NO. _____

24-5987

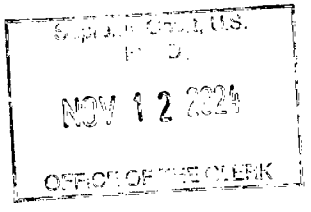
In The

SUPREME COURT OF THE UNITED STATES

BRANDON HOWARD MAUK,
Petitioner,

v.

MICHIGAN,
Respondent.



On Petition for a Writ of Certiorari
to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Brandon Howard Mauk
In Propria persona
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QUESTION PRESENTED

Does Michigan violate a defendant's constitutional right to jury unanimity when the State Supreme Court refuses to recognize the difference in unanimity claims in context of instances of conduct and elements, as well as the proprietary tests applicable to each, that not only this Court but numerous federal courts of appeals and state supreme courts have recognized in a multipe acts case claim of unanimous verdict violation?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Howard Mauk respectfully petitions for a writ of certiorari to review the judgment of the Michigan Court of Appeals.

OPINIONS BELOW

The final order of the Michigan Supreme Court denying leave to appeal, along with the motion presented for reconsideration of the initial order from the Michigan Supreme Court denying leave to appeal on September 30th, 2024, is unpublished and included in the Appendix. (See Appendix, filed under separate cover). The Michigan Court of Appeals decision is unpublished along with the motion for reconsideration filed on May ,6th 2024. See Appendix,

JURISDICTION

The Michigan Supreme Court Issued its final order denying leave to appeal on September 30, 2024. This filing is timely, this court has jurisdiction under **28 U.S.C. §1257(a).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and distric wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Sixth Amendment Right is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

A. Factual background and trial court proceedings

Mr Mauk was charged with two sets of ten identical counts, each of Criminal Sexual Conduct in the first degree MCL 750.520b. Counts 1-10 alleged penetration with a vibrator. Counts 11-20 alleged penetration with Mr Mauk's tongue. Counts 1-10 as well as 11-20 were identically worded with no differentiation among the counts. All the counts alleged the same date and time on the charging document (on or about 2018). This information was given to the jury during opening instructions. (See Appendix G. Opening instructions).

Mh's testimony during trial alleged more then twenty separate, specific and generic incidents, (See Appendix H Timeline of Mh's testimony). The prosecution dismissed five counts (counts 6-10) after close of proof's on day three of trial, without explanation given to the jury, or without any explanation placed on the record (see Appendix I. Dismissal of counts). The jury found Mr Mauk not guilty of two counts, indistinguishable from the remaining counts (counts 4 and 5). (See Appendix J. Verdict forms).

On direct appeal the prosecution asserted:

> Mh's testimony identified separate incidents that included details of approximately when the offense occurred, where it occurred, and what specific act constituted the assault, either being the oral/genital contact or the vibrator or both. Although she testified as to how offten this usually happened, Mr Mauk was only charged with the incidents that included some details beyond her estimation of how many times per week this usually happened." (See Appendix K. Pg. 39 of States brief).

The trial Court instructed the jury with a general unanimity instruction, stating in part : "A verdict in a criminal case must be unanimous. In order to return a verdict it is necessary that each of you agree on that verdict." (See Appendix L.Final jury instructions

TT III 154 L. 8-10). This instruction did not clarify that the jury must unanimously agree on the same specific incident that formed the basis of that verdict, or that the generic incidents testified to, could not be considered.

Each juror was free to choose whichever incident they believed belonged to which count. The state did not present it's proofs to the jury in a sufficient sequential factual basis. The prosecution gave the jury no direction in his closing argument. The Court during final jury instructions gave the jury no way to connect the counts with the proof's (see Appendix L. Final jury instructions).

The jury was given 15 identical verdict forms, Multiple identical jury instructions, with a pool of separate, specific, and generic incidents, where some included details of approximately when the offense occurred, where it occurred, and what specific act constituted the assault, to choose from. Each incident testified to could attach to any individual count on the verdict forms, (see Appendix J. Verdic forms.) Each count in this case was duplicitous.

Without further instructions from the Court (specific Unanimity instruction) it is impossible to discern which count belongs to which incident or if each verdict was based off one incident or multiple, constituting 15 duplicitous counts in violation of Mr Mauk's constitutional right to unanimous jury verdicts.

Mr Mauk provided multiple defenses and multiple witnesses that provided separate pieces of testimonal evidence about specific dates, for the acts alleged on those dates. Mr Mauk produced tangible evidence that proved that the assaults testified to prior to April 5th, 2021, were impossible (see Appendix M. Receipt of vibrator).

Moreover, Mr Mauk produced two witnesses that testified that MH was not with him, but with other people on the date of June 23, 2021. Which was the claimed date of the most recent assault. Patrick Beahan testified to facts that Mr Mauk's boat was not in the water like MH described in her testimony of the alleged assault on November 25th, 2019. Patrick also testified that Mr Mauk kept his boat in the heated storage building and that having a fire onboard like MH described during one of the assaults, would not be possible.

Patrick Beahan also testified that he was with Mr Mauk for "most of the day" and during the hours in question on June 23rd, 2021. making the alleged assault claimed on June 23rd 2021 impossible. This testimony was given as material evidence in response to specific proof's offered by the prosecution. In turn, giving the jury an option to find Mr Mauk not guilty of certain acts. (See Appendix N. TT III 26-54, Testimony of theresa Gross and Patrick Beahan).

B. The Michigan Court of Appeals decision

The Michigan Court of Appeals, applying the current precedent case in Michigan, that does not distinguish between elements and instances of conduct, when a duplicitous count is claimed. The Court reviewed all of Mr Mauk's alleged conduct and all 15 counts in the charging documents as a "continuous course of conduct". The Court erroneously reviewed his claim as a unanimity claim as to elements, not recognizing the unanimity claim as instances of conduct and affirmed his convictions. Therefore violating his constitutional right to jury unanimity, contrary to this Court's holding in **Ramos**, infra, at 1397.

