No. _____

In the
# Supreme Court of the United States

ABIGAIL MARIE SIMON,
*Petitioner*,

v.

JEREMY HOWARD,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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April 26, 2022

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## QUESTION PRESENTED

Whether this court should grant certiorari because the state trial court judge gave erroneous jury instructions on the critical *actus reus* element of the crime of criminal sexual conduct, and this court must clarify the proper scope and utility of jury instructions on the critical *actus reus* element of the crime charged.

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

### Petitioner

Abigail Marie Simon, Petitioner, is an individual and has no corporate affiliations.

### Respondent

Jeremy Howard, Respondent, is acting Warden at Women's Huron Valley Correctional Facility Ypsilanti, Michigan.

## RELATED PROCEEDINGS

The proceedings directly related to this petition are:

*People v. Simon*, (Mich. Ct. App. No. 326149)
Conviction & sentence affirmed on June 16, 2016

*People v. Simon*, 901 N.W.2d 860 (Mich. 2017)
Leave to appeal denied on October 3, 2017

*Abigail Simon v Shawn Brewer*, (Case No. 2:18-cv-11618)
Petition denied & judgment entered on April 15, 2021

*Abigail Simon v Shawn Brewer*, (Case No. 21-1405)
Judgment affirmed on January 26, 2022 & Mandate issued on February 18, 2022

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Petitioner Abigail Marie Simon respectfully prays that a Writ of Certiorari issue to the State of Michigan to review the judgments of the Federal District Court for the Eastern District of Michigan in Case No. 18-cv-11618, and the Sixth Circuit Court of Appeals in Docket No. 21-1405. Petitioner Simon was convicted in the State of Michigan, Circuit Court for the County of Kent, of of three counts of first-degree criminal sexual conduct ("CSC I"), Mich. Comp. Laws § 750.520b(1)(b)(v), and accosting a minor for immoral purposes, Mich. Comp. Laws § 750.145a.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The instant Petition is timely filed within 90 days of January 26, 2022, the date of the Sixth Circuit Court's Opinion denying Petitioner's appeal from the United States District Court for the Eastern District of Michigan.

## OPINIONS AND ORDERS BELOW

The Opinion of the Federal District Court for the Eastern District of Michigan denying Petitioner's Petition for Writ of Habeas Corpus is included as App 7, and the Judgment of the Federal District Court for the Eastern District of Michigan denying Petitioner's Petition for Writ of Habeas Corpus is included as App 34. The Opinion of the Sixth Circuit Court of Appeals denying Petitioner's appeal from the United States District Court for the Eastern District of Michigan is included as App 1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Const. Amend. 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.

### U.S. Const. Amend. 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.

### U.S. Const. Amend. XIV

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.

**28 U.S.C. § 2254**

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

### A. Procedural History

Petitioner Abigail Marie Simon was convicted in state court, and on June 16, 2016, the State Court of Appeals affirmed the convictions (Court of Appeals Docket No. 326149), and the State Supreme Court denied leave to appeal on October 3, 2017 (Supreme Court No. 154195).

Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court for the Eastern District of Michigan, and on April 15, 2021, District Judge Mark

A. Goldsmith entered an Opinion and Order denying the petition, but granting a certificate of appealability (App 7).

Petitioner appealed to the Sixth Circuit Court of Appeals, and on January 26, 2022, the Sixth Circuit entered an Opinion affirming the judgment of the District Court (App 1).

### B. Statement of Relevant Facts

Petitioner Abigail Marie Simon was convicted of three counts of criminal sexual conduct, first degree (Mich. Comp. Laws § 750.520b), and one count of accosting a child for immoral purposes (Mich. Comp. Laws § 750.145a) in the Kent County, Michigan, Circuit Court Case No. 13-09055-FH. The jury acquitted Petitioner of one count of first degree criminal sexual conduct. At the preliminary examination on September 13, 2013, complainant ("BB") testified that he and Petitioner had penile-vaginal sex twice, and had oral sex once (PET Transcript, p 33). On cross examination, "BB" was asked whether the oral sex was "performed on you or did you perform the oral sex on Miss Simon?" and he responded "both" (PET Transcript, pp 49-50). "BB" stated he was 6'3" tall and weighed 210 pounds, that Petitioner was 5'8" and much smaller than him, and he agreed he was a very good three-sport athlete (PET Transcript, pp 38; 46). "BB" previously told police that he had used cocaine, and it sometimes made him "crazy or psychotic," but at exam he said he was not being truthful with police about this (PET Transcript, pp 45-46). "BB" came to know Petitioner through tutoring, but then fell in love with her (PET Transcript, p 54).

"BB" testified at exam that the sexual activity he described occurred a few months prior to his 16th birthday (PET Transcript, p 5; 29). Petitioner was 33, and had just been hired to tutor male athletes, and it bothered "BB" that Petitioner had previous sex partners (PET Transcript, p 53). He would frequently show up at her apartment unannounced to make sure she was not with another person (PET Transcript, p 52-53). "BB" agreed this behavior was "very jealous" and "protective" (PET Transcript, p 51). "BB" repeatedly asked Petitioner for sex, even though she told him that "you were not old enough to legally have sex" (PET Transcript, pp 51-56). Each time Petitioner's answer was "no," because he was too young and "there would be problems with that" (PET Transcript, p 55).

