.* at 189 (citing *Valentine*, 395 F.3d at 628–29). With "no identifiable basis for their distinction among the counts … the basis for the jury's split verdict [could not] be determined without conjecture." *Id.* at 190. Since neither Goforth "nor anyone else would be able to determine on which specific charges she previously was acquitted or convicted," Goforth could not be prosecuted again on the five counts "or for any same crimes that occurred during the time period set forth in her indictment." *Id.*

Massachusetts. The Supreme Judicial Court of Massachusetts has likewise relied on double jeopardy protections when confronted with similar questions. In *Commonwealth* v. *Hrycenko*, the defendant was indicted on six identically worded counts of aggravated rape. 630 N.E.2d 258, 260 (Mass. 1994). The state high court dismissed the two identical counts and set

aside Hrycenko's convictions. It held that it was "impossible to determine the bases of the first jury's acquittals and convictions," so Hrycenko was "subjected at retrial to the risk that he would be convicted of the alleged rapes of which he had been acquitted." *Id.* at 263. And it "reach[ed] this conclusion even though the uncertainty regarding a retrial may have been avoided if the defendant had exercised his right to request a bill of particulars prior to the first trial." *Id.* at 260.

Delaware. Finally, in *Luttrell* v. *State,* the Supreme Court of Delaware considered the sufficiency of carbon-copy indictments in a novel procedural posture. The defendant was indicted on three identically worded counts of unlawful sexual contact. 97 A.3d 70 (Del. 2014). At trial, he moved for a bill of particulars. The trial court denied the motion and he was subsequently convicted of all charges. *Id.* at 73–74. He appealed the denial of the motion, arguing that he was entitled to a new trial. Because the indictment "did not clearly delineate the acts for which he was being prosecuted or when they occurred," he argued, "it did not allow him to adequately prepare a defense or protect him from double jeopardy." *Id.* at 71, 77.

The state high court reversed the denial of his motion for a bill of particulars. Because the indictment and the ensuing trial failed to provide him sufficient information "to understand for what particular conduct he was being prosecuted," the failure to grant his motion "left him unable to adequately present a defense." *Id.* at 78. The court agreed with Luttrell that he was entitled to a new trial and remanded the case. *Id.*

The decision below conflicts with all these rulings. Under West Virginia's analysis, juries can convict defendants of a theoretically limitless number of identi-

cally worded charges without ever linking those charges to specific factual allegations. That is precisely the problem these other courts properly guard against. Had petitioner been prosecuted in any of these other jurisdictions, his identical carbon-copy convictions could not stand.

II. The decision below is wrong.

The decision below violates due process and double jeopardy protections. The Constitution "demand[s] that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding. Without such differentiation … prosecutions would reduce to nothing the constitutional protections of the Fifth and Fourteenth Amendments." *Valentine,* 395 F.3d at 638.

Due process requires that an indictment give the defendant sufficient notice of the charges to mount a defense. *Russell*, 369 U.S. at 763–64. This requirement is paramount. "No principle of procedural due process is more clearly established than that notice of the specific charge" is "among the constitutional rights of every accused in a criminal proceeding in all courts." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); cf. *United States* v. *Miller*, 471 U.S. 130, 134 (1985) (indictment was proper because it gave defendant "clear notice" of the allegation "he would have to defend against").

Double jeopardy principles likewise require clarity at the charging stage. The Double Jeopardy Clause "affords a defendant three basic protections: [It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the

same offense." *Ohio* v. *Johnson*, 467 U.S. 493, 497–98 (1984) (cleaned up). These protections are thwarted if an indictment is too vague. "The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, in case any other proceedings are taken against the defendant for a similar offence, the record will show with accuracy to what extent he may plead a former acquittal or conviction." *Sanabria* v. *United States*, 437 U.S. 54, 65–66 (1978) (cleaned up).

Prosecutions based on multiple carbon-copy charges violate each of these protections. As then-Judge Jackson has explained, "if a criminal indictment is going to be drafted to provide adequate notice … 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." See *United States* v. *Hillie,* 227 F. Supp. 3d 57, 80 (D.D.C. 2017) (cleaned up). If that requirement is not met, "any attempt on [the defendant's] part to mount a meaningful defense against the indictment's multiple, undifferentiated charges is impermissibly frustrated." *Id.* at 76. Likewise, "multiple, identically worded counts" raise two double jeopardy concerns—they do not enable a defendant "to plead convictions or acquittals as a bar to a *future* prosecution," and they "create a risk that [he] might be punished more than one time for the same offense in the *present* criminal prosecution." *Id.* at 78 (quoting *Valentine*, 395 F.3d at 635). Indeed, such carbon-copy charges "could result in a unanimous consensus among the jurors regarding [a defendant's] guilt with respect to a particular count, but a lack of unanimity regarding the offensive conduct that is the basis for each juror's vote." *Id.* at 79 (citing *Valentine*, 395 F.3d at 636). *Hillie* thus dismissed without prejudice seven carbon-

copy counts alleging the same conduct "during periods of time that span two to three years." *Id.* at 72.

