NO: 24-5747 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

Warden of the Indiana State Prison

Respondent,

On Petition for Writ of Certiorari to

Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

Elmer Dean Baker

Indiana State Prison

One Park Row

Michigan City, Indiana 46360

Petitioner - pro se

QUESTION(S) PRESENTED FOR REVIEW

QUESTION ONE: Does it violate the Sixth and Fourteenth Amendments to the United States Constitution when a State upholds a conviction after ruling it was not obtained by a unanimous jury decision beyond a reasonable doubt on what crimes were committed ?

QUESTION TWO: Does a change in the law after trial constitute an "exceptional circumstance" demanding flexibility in the interests of justice when it comes to preserving a constitutional issue for appeal?

QUESTION THREE: Does it violate the Sixth and Fourteenth Amendment trial rights when a State holds a criminal defendant was convicted by non-unanimous verdicts but also holds it is a harmless error?

QUESTION FOUR: Is it a violation of the Equal Protection Clause to place the burdens associated with a failure to anticipate a change in the law and object accordingly on some defendants and not others similarly situated?

QUESTION FIVE: Does it violate a defendant's Sixth and Fourteenth Amendment rights when a State reviewing court speculates verdicts based on the same inconclusive nonspecific evidence that they held made the jury's verdicts non-unanimous, especially when the bulk of that evidence was alleged to have been committed outside the State and some of that evidence did not contain all the elements the State was required to prove beyond a reasonable doubt?

QUESTION SIX: Does the Ex Post Facto Clause operate to deny a State Court from altering a common-law rule (Jury Instruction) three years after trial and post hoc foreclose its benefits to a defendant because of his not being able to anticipate this alternation and pre-object accordingly based on the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning?

LIST OF PARTIES

✔ All parties appear in the caption of the case on the front page.

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There are no related cases

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STATEMENT OF JURISDICTION

On May 09, 2024 Petitioner filled a Motion for Permission to file a Successive Petition for Post-Conviction Relief. On June 07, 2024 the Indiana Court of Appeals issued its Order denying Petitioner's Motion for Permission to file a Successive Petition for Post-Conviction Relief. App. B, pg.6. Petitioner filed in the Indiana Court of Appeals a Petition for Rehearing. On July 10, 2024, the Indiana Court of Appeals issued its Order denying his Petition for Rehearing. App. B, pg.5. On August 06, 2024, Petitioner filed in the Indiana Court of Appeals a Petition to Transfer to the Indiana Supreme Court. On August 15, 2024 the Indiana Court of Appeals mailed Petitioner an Order, Opinion, or Notice prohibiting Petitioner's request to Transfer to the Indiana Supreme Court citing Ind. App. R. *57 (B).* App. B., pg. 3, 4. (90 days) from the Indiana Court of Appeals July 10, 2024, Order is October 08, 2024 and to be safe Petitioner is filing this Writ to meet that deadline. However, (90 days) the from the Indiana Court of Appeals August 15, 2024 Order, Opinion or Notice is December 13, 2024. Petitioner has met the requirements of (Rule 13(1),(3)). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and Rule 13(1)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment 5:

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.

Amendment 6:

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.

Amendment 14:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts relevant to the Writ are as follows. After Petitioner's first trial ended in a hung-jury mistrial, in a second trial, a jury convicted Petitioner of two Class A Felony counts of child molesting and one count of Class C Felony child molesting. Petitioner was charged under two separate single incident Indiana criminal statutes[1] without the State specifying a specific incident as to each charge for the jury to focus on. The State was then allowed to present the jury with a pleura of uncharged incidents of criminal acts any one of which the jury could use to support each individual jurors vote of guilty and many of those uncharged incidents of criminal acts were alleged to have been committed outside the State of Indiana and the Courts jurisdiction and many did not include the required elements the State was required to prove beyond a reasonable doubt. Each individual juror was left to pick and choose which alleged incident to base their votes on because of the States unspecific charging and the jury was given no instruction from the trial Court on how it could use these uncharged incidents of criminal acts. Therefore as the Indiana Supreme Court discovered, nothing in the record clarified if they all unanimously agreed upon the same uncharged incidents of criminal acts. *Baker v State*, 948 N.E.2d 1169 (Ind. 2011). App. A, pg.3-15.

In a timely filed motion to correct errors directly after Petitioner's trial the trial court rejected Petitioner's argument that the verdicts were not unanimous because of the facts above. When Petitioner's direct appeal was decided, three years after the trial, the Indiana Supreme Court agreed with Petitioner and ruled that the record did not support unanimity in the case because the unanimity instruction the trial court had given was fatally ambiguous. To correct this problem for all future Indiana criminal defendants similarly situated the Court researched solution from other states and decided to make an intervening change in the controlling jury instruction law by

[1] Ind. Code § 35-42-4-3(a); Ind. Code § 35-42-4-3 (b).

adopting and modifying a new unanimity instruction from the state of California and then ruled it should be given in all future Indiana criminal cases with defendants similarly situated. However, although the errors in Petitioner's case prompted the Indiana Supreme Court to change the unanimity instruction law for cases like Petitioner's, the Court ruled Petitioner could not benefit from their new rule because his trial attorney had failed to anticipate this three years after trial change in the correct instruction law and pre-object accordingly.

