No. _____

In The
Supreme Court of the United States

DAVID KLUG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Fifth District Court Of Appeal For The State Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state prosecuting authority may bundle several single-act offenses concerning the lewd and lascivious molestation of a minor into the same single count of a charging document without violating the Fifth and Sixth Amendments' right to due process and jury unanimity?

Asked differently, do the Fifth and Sixth Amendments, as applied to the States through the Fourteenth Amendment, allow for a series of sexual offenses committed at different times over an extended period on the same victim, either directly or through a charge of lewd and lascivious molestation based on those same underlying offenses, to be joined in a single count in the same charging document?

PROCEEDINGS IN STATE TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

The Petitioner, David Klug, was the defendant in Florida state trial court, in the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida, and the appellant in the reviewing state court, the Fifth District Court of Appeal. Respondent, the State of Florida, was the prosecutor and plaintiff in the state trial court and the appellee in the state appellate court. The related cases include the following:

State Trial Court:

In the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida:

State of Florida v. David Stuart Klug, Case No. 05-2014-CF-022524-AXXX-XX;

State Appeals Court:

In the Fifth District Court of Appeal, State of Florida (state court of last resort):

David Klug, Appellant, v. State of Florida, Appellee, Appeal No. 5D20-610.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Klug respectfully petitions for a writ of certiorari to review the judgment of the Fifth District Court of Appeal, State of Florida.[1]

OPINION BELOW

The *per curiam* decision (without a written opinion) of the Fifth District Court of Appeal, State of Florida, is attached at Appendix A. It is styled *David Klug v. State of Florida*, Fifth District Court of Appeal, Case No. 5D20-610, *rehearing denied* May 3, 2021.

[1] *See, e.g.*, *Davis v. State*, 953 So.2d 612, 613 n.1 (Fla. 2d DCA 2007). *Davis* expressed:

> Because we affirmed without a written opinion, [the appellant] could not seek review in the Florida Supreme Court. *See Jollie v. State*, 405 So.2d 418, 421 (Fla. 1981). In effect, we were the state court of last resort for [the appellant's] direct appeal. *See id*. at 423. Despite the absence of a written opinion affirming [the appellant's] convictions and sentences, we are aware of no rule or procedure precluding the United States Supreme Court from reviewing a conviction and sentence rendered without opinion.

Id.

JURISDICTION

The *per curiam* decision and judgment of the Fifth District Court of Appeal, State of Florida, was entered on March 23, 2021. A motion for written opinion and motion for rehearing *en banc* was timely filed and subsequently denied on May 3, 2021. This Court's jurisdiction is invoked under Title 28, United States Code § 1257(a).[2]

CONSTITUTIONAL AND STATUTORY AND PROVISIONS INVOLVED

The Fifth Amendment states:

> 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 offense to be twice put in jeopardy of life or limb;

[2] This Court entered an order in March 2020 to recognize the COVID-19 pandemic extending the time in which to file a petition for a writ of certiorari from 90-days up to 150-days from the date of the lower court judgment relief is sought. *See* 589 U.S. ___, Court's Order (March 19, 2020) ("[i]n light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari: It is ordered that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment"); *see also* Court's Order, dated July 19, 2021, at 594 U.S. ___.

> 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. V.

The Sixth Amendment states:

> 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 defense.

U.S. Const., amend. VI.

Florida's substantive criminal statute proscribing lewd and lascivious molestation, Florida Statute § 800.04, states, in pertinent parts:

> Lewd or Lascivious Molestation. – A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so

> touch the perpetrator, commits lewd or lascivious molestation.

Fla. Stat. § 800.04(5)(a). The penalty provisions for violating section 800.04(5)(a) are at 800.04(5)(b) and (c).

INTRODUCTION

David Klug was arrested in Brevard County, Florida, more than seven years ago, in April 2014. He was charged with lewd and lascivious molestation of a minor (a child less than 12-years-old), a violation of Florida Statute § 800.04(5).[3] Six years later, Mr. Klug faced jury trial in January 2020.[4] He was found guilty as charged (Mr. Klug was charged in four counts)[5] and

[3] Under Florida Statute § 800.04(5), a person commits the crime of lewd or lascivious molestation thusly: "A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation." Fla. Stat. § 800.04(5)(a).

Under the accompanying penalty provisions, a person who is older than 18 who commits an offense against a minor less than 12-years-old is subject to a life felony (as well as a mandatory minimum sentence of at least 25 years' imprisonment, pursuant to Fla. Stat. § 775.082(3)(a)4.a.(II)); conversely, if the minor victim is 12 or older, but less than 16-years-old, then the offender is subject to a second degree felony punishable by up to 15 years' imprisonment. *See* Fla. Stat. § 800.04(5)(a)(b) and (c)2.

[4] In that time, Mr. Klug was released from custody and remained successfully at liberty under terms and conditions of bond.

[5] As to Counts 1, 2, and 4, Mr. Klug was sentenced to concurrent terms of 25 years in prison, and, as to Count 3, he was

was sentenced to (a mandatory minimum) 25 years in state prison.[6]

Mr. Klug remains incarcerated pending this instant petition.

