No. 23-7585

IN THE SUPREME COURT OF THE UNITED STATES

WILFRED H., PETITIONER

v.

JOSH WARD, INTERIM SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL COMPLEX, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state deny due process or offend double jeopardy principles when it charges a defendant with multiple sex-abuse-related offenses against a child within the same period and ultimately proves at trial that multiple, separate acts of abuse occurred?

ADDITIONAL RELATED PROCEEDINGS

There are no related proceedings in state or federal courts, or in this Court, other than those listed in Petitioner's Rule 14.1(b)(iii) statement.

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JUDGMENT BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a-9a) is unreported but reprinted at 2024 WL 313316. The opinion of the Circuit Court of Randolph County, West Virginia (Pet. App. 10a-58a) is unreported.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered its judgment on January 25, 2024. Chief Justice Roberts extended the time to file a petition for certiorari to May 24, 2024. Petitioner filed his petition on May 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

In this appeal from the denial of state collateral relief, Petitioner Wilfred H. argues that the State unconstitutionally

indicted him on multiple sex-abuse-related charges. According to Petitioner, West Virginia is an "outlier" in not requiring extensive detail in criminal indictments. Pet. 2. But in truth, West Virginia takes a common approach to charging multiple and repeated instances of the same crime, especially when it proves hard to pinpoint exact dates of a crime that involved a child victim. In contrast, Petitioner chiefly relies on a single Sixth Circuit decision that no other federal appellate court has followed in any published decision -- and that the Sixth Circuit itself has "retreated from" in more recent years. Dodd v. Clarke, No. 3:21CV259, 2022 WL 3587817, at *7 (E.D. Va. Aug. 22, 2022). Thus, it's Petitioner who urges this Court to grant the petition in service of an outlier position. The Court should not.

None of the typical signals for a case warranting a grant of certiorari can be found here. No hardened split exists among the courts. The question is not of such unique importance that the Court must take it up now. This case is a poor vehicle for review. And ultimately, the Supreme Court of Appeals of West Virginia got this question right.

"[T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims." Lawrence v. Florida, 549 U.S. 327, 335 (2007). And even putting aside that presumption, this Court has denied petitions

for certiorari presenting this same question more than once before. See, e.g., Dodd v. Dotson, No. 23-1036, 2024 WL 2262341 (U.S. May 20, 2024); Thomas v. West Virginia, 583 U.S. 815 (2017); Cyphers v. Thaler, 132 S. Ct. 2432 (2012); Marcavage v. Massachusetts, 562 U.S. 891 (2010). The same result should follow here. The Court should deny the petition.

STATEMENT

1. In October 2014, a Randolph County grand jury charged Petitioner with sixty-one criminal counts: 37 counts of first-degree sexual assault, 23 counts of third-degree sexual assault, and one count of display of obscene material to a minor. Pet. App. 2a; see also See Pet. App. 59a-78a (indictment). These counts stemmed from Petitioner's years-long abuse of his minor cousin, M.A.H. Pet. App. 1a-2a.

Of most relevance here, counts 4, 5, and 6 of the indictment charged that Petitioner, "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." Pet. App 2a n.3. The counts also explained that the Petitioner "engage[d] in oral sexual intercourse with . . . M.A.H., . . ., who was younger than twelve years of age at the

time, was unable to consent because of her age, and was not married to [Petitioner]." Pet. App 2a. n.3.

Petitioner did not initially object to the sufficiency or legality of the indictment. Instead, Petitioner filed a motion for a bill of particulars, Pet. App. 80a, which the parties resolved through a discovery conference and a stipulation, Pet. App. 3a n.4, 83a, 87a-88a. The stipulation for counts 4, 5, and 6 explained that the State alleged "contact between [Petitioner's] 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. 3a; see also Pet App. 87a. Having stipulated to these specifics, Petitioner did not otherwise complain about the sufficiency of the indictment. Petitioner's trial counsel understood that the stipulation "indicated [the State] w[as] going to have to prove three separate incidents of that type alleged during the time frame specified in the indictment." Pet. App. 3a.

The case went to trial in January 2016, but the jury deadlocked. Pet. App. 2a. During that trial, the State also dismissed counts 2, 7, 59, 60 and 61. Pet. App. 2a.

2. The case then went to trial a second time in August 2016 on the remaining charges. Pet. App. 12a.

M.A.H. testified. Among other things, she recounted how, when she was ten years old, she would wake up from sleeping to find Petitioner's "penis on the entrance of [her] mouth." Pet. App. 91a. She confirmed this conduct occurred "[f]our or five" times," all at Petitioner's home in Randolph County. Pet. App. 91a. She further testified to multiple, specific instances of sexual abuse from Petitioner over the preceding years. WVSCoA App. 1360-1374*; contra Pet. 4 (dismissing this testimony as "broad brush"). She read from a letter to friends in which she disclosed how she had "got[ten] raped almost every weekend for four and a half years." WVSCoA App. 1380. And in a forensic interview also played at trial, M.A.H. described how sexual acts with Petitioner happened "a lot," WVSCoA App. 1194, perhaps "every other weekend for about three years, and then once a month for the last year and a half," WVSCoA App. 1205. She then again detailed specific incidents, including places, times, things Petitioner said to her, acts he performed, and more. See, e.g., WVSCoA App. 1194-1214. On cross, M.A.H. even explained how she was able to testify to the frequency of the abusive acts. WVSCoA App. 1398-99 ("Based on the frequency that I visited.").