The first time they had sex, Petitioner told him she "couldn't do it," and "BB" agreed he told police the truth when he said he "forced yourself on Abigail Simon" (PET Transcript, p 60). Despite "BB" telling police that he forced himself on Petitioner, that he should be in trouble, that he should go to jail because he might do it again if not stopped, that he had a terrible temper, and that his parents can't control him, police simply responded with disbelief (PET Transcript, pp 60-67). "BB" agreed that he forced himself on Petitioner during the second incident of penile-vaginal sex (PET Transcript, p 77). While he could not remember details of the oral sex, "BB" agreed that in all three instances, he forced himself on her (PET Transcript, pp 77-80).

Detective Amy Lowrie stated that "BB" told her he forced himself on Petitioner (PET Transcript, p 87),

and that there were letters or a diary written by "BB" with messages to Petitioner stating "your hands and kiss belong to me and I own them" and statements by "BB" apologizing for having done things to Petitioner and stating it was "100% my fault" (PET Transcript, pp 96-97).

At trial, "BB" disavowed much of this preliminary examination testimony, and his statements to police, claiming that he perjured himself to protect Petitioner (Trial Transcript, Vol VII, pp 57-65; 170-177; 181-184). "BB"'s testimony at the preliminary exam, however, did not come in simply as impeachment evidence at trial. The prosecutor, stating that prior sworn testimony can come in as substantive evidence, moved for admission of "BB"'s full testimony from the preliminary exam, and the trial court granted that request (Trial Transcript, Vol VII, pp 260-261).

A defense motion to quash was argued and defense counsel Michael Manley previewed the defense: "whether a person who had sexual penetration forced upon them by an individual under the age of 16 engages in sexual penetration as used in the criminal sexual conduct statute;" and "whether as a matter of law, a person who had sexual penetration forced upon them by an individual under the age of 16 is protected against prosecution under the criminal sexual conduct statutes, or whether it is a viable defense, one that has to be a question of fact" (Motion Transcript, 1/10/14, p 6).

Defense counsel discussed jury instructions with respect to the defense claim that Petitioner was forcibly raped, and indicated that guidance would be needed on

how to frame instructions. The trial court stated that "I can't see why you can't raise those issues" and that "I can't see that I'd be precluding you from bringing in that type of stuff" Motion Transcript, 1/10/14, pp 16-17).

Prior to trial, at a motion hearing on November 7, 2014, defense counsel indicated he would like to discuss proposed jury instructions, and explained that the defense would be arguing a lack of *actus reus*, based on an involuntary act, as Petitioner was raped, citing *People v. Likine*, 823 N.W.2d 50 (Mich. 2012) (Motion Transcript, 11/7/14, pp 6; 24-25). The prosecutor indicated that she did not understand the distinction the defense was making between *actus reus* and *mens rea*: "Now, as to *Likine*, again, it says that the prosecutor has to show that the act was done, and I think that the jury instructions, the standard jury instructions require me to do that. I don't think saying that she voluntarily did it adds anything to those instructions. Her state of mind is not an element of the offense, and I don't believe addresses the defense" (Motion Transcript, 11/7/14, pp 31-32).

During jury *voir dire*, the trial court sustained a prosecution objection when defense counsel attempted to discuss whether someone who is raped should be held accountable (Trial Transcript, Vol I, pp 107-108), and told the jury that they would have to "accept the law as I give it to you, whatever that law may be" despite jurors' own opinions (Trial Transcript, Vol I, pp 108-110). When defense counsel again tried to preview the defense of involuntariness, the prosecution again objected (Trial Transcript, Vol I, p 111), and the trial

court used "gun to head" as an example, and told the jury he would outline this when he instructed them on the law (Trial Transcript, Vol I, pp 111-112).

The trial court told the jury they would be provided with a copy of the instructions, and again advised that they must take the law as the court gives it to them (Trial Transcript, Vol II, p 9). During opening statement, defense counsel outlined the three instances where the defense admitted forced sex occurred. The first occasion occurred after Petitioner clearly said "no" and "it was violent, forcible, and against her will. And she's going to tell you how it happened. She's going to tell you. Her shirt never came off. She was thrown on the bed. She was pinned down. Her pants came down, and he sexually assaulted her. And she's going to tell you exactly what happened." (Trial Transcript, Vol II, p 95). Petitioner testified to this act of rape, stating that "BB" took her pants off while holding her down, and forced his penis into her vagina while she begged him to stop (Trial Transcript, Vol IX, pp 249-251).

Defense counsel then described the second act of rape (Trial Transcript, Vol II, pp 95-96). Petitioner testified to the second act, and said she told "BB", when he asked to have anal sex, that she would never do this. "BB" became angry, pulled her pants down and, without using lubrication, and while she was begging him to stop, "he did it anyways" (Trial Transcript, Vol IX, pp 265-267).

Defense counsel discussed the third act of forced sex: "She's going to tell you about oral sex, one of the charges, where her head was forced down and held after he was angry" Trial Transcript, Vol II, p 96).

Defense counsel noted that "BB" apologized in a text for doing this to Petitioner (Trial Transcript, Vol II, pp 96-97). After reiterating that the first two sex acts between her and "BB" were against her will, Petitioner described the third act, which took place in her car on April 24, 2013. Petitioner stated that "BB" "yanked my head down and had me perform oral sex on him…" (Trial Transcript, Vol X, pp 22-23). She stated that she did not do this voluntarily, and could not physically resist by pushing him off (Trial Transcript, Vol X, p 24). She testified that the three forced sex acts constituted the only sexual contact between her and "BB" (Trial Transcript, Vol X, p 29).

