

24-5966

No. 24-_____

ORIGINAL
PETITION

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
OCT 18 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Joey Deal,

Petitioner, Pro se,

v.

State of New Mexico, and

Hector Rios, Warden,

Respondent.

On Petition For Writ Of Certiorari

To The State of New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Joey Deal
Petitioner, Pro se
NMCD # 57137
Otero County Prison Facility
10 McGregor Range Road
Chaparral, New Mexico 88081

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SUPREME COURT, U.S.

I. Question Presented

Was the New Mexico Supreme Court's denial of Mr. Deal's State Petition for Certiorari contrary to the United State's Constitution, Amendments V, and XIV, in a manner that conflicts with relevant decisions of this Court. See, Rule 10(c).

II. List of Parties

All parties appear in the caption of the case on the cover page.

III. Related Cases

There are no related case currently pending in this court.

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VII. Petition for Writ of Certiorari

Joey Deal, Petitioner, Pro se, is an inmate currently incarcerated at the Otero County Prison Facility in Chaparral, New Mexico. Mr. Deal respectfully petitions this court for a writ of certiorari to review the judgement of the New Mexico Supreme Court.

VIII. Opinions Below

The decision by the New Mexico Supreme Court denying Mr. Deal's State Petition for writ of certiorari is recorded under Cause No. S-1-SC-40353. The New Mexico Supreme Court denied Mr. Deal's petition for Writ of Certiorari on July 12, 2024. That Order is attached as **Appendix A**. Subsequently, the New Mexico Supreme Court denied Mr. Deal's motion for reconsideration on the 29th day of July, 2024. That Order is attached as **Appendix B**.

IX. Jurisdiction

Mr. Deal invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the New Mexico Supreme Court's denial of his motion for reconsideration. Wherefore, under Rule 13, this petition is timely filed if received by the United States Supreme Court no later than 28th day of October, 2024, or under Rule 13.3 having been "sent to the Clerk by first-class United States Postal Service, including express and priority mail, postage prepaid, and bearing a postmark, . . . showing that the document was mailed on or before the last day for filing. . . ."

X. Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

XI. Statement of the Case

This case presents violations of three United States Constitutional Amendments. From Mr. Deal's perspective, pertinent here is the Fourteenth Amendment of the United States Constitution which made applicable the Fifth and Sixth Amendments to all state criminal prosecutions. Mr. Deal protests that the New Mexico Supreme Court's denial of his State Certiorari Petition effectively "decided an important federal question in a way that conflicts with relevant decisions of this Court." See, Rule 10(c) of the USSCt Rules.

The Fifth Amendment of the United States Constitution protects defendants from double jeopardy as depicted in the seminal Supreme Court case interpreting the Double Jeopardy Clause, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The Supreme Court summarized the "three separate constitutional protections" of the Double Jeopardy Clause in *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989): "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." Mr. Deal contends that his constitutional protections against double jeopardy prohibiting multiple punishments for the same offense under the Fifth and Fourteenth Amendments were violated when the State of New Mexico charged, prosecuted, and convicted petitioner of multiple, identically worded (i.e., carbon copy, cookie cutter) course-of-conduct counts.

The Sixth Amendment guarantees all criminal defendants in state prosecutions "to be informed of the nature and cause of the accusation. *Argersinger v. Hamlin*, 407 U.S. 25, 27-28, 92 S. Ct. 2006, 32 L. Ed. 2d 530, ... (1972). This Court has found that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a

chance to be heard in a trial of the issues raised by the charged ... are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644, ... (1948). "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991). Mr. Deal contends that his constitutional protections guaranteeing due process under the Sixth Amendment were violated when the State of New Mexico charged, prosecuted, and convicted petitioner of multiple, identically worded (i.e., carbon copy, cookie cutter) counts.

The Sixth Amendment of the United States Constitution guarantees defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Deal contends that his constitutional protections guaranteeing effective assistance of counsel under the Sixth Amendment were violated when defense counsel, during closing arguments, indicated to the jury that Mr. Deal had admitted to a particular incident of sexual abuse that had not been presented to the jury during the trial. Nor, had any allegation of such abuse ever been made by the alleged victim.