The Michigan Court of Appeals decision issued in this matter followed the rule of law in **People v. Cooks**, 466 Mich 503; 521 NW2d 275 (1994). The law in **Cooks** that the Michigan Supreme Court arrived at in 1994, is now contrary to multiple federal courts and state courts of last resort's current day holdings, see below.

REASONS FOR GRANTING THE PETITION

I. Multiple rulings from this court, along with multiple jurisdictions of Federal Courts of Appeals, support Mr Mauks assertion of his duplicitous counts and Michigan's direct violation of his Sixth Amendment rights to unanimous jury verdicts.

This Court had recently detailed the history of the federal constitutional right to jury unanimity.

> "The Sixth Amendment promises that 'In all criminal prosecutions, the accuses 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' The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what trial by impartial jury' entails." **Ramos v. Louisiana**, 140 S.Ct. 1390, 1395, 206 L. Ed 2d 583 (2020).

> "One of these requirements was unanimity. Wherever we might look to determine what the term 'trial by an impartial jury trial' ment at the time of the Sixth Amendment adoption--whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterword-- the answer is unmistakable. Ajury must reach a unanimous verdict in order to convict." **Id.**

This Constitutional requirement has come to apply to state and federal criminal trials equally. See **Id.**, at 1397.

Although the federal constitutional right to jury unanimity clearly applies in both state and federal Courts, what is less clear is precisely what the jury must be unanimous about.

This Court has explained that a jury "cannot convict unless it unanimously finds that the Government has proved each element" of the offense charged. **Richardson v. United States,** 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L. Ed 2d 985 (1999). This Court has also recognized that "different jurors may be persuaded by different pieces of evidence, even when they agree [on] the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues [that] underlie the verdict." (Internal quotation marks omitted). **Schad v. Arizona,** 501 U.S. 624, 631-632, 111 S.Ct. 2491, 115 L. Ed 2d 555 (1991). (Opinion announcing judgement). A jury must agree "on the principal facts underlying its verdict--what Courts have tended to call the elements of the offense. But that requirement does not extend to subsidiary facts--what [the] Court has called 'brute facts!" **United States v. Lee,** 317 F3d 26, 36 (1st Cir.) cert denied, 538 U.S. 1048, 123 S.Ct. 2112, 155 L. Ed. 2d 1089 (2003).

This Court has clarified that alternative means of committing a crime constitutes underlying brute facts:

> "[F]or example, [the court has] sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that death occurred through both shooting and drowning. In **holding that the** Government was not required to make **the charge in** the alternative . . . [the court] explained that it was immaterial whether death was caused by one means or the other . . . This fundamental proposition is [also] embodied in **Federal rule of Criminal Procedure 7(c)(1)** which provides that [i]tmay be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." (Citations omitted; internal quotation marks omitted.) **Schad,**supra, 501 U.S. 631 (opinion announcing judgment).

A majority of unanimity cases involve this "crucial distinction . . . between a fact that is an element of the crime and one that is'but the means' to the commission of an element." **United States v. Verrecchia**, 196 F3d 294, 299 (1st Cir. 1999). The line between means and element may be unclear at times, and courts have divided over the appropiate test to apply to distinguish between means and element. See **Schad**, supra at 641-642 (opinion announcing judgement).

Indeed, **Ramos**, **Schad**, and **Richardson** all involved indictments that chargs a defendant in a single count with violating multiple statutory provisions, subsections, or clauses, and thus this court had to determine whether the statutory provisions, subsections, or clauses constituted elements or alternative means. As a result, those cases raised unanimity as to elements claims unlike the present case, which involves unanimity as to instances of conduct. Although those cases did not rase claims of unanimity as to instances of conduct, this Court implicitly acknowledged that if an indictment charged a defendant in a single count with violating a single statutory provision, subsection, or clause on multiple occasions, the jury must agree unanimously as to which instance of conduct the defendant committed.

For example, in **Schad**, this Court rejected a challenge to Arizona's first degree murder statute, which permitted conviction on a theory of either premeditation or felony murder. See **Id.**, at627. In this concurrence, which was necessary to this Court's judgement, Justice Scalia warned that "We would not permit...an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday..." **Id.**, at 651, (Scalia, J., concurring in part and concurring in the judgement). Subsequently, the majority in **Richardson**

specifically cited Justice Scalia's warning in **Schad** in support of the proposition that "the Constitution itself limits a State's power to determine crimes in ways that would permit juries to convict while disagreeing about means, at least [when] that definition risks serious unfairness and lacks support in history or tradition." **Richardson**, supra, at 820.

Relying on these admonitions, a majority of federal court of appeals have recognized that a duplicitous indictment may raise two distinct and separate kinds of unanimity issues (1) unanimity as to a crime's element, which was the kind of unanimity claim raised in **Ramos, Schad** and **Richardson**; and (2) unanimity claim as to instances of conduct, also known as a multiple acts or multiple offense claim, which was the kind of claim this Court implicitly acknowledged in **Schad** and **Richardson**. These Courts have explained that this first kind of unanimity claim involves the question of "when is a disputed fact - eg., whether the crime occurred on a Monday or a Tuesday, with a knife or a gun, against this or that victim - one that the jury must unanimously agree [on], and when is it merely dispensable detail [ie., element vs. means]? And the second [involves the question]: when is a defendant's conduct one violation of a statute, and when is it many?" **United States v. Newell**, 658 F3d 1, 20 (1st Cir), cert denied, 565 U.S. 955, 132 S.Ct. 430, 181 L. Ed 2d 280 (2011). Michigan and many other state Courts of last resort have yet to recognize this distinction in their jurisprudence. This Court's ruling on this issue would minimize court hours in litigation on this topic, and help multiple jurisdictions understand this stark distinction between the two claims.

