No. 23-7585

IN THE
Supreme Court of the United States

WILFRED H.,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

West Virginia insists that no "true" or "genuine" or "hardened" split exists. *E.g.*, Opp. 2, 20, 23. But these weak qualifiers only confirm that the lower courts have long and openly disagreed on the question presented. The Sixth Circuit has never "run away from" *Valentine*, contra *id.* at 23, and cases from other jurisdictions "condemn[ing]" the Sixth Circuit's approach, *id.*, are still further proof that a split exists. As to the Fifth Circuit, the opposition similarly shows only that other jurisdictions have disagreed with *Panzavecchia*, which is the whole point. West Virginia also fails to distinguish either these cases or the similar state supreme court decisions. And while West Virginia says it "takes a common approach," *id.* at 2, it cites no federal appellate or state high court decision upholding an indictment with dozens or hundreds of identical carbon-copy counts.

On the merits, the state largely ignores the serious problems that its approach creates, pretending that the issue is the nature of the offenses instead of their identical wording. On whether the issue warrants review, the state ignores the many decisions of its own high court, which show that the question presented is recurring and important. And on vehicle issues, the state second-guesses its own arguments below before ultimately suggesting that petitioner come back after he has sought relief under AEDPA—a Catch-22 that would conveniently insulate West Virginia's outlier practices from constitutional scrutiny. The Court should grant review now.

I. There is a clear and entrenched circuit split.

A. West Virginia contends that *Valentine* is defunct, distinguishable, and "condemned" by other courts. See Opp. 19–25. But the state's abrogation argument is strange. It relies heavily on (i) mostly unpublished Sixth Circuit decisions that factually distinguish *Valentine*, see *id.* at 23, and (ii) decisions from lower courts in *other* jurisdictions that criticize *Valentine*'s reasoning, see *id.* at 23–24. Needless to say, none of that shows abrogation.

In truth, the Sixth Circuit continues to cite *Valentine* as supplying the controlling standard for "defendants'

right to fair notice" under due process. *E.g.*, *United States* v. *Lanier*, No. 23-5217, 2024 WL 915158, at *3 (6th Cir. Mar. 4, 2024); see also *United States* v. *Cervenak*, 99 F.4th 852, 868 (6th Cir. 2024) (Thapar, J., concurring), *reh'g en banc granted, vacated,* No. 23-3466, 2024 WL 3736787 (6th Cir. Aug. 9, 2024); *United States* v. *Rankin*, 929 F.3d 399, 405 (6th Cir. 2019). The Sixth Circuit has merely noted that a *separate* holding in *Valentine*—that court of appeals decisions can clearly establish federal law—no longer controls under AEDPA.[1] See *Coles* v. *Smith*, 577 F. App'x 502, 507 (6th Cir. 2014); Opp. 24–25. *Valentine* still controls on the underlying constitutional question. That is no doubt why a sitting member of this Court has adopted and applied its reasoning. See *United States* v. *Hillie,* 227 F. Supp. 3d 57, 76–80 (D.D.C. 2017) (Jackson, J.).[2] And it is surely why multiple state high courts have expressly followed *Valentine* too. See Pet. 9–10.

Nor is *Valentine* distinguishable. Contra Opp. 22. As the Sixth Circuit explained, Valentine's indictment violated the Due Process Clause because it made "absolutely no distinctions" between the identically worded counts. *Valentine* v. *Konteh*, 395 F.3d 626, 632 (6th Cir. 2005). "Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction." *Id.* at 636–37. And "because the criminal counts were not connected to distinguishable incidents," the jury could not have found Valentine guilty of some counts but not others, creating double jeopardy problems. *Id.* at 633.

So too here. As in *Valentine*, "The indictment, the bill of particulars, and even the evidence at trial failed

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[1] Trying to stretch *Cole* to apply here, West Virginia alters the court's description of *Valentine* to refer to "habeas relief[] for a state prisoner." Opp. 24–25. The court actually referred to "habeas relief *under AEDPA*." *Coles*, 577 F. App'x at 508 (emphasis added). This is the only aspect of *Valentine* that the Sixth Circuit has "retreated from." *See* Opp. 2.

[2] West Virginia claims that because the indictment here did not quote statutory language that "proscribes a wide array of conduct in the broadest, most generic terms," this case is unlike *Hillie*. Opp. 26 (quoting 227 F. Supp. 3d at 75). But that portion of *Hillie* addressed a Sixth Amendment violation, not the issues here.

to apprise" petitioner of "what occurrences formed the bases of the criminal charges he faced." *Id.* His indictment contained three identically worded counts. The bill of particulars the parties to which the parties stipulated made no distinctions among those counts. And M.A.H.'s testimony offered no clarification, merely restating the allegations and providing that the alleged conduct occurred "[f]our or five times" without meaningful factual support. Opp. 5.

West Virginia also emphasizes that other courts—mostly state intermediate appellate courts—have declined to follow *Valentine*. See Opp. 10, 23–24. Since none of those courts is the Sixth Circuit, their criticisms do not avoid the split; they illustrate it. And while West Virginia tries to paint the Sixth Circuit as a lone outlier, it admits that *Valentine* "[r]el[ied] on cases from other circuit courts." *Id.* at 20.