In closing, the State observed how M.A.H.'s testimony had confirmed the "frequency of these events" -- and how that testimony

* The State cites the Joint Appendix filed with the Supreme Court of Appeals of West Virginia in case no. 22-0506 as "WVSCoA App."

had made it clear that the State had even "conservatively charged" Petitioner. WVSCoA App. 1491. For his part, Petitioner never argued that he had performed some acts but not others, or that Petitioner had not established some minimum number of acts. Petitioner instead argued that M.A.H.'s entire account was incredible. WVSCoA App. 1505. Petitioner's counsel later explained that he "thought the jury would either believe [P]etitioner or believe the victim on the issues" -- in other words, trying to parse individual incidents would have done Petitioner no good. Pet. App. 3a; see also Pet. App. 37a (describing how Petitioner's counsel did not think distinguishing among acts was a "huge issue" because "he thought the jury was either going to believe the victim in this case or Petitioner").

During deliberations, the jury sent a note out asking why counts 4, 5, and 6 of the indictment "read the same." Pet. App. 2a. Without objection from Petitioner's counsel, the trial court told the jury that the three counts charged three occurrences of sexual intercourse (constituting "contact between the sex organ of [Petitioner] . . . and the mouth of [M.A.H.] . . . occurr[ing] on or about or between November 16, 2007 and July 15, 2010"), as described in the indictment. Pet. App. 2a-3a. And the court provided an explanatory hypothetical in which three instances of speeding in one month might give rise to three charges with the same wording in the indictment. Pet. App 3a; see also Pet. App.

94a-95a. In short, the "answer to [their] question" was that the relevant counts "charge[d] th[e]s[e] [acts] with having been done three times during that period of time." Pet. App. 95a; see also Pet. App. 96a ("So essentially it is charging three occurrences."). Even defense counsel understood that this instruction "disallow[ed] the jury from making three (3) separate findings of guilt based on a single incident." Pet. App. 6a.

The jury then resumed deliberating and returned a guilty verdict on five counts of first-degree sexual assault (including counts 3, 4, and 5), two counts of third-degree sexual assault, and one count of display of obscene matter to a minor. Pet. App. 3a; see also Pet. App. 99a-102a. The jury did not reach a verdict on the remaining counts. Pet. App. 3a.

Although Petitioner filed post-trial motions, he did not challenge his indictment in any way. He then appealed, raising ten assignments of error -- none of which concerned his indictment. The Supreme Court of Appeals of West Virginia affirmed in a memorandum decision. See State v. Wilfred H., No. 17-0170, 2018 WL 3005947 (W. Va. June 15, 2018). This Court denied Petitioner's petition for writ of certiorari. See Wilfred H. v. West Virginia, 139 S. Ct. 1274 (2019).

3. Petitioner later pursued post-conviction relief in state court, including an initial petition for writ of habeas corpus in 2019, an amended petition for writ of habeas corpus in 2020, and

a supplemental petition for writ of habeas corpus in 2021. Pet. App. 10a. Among other things, Petitioner's supplemental petition raised concerns about his indictment for the first time. WVSCoA App. 2171. At times, Petitioner seemed to focus on whether the indictment afforded him due process and protection against double jeopardy. WVSCoA App. 2186-87. At other times, though, Petitioner styled the argument more as a sufficiency challenge, maintaining that the State "did not demonstrate separate and distinct violations of charges 4-6" through "evidence of three separate and distinct instances where [Petitioner's] penis was in contact with M.A.H.'s mouth." WVSCoA App. 2187-88. In the end, the trial court denied relief on this (and every other) ground, holding that "the indictment gave Petitioner proper notice by identifying the victim, the offenses committed, and the dates on which the offenses were committed." Pet. App. 41a.

The Supreme Court of Appeals affirmed the denial of post-conviction relief in another memorandum decision. Pet. App. 2a. In addressing Petitioner's complaints about the indictment, the court recognized that "the sufficiency of an indictment is determined by practical rather than technical considerations." Pet. App. 5a. With that principle in mind, the court explained that an indictment that "substantially follows the language of the 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, . . . is generally sufficient." Pet. App. 5a (cleaned up). In this case, the indictment substantially followed the relevant statutes; "identified the victim . . .; described the sexual offenses at issue . . .; and set out a time period for the offenses." Pet. App. 5a. Relying on prior West Virginia precedent, the court concluded that great specificity was simply not constitutionally required. Pet. App. 5a. What's more, "the circuit court plainly instructed the jury that counts 4, 6, and 6 charged three separate occurrences during a period of time." Pet. App. 6a.

Petitioner timely filed this petition for certiorari from the denial of state post-conviction relief.

ARGUMENT

Petitioner insists that the Court should get involved to resolve a split among the courts -- but that split is illusory. He says the decision below was wrong -- but facts and law say otherwise. He briefly argues the issue is "important and recurring" -- but courts already have this issue well in hand. And though he passingly suggests this case is a good vehicle, several things show it's not. For any or all of these reasons, the Court should deny the petition.