The unanimity instruction given at Petitioner's trial[2] was a pattern instruction that had been widely accepted and used in Indiana for decades and the newly adopted one from the California Courts was novel and no Indiana defense counsel could have predicted it would be adopted in Indiana and be ruled mandatory with the Indiana Supreme holding it ***must*** be given in all future Indiana criminal cases with facts similar to Petitioner's case to assure unanimity in their verdicts.

The instruction given to petitioner's jury was ruled inadequate because it merely instructed the jury in relevant part "Your verdicts must represent the considered judgment of each juror. In order to return a verdict of guilt or innocence you must all agree". [3]The newly adopted instruction reads in relevant part: that the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they *must* either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged. The Court also held: "In the case before us, (Petitioner's), the State did not designate which specific act or acts of child molestation that it would rely upon to support the three-count (single incident) charging information. {948 N.E.2d 1178}, and the jury was not given any form of the second phase of the newly adopted instruction. Petitioner was denied his Sixth and Fourteenth Amendments

[2] {948 N.E.2d 1177-78}. App. A, pg. 14.
[3] This could have been the reason in Petitioner's first trial after 19 hours of deliberating the jury could not agree and a mistrial was declared.

Constitutional right to unanimity in the verdicts, which is absent. His convictions should not be allowed to remain. See the following Indiana case summarizing Petitioner's case in relevant part.

> See: *Calvert v State*, 177 N.E.3d 107 (2021 Ind. App.) explanation of Petitioner's case: at P14: "In Baker, the defendant was charged with one count of child molesting for each of the three victims, but the jury heard evidence of multiple acts of molesting for each victim. 948 N.E.2d at 1177. In resolving Baker, our Supreme Court recognized that where "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with," a basic unanimity instruction is insufficient. Id. at 1175. "This is because, absent a more particular instruction, the jury could unanimously agree that the defendant was guilty, yet, in doing so, rely on different acts in evidence." Benson, 73 N.E.3d at 202. Stated differently, "the State could point to multiple, separate criminal acts and the jury could convict, despite it being divided about which acts occurred." Id. To remedy this issue, the Court held: [T]he State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged". Id. citing Baker, 948 N.E.2d at 1177.

REASONS FOR GRANTING THIS PETITION

SUPPORTING ARGUMENTS:

QUESTION ONE:

The Indiana Supreme Court's decisions that: (1) Petitioner received non-unanimous verdicts [but] it does not violate the Sixth and Fourteenth Amendments to the United States Constitution; (2) a non-unanimous verdict is a harmless error; (3) a unanimous verdict is waivable; (4) a reviewing court can speculate a verdict - is in conflict with other decision of the United States Supreme Court as cited and argued herein.

In Indiana, a guilty verdict in a criminal case "must be unanimous." Baker, 948 N.E.2d at 1169 1174[4] (quoting *Fisher v. State*, 291 N.E.2d 76, 82 (Ind. 1973)). The right to a unanimous jury verdict has constitutional dimensions. Art. III, 2, cl. 3, and Sixth Amendment guarantees a defendant in a criminal trial a right to unanimous jury verdict. *Id.* And see: *United States v. Fawley*, 137 F.3d 458 (7th Cir. Ct. App. 1998) "Case law is clear that a unanimous jury verdict is essential for conviction in any criminal case, whether it be federal or state". *Id.*, citing *Andres v. United States*, 333 U.S. 740, 748, 68 S. Ct. 880, 884, 92 L. Ed. 1055 (1948), Unanimity in jury verdicts is required where U.S. Const. amend. VI and VII apply. *Id.*; Unanimity is one of the peculiar and essential features of trial by jury at common law, *American Pub. Co. v. Fisher*, 166 US 464, 41 L ed 1079, 17 S Ct 618. A unanimous verdict is not mere rule of procedure; unanimity has its constitutional basis in the Sixth Amendment. *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

[4] The case at bar.

The Indiana Supreme Court in deciding Petitioner Baker's final appeal acknowledged that the record did not support a finding the verdicts were a product of jury unanimity - that there was no way of knowing if each individual juror agreed as to what crime was committed. Baker, 948 N.E.2d 1169}.

The **fact** Petitioner's verdicts were not the product of jury unanimity is not in contention {948 N.E.2d 1169}. The decision of the Indiana Supreme Court to affirm Petitioner's conviction is in conflict with other Indiana and Federal appellate courts cited herein and his convictions cannot legally be sustained.

QUESTION TWO:

This Court should grant certiorari to resolve the inconsistent holdings among Indiana and the federal courts on the question of what constitutes a valid waiver to raising issues of constitutional dimension, when a trial counsel fails to anticipate an intervening change in the law well after trial and pre-act at trial accordingly. The central question here is can Indiana's ambiguous waiver finding abrogate a defendant's Sixth Amendment right to unanimous verdicts, especially when Indiana does not regularly follow its contemptuous objection rules.

