

[CAPTION]

MOTION FOR STATE TO ELECT

Comes now Defendant, in person and by counsel, and hereby requests an order requiring the State to elect a specific act upon which the jury may unanimously agree for each of the charged counts in the case. In support of this motion, defendant would show the following:

1. [name] is charged in a [insert number] count Information. [Specify charges filed with a brief description of the offense and time period alleged. E.g. Count I, Child Molest, alleges sexual intercourse and spans a time period of four years (specify dates).]
2. Indiana has “long required that a verdict of guilty in a criminal case must be unanimous.” Fisher v. State, 291 N.e.2d 324, 333 (Ind. 1973)”
3. Indiana has also long recognized “that time is not of the essence in the crime of child molesting.... Depending on the facts of a particular case, applying the rule of jury unanimity can present difficult challenges in charges of child molesting.” [Internal citations omitted] Baker v. State, 948 N.E.2d 1169, 1174 (Ind. 2011).
4. The Baker Court discussed that jury unanimity is at issue where evidence is presented of a greater number separate criminal offenses than the defendant is charged with. “The procedure most commonly followed to balance the need to prosecute cases involving repetitive acts charged in a single count with the defendant’s assurance of unanimity has been described as the ‘either/or’ rule. That is to say, the defendant is entitled *either* to an election by the State of the single act upon which it is relying for a conviction *or* to a specific unanimity instruction.” Id. at 1175-1176.
5. The facts in the present case are similar to those in the *Baker* case. Wells is charged in four counts but it is anticipated, as a result of the taking of [alleged victim’s] deposition, that she will testify, [insert relevant facts]. It is further anticipated that she will testify that the sexual abuse happened “every other night” and she will generically describe the sexual abuse.

During the course of the deposition, she was not able to provide specific details or facts of

any particular incident. She testified that the same thing happened in the same manner every other night and as she got older, the nature of the sexual abuse changed. The four counts filed against [name] encompass the hundreds of times he is alleged to have sexually abused [alleged victim]. Based upon the nature of the anticipated testimony and the manner in which [name] has been charged, it will be impossible to know if the jurors have agreed upon which acts the defendant committed and it will be impossible to ensure that each juror has considered the same occurrence. [Name] will be better able to assert a defense and will be protected from double jeopardy if the State is required to elect the acts upon which it will rely for each count charged.

6. In reaching its decision in Baker, the Indiana Supreme Court relied upon analysis of the issue made by several jurisdictions. The arguments for an election of offenses can be summarized by one Texas court as follows: First, a failure to elect leaves the door wide open for the possibility of a non-unanimous verdict and a defendant has a constitutional right to a unanimous verdict. Second, a failure to elect results in a defendant not having adequate notice as to which charge he must defend against, thus infringing on a defendant's constitutional right to due process and effective assistance of counsel. Third, a failure to elect leads to the possibility that a jury might tend to convict not because it found beyond a reasonable doubt that each of the offenses was committed, but because it was convinced of guilt because of the number of alleged incidents. Fourth, a failure to elect could impact a defendant's right to claim his constitutional right against double jeopardy in any future, related prosecutions. Finally, it may impede appellate review of the sufficiency of evidence.

See Phillips v. State, 130 S.W.3d 343, 350 (Tex. App. 2004.)

WHEREFORE, Defendant, [name] respectfully requests this Court order the State to elect the specific acts it intends to rely upon for conviction for each count filed against him and for all just and proper relief in the premises.

[signature]