The federal Courts of appeals also have recognized, that a claim of unanimity as to elements, implicates different concerns than a claim of unanimity as to instances of conduct. Specifically, for claims of unanimity as to elements, unanimity concerns arise from the statutory language or scheme at issue. See **Schad** supra at 631-632. The concern in those cases is whether the statutory language creates multiple elements, each of which the government must charge as a separate offense, or alternative means of committing an element. In contrast, for claims of unanimity as to instances, unanimity concerns arise from the evidence of the defendant's conduct admitted during trial, viewed in a light of the statutory language. In the latter situation, there is no dispute over whether the defendant violated multiple subsections of a statute, each of which constitutes a separate offense; rather the dispute is over whether the defendant may be convicted of a single count of violating a statute based on evidence of multiple, separate occurrences of the prohibited act or acts. See **United States v. Correa-Ventura**, 6 F3d 1070, 1080 (5th Cir. 1993).(discussing differences between unanimity as to elements cases and unanimity as to instances.)

For example, a claim of unanimity as to instances of conduct may arise in a case in which the defendant is charged with a single count of assault but there was evidence presented to the jury that the defendant assaulted the victim three separate times on three separate dates. In such a case, the concern arises that the jury may have agreed that the defendant committed assault but may not have agreed which assault the defendant committed.

In the case at bar, Mr Mauk contends that counts one through fifteen are duplicitous because each count was premised on multiple separate instances of conduct, and thus the lack of bill of particulars or a specific unanimity instruction led to a verdict that violated his right to jury unanimity. In other words, Mr Mauk claims that these counts violated his right to unanimity as to instances of conduct, not his right to unanimity as to elements.

II. Multiple federal courts of appeals and many state courts apply a multipart test to claims of unanimity as to instances of conduct to determine whether the defendants constitutional right to jury unanimity is being violated. Michigan does not.

Firts, a court must determine whether a single count is premised on multiple, separate instances of conduct. If the answer is yes, then the court next must determine if each instance could establish a separate violation of the statute at issue. "In some cases the standard for individuating crimes is obvious -- we count murders, for instance by counting bodies. But in other cases, determining how many crimes were committed is much less clear." **Newell**, supra, at 23-24. For example, it may be difficult to determine whether a single count is premised on multiple acts each of which is committed in the course of a single criminal episode of realtively brief, temproal duration, and thus constitutes alternative means of committing the elements at issue, or whether it is premised on multiple separate and distinct acts, each of which could constitute a separate statutory violation. In these more difficult cases, courts have examined the statute's language, its legislative history, and case law regarding similar statutes to help determine whether the charge is duplicitous. See **Id.**, **Correa-Ventura**, supra at 1082.

In examining the statutory language at issue, a majority of federal courts of appeals have explained that, if the underlying criminal statute contemplates criminalizing a continuing course of conduct and the defendant has been charged with violating the statute by a continuing course of conduct, a single count premised on multiple, separate instances of conduct is not duplicitous when the multiple instances of conduct constitute a "continuing course of conduct, during a discrete period of time. . ." (Internal quotation marks omitted.) **United States v. Davis,** 471 F3d 783, 790 (7th Cir. 2006); see also **United States v.O'Brien,** 953 F3d 449, 455 (7th Cir. 2020), cert. denied, __ U.S. __, 141 S.Ct. 1128, 208 L. Ed. 2d 565 (2021); **United States v. Prieto,** 812 F3d 6, 12 (1st Cir.) cert. denied, 580 U.S. 855, 137 S.Ct. 127, 196 L. Ed. 2d 100 (2016); **United States v. Mancuso,** 718 F3d 780, 792 (9th Cir. 2013); **United States v. Moyer,** 674 F3d 192, 205 (3rd Cir), cert denied, 568 US 846 133 S. Ct. 165, 184 L. Ed 2d 82 (2012), and cert. denied sub nom. **Nestor v. United States,** 568 US 1143, 133 S.Ct. 979, 184 L. Ed. 2d 760 (2013); **United States v. Kamalu,** 298 Fed Appx. 251, 254 (4th Cir. 2008); **United States v. wiles,** 102 F3d 1043, 1062 (10th Cir. 1996), cert. denied, 522 US 947, 118 S.Ct. 363, 118 S.Ct. 364, 139 L. Ed. 2d 283 (1997), and vacated sub nom. **United States v. Schleibaum,** 522 US 945, 118 S.Ct. 361, 139 L. Ed 2d 282 (1997);**United States v. Berardi,** 675 F2d 894, 898 (7th Cir. 1982); **United States v. Alsobrook,** 620 F2d 139, 142-43 (6th Cir.), cert. denied 449 US 843, 101 S.Ct. 124, 66 L. Ed. 2d 51 (1980). To determine if a statute criminalizes only a single act, a continuous course of conduct or both, courts

must interpret the statute's language in the matter directed by MCL 8.3a; **People v. Thompson**, 477 Mich 146, 151; 730 NW2d 708 (2007). **Dowdy, infra**, at 520-521, (Holding, based on the interpretation of the language of the statute MCL 750.520b as required by MCL 8.3a, that the Michigan legislature intended to criminalize each separate offense under MCL 750.520b. Not a continuous course of conduct.)

If a statute does criminalize a continuing course of conduct, then the court must determine whether the multiple instances of conduct alleged in fact constituted a continuous course of conduct by examining, among other things, whether the acts occurred within a relatively short period of time, were committed by one defendant, involved a single victim, and further a single, continuing objective. See eg., **United States v. O'Brien**, supra, at 455; **United States v. Davis**, supra, at 790-791; **United States v. Berardi**,supra, at 898.