Three years after Petitioner Baker's trial [and] after acquiescing Petitioner's record did not support the verdicts were the product of jury unanimity because no one could tell from the record if all the jurors were in agreement as to what crimes Baker had committed because of a fatally ambiguous unanimity instruction [and] after recognizing the problem was the jury was presented with a pleura of entirely separate criminal incidents, each of which could be used to support a conviction by each individual juror and the generic fatally ambiguous unanimity instruction that was given did not adequately inform the jurors how

they could use this evidence to assure unanimity in their verdicts [and] after researching other States solutions to similar problems and adopting an entirely new unanimity instruction to replace the fatally ambiguous unanimity instruction Petitioner's jury was given and slightly modifying it and mandatorily ruling it must be given in all future Indiana criminal cases with facts similar to Petitioner's to assure future defendant's did not suffer from the same non-unanimity in their verdicts, as Baker had, the Indiana Supreme Court unfairly held the issue was waived to him because his trial counsel had failed to anticipate the finding of error in the fatally ambiguous unanimity instruction Petitioner's jury was given and tender the instruction that was adopted into Indiana law three years later.

Challenges to jury instructions are reviewed under the law of the regional circuit where the court sits. *Voda v. Cordis Corp.*, 536 F.3d 1311, 1321 (Fed. Cir. 2008) *citing Eli Lilly and Co. v. Aradigm Corp.,* 376 F.3d 1352, 1359 (Fed. Cir. 2004). Indiana is in the seventh circuit, and "Precedent in the Seventh Circuit holds that, in order to preserve an issue for appeal, a party does not have to object to jury instructions that later become erroneous under a change in the law". *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 260 Fed. Appx 284 2008 U.S. App. LEXIS 207, citing *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991).

Where the claimed error in the jury instruction is based on a change in the law that arose after trial, challenges to the jury instructions are reviewed de novo. *Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215, 1231 (10th Cir. 1996); *Key v. Rutherford,* 645 F.2d 880, 883 (10th Cir. 1981).

This Court should decide the conflict between Indiana and others circuits as to what constitutes a valid waiver when an attorney has to anticipate a change in law or appellate decision in order to make an informed decision whether to object or not.

Compare, e.g., *Stephenson v State*, 864 NE2d 1022 (Ind.2007) where the Indiana Supreme Court held that counsels are not required to anticipate a change in the law.; *Smylie v State*, 823 NE2d 679, 690 (Ind.2005), in which the Indiana Supreme Court ruled in would be unjust to fault his attorney and declare the issue waived for not objecting on Blakely grounds before Blakely was decided..., requiring a defendant or counsel to have prognosticated the outcome of *Blakely* or of today's decision would be unjust. *Id.*; *Sada v State*, 706 NE2d 192,199 (Ind.Ct.App.1999) ("It cannot be said that it was unreasonable for trial counsel to fail to anticipate a change in the law.") *Id.*; *Wieland v State*, 848 NE2d 679 (Ind. Ct. App. 2006), trans.denied, (same). This is the same approach taken by the Seventh Circuit in *United States v. Pree*, 384 F.3d 378 (7th Cir.2004).

With: Failure to object to an erroneous instruction at trial results in a waiver of the issue on appeal." *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019). *Accord, C.S. v. State*, 131 N.E.3d 592, 595 (Ind. 2019); *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002); *Baumholser v. State*, 62 N.E.3d 411, 414 (Ind. App. 2016); *England v. State*, 530 N.E.2d 100, 102 (Ind. 1988); *James v. State*, 613 N.E.2d 15, 25 (Ind. 1993). *Ralston v. State,* (1980) 412 N.E.2d 239, *trans. denied; United Farm Bureau Family Life Insurance Co. v. Fultz,* (1978) Ind.App., 176 Ind. App. 217, 375 N.E.2d 601, *trans. denied.*

Other circuits have also held counsels' actions are not judged by their failure to anticipate a change in the law. See *Boston v Mooney*, 2015 U.S. Dist. LEXIS 148106 (E.D. of PA 2015), Holding, ("This court is mindful that defense attorneys cannot predict future developments in the law and, therefore, their representation must be examined by the law in effect at the time") *Id.* citing *Commonwealth v. Pizzo*, 529 Pa.155, 602 A.2d 823,825(Pa.1992).; See the recent United States Supreme Court's relevant decision in *Maryland v. Kulbicki*,136 S.Ct. 2; 193 L Ed 2d 1(Oct.5,2015). Holding that: ("to demand that lawyers go ``looking for a needle in a haystack," even when they have ``reason to

doubt there is any needle there" [would be unfair]. {136 S.Ct. 5} (quoting *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)) accord *Gobert v Lumpkin*, 2022 U.S. Dist. LEXIS 59430 (W.D. TX 2022); There is no duty of counsel to anticipate changes in the law. *United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009). See: *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court.") (citing *Kurina v. Thieret*, 853 F.2d 1409, 1417 (7th Cir. 1988)). Buy holding the newly adopted instruction ***must*** be given in future Indiana cases, the Indiana Supreme Court changed the instruction law in Indiana for child molesting cases. *The term "must" is mandatory language. Hewitt v. Helms,* 459 U.S. 460, 466, 74 L. Ed. 2d 675, 103 S. Ct.