On the sixth day of trial, the trial court stated:

> In other words, that to the extent that the defendant engaged in acts of sexual penetration with the victim, she did not do it voluntarily. The acts were done perhaps while she was sleeping or didn't know they were happening, whatever the case may be, or that she performed these acts under duress. In other words, she was forced to do so for whatever reason, and that gets into some of the testimony we heard from the social worker earlier . . . Now, as I understand it, the defense has indicated that what they're trying to establish here is that the victim basically engaged in a course of conduct, for lack of a better word, that essentially removed from the defendant the element of voluntariness or that she essentially had to do these things, being forced to do these things. You know, that's -- I don't know. That's for the jury

> to determine . . . It's a little bit of -- somewhat unusual of a defense, I think, but it's there, and that's what the defendant is going to be claiming here, as I understand it, that she never voluntarily, or if it was voluntary it was under duress engaged in these acts of sexual penetration.

(Trial Transcript, Vol VI, pp 36-37).

The prosecutor addressed the jury regarding the primary claim of the defense -- that there was no crime here due to the fact that there was no voluntary *actus reus* because, as to each of the three counts where sexual contact was admitted by the defense, the contact occurred through forcible rape:

> Now, the defense has asked the Court to talk to you about voluntary, but ***I believe the Court is going to instruct you that voluntary is like, you know, some examples are unconsciously, uncontrollable reflex-type things. No where does she contend that she -- this was a reflex or something that she couldn't control. Her actions were all voluntary based on her decisions, and there is no evidence to support that it was involuntary.***

(Trial Transcript, Vol XI, pp 10-11)(emphasis added).

The prosecutor also told the jury the following regarding the defense of duress:

> It's hard to hear those kinds of things related to what she says from the stand. It so demeans

and it so discredits what those hostages go through, but that's what she wants you to believe in this case.

I believe the judge's instructions to you will be that it's a threat of future injury -- or that a threat of future injury is not sufficient to constitute duress; rather the threatening conduct must be present, imminent, and impending. This is for situations where you have a gun at your head or a knife at your neck or something that you obviously have to comply or you know you're going to die. That's it.

Again, it's hard to discuss that her testimony would have you believe that that's where she was. Again, there is no evidence to support this. There's no knife, there's no gun, there's no nothing in this case.

(Trial Transcript, Vol XI, pp 10-11).

In rebuttal, the prosecutor argued:

***By the way, duress as a defense, if you doubt me, please, anything I say about the law, please ask the judge.*** Don't take my word for it. But duress does not mean that someone's threatening to kill themselves. That's not a duress defense. And it sounded like he was withdrawing the other defense that he beat her.

Anyway, the months of -- you know, like he says months of text messages that she was trying to placate him, that that's duress or that's involuntary. ***No, that's all voluntary. Ask the***

> ***judge for a definition if you have any doubt about that.***
>
> * * *
>
> Placating is not duress. The instruction you are going to receive from the Judge is that you have to look at whether or not she could have done something else other than have sex with him. Was there another way out? Yes. There were a million ways out. You cannot come to the conclusion that she didn't have a different way to go.
>
> * * *
>
> And all the evidence -- there's an avalanche of evidence. It's all right there. Again, bet your life? It has nothing to do with your life or her life. That is not the standard.

(Trial Transcript, Vol XI, pp 115-119)(emphasis added)

The court instructed that the jury and described "voluntary" as:

> To have quote/unquote "voluntarily" engaged in something, ***the defendant must have made some conscious act.*** The defendant's act is involuntary only if the act did not occur under the defendant's control, and she was truly powerless to prevent its occurrence.
>
> ***Now, some examples of involuntary acts that could not be the basis for a crime are spasms, seizures, reflective*** [sic] ***actions and movements occurring while the actor is***

> ***unconscious or asleep.*** However, ***if one consciously acts, then that is voluntary for purposes of this element.***
>
> Now, this is regardless of the motives for the act including whether or not the act was motivated by fear or self-preservation. The motive for an act can relate to the defense of duress which I will explain to you later. It does not relate to the first element of the criminal sexual conduct offense.

(Trial Transcript, Vol XI, pp 133-134)(emphasis added).

The trial court next instructed the jury as to the defense of duress:

> The defendant is not guilty if she committed the crime under duress. Under the law there was duress if four things were true.
>
> One, the threatening behavior would have made a reasonable person fear death or serious bodily harm.
>
> Two, the defendant actually was afraid of death or serious bodily harm.
>
> Three, the defendant had this fear at the time she acted.
>
> Four, the defendant committed the act to avoid the threatened harm.
>
> Now, ladies and gentlemen, a threat of future injury is not sufficient to constitute duress. Rather, the threatening conduct must be

> present, imminent, and impending. In deciding whether duress made the defendant act as she did, think carefully about all the circumstances as shown by the evidence.

(Trial Transcript, Vol XI, pp 134-135).

Following Petitioner's convictions, the Court of Appeals affirmed on June 16, 2016 (Court of Appeals Docket No. 326149, RE 5-19). The Supreme Court denied leave to appeal on October 3, 2017 (Supreme Court No. 154195, RE 5-20) (Record of Court of Appeals, RE 5-19).[1]

Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court, and on April 15, 2021, District Judge Mark A. Goldsmith entered an Opinion and Order denying the petition, but granting a certificate of appealability (App 7). On January 26, 2022, the Sixth Circuit entered an Opinion denying Petitioner's appeal from the United States District Court for the Eastern District of Michigan (App 1).