The Fourteenth Amendment of the United States Constitution guarantees that a state defendant can be convicted of a crime only upon the showing of sufficient evidence to support a guilty verdict beyond a reasonable doubt. This Court held that the government must provide sufficient evidence to support each element of each crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2789, 61 L.Ed.2d 560 (1979). "The relevant question is whether ... any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, at 319. Due process limits the jury's ability to convict. *Id.* at 319, 99 S.Ct., at 2789. The Court has long acknowledged that due process prohibits a criminal conviction except on proof beyond a reasonable doubt. *Id.* at 316, 99 S.Ct. at 2789. The question of the sufficiency of the

evidence remains, as the Due Process Clause of the Fourteenth Amendment may require a minimal standard of evidentiary support to sustain a conviction. Mr. Deal contends that his Constitutional protections guaranteeing due process under the Fourteenth Amendment were violated when the State of New Mexico failed to present substantial evidence to support each element of each crime charged.

1. The Criminal Information

Mr. Deal was charged by criminal information in the Eleventh Judicial District Court in the State of New Mexico on March 19, 2001. Mr. Deal's trial began on May 22, 2002 on the following counts:

- ★ Eighteen (18) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Penetration of a Minor (CSPM), a second degree felony, contrary to NMSA 1978, § 30-9-11(D)(1);
- ★ Eighteen (18) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Penetration of a Minor, a third degree felony (CSPM), contrary to NMSA 1978, § 30-9-11(E);
- ★ Ten (10) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Contact of a Minor (CSCM), a third degree felony, contrary to NMSA 1978, § 30-9-11(E);
- ★ Thirty-six (36) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Incest, a third degree felony, contrary to NMSA 1978, § 30-10-03.

Mr. Deal contends that the State's decision to charge identically worded counts violated his Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

2. The Jury Instructions

After both sides had rested, the State District Court presented the jury with identically worded instruction for each count charged under each individual statute. For example, each alleged violation presented a single instruction differentiated only by count number.

The jury instruction for counts one through eighteen each stated:

For you to find the defendant guilty of Criminal Sexual Penetration of a child 13 to 16 by use of coercion by a person in a position of authority as charged in count [], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant caused Jennifer Deal to engage in sexual intercourse;
2. Jennifer Deal was at least 13 but less than 16 years old;
3. The defendant was a person who by reason of his relationship to Jennifer Deal was able to exercise undue influence over Jennifer Deal and used his position of authority to coerce her to submit to the act;
4. This happened in New Mexico on or between January of 1998 and June 18, 1999.

The jury instruction for counts nineteen through thirty-six each stated:

For you to find the defendant guilty of Criminal Sexual Penetration as charged in count [], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant caused Jennifer Deal to engage in sexual intercourse;
2. The defendant threatened to tell others that Jennifer Deal wanted to do all these sexual acts with her father, and Jennifer Deal believed that the defendant would carry out the threat;
3. This happened on or between June 19, 1999 and March 02, 2001.

The jury instruction for counts thirty-seven through forty-six each stated:

For you to find the defendant guilty of Criminal Sexual Contact of a Minor by use of coercion by a person in a position of authority as charged in count [], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to the breasts of Jennifer Deal;
2. The person was a person who by reason of his relationship to Jennifer Deal was able to exercise undue influence over Jennifer Deal and used this authority to coerce her to submit to sexual contact;
3. Jennifer Deal was at least 13 but less than 18 years old;
4. The defendant's act was unlawful;
5. This happened in New Mexico on or between January of 1998 and March 02, 2001.

The jury instruction for counts fifty through eighty-four each stated:

For you to find the defendant guilty of incest as charged in count [], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly had sexual intercourse with Jennifer Deal;
2. That Jennifer Deal was the daughter of the Defendant;
3. This happened in New Mexico on or between January of 1998 and March 02, 2001.