The following dictates the Indiana Supreme Court was in error when it waived Petitioner's unanimity issue because he failed to anticipate their change in the instruction law three years after trial and pre-object accordingly. ("Claim that judgment of state supreme court violated 14th Amendment of Constitution was not too late where made for first time by assignment of errors presented when writ of error from Supreme Court was granted, where act complained of was act of state supreme court, done unexpectedly at end of proceeding when aggrieved party no longer had any right to add to record"). *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163, 1917 U.S. LEXIS 1639 (1917); ("...decisions of the U.S. Supreme Court firmly establish that a state prisoner may relitigate a constitutional claim "upon showing an intervening change in the law."). *Sanders v United States*, 373 US 1, 17, 10 L Ed 2d 148, 83 S Ct 1068 (1963).

Moreover, the general unanimity instruction Petitioner's jury was given had been an accepted and widely used instruction in Indiana for decades and trial counsel had no reason to object under the assumption Indiana would considered it constitutionally infirm and replace it three years later. See: *Ross v State*, 877 NE2d 829 (Ind. App. 2007).

("Nonetheless, we cannot deem trial counsel ineffective for failing to note an incorrect or overbroad statement of the law that apparently has escaped the notice of our courts for twenty years"). {877 N.E.2d 837} See also, *United States v. Washington*, 304 U.S. App. D.C. 263, 12 F.3d 1128, 1139 (D.C. Cir. 1994) (recognizing doctrine and noting that it "reflects the principle that it would be unfair, and even contrary to the efficient administration of justice, to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success.") *Id.*

Petitioner argues there is cause to excuse the default placed on him by the Indiana Supreme Court because trial counsel did not objection to the unanimity instruction that the court gave his jury because there was no reasonable basis for a challenge to the unanimity instruction at the time of trial, relying on the rule of *Reed v. Ross*, 468 U.S. 1, 17, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).

In *Reed*, the Supreme Court first identified three situations in which it might be said to announce a "new" rule: First, a decision of this Court may explicitly overrule one of our precedents. Second, a decision may overturn a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. And, finally, a decision may disapprove a practice this Court arguably has sanctioned in prior cases.468 U.S. at 17 (citations and internal markup omitted). It then explained that when a case falling into one of the first two categories is given retroactive application, "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted." *Id.* Under such circumstances, cause to excuse a procedural default is present. *Id.*

The intervening change in the controlling Indiana jury instruction law made Petitioner's trial counsel ignorant of the law because it happened three years after trail and counsels representation of Petitioner which is apparent cause to excuse his failure

to object. The Indiana Supreme Court unfairly used their newly adopted unanimity instruction and their contemporaneous objection rule in an Ex Post Facto fashion to overshadow the fact Petitioner was denied unanimity in his verdicts.

In *Collins v. Auger*, 577 F.2d 1107 (8th Cir. 1978), the United States Court of Appeals for the Eighth Circuit seemingly approved the following definition of cause: "(L)ack of knowledge of the facts or law would be sufficient cause for failure to make the proper objection * * *." *Id.* at 1110 n.2. Other Courts of Appeals have held that novelty can constitute cause. See, e.g., *Norris v United States*, 687 F.2d 899, 903 (CA7 1982); *Dietz v Solem*, 677 F.2d 672, 675 (CA8 1982); *Collins v Auger*, 577 F.2d 1107, 1110, and n 2 (CA8 1978); *Myers v Washington*, 702 F.2d 766, 768 (CA9 1983); *Gibson v Spalding*, 665 F.2d 863, 866 (CA9 1981); *Ford v Strickland*, 696 F.2d 804, 817 (CA11 1983); *Sullivan v Wainwright*, 695 F.2d 1306, 1311 (CA11 1983). See generally Comment, Habeas Corpus-The Supreme Court Defines The *Wainwright v Sykes* "Cause" and "Prejudice" Standard, 19 Wake Forest L Rev 441, 454-456 (1983).

Had Baker's trial counsel objected to the given unanimity instruction, the court would have been obligated to overrule his objection because it was a correct instruction at the time of trial. See: *Johnson v State*, 832 N.E.2d 985 (2005 Ind. App.) ("Therefore, had Johnson's trial counsel submitted a voluntary intoxication instruction to negate Johnson's intent, such instruction would properly have been denied by the trial court. Accordingly, we do not find Johnson's trial counsel ineffective for failing to propose such an instruction"). *Id.*

An exception to normal law of the case and waiver rules is recognized when an intervening decision from a superior court changes the controlling law. This intervening-law exception can apply when there was strong precedent prior to the change, such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner. In these circumstances, a party cannot

be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made. Thus, if a motion was almost certain to fail before a change in the law, that motion, brought after the change in the law, may be deemed - by application of this exception - not to have been waived. Boston Sci. Corp. v. Cook Grp. Inc., 269 F. Supp. 3d 229, 234-35 (D. Del. 2017)

The fact that trial counsel failed to object to an unknown ambiguous confusing instruction does not render the error of Petitioner's verdicts being non-unanimous any less a violation of petitioner's constitutional rights guaranteed by the Sixth and Fourteenth Amendments. Where a constitutional right comes into conflict with a statutory right, (I.E. instructional law or procedural default) the former prevails. Moreover, "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. *Gray v. Mississippi*, 481 U.S. 648, 668, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987).

