

NO: 24-5747

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 REHEARING

Elmer Dean Baker

Indiana State Prison

One Park Row

Michigan City, Indiana 46360

Petitioner - pro se

TABLE OF CONTENTS

	Page
Cover.....	1
Table of Authorities.....	2, 3
Argument.....	4-10
Conclusion.....	11
Certificate.....	12

TABLE OF AUTHORITIES

Cases	Page
Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1231 (10th Cir. 1996).....	5
Arizona v. Fulminante, 499 U.S. 279 (1991).....	7
Baker v State, 948 N.E.2d 1169 (Ind. 2011).....	6
Black & Decker, Inc. v. Robert Bosch Tool Corp., 260 Fed. Appx 284 2008.....	5
Boston v Mooney, 2015 U.S. Dist. LEXIS 148106(E.D. of PA 2015).....	9
Commonwealth v. Pizzo, 529 Pa.155, 602 A.2d 823,825(Pa.1992).....	10
Eli Lilly and Co. v. Aradigm Corp., 376 F.3d 1352, 1359 (Fed. Cir. 2004).....	4
Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch., 876 F.3d 926 (7th Cir. 2017).	9
Gacy v. Welborn, <u>994 F.2d 305</u> , 311 (1993).....	5
Haines v. Kerner, <u>404 U.S. 519</u> , 92 S. Ct. 594 <u>30 L. Ed. 2d 652</u> (1972).....	10
Hart v. Wal-Mart Stores, Inc. <u>360 F.3d 674</u> , 680 (7th Cir. 2004).....	5
Hernandez v. Cepeda, 860 F.2d 260 (7th Cir. 1988).....	9
Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).....	6
Hunt v. Armour & Co., <u>185 F.2d 722</u> (7th {762 F. Supp. 2d 1117} Cir. 1950).....	5
Irvin v Dowd, 366 US 717, 6 L Ed 2d 751, 81 S Ct 1639 (1961).....	5
Jackson v. Duckworth, <u>112 F.3d 878</u> , 881 (7th Cir. 1997).....	10
Key v. Rutherford, 645 F.2d 880, 883 (10th Cir. 1981).....	5

Lindh v. Murphy, <u>96 F.3d 856</u> , 873 (7th Cir. 1996).....	5
Mathis v. United States, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016).....	7
Perruquet v. Briley, 390 F.3d 505, 512 (7 th Cir. 2004).....	10
Perrywatson v United Airlines Inc., 762 F. Supp. 1107 (20087 th Circuit.).....	5
Phillips v. Cameron Tool Corp., 950 F.2d 488, 491 (7th Cir. 1991).....	5
Ross v State, 877 NE2d 829 (Ind. App. 2007).....	8
Saunders v. Rhode Island, 731 F.2d 81, 84-85 (1st Cir. 1984).....	10
Sincox v. United States, 571 F.2d 876, 878 (5th Cir. 1978).....	7
Sullivan v. Louisiana, 508 U.S. 275 (1993).....	7
Thiel v. State Bar of Wisc., <u>94 F.3d 399</u> , 404 (7th Cir. 1996).....	5
United States v Maez, 960 F.3d 949 (7th Cir. 2020).....	7
United States v. Davenport, 2011 U.S. Dist. LEXIS 106949 (N.D. Ind. 2011).....	8
United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978).....	6
United States v. Morris, 612 F.2d 483, 489 (10th Cir. 1979).....	6
United States v. Pachay, 711 F.2d 488, 491 (2d Cir. 1983).....	6
United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978).....	6
United States v. Washington, 12 F.3d 1128 (D.C. Cir. 1994).....	9
United States v. Watson, <u>87 F.3d 927</u> (7th Cir. 1996).....	5
Voda v. Cordis Corp., 536 F.3d 1311, 1321 (Fed. Cir. 2008).....	4
Woody's Grp., Inc. v. City of Newport, 183 Cal. Rptr. 3d 318 (9 th Cir. 2015).....	9

INDIANA STATUTES

Ind. Code § 35-42-4-3(a).....	7
-------------------------------	---

PETITION FOR REHEARING

COMES NOW, Petitioner, pro se and respectfully submits:

1. On October 04, 2024 Petitioner filed Writ of Certiorari to Indiana Supreme Court;
2. Writ was docked under No. 24-5747 on October 11, 2024;
3. On the 16th day of December, 2024 this Court denied Petitioner's Writ of Certiorari.

Petitioner now, timely and in good faith, files this Petition for a Rehearing pursuant to Rule 44 and submits he was denied unanimous verdicts in Counts I and II and Due Process of Law at trial and in his State direct appeal.

