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STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 2018AP2128-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TRAVANTI D. SCHMIDT,

Defendant-Appellant-Petitioner.

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PETITION FOR REVIEW

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PETITION FOR REVIEW

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The Defendant-Appellant-Petitioner, Travanti D. Schmidt, by Attorney David R. Karpe, of Madison, Wisconsin, hereby petitions this Court, pursuant to Wis. Stat. §§808.10 and 809.62, to review the June 10, 2021 decision of the court of appeals in this case.

### **ISSUES PRESENTED**

1. Was the evidence insufficient to convict the defendant of assault where the evidence indicates that the defendant's intent was to assault a different person, not the victim?

The court of appeals held that it was irrelevant whether or not any victim was struck with saliva, so the doctrine of transferred intent does not apply.

2. Was the charge so vague and duplicitous as to whom the victim was so that the Court should reverse even though there was no contemporaneous objection?

The court of appeals held that the claim that the charge was not duplicitous was either waived or forfeited.

3. Did the jury instructions violate the requirement of jury unanimity?

The court of appeals held that the law is unsettled, so that the failure of trial counsel to object to the instruction was not ineffective assistance of counsel.

### **CRITERIA FOR REVIEW**

Even though the decision below, *State v. Schmidt*, 2018AP2128-CR (June 10, 2021), is an unpublished *per curiam* decision that may not be cited as authority, the Supreme Court ought to grant review because the Court's determination of the issue in this case would have statewide application. Review will help develop the law and provide guidance to judges throughout the state. In summary, the court of appeals could not reach the merits of the jury unanimity claim in this case because the law is unsettled, but the Wisconsin Supreme Court has the authority to review the unanimity claim without finding ineffective assistance of counsel.

### **STATEMENT OF THE CASE**

This was a direct appeal under Wis. Stat. (Rule) § 809.30 of a conviction in a criminal felony matter.

### **Statement of Facts**

The facts as stated in the decision of the court of appeals are essentially correct and not in dispute. The “background” section of the opinion states,

The State filed a criminal complaint charging Schmidt with one count of assault by a prisoner with a bodily substance, in violation of Wis. Stat. § 946.43(2m)(a) (2019-20). The complaint alleged that Schmidt, a prisoner confined to the Wisconsin Secure Program Facility in Boscobel, Wisconsin, expelled saliva at or toward “Victim 1” while Victim 1 was escorting Schmidt from a holding cell to another cell. The case proceeded to trial. Correctional officers C.F. and S.P. testified to the following facts. On December 22, 2014, Schmidt was being moved through a hallway by correctional officers, including C.F., while S.P. stood off to the side. As he was being escorted, Schmidt shouted derogatory remarks and profanity at S.P. and another officer. Schmidt turned his head toward S.P., and C.F. instructed Schmidt to “face forward.” At approximately the time that C.F. gave Schmidt the instruction to face forward, C.F. and S.P. heard Schmidt clear his throat to bring up spit. As Schmidt prepared to spit, C.F. brought up his arm to block the spit. Schmidt spat in the direction of S.P., and the saliva landed on C.F.’s right arm, shoulder and chest. Schmidt also testified at trial, stating that he never spat or

yelled at any of the officers. Instead, he testified that he “had some painful expression coming out” because C.F. stepped on his injured foot. When asked if the substance seen in one of the videos shown to the jury was spit, Schmidt responded that it was not spit but was instead “light from the top of the ceiling” and that the placement of the camera near a bright light made the light appear as spit. The jury found Schmidt guilty as charged. Schmidt filed his first appeal, arguing that the evidence was insufficient to support his conviction and that his charge was duplicitous. In response, on March 8, 2018, this court issued an order (referred to in this opinion as the 2018 order) in which we concluded that Schmidt’s arguments may have implied a unanimity problem; therefore, we provided Schmidt with an opportunity to decide whether to pursue a jury unanimity claim. Schmidt decided to pursue the jury unanimity issue and, over the State’s objection, we dismissed the appeal without prejudice, concluding that Schmidt’s arguments were best addressed through the postconviction process. Schmidt filed a motion for postconviction relief, arguing that he had received ineffective assistance of trial counsel due to counsel’s failure to object to the jury instruction setting forth the elements of Wis. Stat. § 946.43(2m)(a), which Schmidt contends violated his right to a unanimous verdict. The circuit court denied the motion without a hearing, concluding that, pursuant to § 946.43(2m)(a), the jury need only have unanimously agreed that a correctional officer was the target of Schmidt’s assault and did not have