He appealed to Florida's Fifth District Court of Appeal, challenging the state's charging practice; that is, Mr. Klug argued that the state alleged and charged multiple, separate, and distinct criminal acts over the course of a substantial period of time solely within a single count of the charging document, the Information. In other words, the state alleged different substantive criminal acts within a single count which allowed the jury to render guilt without unanimity. The state said it had to charge the case this way because it was of exceptional significance concerning matters involving and related to the on-going and continuous course of a child's sexual abuse by an adult. The charges brought against Mr. Klug were duplicitous, more so, the charges (as framed) violated Mr. Klug's Sixth and Fourteenth Amendments' rights to have a unanimous jury decide his fate as well as his Fifth Amendment right against double jeopardy and to Due Process, both as a procedural and substantive matter.

Mr. Klug lost on direct criminal appeal, his convictions and sentence were affirmed by Florida's Fifth District Court of Appeal in a *per curiam* order issued

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sentenced to 15 years, said term to run concurrently with all other counts.

[6] *See* Fla. Stat. §§ 800.04(5)(a)(b) and 775.082(3)(a)4.a.(II).

on March 23, 2021, otherwise known as a PCA (*per curiam affirmed*) opinion. Mr. Klug asked to have that matter reheard and his request was denied on May 3, 2021. He now petitions this Honorable Court for its studied review and intervention considering the recent cases decided in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), and *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (holding that a state jury must be unanimous to convict a criminal defendant of a serious offense).

This petition asks whether it is constitutionally allowed, even in a case involving the putative sexual abuse of a child, to allege multiple, separate, and distinct criminal acts, events, and incidents solely within a single count of a state's charging document. Acknowledging and appreciating the depth and over-arching policy concerns governing how we address child abuse allegations, such matters, still, must fall under the penumbra of our Constitution's minimal protections afforded those accused among the most serious of crimes, crimes against children, whether in federal or in state criminal court.

Mr. Klug would respectfully ask of this Court's time and effort, have his petition granted, and his case heard on the merits.

STATEMENT OF THE CASE

As of this petition, Mr. Klug is 52-years-old. He is a husband, a father, a neighbor, and a friend. He is serving a mandatory 25-year minimum state prison

sentence[7] having been found guilty by a jury in Brevard County, Florida, of lewd and lascivious molestation of a minor less than 12-years-old, a violation of Florida Statute § 800.04(5). He was arrested by state authorities in April 2014 after allegations were brought to light against him that he was having an inappropriate sexual relationship with his daughter's friend from school, who, over the course of the putative relationship and school-year, was between 11- and 12-years-old.[8]

The state first filed an original Information against Mr. Klug in May 2014, and then a subsequent and Amended Information about a week later. A Second Amended and then Third Amended Information were later filed at the time of trial, in January 2020. The state, in effect, narrowed the timing of the alleged abuse into three separate frames, to-wit: Count 1

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[7] *See* Fla. Stat. §§ 800.04(5)(a)(b) and 775.082(3)(a)4.

[8] The state charged Mr. Klug over the development of four charging documents: the originally filed Information (May 22, 2014), an Amended Information (May 27, 2014), a Second Amended Information (January 13, 2020), culminating in a final and Third Amended Information (January 13, 2020). The Third Amended Information alleged four separate counts. All four counts charged a violation of the state's lewd and lascivious molestation statute, Fla. Stat. § 800.04(5). Counts 1, 2, and 4 of the Third Amended Information charged conduct as against the minor victim when she was 11-years-old; Count 3 charged conduct when the alleged victim was ostensibly 12-years-old. Mr. Klug asked the trial court to dismiss the state's charges; which request was denied. This denial was affirmed on appeal. Mr. Klug was found guilty of all four counts and he was sentenced to (concurrent) 25 years in state prison for Counts 1, 2, and 4, and he was sentenced to a concurrent 15-year sentence for Count 3.

charged Mr. Klug between August 1, 2013, and December 25, 2013, with having committed "on one or more occasions" lewd and lascivious conduct; Count 2 charged Mr. Klug between December 26, 2013, and February 2, 2014, with having committed "on one or more occasions" lewd and lascivious conduct; Count 3 charged Mr. Klug between February 3, 2014, and April 11, 2014, with having committed "on one or more occasions" lewd and lascivious conduct; and Count 4 charged allegations "on or between December 26, 2013, and February 2, 2014[.]" Perhaps said differently, the state charged Mr. Klug with lewd and lascivious molestation of a minor child (in violation of Fla. Stat. § 800.04(5)) between (1) August 2013 and December 2013, between (2) December 2013 to February 2014, and (3) continuing from February 2014 to April 2014.

From the initial Information (May 22, 2014) and the first amended Information (May 27, 2014), the state amended its charging document twice more before trial (in a Second and then a Third Amended Information), which was held in January 2020. Consequently, Mr. Klug was charged in a Third Amended Information filed on the morning his jury trial began.[9]

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[9] Specifically, the Third Amended Information charged, respectively:

> Count 1: In the County of Brevard, State of Florida, on one or more occasions on or between August 1, 2013 and December 25, 2013, David Stuart Klug being eighteen years of age or older years of age, did intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area or buttocks, or clothing covering

Mr. Klug moved the trial court to dismiss the Information because it was alleging multiple incidents in a single count. Mr. Klug argued, "It is improper for the

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them, of a person less than twelve years of age, [name omitted], by touching and/or rubbing [name omitted] vagina, vaginal area, and/or buttocks, contrary to Section 800.04(5)(a)(b), 775.082(3)(a)4 Florida Statutes.