ARGUMENT

Rehearing is necessary because Petitioner Baker successfully raised a challenge to the Unanimity instruction his jury was given¹ but the Indiana Supreme Court ignored binding precedent of their Circuit and ruled the issue was barred to Petitioner because his trial counsel did not anticipate a three years after trial change if Indiana's unanimity instruction law and pre-object accordingly.

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

¹ The Indiana Supreme Court ruled the unanimity instruction Petitioner's jury was given at trial was inadequate and completely change Indiana's unanimity instruction law for child molest cases by adopting a new one from the State of California and ruling it must be given in all future compatible Indiana cases.

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).

The Indiana Supreme committed an abuse of discretion and denied Baker due process of law when it ignored binding precedent. See: *Perrywatson v United Airlines Inc.*, (January 10, 2014), 762 F. Supp. 1107 United States District Court of the 7th Circuit. "Ours is a hierarchical judiciary, and judges of inferior courts must carry out decisions" of their superiors". *Id*, citing *Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan*, 360 F.3d 674, 680 (7th Cir. 2004); *Gacy v. Welborn*, 994 F.2d 305, 311 (1993); *United States v. Watson*, 87 F.3d 927, 930 n.2(7th Cir. 1996); *Thiel v. State Bar of Wisc.*, 94 F.3d 399, 404 (7th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 873 (7th Cir. 1996)(*en banc*); *Hunt v. Armour & Co.*, 185 F.2d 722 (7th {762 F. Supp. 2d 1117} Cir. 1950).

Rehearing is necessary because Petitioner Baker's verdicts were not unanimous and therefore are not legally sustainable. Rehearing is necessary because the Indiana Supreme Court ruled Petitioner's trial counsel had unknowingly waived his right to a unanimous verdict. Rehearing is necessary because numerous federal courts have ruled a unanimous verdict cannot be waived under [any] circumstance. Rehearing is necessary because if a unanimous verdict cannot be voluntarily waived it certainly cannot be waived

unintentionally and unknowingly. Rehearing is necessary because regardless of the Heinousness of Petitioner's alleged crimes he is entitled to a fair trial. See: *In, Irvin v Dowd*, 366 US 717, 6 L Ed 2d 751, 81 S Ct 1639 (1961), the Supreme Court noted that a "fair trial in a fair tribunal is a basic requirement of due process" and stated that "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." 366 U.S. at 722. *Id.*

The Indiana Supreme Court ruled Petitioner's record does not support that his verdicts were the product of jury unanimity because the unanimity instruction his jury had been given was fatally ambiguous, therefore there is no way anyone can tell from the record which crimes Petitioner was found guilty of. So, three years after Petitioner's trial, to correct the fatally ambiguous unanimity instruction for future Indiana criminal defendant's the Supreme Court changed Indiana's unanimity instruction law by adopting a new one from the state of California and modifying it for use in all future Indiana criminal cases with facts similar to Petitioner's.{*Baker v State*, 948 N.E.2d 1169 (Ind. 2011)}

See: *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). ("It must be observed, however, that the requirement of a unanimous verdict is nowhere defined in the Constitution as 'a privilege to be enjoyed.' It is the inescapable element of due process that has come down to us from earliest time. No federal case has been cited and none can be found by independent research that holds or even remotely suggests that it may be waived"). {204 F.2d 838}

The following federal courts have consistently held that the right to a unanimous verdict is so important that it is one of the few rights of a criminal defendant that cannot, under [any] circumstances, be waived. See *United States v. Pachay*, 711 F.2d 488, 491

(2d Cir. 1983); *United States v. Morris*, 612 F.2d 483, 489 (10th Cir. 1979); *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978); *United States v. Scalzitti*, 578 F.2d 507, 512 (3d Cir. 1978); *Sincox v. United States*, 571 F.2d 876, 878 (5th Cir. 1978). Therefore, if a defendant cannot voluntarily waive his right to a unanimous verdict then certainly in all fairness, he cannot unintentionally waive that constitutional right.

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.*

In Counts I and II petitioner was charged under a divisible statute Ind. Code § 35-42-4-3(a) and the Indiana Supreme Court ruled that the record was unclear as to exactly what crime within Ind. Code § 35-42-4-3(a) each individual juror relied on to support their verdicts. (948 N.E.2d 1169)

See *Mathis v. United States*, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016). If the statutory alternatives are different elements, then the statute is considered "divisible" in the sense that it divides into multiple crimes. *Mathis*, 136 S. Ct. at 2249. For that kind of statute, the federal court must "determine what crime, with what elements, a defendant was convicted of" before counting the conviction as a predicate under the Armed Career Criminal Act. *Id.*