A. Petitioner first argues that West Virginia has issued a series of "outlier decisions" on indictments, creating a split of authority. Pet. App. 7a. But "practically the only case that

supports the petitioner's argument is Valentine v. Konteh[, 395 F.3d 626 (6th Cir. 2005)], a panel decision that is hardly robust precedent even within the Sixth Circuit." Crawford v. Lamas, No. 3:13-CV-143, 2016 WL 10908611, at *8 (W.D. Pa. Feb. 17, 2016), adopted in relevant part by 2016 WL 10908614 (W.D. Pa. Mar. 16, 2016), aff'd sub nom. Crawford v. Pennsylvania, 714 F. App'x 177 (3d Cir. 2017). Decisions from far and wide -- including those from the jurisdictions that Petitioner relies on -- align with the approach that the Supreme Court of Appeals of West Virginia used here. See, e.g., State v. Billman, Nos. 12 MO 3, 12 MO 5, 2013 WL 6859096, at *11 (Ohio Ct. App. Dec. 16, 2013) ("The factors weighing against the persuasive value of Valentine . . . are overwhelming.").

1. Start in the Fifth Circuit, where Petitioner incorrectly contends that United States v. Panzavecchia helps him. 421 F.2d 440 (5th Cir. 1970). In the fifty years since it issued, "[t]he Panzavecchia opinion has been cited infrequently, and . . . never squarely followed." Commonwealth v. Watkins, 595 N.E.2d 786, 788 (Mass. Ct. App. 1992); see also, e.g., State v. Cassey, 543 A.2d 670, 676 (R.I. 1988) ("We do not find [Panzavecchia] either persuasive or controlling."). That might be partly because Panzavecchia itself acknowledges how it hinges on "technicality," but even the Fifth Circuit has since recognized that "the validity of an indictment is determined by reference to practical, not

technical considerations." United States v. Asibor, 109 F.3d 1023, 1037 (5th Cir. 1997) So Panzavecchia offers a questionable basis for a claimed "split" to begin with.

But more importantly, Panzavecchia involved a specific set of facts that's absent here: a situation in which the defendant was acquitted on one of several identically worded counts and convicted on others. In that situation, "future pleas of former acquittal or conviction [we]re imperiled." Id. at 442. In contrast, the court noted that "a judgment of conviction or acquittal on all counts would have obviated the present dilemma." Id. Of course, that's exactly what happened in Petitioner's case: the jury convicted on all three of the identically worded counts, so Petitioner needn't concern himself with which counts offer protection from future prosecution and which ones don't.

Beyond that, Panzavecchia has since been limited by the notion that the defendant can obtain more specifics through discovery and trial. See United States v. Walsh, 194 F.3d 37, 45 (2d Cir. 1999); see also, e.g., United States v. Fuller, No. 16-CR-867, 2017 WL 3457166, at *5 (S.D. Cal. Aug. 11, 2017); United States v. Scott, No. CR.07-30112, 2008 WL 1733193, at *2 (D.S.D. Apr. 14, 2008); United States v. Basciano, No. 03-CR-929, 2006 WL 8451578, at *18 (E.D.N.Y. Jan. 3, 2006); see also 1 Andrew D. Leipold, Federal Practice and Procedure § 126 (5th ed. June 2024 update) ("If a defendant claims prior jeopardy in defense to a pending charge,

the court is free to review the entire record of the first proceeding, not just the charging document, and so the need for the indictment . . . to serve this role is limited."). That's happened here through M.A.H.'s testimony and statements -- which provided more specific details of times, places, and frequency -- and through discovery. See, e.g., WVSCoA App. 2192 (criminal investigation report providing specific number of oral sex incidents). Likewise, Petitioner's counsel testified that the stipulated bill of particulars "narrowed the proof that would be able to support a conviction." WVSCoA App. 1739.

So the Fifth Circuit's authority does not create any real split.

2. Kentucky also does not take a different approach from West Virginia. Quite the opposite: "Use of identical indictment counts is the typical practice of the Commonwealth." Smith v. Commonwealth, 636 S.W.3d 421, 431 (Ky. 2021); see also, e.g., Buster v. Commonwealth, 381 S.W.3d 294, 302 (Ky. 2012) (holding that a defendant "was provided fair notice of the charges against him" despite use of identical counts spanning years of sex abuse). If "distinct conduct" underlies each count -- such as conduct that can be "matched up to [the victim's] testimony" -- then no constitutional problem arises. Walker v. Commonwealth, No. 2021-CA-0755, 2023 WL 128601, at *12 (Ky. Ct. App. Jan. 6, 2023). Kentucky thus recognizes "[t]he reality that child victims will

often be somewhat vague in their recollections of times and dates," and that vagueness "does not, by itself, render a defendant's trial unfair." Dunn v. Commonwealth, 360 S.W.3d 751, 761 (Ky. 2012); see also Schrimsher v. Commonwealth, 190 S.W.3d 318, 327 (Ky. 2006) (finding an indictment was sufficiently specific considering how there was "no eyewitness to the criminal conduct except for one or both of the two co-defendants and the infant victim").

Dunn v. Maze, 485 S.W.3d 735 (Ky. 2016), does not say otherwise. In that case, the defendant had been indicted on seven identical counts of sodomy; a jury ultimately convicted him of five counts and acquitted him on two. Id. at 738. His convictions were later vacated, and the Commonwealth sought to retry him. Id. The Supreme Court of Kentucky held that, on those unique facts, a double-jeopardy problem arose. But the court also recognized that the defendant there "could not have asked either the trial court or the Court of Appeals to dismiss the charges against him [after the first trial] because any double-jeopardy claim based on the threat of a second trial was not yet ripe." Id. at 744. A double-jeopardy claim is not ripe "until the government actually initiates the second prosecution." Id. But when the Commonwealth tried to retry the defendant, *then* a double-jeopardy problem arose because the prior "acquittals c[ould] not be tied to any particular alleged crimes" considering the mix of guilty and not-guilty verdicts.

