STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent-Petitioner.

REVIEW OF AN ORDER AND DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER DISMISSING TWO CRIMINAL COUNTS ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE TERRENCE T. BOURKE, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Generally, the State does not offend a defendant's due process right to notice when it alleges a reasonably narrowed charging period instead of a specific commission date in charges of child sexual assault. When a defendant raises a notice challenge to such charges, Wisconsin courts apply a multi-factor

reasonableness test to assess whether the State sufficiently narrowed the charging period to permit the defendant to prepare a defense.

a. If Wisconsin courts continue to apply the reasonableness test, may courts consider factors bearing on the circumstances of the alleged crime and the State's efforts to narrow the charging period when the defendant complains that the charging period is overly broad?

   - The circuit court said no, holding that the court of appeals in *State v. R.A.R.*[1] precluded consideration of those factors when a defendant does not specifically allege the State's lack of diligence.

   - The court of appeals said yes, holding that its pre-*R.A.R.* case *State v. Fawcett*[2] endorsed application of all relevant reasonableness factors regardless of the defendant's specific allegations.

b. In such notice challenges, should Wisconsin courts consider whether the charges as stated prejudiced the defendant by actually depriving him of an available defense?

   - This question was not explored in the lower courts, but it is relevant because this case and *State v. Hurley*[3] represent the first time

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[1] 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988).
[2] 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988).
[3] *State v. Joel M. Hurley*, Case No. 2013AP558-CR (Wis. Sup. Ct.).

that this court will examine how courts should apply the reasonableness test.

2. Here, the State alleged in 2012 that Kempainen sexually assaulted his stepdaughter, L.T., two times: once when she was eight during a four-month period in 1997, and once when she was eleven or twelve during a three-and-a-half-month period in 2001. Although L.T. could not recall specific dates, she provided vivid details of how Kempainen assaulted her, the times of day the assaults occurred, and the surrounding context of the assaults.

   Where Kempainen does not claim that the multi-month charging period and reporting delay prevented him from alleging a defense otherwise available to him, did the charges satisfy due process notice requirements?

   - The circuit court said no. It relied heavily on the long delay in reporting. It did not consider what defenses, if any, Kempainen reasonably had available to him.

   - The court of appeals said yes. In addition to all seven reasonableness factors supporting its conclusion, it also determined that Kempainen failed to allege any actual prejudice in preparing a defense caused by the charging periods or the reporting delay.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case has been scheduled for oral argument on January 8, 2015. This court ordinarily publishes its decisions.

SUMMARY OF PARTIES' POSITIONS

The Wisconsin Court of Appeals and circuit courts apply a seven-factor reasonableness test to determine whether charging periods and delays in charging a defendant in child sexual assault cases violate a defendant's due process right to plead and prepare a defense. In one published opinion, *Fawcett*, the court of appeals indicated that courts may apply all seven factors and additional relevant considerations to such challenges. In a subsequent case, *R.A.R.*, the court of appeals suggested that unless the defendant specifically challenged the State's diligence in forming the charges, courts are limited to considering only four factors.

In his petition and brief to this court, Kempainen frames the issue as whether the court of appeals erred when it determined that the complaint provided sufficient notice. That framing would be appropriate if this court was merely an error-correcting court, or if there was supreme court precedent instructing courts how to apply the reasonableness test.

Neither of those scenarios is present. This case presents an apparent conflict between two published court of appeals cases regarding the reasonableness test, on which this court has not provided any input. Thus, the questions here reach beyond Kempainen's suggestion that this

court has two choices—i.e., that it must wholly endorse either the approach in *Fawcett* or that in *R.A.R.*

In fact, a third option is present: as the primary law-creating tribunal in this state, this court has the opportunity to assess the reasonableness test in light of subsequent developments in the law and advise how Wisconsin courts should apply it to ensure consistency and fairness.

In the State's view, the reasonableness test as the court of appeals introduced and applied in *Fawcett* provides a useful tool for Wisconsin courts to assess notice challenges in child sexual assault cases. This court, however, should clarify how courts should apply the test. Specifically, all of the existing reasonableness factors identified in *Fawcett* should remain in play, with additional consideration given to whether the complaint alleges a continuous course of conduct and whether the defendant can demonstrate prejudice based on his inability to plead and present an otherwise reasonably available defense.

By incorporating those considerations, Wisconsin courts will assess notice challenges more consistently and will better balance the defendant's due process rights with the State's well-recognized flexibility in alleging charging periods in child sexual assault complaints.

ARGUMENT

I. A reasonableness test can assist Wisconsin courts evaluating challenges to notice requirements in child sexual assault cases.

A. Case posture and standard of review.

This case presents questions related to law developed in the court of appeals, but that are of first impression for this court. Those questions reduce to the following: if Wisconsin courts continue to apply a reasonableness test to notice challenges in child sexual assault cases, how should courts apply that test?

This case involves published but seemingly conflicting court of appeals precedent in *Fawcett* and *R.A.R.* This court is bound by its own precedent. *See Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶41, 281 Wis. 2d 300, 697 N.W.2d 417. Additionally, based on the principle of stare decisis and on Wis. Stat. § 752.41(2), published court of appeals opinions have statewide precedential effect. *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997). Nevertheless, this court has the power to modify or overrule court of appeals opinions. *See id.* at 189-90 (only the supreme court has the power to overrule, modify, or withdraw language from a published court of appeals opinion).

Before this court is the question whether the criminal complaint gave Kempainen adequate notice to permit him to plead and present a defense to charges of child sexual assault. The sufficiency of a pleading is a question of law that

this court reviews independently. *See Fawcett*, 145 Wis. 2d at 250. Whether the State has deprived a defendant of a constitutional right is a question of constitutional fact that this court independently reviews. *Id.* Whether a period of time alleged in a complaint and information is too indefinite to allow a defendant to prepare an adequate defense is an issue of constitutional fact that this court reviews independently of the court of appeals' or circuit court's determinations. *See id.* at 249.

B. Case law addressing notice challenges in child sexual assault cases demands a policy of flexibility in charging requirements.

1. Challenges to the sufficiency of the complaint implicate a defendant's right to plead and prepare a defense and right to be free from double jeopardy.

Under the Sixth Amendment to the United States Constitution and article I, sections 7 and 8 of the Wisconsin Constitution, a defendant has the right to be informed of the nature and cause of the allegations against him or her. *See Russell v. United States*, 369 U.S. 749, 763-64 (1962); *State v. Sorenson*, 143 Wis. 2d 226, 253, 421 N.W.2d 77 (1988). To comport with that right, criminal charges must sufficiently address twin concerns: first, to allow a defendant to plead and prepare a defense; second, to avoid the risk of double jeopardy. *See Blenski v. State*, 73 Wis. 2d 685, 695-96, 245 N.W.2d 906 (1976).