3. Convictions and Sentencing

Mr. Deal was found guilty on 79 out of 84 counts. The jury acquitted on counts one through five. Sentencing was held on September 11, 2002. The State District Court sentenced Mr. Deal to a term of incarceration of 108 years.

4. State Petition for writ of Habeas Corpus

Mr. Deal filed a State Petition for writ of Habeas Corpus asserting six claims of U.S. Const. Amend. violations on January 03, 2024. (See, **APPENDIX E**). The State District Court issued its Order denying the State Petition for writ of Habeas Corpus on February 27, 2024. (See, **APPENDIX D**).

Issue I.

Petitioner raises this claim under the Fifth and Fourteenth Amendments to the United States Constitution and *art. II, sec. 14* of the New Mexico Constitution. Mr. Deal's Constitutional right to due process and to be free from double jeopardy were violated when the State charged, prosecuted, and convicted Petitioner of the following crimes.

- A)** Eighteen (18) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Penetration of a Minor (CSPM), a second degree felony, contrary to NMSA 1978, § 30-9-11(D)(1);
- B)** Eighteen (18) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Penetration of a Minor, a third degree felony (CSPM), contrary to NMSA 1978, § 30-9-11(E);
- C)** Ten (10) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Criminal Sexual Contact of a Minor (CSCM), a third degree felony, contrary to NMSA 1978, § 30-9-11(E);

D) Thirty-six (36) identically worded, (I.e., carbon-copy, cookie-cutter) counts of Incest, a third degree felony, contrary to NMSA 1978, § 30-10-03.

Issue II.

Petitioner raises these claims under the fifth and fourteenth Amendments of the United States Constitution, and *art. II, sec. 14* of the New Mexico Constitution. Petitioner contends that the evidence at trial was insufficient to support multiple convictions for:

- A)** Thirteen counts of Criminal Sexual Penetration of a Minor, contrary to NMSA 1978, § 30-9-11(D)(1);
- B)** Eighteen (18) counts of Criminal Sexual Penetration of a Minor, contrary to NMSA 1978, § 30-9-11(E);
- C)** Ten (10) counts of Criminal Sexual Contact of a Minor, contrary to NMSA 1978, § 30-9-11(E);
- D)** Thirty-six (36) counts of Incest, a third degree felony, contrary to NMSA 1978, § 30-10-03;
- E)** Any crime alleged to have occurred within the timeframe of "on or between November 2000 and March 2001."

Issue III.

Petitioner was convicted of one (1) count of child abuse that was not properly bound-over from magistrate court. Petitioner raises this claim under the Fifth and Fourteenth Amendments of the United States Constitution, and *art. II, sec. 14* of the New Mexico Constitution.

Issue IV.

Petitioner, in addition to his earlier contentions regarding his convictions of incest, add that he was illegally convicted of five counts of incest contrary to NMSA 1978, § 30-10-03. Petitioner was acquitted of CSPM counts one (1) through five (5). Petitioner raises this claim under the Fifth and Fourteenth Amendments of the United Staes Constitution and *art. II, sec. 14* of the New Mexico Constitution.

Issue V.

Petitioner did not receive effective assistance on counsel at trial when counsel made inculpatory statements during closing arguments impugning Petitioner's guilt with remarks alleging an event that never happened and was never presented to the jury during trial. Counsel's actions were not cosistent with the guarantees of the Sixth and Fourteenth Amendments of the United Staes Constitution and *art. II, sec. 14* of the New Mexico Constitution.

Issue VI.

Cummulative error. Petitioner raises this claim under the Fifth and Fourteenth Amendments of the United Staes Constitution and *art. II, sec. 14* of the New Mexico Constitution.