Id. at 749. Thus, "they must necessarily act as acquittals on all the counts brought at that time." Id.

Here, of course, the State has not sought to try Petitioner for additional, identical offenses that fell within the same period as his first indictment. Thus, even Kentucky would declare that any double-jeopardy claims are "pure speculation." Dunn, 485 S.W.3d at 745. Nor is there some mix of guilty and not-guilty verdicts that muddles the question of which offenses the jury found and which they did not. And though the Kentucky court also raised due-process concerns about the use of identical instructions tied to identical counts, id. at 748, Petitioner has not raised similar objections to the instructions used in his case. So unless the State tries to charge Petitioner all over again for the same conduct falling within the same period as his indictment in this case, Dunn has nothing to do with these facts. Accord Crawford, 2016 WL 10908611, at *9 ("[T]o argue that the possible misconduct of a future prosecutor should have an impact on the analysis of the indictment in the current prosecution is to import inappropriate double jeopardy analysis into the proper discussion of due process."); People v. Gurk, No. 257339, 2006 WL 355130, at *2 (Mich. Ct. App. Feb. 16, 2006) ("[D]efendant's argument is premature, as he is not subject to a second prosecution for an event occurring during the same time period.").

Kentucky, then, also gives no support to Petitioner.

3. Petitioner's authority from Mississippi largely addresses the same distinguishable situation as his Kentucky case: an attempt by the State to retry a defendant after acquittal on some counts and conviction -- followed by vacatur -- on other counts. See Goforth v. State, 70 So. 3d 174, 190 (Miss. 2011). In Goforth, the State obtained convictions on three of five identical counts, while the defendant was acquitted on the remaining two. Id. at 188. When the Supreme Court of Mississippi reversed the three convictions on appeal, the state was left with "no identifiable basis for their distinction among the counts." Id. at 190. "As a result, the basis for the jury's split verdict [could]not be determined without conjecture." Id. Double jeopardy thus barred retrial on *all* the counts. Id.; see also Walker v. State, 262 So. 3d 560, 566 (Miss. Ct. App. 2018) (distinguishing Goforth in a case where, among other things, the defendant "was not acquitted of any [counts], and he is not going to be retried").

At the same time, though, Goforth recognized and reaffirmed the same court's prior decision in Tapper v. State, 47 So. 3d 95, 101 (Miss. 2010). There, the court held that a trial court had "not erred in refusing to quash [a] defendant's indictment." Goforth, 70 So. 3d at 189 (describing Tapper). Like Petitioner here, the defendant in Tapper had "argued that a multi-count indictment that included four identical counts of touching a child

for lustful purposes had failed to notify him of the nature and cause of the accusation against him, and that its failure to allege more specific dates had denied him the opportunity to present a full defense." Id. Tapper was blunt about the invalidity of arguments like Petitioner's: "The cold, hard facts [we]re that, even if these young, immature girls had the ability to describe to the prosecutor in adult terms and in the most graphic detail the acts which they said [the defendant] committed upon them, [the defendant] would not have been in any better position to prepare his defense 'that he didn't do it.'" Tapper, 47 So. 3d at 102; see also, e.g., Tallant v. State, 345 So. 3d 575, 591 (Miss. Ct. App. 2021) (finding no reversible error where, although counts "were identically worded," the defendant "was charged with distinct and separate offenses").

As in Tapper, the State charged Petitioner here as specifically as it could, obtained convictions on all the counts, and is not pursuing a second trial against him. So the same result would have followed in Mississippi as it did in West Virginia.

4. In next arguing that Massachusetts goes another way, Petitioner relies on a case that *rejects* his argument. Like Dunn and Goforth, the Supreme Judicial Court of Massachusetts in Commonwealth v. Hrycenko confronted an attempt by the State to retry a defendant after it (1) charged a defendant in identical counts; (2) received convictions on some and acquittals on others;

and (3) attempted to retry the defendant on the vacated counts. 630 N.E.2d 258, 260 (Mass. 1994). And as in Dunn and Goforth, the court held the retrial wasn't permissible, as the "[t]he defendant could not have been retried on the two indictments on which the convictions were reversed on appeal without being subjected to the risk of conviction on a rape charge on which he had been previously acquitted." Id. at 263.

But before reaching that conclusion, the court also addressed the defendant's separate argument that "the indictments on which the convictions stand were defective as a matter of law because, being written in identical language, they failed sufficiently to apprise him of the charges against him thereby leaving him unable adequately to prepare his defense and to plead former jeopardy." Id. at 261. On that point, the Massachusetts high court was unconvinced. "[I]dentically-worded indictments are not defective if the defendant has the opportunity to obtain, through a bill of particulars, sufficient information to enable him to understand the charges against him and to prepare his defense." Id. at 261. As West Virginia courts have done, the Massachusetts court noted how "indictments that follow the statutory form are constitutionally sufficient," and there was "no reason to except identically-worded indictments from this rule." Id. at 261-62; see also Commonwealth v. Erazo, 827 N.E.2d 1288, 1291 (Mass. Ct. App. 2005) ("[G]eneric indictments or complaints differentiated

only by the number assigned to the charge . . . have withstood constitutional challenges despite impediments they pose to the assertion of an alibi defense or other defense that is directly related to the temporal aspect of the alleged crimes.").