Correspondingly, Wisconsin courts assess such notice challenges under a two-step framework: *first*, "whether the accusation is such that the defendant [can] determine whether it states an offense to which he [is able to] plead and prepare a defense"; and *second*, "whether conviction or acquittal is a bar to another prosecution for the same offense." *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968).

The focus here is on the first portion of the *Holesome* test: Kempainen challenges the State's allegations of child sexual assault occurring over two multi-month charging periods and claims that those periods are too broad—and the delays in charging were too long—to permit him to plead and prepare a defense. [4]

2. Allegations of child sexual assault demand flexibility in notice requirements.

Child sexual assault cases present special considerations for courts assessing notice challenges. As a general matter, time is not a

[4] The court of appeals also concluded that the second double-jeopardy prong of *Holesome* was satisfied, i.e., that the charges were sufficiently stated to ensure that conviction or acquittal of Kempainen in this case would bar another prosecution for the same offense. *State v. Kempainen*, No. 2013AP1531-CR, slip op. ¶25 (Wis. Ct. App. April 16, 2014). Because Kempainen does not challenge that portion of the court of appeals' holding in his petition or brief to this court, the State does not set forth a separate discussion and analysis of that *Holesome* prong, other than to note that for the reasons stated in its opinion, the court of appeals correctly concluded that the charges did not present double jeopardy concerns.

material element in child sexual assault cases; hence, the State need not precisely allege a commission date when alleging charges of child sexual assault. *Fawcett*, 145 Wis. 2d at 250.

Furthermore, the child-victim often is reluctant to immediately report the assaults and cannot remember details such as dates and times, which make such crimes especially difficult for the State to detect and prosecute:

> Often there are no witnesses except the victim. The child may have been assaulted by a trusted relative or friend and not know who to turn to for assistance and consolation. The child may have been threatened and told not to tell anyone. Even absent a threat, the child might harbor a natural reluctance to reveal information regarding the assault. These circumstances many times serve to deter a child from coming forth immediately. As a result, exactness as to the events fades in memory.

Id. at 249 (citation omitted); *see also id.* at 254 ("[C]hild molestation is not an offense [that] lends itself to immediate discovery. Revelation usually depends upon the ultimate willingness of the child to come forward.").[5]

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[5] Other jurisdictions have also recognized the inherent difficulty in detecting and prosecuting child sexual assault charges. *See, e.g.*, *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005) (and cases cited therein) (child sexual assault victims have limited perceptions and faculties to define specific times and dates of traumatic sexual abuse); *State v. Sisson*, 536 P.2d 1369, 1372 (Kan. 1975) ("Where a prosecution is not commenced promptly after the alleged commission of an offense or the event is not otherwise brought to public notice[,] it is not unusual for uncertainty as to dates to appear particularly where the memories of

(Continued on next page.)

Because of those special considerations in child sexual assault cases, courts have required "a more flexible application of notice requirements." *Fawcett*, 145 Wis. 2d at 254. Thus, in cases alleging incidents of child sexual assault occurring over a multi-month charging period, "the vagaries of a child's memory" should not result in outright dismissal of the charges, but more appropriately are weighed before the jury as challenges to the child's credibility. *Id.* ("Such circumstances ought not prevent the prosecution of one alleged to have committed the act.").

Nationally, courts have adopted different legal approaches to notice challenges by defendants in child sexual assault cases. John J. Connolly, Note, *"Reasonable Particularity" in Indictments Against Child Abusers*, 49 Md. L. Rev. 1008, 1014-15 (1990).[6] The most commonly applied rationale is "that time is not an essential element in a sexual abuse case and, therefore, need not be alleged with particularity," *id.* at 1014. Accordingly, those

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children are involved."); *State v. Hoban*, 738 S.W.2d 536, 541 (Mo. Ct. App. 1987) ("Leeway is necessary in charging sexual abuse . . . with minors because children who are the victims of abuse may find it difficult to recall precisely the dates of offenses against them months or even years after the offense has occurred."); *State v. D.B.S.*, 700 P.2d 630, 634 (Mont. 1985), *overruled on other grounds by State v. Olson*, 951 P.2d 571 (Mont. 1997) ("We should recognize that children . . . are not governed by the clock and calendar as adults are. They are generally at a loss to apply times or dates to significant events in their lives.").

[6] Although this is a nearly 25-year-old law review note, counsel's research indicates that its analysis and understanding of how courts address notice challenges in child sexual assault cases largely remain correct and relevant.

courts generally hold that courts should not dismiss child sexual assault charges alleged over a time period where the defendant cannot demonstrate prejudice based on a compromised defense that he would have otherwise had reasonably available to him if the State had alleged a more specific commission date.[7]

Along with a minority of other state courts,[8] the Wisconsin Court of Appeals in *Fawcett* adopted a "reasonableness test" that sets forth non-exhaustive factors for courts to consider in determining whether the charging periods in child sexual assault allegations are sufficiently particular. The State discusses the development of that law below.

3. The court of appeals in *Fawcett* identified a seven-factor test helpful in assessing the first *Holesome* prong in child sexual assault cases.

In *Fawcett*, the court of appeals confronted the task of applying the *Holesome* test to a notice

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[7] *See, e.g.*, *United States v. Beasley*, 688 F.3d 523, 533 (8th Cir. 2012); *Erickson v. People*, 951 P.2d 919, 922 (Colo. 1998); *Hoban*, 738 S.W.2d at 539; *State v. Shaver*, 760 P.2d 1230, 1234-35 (Mont. 1988); *see also* 41 Am. Jur. 2d Indictments and Informations § 129 (West 2014) (listing other jurisdictions).

[8] *See, e.g.*, *State v. Mulkey*, 560 A.2d 24, 30 (Md. Ct. App. 1989); *State v. Naugle*, 393 N.W.2d 592, 595-96 (Mich. Ct. App. 1986); *In re K.A.W.*, 515 A.2d 1217, 1222 (N.J. 1986); *State v. Baldonado*, 955 P.2d 214, 220 (N.M. Ct. App. 1998).

challenge to a complaint involving allegations of child sexual assault.

The court noted that the *Holesome* test did not provide much guidance in assessing notice requirements: "[t]he *Holesome* language is extremely broad and arguably states nothing more than the constitutional right to notice and the constitutional protection against double jeopardy in different terms." 145 Wis. 2d at 251.

To assist it in applying *Holesome*'s first prong, the court identified a seven-factor "reasonableness" test that the New York Court of Appeals set forth in *People v. Morris*, 461 N.E.2d 1256 (N.Y. 1984):

> (1) the age and intelligence of the victim and other witnesses;
>
> (2) the surrounding circumstances;
>
> (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
>
> (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged;
>
> (5) the passage of time between the alleged period for the crime and the defendant's arrest;
>
> (6) the duration between the date of the indictment and the alleged offense; and
>
> (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis. 2d at 253 (formatting added).