[1] The Record Entry Numbers (RE) are from the District Court for the Eastern District of Michigan.

## REASON FOR GRANTING THE WRIT

### I. This Court Should Grant Certiorari Because the State Trial Court Judge Gave Erroneous Jury Instructions on the Critical *Actus Reus* Element of the Crime of Criminal Sexual Conduct, and this Court must Clarify the Proper Scope and Utility of Jury Instructions on the Critical *Actus Reus* Element of the Crime Charged.

Petitioner is entitled to federal habeas corpus relief as her conviction and custody are in violation of the federal constitution. U.S. Const. Ams. V, XIV; 28 U.S.C. § 2254(a); *Marby v. Johnson*, 467 U.S. 504 (1984). The issue that Petitioner raised in her petition for a writ of habeas corpus made a substantial showing of the denial of constitutional rights, as required by 28 U.S.C. § 2253(c)(2).

At trial, Petitioner testified that three sexual penetrations occurred, but claimed that the victim raped her, and also testified that all the text messages she sent to the victim were done to appease the victim so that he would not assault her -- thereby claiming that she engaged in involuntary acts when the sexual acts occurred. According to the jury instructions at trial, however, the instruction limited "involuntary acts" to those that may have occurred while Petitioner was unconscious or that resulted from involuntary bodily movements. In other words, the instructions indicated to the jury that an act is involuntary only if the defendant is unconscious, and that the examples that the trial court judge provided of "involuntary acts" were irrelevant to this case, and may have led to the

jury to conclude that any "conscious" bodily act, even if physically forced against Petitioner was a voluntary act.

This Court should grant review in this case to provide guidance on how to apply the jury instruction on the *actus reus* element of the crime of criminal sexual conduct, an issue that has confounded, and will continue to confound, the lower courts. As conveyed to the jury, the instruction allows only the limited inference that one or some, but not all, of the incidents charged were involuntary. Critically, the instruction is incapable of discerning which of the incidents were voluntary acts, and which were not. Thus, the instruction cannot single out the charged incidents as involuntary, which made the defense advanced at trial irrelevant to whether the charged incidents were unintentional, and therefore a crime. The lower courts, including the Sixth Circuit, construe the incidents far more broadly, allowing the inference that ***all*** of the incidents were intentional and voluntary. As explained below, making that inference requires a rejection of the defense outright.

The prosecution introduced a number of text messages by Petitioner and complainant. These messages, and testimony by complainant, show that Petitioner refused to engage in sexual penetration due to complainant's age, and that on the three occasions where Petitioner admitted penetration occurred, resulting in the three CSC 1 counts of conviction at issue, Petitioner refused to engage in sex, and was overpowered and forced by her much larger and stronger assailant.

The defense was that there was no *actus reus*, because any penetration was involuntary through forcible rape. But the court gave an erroneous, vague, and misleading instruction on the critical involuntariness defense, which allowed a conviction unless it was shown that Petitioner was seizing, asleep, or unconscious; or was being threatened with death or great bodily harm (duress).

Petitioner presented two distinct federal constitutional issues in relation to the erroneous instruction of the jury, arguing that (1) the instructions allowed the prosecution to convict without proving an essential element beyond a reasonable doubt, violating Petitioner's federal due process rights, and (2) the error in instructing the jury denied Petitioner's federal due process right to present a defense. The decision of the Michigan Court of Appeals did not assess either of these issues, and the District Court erroneously concluded that the question of whether structural error occurred was irrelevant, because the Michigan Court of Appeals "reasonably" concluded that no error occurred.

### A. Substantive Error in the Jury Instructions Denied Petitioner Due Process Under the Federal Constitution.

The Michigan Court of Appeals took an isolated passage of the trial court's instruction on the critical issue of voluntariness in relation to the *actus reus* of the three CSC 1 counts out of context, ignores the prosecutor's argument to the jury, and uses a secondary dictionary definition of "conscious" to erroneously conclude that the jury was in position to find a lack of *actus reus* based on forcible rape if they

believed that Petitioner was overpowered (Court of Appeals Docket No. 326149, RE 5-19, Page ID # 949-951). The District Court adopted this reasoning in rejecting the habeas petition based on a denial of her right to a jury trial in which all elements of the crime must be proved beyond a reasonable doubt (App. 30). The essential position of the Michigan appellate court (and the District Court) was that one passage fairly presented the issue of involuntary *actus reus* through forcible rape to the jury, thereby making the trial court's instruction acceptable. This unreasonably applied this Court's precedent when the entire course of instruction to the jury, combined with prosecution argument, informed the jury that if Petitioner was conscious, not subject to spasms or seizures, and was not being forced to submit to the three acts of penetration at issue by imminent threats of death or great bodily harm, she must be found guilty.