5. State Petition for writ of certiorari

Mr. Deal's State Petition for writ of certiorari was filed in the New Mexico Supreme Court on April, 15, 2024. (See, **APPENDIX C**). Wherein, Mr. Deal raised six issues:

Point 1:

Petitioner raises this claim under the Fifth and Fourteenth Amendments to the United States Constitution and *art. II, sec. 14* of the New Mexico Constitution. Mr. Deal's Constitutional right to due process and [protection against] (brackets in original) double jeopardy were violated when the State charged, prosecuted, and convicted Petitioner of the following crimes: (A) thirteen (13) identically worded () counts of CSPM; (B) eighteen (18) identically worded () counts of CSPM; (C) ten (10) identically () worded counts of CSCM; (D) thirty-six identically worded () counts of incest. See, State petition for writ of habeas corpus, pp 28-34;

Point 2:

Petitioner raises this claim under the Fifth and Fourteenth Amendments to the United States Constitution and *art. II, sec. 14* of the New Mexico Constitution. Petitioner contends that the evidence at trial was insufficient to support multiple convictions convictions for: (A) thirteen (13) counts of CSPM; (B) eighteen (18) counts of CSPM; (C) ten (10) counts of CSCM; (D) thirty-six counts of incest; and (E) and crime alleged to have occurred with the time frame on or between November 2000 and March 2001. See, State petition for writ of habeas corpus, pp 35-63;

Point 3:

Petitioner was convicted of one (1) count of child abuse that was not properly bound-over from magistrate court. Petitioner raises this claim under the Fifth and Fourteenth Amendments of the United States Constitution, and *art. II, sec. 14* of the New Mexico Constitution. See, State petition for writ of habeas corpus, pp 63-66;

Point 4:

Petitioner, in addition to his earlier contentions regarding incest, contends that he was illegally convicted of five counts of incest contrary to NMSA, § 30-10-03 relating (tied) specifically to counts one (1) through five (5) when he was acquitted of those counts at trial. Petitioner bases this claim under the Fifth and Fourteenth Amendments of the United States Constitution, and *art. II, sec. 14* of the New Mexico Constitution. See, State petition for writ of habeas corpus, pp 66-67;

Point 5:

Petitioner did not receive effective assistance on counsel at trial when counsel made inculpatory statements during closing arguments impugning Petitioner's guilt with remarks alleging an event that never happened and was never presented to the jury during trial. Counsel's actions were not consistent with the guarantees of the Sixth and Fourteenth Amendments of the United Staes Constitution and *art. II, sec. 14* of the New Mexico Constitution. See, State petition for writ of habeas corpus, pp 67-70;

Point 6:

Cummulative error. Petitioner raises this claim under the Fifth and Fourteenth Amendments of the United Staes Constitution and *art. II, sec. 14* of the New Mexico Constitution.

XII. Reasons for Granting the Writ

To avoid the erroneous deprivations of Mr. Deal's constitutionally protected rights to due process, to be free from double jeopardy, and to have the effective assistance of Counsel, and to satisfy fundamental fairness in the interest of justice.

This Court's precedents have relied upon Constitutional Law and principles of fundamental fairness when addressing undifferentiated charging schemes like the one presented in the case. The unambiguous and well settled legal maxims derived from the Fifth and Fourteenth Amendments demand that criminal defendants be protected from double jeopardy prosecutions. The Court has noted that "[T]he only function the double jeopardy clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." (quoting *Whalen v. United States*, 445 U.S. 684, 697, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715 (1980). The charging scheme employed by the State of New Mexico in this case allowed the State to "impose greater punishments, than the Legislative Branch intended."

An indictment is generally sufficient where it "set[s] forth an offense in the words of the statute itself, as long as those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)). The multiple, undifferentiated charges in the indictment violated Mr. Deal's rights to notice and his right to be protected from double jeopardy. Under *Russell v. United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038 (1962), criminal charges must give a defendant adequate notice of the charges in order to enable him to mount a defense. 369 U.S. at 763-64.

Fair notice is essential in criminal prosecutions:

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *Cole v. Arkansas*, 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514 (1948); see also *Jackson v. Virginia*, 443 U.S. 307, 314, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) ("A conviction upon a charge not made . . . constitutes a denial of due process."); *In re Oliver*, 333 U.S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence."); *Madden v. Tate*, 830 F.2d 194, 1987 WL 44909, at *3 (6th Cir. 1987) ("The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense.").