The court of appeals endorsed the reasonableness test as a tool for courts to "assist . . . in determining whether the [first prong of the] *Holesome* test is satisfied." *Id.* at 253. Applying all seven factors, the *Fawcett* court concluded that the charging period set forth—allegations of two sexual assaults of a ten-year-old boy over a six-month period, which the boy reported and the State charged shortly after the alleged assaults—adequately informed Fawcett of the charges against him. *Id.* at 248, 254.

4. Wisconsin courts' application of *Fawcett* has been inconsistent.

Shortly after *Fawcett* issued, the court of appeals considered another challenge to the sufficiency of a child sexual assault complaint. *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988). The State charged R.A.R. in August 1987 with sexual assaults committed against his sisters, including two charges alleged to have occurred during the spring of 1982; one charge during the summer of 1982; and one charge during the summer of 1983. *Id.* at 409. In response to R.A.R.'s motion "to make each count more definite and certain," *id.* at 410, 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, the court of appeals invoked the reasonableness test in *Fawcett*. *R.A.R.*, 148 Wis. 2d at 411. In

applying the reasonableness test, however, the *R.A.R.* court suggested that *Fawcett* required that courts apply the first three factors only when the defendant claims that the State could have used more diligent efforts to obtain a more precise date. *Id.*[9]

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[9] In introducing the seven-factor reasonableness test, the *Fawcett* court, in a footnote, quoted directly from *Morris*:

> [A] defendant may contend that the prosecutor is able but has failed to obtain more specific information due to a lack of diligent investigatory efforts. [*People v. Morris*, 461 N.E.2d 1256, 1260 (N.Y. 1984)] This inquiry also embraces good faith. *Id.* In evaluating the possibility that a more specific date could have been obtained through diligent efforts, the court may look to the following factors to determine whether a more specific date could have been alleged: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately. *Id.*
>
> If after this exercise the state is found to have exerted diligent investigatory efforts, the charging document should then be examined to determine whether, under the circumstances, the designated period of time set forth is reasonable. *Id.* Factors relevant to this determination include but are not limited to [the final four factors]. *Id.*

State v. Fawcett, 145 Wis. 2d 244, 251 n.2, 426 N.W.2d 91 (Ct. App. 1988) (quoting *Morris*, 461 N.E.2d at 1260) (final bracketed text added).

According to the court, because R.A.R. did not expressly challenge the prosecutor's diligence, the court limited itself to the final four *Fawcett* factors and concluded that the complaint failed to sufficiently inform R.A.R. of the charges against him. *Id.* at 411-12. Based on those factors, the court of appeals agreed that the four charging periods were too insufficiently definite. *Id.* at 413. In so concluding, the court gave great weight to the multi-month charging periods and 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.

Since *R.A.R.*, the court of appeals decided only one other published case (besides the present one) exploring a notice challenge in a child sexual assault case: in *State v. Miller*, Miller challenged a four-year long charging period on notice grounds. 2002 WI App 197, ¶27, 257 Wis. 2d 124, 650 N.W.2d 850. The court of appeals, invoking *Fawcett*, applied all seven factors in rejecting Miller's argument. *Id.* ¶29.[10]

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[10] Kempainen, at pp. 23-24 in his brief, invokes and discusses an unpublished per curiam case, which is not citable under the rules. *See* Wis. Stat. (Rule) § 809.23(3)(a) and (b) (2011-12) (permitting citation to certain authored unpublished opinions, not per curiam opinions). Thus, the State does not respond further to that portion of Kempainen's brief.

That said, to the extent that Kempainen points out that Wisconsin courts have inconsistently applied the reasonableness factors based on either *Fawcett* or *R.A.R.*, the State agrees that numerous unpublished and uncitable court of appeals cases support that point.

5. This court should retain the *Fawcett* test and provide additional guidance on its application.

Based on the above discussion—and because this court has not yet weighed in on the reasonableness test in child sexual assault cases—this case presents several questions for this court:

- First, should this court endorse the continued use of a reasonableness test in assessing notice challenges in child sexual assault cases?

- Second, if this court endorses the reasonableness test, what factors may courts consider and how are courts to apply those factors?

As for the first question, the reasonableness test is not strictly necessary to resolve such notice challenges. Numerous jurisdictions simply follow the rule that because time is not a material element in child sexual assault cases, more leniency is permitted in charging absent a demonstration by the defendant that a long charging period or delay prevented him from preparing a defense that would have otherwise been reasonably available to him. *See* note 7, *supra*.

That said, this court should retain the reasonableness test as set forth in *Fawcett* with some additional recommendations for its application. As an initial matter, the principle of stare decisis counsels against the wholesale

overrule of precedential law set forth in *Fawcett* that has proven useful for 26 years. *See Cook*, 208 Wis. 2d at 186. Further, courts' application of the reasonableness test avoids concerns that the alternative approach is too dismissive of a defendant's due process rights.[11] Applied in conjunction with the overarching considerations—whether the State made a good-faith effort in narrowing the timeframe and whether the defendant can demonstrate actual prejudice resulting from the pleadings—the reasonableness test is a helpful tool in identifying the rare instances where a charging period actually prejudices a defendant's ability to plead and present a defense.

Thus, the second question—what the reasonableness test optimally looks like—gets to the heart of the matter. The test the court of appeals enunciated in *Fawcett* provides a good starting point. But in light of inconsistent applications by Wisconsin courts and intervening changes in the legal landscape since *Fawcett* and *R.A.R.*, this court should also clarify the reasonableness test factors, identify related considerations, and demonstrate how courts should apply the test.

Accordingly, the State recommends that this court affirm the court of appeals' decision in this case in a two-step approach: First, this court should affirm the court of appeals' reaffirmation of

[11] For example, the New Mexico Court of Appeals suggested that courts that had not adopted a reasonableness test failed to adequately recognize the defendant's due process rights. *Baldonado*, 955 P.2d at 219-20.

the totality-of-the-circumstances reasonableness test as presented and applied in *Fawcett*. In doing so, this court should expressly reject the suggestion in *R.A.R.* that the defendant's pleading dictates the factors that courts may consider in notice challenges to charges of child sexual assault. Rather, in any notice challenge to charges of child sexual assault, courts may consider and weigh the first three *Fawcett* factors, including the victim's age and intelligence, the surrounding circumstances, and the nature of the offense. To the extent that *Fawcett* and *R.A.R.* conflict on that point, this court should expressly overrule *R.A.R.*

Second, this court should demonstrate how circuit courts should weigh and apply the reasonableness factors and other important related considerations—including whether the defendant can demonstrate a compromised defense resulting from the allegedly broad charging period or delay in reporting—by applying the factors to this case. This court's guidance will help the circuit courts and court of appeals avoid inconsistencies in assessing such challenges.

The State addresses the first part of its recommended approach in the remaining sections of Part I. In Part II, it recommends how courts should apply the *Fawcett* reasonableness factors by demonstrating how they apply to this case.

