STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER
DISMISSING TWO CRIMINAL COUNTS,
ENTERED IN SHEBOYGAN COUNTY
CIRCUIT COURT, THE HONORABLE
TERENCE T. BOURKE PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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I. CHARGING PERIODS OF FOUR MONTHS AND THREE AND ONE-HALF MONTHS FOR CHILD SEXUAL ASSAULTS THAT WERE NOT REPORTED UNTIL FIFTEEN YEARS AND ELEVEN YEARS AFTER THEIR ALLEGED COMMISSION PROVIDE SUFFICIENT NOTICE TO ALLOW KEMPAINEN TO PLEAD AND PREPARE A DEFENSE TO THE CHARGES.

As the parties' briefs demonstrate, the two leading Wisconsin cases on the issue presented are *State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), and *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988). Both *Fawcett* and *R.A.R.* were decided twenty-five years ago, only six months apart. Unfortunately, the factors this court adopted in *Fawcett* do not transfer well to the situation here, i.e., an adult reporting sexual assaults that occurred when she was a child. Nor does *R.A.R.* – the first reported case to apply *Fawcett* – recognize that where there is a long delay between the alleged crime and its reporting, it will normally be more difficult to narrow the charging period than if the offense was reported immediately. As a result, if the fifth and sixth *Fawcett* factors are given the great weight the *R.A.R.* court accorded them, then a strict application of *R.A.R.* will likely nullify the legislature's intent to allow the prosecution of child sexual assaults that are not reported until decades after their commission.

If this court shares these concerns – discussed in more detail below – but feels hamstrung by the

rule that it may not overrule, modify or withdraw language from its prior published decisions,[1] then the State asks this court to certify this appeal to the Wisconsin Supreme Court.

A. The factors *Fawcett* identified as assisting in the determination of whether a criminal charge satisfies a defendant's due process right to notice do not transfer neatly to a situation where an adult reports sexual abuse she suffered as a child.

In *Fawcett*, this court used a seven-factor "reasonableness" test taken largely from *People v. Morris*, 461 N.E.2d 1256 (N.Y. 1984), to determine whether the test established in *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968),[2] had been satisfied. The first *Fawcett* factor is "the age and intelligence of the victim and other witnesses." *Fawcett*, 145 Wis. 2d at 253.

That factor makes sense within the context of the underlying facts in both *Fawcett* and *Morris*, but it is of far less utility where an adult victim reports sexual assaults endured when she was a child.

Fawcett involved a ten-year-old victim who was first interviewed by police on December 11 or 12, 1985, a mere four or five days after the crime was originally alleged to have occurred, i.e., on December 7, 1985. *See* Brief of Plaintiff-Respondent in *State v. Fawcett*, No. 87-0692-CR

[1] *See In re Marriage of Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

[2] The *Holesome* test is set forth in the State's brief-in-chief at 7.

(Wis. Ct. App.), at 11, found in Appendices and Briefs, 145 WIS.(2D) 244-308, Tab 1. Only after Fawcett at the preliminary hearing produced an alibi witness – a priest who testified that Fawcett was attending a religious retreat in Chicago from the evening of December 6 through the afternoon of December 8 – did the State amend the charging period to allege two counts of unlawful sexual contact during the six months preceding December of 1985.[3]

Under these circumstances, this court found no due process violation even though one would expect the short gap between the incident and the child's report would make it easier to narrow the charging period.

Similarly, the sexual assaults in *Morris*, where the victims were only five and six, were reported shortly after their commission, with Morris being arrested a mere twelve days after the end of the twenty-four-day charging period and indicted five months after the alleged acts occurred. *See Morris*, 461 N.E.2d at 1260. The New York court found the charging period constitutionally adequate even though it acknowledged that "it would be easier to prepare an alibi defense if the exact date and time of the offense were known and provided." *Id.*

In *Fawcett* and *Morris*, the alleged victims were young children at the time of the incidents as well as when the incidents were reported shortly after

[3] These facts are taken from *Fawcett v. Bablitch*, 962 F.2d 617, 618 (7th Cir. 1992), the decision in Fawcett's federal habeas corpus appeal. There the Seventh Circuit disparaged Fawcett's reliance on the approach taken by the court in *People v. Morris*, 461 N.E.2d 1256 (N.Y. 1984), saying it was "not a 'test' so much as it is an agenda for inquiry." 962 F.2d at 619.

their commission. Accordingly, there was no confusion regarding how to evaluate the intelligence of the victim, the first *Fawcett* factor. In contrast, where the report of sexual abuse occurs fifteen years (count one) or eleven years (count two) after the crime, and the alleged victim is now twenty-three, it is unclear whether the court is supposed to make a retrospective determination of the alleged victim's intelligence when she was fifteen years or eleven years younger. If so, how does the court go about doing so? Relatedly, does this factor become less relevant when the alleged victim is an adult by the time she reports being sexually assaulted?