Count 2: In the County of Brevard, State of Florida, on one or more occasions on or between December 26, 2013 and February 2, 2014, David Stuart Klug being eighteen years of age or older years of age, did intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area or buttocks, or clothing covering them, of a person less than twelve years of age, [name omitted], by touching and/or rubbing [name omitted] vagina, vaginal area, and/or buttocks, contrary to Section 800.04(5)(a)(b), 775.082(3)(a)4 Florida Statutes.

Count 3: In the County of Brevard, State of Florida, on one or more occasions on or between February 3, 2014 and April 11, 2014, David Stuart Klug being eighteen years of age or older years of age, did intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area or buttocks, or clothing covering them, of a person less than twelve years of age, [name omitted], by touching and/or rubbing [name omitted] vagina, vaginal area, and/or buttocks, contrary to Section 800.04(5)(a)(b), Florida Statutes.

Count 4: In the County of Brevard, State of Florida, on or between December 26, 2013 and February 2, 2014, David Stuart Klug being eighteen years of age or older years of age, did in a lewd or lascivious manner, intentionally force or entice a person less than twelve years of age, [name omitted] years of age, to touch the breasts, genitals, genital area or buttocks, or clothing covering them, of David Stuart Klug, by forcing and/or enticing [name omitted] to touch David Stuart Klug's penis with her hands, contrary to 800.04(5)(a)(b), 775.082(3)(a)4 Florida Statutes.

State to charge that a specific criminal act occurred ['on one or more occasions']. Counts 1, 2, and 3 of the Third Amended Information are [] fundamentally flawed in that they now charge multiple sexual offenses in a single count." Mr. Klug cited *State v. Dell'Orfano*, 651 So.2d 1313 (4th DCA 1995), in support of his position. He argued, "All three counts should be dismissed." The trial court denied the motion and trial commenced. Mr. Klug was found guilty as charged;[10] subsequently, Mr. Klug asked for a new trial which request was denied. He asked that the court reconsider its position, and that motion, too, was denied. Mr. Klug appealed his cause to the Fifth District Court of Appeal.

On appeal, Mr. Klug argued that "the trial court erred in allowing the state to go to trial on Counts 1, 2, and 3 where the 'on one or more occasions' language within the charges made it impossible to guarantee [Mr. Klug] his right to a unanimous verdict[.]" *A fortiori*, Mr. Klug recounted that "[d]uring the trial, the defense objected to the evidence adduced by the State as to multiple offenses during the time periods charged in the information." In briefing, Mr. Klug observed:

> The right to a unanimous verdict in situations where a series of acts are charged is guaranteed by the U.S. Supreme Court decision in *Richardson v. United States*, 526 U.S.

[10] Mr. Klug was sentenced to 25 years in state prison for Counts 1, 2, and 4, all sentences to run concurrent with one another; he was sentenced to 15 years for Counts 3, this sentence to run concurrently with the remaining counts.

813[, 119 S. Ct. 1707] (1999). There, Justice Breyer wrote "this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition."

The specific issue in Mr. Klug's case was directly addressed by the Florida Fourth District Court of Appeal in *Smith v. State*, 98 So.3d 632 (Fla, 4th DCA 2012). There, the court began its analysis by referencing its own prior decision in *Whittingham v. State*, 974 So.2d 616 (Fla. 4th DCA 2008), holding that a party must object to this type of charging document because the error is not fundamental. *Id*. at 618-619. In *Smith*, though, the defendant did object throughout, just like Mr. Klug did in this case. The charging document in *Smith* alleged "the information alleged that the appellant committed 'numerous' unspecified lewd acts on D.S. within a thirty-month time span." In counts 1 through 3 in the instant case, the State alleges Mr. Klug committed lewd and lascivious acts on "one or more occasions." (R.693). The evidence adduced at trial, as to counts 1, 2, and 3, included the testimony by the alleged victim that it happened on one or more occasions. (Tr. 651 as to Count 1); (Tr. 666 as to Count 2); (Tr. 667 as to Count 3). During cross, the alleged victim testified that based on her earlier statements (the testimony on direct and her CPT [Child Protective Services] interview that had been

published to the jury at that point), she was ambushed by Mr. Klug "30 or 40 times at a minimum." (Tr. 705). It is impossible to glean from the jury verdicts in this case which specific event prompted each juror individually to find count 1, count 2 or count 3 was committed. More importantly, it is impossible to determine whether the jurors agreed unanimously on what occasion Mr. Klug committed the offense.

. . .

The State's presentation of evidence at trial was that this occurred countless times, but the State was presenting just a few examples, one for each time period. . . . The intended or unintended (from a due process standpoint it is irrelevant which) consequence of this is the jury did not have to agree on a singular event's occurrence in order to find Mr. Klug guilty.

. . .

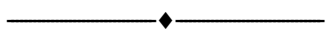
The courts of this State have made substantial accommodations to permit the prosecution of vague allegations made by children because of their age and level of sophistication. Mr. Klug is not challenging those general accommodations or questioning the general impropriety of those policy determinations. But the *Smith* court drew a hard line in the sand on the kind of charging decision made here because it corrupts the unanimity requirement of our state and federal constitutions. The State in this case was allowed by

> the trial court to improperly cross that line. Mr. Klug is entitled to relief from that violation of his rights.