As the Seventh Circuit Court of Appeals stated, "It is not fair to change the rules so substantially when it is too late for the affected parties to change course." *Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch.*, 876 F.3d 926, 935 (7th Cir. 2017) ; *see also Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 183 Cal. Rptr. 3d 318, 330 (Cal. Ct. App. 2015) ("[C]hanging the rules in the middle of the game does not accord with fundamentally fair process.").

See: Hernandez v. Cepeda, 860 F.2d 260 (7th Cir. 1988) where in Justice Cudahy's concurring opinion he held: "... a change in the law after trial would constitute an "exceptional circumstance" demanding flexibility in the interests of {1988 U.S. App. LEXIS 20} justice. To hold otherwise would be to require trial attorneys to be seers as well as advocates, an unfortunate result". Id.

The failure to have Baker's jury instructed as was later determined to be the correct manner to assure jury unanimity by the Indiana Supreme Court's adopting of a new

instruction from the California courts violated Petitioner's Fifth and Fourteenth Amendment due process rights. Petitioner cites a number of U.S. Supreme Court decisions holding instructional error can violate a criminal defendant's due process rights. See: *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *Mathews v. United States*, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988)). The right to a fair trial is "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).

The Indiana Supreme Court committed an abuse of discretion when it placed a procedural bar on the issue of his receiving non-unanimous verdicts because his trial counsel failed to object to the fatally ambiguous jury instruction that confused the jury on what the State was required to prove beyond a reasonable doubt and Petitioner Baker deserves to have this Writ Granted and all other relief justifiable in the premises.

QUESTION THREE:

A non-unanimous verdict in a criminal case is a structural non-waivable error. Structural errors are not subject to the harmless error analysis. The United States Supreme Court holds "structural errors," include the right to a unanimous jury verdict beyond a reasonable doubt, see *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); See: *United States v Maez*, 960 F.3d 949 (7th Cir. 2020) citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("structural defects in the constitution of the trial mechanism ... defy analysis by 'harmless-error' standards") *Id.* The post-conviction court erroneously dismissed this entire issue by simply declaring there was overwhelming evidence of guilt. App.-B, p.53.

QUESTION FOUR:

Petitioner was denied Due Process of Law and his rights under both the Equal Protection Clause of the U.S. Constitution, Amend14, and the Equal Privileges and Immunities Clause of the Ind. Constitution, Art.1,§23. The post-conviction court erroneously dismissed this entire issue by simply declaring there was overwhelming evidence of guilt. App.-B, p.53.

Where there is a violation of the Equal Protection Clause of the 14th Amendment, there is also a violation of the Equal Privileges and Immunities Clause of the Indiana Constitution. *Helton v State*, 624 NE2d 499, 511(Ind.App.Ct.1993), trans.denied. These provisions require that citizens are treated evenhandly, and prohibit arbitrary discriminatory legislation. The purpose of these protections is to prevent the distribution of extraordinary benefits or burdens to any group. *State v Price*, 724 NE2d 670,675(Ind.Ct.App.2000). A two-part test governs claims made pursuant to this clause. First: "the disparate treatment must be reasonably related to inherent characteristics which distinguish the equally treated classes"; Second: "the preferential treatment must be uniformly applicable to all persons similarly situated". *Collins v State*, 644 NE2d 72,80 (Ind.1994).

Indiana has a double standard as to what constitutes a valid intentional waiver of an issue and ineffective assistance of counsel. In Petitioner's case, the Indiana Supreme Court faulted his trial counsel for not objecting to the unanimity instruction that was given at his trial, that was correct at time of trial, that they found so inadequate they replaced it with another state's. But, in *Stephenson v State*, 864 NE2d 1022 (Ind.2007) the Indiana Supreme Court held that counsels are not required to anticipate a change in the law. And see: *Smylie v State*, 823 NE2d 679, 690 (Ind.2005), in which the Indiana Supreme Court ruled in would be unjust to fault his attorney and declare the issue waived for not objecting

on *Blakely* grounds before *Blakely* was decided..., requiring a defendant or counsel to have prognosticated the outcome of *Blakely* or of today's decision would be unjust. *Id.* And in *Sada v State*,706 NE2d 192,199(Ind.Ct.App.1999) ("It cannot be said that it was unreasonable for trial counsel to fail to anticipate a change in the law.") Id.; *Wieland v State*, 848 NE2d 679 (Ind.Ct.App.2006), trans.denied.

This is the embodiment of a violation of due process and a defendant's rights under both the Equal Protection Clause of the U.S. Constitution, Amend14, and the Equal Privileges and Immunities Clause of the Ind. Constitution, Art. 1, §23.

Petitioner was denied Due Process of Law and his rights under both the Equal Protection Clause of the U.S. Constitution and the Equal Privileges and Immunities Clause of the Ind. Constitution and the decisions of both the Indiana Supreme Court and Petitioner's Post-Conviction Courts were contrary to and an unreasonable application of clearly established law as argued herein; and he deserves to have this Writ Granted his convictions and sentences vacated.