The court went on to deny Petitioner's claim by extracting piecemeal the claimed appropriate single statement, and in doing so, the court ignored the error in the trial court's instructions to the jury, and ignored the argument of the prosecutor supporting the erroneous instructions. Again, this constitutes an unreasonable application of this Court's precedent, which demands that courts consider this type of claim in the context of the instructions and the trial record as a whole. *See*, *Boyde v. California*, 494 U.S. 370, 380 (1990); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

However, the District Court maintained that correct statements regarding the jury instructions were

sufficient to "remedy" the inaccurate statements: "[t]he court found aspects of the instructions that Petitioner claimed were inaccurate to be accurate, and it concluded that the sum created by those parts and the incontrovertibly accurate statement was, as a whole, accurate . . . The court of appeals did not violate *Estelle* or other federal constitutional cases by allowing one good instruction to save otherwise flawed instructions." (App. 27). However, this Court has held that one correct statement by the Court does not cure a set of incorrect instructions. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). Where, as here, the instruction at issue is subject to an erroneous interpretation, this Court has held that the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Estelle v. McGuire*, 502 U.S. at 72. *See also*, *Boyde v. California*, 494 U.S. at 380. By claiming that the improper instructions here "fairly presented" the voluntariness question to the jury, the District Court unreasonably applied established precedent from this Court.

Even though the word "conscious," as used in these instructions, considering the examples provided by the trial court (spasms, seizures, movements occurring while the actor is unconscious or asleep), has to be seen in conjunction with the word's primary dictionary definition (awake and able to understand what is happening around you; condition of being conscious; the normal state of being awake; aware of and responding

to one's surroundings; awake),[2] the Michigan appeals court took this completely out of context and used a secondary definition of the word to give it a wholly different meaning (Court of Appeals Docket No. 326149, RE 5-19, Page ID # 951). While the District

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[2] See, e.g.:

- Dictionary, c. (2018). consciousness Definition in the Cambridge English Dictionary. [online] Dictionary.cambridge.org. Available at: http://dictionary.cambridge.org/us/dictionary/english/consciousness [Accessed 22 May 2018].
- En.wikipedia.org. (2018). Consciousness. [online] Available at: https://en.wikipedia.org/wiki/ Consciousness [Accessed 22 May 2018].
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Court acknowledged that the Michigan Court of Appeals "did not specifically engage with the maxim ejusdem generis", (App. 28), the District Court nevertheless stated that, "the court of appeals did engage with the effect the trial court's inclusions of these examples would have on a jury, concluding, reasonably, that the trial court was clear that it was providing examples rather than an exclusive list of involuntary acts . . . Petitioner has failed to show a flaw in the court of appeals' reasoning, much less one so severe as to warrant habeas relief." (App. 28-29). This holding is clearly erroneous, since the "list of involuntary acts" completely deleted the sole basis of defense that was raised on Petitioner's behalf at trial.

In *People v. Likine*, 823 N.W.2d 50 (Mich. 2012), the Michigan Supreme Court held that where, as here, an offense is considered strict liability, eliminating the need to show *mens rea* (here consent is not a factor due to complainant's age), there is still a need to show a voluntary *actus reus*. It is the prosecution's obligation to prove this element. *Likine, supra* at 65. Stating that the "physical part" of a crime demanded a voluntary act (or a failure to act when there was a duty to do so), the *Likine* court assessed, as to Defendant Selesa Likine, her failure to pay child support. Citing *Port Huron v. Jenkinson*, 43 N.W. 923 (Mich. 1889), the court held that the prosecution cannot prove the element of *actus reus* if the *act or omission* at issue was beyond a defendant's control. In other words, if a defendant in fact committed the act, but due to forces beyond the defendant's control the commission -- a necessary element has not been proven and no crime has been committed. The state Supreme Court listed a

non-comprehensive (and far from exclusive) list of involuntary action negating the *actus reus* element. *Likine, supra* at 66.

It is obvious that the state Supreme Court had no intent to limit "involuntary acts" to those listed. Defendant Likine was fully conscious, and was not suffering from any seizure or reflexive movement, when her failure to pay child support was rendered involuntary due to commitment to a mental health facility. It is the "common thread" -- that the act or omission at issue did not occur under the defendant's control -- that is of critical importance in this analysis. The Supreme Court quoted Simester, On the So-Called Requirement for Voluntary Action, 1 Buff. Crim. L. R. 403, 419 (1988), to describe voluntary behavior as "behavior which is intentional under some description, which is "done because the agent wants to do it." *Likine, supra* at 66, n 49.

Petitioner was convicted of three distinct counts of criminal sexual conduct: vaginal and anal intercourse, and fellatio. Mich. Comp. Laws § 750.520b. The *actus reus* is sexual penetration, and under Mich. Comp. Laws § 750.520a(r), sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." For vaginal intercourse where the woman is the defendant, the *actus reus* is inserting a penis into one's vaginal opening (action) or by allowing a penis to be inserted (omission). For anal intercourse where the woman is

the defendant, the *actus reus* is inserting a penis into one's anal opening (action) or by allowing a penis to be inserted (omission). For oral sex, the *actus reus* is putting one's mouth on a penis or putting one's vagina against a mouth (action) or by allowing a penis to be inserted in one's mouth or a mouth to touch one's vagina (omission). But neither the action nor the omission is a voluntary *actus reus* if force is used to overcome a defendant's objection to the contact.