Importantly, the constitutional errors in this case is traceable not to the generic language of the individual counts of the indictment but to the fact that there was no differentiation among the counts. The Prosecution abused its charging discretion by piling on multiple identical counts. Numerous charges cannot be made out through estimation or inference. Instead, if prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction. Unfortunately, the State of New Mexico, as this Court will soon see, has a long and dubious history of allowing unconstitutional convictions to stand when the petitioner is a convicted sex offender.

At Mr. Deal's trial, the State failed to differentiate each count of charged conduct by presenting substantial evidence supporting multiple convictions under the associative statute. In *Valentine v. Konteh*, 395 F.3d 626 (2005), a case that comparatively stands on all fours with the case at bar, the 6th Circuit wrote, "[W]e cannot be sure what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided by th[e] jury." 395

F.3d at 635. The 6th Circuit was convinced that, given the lack of any distinction presented in the information, the trial record, or the jury's verdict, [defendant's] multiple convictions for identically-worded counts spanning the same period of time create a double jeopardy problem. A defendant's Constitutional protections inherently require that everyone know which instances he was convicted of so that he can raise a double jeopardy bar to future prosecutions for similar conduct. Yet here, no one—including the state—knows what specific instances of sexual conduct Mr. Deal was convicted of. Any attempt to come up with an answer would be based on guesswork, speculation and conjecture. The alleged victim, Jennifer Deal, was not a child of tender years when the alleged abuse occurred, and at trial, she was one month shy of her 19th birthday when she testified to a course-of-conduct rather than specific instances of abuse.

The problem is that nothing in the record—not the information, not the jury instructions, and not the prosecutor's closing argument, identify with specificity what act the jury's guilt determination for each count was based on. This uncertainty raises a significant double jeopardy concern. *Valentine* is instructive. There, the defendant was convicted of 40 counts of sexual abuse, including 20 "carbon copy" counts of child rape, "each of which was identically worded so that there was no differentiation among the charges," and 20 similarly identical counts of felonious sexual penetration. See *Id.* at 628. The lone child victim testified that the undifferentiated offenses took place a number of times ("about 20" times, "about 15" times, "about 10" times) and described the typical abuse scenarios.

Similarly, Mr. Deal was charged by the State of New Mexico under a course-of-conduct theory rather than for individually distinct acts. New Mexico does not have a "course-of-conduct," or pattern statute for sexual abuse. The New Mexico District Attorneys have broad discretion when constructing the prosecutorial instrument. A single charged act is typically written as having occurred "on or about [a specific date]. When multiple violations of the same

statute are charged as a course-of-conduct, the charging instrument states, for example, that the abuse occurred "on or between January 01, 2001 and, December 31, 2001." In Mr. Deal's case, both the indictment and jury instructions alleged multiple course-of-conduct counts for the same charging period.

Pattern statutes for sexual assaults have been enacted by other jurisdictions to respond to the concern that many young victims, who have been subject to repeated numerous incidents of sexual assault over a period of time by the same assailant, are unable to identify discrete acts of molestation. The focus of a pattern statute is to criminalize a continuing course of sexual assaults, not isolated instances. The essential culpable act is the pattern itself, that is, the occurrence of more than one sexual assault over a period of time, and not the specific assaults comprising the pattern. 6A Corpus Juris Secundum § 75 Sexual Assault (2004). This Court has held that "Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice." *Id.* at 70. See *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). New Mexico Legislators have left this decision strictly to the prosecutors.

The 6th Circuit, in *Valentine* vacated all but one of the defendant's multiple convictions for child rape and all but one of the multiple convictions for sexual penetration because "[d]ue process [] requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy." *Id.* at 634. In *Valentine*, and the case at bar, the identically-worded counts, combined with the victim's testimony, posed two related problems: "First, there was insufficient specificity in the indictment or in the trial record to enable [the defendant] to plead convictions or acquittals as a bar to future prosecutions. Second, the undifferentiated counts introduced the very real possibility that [defendant] would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense."

Id. at 634-35.