When a single count does charge the defendant with having violated a single statute in multiple, separate instances, each of which could establish a separate violation of the statute, federal courts agree that such a count is duplicitous. See eg., **United States v. Mancuso**, supra, at 792; **United States v. Moyer, supra**, at 204-205; **United States v. Kamalu**, supra, at 254-55; **United States v. Sturdivant, supra**, at 75; **United States v. Schlei**, 122 F3d 944, 979 (11th Cir. 1997), cert. denied, 523 US 1077, 118 S.Ct. 1523, 140 L. Ed. 2d 674 (1998); **United States v. Correa-Ventura**, supra, 6 F3d at 1081-82 **United States v. Holley, 942** F2d 916, 927-929 (5th Cir. 1991); **United States v. Tanner**, 471 F2d 128, 138-139 (7th Cir.) cert. denied, 409 US 949, 93 S.Ct. 269. 34 L. Ed. 2d 220 (1972).

Without a bill of particulars or a specific unanimity instruction a majority of federal courts of appeals have held that a duplicitous count violates a defendant's right to jury unanimity. See eg., **United states v. Newell,** supra, at 28 (single count premised on multiple acts was duplicitous, and thus, trial courts failure to give unanimity instruction violated defendant's right to jury unanimity); **United States v. Fawley,** 137 F3d 458, 471 (7th Cir. 1998)(trial court's failure to give specific unanimity instruction violated defendant's right to jury unanimity when single count was premised on multiple, seaprate acts); **United States v. Schlei,** supra, at 979-980 (single count was duplicitous, and thus trial court's failure to cure with specific unanimity instruction violated defendant's right to jury unanimity);**United States v. Holley,** supra, 942 F2d 928-29 (single count based on multiple, separate acts was duplicitous, and thus, trial court's failure to give specific unanimity instruction violated defendant's right to jury unanimity); **United States v. Beros,** 833 F2d 455, 460-463 (3rd Cir 1987). (single count based on multiple, separate acts was duplicitous and implicated defendant's right to jury unanimity. and thus trial court's failure to give specific unanimity instruction was error and not harmless). But cf. **United States v. Sarihifard,** 155 F3d 301, 310 (4th Cir.1998) (although defendant was charged with single count of perjury premised on multiple, separate instances of conduct, right to jury unanimity was not violated because trial court gave specific unanimity instruction); **United States v. Alsobrook,**supra, at 142-43 (same).

Although, the defendants right to jury unanimity may have been violated, reversal of the defendant's conviction is required only if the defendant establishes prejudice, namely, that the duplicity created the genuine possibility that the conviction resulted from different jurors concluding that the defendant committed different acts. See **United States v. Sarihifard,** supra,at 310; **United States v. Correa- Ventura,** supra, at 1082; **United States v. Holley,**supra, at 926; **United States v. Beros,** supra, at 460-463. But See **United States v. Sturdivant,** supra,at 75; **United States v. Margiotta,** 646 F2d 729, 733 (2nd Cir. 1981). In such cases, courts have invoked principles of fairness in requiring a specific unanimity instruction to avoid any potential for juror confusion.

III. Multiple state courts of last resort agree with the distinction federal courts have made between unanimity claims as to elements and instances, including this courts acknowledgement of both, Along with this Court's clearly established federal law in Ramos and have applied it, contrary to Michigan's jurisprudence.

UTAH

The Utah Supreme Court directs that "In criminal cases the verdict shall be unanimous". To satisfy this constitutional requirement it is insufficient for a jury to unanimously find "only that a defendant is guilty of a crime" and render "a generic 'guilty' verdict that does not differentiate among various charges." **State v. Hummel.**2017 UT 19, P26, 393 P3d 314 (emphasis in original; quotation otherwise simplified). Rather, it "is well-established in our law" that a jury must be unanimous "as to a specific crime" and "on all elements of a criminal charge." **Id.,** at P28-30 (quotations simplified). For example: **State v. Saunders,** 1999 UT 59, 60; 992 P2d 951 (1999), found that, a verdict would not be unanimous if "some jurors found

a defendant guilty of a robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of robbery committed January 15, 1991, in Denver Colorado, even though... all the jurors together agreed that he was guilty of some robbery.

Thus, in Utah, where evidence is presented that the defendant committed more distinct criminal acts than what the defendant was charged with, "the jury must be unanimous as to which act or incident constitutes the charged crime." **State v. Case,** 2020 UT App 81, P21; 467 P3d 893 (2020). (quotations simplified). "To ensure unanimity in such multiple-acts cases, the jury instructions must either (1) link an alleged criminal act to a charge or (2) inform the jury that it must unanimously agree that the same alleged criminal act has been proven beyond a reasonable doubt." **State v. Gollaher,** 2020 UT App 131 P.32, 474 P3d 1018. Such instructions is "critical to ensuring unanimity." **State v. Alires,** 2019 UT App 206, P.23; 455 P3d 636. Otherwise, "the jurors could have completely disagreed on which acts occurred or which acts were illegal." **Id.**, "Thereby effectively lowering the State's burden of proof at trial." **State v. Granere,** 2024 UT App 1, P.38; 543 P.3d 177 (2024).