Petitioner's challenge would have failed in Massachusetts just as it did in West Virginia.

5. Delaware law is no help to Petitioner, either. In Luttrell v. State, 97 A.3d 70, 76 (Del. 2014), the Supreme Court of Delaware considered whether the trial court abused its discretion in denying a motion for a bill of particulars in a sex-abuse case involving multiple identical counts. Applying Delaware law, the court held that the defendant's motion should have been granted. Id. at 77-78. Among other things, the testimony from the victim "shifted over time" and did not line up with the dates in the indictment (or other evidence from other witnesses). Id. at 77. Given that confusion, the defendant had no ability to mount a defense without more information from the prosecution. See, e.g., State v. King, No. 1912024006, 2021 WL 1215824, at *3 (Del. Super. Ct. Mar. 29, 2021) (distinguishing Luttrell where the "[d]efendant ha[d] not alleged any inconsistencies in the victim's statement that would raise the concerns of confusion that were expressed in Luttrell").

Of course, Delaware can adopt whatever law it might wish on motions for bills of particulars, and Luttrell never suggests that

its conclusions were constitutionally compelled. Given that, Luttell has little to say about whether the West Virginia courts got it right in Petitioner's case. That key legal distinction aside, the facts drive a different result in Petitioner's case, too. Unlike the defendant in Luttrell, Petitioner does not allege that he was confused by M.A.H.'s story, and the evidence was largely consistent. The indictment did not allege dates or times that *contradicted* M.A.H.'s testimony. See State v. Williams, No. 1204002559, 2017 WL 5068570, at *6 (Del. Super. Ct. Oct. 30, 2017) (distinguishing Luttrell where the victim's testimony "did not fundamentally change, nor was it contradicted by other witnesses or evidence during the trial"); State v. Hunter, 2017 WL 5983168, at *6 (Del. Super. Ct. Sept. 29, 2017) (distinguishing Luttrell where the indictment did not "list[] dates of the alleged crimes different from the dates stated by the victim"). Without that incongruity, Petitioner's indictment did not present the same problems. And were that not enough, Petitioner's indictment "specified the particular sexual act Defendant allegedly committed." State v. Hearne, No. 1605006649, 2020 WL 7093407, at *4 (Del. Super. Ct. Dec. 4, 2020) (distinguishing Luttrell on this basis). Luttrell does not embrace the position Petitioner prefers.

6. That just leaves the Sixth Circuit and its "controversial" decision in Valentine. Wayne R. LaFave, et al., Criminal Procedure § 19.3(c) (4th ed. Dec. 2023 update). But

Valentine is distinguishable (and thus creates no true split), and its shallow reasoning has not been generally accepted.

Valentine concerned an Ohio case in which a defendant "was convicted of 20 'carbon-copy' counts of child rape, each of which was identically worded so that there was no differentiation among the charges and 20 counts of felonious sexual penetration, each of which was also identically worded." Valentine, 395 F.3d at 628. "The prosecution did not distinguish the factual bases of these charges in the indictment, in the bill of particulars, or even at trial." Id. And the child victim never gave any consistent account of the number of offenses, sometimes saying that Petitioner had committed far few than the 20 offenses charged. Id.

Relying on cases from other circuit courts, the Valentine majority started from the premise that federal due process rights applicable to federal indictments also applied to "state criminal charges." Valentine, 395 F.3d at 631. From there, the majority determined that the defendant "was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts." Id. at 632. And outside the victim's "estimate," "no evidence as to the number of incidents was presented." Id. at 633. The court was unwilling to "permit multiple convictions to stand based solely on a child's numerical estimate." Id. Put differently, the majority concluded that the defendant was "was prosecuted and convicted for a generic pattern

of abuse rather than for forty separate abusive incidents." Id. at 634. The majority also found that the indictment presented a double jeopardy problem, even though the defendant "face[d] no current risk of being tried a second time." Id. at 635. It was enough for the majority that his "indictment would have complicated any subsequent assertion of double jeopardy." Id. In the end, though, the majority emphasized that "the constitutional error in this case [wa]s traceable not to the generic language of the individual counts of the indictment." Id. at 636. Rather, the majority thought the "[n]umerous charges" had been "made out through estimation or inference." Id.

The dissent observed, though, that "no Supreme Court case has ever found the use of identically worded and factually indistinguishable indictments *unconstitutional*." Valentine, 395 F.3d at 638 (Gilman, J., dissenting). The dissent also noted an inherent contradiction in the majority's analysis: it disclaimed any requirement that the indictment provide "exact times and places" while simultaneously condemning the indictment for lacking such detail. Id. at 640. At bottom, this botched analysis would "hamper a state's ability to prosecute crimes where a young child is both the victim and the sole witness." Id. And by repeatedly making its own judgments about the credibility of the child witness, "the majority's holding unnecessarily substitute[d] a

rigid rule for what should properly be the jury's factfinding powers." Id. at 641.