The same reasoning applies here. Petitioner was not afforded fair notice. The three surviving identical counts each alleged the same conduct, in verbatim language, at some point during a nearly-three-year period. Pet. App. 59a–60a. Petitioner thus had no way to know which count corresponded with what alleged events, or even whether they reflected separate alleged incidents.

The jury was similarly perplexed by these identically worded counts. The trial evidence did not distinguish among them, and the trial court's explanation did not solve the problem. The court did not specify factual allegations to distinguish the counts. Pet. App. 95a. Even the hypothetical analogous indictment provided by the trial court would have been constitutionally deficient. If a state indicted and tried a defendant for speeding three times in July without providing any additional factual information to distinguish those charges, the defendant would not have adequate notice. *Id.* And again, the time period here is not a single month, but two-and-a-half years.

Likewise, the indictment violated double jeopardy principles in both ways noted in *Hillie*. Given the long time period involved and the vague trial evidence, "it is unclear what limitations would have been imposed on [petitioner's] re-indictment" on similar charges. See *Valentine,* 395 F.3d at 635. Would double jeopardy preclude any prosecution concerning the abuse of M.A.H., the abuse of M.A.H. between November 16, 2007, through July 15, 2010, the offenses offered into evidence at trial, or some group of three specific offenses? Because it is not apparent what factual incidents were presented to and decided

by the jury, those questions are impossible to answer. See *id.*; *Hillie,* 227 F. Supp. 3d at 79.

Further, had the jury convicted on some but not all of these identical charges, there would be no way to tell what allegations or incidents were off-limits to future prosecution—or whether the jurors even agreed on which incidents they had resolved. Cf. *Miller* v. *Commonwealth*, 283 S.W.3d 690, 694 (Ky. 2009) (reversing convictions where charges and jury instructions provided "no assurance that the jurors were voting for the same factually distinct crime"). And given the jury's confusion and the court's failure to provide adequate clarification, petitioner may well have been punished multiple times for the same offense in this very case. See *Valentine*, 395 F.3d at 636.

None of this means courts cannot recognize that the "exigencies of child abuse cases necessitate considerable latitude in the construction of criminal charges." *Id.* Indeed, many courts hold "in the context of child abuse prosecutions" that "fairly large time windows"—standing alone—"are not in conflict with constitutional notice requirements." *Id.* at 632. Constitutional problems arise when prosecutors allege multiple *identical* charges during the same long time period. See *id.* at 638. And this charging practice is not necessary to ensure that abusers face proportionate punishment. In other states, prosecutors address these issues by charging "specific" acts "during specific, consecutive . . . intervals," with no specific offense alleged "more than once in any given interval." See *State* v. *Lente*, 453 P.3d 416, 427 (N.M. 2019). This practice "eliminates the concerns" that arise in cases like this one, *id.*, while properly allowing for imprecise or general victim testimony.

West Virginia, however, simply runs roughshod over these bedrock constitutional protections. That is neither necessary nor permissible.

III. This question is important and recurring.

The question presented is vital because it goes to the most basic protections afforded to criminal defendants. An essential part of the Constitution's due-process guarantee is the principle of "fair notice." See *Wooden* v. *United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring); *Cole*, 333 U.S. at 201. Likewise, "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969).

This question also arises frequently. It comes up most often in sexual-abuse cases, but it can arise in any case involving an alleged pattern or sequence of conduct across some period of time. *E.g.*, *Panzavecchia*, 421 F.2d at 440–41 (passing counterfeit bills). Indeed, this issue arises often in West Virginia alone, as the cases cited above illustrate. And the lower courts need guidance. "Supreme Court precedent in this area is very general and lacks a specific application to the problems encountered in prosecutions of child sexual abuse." *Crawford* v. *Pennsylvania*, 714 F. App'x 177, 180 (3d Cir. 2017). And as already explained, courts openly disagree about how to address those problems—or whether to simply ignore them, like the court below. *Compare People* v. *Gurk*, 722 N.W.2d 213, 213 (Mich. 2006) (Corrigan, J., concurring) (arguing to reject *Valentine*'s reasoning), *with id.* at 214 (Kelly, J., dissenting) (endorsing *Valentine* as "well reasoned"); see also, *e.g.*, *Hillie,* 227 F. Supp. 3d at 78 (following *Valentine*); Pet. App. 5a (following "the dissent in *Valentine*").

IV. This case is an ideal vehicle.

No obstacles prevent reaching the question presented here. The judgment below is final. The issue was preserved at each level of the state habeas proceedings and decided *de novo* below. The relevant facts are undisputed. And the question presented is outcome-determinative as to the counts at issue. Had the court below followed the other jurisdictions discussed above, petitioner's convictions on these counts would have been vacated. And there is no realistic chance the West Virginia court will reverse itself after having explicitly rejected *Valentine*'s reasoning on multiple occasions. See Pet. App. 5a; *Dilworth*, 739 S.E.2d at 650–51 & n.18.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

TOBIAS S. LOSS-EATON
CLAIRE HOMSHER
CHARLES W. JETTY
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8427
tlosseaton@sidley.com

JEFFERY T. GREEN*
DANIELLE HAMILTON
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(240) 286-5686
jeff@greenlawchartered.com

Counsel for Petitioner

* Counsel of Record

May 24, 2024