As to each act there was substantial evidence that the penetration was physically forced over Petitioner's repeated and strenuous objection. For example, with respect to the first of the three acts of penetration, Petitioner testified that "BB", after she told him she would not have sex with him, causing him to hit a mirror in anger, "pulled me down on the bed." "BB" "pulled my pants off me, and I was able to like try and pull them back up. And I kept saying no, no, no, Brendan, please don't, please don't. And he did it anyways." "BB" held her down with one hand, and while she begged him to stop "BB" "forced himself inside of me." (Transcript, RE 5-13, Page ID # 768-769). "BB" agreed he used force to achieve penetration (PET Transcript, p 80). Because the *actus reus* is penetration, the prosecution had to show that Petitioner voluntarily accomplished the sexual penetration or voluntarily chose to let "BB" accomplish it. It is absurd to say that a woman performed a voluntary act of sexual penetration simply because she voluntarily engaged in the preceding activities.

### B. By Excusing the Obligation of the State to Prove a Crucial Element of the Charged Crimes Beyond a Reasonable Doubt, the Erroneous Instruction on Voluntariness Violated Clear United States Supreme Court Precedent.

Again, this case was marked by a litany of 'texts' presented by the prosecution to convince the jury that Complainant "BB" and Petitioner had engaged in consensual sex on four distinct charged occasions. But the forcible rape rendered Petitioner's actions involuntary, and thus it was not possible for her to have committed the *actus reus* element of first degree criminal sexual conduct, despite the fact that *mens rea* was not at issue as to these strict liability offenses.

The defense proposed instructions clearly stated that Petitioner could not be held criminally liable if she was powerless to prevent the occurrence of a sexual act, that the sexual acts should be considered involuntary on her part if the jury found "BB" employed force, if he overcame Petitioner "through the actual application of physical force or physical violence," and that the prosecution had the burden of proving beyond a reasonable doubt that the sexual acts were voluntary (Record of Court of Appeals, RE 5-19, Page ID # 1037-1046). However, the state court rejected the defense proposed instructions, and provided instructions which removed the defense of involuntariness through forcible rape. The instructions gave the jury a choice of finding the *actus reus* involuntary if Petitioner were asleep, unconscious, or subject to uncontrollable physical reflexes, or excusing the act if it was voluntary but

under duress through a threat of death or great bodily harm. Neither of these claims was put forward by the defense, and there was no evidence to support them.

During closing argument the prosecutor argued to the jury that the trial court's instructions would direct them that, to show involuntariness, Petitioner would have to prove "unconsciously, uncontrollable reflex-type things. Nowhere does she contend that she – this was a reflex or something that she couldn't control . . . there is no evidence to support that it was involuntary" (Trial Transcript, Vol XI, pp 10-11). Indeed, the trial court did tell the jury this by providing a series of examples of involuntariness that had nothing to do with the claim of involuntariness by forcible rape put forward ("spasms, seizures, reflective [sic] actions and movements occurring while the actor is unconscious or asleep") and by repeatedly telling the jury that if Petitioner was conscious, "then that is voluntary for purposes of this argument" (Trial Transcript, Vol XI, pp 133-134).

While the trial court did tell the jury that a defendant's act is involuntary if it did not occur under her control, and she was powerless to prevent it, the court at the same time unconstitutionally took the issue of lack of *actus reus* through forcible rape out of the jury's purview in this case by bracketing this statement with claims that defendant had to be unconscious, and by giving examples that (1) had nothing to do with this case and (2) limited the jury's consideration to reflexive bodily movements such as spasms, or seizures, or actions that took place while Defendant was sleeping or unconscious. The state trial

court's statement to the jury that "if one consciously acts, then that is voluntary for purposes of this element" was highly prejudicial coming after these irrelevant examples. A rape victim can be fully conscious, but that does not mean that the act of penetration is voluntary. The state trial court should have added an example that was grounded in the facts of this case, or at least added a reference to "any other reasons" a defendant was powerless to act.

The trial court's faulty instruction removed the prosecution's burden to prove a critical element. The defense presented a factually supported claim that an essential element, the *actus reus* of the offense, was not proven beyond a reasonable doubt because "BB"'s forcible rape of Petitioner eliminated her ability to voluntarily accomplish the *actus reus* of the offense. The trial court unconstitutionally denied the ability to present that claim by limiting involuntariness to spasms or seizures, or actions while asleep or unconscious.

The jury was ***prevented***, by the erroneous instruction, from assessing Petitioner's claim that she could not have committed the acts of criminal sexual conduct charged in the three counts of conviction because the acts were involuntary on her part due to forcible rape by the complainant. The giving of a duress instruction does not save this failure, and in fact compounds it, because the claim Petitioner made here is distinct from duress -- she was not threatened with death or great bodily harm into performing a sex act on the three occasions resulting in the three CSC I counts of conviction, she was overpowered. The prosecution

burden to prove the essential *actus reus* element of the three counts at issue here beyond a reasonable doubt is a constitutionally irreducible minimum. The faulty instruction removed that burden in this case, and the instruction must be considered structural error.

The accused has a right to have every essential element of a crime proved to a jury beyond a reasonable doubt before a conviction can be entered. *See*, *In re Winship*, 397 U.S. 358 (1970); *Sandstrom v. Montana*, 442 U.S. 510 (1979). That specific and undeniable protection is lost if a jury is not properly instructed on the elements that the prosecution must prove beyond a reasonable doubt. In *Sandstrom*, the Court addressed a burden shifting instruction that a defendant presumes the ordinary consequences of his acts where intent was an essential element of the offense. Echoing *Winship*, this Court clearly held that every element at issue must be proved beyond a reasonable doubt, and jury instructions, which prohibit completion of this necessary task by a jury, are unconstitutional. *Sandstrom v. Montana*, 442 U.S. at 520-521. In *Sandstrom*, the fact of purposeful or knowing intent was a key element necessary to convict of deliberate homicide. Because the challenged instruction relieved the state of the burden of proof on that element, the federal constitution was violated. Jury instructions that eliminate the prosecution's burden of proving each essential element of a crime to a jury beyond a reasonable doubt violate the federal constitution. *See*, *Patterson v. New York*, 432 U.S. 197 (1977). The instruction on voluntariness did just that. Petitioner was not unconscious, asleep, or experiencing involuntary bodily movements or spasms, and because

she did not fear death or great bodily harm (gun to head, blade to throat), her claim of involuntariness could not be accepted.