David Klug v. State of Florida, Appellant Klug Initial Brief, pages 22-26 (filed Aug. 21, 2020).

For its part, the Fifth District Court of Appeal affirmed Mr. Klug's convictions and sentence in a *per curiam affirmed* decision without a written opinion on March 23, 2021. Mr. Klug asked for a written opinion as well as rehearing *en banc* following that PCA. His motion was denied on May 3, 2021, and the appellate court's mandate issued on May 24, 2021.

Mr. Klug now petitions this Honorable Court for relief.



REASONS FOR GRANTING THE WRIT

Mr. Klug's case offers an exceptional opportunity for the Court to resolve an on-going and repetitive conflict within and between the several States on how best to constitutionally pursue child sexual abuse matters without violating an accused's rights to fairness and jury unanimity under the Fifth and Sixth Amendments. This case presents the chance to answer how we reconcile competing interests between vigorously enforcing child sexual abuse laws and upholding an individual's protected rights under our Constitution during the course of criminal prosecution. At a constitutional minimum, a state should not be allowed to group or bundle multiple, separate, and distinct criminal offenses within a single count of a charging document, even if the case involves child sexual abuse.

A child claims that an adult, a friend of the family, has been acting inappropriately, for a time, for a while. The child can't necessarily recall the specifics, or explain when, or place, or exact manner . . . but, it happened, the child insists, again and again. "I was sexually abused." A prosecutor, armed with broad and lenient discretion,[11] chooses to charge the accused

[11] Then Attorney General Robert H. Jackson is famously known for his address to the Second Annual Conference of United States Attorneys: "The prosecutor has more control over life,

adult. The charging document doesn't identify or articulate a specific criminal act at a particular time or place; rather, the prosecutor alleges that over the course of a long period of time, the accused committed terrible wrongs at different times, at different places, in different ways . . . all in one single count. The prosecutor explains that it *has* to be done this way because of the credibility, reliability, and veracity problems inherent in these kinds of cases, in child sexual abuse matters. The prosecutor defends the charging practice by emphasizing the significant policy concerns supporting the high aspirations to protect our children. David Klug fell victim to this stratagem. There is simply no practical and viable way to defend across multiple assertions of wrong-doing in a single count. He asks whether the Constitution permits this method of charging and allows a prosecuting authority to allege several, multiple, and separate offenses all within a single count of a charging document – is there a constitutionally recognized exception (should there even be one?) for duplicitous charging practices when the prosecution involves that of child sexual abuse? This Court is best positioned to answer this universally significant question today. Mr. Klug would humbly ask of this Institution's consideration, time, and study; his petition should be granted, and his case heard on the merits.

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liberty, and reputation than any other person in America. His discretion is tremendous." Jackson, Robert H., *The Federal Prosecutor* (April 1, 1940), and available at https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

A. Framing the question.

Again, the starting point asks: What happens when a child accuses an adult of abuse, sexual abuse at that, but cannot recall or explain with any real specificity or clarity how the abuse took place, where it happened, or even when it happened? In their proposals to this issue, the several States take myriad approaches . . . with various answers. *See generally, e.g.*, *Dell'Orfano v. State*, 616 So.2d 33 (Fla. 1993); *State v. Generazio*, 691 So.2d 609 (Fla. 4th DCA 1997) (collecting cases); *State v. Dell'Orfano*, 651 So.2d 1213 (Fla. 4th DCA 1995) (collecting cases); *see also Cooksey v. State*, 752 A.2d 606 (Md. 2000) (collecting cases). In Mr. Klug's case, the state took a charging approach of establishing three time frames (between August and December 2013; December 2013 and February 2014; and then February and April 2014) and alleged that "on one or more occasions" during these time-frames Mr. Klug committed crimes of lewd and lascivious molestation in violation of state law[12] as against the minor victim.

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[12] Florida Statute § 800.04(5) proscribes "single act" crimes and is not a continuing offense – in other words, the charging of more than one single act offense in a single count makes the count duplicitous. *See generally Toussie v. United States*, 90 S. Ct. 858 (1970) (referring to continuing offense doctrine). Duplicitous charges are not allowed at law. *See Richardson v. United States*, 119 S. Ct. 1707, 1711 (1999); *see also Schad v. Arizona*, 111 S. Ct. 2491 (1991), *abrogation recognized by Edwards v. Vannoy*, 141 S. Ct. 1547, 1558 (2021) (emphasizing "the significance of the jury-unanimity right for criminal defendants"). For a good history on duplicity, *see* Lugar, Marlyn E., *Duplicitous Allegations in Indictments*, 58 W. Va. L. Rev. 18 (1955); *see also*, *e.g.*, Fed. R. Crim. P. 8 (prohibiting against duplicitous counts); *United States v. Ramos*, 666 F.2d 469, 473 (11th Cir. 1982) ("[t]he error of duplicity

The policy concerns weighing in favor of upholding the child's interests subsumed those constitutional protections of the defendant, the constitutional rights of Mr. Klug, in this prosecution, particularly, the rule that says an accused may only be convicted on a criminal event by jury unanimity.[13] This case, then, presents the question as to whether a count that charges a person with having committed what, in law, is a single-act sexual offense, on several occasions over a substantial period of time,[14] effectively charges more than one offense and thus violates the Fifth Amendment Due Process Clause (and double jeopardy concerns) including the Sixth Amendment right to a jury trial (as incorporated against the States by way of the Fourteenth Amendment) and a unanimous jury finding. *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *see also Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). The question posed here is nationally relevant, if not nationally significant – it weighs considerably on a

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is present where more than a single crime is charged in one count of an indictment").