Laying out these facts should make it obvious why Valentine doesn't drive the analysis in Petitioner's case. As reflected in the bill of particulars, the supplemental instruction, and the testimony provided at trial, Petitioner was not charged three times for one single offense. Nor was he charged based on an estimate. Instead, he was charged based on specific, consistent testimony from a child witness recounting *at least* three separate acts. See, e.g., State v. Palmer, No. 19 MA 0108, 2021 WL 6276315, at *6 (Ohio Ct. App. Sept. 29, 2021) (finding Valentine was distinguishable where witness gave specific count of number of sexual acts, described the acts, and recounted where and generally when they took place); State v. Hernandez, 874 N.W.2d 493, 504 (S.D. 2016) (explaining that identical child-abuse charges do not raise "multiplicity" concerns when the acts underlying each count reflect separate units of prosecution); State v. Register, No. 92,122, 2006 WL 90077, at *6 (Kan. Ct. App. Jan. 13, 2006) (refusing to apply Valentine analysis where evidence established three different sexual incidents, despite "carbon-copy" counts of indictment). And as the Valentine dissent recognized, the U.S. Constitution has generally not been held to require more in charging documents; certainly, this Court has never so held.

Even if Valentine did take a materially different approach from West Virginia, it doesn't reflect a true split because courts have largely run away from it. No published federal court of appeals opinion has ever followed it. See Ballard v. Dilworth, 739 S.E.2d 643, 651 (W. Va. 2013). A slew of decisions have been careful to distinguish it, including many from the Sixth Circuit. See, e.g., United States v. Lanier, No. 23-5217, 2024 WL 915158, at *3 (6th Cir. Mar. 4, 2024); Coles v. Smith, 577 F. App'x 502, 507-09 (6th Cir. 2014); Bruce v. Welch, 572 F. App'x 325, 330 (6th Cir. 2014); Hardy v. Beightler, 538 F. App'x 624, 629 (6th Cir. 2013); Cowherd v. Milton, 260 F. App'x 781, 78687 (6th Cir. 2008); see also, e.g., Ervin v. Santistevan, No. 22-2102, 2022 WL 17665669, at *3 (10th Cir. Dec. 14, 2022) (finding information and discovery at trial obviated concerns like those in Valentine); United States v. Beasley, 688 F.3d 523, 533 (8th Cir. 2012) (finding breadth of time frames alleged in indictments did not give rise to concerns identified in Valentine).

Other decisions have not just distinguished it -- they've condemned the decision outright. See, e.g., People v. Avendano, No. 2-22-0176, 2023 WL 6542205, at *12 (Ill. App. Ct. Sept. 12, 2023) ("[W]e find the dissent in Valentine more persuasive."). Ohio courts have been especially pointed in their rejections of Valentine. Valentine "was based on Fifth Amendment law that does not apply to the Ohio Grand Jury indictment requirement," they've

said. Billman, 2013 WL 6859096, at *11. Valentine "also misapplies existing federal law and misrepresents a number of the cases on which it relies." Id. The case further incorrectly assumed that "the jury would believe its finding of guilt on one count of child [abuse] would require a conviction on another count of child [abuse] merely because it contained the same elements and the same date range." State v. Triplett, No. 17 MA 0128, 2018 WL 6930504, at *16 (Ohio Ct. App. Dec. 21, 2018). And Valentine's approach "would improperly protect a defendant who committed multiple instances of the same offense against a child." Id.; see also State v. Yaacov, No. 86674, 2006 WL 2902794, at *3 (Ohio Ct. App. Oct. 12, 2006) (explaining how Valentine would undermine child-abuse prosecutions).

Even the Sixth Circuit has little use for Valentine now. In Coles, the Sixth Circuit observed how this Court had later confirmed that federal habeas petitioners must show violation of a federal right clearly established by *this* Court. 577 F. App'x at 507 (citing Renico v. Lett, 559 U.S. 766, 778-79 (2010). Renico cast doubt on the continuing vitality of Valentine, which had crafted a rule on federal habeas review that this Court had never embraced. Coles, 577 F. App'x at 507. The Sixth Circuit thus "doubt[ed] [its] authority to rely on [its] own prior decision -- Valentine - to independently authorize habeas relief" for a state

prisoner." Id. at 507-08. Valentine is very nearly dead letter in the Sixth Circuit.

So even Valentine, Petitioner's "leading" case, Pet. 7, does not create a genuine split because it would not produce a different result on the facts here. But even if it did, that split would not warrant the Court's intervention seeing as how Valentine is quickly fading into disuse.

B. Left with no real split, Petitioner argues that the decision below is wrong. But "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." Stephen Shapiro, et al., Supreme Court Practice § 5.12(c)(3) (10th ed. 2013); see also Overton v. Ohio, 122 S. Ct. 389, 390 (2001) ("We cannot act as a court of simple error correction.") (Breyer, J., respecting denial of certiorari). In any event, the decision below is right.

This Court's cases "indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). Each of these criteria -- (a) elements of the offense, (b) adequate

notice, and (c) protection against double jeopardy -- were satisfied by the indictment in this case.

1. As to the elements of the offense, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" Hamling, 418 U.S. at 117 (citing United States v. Carll, 105 U.S. 611, 612 (1882)). In this case, the indictment set out the elements of the offense for each crime charged. Pet. App. 60a-61a. Both the indictment and the stipulated bill of particulars also specified that Petitioner was accused of placing his penis in M.A.H.'s mouth, distinguishing this case from one in which the indictment quotes statutory language that "proscribes a wide array of conduct in the broadest, most generic terms." United States v. Hillie, 227 F. Supp. 3d 57, 75 (D.D.C. 2017).