to unanimously agree as to which correctional officer was the specific target.

*State v. Schmidt*, 2018AP2128-CR at 2-4.

Rejecting Mr. Schmidt's sufficiency of evidence claim, the court held that under the assault-by-prisoner statute, Wis. Stat. § 946.43(2m), because there is no requirement that the spit contact anyone, it does not matter whether the spit contacted a different officer than the officer towards whom the spit was intended. *State v. Schmidt*, 2018AP2128-CR at 5-7.

Regarding the duplicity argument, the court held that it could not review the defect in the charging document or the jury instructions. *Id.* at 7-12.

Finally, regarding the jury unanimity claim, the court of appeals held that it could only reach the question by way of an ineffective assistance of counsel claim, and that because the law is unsettled on this point, there could be no ineffective assistance of counsel. *Id.* at 12-19.

## ARGUMENT

The Court Should Grant Review Because the Court's Decision Will Help Clarify Whether it Violates Jury Unanimity Where Instructions Are Not Clear Who the Victim of a Crime Was.

The court of appeals held that under *State v. Trammel*, 2019 WI 59, 387 Wis.2d 156, 928 N.W.2d 564, and *State v. Zelenka*, 130 Wis.2d 34, 387 N.W.2d 55, it could not review un-objected-to jury instructions. This Court may do so, and the Court should grant review in order to consider that the instructions violated jury unanimity. While the decision of the court of appeals (and possibly the Petitioner's brief) somewhat conflated the duplicity and the jury unanimity issues, but given the court's holding that the law regarding jury unanimity as to victim identity is unsettled, it is an invitation for this Court to resolve this first-impression question. As the court of appeals stated, this case does not require us to definitively conclude whether Wis. Stat. § 946.43(2m)(a) requires jury unanimity as to the identity of the target of the assault. Rather, we need

only address whether trial counsel's failure to object to the jury instructions on unanimity grounds was "'outside the wide range of professionally competent assistance'" so as to constitute deficient performance.

*Schmidt* at 19.

This is an interesting question of statewide importance for the Court to consider. The question as to whether it violated the unanimity requirement to fail to have the jury specify whom they were finding as the victim may be a case of first impression in Wisconsin. There is case law from Texas supporting that a capital murder defendant's right to a unanimous verdict is violated if "the record reflects a possibility that the jury did not agree on which victims were killed in a transaction. *See Saenz v. State*, 451 S.W.2d 388, 391 (Texas Court of Criminal Appeals 2014) (The jury charge did not apprise the jury of the proper unanimity requirement because it did not specify the killing of any one victim as the predicate murder and the jury was not required to specify which two or more of the five

alleged victims they agreed Ms. Saenz had murdered.).

Similarly, under federal law, the jury must unanimously agree as to who was the intended victim of a murder conspiracy in order to adequately protect a defendant's right to a unanimous verdict. *See United States v. Gonzalez*, 786 F.3d 714, 716, 719 (9th Cir. 2015). In other words, if the instructions fail to guarantee that the jury was unanimous regarding whether alleged victim A or alleged victim B was the victim of the conspiracy, the verdict must fail, just as it must fail here, where the instructions do not permit the reviewing court to conclude with confidence that the jury verdict meant either that alleged victim A or alleged victim B was the victim of the alleged assault by Mr. Schmidt. That Mr. Schmidt testified that he did not spit at all does not waive this issue, because the jury obviously rejected his testimony and instead found that he had directed saliva at someone. The verdict does not answer the question of who that someone was.