[13] *See, e.g.*, *Cooksey v. State*, 752 A.2d 606, 609 (Md. 2000) ("we defined duplicity in criminal pleading as 'the joinder of two or more distinct and separate offenses in the same count.' We observed that '[t]he object of all pleading, civil and criminal, is to present a single issue in regard to the same subject-matter, and it would be against this fundamental rule to permit two or more distinct offenses to be joined in the same count.' ") (quoting *State v. Warren*, 26 A. 500, 500 (1893)).

[14] *See Stoddard v. State*, 911 A.2d 1245, 1256-1257 (Md. 2006) ("*Cooksey* focused on whether the State could bundle a number of single-act offenses into the same *count*") (citing *Cooksey*, 752 A.2d at 606).

prosecuting authority's charging discretion, how best to frame an accusation or allegation, and whether a charge or charges pass constitutional review (especially in a case involving child abuse). It's a question which invades daily the operation and administration of criminal process in both state and federal arenas; more particularly, this case questions the validity of Florida's charging practices when it comes to allegations of on-going sexual abuse of a minor. *See State v. Generazio*, 691 So.2d 609, 611 (Fla. 4th DCA 1997) (after examining competing case law, ruling "that in a case of ongoing sexual abuse of a child, where the child is unable to remember the specific dates on which he or she was abused, the allegation that the act occurred 'on one or more occasions' is not, per se, duplicitous").[15] It's a repetitive question, essentially tracing a history

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[15] *A fortiori*, Mr. Klug's case highlights and throws into sharp relief the express (intra-state) conflict between the lower court's PCA order and the Fourth District Court of Appeal's decision and opinion in *Smith v. State*, 98 So.3d 632 (Fla. 4th DCA 2012) (in a case involving charges of lewd and lascivious conduct, ruling that "where a single count embraces two or more separate offenses, albeit in violation of the same statute, the jury cannot convict unless its verdict is unanimous as to at least one specific act") (internal citation omitted). In *Smith*, the appellate court reversed "the conviction for lewd and lascivious conduct and remand[ed] for the state to elect one act upon which to try the appellant." *Id*. at 640. Clearly, just as in *Smith*, Mr. Klug repeatedly and expressly raised his objections and challenges to the state's method of charging in this case. The issue presented is squarely preserved and clearly framed; there are no other factual contentions at play and the only question before the Court is purely legal. Ultimately, too, Mr. Klug would ask that his convictions and sentence should be vacated and set aside and the charging document in his case dismissed. *See id*.

over the past two centuries. *See generally, e.g.*, *Frohwerk v. United States*, 39 S. Ct. 249 (1919). With recent decisions in *Ramos* and *Vannoy*, it's a relevant and pertinent question ripe for acceptance, review, and answer by the Court. In short, Mr. Klug respectfully asks of this Court to grant his petition for a writ of certiorari and hear his case on the merits.

B. Exploring the question.

The Second Circuit Court of Appeals in *United States v. Murray* long-ago recognized:

> Important policy considerations underlie the rule that two or more distinct crimes should not be alleged in a single count of an indictment. If an indictment is duplicitous, a general verdict of not guilty will not reveal whether the jury found defendant guilty of only one crime and not the other, or guilty of both. Moreover, a guilty verdict on a duplicitous indictment does not indicate whether the jury found defendant guilty without having reached an unanimous verdict on the commission of a particular offense. Thus, the prohibition of duplicity is said to implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution. On the other hand, the allegation in a single count of the commission of a crime by several means should be distinguished from the allegation of several offenses in the same count.

> Although drawing the line between these two concepts may be difficult in practice, in theory the latter type of allegation is duplicitous [and not allowed], while the former is not.

618 F.2d 892, 896 (2d Cir. 1980) (citations omitted).

The State of Florida acknowledges the tensions at play between the rights of child victims, the interests in redeeming those rights, measured against the constitutional protections afforded those accused of such crimes.[16] In *Dell'Orfano v. State*, the Florida Supreme Court observed in 1993: "The present case poses two conflicting public policy concerns that the Court must reconcile. First is the strong interest in eliminating the sexual abuse of children through vigorous enforcement of child abuse laws." 616 So.2d 33, 35 (Fla. 1993). The court noted, "We recognize that young children often are unable to remember specific dates on which they were abused." *Id*. Conversely, and "[s]econd is the strong interest of defendants in being apprised of the charges against them such that they can prepare an adequate defense." *Id*.

The Maryland Court of Appeals explained at great length "the rule against duplicitous pleading" in *Cooksey v. State*, 752 A.2d 606, 609-611. Among other policy interests behind the prohibition against duplicitous pleading, the court in *Cooksey* explained that

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[16] *See, e.g.*, *Smith v. State*, 98 So.3d 632, 639 (Fla. 4th DCA 2012) ("we agree with appellant that the conviction for lewd and lascivious conduct cannot stand, because the information alleged that the appellant committed 'numerous' unspecified lewd acts on [the alleged victim] within a thirty-month time span").