In response, the District Court merely held that, since the court instructed the jury that arguments were not evidence, no due process violation occurred from this argument (App. 29). This holding misses the point. It was the jury instructions given in this case that specifically ***permitted*** the prosecutor to give the above erroneous argument to the jury. In this regard, the matter is not "harmless error", since the instruction dealt with intent, as in Petitioner's case. *Kotteakos v. United States*, 328 U.S. 750 (1946). The Sixth Circuit granted a habeas petition when the trial court improperly instructed on an intent element. *See*, *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995).

### C. Assessment of the Full Trial Record; Reasonable Likelihood Jury Has Unconstitutionally Applied the Erroneous Instruction.

Again, Petitioner recognizes that more than an erroneous instruction is needed to grant the writ. The question is whether the instructional error infected the entire trial, thus denying due process. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Where the instruction at issue is subject to an erroneous interpretation, the Supreme Court has held that the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id*. Certainly, these tests were met

here. The entire course of the state trial court's statements to the jury on the critical point at issue here leads to a conclusion of error of constitutional dimension. The trial court also told the jury at this juncture that he was having "some difficulty" with the defense because, given the age differential between complainant and Petitioner, the law only allows certain "factual circumstances" as an excuse, and used "gun to head" as the example (Trial Transcript, Vol I, pp 107-111). Later, the trial court expressed his understanding that the defense involved acts that "were done perhaps while she was sleeping or didn't know they were happening, whatever the case may be, or that she performed these acts under duress" (Trial Transcript, Vol VI, pp 36-37). Further statements to the jury conflated voluntariness with duress (Trial Transcript, Vol VI, pp 42-43).

Finally, the instructions by the trial court completely eviscerated the defense claim here with respect to the *actus reus* of penetration in relation to the convictions at issue. The trial court first told the jury that "voluntarily" had a specific legal meaning different from common usage of the word, that it entailed "some conscious act," which in turn suggested that only unconsciousness would be required to show involuntariness. The next sentence directed the jury to accept defendant's claim of an involuntary act "only if the act did not occur under the defendant's control, and she was truly powerless to prevent its occurrence." In isolation this sentence would not have offended, but it was immediately followed by a list of irrelevant examples ("spasms, seizures, reflective [sic] actions and movements occurring while the actor is unconscious or

asleep") which: (1) had to have led the jury to a conclusion that any "conscious" bodily act, even if physically forced against a defendant's strong protestation, was to be considered voluntary under the legal definition; and (2) reinforced the prosecution claim that there was no evidence of involuntariness in this case based on this definition.

Indeed the examples listed were all similar in scope, and under the doctrine of *ejusdem generis* they logically moved the jury away from consideration of forcible rape negating the *actus reus* here. Under the doctrine of *ejusdem generis* when a general term (here, "involuntary acts") is followed by a list of specific examples, the general term is restricted to include only things of the same kind, class, character or nature as the examples listed. *See*, *Yates v. United States*, 574 U.S. 528 (2015); *Washington State Dep't. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 337 U.S. 371, 384 (2003); *Begay v. United States*, 553 U.S. 137, 142-143 (2008). This is exactly what the prosecutor told the jury during argument -- that because Petitioner did not contest her commission of the *actus reus* of the offense, she had no defense.

The court told the jury that Petitioner had to show that her actions were involuntary due to "spasms, seizures, reflective [sic] actions and movements occurring while the actor is unconscious or asleep." (Trial Transcript, Vol XI, p 131). Of course the prosecutor told the jury that there was no evidence of anything resembling those examples in this case. Pursuant to the logic of the *ejusdem generis* doctrine, it

must be concluded that the instruction deprived Petitioner of a defense.

Finally, the trial court again told the jury that "if one consciously acts, then that is voluntary for purposes of this element." (Trial Transcript, Vol XI, p 131). This statement eliminated any possibility that the jury would assess Petitioner's claim of involuntariness, and was the nail in the coffin. According to the instructions, a rape victim can be fully conscious, but the act of penetration is not involuntary if she is being overpowered. The trial court never mentioned the actual basis of the defense claim -- that Petitioner was alleging that the prosecution had not shown the necessary element of *actus reus* for CSC1, penetration, because any penetration with respect to the three counts of conviction was involuntary due to "BB" physically forcing the acts over Petitioner's protestations.

It is clear that the duress instruction further confused a constitutionally defective instruction on the critical element of *actus reus*. Looking at the full trial picture, and assessing all of the instructions by the state trial court on the point of the critical element of *actus reus* here, the test set out by this Court has been met -- there is undoubtedly a reasonable likelihood that the jury applied the faulty instruction in a way that violates the federal constitution.