KENTUCKY

In **Harp v. Commonwealth,** 266 S.W.3d 813, 818 (KY 2008), the Court found that "when the evidence is sufficient to support multiple counts of the same offense, the jury instructions must be tailored to the testimony in order to differentiate each count from the others." **Id.**, atP17. Also in **Martin v. Commonwealth,** 456 SW3d 1, 6 (KY 2015), the Supreme Court of Kentucky identified the two types of "unanimous-verdict violations." (1) "when multiple counts

of the same offense are adjudicated in a single trial" **Id.**, (2) "when a jury instruction may be satisfied by multiple criminal acts by the defendant." This requirement "is violated when 'a general jury verdict [is] based on an instruction including two or more separate instances of a criminal offense. Whether explicitly stated in the instructions or based on the proofs'" **Id.**, (quoting **Johnson v. Commonwealth,** 405 SW3d 439, 499 (KY 2013).

NORTH DAKOTA

Citing numerous cases from other jurisdictions the North Dakota Supreme Court found in **State v. Martinez,** 2015 ND 173, 16; 865 NW2d 391, 396-397.

> "Jury instructions must correctly and adequately inform the jury of the law and must not mislead or confuse the jury. When the defendant is charged with multiple counts of the same offense, a lack of specificity in the jury instructions and the failure to include any destinguising information about the allegations for each count misstates the law and may cause potential unanimity problems. All verdicts in criminal cases must be unanimous. When the jury instructions and verdict forms do not include information identifying the underlying acts for each count and distinguising between the counts and the instructions do not inform the jury that it must unanimously agree on the specific act that formed the basis for each count, the jurors may follow the instructions and unanimously agree that the offense was committed but individually choose different underlying acts to determine guilt. **Id.**, at 18. (citations omitted). See **State v. Marcum,** 166 Wis. 2d 908, 920-922; 480 NW2d 545, (Ct. App. 1992). (If identical verdict forms are permitted from crimes identically charged and only a general unanimity instruction is given, the **door** is left open to the possibility of a fragmented or patchwork verdict with different jurors basing the decision to find the defendant guilty of one count on certain acts and other jurors unsing those same acts to find the defendant not guilty on other counts.)

See also **People v. Cardamone,** 381 Ill. App. 3d 462, 885 NE2d 1159, 1188, 319 Ill Dec. 479 (Ill App. Ct. 2008); **Harp v. Commonwealth,** 266 SW3d 813, 819 (Ky 2008); **R.A.S. v. State,** 718 So. 2d 117,122-23 (Ala 1998).(Applying "either/or" rule

requiring the state elect an act for each count or the jury be instructed that they must all agree which specific act was committed, to protect the defendants right to a unanimous verdict.); **Jackson v. State,** 342 P.3d 1254, 1257 (Alaska Ct. App. 2014). (Applying either /or rule and holding the failure to properly instruct the jury is a constitutional violation.); **State v. Arceo,** 84 Haw. 1, 928 P.2d 843, 874-875 (Haw. 1996). (Failure to properly instruct the jury violated the defendants constitutional right to unanimous verdict.); **Baker v. State,** 948 NW2d 1169, 1176-79 (**Ind** 2011)(applying either/or rule.); **State v. Celis-Garcia, 344** SW3d 150, 158 (Mo. 2011).(Defendant's constitutional right to unanimous verdict violated, Court did not instruct the jury it must unanimously agree on at least one underlying act.); **State v. Weaver,** 1998 MT. 167, 26, 38, 964 P.2d 713, 718 721, 290 Mont. 58(Failure to instruct the jury that it had to reach a unanimous verdict as to at least one specific underlying act for each count was reversible error.) Abrogated by statute on other grounds by **State v. Deines,** 2009 MT. 179 14-16, 208 P.3d 857, 861-62, 351 Mont. 1.

MISSOURI

The Missouri Supreme Court found in **State v. Celis-Garcia,** 344 SW3d 150 (Mo. BANK 2011), that "Amultiple acts case arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count." **Id.,** at 155-156. See **Hoeber v. State,** 488 SW3d 648, (2016).

ALASKA

The Alaska Supreme Court noted in **Kahn v. State,** 278 P3d 893, 899 (Alas. 2012), that in **United States v. Correa-Ventura,** supra, "the Fifth Circuit examined the purpose of unanimous jury verdicts and noted that 'The unanimity rule is a corollary to the reasonable doubt standard, both conceived as a means of guaranteeing that each of the jurors reach a subjective state of certitude' with respect to a criminal defendant's culpability before rendering a conviction." **Kahn,** supra, at 899. (quoting **In re Winship,** infra at 364).

HAWAII

The Hawaii Supreme Court correctly found that "when separate and distinct culpable acts are submitted within a single count charging a sexual assault--any one of which could support a conviction thereunder--and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case in cheif, the prosecution is required to elect the specific act upon which it is relying to establish the 'conduct' element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., and instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt." **State v. Arceo,** 84 Haw. 1, 32-33, 928 P. 2d 843, 874-75 (Haw. 1996).

CONNECTICUT

The Connecticut Supreme Court in 2022 overruled the use of the "Gipson test" and agreed with the distinction federal Courts have drawn between claims of unanimity as to elements and claims of unanimity as to instances of conduct, as a result the state adopted the relevant federal test for claims of unanimity as to instances of conduct found herein. See **State v. Douglas**, 345 Conn. 421, 438-449, 458-463; 258 A.3d 1067, 1092 (2022).

IV. The findings of the Michigan Supreme Court in People v. Cooks, infa, is not only conflicting with many decisions of other state Courts of last resort and multiple United State Court of Appeals' decisions, it has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, Michigan's erroneous findings should not be allowed to stand.