This Court recognized that the requirement of some differentiation between incidents, however, is not an "insuperable obstacle." *Currier v. Virginia*, 138 S. Ct. 2144, 2149, 201 L. Ed. 2d 650 (2018). The Sixth and Fourth circuits have followed this train of thought. E.g.,

Hardy v. Beightler, 538 F. App'x 624, 629 (6th Cir. 2013) (finding no double jeopardy problem despite identically-worded counts because "[o]n several occasions, the prosecution was careful to explain to the jury the differences between the identical rape counts and the identical kidnapping counts"); *Valentine*, 395 F.3d at 637 (explaining that differentiation could be established with reference to "certain locations or certain actions"); *State v. Generazio*, 691 So. 2d 609, 611 (Fla. 4th DCA 1997) (permitting differentiation among counts based on the type of sexual act committed).

On this issue, the *Valentine* Court explained: The Constitution does, however, 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 at some point in the proceeding. Without such differentiation, these prosecutions would reduce to nothing the constitutional protections of the Fifth and Fourteenth Amendment.

The problem is that within each set of counts, there are absolutely no distinctions made. Mr. Deal was prosecuted for multiple course-of-conduct counts that allegedly occurred within the same charging period, and for the same statutory violations. In its charges and in its evidence before the jury, the prosecution did not lay out the factual bases for each separate course-of-conduct alleged to have occurred within the same charging period. At best, the testimony supported one course-of-conduct conviction for each of the statutory violations. The State's amalgamation of like counts created an enigmatic impossibility for the jury to decipher.

The point at which isolated, sporadic conduct becomes a continuous course-of-conduct is not well defined. See, e.g., *United States v. Lignarold*, 770 F.2d 971, 979 (11th Cir. 1985). The evidence did not show that the course-of-conduct ever ended. Therefore, only one course-of-

conduct count for each statutory offense may survive if the state presented sufficient evidence to support upholding the conviction. State District Court Judge Weaver's reasoning for denying Mr. Deal's state petition was that "There is no doubt that the repeated incidents alleged were separate and distinct because they occurred over time and thus at distinctly different times." The State Court clearly misunderstands the legal standard and evidentiary requirements of a course-of-conduct. Judge Weaver's statement does not account for the Prosecutor's failure to differentiate the "repeated incidents" and the "distinctly different times." In other words, what non-descript count occurred where and at what times? Without this differentiation, the Court's conclusion does not cut constitutional muster.

The alleged victim testified that the sexual contact began sometime in 1997 when she was a freshman in high school, and that the touching progressed. The implication is that criminal conduct occurred between September, when school started, and December of 1997. However, Mr. Deal was not charged with any crime alleged to have occurred in 1997. When questioned about when the touching led to intercourse, Jennifer Deal stated, "**Um, I'm not sure exactly when it started.** Um, it just progressed. I'm not sure exactly, like, what dates or anything, or **how old I was when it started**, when it exactly progressed into that." (Emphasis added). When asked, "How often did it take place?" She responded, "Uh, sometimes it was every night and sometimes there was a period when a couple of days would go by, and **it just happened a lot.**" (Emphasis added). Despite Ms. Deal's inability to articulate what year, or how old she was when the alleged intercourse began, they chose to charge Mr. Deal beginning in January of 1998 through March, 2001.

At the end of direct examination, the Prosecutor asked, "Jennifer can you give a rough estimate who many times you were forced to have sex with your father?" Answer, "It was a lot, probably over a hundred times." Jennifer Deal described two types of abusive behavior (CSCM

and CSPM) by Mr. Deal, testifying that the non-specific abuse began in 1997 and ended in November of 2000. She estimated that the abuse occurred "probably over a hundred times." Outside of the victim's estimate, no evidence as to the number of incidents was presented. In reality, Jenifer Deal described a pattern of abuse that cannot be divided into discernably distinct events. The State cannot identify what month the CSCM began, or even what year the CSPM began. The prosecutor made no attempt to identify 36 counts of CSPM, 10 counts of CSCM, or 36 counts of incest with any specificity or differentiation.

In *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 US, at 364, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323. The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 US 363, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.*, at 372, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323 (Harlan, J., concurring).