Significantly, the *Morris* court said that the factors a court should examine to determine the reasonableness of the charging period "should not be limited to" the factors enumerated there. 461 N.E.2d at 1260. Because *Fawcett* was based on *Morris*, this court should clarify that the *Fawcett* factors are merely guidelines and do not necessarily apply where the alleged victim is an adult when he or she reports the abuse. Alternatively, if this court does not believe it has the authority to do so, it should ask the supreme court to review this case.

B. Given that the legislature greatly expanded the statute of limitations for child sexual assault between *State v. R.A.R.* and the crimes Kempainen allegedly committed, the fifth and sixth *Fawcett* factors no longer lend as much support to his argument that the complaint was insufficiently definite.

In *R.A.R.*, 148 Wis. 2d 408, the defendant was charged in August of 1987 for crimes committed against his sisters in 1982 and 1983. *Id.* at 409. The first and second charges were alleged to have occurred during the spring of 1982; the third charge during the summer of 1982; and the fourth charge during the summer of 1983. *Id.* In response to a defense motion, the trial court dismissed the complaint and information after the State was unable to narrow the charging periods for the alleged offenses to forty days or less. *See* Brief and Appendix of Plaintiff-Appellant in *State v. R.A.R.*, No. 88-1008-CR (Wis. Ct. App.), at A-Ap. 105-06, found in Appendices and Briefs, 148 WIS.(2D) 400-419, Tab 2.

On the State's appeal from the dismissal order, this court agreed that the four charging periods were insufficiently definite. 148 Wis. 2d at 413. In so concluding, this court gave great weight to the four-to-five-year intervals between the alleged offenses and the filing of the complaint and R.A.R.'s arrest in August 1987. *Id.* at 412.

Seizing on this aspect of *R.A.R.*, Kempainen asserts that "fifteen years separating a single alleged incident is unreasonable and unfairly denies due process to the accused." Kempainen's

brief at 18-19. Kempainen thereby suggests that where – as here and as in *R.A.R.* – a lengthy delay occurs between the alleged crimes and the defendant's arrest and/or the filing of the complaint, due process demands a shorter charging period than is required where the crimes are temporally closer to the charging and/or defendant's arrest. While this suggestion makes sense if *R.A.R.* is viewed in isolation, the legislature's subsequent expansion of the statute of limitations for child sexual assault means that the fifth and sixth *Fawcett* factors no longer lend as much support to Kempainen's position. If they did, then a strict application of *R.A.R.* would defeat the legislature's oft-expressed intent to allow the prosecution of child sexual assaults that are not reported until decades after their occurrence.

When the crimes charged against R.A.R. occurred, there was a six-year statute of limitations for all felonies, including child sexual assault. *See* Wis. Stat. § 939.74(1) (1981-82). Even when *R.A.R.* was decided in 1988, this six-year limitation period governed. *See* Wis. Stat. § 939.74(1) (1985-86).

In contrast, by the time the crimes charged against Kempainen allegedly occurred, the legislature had dramatically expanded the statute of limitations. For count one, the applicable statute of limitations in 1997 allowed charges to be filed "before the victim reaches the age of 26 years." Wis. Stat. § 939.74(2)(c) (1995-96). And by the time the complaint was filed in 2012, the statute of limitations had been enlarged even more, allowing charges to be brought at any time

"before the victim reaches the age of 45 years." Wis. Stat. § 939.74(2)(c) (2011-12).

Likewise, for count two the applicable statute of limitations in 2001 allowed charges to be filed "before the victim reaches the age of 31 years." Wis. Stat. § 939.74(2)(c) (1999-2000); by the time the complaint was issued, § 939.74(2)(c) allowed charges to be brought any time before LRT turned forty-five.

The result of this expansion is that unlike the legal landscape when this court decided *R.A.R.,* charges of child sexual assault may now legally be brought decades after the crime occurred. In that situation, it is unrealistic to believe that the prosecutor will be able to narrow the charging period so that it is *shorter* than the permissible charging period for crimes that are prosecuted shortly after their commission. Yet if *R.A.R.* is read to require that the fifth and sixth *Fawcett* factors be weighed heavily against the State whenever there is a long hiatus between the alleged offense and issuance of the complaint and/or defendant's arrest, it will be exceedingly difficult – if not impossible – to prosecute decades-old sexual assaults. In those cases, it is unlikely the State will be able to narrow the charging period from the three months found impermissible in *R.A.R.* This inability is natural and expected, given that evidence helping to pinpoint the actual dates of a child sexual assault committed decades earlier – such as calendars, diaries and employment records – will normally be less readily available than if the crime was reported shortly after its occurrence, the situation in both *Fawcett* and *Morris*

Illustrative is *State v. MacArthur*, 2008 WI 72, 310 Wis. 2d 550, 750 N.W.2d 910. MacArthur was charged in January 2006 with multiple counts of sexual intercourse with a child and indecent behavior with a child occurring between 1965 to 1972. In a pretrial appeal, the supreme court rejected his argument that the Due Process Clause barred his prosecution, noting that MacArthur conceded he could not establish that the State delayed prosecuting him for improper reasons, one of the showings required to make out a due process violation. 310 Wis. 2d 550, ¶ 45.