C. The reasonableness test should not be limited based on the defendant's specific pleading.

This court should affirm the court of appeals' decision in this case and hold that courts may apply the first three reasonableness factors to notice challenges alleging an overly broad charging period in child sexual assault cases, regardless of whether the defendant specifically challenges the State's diligence.

1. The first three factors are relevant to whether the State sufficiently narrowed a charging period.

The age and intelligence of the victim and other witnesses, the surrounding circumstances, and the nature of the offense generally are relevant to a defendant's challenge to a charging period in a child sexual assault complaint. All of those factors comport with *Fawcett*'s mandate of "a more flexible application of notice requirements" in cases involving child sexual assault, *Fawcett*, 145 Wis. 2d at 254, because they flesh out the circumstances surrounding the victim's claims and the situation the State faced in investigating and designating the charging period.

The first factor allows courts to consider the age and intelligence of the victim at the time of the alleged assaults, which—in combination with factor seven (the ability of the complaining witness to particularize the date and time of the alleged offense)—assists the court's determination

of how broad the charging period may be and still satisfy a defendant's due process rights.

Other states that have adopted a reasonableness test apply the "age and intelligence" factor to general challenges to charging periods. For example, the New Jersey Supreme Court adopted the final four *Morris* factors but added additional factors, including "the age and intelligence of the victim." *In re K.A.W.*, 515 A.2d 1217, 1222 (N.J. 1986). Other courts that have developed reasonableness tests based on *Morris* also have identified the victim's age and intelligence as a relevant factor regardless of the defendant's specific challenge.[12]

Indeed, it seems difficult to apply only the final four factors without considering the age of the victim and other witnesses. In *R.A.R.*, the court of appeals expressly eschewed the first three factors in its assessment, yet it still considered the ages of the victims when the alleged assaults occurred, noting that the victims "were at least a year older than the victim in *Fawcett* at the time of the claimed offenses." 148 Wis. 2d at 412.

In addition, factors two and three—the surrounding circumstances and the nature of the offense—are also pertinent to the charging period's reasonableness. The surrounding-

[12] *See, e.g.*, *State v. Mulkey*, 560 A.2d 24, 30 (Md. Ct. App. 1989) (developing four factors including "the age and maturity of the child"); *Baldonado*, 955 P.2d at 220 (developing nine factors including "[t]he age and intelligence of the victim"); *see also Naugle*, 393 N.W.2d at 595-96 (identifying four factors, including "the victim's ability to specify a date," under which the court considered the victim's age at the time of the alleged assaults).

circumstances factor illuminates the relationship between the victim and defendant, i.e., whether there was a familial or other trusting relationship that would explain the victim's delayed reporting or inability to specify a date.

And the nature-of-the-offense factor should include inquiries into whether the offenses involve a continuing course of conduct;[13] the likelihood that the victim would immediately report the offense; and whether the offense itself was likely to occur at a specific time, for example, at a holiday gathering or during a particular season. Those inquiries help complete the picture of the situation that the State faced in investigating and building its case and whether the charges prejudice the defendant.[14]

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[13] In *K.A.W.*, the New Jersey Supreme Court also adopted a factor considering whether the State alleged a continuous course of conduct. 515 A.2d at 1222. *See also Baldonado*, 955 P.2d at 220 (identifying surrounding circumstances factor to include "whether a continuing course of conduct is alleged"); *Naugle*, 393 N.W.2d at 596 (finding it "conceivable that specific dates would not stick out" where victim claimed assaults were ongoing).

[14] In the State's brief-in-chief in *State v. Hurley*, the State also urges that this court direct the circuit courts and court of appeals to consider the impact of the repeated nature of the criminal acts when considering notice challenges to charges of repeated sexual assault. State's brief, *State v. Joel M. Hurley*, Case No. 2013AP558-CR at 21 (filed October 20, 2014).

To clarify, the State does not endorse different reasonableness tests for charges of repeated sexual assaults versus charges of single assaults. Rather, whether the alleged conduct is continuous should be part of the reasonableness test courts apply to a challenge to either charge. That said—and as discussed *infra* in Part II—in

(Continued on next page.)

2. There is no meaningful difference between alleging an overly broad charging period and a lack of diligence by the State in child sexual assault cases.

Kempainen suggests that the claims are different because the latter requires a showing that regardless of diligent efforts by the State, the charging period is still too indefinite (Kempainen's br. at 18).

But in both instances, the defendant is ultimately challenging the sufficiency of the notice provided to him, regardless of whether that can be chalked up to lack of diligence. *See Kempainen*, slip op. ¶13 n.1. ("We note that in most cases, including the one before us, where a defendant alleges that the time period for a charge is too broad, the consideration will inherently be before the court as to whether more specificity could have been alleged."). Significantly, the result is the same regardless of which challenge the defendant raises: the court will dismiss the complaint without prejudice to allow the State to attempt to identify a more specific date. The circuit court in this case did just that (32:21; Pet-Ap. 141).

Additionally, the first three factors speak to more than merely the State's diligence. They also are relevant to the question whether the charging period reasonably provides a defendant adequate

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single-act cases, the fact that the alleged assaults are not repeated should not necessarily favor the defendant's position.

notice to allow him to prepare a defense. To gauge whether the periods alleged are unreasonable, courts necessarily will look to whether the surrounding circumstances under the first three factors explain or otherwise support the State's allegations. And the surrounding circumstances can identify situations in which the defendant may have had a role in causing the delay in reporting.[15]

Morris and *R.A.R.* do not explain why courts should only apply the first three factors to a diligence challenge, nor is a reasonable explanation apparent. Indeed, New York courts applying *Morris* do not appear to have read *Morris* as the *R.A.R.* court did: in several cases, New York's highest court applied all of the reasonableness factors in a totality-of-the-circumstances, not bifurcated, approach.[16] Additionally, other state courts adopting the *Morris* factors appear to have adopted a totality-of-the-circumstances approach to the factors.[17]

Finally, by drawing an analytical line between (1) claims in which the defendant is alleging that the State could have been more diligent in obtaining a more definite date or time period and

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[15] For that matter, it would seem that the remaining four factors would be pertinent to an inquiry into the State's diligence in particularizing the charging period. Again, the *Morris* court did not explain why those factors should be limited to a general inquiry into the adequacy of the complaint.

[16] *See, e.g.*, *People v. Sanchez*, 643 N.E.2d 509, 512-513 (N.Y. 1994); *People v. Watt*, 609 N.E.2d 135, 136-37 (N.Y. 1993); *People v. Keindl*, 502 N.E.2d 577, 581 (N.Y. 1986).

[17] *See, e.g.*, cases cited in note 7, *supra*.

(2) claims of general inadequate notice, the language in *R.A.R.* creates a perverse incentive: defendants in cases involving delayed reporting where the victim was abused as a young child—an unfortunately common scenario—may avoid the three factors most likely to weigh against them by simply declining to allege a lack of diligence.

