No. _____

IN THE
Supreme Court of the United States

ADAM JASON POITRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government introduces evidence of multiple alleged instances of sexual abuse to prove a single count of aggravated sexual abuse in violation of 18 U.S.C. § 2241(c), does the Sixth Amendment require a specific unanimity instruction?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Poitra, No. 3:19-cr-00170-PDW, United States District Court for the District of North Dakota. Judgment entered September 28, 2021.

United States v. Poitra, No. 21-3262, United States Court of Appeals for the Eighth Circuit. Judgment entered February 21, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Adam Jason Poitra respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 60 F.4th 1098. The district court's relevant rulings are unreported.

JURISDICTION

The court of appeals entered judgment on February 21, 2023. Poitra received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on April 14, 2023. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment: The Sixth Amendment to the United States Constitution provides:

> 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. VI.

Aggravated sexual abuse: The federal aggravated sexual abuse statute provides in relevant part:

> Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. . . .

18 U.S.C. § 2241(c).

Definition of "sexual act": Section 2246(2) of Title 18 provides:

> [T]he term "sexual act" means—
>
> > (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2).

INTRODUCTION

This petition presents an important question of federal law that should be settled by this Court—when the government introduces evidence of multiple instances of sexual abuse to prove a single count of aggravated sexual abuse in violation of 18 U.S.C. § 2241(c), does the Sixth Amendment require that the jury be instructed that it must unanimously agree as to the specific act or acts the defendant committed? The decision below is inconsistent with the general agreement among the courts of appeals that where the government introduces evidence of multiple discrete violations of a statute, the trial court should give a specific unanimity instruction. This Court has never addressed this issue in the context of the federal sexual abuse statutes. This case presents the ideal opportunity for the Court to address this important question of federal law that impacts people in Indian Country and other federal enclaves.

STATEMENT OF THE CASE

Criminal case: Adam Jason Poitra faced a single count of aggravated sexual abuse in violation of 18 U.S.C. §§ 2241(c) and 1153. Dist. Ct. Dkt. 3 (indictment); Dist. Ct. Dkts. 60-61 (motion and order dismissing remaining count of indictment).[1] The indictment alleged:

> From on or about September 1, 2017, and continuing through on or about March 17, 2018, in the District of North Dakota, in Indian country, within the exclusive jurisdiction of the United States,
>
> ADAM JASON POITRA,
>
> an Indian, did attempt and knowingly cause Jane Doe, a child under the age of 12, to engage in a sexual act;
>
> In violation of Title 18, United States Code, Sections 2241(c) and 1153.

Dist. Ct. Dkt. 3.

At trial, the government introduced evidence of multiple, discrete instances of alleged sexual acts against the victim, including multiple separate instances of digital penetration of the victim's vagina while she was taking a shower, Trial Tr., Vol 2 at 67-70, and separate instances of penile-vaginal contact or penetration while she was in the bedroom, Trial Tr., Vol. 2 at 73-77. The victim testified that the sexual abuse happened over a period of almost a year (from the summer of 2017 to April or May of 2018). Trial Tr., Vol. 2 at 77-79. In closing arguments, the government urged the jury to find Poitra guilty based on any of the alleged

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Poitra*, No. 3:19-cr-00170-PDW (D.N.D.). All citations to the trial transcript are to the redacted transcripts, available at Dist. Ct. Dkt. 151 (Vol. 2) and Dist. Ct. Dkt. 152 (Vol. 3).

instances of sexual abuse without stating that the jury must agree on at least one specific instance:

> You'll note too that the instructions say a sexual act in the singular. The government doesn't need to prove that these things happened on a specific date or at a specific place or for that matter even more than once. Our burden is to prove beyond a reasonable doubt that at least one occurrence happened before [the victim's] 12th birthday . . . .

Trial Tr., Vol. 3 at 393-94.

Despite the introduction of evidence of multiple discrete instances of sexual abuse, Poitra did not request, and the district court did not provide, an instruction that the jury must unanimously agree on the specific act or acts of sexual abuse it found that Poitra committed. *See* App. 10a-13a. The district court instructed the jury that it must find that Poitra knowingly engaged in, or attempted to engage in, "a sexual act," provided a four-prong definition of "sexual act," and gave a general unanimity instruction. *Id.* Poitra was found guilty of aggravated sexual abuse and sentenced to 440 months in prison. App. 14a; Dist. Ct. Dkt. 129.