"[a]lthough the prohibition against duplicity is a rule of pleading, its application in criminal cases has underlying substance"; for example, "it serves to protect several basic rights that may be seriously jeopardized by the charging of separate offenses in a single count." *Id*. at 609-610. "The most basic right protected by the rule," the court said, "is that of fundamental fairness, to both the defendant and the State." *Id*. at 610. Moreover, "[a]mong the equally important but subordinate rights often identified as being protected by the prohibition against duplicitous pleading are the right of the accused to reasonable notice of charges, guaranteed by the Sixth Amendment to the U.S. Constitution . . . the right [] to jury unanimity; and the right, guaranteed by the Fifth Amendment to the U.S. Constitution . . . not to be placed in double jeopardy." *Id*. Also, "Courts have [] regarded the prohibition against duplicity as avoiding prejudice and confusion from evidentiary rulings made during the trial and assuring that, if convicted, the defendant is appropriately sentenced." *Id*. (citations omitted).

The court in *Cooksey* explained further, "The double jeopardy and jury unanimity concerns arise because a court cannot always be certain that a verdict rendered on a duplicitous count truly represents the unanimous agreement of the jury as to each offense charged in the count." *Cooksey*, 752 A.2d at 610. "If a guilty verdict is rendered on a count containing two or more separate offenses," for example, "there is the prospect of uncertainty as to whether the jury unanimously found guilt as to all offenses, at least one but

less than all, or none, and, if at least one but less than all, which ones." *Id*. It is possible (and more than simply theoretical), "and often not improbable, that, although all jurors were convinced that the defendant committed at least one offense alleged in the count and returned a verdict of guilty on that basis, they either did not all agree as to which one or they agreed as to a particular one but not as to others. Had the offense been charged separately, there may have been either an acquittal or a hung jury/mistrial on one, several, or all of them." *Id*.

Cooksey asked and posed these questions: "first, to what extent may the State *satisfy* the rule against duplicity by treating successive acts, each of which constitutes an offense that could be charged separately, as one offense committed through a continuing course of conduct;[17] and second, should the rule against duplicitous pleading be strictly applied when (1) there is some perceived higher social purpose for not strictly applying it in a particular setting,[18] and (2) the concerns and rights underlying the rule can be addressed in other ways?" *Id*. at 611 (emphasis in original).[19]

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[17] *Cooksey* answered this question by noting that "New York and California attempted to deal with the problem by statute, allowing the legislative branch, after public hearings, to weigh all the competing interests and concerns and strike a proper balance." *Cooksey*, 752 A.2d at 620.

[18] The significance and public interest in prosecuting child sexual abuse crimes.

[19] *See, e.g.*, *State v. Dell'Orfano*, 651 So.2d 1213 (Fla. 4th DCA 1995), and *State v. O'Brien*, 636 So.2d 92 (Fla. 5th DCA 1994), in which the courts explored how prosecutors tried to

In 1995, in *State v. Dell'Orfano*, 651 So.2d 1213 (Fla. 4th DCA 1995), the court "considered the issue of how charging patterns in child sexual abuse cases may result in non-unanimous verdicts[.]" *Whittingham v. State*, 974 So.2d 616, 618 (Fla. 4th DCA 2008).

> [In *Dell'Orfano*], the state had charged a single criminal act in each count, but the act had occurred multiple times within the time period alleged. The trial court dismissed the information, because it concluded that charging multiple acts within one count would prevent a jury from rendering a unanimous verdict of guilt. One juror could find that the defendant committed one of the acts but not the other, while another juror may not agree and find that the defendant committed another of the alleged charges. The state argued that, instead, each count charged a single criminal act which was committed multiple times. To find a defendant guilty, each juror

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exhaust various ways and means to properly narrow and focus the charge in abuse matters, and, allowing the state to amend the charging documents at question. *See O'Brien*, 636 So.2d at 94 ("we reverse the order dismissing the information, and remand to permit the state to amend or file a response to the motion for a bill of particulars, based on the child-victim's testimony at the hearing").

Interestingly, the dissent in *O'Brien* noted that "[t]he trial judge made a factual finding that the state had been given the opportunity to 'show clearly and convincingly that it has exhausted all reasonable means of narrowing the time frames further' as required by *Dell'Orfano*, [616 So.2d 33, 33 (Fla. 1993)]. He found the state had not met its burden. I agree with the trial judge. . . ." *O'Brien*, 636 So.2d at 96 (Thompson, J., dissenting).

> must find that the defendant committed the act on at least one occurrence.
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> We noted that most courts which had considered the issue had permitted the prosecutor discretion in the charging pattern in child sexual abuse cases. In particular, we pointed to a Washington Supreme Court decision which explained:
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> > Multiple instances of criminal conduct with the same child victim is a frequent, if not usual, pattern. Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, including the victim's ability to testify to specific times and places. . . . The criteria used to determine that only a single charge should be brought, may indicate that the election of one particular act for conviction is impractical.
>
> Although acknowledging the majority view, we nevertheless held, "Where it is reasonable and possible to distinguish between specific incidents or occurrences, as it is in this case, then each should be contained in a separate count of the accusatory document.

Whittingham, 974 So.2d at 618 (citing *Dell'Orfano*, 651 So.2d at 1215-1216 (quoting *State v. Petrich*, 683 P.2d 173, 178 (1984) (*en banc*))).