Defendants can thereby avoid the flexibility required in *Fawcett* for cases of sexual assault involving a young victim by preventing the court from considering the circumstances of alleged conduct, the relationship between the victim and the alleged abuser, and allegations that the abuser had a role in discouraging the child from reporting the conduct sooner. Rather, the *R.A.R.* approach encourages courts to focus entirely on temporal factors involving the ratio of the alleged span of time to the number of alleged criminal acts, the passage of time between the conduct and the complaint, and the ability of the victim to identify a specific date and time of the offense. That limited view defeats *Fawcett*'s flexibility requirement and ignores the reasons why a charging period may be broad or a reporting delay may be significant.

3. The court of appeals in *Fawcett* believed that all seven factors applied regardless of the defendant's specific allegations.

Finally, the court of appeals in *Fawcett* properly understood its test to be a totality-of-the-circumstances test incorporating all relevant factors, not a bifurcated test dependent upon how the defendant crafted his challenge. Kempainen

wrongly asserts that, based on inferences, the defendants in *Fawcett* and *Miller* did allege a lack of diligence by the State in investigating the charges (Kempainen's br. at 18-21). But a review of the briefs filed in *Fawcett*, *R.A.R.*, and *Miller* suggest the opposite: the courts in those cases all considered identical motions.

First, in *Fawcett*, nothing suggests that Fawcett alleged that the State was not diligent, thus "explaining" the court's consideration of the first three reasonableness factors. In his brief to the court of appeals, Fawcett described his motion as being one to "make more definite and certain the allegations in the information." *State v. Fawcett*, No. 87-0692-CR (Wis. Ct. App.), Appendices and Briefs, 145 Wis. (2d) 244-308, Tab 1 at 3. Even though Fawcett did not appear to challenge the State's diligence specifically, the *Fawcett* court considered all seven reasonableness factors and concluded that the charging period set forth in that case provided adequate notice. *Fawcett*, 145 Wis. 2d 244. Thus, the *Fawcett* court did not appear to understand its footnote to mean what the circuit court or court of appeals in *R.A.R.* understood it to mean.

Similarly, the defendant in R.A.R. made the same motion that Fawcett did: he moved to dismiss the charges or make them more definite. State's brief in *State v. R.A.R.*, No. 88-1008-CR (Wis. Ct. App.), Appendices and Briefs, 148 Wis. (2d) 400-419, Tab 2 at 3. Thus, there was no reason for the *R.A.R.* court to have interpreted the motion differently than the *Fawcett* court interpreted the identical motion before it.

So, too, in *Miller*: Miller filed a motion alleging an "over broad" charging period and then a separate motion to make more definite and certain, just as R.A.R. and Fawcett did. Miller's brief in *State v. Miller*, No. 01-1406-CR (Wis. Ct. App.), Appendices and Briefs, 257 Wis. (2d) 80-152, Tab 2 at 2, 7. The court in *Miller* considered all of the *Fawcett* factors. 257 Wis. 2d 124, ¶¶30-37. Kempainen fails to explain why the court of appeals in *Miller* correctly treated the motions before it differently than the *R.A.R.* court treated its identical motion.

Hence, this court cannot reasonably infer that the defendants in *Fawcett* and *Miller* specifically challenged the State's diligence, as neither court went on to apply the first three factors, conclude that the State was diligent, and then move on to the second four factors, as *R.A.R.* suggests is the proper procedure.

Kempainen also suggests that the legislature enacted Wis. Stat. § 948.025, which permits the State to charge repeated acts of sexual assault where a continuous course of three or more assaults are alleged, to replace the flexibility demanded by *Fawcett* (Kempainen's br. at 26-30). But the fact that the legislature granted the State additional authority and flexibility to prosecute continuous acts does not mean that time is suddenly a material element of single-act offenses, or that victims of single acts are now expected to remember exact dates or immediately report traumatic abuse. *Fawcett*'s flexibility is required, in part, because child sexual assault victims are young, may have limited conceptions of time, and may be reluctant to report. The enactment of

§ 948.025 did not eliminate the continued need for charging flexibility in single-act cases.

In sum, this court should hold that Wisconsin courts may consider the first three reasonableness factors in challenges to notice requirements in child sexual assault cases, regardless of whether the defendant alleges a lack of diligence by the State. There is no reason to foreclose courts from weighing the victim's age and intelligence, the surrounding circumstances, and the nature of the offense when determining whether the State comported with notice requirements. And the defendant's pleading should not limit the reasonableness factors that courts weigh in notice challenges to child sexual assault charges given the relevancy of those factors and the flexibility counseled in such cases.

Hence, this court should expressly overrule *R.A.R.* to the extent that it limits the reasonableness factors depending on the defendant's specific challenge. That holding conflicts with *Fawcett* and thus should no longer provide precedent for Wisconsin courts.

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Next, this court should provide guidance on how courts are to apply the reasonableness test. The State recommends that the touchstones of the test are (1) whether the State reasonably narrowed the charging period based on the totality of circumstances and (2) whether the charges will cause a defendant actual prejudice in preparing and presenting a defense. In Part II, the State demonstrates how its recommended approach applies here.

II. The complaint provided sufficient notice.

In his brief, Kempainen fails to address how the reasonableness factors—either all seven or only the last four—should apply here. Nor does he argue why the court of appeals erred in its application of the reasonableness factors (or, for that matter, why the circuit court was correct in its application). That omission is curious, as it is necessary for Kempainen to prevail.

But regardless whether the full reasonableness test or only the final four factors apply, the State did not violate Kempainen's due process right to plead and present a defense. Below, the State addresses the reasonableness factors and applies them to the facts of this case using the following approach:

- First, based on L.T.'s age and intelligence, the surrounding circumstances, the nature of the offense, and L.T.'s ability to specify when the assaults occurred, it was understandable why L.T. could not recall specific dates and why she delayed reporting the assaults. Under the circumstances, the State set reasonable charging periods.

- Second, in light of that analysis, the temporal factors demonstrate that the charges were consistent with L.T.'s reporting. Further, Kempainen failed to demonstrate that he had a defense

otherwise available to him but for the charging period or delay in charging.[18]

A. The first three factors, along with factor seven, support the conclusion that the complaint was sufficient.

There appears to be no dispute that the first three factors support the conclusion that notice was adequate. Factors one through three involve a consideration L.T.'s age and intelligence, the surrounding circumstances, and the nature of the crime, *see Fawcett*, 145 Wis. 2d at 253, and are sensibly considered together, *Miller*, 257 Wis. 2d 124, ¶30. Additionally, factor seven, which examines L.T.'s ability to particularize the date and time of the alleged assaults, is sensibly considered in conjunction with factors one through three.