Appeal: On appeal, Poitra argued that the district court plainly erred in failing to instruct the jury that it was required to agree on the specific act of sexual abuse it found Poitra committed in order to find him guilty. App. 2a. Poitra relied on a pair of circuit opinions for this argument, the first holding that aggravated sexual abuse under § 2241(c) is a separate-act offense, *United States v. Two Elk*, 536 F.3d 890, 898-99 (8th Cir. 2008), and the second holding that when the government presents evidence of discrete, singular acts of abuse to support a single count of a separate act offense, it is plain error to fail to give a specific unanimity

instruction, *United States v. Keepseagle*, 30 F.4th 802, 810 (8th Cir. 2022) (applying state child abuse statute under 18 U.S.C. § 1153).

The court of appeals rejected this argument, finding that because *Keepseagle* addressed a state statute, not § 2241(c), and *Two Elk* addressed § 2241(c) in the context of double jeopardy, not jury instructions, there was no plain error:

> Here, the district court gave a general unanimity instruction, stating multiple times that the verdict "must be unanimous." Relying on *United States v. Keepseagle* and *United States v. Two Elk*, Poitra argues that the term "sexual act" as defined in 18 U.S.C. § 2246(2) includes four distinct types of sexual acts, and thus a specific instruction was required. ***Keepseagle***, 30 F.4th at 813; ***United States v. Two Elk***, 536 F.3d 890, 898-99 (8th Cir. 2008) (holding that aggravated sexual abuse under 18 U.S.C. § 2241(c) is a separate-act offense). *See* ***United States v. Karam***, 37 F.3d 1280, 1286 (8th Cir. 1994) (discussing unanimity in a drug distribution case). But *Keepseagle* addressed a South Dakota statute, not 18 U.S.C. § 2241(c). And *Two Elk* addressed 18 U.S.C. § 2241(c) in the context of double jeopardy, not jury instructions.
>
> Poitra cites no authority that failure to give a specific unanimity instruction under 18 U.S.C. § 2241(c) is error. To the contrary, this court has held that jurors need not agree on a specific sexual act to reach a unanimous verdict. *See* ***United States v. DeMarce***, 564 F.3d 989, 1000 (8th Cir. 2009) (upholding district court's general instructions on attempted aggravated sexual abuse despite defendant requesting a specific instruction). *See generally* ***Richardson v. United States***, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). Absent authority directly supporting his position, there was no plain error.

App. 3a (emphasis in original). The court of appeals exercised jurisdiction under 28 U.S.C. § 1291. App. 1a.

Poitra timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 9a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. This Court has "repeatedly and over many years" made clear that the Sixth Amendment requires that a jury verdict be unanimous. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020); *see also Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] jury . . . cannot convict unless it unanimously finds that the Government has proved each element."). This case provides the ideal opportunity for the Court to make clear that when the government presents evidence of multiple alleged violations of a single criminal statute to prove a single count of the indictment, the Sixth Amendment requires that the jury unanimously agree on which act or acts the defendant committed before finding him guilty.

1. The decision below is inconsistent with the general agreement among the courts of appeals that when the government presents evidence of multiple alleged offenses to support a single count, the jury must be given a specific unanimity instruction.

Almost 25 years ago, Justice Blackmun recognized the agreement among the courts of appeals that the Sixth Amendment requires not only that the jury unanimously agree that the defendant violated the statute in question, but also that

the jury unanimously agree as to the basic facts underlying the offense: "[T]he Courts of Appeals are in general agreement that '[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense.'" *McKoy v. North Carolina*, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring) (quoting *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983)). "This rule does not require that each bit of evidence be unanimously credited or entirely discarded, but it does require unanimous agreement as to the nature of the defendant's violation, not simply the fact that a violation has occurred." *Id.*

As Justice Blackmun noted, the courts of appeals generally agree that where there is a risk of juror confusion, the Sixth Amendment requires that a specific unanimity instruction be given. "In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability." *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987). "This rule is inapplicable, however, where the complexity of the case, or other factors, creates the potential that the jury will be confused." *Id.* In other words, "such an instruction will be inadequate to protect the defendant's constitutional right to a unanimous verdict where there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts." *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991)