The plain language of Wis. Stat. § 946.43(2m) does

not envision that a victim need not be specified. It states, in relevant portion, “Any prisoner confined to a state prison ... who ... expels ... saliva ... at or toward *an* officer ... is guilty of a class I felony [if t]he prisoner expels ... the saliva ... with the intent that it come into contact with the officer [and t]he prisoner expels ... the saliva with the intent ... to abuse *the* officer [and t]he officer does not consent to the ... saliva ... being expelled at or toward *him or her*. (emphasis added).

I note several things here: 1. the statute speaks of expelling saliva at or toward *an* officer, not multiple persons. 2. it specifies that the intent of the defendant be that the come into contact with “*the* officer,” not “officers” or some other plural noun, 3. the intent must be to abuse *the* officer, not to abuse officers in general or two or more officers, and 4. *the* officer, not officers, or group of officers does not consent. If the legislature intended that a victim need not be specified, the legislature would have or should have stated the offense differently, or specified that the

offense need not be charged or proven regarding a specific victim.

“An” officer in the first mention, using the indefinite article, used when mentioning a noun for the first time. *See, e.g.,* [www.english-at-home.com](http://www.english-at-home.com) (viewed November 20, 2019). The use of the definite article in second and subsequent mention of the officer is significant because (a) it refers to one officer, and (b) the definite article refers to unique or specific things, in this case, the specific officer who was at first mentioned in the first reference with the indefinite article. Had the legislature chosen to use indefinite articles throughout the statute, the meaning would have been different. “A” is commonly in the singular, signifying “one and only one.” There is a competing argument that “it may in the alternative precede a noun when the thing named is not already known to the reader. In other words the indefinite article ‘a’ may [in some contexts, at least,] mean ‘any’ rather than only one. *Local 321, International Association of Firefighters v. Racine*, 2013

WI App 149, ¶19, 352 Wis.2d 153, 841 N.W.2d 830. At the risk of seeming to set up a straw man, this does not always apply: “When used as an indefinite article, it means some undetermined or unspecified particular.” *McFadden v. United States*, 576 U.S.186, 135 S. Ct. 2298, 2304 (2015). When “the” is used, however, especially when it follows the same noun that had been preceded with “a,” there can be little doubt that the legislature’s use of the definite article means the victim has to be a specific person within ones of the named classes in the statute, and not just persons in general.

“Words are to be given the meaning that proper grammar and usage would assign them,” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012). Unless there would be some other indication of legislative intent that the law does not require unanimity of verdict as to the identity of a particular victim, grammar and usage would rule, establishing that “the” is “a function word indicating that a following noun or noun equivalent is

definite or has been previously specified by context.” *Nielsen v. Preap*, 139 S.Ct. 945, 965 (2019) (quoting from the dictionary).

“The” thus stands for particularity. *See Work v. United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200, 208 (1923) (The use of the definite article in a reference to “*the* appraisalment” meant “an appraisalment specifically provided for.”).

Thus, the statute calls for consideration by a jury of “the officer’s” lack of consent and intent to spit at or toward a particular officer and intent to abuse a particular officer, not all officers in general.

### **CONCLUSION**

For the reasons set forth above, Mr. Schmidt respectfully requests that this Court grant review in this matter.

Respectfully submitted this 12th day of July, 2021.

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**CERTIFICATE**

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I certify that this petition meets the criteria under Rules 809.19(8)(b), and 809.62(4), Stats., for a petition produced with a proportional serif font. The petition is 2,528 words long.

Signed,

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David R. Karpe

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**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)**

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I hereby certify that I have submitted an electronic copy of this petition which complies with the requirements of s. 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Signed,

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David R. Karpe