2. The indictment here also provided Petitioner with adequate notice of the charges made against him. Besides setting out the crime's elements, each count in the indictment identified the alleged victim and provided an approximate date range for the offense. The nature of the crime itself -- "sexual assault" of a minor -- is both a defined legal term, W. Va. Code § 61-8B-3(a)(2), and an easily understandable plain English description of specific acts, which the State supplemented by referring to "oral sexual

intercourse." Pet. App. 60a-61a. The stipulated bill of particulars confirmed that the acts involved Petitioner "engag[ing] in contact between his sex organ and the mouth of the victim." Pet. App. 87a.

To be sure, this Court has said that the statutory elements "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." Hamling, 418 U.S. at 117-18 (quoting United States v. Hess, 124 U.S. 483, 487 (1888)). But that does not mean that every element of the offense must contain additional factual specificity to sustain an indictment. For example, in Hamling itself, this Court rejected an argument that an indictment was insufficient where it merely charged the defendant with distributing "obscenity," without providing more detail into the exact nature of the material distributed. 418 U.S. at 118-19. "Obscenity," the Court reasoned, was a "legal term of art" that placed the defendant on sufficient notice of the nature of the crime being alleged. Id. at 118. Though the government could have perhaps said more, "[t]he sufficiency of the indictment is not a question of whether it could have been more definite and certain." United States v. Debrow, 346 U.S. 374, 378 (1953).

This case differs from Russell v. United States, in which this Court held that an indictment was legally deficient because

the elements of the offense could not convey the precise nature of the crime that the defendant allegedly committed. 369 U.S. 749, 766 (1962). Russell involved a statute that made it a crime to tell a knowing falsehood to a Congressional committee on any matter "pertinent" to the investigation. Id. at 757. This Court held that an indictment alleging a crime under that statute needed to identify the "pertinent" matter at issue because the term was not self-defining. Id. at 771-72; see also United States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007) (explaining how the nature of the hearing in Russell was a uniquely crucial fact for guilt).

By contrast, as Petitioner himself seems to acknowledge, there is no ambiguity as to the types of conduct that constitute "sexual assault" under the statute. The discovery turned over before trial and the evidence presented at trial also bore out the crimes alleged in the indictment, and Petitioner had a full and fair opportunity to cross-examine the alleged victim on any elements of her testimony. Thus, unlike in Russell, there was no impediment to Petitioner's preparation of a full and fair defense. See, e.g., Fawcett v. Bablitch, 962 F.2d 617, 619 (7th Cir. 1992) (Easterbrook, J.) (describing the ways for a defendant to mount a defense to a similar indictment alleging multiple sexual assaults over a long period).

So the indictment provided Petitioner with adequate notice of the nature of the offenses charged against him.

3. Finally, Petitioner is fully and fairly protected against any likelihood of double jeopardy. Ordinary principles of collateral estoppel apply to determine whether a charge in a subsequent indictment constitutes a separate offense that may be brought against a defendant despite a prior acquittal or conviction on similar charges. See Ashe v. Swensen, 397 U.S. 436, 442-43 (1970). The inquiry requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." Id. at 444 (cleaned up). It must then determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id. (cleaned up).

Here, the similar counts alleged against Petitioner contain a specified date range in which Petitioner is alleged to have engaged in sexual assault or attempted sexual assault with a specified victim. The evidence presented at trial related to conduct between the Petitioner and the victim at a particular place and in particular circumstances within the specified date ranges. The jury returned a general verdict that convicted Petitioner of all the relevant counts, after confirming that they did need to find separate offenses to sustain each count (and after receiving instructions that they needed to be unanimous on all counts).

Reading the indictment in light of the evidence presented at trial and the jury's verdict, Petitioner could assert double

jeopardy as a bar to any future indictments that alleged the same crimes involving the same victim within the same date range. There can thus be no ambiguity or potential that Petitioner will twice be held in jeopardy for the same offense. See Russell, 369 U.S. at 764.

4. Consider the ramifications of a stricter approach. "[C]ourts have rejected attempts to tighten the traditional rules," which generally permit looser pleading when it comes to matters like time, place, and other fine details. LaFave, supra, at § 19.3(c). For good reason. As the Valentine dissent noted, unduly tightening the requirements for pleading indictments would seriously impair the prosecution of child sex crimes. "[A]ttempting to elicit temporal location information from children about abuse" will usually be challenging, especially because children often delay in reporting. Lindsay Wandrey, et al., Maltreated Children's Ability to Estimate Temporal Location and Numerosity of Placement Changes and Court Visits, 18 Psychol. Pub. Pol'y & L. 79, 98 (2012). An overly rigid approach also threatens to transform distinct criminal acts into a single criminal act, undermining legislative intent. Indeed, that's arguably exactly what happened in Valentine, when the majority declared that Ohio was trying to punish one course of conduct. See Phil Telfeyan, Sexual Violence, Counting to Twenty, and the Metaphysics of Criminal Acts: An Analysis of Valentine v. Konteh,

29 Harv. J. L. & Gender 493, 498 (2006) (criticizing this approach). And Petitioner's approach seems entirely arbitrary. For example, he endorses an indictment that breaks out counts by six-month intervals while *not* alleging "what specific sex acts [the defendant] was alleged to have committed." Pet. 15 (citing State v. Lente, 453 P.3d 416, 427 (N.M. 2019), as an example of an appropriate charging practice). Yet he condemns his own indictment which, while not taking that piecemeal approach nevertheless *did* provide the "specific sex acts."