The appendix to MacArthur's supreme court brief reveals that the first two counts involving JMD as the victim specified thirteen-month charging periods, i.e., from February 7, 1966 to March 6, 1967, while the third count involving JMD covered twenty-two months, i.e., from August 15, 1970 to June 15, 1972. *See* Defendant-Appellant-Cross-Respondent's Brief and Appendix in *State v. MacArthur*, No. 2006AP1379-CR (Wis. Sup. Ct.), at A-Ap. 108-12, reproduced in the appendix to this brief as A-Ap. 142-46.[4]

To like effect is *State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289, 786 N.W.2d 227, where the court found no due-process violation despite the passage of thirty-six years between the crimes and the issuance of charges. *Id.* at ¶¶ 44, 56. Similar to the lengthy charging periods involved in *MacArthur*, the charging period in *McGuire* covered more than two years, i.e., from the fall of 1966 until the end of December 1968. *See* Brief and Appendix of Defendant-Appellant-Petitioner in *State v.*

[4] The appendix to this brief is paginated consecutively to the appendix in the State's brief-in-chief and begins at A-Ap. 142.

McGuire, No. 2007AP2711-CR (Wis. Sup. Ct.), at 1.

The State acknowledges that *MacArthur* and *McGuire* are unlike this case in that the defendants in those cases did not claim that the charging periods were insufficiently definite to satisfy due process. What *MacArthur* and *McGuire* do, however, is refute Kempainen's assertion that a fifteen-year delay between the conduct underlying a criminal charge and the filing of the complaint "is unreasonable and unfairly denies due process to the accused." *See* Kempainen's brief at 18-19.

MacArthur and *McGuire* also illustrate that when prosecutions for child sexual assault are allowed to proceed decades after the underlying crime or crimes occurred, the charging periods will often be longer than if the prosecution followed closer on the heels of the charged misconduct. This means that if *R.A.R.* is read to prohibit charging periods of three months or less when five years or more elapse between the alleged crime and the filing of charges, then the legislature's intent – clearly expressed through repeated enlargement of the statute of limitations – to allow prosecution of decades-old child sexual assaults will be stymied. This court should prevent that from happening, either by giving less weight to the fifth and sixth *Fawcett* factors in cases like the present or, alternatively, by certifying this case to the Wisconsin Supreme Court so that it can re-examine the viability of *R.A.R.* and *Fawcett*, cases decided a quarter-century ago.

II. OTHER COURTS HAVE FOUND CHARGING PERIODS AS BROAD AS OR BROADER THAN THE ONES HERE CONSTITUTIONALLY ADEQUATE.

While Wisconsin has no recent published decisions allowing charging periods for child sexual assault as broad as or broader than the ones here, plenty of post-*R.A.R.* cases from other jurisdictions find no constitutional violation under similar circumstances.

For example, in *Vernier v. State*, 909 P.2d 1344, 1350-52 (Wyo. 1996), the court found that charging periods of sixty days for child sexual abuse allegedly committed seventeen years earlier and ninety days for child sexual abuse allegedly committed ten years earlier were sufficient under both the United States and Wyoming constitutions.

More recently, the Sixth Circuit in *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005), cited several federal decisions finding that notice was constitutionally sufficient in child abuse prosecutions featuring fairly broad charging periods:

> This Court and numerous others have found that fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements. *See Isaac v. Grider,* 2000 WL 571959 at *5 (four months); *Madden v. Tate,* 1987 WL 44909, at *1-*3 (6th Cir. 1987) (six months); *see also Fawcett v. Bablitch,* 962 F.2d 617, 618-19 (7th Cir. 1992) (six months); *Hunter v. New Mexico,* 916 F.2d 595, 600 (10th Cir.1990) (three years); *Parks v.*

Hargett, 1999 WL 157431, at *4 (10th Cir. 1999) (seventeen months).

Although not controlling, the above cases severely undercut the trial court's conclusion that the four-month charging period in count one and the three-and-one-half-month charging period in count two provide insufficient notice to Kempainen so as to allow him to plead and prepare a defense to the charges.

CONCLUSION

For the reasons set forth in the State's opening brief and this brief, this court should reverse the trial court's order dismissing the charges against Kempainen or, alternatively, should certify this case to the Wisconsin Supreme Court to allow that court to re-examine *R.A.R.* and *Fawcett*.

Dated this 10th day of January, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2561 words.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of January, 2014.

_____
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