(quoting *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988)). In those cases, "the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983); *see also United States v. Karam*, 37 F.3d 1280, 1286 (8th Cir. 1994) ("Courts have held that the risk of a nonunanimous verdict inherent in a duplicitous count may be cured when the jury is given a limiting instruction that requires it to unanimously find the defendant guilty with respect to at least one distinct act"). "[J]ust as the sixth amendment requires jury unanimity in federal criminal cases on each delineated offense that it finds a defendant culpable, it must also require unanimity regarding the specific act or acts which constitutes that offense." *Beros*, 833 F.2d at 461 (citing *Johnson v. Louisiana*, 406 U.S. 356 (1972) (Powell, J. concurring)). "Absent such certainty, the unanimity requirement would provide too little protection in too many instances." *Id.*

The courts of appeals have found that the Sixth Amendment requires a specific unanimity instruction where the government presents evidence of multiple distinct violations in a variety of statutory settings. *See, e.g.*:

- ***United States v. Holley*, 942 F.2d 916 (5th Cir. 1991)** (evidence of multiple alleged false statements for each count of perjury under 18 U.S.C. § 1623);
- ***United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988)** (evidence of two separate and distinct false statements for each count of making

a tax return containing a false statement in violation of 26 U.S.C. § 7206(1) and preparing a tax return containing a false statement in violation of 26 U.S.C. § 7206(2));[2]

- ***United States v. Beros*, 833 F.2d 455 (3d Cir. 1987)** (evidence of multiple separate transactions of criminal conduct for individual counts of embezzling, stealing, abstracting or converting union funds in violation of 28 U.S.C. § 501(c) and 18 U.S.C. § 664);
- ***United States v. Payseno*, 782 F.2d 832 (9th Cir. 1986)** (evidence of three acts of extortion directed at separate victims at different times and in different locations for single count of extortion in violation of 18 U.S.C. § 894) (reversing on plain error review);
- ***United States v. Margiotta*, 646 F.2d 729 (2d Cir. 1981)** (government may introduce evidence of 50 individual mailings to prove single count of mail fraud in violation of 18 U.S.C. § 1341 if jury is

[2] Petitioner notes that there are cases suggesting that *Duncan* was overruled by *Schad v. Arizona*, 501 U.S. 624 (1991). *See United States v. Damra*, 621 F.3d 474, 503 (6th Cir. 2010) (stating that *Duncan* was overruled on other grounds by *Schad*). The plurality opinion in *Schad* cited *Duncan* in passing, but did not explicitly overrule it. *Schad*, 501 U.S. at 634-35 (plurality opinion). Indeed, the Sixth Circuit has continued to apply *Duncan* in the specific unanimity context. *See Damra*, 621 F.3d at 503-05 (discussing and distinguishing *Duncan*). *Schad* addressed the "somewhat different" situation than the one at issue here. *See Holley*, 942 F.2d at 927. There, there was a single killing of one individual, and the question was whether the jury had to be unanimous on the *mens rea* element of murder. *Id.* "This differs, however, from the situation where a single count as submitted to the jury embraces two or more separate offenses, though each be a violation of the same statute." *Id.*

instructed it must find "at least one item") (approving special interrogatory identifying one or more mailings).

In holding that the district court did not commit plain error in failing to give a specific unanimity instruction in the face of evidence of dozens of alleged instances of sexual abuse, the decision below deviated from the general rule followed by the courts of appeals. This Court should make clear that a specific unanimity instruction is required to ensure jury unanimity under these circumstances.

2. The federal aggravated sexual abuse statute presents unique jury unanimity concerns.

The need for this Court's intervention is even more apparent upon examination of Poitra's statute of conviction—aggravated sexual abuse in violation of 18 U.S.C. § 2241(c). Without clear direction from this Court, the federal sexual abuse statutes present a serious risk of nonunanimous jury verdicts. These statutes apply in the special maritime and territorial jurisdiction of the United States and in federal prisons. *See, e.g.*, 18 U.S.C. § 2241(a), (b), (c); 18 U.S.C. § 2242; 18 U.S.C. § 2243(a), (b); 18 U.S.C. § 2244(a), (b). The question presented in this case is an important question for individuals in Indian Country and other federal enclaves.