In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Because the charges against Mr. Deal were of the carbon-copy variety, the State of New

Mexico appears to allege that Mr. Deal actively and simultaneously engaged in multiple courses-of-the-same-conduct with the same victim during a single charging period. Even if this were an acceptable charging scheme, it is impossible to disaggregate the alleged conduct into distinctly individualized courses-of-conduct. Under *Jackson v. Virginia*, the government must provide evidence to support each element of each crime charged. 443 U.S. 397, 314-315 (1979). Here, the same non-specific evidence on an ongoing pattern of conduct used to support one conviction was invariably required to support multiple convictions of the same statute during the same charging period. The Prosecutor failed to provide any identifying characteristics that would allow a jury to differentiate one charged course-of-conduct from the exact same activity alleged in every other similar charge. The evidence simply does not support multiple convictions for a single statute.

A state court decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). A state court decision "unreasonably applies" clearly established federal law if "there was no reasonable basis" for the state court's decision. *Cullen v. Pinholster*, 563 U.S. 170, 188, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); see also *Bell*, 535 U.S. at 694 ("[A]n unreasonable application is different from an incorrect one."). In this instance, Mr. Deal asserts that in light of this Court's precedents cited herein, the State of New Mexico's failure to correct the Constitutional violations that occurred at trial is an unreasonable application of federal law.

States have the authority to enact criminal statutes regarding a "pattern" or a "continuing course" of abuse. They do not have the power to prosecute one for a pattern of abuse through simply charging a defendant with the same basic offense many times over. The charging

instrument must possess distinctiveness in order to satisfy due process. Which, in turn means differentiation. Differentiation simple requires reference to different date ranges or different time ranges or certain locations or certain actions. Thus, differentiation does not require overly-burdensome precision, but for certain it is not and cannot be multiplicitous, duplicative, and indistinguishable.

In *Russell*, the court found that indictments are only constitutionally sufficient if "the record shows with accuracy to what extent he may plead a former acquittal or conviction" in proceedings taken against him for a similar offense. 369 U.S. at 764. The indictments in this case failed to comply with this mandate of *Russell*. 285 F. Supp. 2d at 1026-27.

When prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy. Even under the deferential standard of AEDPA, these convictions resting on such a clear violation of federal law cannot stand. In post-conviction proceedings, reviewing Courts must ensure that prisoners were afforded proper constitutional protections during their state criminal proceedings. As the carbon-copy counts of Mr. Deal's indictment would have complicated any subsequent assertion of double jeopardy, this Court should find that his due process rights were violated.

Given the way Mr. Deal was indicted and tried, it would have been impossible for the jury to consider each count on its own. The evidence provided for one conviction was the exact same evidence used to support every subsequent conviction. The jury could not have found Mr. Deal guilty of Count 6, but not for Counts 7 through 18. Nor could the jury have found him guilty of Counts 19, without finding him guilty for counts 20 through 36. The same is true for counts 37 through 46, and counts 50 through 84. Such a result would be unintelligible, because the criminal counts were not connected to distinguishable incidents.

Since none of the criminal counts charged distinct, discriminatory acts, multiple

convictions for the same course-of-conduct clearly violated due process and double jeopardy. Mr. Deal had no ability to defend himself under the State's prejudicial charging scheme. Thus, all but one count of each statutory offense violated the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

Petitioner asserts that the New Mexico State Supreme Court's denial of his state petition of certiorari was contrary to: *Donnelly v. Dechristoforo*, 416 U.S. 637 (1974); *U.S. v. Agurs*, 427 U.S. 97 (1976), *Darden v. Wainwright*, 477 U.S. 168 (1986); *Davis v. Ayala*, 576 U.S. 257 (2015).

XIII. Conclusion

For the foregoing reasons, Mr. Deal respectfully requests that this Court to issue a writ of certiorari on the six points of Federal Constitutional violations and the judgement of the New Mexico Supreme Court. Furthermore, to find that Mr. Deal's state convictions were obtained in violation his Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Without this Court's intervention, Mr. Deal will not have been afforded the benefits and protections of our countries highest and most revered law, the United States Constitution.