Mr Mauk was charged with 15 separate individual counts in violation of **MCL750.520b**, all alleging the same date and time. The prosecution placed into the proofs more, different, separate, alleged incidents in violation of **MCL 750.520b** than there were counts. In Michigan, the legislature intended to charge each incident in violation of **MCL 750.520b** as separate offenses. See **People v. Dowdy**, 148 Mich App 517, 520-521; 384 NW2d 820 (1986). **People v. Brown**, 105 Mich App 58, 68-69; 306 NW2d 392 (1981); aff'd in part and vacated in part on other grounds in **People v. Robideau**, 419 Mich 485; NW2d 592 (1984); See Also **People v. Sikorski**, 499 Mich 899; NW2d 155 (2016). The Legislature does not permit a charge of continuous course of conduct, thus review of a violation or multiple single violations of **MCL 750.520b** as a continuous course of conduct for a claim of a unanimous jury verdict violation, is not permitted by the Legislature of Michigan, or is it permitted by this Court.

See e.g., **Richardson**, supra, at 817; **Ramos**, supra, at 1397; **Dowdy**, supra, at 520-521.

Affirming Mr Mauks convictions, the Michigan Court of Appeals applied **People v. Cooks**, 466 Mich 503; 521 NW2d 275 (1994), for the foundation of there ruling. The majority in **Cooks** erroneously found:

> "when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act IF the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. **Cooks**, supra, at 530.(emphasis added).

In **Cooks** the majority held that a more specific unanimity instruction was not required. The **Cooks** defendant was charged with only one count of **MCL 750.520b**, but the victim at trial testified about three separate instances of sexual penetration. **Id.**, at 505. These instances allegedly occurred over a three-day period. See **Id.** at506-07. The victim testified that, during each instance, the defendant fondled the victim's breasts and vagina and pushed her against a wall, and the victim "believed" that, each time, the defendant penetrated her anus with his penis. See **Id.**, The victim testified that, for two of these three instances, defendant also kissed her see **ID.**, The trial court gave the jury a general instruction on unanimity, the Court of Appeals vacated the defendants conviction on the basis that the jury needed to be instructed about unanimously agreeing on what specific act of penetration occurred. **Id.**, at 505-506.

Reversing the Court of Appeals decision, the **Cooks** Court erroneously held:

> "the evidence offered in this case to support each of the alleged acts of penetration was materially identical, i.e., the complainant's equivocal testimony of anal penetration, occurring in the same house over an unspecified three-day period in January 1989, while only she and defendant were in the room. Thus, the multiple acts alleged by the prosecutor were tantamount to a continuous course of conduct." **Id.**, at 527-528.

However, the majority in **Cooks.** looked to **Ferris, Sutherland,** and **Duncan,** as the federal support, for cases with claims of unanimity as to "instances of conduct" or "multiple acts" cases. These federal cases utilized the 5th Circuit's "conceptually distinct" "Gipson test", found in **United States v. Gipson,** 553 F2d 453 (5th Cir. 1977).

These cases in **Cooks** were used to support Michigan adopting a "continuous course of conduct" exception without the legislature writing a law providing that the courts could charge or review one's conduct as a "continuous course of conduct". The "Gipson test" allowed for this, using the "distinct conceptual grouping" analogy.

The defendant in **Cooks** claimed a unanimity issue of instances of conduct. **Using** the analogy in **Gipson,** supra, and the following federal and state cases, the Michigan Supreme Court erroneously reviewed the defendant's claim as a claim of elements. In doing so, reviewing his claim as a continuous course of conduct, violating his then State constitutional right to a unanimous jury verdict.

Viewing Mr Mauk's case in the same light, at present time, is now contrary to this court's ruling in **Richardson,** supra, at 817; **Ramos,** supra, at 1397. Multiple state Courts of last resort and federal Courts of Appeals have determined that there are two distinct unanimity claims, when a defendant raises a unanimity claim

as to a duplicitous count, with different tests applying to each. Michigan jurisprudence continues to refuse to recognize this distinction, and continues to follow the erroneous rule of law found in the **Cooks** Court's findings.

The law applied in the **Cooks** Court findings is contrary to this Courts holdings, and the holdings in different jurisdictions of the federal Court of Appeals.

THE "GIPSON TEST"

This Court, in **Schad**, supra, at 635, disapproved of the "Gipson test" stating:

> "we are not persuaded that the **Gipson** approach really answers the question, however. Although the classification of alternatives into "distinct conceptual groupings" is a way to express a judgment about the limits of permissible alternatives, the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions... In short, the notion of "distinct conceptual groupings" is simply to conclusory to serve as a real test." **Id.**, at 635.

Contrary to this Courts holding in **Schad**, **supra**, at 635, the **Cooks** Court found that:

> "[T]he decision in **United States v. Gipson**, 553 F, 2d 453 (CA 5. 1977), is considered a seminal ruling regarding the need for a specific unanimity instruction."

The Court went on to note that:

> "Although the 'conceptually distinct' **Gipson** test was not utilized by the Supreme Court in **Schad**, Its application to the issue now before us by other federal courts has produced an analytical framework that we find instructive." **Cooks**, supra, at 516. (emphasis added).

The "distinct conceptual grouping" test, also known as the "**Gipson** test" did not require that a court analyze whether the statute at issue criminalized a continuous course of conduct, or whether the **unanimity** issue claimed was a claim of elements of the

offense or instances of conduct.

Federal Appellate Courts, including the Fifth Circuit, specifically have held that **Schad** overruled and replaces the **Gipson** test. See e.g., **Maxwell v. Thaler,** 350 Fed. Appx. 854, 857 (5th Cir. 2009)(applying **Schad,** not **Gipson**), cert. denied, 559 US 978, 130 S.Ct.1698, 176 L. Ed. 2d 191 (2010); **Ree v. Quarterman,** 504 F3d 465, 481-82 (5th Cir. 2007)(referring to **Gipson** test as "former test" and applying **Schad** test); **United States v. Verbitskaya,** 406 F3d 1324, 1334 (11th Cir. 2005)(**Schad** rejected **Gipson** analysis), cert. denied, 546 US 1096, 126 S.Ct. 1095, 163 L. Ed. 2d 864 (2006); see also **United States v. Sanderson,** 966 F2d 184, 188 (6th Cir. 1992); "we interpret **Schad** to hold that there must be a commonsense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." **Id., at** 188.