Poitra was convicted of aggravated sexual abuse of a child in violation of § 2241(c). As relevant here, this statute prohibits "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years." 18 U.S.C. § 2241(c). Section 2241(c) is a separate-act offense, meaning that "engaging in multiple sexual acts (as listed in § 2246(2)) would amount to multiple violations of § 2241(c) and would leave the perpetrator susceptible to multiple punishments

thereunder," even for multiple sexual acts committed during a single incident. *United States v. Two Elk*, 536 F.3d 890, 899 (8th Cir. 2008); *see also United States v. Yazzie*, 743 F.3d 1278, 1294 (9th Cir. 2014) (finding that the "allowable unit of prosecution" under § 2241(c) is each sexual act listed in § 2246(2)).

Two features of the aggravated sexual abuse statute conspire to make it especially susceptible to a nonunanimous jury verdict: first, the inability of many child witnesses to testify with particularity when and where an alleged instance of sexual abuse occurred, and second, the multipronged definition of "sexual act" in 18 U.S.C. § 2246(2). It has long been recognized that child victims of sexual abuse "often do not have a recollection of the specific dates on which the abuse occurred," so the government often sets forth the alleged offense in generic terms during a certain timeframe. *Walker v. State*, 521 P.3d 967, 982 (Wyo. 2022); *see also State v. Arceo*, 928 P.2d 843, 868 (Haw. 1996) ("In cases involving a continuing pattern of sexual abuse of very young children, in which the evidence consists primarily of the children's statements, it is not likely that they will clearly identify the specific instances when particular acts took place."). This situation lends itself to the introduction of evidence of multiple alleged offenses to support a single count.

Further, the definition of "sexual act" under § 2246(2) has four prongs that, depending on the nature of the alleged abuse, are not necessarily mutually exclusive. "Sexual act" means:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2). Where, as here, the indictment, jury instructions, and verdict form do not specify a particular prong of the definition of "sexual act," there is a genuine risk of a nonunanimous jury. In other words, individual members of the jury are invited to find that the defendant committed entirely different sexual acts.

The nature of child sex abuse prosecutions and the multi-pronged definition of "sexual act" under § 2246(2) increase the likelihood that prosecutors will introduce evidence of multiple alleged instances and types of sexual abuse over an indeterminate period of time to prove a single count, which in turn increases the likelihood that an improperly instructed jury will convict without agreeing on the particular instance or instances of sexual abuse. Federal courts of appeals have recognized the "peril" of general jury unanimity instructions under these circumstances. *See, e.g.*, *United States v. Perrault*, 995 F.3d 748, 776 (10th Cir. 2021) (recognizing danger of submitting multiple counts of sexual abuse in a single instruction without including the indictment in the jury instructions, but finding no plain error because it was apparent that the jury linked individual counts to separate conduct); *United States v. McGill*, 359 F. App'x 56, 60 (10th Cir. 2010)

(unpublished) (recognizing that "use of generic, facially indistinguishable counts with broad overlapping time frames" creates the risk that "different jurors might vote to convict on the same count on the basis of different conduct," but finding no error where the instructions linked specific counts with particular incidents by unique factual circumstances). *But see United States v. McCabe*, 131 F.3d 149 (table), No. 96-30092, 1997 WL 753348 (9th Cir. Nov. 26, 1997) (finding no genuine risk of jury confusion and no plain error in failing to give specific unanimity instruction where three distinct sexual acts were charged together in a single count of aggravated sexual abuse). This Court should make clear that a specific unanimity instruction is required where the government presents evidence of multiple distinct acts in sexual abuse cases.

Indeed, the high courts of many states have recognized and addressed the risk of non-unanimity in cases involving sexual abuse of children, requiring that where the state presents evidence of multiple instances of sexual abuse, either the state must elect the act upon which it is relying for a conviction, or the trial court must instruct the jury that it must unanimously agree on the underlying act supporting the conviction. As the Supreme Court of Hawaii explained:

> The jurisdictions requiring unanimity of jury verdicts in criminal cases and holding that sexual assaults are not 'continuing offenses' appear to be in agreement that, where evidence of multiple culpable acts is adduced to prove a single charged offense, the defendant is entitled either to an election by the prosecution of the single act upon which it is relying for a conviction or to a specific unanimity instruction.