According to the complaint, L.T. was eight and either eleven or twelve years old when the alleged assaults occurred (1:1; Pet-Ap. 115). Kempainen lived in the same house as L.T. and was her stepfather (*id.*). As such, he "held a position of trust, dominance, and authority" over L.T. *Kempainen*, slip op. ¶16. Moreover, the sexual nature of the offenses "would have highlighted to

[18] In *Hurley*, the State likewise recommends that courts consider the defendant's available defenses, but does so under factor two of the analysis. Here, the State recommends that courts consider available defenses in tandem with factors four through six. This court could adopt either approach or opt to identify the defendant's available defenses as an additional factor. The State's overarching point remains that consideration of the defendant's defenses should be part of the analysis.

L.T. the position of dominance he held over her." *Id.*

As for the nature of the offenses and surrounding circumstances, L.T. reported to police that the first assault occurred at the beginning of the school year when she was eight years old and in the second grade, which she recalled specifically because that was her first year of attending school in Sheboygan after moving there (1:2; Pet-Ap. 116). L.T. alleged that the first assault involved Kempainen coming home late at night when she was sleeping on the living room couch (*id.*). She recalled that he smelled of alcohol and laid himself down next to her (*id.*). She reported that while on the couch, Kempainen rubbed her vagina through her pajamas; then he took her hand, put it down his sweatpants, and used it to massage his penis. He then pulled down her pajama bottoms and performed oral sex on her by "sticking his tongue inside her vagina" for what seemed to be "a very long time" before he passed out (*id.*). L.T. said at that time she felt "scared and nervous" during the assault and after Kempainen passed out, she got up, went into the kitchen and cried, and fell asleep in a different part of the house (*id.*).

L.T. reported that about a week after the assault, Kempainen called her to the basement where they were alone and told her that he was "really drunk" on the night of the incident and that what he had done was "really bad" but asked her not to tell her mother (*id.*). According to L.T., Kempainen also said that he would get in trouble if L.T. told her mom and he told L.T. "I know you were bad" (*id.*). As the court of appeals noted, "the alleged assault itself and these statements by the father figure in the home, if true, undoubtedly

would have had a significant impact on eight-year-old L.T." *Kempainen*, slip op. ¶16.

L.T. said that the second incident also occurred in the family home during her sixth-grade year while "it was warm outside" (1:2; Pet-Ap. 116). During that time, she was generally responsible for waking Kempainen for his 4:30 p.m. work shift (1:3; Pet-Ap. 117). On the day of the incident, she was lying sideways at the foot of Kempainen's bed watching Disney on television and waiting to wake him up (*id.*). She told police that Kempainen woke up on his own and began rubbing her back under her clothes before moving his hand to the front of her chest and feeling her breasts (*id.*). L.T. reported that she was scared but immediately left and went to a friend's house (*id.*).

L.T. did not immediately disclose the assaults because she was afraid of her mother's reaction to both her and Kempainen (*id.*). L.T. acknowledged, however, that she confided in two friends in the years between the assaults and her eventual disclosure to police. First, she told a trusted friend in eighth grade that she was either "raped" or "molested," but did not provide further details (1:4; Pet-Ap. 118). Second, L.T. told her first serious boyfriend of the assaults while they were dating in 2012 (*id.*). According to both L.T. and the boyfriend, L.T. began crying after a consensual sexual encounter between the two; at that point, L.T. revealed that Kempainen had sexually assaulted her when she was younger (*id.*). Despite her boyfriend's recommendations that L.T. tell her mother and call the police, L.T. demurred and remained frightened of the consequences of reporting (*id.*). The boyfriend also reported that L.T. had told him that she felt responsible (*id.*).

In October 2012, the boyfriend told L.T.'s mother of L.T.'s claims of Kempainen's abuse (1:3; Pet-Ap. 117). Soon after her mother confronted her, L.T. admitted the abuse to her mother and police (*id.*).

As the court of appeals noted, the complaint explains that L.T. did not immediately report the abuse to her mother or authorities because she was afraid her mother would be angry with her and with Kempainen. *Kempainen*, slip op. ¶17. Those were understandable concerns in light of her claims that Kempainen had told her after the first incident that she was "bad" and that he would get in trouble if her mother knew. Further, the complaint underscored the reasonableness of L.T.'s concerns about her mother's potential reactions: when L.T. finally told her mother of the abuse, her mother confronted Kempainen in a manner that led to her arrest for disorderly conduct.

Also, the allegations here detailed two separate acts, not a continuous course of conduct. Although a continuous course of repeated acts would further support the conclusion that it was reasonable that L.T. could not recall specific dates, the fact that this case involves only two single acts does not stand for the converse notion that L.T. should have remembered the dates of these two incidents. Again, given L.T.'s age at the time of the assaults, Kempainen's position of dominance as her stepfather, Kempainen's remarks to her after the first assault, the fear and trauma she stated she experienced from the assaults, and evidence that L.T. felt some responsibility for the assaults, it is understandable that L.T. could not remember the exact dates.

As the above analysis indicates, a consideration of L.T.'s age and intelligence, the surrounding circumstances, and the nature of the offenses alleged provide important details as to what information the State had reasonably available to it in investigating the crime and forming the charges. In light of L.T.'s ages at the times of the assaults and her reasonable reluctance to report them, neither the State nor L.T. could reasonably narrow the dates of the occurrences further. Additionally, in light of Kempainen's position of dominance over L.T. and statements to her after the first assault, Kempainen played a role in the delay. Accordingly, the first three factors suggest that the State framed the charges as narrowly as possible.

Finally, factor seven also supports the conclusion that the charges were adequately narrow. While L.T. understandably could not recall the precise dates of the alleged assaults, she did provide vivid detail as to the approximate time of a particular year, the times of day, and what happened before, during, and after the assaults. The depth of those details supports the conclusion that the State adequately notified Kempainen of what crimes he allegedly committed and when.

B. The fourth, fifth, and sixth factors require consideration of the first three factors and the impact on defenses available to the defendant.

Under the reasonableness test, the fourth factor asks the court to consider the length of the charging period in relation to the number of criminal acts alleged. *Fawcett*, 145 Wis. 2d at 253. The fifth and sixth factors address the duration of time between the alleged crime and arrest and indictment, respectively.[19] *Id.* at 253.

Courts need clarification on how to apply these factors. Currently, courts—including the circuit court in this case—tend to weigh long charging periods and delays automatically in a defendant's favor. That approach is inappropriate, given the flexibility required for child sexual assault cases and the expansions in applicable statutes of limitation. Rather, in weighing these three factors, courts should (1) consider and balance their analysis of the first three (plus seventh) factors and (2) consider whether the charging period or delay in charging actually prejudiced the defendant by preventing him from asserting an otherwise reasonably available defense.

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[19] Factors five and six are largely redundant; courts have generally considered them as a single factor. *See, e.g., Kempainen*, slip op. at ¶11; *Miller*, 257 Wis. 2d at 145; *R.A.R.*, 148 Wis. 2d at 412. To the extent that this court is reviewing the individual factors and their application, this court may consider merging these factors into a single factor discussing the duration between the alleged time of the crime(s) and charges.