V. In the following cases the Michigan Jurisprudence failed to notice legislative intent, or whether the unanimity issue claimed, or found by the Court, was one of elements or instances of conduct. In turn Michigan adopted the wrong rule of law, with the wrong understanding and application of that law, and is still currently applying this erroneous rule of law today. This Court should not allow this to continue.

THE LAW USED IN COOKS

In **Cooks,** the use of **United States v. Duncan,** 850 F2d 1104 (CA 6, 1988), is out of place, although the defendant in **Duncan** claimed a unanimity claim as of instances of conduct. See **Id., at 1113.** Regardless, this case is misplaced, as it was abrogated by **Schad,** on the same grounds used in **Cooks,** supra, at 516. See **United States v. Schmelts,** 667 F3d 685, 688 (6th Cir. 2011). This

case was overruled before the **Cooks** Court's findings and is misplaced in the **Cooks** Courts decision.

In **United States v. Ferris**,719 F2d 1404 (9th Cir. 1983), which the prosecution heavily relied on in **Cooks**, the Ninth Circuit concluded that different instances of possession did not violate the required unanimity of the jury's decision. But as in **United States v. Ruiz**, 710 F3d 1077 (9th Cir. 2013), possession is a continuing offense, and the court reasoned in **Ferris** that different juror's conclusions that defendant might have been in possession of controlled substance at different times was therefore not inconsistent with the unanimity of the verdict. **Ferris** , was a continuing course of conduct case, where multiple instances could be viewed as a single offense. This case is misplaced as the defendant claimed a unanimity claim of instances of conduct, to the contrary, the Court found that legislative intent, (continuous course of conduct) allowed for the review of multiple instances as to the means of the element of the crime charged. This case was erroneously applied in the **Cooks** decision. As the legislature in **Cooks** intended to criminalize each violation separately, not as a continuous course of conduct. See **MCL 750.520b. Dowdy**, supra, at 520-521.

In **United States v. Sutherland**, 656 F2d 1181 (Ca 5, 1981), The defendant was a judge involved in a scheme with two other defendants, to collect fees for traffic tickets to his docket and then favorably disposing of them. The defendants were indicted for conspiracy to violate: **18 U.S.C. § 1962 (C)**. which provides in part:

> "the conduct of such enterprise's affairs through a **pattern of racketeering activity** or collection of unlawful debt." **Sutherland**, supra, at 1197 (emphasis added).

For the pattern element of the RICO conviction, proof of at lease two acts of racketeering activity is necessary but not sufficient; The government must show that racketeering predicates are related and that they amount to or pose threat of continued criminal activity. See **United States v. Alkins,** 925 F2d 541, 1991 U.S. App Lexis 1761 (2nd Cir. 1991). In other words, the government must show a continuing course of conduct. Again the multiple acts here are the means to proving the element of the offense charged. The unanimity issue here was of elements, not instances of conduct. This case is misplaced in the **Cooks** court finding, thus being erroneously applied in the **Cooks** Court ruling.

In **State v. Spigarolo,** 210 Conn. 359; 556 A.2d 112 (1989). The Connecticut Supreme Court unilized the "**Gipson** test". In 2022 the Connecticut Supreme Court found:

> "The **Gipson** test did not require that a court analyze whether the statute at issue criminalized a continuous course of conduct and is not the proper test for determining claims of unanimity regarding instances of conduct." **State v. Douglas,** 345 Conn. 421, 458; 285 A.3d 1067, 1092 (2022). (emphasis added).

The Connecticut Supreme Court overruled the cases that used the "**Gipson** test" and adopted a new federal test for unanimity claims that clearly distinguishes between unanimity claims involving a single count premised on multiple separate instances of conduct (the instant case), and unanimity claims involving a single count premised on the violation of multiple statutes, statutory subsections or statutory clauses. See **Id.**, at 438.

This case is misplaced in **Cooks** as the Connecticut Supreme Court noted in **Spigarolo,** the state charged risk of injury count under the "situation" prong of § 53-21. "This court had interpreted

§ 53-21 as criminalizing a continuing course of sexual contact in which a child was placed in a situation that was likely to be harmful to the child's health and morals." See **Douglas,** supra, at 467. Again this case is misplaced, the legislature was found to charge a continuing course of conduct. The legislature in **Cooks** did not criminalise a continuing course of conduct. This case is misplaced in the **Cooks Court** finding, thus being erroneously applied in the **Cooks** Court ruling.

The use of California cases in **Cooks** is misplaced. California legislature passed legislation criminalizing a continuing course of conduct in cases' involving child sex offenses. See, **Cal pen code § 288.5.** Michigan did not. See **MCL 750.520b; Dowdy,** supra, at 520-521.

These federal and state cases were erroneously applied in the **Cooks** decision, Justice Levin explained this in his dissent:

> "The court proceeded to distinguish 'alternative means' cases from 'alternative acts' cases"--"This is not an 'alternative means' case." **Cooks,** supra, at 533.

The **Cooks** Court ruling is in direct opposition of the acknowledgement this court made in **Schad** and **Richardson** along with the federal court of appeals, and state supreme court rulings herein. The **Cooks** Court decision was wrongfully decided and should have required a specific unanimity instruction. The legislature intended to criminalize each instance of criminal conduct. The defendant in **Cooks** was charged with a single count of **MCL 750.520b,** the prosecution placed into the proofs during trial three instances of conduct. Each instance of conduct was a violation of the statute. Without the proper jury instruction, it is possible the duplicity

created the genuine possibility that the conviction resulted from different jurors concluding that the defendant committed different acts.