Arceo, 928 P.2d at 872-73; *see also Baker v. State*, 948 N.E.2d 1169, 1176 (Ind. 2011) ("The procedure most commonly followed to balance the need to prosecute cases

involving repetitive acts charged in a single count with the defendant's assurance of jury unanimity has been described as the 'either/or' rule. That is to say, the defendant is entitled *either* to an election by the State of the single act upon which it is relying for a conviction *or* to a specific unanimity instruction." (emphasis in original)). Many states have followed this approach. *See, e.g.*:

- ***State v. Douglas C.*, 285 A.3d 1067 (Conn. 2022)** (vacating sexual assault conviction);
- ***Walker v. State*, 521 P.3d 967 (Wyo. 2022)** (vacating two counts of sexual abuse of a minor on plain error review);
- ***State v. Martinez*, 865 N.W.2d 391 (N.D. 2015)** (vacating three counts of gross sexual imposition on plain error review);
- ***State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. 2011) (en banc)** (vacating two counts of statutory sodomy on plain error review);
- ***Baker v. State*, 948 N.E.2d 1169 (Ind. 2011)** (finding that specific unanimity instruction was required for three counts of child molestation but finding no fundamental error);
- ***State v. Muhm*, 775 N.W.2d 508 (S.D. 2009)** (finding that prosecutorial election or specific unanimity instruction was required for attempted rape, rape, sexual contact with a child, and criminal pedophilia but finding that error was harmless);

- ***State v. Voyles*, 160 P.3d 794 (Kan. 2007)** (vacating four counts of indecent solicitation of a child and four counts of aggravated criminal sodomy);
- ***R.A.S. v. State*, 718 So.2d 117 (Ala. 1998)** (vacating convictions for sexual abuse, sodomy, and rape);
- ***State v. Arceo*, 928 P.2d 843 (Haw. 1996)** (vacating convictions for sexual assault on plain error review).

Because this Court only recently held that the federal Constitution guarantees the right to a unanimous jury in state proceedings, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), many of these courts applied the right to jury unanimity protected by state law. *See, e.g.*, *Walker*, 521 P.3d at 976.

The states have long recognized and addressed the jury unanimity concerns presented by sexual abuse cases. This Court should ensure that federal defendants have the same protections when charged with sexual abuse in Indian Country and other federal enclaves.

3. This case is an ideal vehicle for the question presented.

This case squarely presents the Sixth Amendment issue raised by the introduction of multiple alleged acts of sexual abuse to support a single count of aggravated sexual abuse. The government introduced evidence of numerous distinct instances of sexual abuse—multiple instances of touching or digital penetration of the victim's vagina while she was showering and multiple instances of contact with or penetration of her vagina by Poitra's penis while she was in the bedroom. The

indictment alleged that the sexual abuse took place during a 6-month timeframe (September 2017 to March 2018) and did not specify the type of "sexual act" alleged. Dist. Ct. Dkt. 3. The jury instructions followed suit, requiring the jury to find that Poitra engaged in (or attempted to engage in) "a sexual act" with the victim and defining "sexual act" to include all four subsections of § 2246(2). App. 10a-11a.

There was a significant risk that the jury did not unanimously agree on the act or acts Poitra committed. For example, some jurors could have found that the victim's testimony that he touched or penetrated her vagina with his hand in the shower was credible while other jurors could have found that this testimony was not credible (or that what actually happened did not rise to the level of being a "sexual act") and instead found her testimony about penetration of her vagina by Poitra's penis to be credible. Some jurors could have found that the alleged sexual abuse in the shower took place on one day but not another or that the alleged sexual abuse in the bedroom took place on one day but not another. In short, the evidence presented by the government allowed each individual juror to convict based on a different instance of sexual abuse. The general unanimity instruction did not adequately protect Poitra's right to a unanimous jury. Despite the plain error standard of review applied below, this case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 11th day of July, 2023.

Respectfully submitted,

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