1. Courts currently tend to find that multi-month charging periods and delays favor the defendant's position.

Generally, courts applying factors four, five, and six have done so simply by comparing the challenged complaint's charging periods and delays with the corresponding numbers in other cases involving notice challenges. But those types of comparisons provide limited perspective at best. In Wisconsin, there are only a few published cases—*Fawcett*, *R.A.R.*, *Miller*, and now *Kempainen*—available for such comparison. Such limited comparisons can lead courts to develop bright-line standards for how long is too long, instead of taking into account relevant circumstances that may explain or excuse lengthy charging periods or delays.

Depending on the circumstances, a charging period of one month may fail notice requirements in one case, whereas a significantly longer charging period may be sufficient in another. Likewise, an accused defending charges filed a dozen years after the alleged acts may be no worse off in pleading and presenting a defense than one charged shortly after the alleged incident.

Finally, courts have reflexively weighed what they perceive to be broad charging periods and long delays in favor of the defendant and have found that notice was inadequate. *See, e.g.*, *R.A.R.*, 148 Wis. 2d at 412; *accord Miller*, 257 Wis. 2d 124, ¶35 (stating that factors referencing delay "address the problem of dimmed memories and the

possibility that the defendant may not be able to sufficiently recall or reconstruct the history regarding the allegations"). Indeed, the circuit court here, in concluding that Kempainen was deprived of notice, appeared to heavily weigh in his favor the long delay in reporting (32:16-17).

2. Courts' current approach ignores the flexibility mandated in child sexual assault cases and broader statutes of limitations.

First, the courts' current approach ignores the analysis under the first three (plus seventh) factors and the mandate that notice requirements should receive greater flexibility in child sexual assault cases. The court's analysis under the first three factors can go a long way to explain *why* the State could not narrow the charging period down further and *why* the delay in charging was as long as it was, including what role the defendant may have had in discouraging the victim from reporting. As noted above, given the totality of circumstances considered under the first three (plus seventh) factors, a relatively long charging period and delay may be reasonable (or unreasonable) depending on the victim's age and intelligence, the surrounding circumstances, and the nature of the offense.

Second, the courts' purely mathematical approach to factors four through six may potentially limit the State's authority to prosecute charges of child sexual assault where the reporting was significantly delayed, when the legislature has greatly expanded that authority

since the court of appeals decided *Fawcett* and *R.A.R.*

For example, when the crimes charged against R.A.R. allegedly occurred and when *R.A.R.* was decided, a six-year statute of limitations applied for all felonies, including child sexual assault. *See* Wis. Stat. § 939.74(1) (1981-82); *id.* (1985-86). But by the time the crimes charged against Kempainen allegedly occurred, the legislature had dramatically expanded the statute of limitations to allow charges in 1997 to be filed "before the victim reaches the age of 26 years." Wis. Stat. § 939.74(2)(c) (1995-96). In 2001, it was expanded to "before the victim reaches the age of 31 years." Wis. Stat. § 939.74(2)(c) (1999-2000). By the time the State filed the complaint against Kempainen in 2012, charges could be brought at any time "before the victim reaches the age of 45 years." Wis. Stat. § 939.74(2)(c) (2011-12).

Thus, unlike the legal landscape when the court of appeals decided *Fawcett* and *R.A.R.*, the State may legally file charges of child sexual assault decades after the crime allegedly occurred. Yet if the fifth and sixth factors are understood to weigh heavily against the State whenever there is a long hiatus between the alleged offense and issuance of the complaint, it will be exceedingly difficult—if not impossible—to prosecute decades-old sexual assaults.

To that end, if courts continue to simply compare delays and charging periods to those in older cases such as *R.A.R.*, it is unlikely that the State will be able to narrow the charging period from the three months found impermissible in *R.A.R.* to a shorter period, especially where it took

the victim years to come forward with the accusations. 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, which was the situation in both *Fawcett* and *Morris*.

3. Courts should also consider whether the charging period and delay prejudiced the defendant.

Admittedly, the expanded statutes of limitation and considerations under the first three reasonableness factors do not eliminate a defendant's constitutional right to notice. But whether due process requires dismissal of long-delayed charges of child sexual assault over charging periods should also incorporate an assessment of whether the charging period and delay actually prejudiced the defendant's ability to plead and prepare a defense.

Indeed, this court has incorporated such an assessment in *Sorenson*, 143 Wis. 2d at 253.[20] In that case, Sorenson alleged a lack of sufficient specificity to a charge of child sexual assault alleged to have occurred during a six-week period shortly before the young victim reported the assault. *Id.* at 233, 253. This court denied Sorenson relief, in part because Sorenson was not

[20] This court decided *Sorenson* shortly before the court of appeals endorsed the reasonableness test in *Fawcett*.

"in fact impeded in the preparation of his defense" by the State's designating a charging period instead of a specific date. *Id.* at 254; *see also Gutenkunst v. State*, 218 Wis. 96, 104, 259 N.W. 610 (1935) (no prejudice based on month-long charging period; the witness's failure to recall an exact day may go to credibility rather than barring the prosecution).

More recently, this court similarly observed that a defendant claiming a due process violation based on a delay in prosecution must demonstrate prejudice. *State v. McGuire*, 2010 WI 91, ¶¶44-56, 328 Wis. 2d 289, 786 N.W.2d 227. In *McGuire*, the State charged McGuire in 2005 with five counts of indecent behavior with a child occurring between 1966 and 1968. *Id.* ¶1. McGuire claimed that the State violated his due process rights because the 36-year passage of time between the alleged offenses and charges of child sexual assault "prejudiced his defense because critical witnesses died and evidence was destroyed." *Id.* ¶44.

In denying relief, this court explained that "[t]he statute of limitations is the principal device . . . to protect against prejudice arising from a lapse of time between the date of an alleged offense and an arrest." *Id.* ¶45 (citations omitted). This court then observed that a defendant claiming that a delay in charging violated his due process rights "must show '(1) actual prejudice as a result of [the] delay; and (2) [that] the delay arose out of an improper purpose, [such as to] give the State a tactical advantage over the defendant.'" *Id.* (citation omitted).

Thus, under *Sorenson* and *McGuire*, to obtain outright dismissal of child sexual assault charges, a defendant must demonstrate actual prejudice, i.e., that the expansive charging period or delay in reporting prevented him from preparing a defense otherwise reasonably available to him. That consideration should be part of Wisconsin's reasonableness test.[21]

If it is not, the result will be extreme: Wisconsin courts will dismiss charges when the State did not deny the defendant's right to present

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[21] Other jurisdictions evaluating notice requirements consider whether the defendant demonstrated that the charging period or delay prejudiced his ability to plead and present a defense. *See, e.g.*, *Baldonado*, 955 P.2d at 221 (holding that even if court finds that charges are not reasonably particular, the court "must then look to see if the [d]efendant is prejudiced by that failure").