### D. Denial of Constitutional Right to Present a Defense.

A defendant in a criminal case has a constitutional right to present a defense under U.S. Const. Ams. V,

VI, XIV, and the Constitution provides the accused a meaningful opportunity to present a complete defense. *Davis v. Alaska*, 415 U.S. 308 (1974); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Taylor v. Illinois*, 484 U.S. 400 (1988). This right is fundamental to due process. *Washington v. Texas*, 388 U.S. 14, 19 (1967). This Court recognized that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284 (1973). The essence of the right to present a defense is the entitlement to present the "defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19.

The District Court held that, "this Court will not disturb the Michigan Court of Appeals' determination that the instructions fairly communicated the state law. Therefore, Petitioner is not entitled to the writ based on a denial of her right to present a defense." (App. 31). The District Court's resolution of the issue unreasonably applied this Court's precedent. It follows logically that the due process right to present a defense is denied if the jury, due to faulty instructions, is prohibited from properly assessing a defense claim.

**E. Structural Error.**

Although Petitioner raised the argument that the erroneous jury instruction was structural error, the District Court ruled that the question of whether the instructional error was structural is irrelevant, because the Michigan Court of Appeals "reasonably concluded" that no error occurred (App. 31-32). This holding is

clearly erroneous. When jury instructions eliminate the burden of the government to prove each element of an offense beyond a reasonable doubt, structural error occurs, and a harmless error analysis is not required for a reviewing court to find a constitutional violation. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Because the error eliminated the state's need to prove that the *actus reus* of the offense was even committed by Petitioner, the error here was structural error.

The instructional error in this case is not at all similar to the error this Court confronted in *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the defendant was convicted of various fraud and tax evasion charges in connection with real estate loans. The trial court erred in failing to instruct on the issue of the materiality of the alleged false statements involved in the various offenses. This Court found that the complete omission of an element in jury instructions, where that element was not contested, was subject to harmless error analysis. In this case, Petitioner fully contested the *actus reus* element of the charged offense, and it was the constitutional obligation of the state trial court to properly instruct the jury on that essential element. The *Neder* definition of structural error makes it clear that the error here is not harmless. Structural error contemplates a defect in the framework of the trial, infecting the entire process, and rendering the trial fundamentally unfair. *Arizona v. Fulminante*, 499 U.S. 279 (1991). Indeed, this Court has found structural error in the jury instruction context where there has been a failure to properly apprise the jury regarding the need to prove guilt

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320, n 4 (1979).

Nor is this case similar to *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), where harmless error analysis was allowed to proceed when an instruction allowed the jury to find guilt if the intent to aid and abet the underlying felony occurred after, as well as before, the murder in a felony murder trial, an impermissible theory under California law. Unlike here where jury assessment was completely foreclosed, the jury in *Hedgpeth* did assess the timing of the formation of the intent at issue, and the jury was able to consider the "value" of allegedly obscene material.

Because the trial court's instructional error in this case was clearly in line with the types of error considered structural by this Court in *Neder* -- intrinsically harmful, rendering unfair or unreliable the determination of guilt or innocence, and denying a defendant the basic protections which allow a criminal trial to reliably serve its function as a vehicle for determination of guilt or innocence -- harmless error analysis is foreclosed. *See*, *Rose v. Clark*, 478 U.S. 570, 577-578 (1986).

The consequences of removing jury assessment of whether the *actus reus* of a crime has been proven beyond a reasonable doubt is an error whose consequences are unquantifiable and indeterminate, and this constitutes another rationale for including the error here in the structural error class. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Errors are"structural" when the error is so significant to the judicial system generally that specific prejudice in the

particular case is immaterial. The removal of the requirement that Petitioner's jury find that her actions satisfied the key *actus reus* element of the offenses with which she was charged is deemed structural error.

Even if this Court also concludes that the error was not structural, the instructional error was harmful under the test set out in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), where a reviewing court finding error should determine whether it had substantial and injurious effect or influence in determining the jury's verdict. In this case, on the contested element of whether the penetration in regard to the three primary counts of conviction were voluntary or the result of forcible rape, the evidence amounted to a credibility contest between Petitioner and the complainant. The complainant repeatedly stated, including under oath at the preliminary exam, that the penetration was forced by him against Petitioner's will. One need only look at the fourth count of CSC 1 charged (Count 5) to conclude severe prejudice occurred here. As to that charge, the jury was properly instructed, and found in Petitioner's favor, acquitting her on that count (Trial Transcript, Vol XII, p 9).

Given the substantial evidence of lack of voluntary *actus reus* through forcible rape as to the three counts at issue here there is every reason to conclude that a properly instructed jury would likely have found for Petitioner on these counts as well. Again, the substantial number of texts, and some photos, which purported to show that there was a consensual relationship between Petitioner and complainant did not impact the assessment of whether, at the point of

penetration in relation to the three distinct charges at issue, Petitioner voluntarily consented or was physically forced to engage over protest. Indeed, some of the texts, and complainant's preliminary exam testimony which was introduced as substantive evidence in the prosecutor's case in chief, suggest Petitioner was reluctant to have sex with the complainant because she knew his age made it illegal. This actually supports her claim that she, on each of the three occasions at issue, strenuously objected to the ultimate act of penetration, and that each critical act of penetration was indeed accomplished by physical force exerted by the complainant against her will.

There is no doubt that the instructional error here had substantial and injurious effect or influence in determining the jury's verdict. Because the lower courts are not properly applying the jury instruction in situations such as this case, this Court's review is warranted.

## CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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