QUESTION FIVE:

The Indiana Supreme Court's decision to speculate verdicts for the State was in conflict with other decisions of this Court and other circuits.

See: *Sandstrom v Montana*, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 holding: "When a reviewing court engages in pure speculation-its view of what a reasonable jury would have done, the wrong entity judges the defendant guilty". *Id.* Moreover, denial of the right to a jury verdict of guilt beyond a reasonable doubt, the consequences of which are necessarily unquantifiable and indeterminate, is certainly a "structural defec[t] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards"

under Arizona v Fulminante, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246 (opinion of Rehnquist, C. J., for the Court).

The following cases contain language discussing the jury's role as factfinder, see Sullivan v Louisiana, 508 US 275, 124 L Ed 2d 182, 113 S Ct 2078 (1993); Court of Ulster Cty. v Allen, 442 US 140, 156, 60 L Ed 2d 777, 99 S Ct 2213 (1979); Patterson v New York, 432 US 197, 206, 53 L Ed 2d 281, 97 S Ct 2319 (1977); In re Winship, 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970), each also confirms that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. See also Sullivan, supra, at 277, ("The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' "); Patterson, supra, at 204, 53 L Ed 2d 281, 97 S Ct 2319; Winship, supra, at 361, 363, 25 L Ed 2d 368, 90 S Ct 1068.

After ruling Baker did not receive unanimous verdicts the Indiana Supreme Court speculated what the jury would have done absent the error and speculated a verdict for the State. This was fundamentally unfair and in direct conflict with the United States Supreme Court. In *Carella v California*, 109 SCT 2419, 105 LED2D 218, 491 US 263 (1989), Justice Scalia, with whom Justice Brennan, Justice Marshall, and Justice Blackmun joined, wrote the following in relevant part: "The law assigns the fact finding function' in a criminal case solely to the jury." *Id.*

The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v Louisiana*, 391 US 145, 155, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id., at 156, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198. A

defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. Id.

In other words, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v United States*, 326 US 607, 614, 90 L Ed 350, 66 S Ct 402 (1946)". [491 US 268]. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." Id citing *Sullivan*, 508 US at 280.

However, in the acknowledged absence {948 N.E.2d 1178-79} of this constitutional right Petitioner was adjudged guilty on the strength of an invalid, reviewing courts speculation of what the jury would possibly have done absent the error that caused the non-unanimity of their verdicts.

In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v City of Louisville*, 362 US 199 [4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). {504 US 727}. Finally, and in any event, the standard is beyond a reasonable doubt, not beyond all possible doubt. See, e.g., *United States v. Clifton*, 406 F.3d 1173, 1178 (10th Cir. 2005); See *Bachellar v Maryland*, 397 US 564, 569-571, 25 L Ed 2d 570, 90 S Ct 1312 (1970) (condemning post hoc speculation as to which alternative ground informed jury verdict). *Id.*

Petitioner's guilty verdicts rest on the back of an entity that was not authorized to make a finding of guilt. After the Indiana Supreme Court ruled Baker's jury was presented a greater number of separate criminal offenses than he was charged with and therefore his jury should have been given a specific act on which it relies on to prove a particular charge [or] the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged". Baker, 948 NE2d 1177, neither of which was done, the Court ruled it a harmless error because the jury would have convicted the defendant of any of the various offenses shown by the evidence to have been committed." Baker, 948 NE2d 1169,1179(Ind. 2011) **Two** things make this assumption fundamentally unfair to Baker and amount to a manifest injustice. App.-A, pg. 15.

[One]: The Webster's Universal College Dictionary, 1997 Edition defines the word, "Would" as (used to express an uncertainty): It would appear that he is guilty. Used to express a possibility. And possibly is defined as "perhaps; maybe; uncertainty is defined as having doubt.

[Two]: All those "various" offenses did not include the required element the State need to prove beyond a reasonable doubt to support their charging instruments and the bulk of then were alleged to have occurred in other States.

The Sixth Amendment safeguards the accused's right to a speedy and public trial by an impartial jury and requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. U.S. Const. amend VI.; *U.S. v Salazar*, 751 F.3d 326 (2014 U.S. App. 5th Cir.) citing *In re Winship*, 397 US 358,364, 25 L Ed 2d 368, 90 S Ct 1068 (1970).

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., *Patterson v New York*, 432 US 197, 210, 53 L Ed 2d 281, 97 S Ct 2319 (1977); *Leland v Oregon*, 343 US 790, 795, 96 L Ed 1302, 72 S Ct 1002 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., *In re Winship*, 397 US 358; *Cool v United States*, 409 US 100, 104, 34 L Ed 2d 335, 93 S Ct 354 (1972) (per curiam). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. *Winship*, *supra*.