Many of those jurisdictions have observed that in cases involving a defendant who lived with the victim, the defendant generally asserts a credibility defense, which does not depend on a specific date, and would not likely have defenses that could be affected by a charging period or delay—such as alibi, identity, or lack of access—available to him. *See, e.g.*, *Covington v. State*, 703 P.2d 436, 439 (Alaska Ct. App. 1985) (blanket denial of abuse was not affected by charging periods of one to eleven months where the defendant lived with the victim); *People v. Jones*, 792 P.2d 643, 657 (Cal. 1990) (noting that alibi or wrongful identity defenses were unlikely to be available where the defendant lived with the alleged victim for a long period of time and had continued access); *Naugle*, 393 N.W.2d at 596 (observing that the defendant's assertion of an alibi defense was "specious" where the defendant lived in the same house with the victim over an extended period and the victim was often alone with him); *State v. Wilcox*, 808 P.2d 1028, 1033 (Utah 1991) (doubting availability of alibi defense where the defendant had continuous contact with the victim during half of the 32-month charging period).

a defense. A defendant who could not have used a shorter offense period or could not have benefitted from more contemporaneous charges in preparing a defense should not be able to claim that a longer offense period or delay denied his due process right to prepare a defense. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("(D)ue process is flexible and calls for such procedural protections as the particular situation demands").

Accordingly, this court should clarify that Wisconsin courts should not engage in mathematical comparisons under factors four through six. Instead, courts should weigh these factors with their findings from the first three factors (plus the seventh) to determine whether the State could have narrowed the charging period further, whether the time alleged is reasonable, and whether the defendant has a reasonably available defense that is impacted by the charging period or delay in charging.

4. Factors four through six support the conclusion that Kempainen received adequate notice.

As for the charging periods, count one alleged one act within a four-month period that L.T. recalled had occurred in the beginning of her second-grade school year in 1997. Likewise, count two alleged one act within a three-and-a-half month period in 2001 (1:1; Pet-Ap. 115). L.T. reported the assaults in 2012, roughly fifteen years after the alleged period in count one and

eleven years after the alleged period in count two.[22]

Under an analysis of the first three factors, there is nothing to suggest that L.T. or the State could have narrowed the charging period further or that the delay in reporting was unreasonable.

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[22] To the extent that it is relevant and appropriate to compare these periods to those in other cases, the three-and-a-half- and four-month time periods do not appear facially to be excessive. *See, e.g.*, *Fawcett*, 145 Wis. 2d at 254 (two alleged acts within six-month period against a 10-year-child). Further, those periods are not beyond the pale compared to charging periods allowed by other state courts. *See, e.g.*, *Vernier v. State*, 909 P.2d 1344, 1350-52 (Wyo. 1996) (finding that charging periods of sixty days for act allegedly committed seventeen years earlier and ninety days for act allegedly committed ten years earlier were sufficient).

Similarly, federal courts have determined that notice was constitutionally sufficient in child abuse prosecutions featuring 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 . . . 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).

Valentine, 395 F.3d at 632; *see also Beasley*, 688 F.3d at 533 (Beasley was fairly informed of child pornography charges despite "admittedly broad" timeframes alleging conduct over two years and six years).

The question then becomes whether Kempainen can demonstrate that the charging periods or delays actually prevented him from asserting a defense that would otherwise be reasonably available to him. As the court of appeals noted, Kempainen had not articulated any actual prejudice due to the passage of time between the offenses and the charges. *Kempainen*, slip op. ¶22 (Pet-Ap. 112). In his motion to dismiss to the circuit court, Kempainen simply stated that the allegations were too vague and like those deemed insufficient in *R.A.R.* (11:1-2; Pet-Ap. 120-21). He did not specify what defense he had reasonably available to him that the charges prevented him from raising.

Nor does there appear to be a reasonably available defense to Kempainen that the charging period and delay could negatively impact—such as an alibi, identity, or lack of access—given that Kempainen lived with L.T. before, during, and after both charging periods. *See* note 21, *supra*. And even if Kempainen claimed that he had no way to prepare an alibi defense—again, an unlikely proposition under the circumstances—his desire to prepare such a defense does not make time an essential element of child sexual assault charges. *See, e.g.*, *Fawcett*, 145 Wis. 2d at 254 n.3 (defendant's inability to prepare an alibi defense for the period does not require dismissal of the complaint).

Kempainen apparently anticipated presenting a defense that the assaults never happened and his ex-wife—L.T.'s mother—put L.T. up to making the accusations, in part based on the pending disorderly conduct charges against L.T.'s mother after she confronted Kempainen about the

accusations (33:10-11). That amounts to a credibility challenge, and neither the delay in reporting nor the charging period would prevent him from asserting such a challenge. Further, L.T.'s delay in reporting the assaults and her vagueness as to exactly when they occurred could support Kempainen's credibility challenge.

In sum, the charges did not offend Kempainen's due process rights to plead and present a defense. The details L.T. provided were consistent with the charges that the State formulated, and gave Kempainen ample notice of the "who, what, when, where, why, and who says so" of L.T.'s accusations. The charging periods of three-and-a-half and four months and the delay in charging were reasonable under the circumstances. Most importantly, Kempainen cannot demonstrate that the charges as presented deprived him of the ability to plead and present a defense. Accordingly, he is not entitled to the extreme relief of outright dismissal of the charges against him.

III. The court of appeals did not overstep its authority in reversing this case.

Finally, Kempainen suggests that the court of appeals here overstepped its authority by essentially overruling *R.A.R.* when it declared that it must follow *Fawcett* based on *Cook*, 208 Wis. 2d at 189-90. *Kempainen*, slip op. ¶14. (Kempainen's br. at 30-32).

Again, because this case is now before this court, whether the court of appeals properly followed its own precedent is largely moot. That said, the court of appeals did not run afoul of *Cook* when it issued its decision here. *Cook* provides

that only this court "has the power to overrule, modify[,] or withdraw language from a published opinion of the court of appeals." *Id.* at 189-90. If *Fawcett* and the later-decided *R.A.R.* conflicted, then the court of appeals violated *Cook* when it decided *R.A.R.*, not when it recognized that violation in *Kempainen*.

Hence, the court of appeals recognized that because *R.A.R.* was the later-decided case, *Fawcett* governed to the extent that the cases conflicted. That decision was well within its authority to make. *See State v. Swiams*, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452 (when two court of appeals' decisions conflict, the first decided governs); *State v. Bolden*, 2003 WI App 155, ¶¶9-11, 265 Wis. 2d 853, 667 N.W.2d 364 (same).

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the decision of the court of appeals.

Dated this 18th day of November, 2014.

Respectfully submitted,

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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 10,242 words.

_____
Sarah L. Burgundy
Assistant Attorney General

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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 18th day of November, 2014.

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Sarah L. Burgundy
Assistant Attorney General