B. West Virginia fares no better with the Fifth Circuit. That court has never abrogated *United States* v. *Panzavecchia*, 421 F.2d 440 (5th Cir. 1970), and courts in the circuit continue to cite it, *e.g.*, *United States* v. *Davis*, No. 3:20-cr-575, 2021 WL 63345, at *1 n.5 (N.D. Tex. Jan. 7, 2021). West Virginia's contrary argument relies largely on state-court decisions from outside the Fifth Circuit that decline to follow *Panzavecchia*. See Opp. 10. At most, those decisions simply underscore the split as well.

West Virginia also cites more recent federal court decisions (again from other jurisdictions) to argue that *Panzavecchia* is defunct. But those decisions actually show the opposite. Opp. 11. For example, the Second Circuit relied on *Panzavecchia* to explain that "a bill of particulars or discovery cannot save a 'defective indictment'"—a category that includes an indictment with multiple "identically worded" counts. *United States* v. *Walsh*, 194 F.3d 37, 45 (2d Cir. 1999) (quoting 421 F.2d at 441–42). In any event, as the petition explained and the state nowhere disputes, "discovery and trial" provided no information connecting any of the three identical counts here to any specific factual allegations. Contra Opp. 11.

Nor is *Panzavecchia* meaningfully different from this case. West Virginia claims that because petitioner was convicted of all three identically worded counts,

whereas the *Panzavecchia* defendant was acquitted of one such count but found guilty of the others, "Petitioner needn't concern himself with which counts offer protection from future prosecution and which ones don't." Opp. 11. That misses the point. Petitioner was indicted and convicted on three counts of first-degree sexual assault that occurred between November 16, 2007 and July 15, 2010. Pet. App. 2a n.3. But M.A.H testified in broad strokes that this occurred "[f]our or five" times. Opp. 5. Thus, if Petitioner is indicted on the same charges during the same time frame in the future, he will have no means of knowing whether this subsequent indictment concerns instances for which was already convicted. Petitioner's indictment and trial thus "imperiled" any future pleas of former conviction. *Panzavecchia*, 421 F.2d at 442.

C. West Virginia also fails to distinguish the high-court opinions from Kentucky, Massachusetts, Mississippi, and Delaware. See Pet. 9–12; Opp. 12–20. Each jurisdiction recognizes "[t]he core problem when identical, generic counts are used": no one can be sure "what factual incidents were presented and decided by [the] jury." See *Dunn* v. *Maze*, 485 S.W.3d. 735, 748 (Ky. 2016) (quoting *Valentine*, 395 F.3d at 635). See also *Goforth* v. *State*, 70 So. 3d 174, 189 (Miss. 2011) ("[A]s in *Valentine*, the multiple, identically worded counts in the indictment [violated] Goforth's constitutional right against double jeopardy in the event of future prosecution.").

West Virginia argues that Kentucky and Mississippi would have convicted petitioner on the identically worded counts because there was no double jeopardy issue, since "the threat of a second trial [is] not yet ripe." Opp. 13. West Virginia again misunderstands the cases. *Dunn* made clear that carbon-copy indictments pose "present" due-process problems sufficient to defeat a defective indictment. 485 S.W.3d. at 748. And although *Tapper* v. *State*, 47 So. 3d 95 (Miss. 2010), indeed held that a trial court had not erred in refusing to quash a defendant's carbon-copy indictment, Opp. 15–16, the Mississippi Supreme Court clarified a year later that it had not considered the double-jeopardy issue in *Tapper* because it was not raised on appeal, *Goforth,* 70 So. 3d at 188–89. When the court did consider a similar question, it found that

where "[n]either the indictment nor the charging instruction differentiate" among multiple, identically worded counts, the indictment fails "to protect [a defendant's] constitutional right against double jeopardy in the event of future prosecution." *Id.* at 189.

As West Virginia acknowledges, prosecutors in Massachusetts and Delaware may be able to avoid constitutional problems "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." Opp. 17–18; *Commonwealth* v. *Hrycenko*, 630 N.E.2d 258, 261 (Mass. 1994); accord *Luttrell* v. *State*, 97 A.3d 70, 77–78 (Del. 2014). But that does not avoid the conflict here, since the bill of particulars below essentially regurgitated the indictment. Pet. App. 87a.