A few years later, in 1997, the Florida Fourth District Court of Appeal wrote the following:

> In *Dell'Orfano*, this court examined the approach taken by other state courts in resolving the problem of how to properly charge the offense of ongoing sexual abuse of a child. With the notable exception of New York, the courts of sister states have recognized that child molestation is, by its very nature, a continuous course of criminality rather than a series of successive crimes. They have allowed the matter of how to charge these sensitive and difficult-to-define acts of sexual abuse to rest in the discretion of prosecutors.
>
> We conclude from our review of the foregoing cases that in a case of ongoing sexual abuse of a child, where the child is unable to remember the specific dates on which he or she was abused, the allegation that the act occurred "on one or more occasions" is not, per se, duplicitous.

State v. Generazio, 691 So.2d 609, 611 (Fla. 4th DCA 1997) (citing *State v. Covington*, 711 P.2d 1183 (Alaska App. 1985); *Baine v. State*, 604 So.2d 248 (Miss. 1992); *State v. Little*, 861 P.2d 154 (Mont. 1993); *State v. Altgilbers*, 786 P.2d 680 (N.M. 1989); *State v. Petrich*, 683 P.2d 173 (Wash. 1984) (*en banc*)).

In *Whittingham v. State*, 974 So.2d 616, 618 (Fla. 4th DCA 2008), the court there explained:

> Child sex abuse cases pose unique problems for prosecution, as our supreme court

> has recognized. *See Dell'Orfano v. State*, 616 So.2d 33, 35 (Fla. 1993). Because the state may charge a defendant in child sexual abuse cases in a manner not permitted in other types of criminal cases, expanding time periods for the commission of offenses and grouping types of offenses together, we hold that it is not fundamental error to submit such a charge to a jury.
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> Significantly, the Fourth DCA emphasized:
>
> A defendant must object at trial to submission to the jury of an aggravated charge to preserve the objection. Otherwise, the prosecution may assume that by failing to challenge the charging pattern, the defendant has acquiesced in the state's determination to charge all of the same type of acts within a single count.
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> The Fourth DCA also points out:
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> > Indeed, by doing so the prosecution actually lessens the potential penalty to the defendant. Where each charge is discrete and charged as such, the defendant is subject to substantially greater penalties and potential consecutive sentencing on each charge.

Whittingham, 974 So.2d at 618-619.

But, when a defendant *does* object and *does* preserve the challenge in the first instance, Florida's Fourth DCA explained in *Smith v. State*, 98 So.3d 632, 639 (Fla. 4th DCA 2012):

Finally, we agree with appellant that her conviction for lewd and lascivious conduct cannot stand, because the information alleged that the appellant committed "numerous" unspecified lewd acts on [the child victim] within a thirty-month time span. Appellant objected to this broad time span both in motions prior to trial and again to the trial court's submission of this charge to the jury. We acknowledge that prosecutors are given some latitude in charging child sexual abuse because of the nature of the crime. *Whittingham v. State*, 974 So.2d 616, 618-619 (Fla. 4th DCA 2008). However, where charging documents containing multiple charges have been allowed are usually cases where no objection has been made to the charge either pre-trial or during trial. Thus, we have considered whether the issue presents a fundamental error, which we have concluded it does not. As we noted in *Whittingham*:

> Because the state may charge a defendant in a child sexual abuse case in a manner not permitted in other types of criminal cases, expanding time periods for the commission of offenses and grouping types of offenses together, we hold that it is not fundamental error to submit such a charge to the jury. A defendant must object at trial to submission to the jury of an aggravated charge to preserve the objection. Otherwise, the prosecution may assume that by failing to challenge the charging pattern, the

> defendant has acquiesced in the state's determination to charge all of the same type of acts within a single count.
>
> *Id*. In this case, having repeatedly objected to the charging document, before trial in her motions to dismiss and during trial in her motion for judgment of acquittal and at the charge conference, appellant's constitutional right to a unanimous jury was compromised because of the state's inclusion of multiple possible lewd acts within one count. *See Perley v. State*, 947 So.2d 672, 674-675 (Fla. 4th DCA 2007) (reversing on constitutional grounds when there were two potential incidents constituting the crime of escape for one charged crime).

Smith, 98 So.3d at 639-640.

The same holds true for Mr. Klug. Had he not raised the issue in the first instance he may certainly not have grounds for relief. He *did* object before trial, however, he *did* move to dismiss the state's Information and the charges therein, he *did* argue against the charge conference; he went so far as to ask for a new trial and briefed the issue on direct appeal to the Fifth District Court of Appeal. It issued a PCA without written opinion, unfortunately, leaving Mr. Klug with the only remedy available at this time, the instant petition. The question and challenge are properly preserved and are ready and ripe for this Court's studied review. The record-on-appeal as it comes to the Court is amply protected.