The majority in **Cooks** failed to give effect to the Michigan legislature's intent of MCL 750.520b and reviewed the defendant's conduct as a continuous course of conduct. In turn reviewing for a claim as to elements instead of a claim of instances of conduct which was actually the claimed issue--setting an erroneous ruling for Michigan Courts to follow for the next 30 years.

VI. The following states have found Michigan's Supreme Courts findings in the majority's opinion to be so erroneous they blatantly adopted the dissent in People v. Cooks, supra, at 530.

HAWAII

State v. Rabago, 103 Haw. 236, 81 P3d 1151 (Haw. 2003), noted: "we adopted the approach of Justice Levin's dissent in **People v. Cooks,** 466 Mich. 503, 521 N.W.2d 275 (Mich. 1994), which argued that 'multiple sex acts do not merge into a single continuing offense because the defendant can be convicted and punished for each separate act.'" **Arceo,** supra, at 16, (quoting **Cooks,** 521 N.W.2d at 288., (Levin, J., dissenting)).

ALABAMA

In **R.G.L. v. State,** 712 So. 2d 348; 1997 Ala. Crim. App. Lexis 257, The Alabama Supreme Court took note of 'the criticism" of the Michigan Supreme Court ruling found in **Cooks, in Arceo,** supra, at 857-858. The Alabama Court found the "criticism" persuasive. In turn the court noted that "we must give effect to the legislature's intent as expressed in the pertinent statutes. **Id.,**

A defendant in a criminal case in entitled to have a unanimous jury verdict. See **Ramos**, supra at 1397. When the state offers multiple acts to convict on a single count, and each act constitutes a violation of the statute. The prosecution must elect which incident/act it relies on for conviction. Unless the court requires a specific unanimity instruction, there is no assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime with which the defendant is charged. **In re Winship**, 397 U.S. 358; 90 S.Ct. 1068; 25 L. Ed. 2d 368 (1970).

Applying the relevant federal test, herein, to Mr Mauk's claim Mh testified to more alleged incidents in violation of **MCL 750.520b** than were charged in Mr Mauk's charging document, See Appendix H (timeline of MH's testimony). Mr Mauk was charged with 15 counts inviolation of **MCL 750.520b**, each charging the same date and time. The amount of incidents introduced at trial, combine with the vague verdict forms and general unanimity instruction, allowed each juror multiple separate, distinct and generic, statutory violations as alternative means to meeting a given element of each identical charged offense. Each instance of conduct constituted a separate violation of **MCL 750.520b**. The statute at issue does not contemplate criminalizing a continuous course of conduct, nor was a specific unanimity instruction given to the jury. Each count in Mr Mauk's trial was duplicitous.

Mr Mauk's Sixth Amendment right to unanimous jury verdicts were violated. The jury should have been given a specific unanimity instruction, with specific verdict forms.

Mr Mauk claimed that trial counsel was ineffective for stipulating to the final jury instructions and failing to request a specific unanimity instruction.

To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors. The result of the proceeding would have been different." **Strickland v. Washington,** 466 US 668, 694 (1984). The **Strickland** Court explicitly rejected an outcome determative test, whether counsel's deficient conduct more likely than not altered the outcome in this case. **Id.,** at 693. This Court reasoned that the outcome of a case which includeds deficient conduct is less entitled to presumption of accuracy and fairness. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Id.,** at 694.

Mr Mauk asserts prejudice is demonstrated because the jury was potentially confused about which count corresponded to which instance of conduct. The jury was given, during trial, more instances of alleged conduct to choose from than there were counts charged. The state did not present it's proofs to the jury in a sufficient sequential factual basis. The prosecution gave the jury no direction in his closing argument. The Court during final jury instructions gave the jury no way to connect the counts with the alleged instances testified to during trial. See appendix L (final jury instructions). The jury was given 15 identical verdict forms with identical jury instructions. See Appendix J (verdict forms). The duplicity in this case created the genuine possibility that the convictions resulted from different jurors concluding that Mr Mauk committed different acts in each count.

of conduct in unanimity claims, the federal Courts of Appeals have made herein. Michigan's ruling in **Cooks** is clearly erroneous and violating constitutional rights of the accused. Thus it cannot be allowed to stand. The distinction between elements and instances that other State Courts of last resort have made are inline with this Court's recognition and rulings along with the rulings of the federal Court of Appeals in many jurisdictions. This Court's distinction on this mater will clear the air in this frenzy of filings on unanimity.

Sex crimes are one of the most common criminal matters seen in the jurisprudence of America today. The plight of the litigants and the trial Courts who, have been charged with ensuring a defendants guarantee of unanimous verdict, is embodied in the jury instructions, and are left with minimal guidance from this court, when the scenario of multiple specific and generic acts of abuse, become the reality for some courtrooms. This Courts guidance and clearly established law, would prevent and protect erroneous State Court rulings like Mr Mauk's and the **Cooks** Court ruling.

RELIEF REQUESTED

Based upon the controlling rule of law examined herein, it is Mr Mauk's submission that the only manner in which the constitutional violations under scrutiny can be adequately cured is to direct and compel Michigan Courts, particularly trial Courts. To give adequate and proper jury unanimity instructions in a "miltiple acts case", to ensure that a deliberating juror/jury is provided the actual elements and attendant circumstances pertaining to each charged count of the indictment, and which act applies to each individual count, to allow a constitutionally sufficient finding as to whether the reasonable doubt and unanimous jury verdict standards are provided for. Furthermore for the Michigan Appellate and Supreme Court jurisprudence to adopt and utilize United States Supreme Court rule of law as binding precedent. For these reasons, this Court should grant the petition for a writ of Certiorari.

Respectfully submitted,

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