II. The decision below is wrong.

West Virginia says an indictment is constitutional if it provides "(a) [the] elements of the offense, (b) adequate notice, and (c) protection against double jeopardy." Opp. 25–26. But the decision below violates the second and third requirements. It is not enough that petitioner received notice of "the nature of the offenses charged against him." *Id.* at 28. Rather, "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 *Hillie,* 227 F. Supp. 3d at 80 (emphasis added) (cleaned up). That was not possible here, and the state does not claim otherwise. Nor does it dispute that adequate notice requires that counts be distinguishable from one another. It simply declares that "an approximate date range" is enough. See Opp. 26–27. That is wrong. See Pet. 8–12. And the upshot is that, in West Virginia's view, the state can charge and convict a defendant of dozens, hundreds, or even thousands of identically worded charges without ever linking those charges to specific factual allegations. *E.g.*, *State* v. *David S.*, No. 22-0113, 2023 WL 6012817, at *1–2 (W. Va. Sept. 15, 2023) (upholding 516-count carbon-copy indictment). Moreover, West Virginia's tolerance for such indictments effectively shifts the burden to defendants to prove a broad negative—which courts also cannot constitutionally do. E.g., *Patterson*

v. *New York*, 432 U.S. 197, 215 (1977) (a state "must prove every ingredient of an offense beyond a reasonable doubt" and "may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements.").

West Virginia also intimates that carbon-copy indictments raise double-jeopardy concerns only when a case is to be reindicted or retried. Opp. 13. But courts rightly take these constitutional concerns into account during the initial proceedings. See, e.g., *Valentine*, 395 F.3d at 635 (clarifying that constitutional concerns arise because of the *hypothetical* challenges re-indictment would pose). Indeed, West Virginia's arguments only demonstrate that it is entrenched in this unconstitutional practice.

Lastly, West Virginia asserts that petitioner's "approach seems entirely arbitrary," because the petition "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." Opp. 31 (quoting *State* v. *Lente*, 453 P.3d 416, 427 (N.M. 2019)) (brackets in original). The state should read *Lente* again. See 453 P.3d at 427 ("Lente's indictment alleges that he engaged in specific sex acts with M.C. during specific, consecutive, six-month intervals. . . . *We do know*, based on the indictment, what specific sex acts Lente was alleged to have committed.") (emphasis added). Indeed, cases like *Lente* show how prosecutors can appropriately charge patterns of sexual abuse without simply ignoring defendants' constitutional rights—as West Virginia does.

III. The split warrants review in this case.

According to West Virginia, the petition "tacitly concedes that the matter is not repeatedly arising in the courts below." Opp. 32. But the state ignores the petition's showing that this issue arises regularly *in West Virginia alone*. Pet. 7. Indeed, West Virginia's own arguments effectively concede that this issue can arise in every case that involves a pattern of child sexual abuse, see Opp. 30–31, and there are unfortunately many such cases around the country at any given time. Likewise, it is odd for the state to declare that "[n]o scholars are flagging this issue as a problematic one,"

id. at 32, while citing scholarly commentary calling the question presented "controversial," *id*. at 19.

West Virginia's vehicle arguments are meritless. It first claims petitioner "effectively invited the error of which he now complains." Opp. 33–34. But the state high court reviewed this issue *de novo*—at the state's urging. West Virginia told the court below that all "questions of law" in the case were "subject to a *de novo* review," and did not contend that petitioner invited (or failed to preserve) this error. See Respondent's Brief 6, 13, No. 22-0506 (W. Va. filed Nov. 21, 2022). It is too late for the state to claim otherwise now.

West Virginia next asserts that the petition "seems to reconfigure [petitioner's] claim into one challenging the sufficiency of the evidence." Opp. 34. Nonsense. The issue here is legal. The petition discusses the trial evidence only to underscore that it did not help the jury tie any count to any particular factual allegations. See Pet. 4, 14.

Finally, West Virginia suggests petitioner should seek federal habeas relief because "the Court 'rarely' grants direct review of state postconviction proceedings." Opp. 35 (quoting language that originated in a pre-AEDPA concurrence). Since AEDPA, however, the "trend" has been the opposite: "Recently, this Court has evidenced a predilection for granting review of state-court decisions denying postconviction relief[.]" *Foster* v. *Chatman*, 578 U.S. 488, 524 (2016) (Alito, J., concurring in the judgment); see *Lawrence* v. *Florida*, 549 U.S. 327, 343 n.7 (2007) (Ginsburg, J., dissenting) (citing examples).

And with good reason. In the current posture, review is *de novo*, so this Court can reach the merits of the constitutional question directly. Under AEDPA, however, the question presented would be different: The federal courts would be constrained to ask whether the decision below "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court." 28 U.S.C. § 2254(d)(1). And this Court has never addressed the precise question presented. West Virginia's position thus amounts to a Catch-22: Petitioning after state post-conviction proceedings is too early,

and petitioning after federal habeas proceedings is too late. The Court has rightly rejected that view.

This difference in posture likewise distinguishes failed petitions that West Virginia wrongly identifies as "presenting [the] same question." See Opp. 3. In *Dodd*, for example, this Court denied review of a *Valentine*-based ineffective-assistance claim governed by AEDPA. See *Dodd* v. *Clarke*, No. 3:21-cr-259, 2022 WL 3587817, at *7 (E.D. Va. Aug. 22, 2022), *appeal dismissed*, No. 22-7017, 2023 WL 8728475 (4th Cir. Dec. 19, 2023), *cert. denied*, No. 23-1036, 2024 WL 2262341 (U.S. May 20, 2024). The failure of that double-bank-shot argument reveals nothing about the merits of this petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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