So Petitioner's understanding wouldn't just present a few technical questions. Rather, adopting his approach could well upend child-abuse prosecutions throughout the country. The Court should refuse Petitioner's invitation to embark on that misadventure.

C. Petitioner further insists that the Court should hear this case because the issues are important and recurring. In doing so, he stresses the importance of double-jeopardy and due-process protections in criminal prosecutions. The State agrees those protections are important, but it's not enough to merely trumpet the importance of a particular constitutional right. *All* constitutional rights are important, and this Court necessarily denies hundreds of petitions each year that raise constitutional issues of all stripes. At the very least, Petitioner would need to convincingly explain why these rights are in genuine danger.

He has not. Judging from the petition, no judges below are writing separately to call for the Court's review. No scholars are flagging this issue as a problematic one. In short, while "jurisdictions may continue to "wrestle[] with whether and under what circumstances multiple, identically worded indictments raise due process and double jeopardy concerns, they acknowledge there are scenarios under which such indictments can be constitutional," just as West Virginia has. Watwood v. Edmunds, No. 3:22CV381, 2024 WL 994650, at *27 (E.D. Va. Mar. 7, 2024).

In insisting that the Court should nevertheless jump in, the most Petitioner can offer is an unpublished Third Circuit case that remarks on the "general" precedent on indictments while rejecting Valentine. Crawford v. Pennsylvania, 714 F. App'x 177, 180 (3d Cir. 2017). But the point there is that the Court has deliberately left States some constitutional room to make their own choices as to what information must go in indictments. That's a feature, not a flaw. Beyond that, by reaching back to decades-old cases to support his position, Petitioner tacitly concedes that the matter is not repeatedly arising in the courts below. The sporadic nature of the problem is reason enough to refuse the petition. After all, a petition "may present an intellectually interesting and solid problem, but "this Court does not sit to satisfy a scholarly interest in such issues." Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955). At a minimum, further

percolation would be warranted, as that would at least allow more than a few scattered courts to speak on these issues in wildly varied contexts.

D. Lastly, this case is a poor vehicle to resolve the question presented.

At the outset, Petitioner effectively invited the error of which he now complains. He did not move to dismiss the indictment at any time. He raised concerns through a motion for a bill of particulars, but he then stipulated to a resolution of that motion. Pet. App. 3a n.4, 83a, 87a-88a. He did not object to the trial court's handling of the jury's question about counts 4, 5, and 6 being charged separately. Pet. App. 2a-3a. And he did not raise the issue of which he now complains in either post-trial motions or his direct appeal. Indeed, this supposed constitutional issue did not arise until Petitioner's supplemental petition for habeas corpus -- in other words, his *third* state habeas filing. And all of this follows from Petitioner's strategic call that this case would reduce to a credibility battle between Petitioner and M.A.H., not a fight over an alibi or the like. Pet. App. 3a; see also Pet. App. 37a; cf. Davis v. United States, 411 U.S. 233, 241 (1973) (noting how "tactical considerations [can] militate in favor of delaying the raising of [a] claim [related to a deficiency in the indictment] in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset

an otherwise valid conviction at a time when reprosecution might well be difficult"). Circumstances like these undermine the need for a grant, even when the Supreme Court of Appeals addressed the issue below. See City of Springfield v. Kibbe, 480 U.S. 257, 259 (1987) (dismissing the writ as improvidently granted in similar circumstances related to jury instructions).

What's more, at points in the petition, Petitioner seems to reconfigure his claim into one challenging the sufficiency of the evidence to support three counts of sexual abuse -- as when he rejects M.A.H.'s testimony as inappropriately "broad brush." Pet. 4; see also, e.g., id. at 14 (arguing that the "trial evidence did not distinguish among [the counts]"). This Court "do[es] not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Nor does the Court take on cases just to decide what "inferences [should be] drawn" from the evidence. Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 178 (1938). So when a petition "present[s] primarily ... a question of fact, [it] does not merit Court review." NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 176 n.8 (1981). And "under what [the Court] ha[s] called the 'two-court rule,' th[is] policy has been applied with particular rigor when [the trial] court and court of appeals

are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)). Parsing out what M.A.H. said about the specifics of what Petitioner did to her is not a good reason to grant certiorari.

And the Court "rarely" grants direct review of state post-conviction proceedings. Lawrence, 549 U.S. at 335. "Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of stay of execution). Among other things, that approach avoids any concerns over whether "this Court has the power to compel a State to employ a collateral post-conviction remedy in which specific federal claims may be raised." Huffman v. Florida, 435 U.S. 1014, 1017 (1978) (Stevens, J., respecting denial of petition for certiorari); see also Foster v. Chatman, 578 U.S. 488, 523 (2016) (Alito, J., concurring in the judgment) ("[T]his Court [should] respect the authority of state courts to structure their systems of postconviction review in a way that promotes the expeditious and definitive disposition of claims of error."). And waiting until a later stage also respects the congressional preferences expressed in the Antiterrorism and Effective Death Penalty Act of 1996, which governs federal habeas

proceedings. AEDPA's standards reflect a "presumption that state courts know and follow the law." Woodford v. Visciotti, 537 U.S. 19, 24 (2002). Congress passed it to promote "principles of comity, finality, and federalism." Williams v. Taylor, 529 U.S. 420, 436 (2000). In contrast, Petitioner seeks to constrain state courts without regard for those principles. That contrast affords yet another reason to deny review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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