C. This Court is best positioned to answer the question.

The question as to what safeguards protect and balance competing interests between alleged victims of child sexual abuse and the accused are answered in varied and myriad ways. The Maryland Court of Appeals may have framed it best:

> All of the courts are sympathetic to the plight of both the young victims, often unable to state except in the most general terms when the acts were committed, and of prosecutors, either hampered by the lack of specific information or, when it is reported that the conduct occurred dozens or hundreds of times over a significant period, faced with the practical problem of how to deal with such a multitude of offenses. The courts are all also properly concerned with the rights of the defendants, who go to trial with a presumption of innocence, and with the ramifications to them of duplicitous pleading. Some [courts] have struck the balance in favor of easier prosecution by allowing *some* bundling of offenses, especially if committed within a reasonably brief period. Others, discerning better ways to deal with these problems, have struck the balance in favor of preserving the rule against duplicitous pleading and have rejected a continuing offense theory when faced with the bundling of single-act sexual offenses in the same count.

Cooksey, 752 A.2d at 615 (cleaned up). Florida, for its part, appears to have taken a position that it is easier

to allow for prosecution with some bundling of offenses in derogation of an accused's rights to due process, jury unanimity, double jeopardy, and fairness. *See id*. (citing *State v. Generazio*, 691 So.2d 609 (Fla. 4th DCA 1997); *State v. Dell'Orfano*, 651 So.2d 1213 (Fla. 4th DCA 1995)). Just as the court said in *Cooksey*, "[w]e, too, are sensitive to the problems faced by prosecutors in these cases." *Cooksey*, 752 A.2d at 617. "But forcing a square peg into a round hole is not the answer." *Id*.

A fortiori, "we must keep in mind that the prohibition against duplicitous pleading is a broad one; it applies not just to offenses against children, but to all criminal and civil pleading." *Id*. at 620. "If we were to begin carving out judicial exceptions to the prohibition, on a case-by-case basis, how would we define them, where would we draw the line, and what alternative protective devices would we mandate in each instance?" *Id*. In short, both the Fifth and Sixth Amendments, at a minimum, proscribe any charging practice that would ordinarily allow for multiple offenses to be lumped together, bundled together, or alleged together within a single count of any given charging document. Mr. Klug, now serving a mandatory 25-year state prison sentence, was more than harmed by the state's Third Amended Information filed in this cause, his constitutional protections were patently ignored. This Court would be more than just in awarding Mr. Klug the relief he seeks – the dismissal of his case.

Particularly here, in the case at bar, the state's Third Amended Information alleged that on or between August 1, 2013 and December 25, 2013 (Count

1); on or between December 26, 2013 and February 2, 2014 (Counts 2 and 4); and on or between February 3, 2014 and April 11, 2014, Mr. Klug "on one or more occasions" committed acts (many different acts, allegedly) of lewd and lascivious molestation as against his daughter's friend from school, all violations of Florida Statute § 800.04(5). In that the state statute at question alleges "single act" crimes, and because the state accused Mr. Klug of more than one single act offense in a single count, the charging document is duplicitous, and, at a minimum, unconstitutionally deprived Mr. Klug of his right to reasonable notice of the charge or charges; a unanimous jury verdict; his right to double jeopardy; and his right to Due Process, whether procedural or substantive. *See Schad v. Arizona*, 111 S. Ct. 2491, 2497-2498 (1991) ("Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.") (internal citation and footnote omitted). Mr. Klug's petition should be granted so as to best answer, for all the several States, as to whether such a charging practice is permissible and constitutional under our Nation's adversarial process and this Court's criminal jurisprudence. *See Vannoy*, 141 S. Ct. 1547; *Ramos*, 140 S. Ct. 1397 ("[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal trials equally"); *Richardson*, 119

S. Ct. 1707; *Schad*, 111 S. Ct. at 2497 ("it is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be ranked fundamental that no person may be punished criminally save upon proof of some specific illegal conduct") (internal citations and quotations omitted).

Mr. Klug, moreover, certainly appreciates the mandates of this Court's Rule 10 when considering the instant petition. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. Given that "[a] petition for a writ of certiorari will be granted only for compelling reasons," *id*., Mr. Klug humbly submits that he comes to the Court with such cause. This case presents questions of constitutional magnitude under the Fifth and Sixth Amendments such that any relief won plays more than just merely for Mr. Klug – it has wide-ranging implications and constitutional meaning and effect. The challenges surrounding how best to prosecute and specifically charge sexual abuse of children rings across the Nation and is encompassed by the adversarial process in both federal and state courtrooms. This case presents issues of nationwide importance suitable for this Court's review and is also nationally significant to the several States as well as federal court because it directly impacts the discretion of a prosecutor's charging decision and how best to frame any given criminal accusation, especially one concerning the welfare of a child and the serious and significant nature of child sexual abuse. There are no factual issues or disputes for the Court's consideration presented by the case at bar; the legal arguments

and issues have been amply raised in the courts below and properly preserved for review. The resolution of the question presented has been addressed differently by the several State courts and illustrates a conflict among and in the differing approaches on how best to answer the problem. *See Cooksey*, 752 A.2d at 615-619 (comparing and contrasting published case law). The various courts across the country have taken the principles underlying the rule against duplicitous pleading and applied them imperfectly, if not in conflict with one another. Mr. Klug's case is an ideal opportunity and vehicle by which to better explore, discuss, study, and focus Fifth and Sixth Amendment jurisprudence. The Court's decision would be extremely pragmatic for the prosecution, the several States, criminal defense lawyers, the defense bar generally, and those pursuing avenues of relief when confronted with sexual abuse. This Court should grant Mr. Klug's petition to answer the issue raised, a question of national significance, repetition, and constitutional practicality.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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