See: *United States v. Davenport*, 2011 U.S. Dist. LEXIS 106949 (N.D. Ind., September 21, 2011) discussing Indiana Statute 35-42-4-3 which the State had charged Petitioner under in Counts I and II. "The structure of Indiana's child molesting statute shows that the Indiana General Assembly considers different types of sexual contact and the varying circumstances under which the contact takes place to present different levels of risk that are punishable in different ways. The Indiana statute [is] divisible in that it defines different categories of child molesting. It is a class C felony if it involves touching with intent to arouse or to satisfy the sexual desires of either the child or the older person, a class B felony if it involves sexual intercourse or deviate sexual conduct, and a Class A felony where the crime involves certain aggravating factors, such as "by using or threatening the use of deadly force or while armed with a deadly weapon." Ind. Code 35-42-4-3. The structure of Indiana's child molesting statute shows that the Indiana General Assembly considers different types of sexual contact and the varying circumstances under which the contact takes place to present different levels of risk that are punishable in different ways. *Id.*

In Petitioner's initial Writ he cited numerous places in the record of trial where the jury was presented with alleged evidence he had only committed the Class C elements of Indiana Statute 35-42-4-3 as to Counts I and II's Class A required elements; and it has been established there is no way of knowing which alleged evidence the jury relied on to support their verdicts.

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 consider 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.*

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.*

Petitioner should not be faulted for his trial counsels failure to anticipate a three years after trial change in Indiana's unanimity instruction law and the issue of non-unanimity should not be foreclosed to him. 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”) *Id.*; *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.

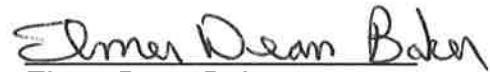
Although Petitioner’s Pro Se Writ and Rehearing Petition may be inartfully drafted, the “basic rational” is “readily discernible” and as a pro se petitioner, Baker prays his Petition be liberally construed pursuant to *Perruquet v. Briley*, 390 F.3d 505, 512 (7th Cir. 2004). As Baker was without counsel, his petition is entitled to a liberal construction, e.g., *Jackson v. Duckworth*, 112 F.3d 878, 881 (7th Cir. 1997) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96, 30 L. Ed. 2d 652 (1972)), and his petition contains enough detail to describe his non-unanimous verdicts claims that is within the power of a federal court to address. The United States Supreme Court holds allegations of a pro se complaint to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96, 30 L. Ed. 2d 652 (1972)).

CONCLUSION

Rehearing should be Granted and Petitioner's Writ of Certiorari should also be GRANTED.

This Petition including footnotes contains 2,126 words.

Respectfully submitted this 27th day of January, 2024.


Elmer Dean Baker
Petitioner, Pro Se

CERTIFICATE OF PRO SE PETITIONER

Petitioner, pro se, Elmer Dean Baker, pursuant to Rule 44 of the United States Supreme Court hereby certifies that his Petition for Writ of Certiorari was filed on October 1, 2024 and received by this Court and docketed on October 11, 2024 and was denied on December 16, 2024 and Petitioner submits this Petition for Rehearing on the 27th day of December, 2024 and it is presented in good faith and not for delay and the grounds in this Petition are limited to intervening circumstances of substantial or controlling effect.

Elmer Dean Baker
Elmer Dean Baker
DOC# 913003
Indiana State Prison
One Park Row
Michigan City, Indiana 46360

NO: 24-5747

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

Warden of the Indiana State Prison

Respondent,

PROOF OF SERVICE

I, Elmer Dean Baker, Petitioner, *pro se*, DOC # 913003 do hereby certify that I have, this 27th day of December, 2024, served copies of the Petition for Rehearing, on the clerk of the United States Supreme Court at 1 First Street N.E., Washington DC 20543-0001 and the Attorney General of Indiana, Ind. Gov. Center S., 5th Floor, 302 West Washington St., Indianapolis, IN 46204-2770, pursuant to Supreme Court Rule 29, by submitting same to a designated employee of the Indiana State Prison for prompt processing and mailing by authorized prison personnel within the facility mailroom, with sufficient first class postage affixed. Petitioner also declares/verifies under penalties of perjury that the foregoing is true and correct.

Respectfully submitted, this 27th day of December, 2024.

Elmer Dean Baker

Elmer Dean Baker, Petitioner, *pro se*
DOC # 913003, Indiana State Prison
One Park Row, Michigan City, IN. 46360-6597

Friday, December 27, 2024

Scott S. Harris, Clerk:
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543-0001

Mr. Harris,

Please file the enclosed Petition for Rehearing / Certificate of pro se
counsel and Proof of Service in the Supreme Court of the United States
under Case No. 24-57-47.

Thank You.

Sincerely,

Elmer Dean Baker

Elmer Dean Baker
DOC# 913003
Indiana State Prison
One Park Row
Michigan City, Indiana 46360