The Indiana Supreme Court's ruling that: the unanimity instruction given at trial was in fact inadequate but the error was harmless because the jury would have convicted him of *any* of the "various" offenses shown by the evidence to have been committed {948 NE2d 1179} resulted in creating a situation where Petitioner was possibility found guilty of crimes not charged because not all the various offenses shown by the evidence contained the proper elements charged in the information's and no one can tell from the record exactly what evidence the jury relied on to support the three count charging information and their verdicts. See: Justice Rucker's opinion in Petitioner Baker's case, in relevant parts: ("In the case before us, the State did not designate which specific act or acts of child molestation that it would rely upon to support the three-count charging information.") {948 NE2d 1178}

The information's for Counts I and II charged Petitioner with Child Molesting C.B. and J.A. as Class A Felonies pursuant to I.C. § 35-42-4-3(a) which requires penetration of some sort. However, many of the "various offenses" shown by the evidence to have been committed only involved touching as required in the lesser Class C Felony pursuant to I.C. § 35-42-4-3 (b).[i.e.].

- C.B. and J.A. testified that the alleged incident in the Auburn house only involved Petitioner touching them inappropriately and that no penetration occurred. (Tr.p.318,321,393,394,551);
- C.B. testified as to another incident that only involved touching, (Tr.p.385);
- J.A. testified as to another incident in Petitioner's semi-truck that only involved touching, (Tr.p.325);
- J.A. testified that Petitioner touched her clit a lot in his semi, (Tr.p.553);
- Just touching with C.B. (Tr.p.555);
- Just touching C.B. (Tr.p.558);
- Played strip poker, (Tr.p.562-63);
- J.A. testified she witnessed Petitioner suck on C.B.'s boobs, (Tr.p.568);
- J.A. testified Petitioner never had sex with her. (Tr.p.617-18)

Moreover, all the truck incidents did not comport with the charging information because charging information said incidents occurred in Dekalb County, Indiana and all truck incidents were outside state of Indiana[5].

The testimony concerning the allegations of molestations in Petitioner's semi-truck appear on 69 pages of his trial transcripts.

- (most of the stuff happened in the semi somewhere", (Tr.p.53,88-89,227-28,272-73,322);
- ("in the semi in the States of Illinois around Chicago, Ohio around Cincinnati, Wisconsin, West Virginia, Indiana, Michigan, Georgia");

[5] This by itself is a direct violation of the U.S. Constitution, Art. III, 2, cl. 3, and Sixth Amendment and Ind. Code § 35-32-2-1,; Ind. Const. Art. 1, § 13(a).

- ("more than 100 times in the semi");
- ("in the semi a lot", (Tr.p.322-25,484,618-19,628,633);
- ("he molested them all the time in the semi-truck...those are not charges...", (Tr.p.272-73,285)

The evidence of these numerous alleged incidents the jury may have found him guilty of merely indicate he committed the lesser Class C Felony child molesting that did not require penetration. I.C. § 35-42-4-3 (b) requires only that a defendant, "performed or submit to fondling or touching with intent to arouse or satisfy the sex desires". Therefore, Petitioner's convictions and sentences in Counts I and II must be vacated and he cannot be found guilty of the lesser Class B Felony Child Molesting without another jury trial because all the evidence presented and relied upon by the jury did not include the elements needed to charge him with Class B Felony Child Molesting and it would result in Petitioner being guilty of crimes not charged which is illegal. See: *Kelly v State*,(1989),Ind.,535 NE2d 140 holding, "it is error to convict a defendant for a crime not charged and if there is a reasonable doubt as to what offense is charged, the doubt should be resolved in favor of the defendant". Id. Citing *Addis v State*, 404 NE2d 59,60 (Ind.App.Ct.1980), rehearing denied, trans. denied. And, Petitioner cannot be found guilty of the lesser Class C Felony Child Molesting in Counts I and II without another jury trial because the information's in Counts I and II traced the language of the section dealing with Child Molesting by sexual intercourse or deviate sexual conduct found in I.C. § 35-42-4-3 (a) and they did not refer to the specific "intent to arouse" or satisfy element of the touching and foundling offense found in I.C. § 35-42-4-3 (b). *Buck v State,(*1983) Ind.,453 NE2d 993; *Hall v State*, 634 NE2d 837,841(Ind.App.Ct.1994). See: *United States v. Willoughby,* 27 F.3d 263, 266(7thCir.1994), where the court essentially found that when the charging information alleges a specific crime, but the actual crime proved at trial is

different, and reversible error results. See: *Cramer v. Fahner*, 683 F.2d 1376, 1385 (7th Cir.1982). Where a verdict is supportable on one ground but not another, and it is impossible to tell which grounds the jury selected, the conviction is unconstitutional. *Id.*

Not only did this evidence not comport with the State's charging information's in Counts I and II, it was inadmissible extrinsic acts. When other crimes or wrongs occurred at different times and under different circumstances from the charged crimes, the deeds are termed extrinsic. *Lee v State*, 689 NE2d 435, 439 (Ind.1997) A trial court commits an abuse of discretion when it admits evidence of extrinsic acts...*Heavrin v State*, 675 NE2d 1075,1083 (Ind.1996) This prejudicial evidence along demands Petitioner's convictions be vacated.

The elements of a Class C child molesting crime is not inherent in the crime of Class A child molesting: a Class C child molesting is not necessarily committed when one committed a Class A child molesting crime. Although, both require knowing or intentional behavior and create the same physical and psychic injuries, however, is that, a Class C child molesting crime has different elements from a Class A child molesting crime. A Class C child molesting crime presupposes sexual intercourse never occurred, i.e. that there was no penetration of the female sex organ by the male sex organ or criminal deviate conduct both requiring penetration. A Class C child molesting is proven if an adult performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person. Thus, a Class C charge is not an inherently included lesser offense of a Class A charge.

Moreover, Petitioner's trial against the States charges concerning C.B. and J.A. was combined with a charge concerning a third alleged victim, A.H. as a Class C felony and if the convictions concerning C.B. and J.A. are vacated, the verdict concerning the class C felony with A.H. should also be vacated because in the trial of A,H, alone the

evidence concerning C.B. and J.A. would not be allowed because of its prejudicial affects. i.e. Evid. R. 403; 404(b), also the conviction concerning A.H. suffers from the same unanimity concern argued herein. The criminal law imposes especially high burdens on the Government in order to protect the rights of the accused. The Government may obtain a conviction only ``upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged." In re Winship, 397 US 358,364, 25 L Ed 2d 368, 90 S Ct 1068 (1970).

Therefore, Petitioner deserves to have this Writ Granted and for all other relief due in the premises.

QUESTION SIX:

The Ex Post Facto Clause, State[6] and Federal[7] operate to deny a State Court from altering a common-law rule (Jury Instruction) three years after trial and post hoc foreclose its benefits to a defendant because of his not being able to anticipate this alternation and pre-object accordingly based on the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning?

The U.S. Supreme Court has made clear that the same ex post facto/due-process analysis applies where, as here, a judicial decision alters a common-law rule of criminal law. *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). Again, the principle is based on the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *Id.* at 459. A "judicial alteration of a common law doctrine of criminal law" violates the principle of fair warning and must not be given retroactive effect "where it is 'unexpected and indefensible by reference to the law which

[6] Ind. Const. Art. 1 § 24.
[7] U.S. Const. Art. 1 § 10.

had been expressed prior to the conduct in issue.'" *Id.* at 462 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)).

Petitioner Baker concedes that traditionally, in the Ex Post Fact Clause analysis the courts are concerned with a criminal or penal law when it is: (1) retrospective, and (2) more onerous than the law in effect on the date of the offense." *United States v. Ramirez*, 846 F.3d 615, 619 (2d Cir. 2017). However, Petitioner Baker argues that retroactively applying a procedural bar based on conduct- a change in the Instruction law - violates the ex post facto clause based on the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning.

See *Boston v Mooney*, 2015 U.S. Dist. LEXIS 148106(E.D. of PA 2015), Holding, ("how can Attorney El-Shabazz be faulted for not requesting an instruction not generally used in Pennsylvania practice?") ("This court is mindful that defense attorneys cannot predict future developments in the law and, therefore, their representation must be examined by the law in effect at the time") *Commonwealth v. Pizzo*, 529 Pa.155, 602 A.2d 823,825(Pa.1992); See: *Saunders v. Rhode Island,* 731 F.2d 81, 84-85 (1st Cir. 1984), Because the basis for objection to jury instruction No. 51 became known only after the Wyoming Supreme Court answered the questions certified to it by the district court, which was after the jury had already returned its special verdict, we will review jury instruction No. 51 under the same standard as if an objection had been timely made. *Id.* at 85.

See the recent United States Supreme Court's relevant decision in *Maryland v. Kulbicki*, 136 S.Ct. 2; 193 L Ed 2d 1 (Oct.5,2015), holding that: ("to demand that lawyers go ``looking for a needle in a haystack," even when they {136 S.Ct. 5} have ``reason to doubt there is any needle there" [would be unfair]. *Id.* The above cases dictates Baker should be exempted from the requirement of contemporaneous objection. It is not fair to

change the rules so substantially when it is too late for the affected parties to change course. *Rodriguez v. State*, 116 N.E.3d 515 (2018 Ind. App.)

Before Petitioner Baker's crimes Indiana Supreme Court precedent dictated that the generic unanimity instruction his trial court gave was adequate to assure unanimity, but three years later the court abandoned that instruction and changed it by adopting an entirely novel new one never used in Indiana. That development-the Court overruling its prior unanimity instruction was "unexpected and indefensible by reference to the law which had been expressed" before Baker's appeal became final. *Rogers*, 532 U.S. at 462.

Petitioner Baker asks this Court to conclude the Indiana Supreme Court violated his due process rights when it retroactively applied a procedural bar on his redress to not receiving unanimous verdicts based on his failure to anticipate a post-trial change in the law and to Grant this Writ and for all other relief due in the premises.

Because of all the constitutional violations above, Petitioner deserves to have this Writ Granted and all other relief just in the premises.

AFFIRMATION

Petitioner affirms under the penalties for perjury that the contents of this Petition are true and correct to the best of his knowledge and beliefs.

Petitioner pro se, Elmer Dean Baker - Elmer Dean Baker

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Petitioner pro se, Elmer Dean Baker - Elmer Dean Baker

Date: 1st day of October, 2024.