STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent-Petitioner

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER DISMISSING TWO CRIMINAL COUNTS ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING

Respectfully Submitted:
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TABLE OF CONTENTS

ARGUMENT

Kempainen respectfully reaffirms the arguments presented in its brief-in-chief, and replies below to the arguments made in the State's response brief.

I. The Reasonableness Test Set Forth in Fawcett Depends Upon the Nature of the Challenge Asserted by the Defendant

The State's contention that 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" is misleading and erroneous. It was the Fawcett court that stated "the 'reasonableness test' analysis depends upon the nature of the challenge asserted by the defendant". State v. Fawcett, 145 Wis. 2d at 251 n.2. The R.A.R. court confirmed that the seven factors in Fawcett were taken almost verbatim from Morris. R.A.R.,

148 Wis.2d at 411. The court then stated, " As we noted in Fawcett, the first three factors apply when the defendant claims the state could have obtained a more definite date through diligent efforts". Id.

The Fawcett court initially certified the case to the Wisconsin Supreme Court seeking guidance whether the reasonableness test of People v. Morris[1] should be adopted as law in Wisconsin. Fawcett, 145 Wis. 2d at 252. The certification was rejected, but in deciding the case, the Fawcett court adopted the seven factors found in the reasonableness test of Morris. In doing so, the Fawcett court included a footnote detailing that the analysis is dependant upon the nature of the challenge asserted by the defendant. Fawcett, 145 Wis. 2d at 251 n.2.

While it is true that all seven factors in Fawcett can assist a court in determining whether

[1] *People v. Morris,* 61 N.Y.2d 290, 473 N.Y.S.2d 769, 461 N.E.2d 1256 (1984).

Holesome is satisfied, the defendant's challenge controls their application. Claims can arise when the interval alleged for a particular crime is so excessive that, on its face it is unreasonable and the case should be dismissed. Id. (Citing Morris, 473 N.Y.S.2d at 772-773). Alternatively, if a defendant contends that the State knew of a specific date in time but strategically failed to allege this information and good cause is not shown for withholding the information, the charge should be dismissed. Id. Finally, if a defendant contends that the prosecutor failed to obtain more specific information due to a lack of diligent investigatory efforts, embracing good faith, the court may look to the first three factors listed: (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.

The State argues that 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. (State's br. at 25). It requires a stretch of the imagination to read past the plain language found in the footnote, "The "reasonableness test" analysis depends upon the nature of the challenge asserted by the defendant". Fawcett, 145 Wis. 2d at 251 n.2. Next, the Fawcett court identified three separate claims available to defendants challenging the sufficiency of a complaint and subsequently detailed how the courts analyze each claim. Id. Any question as to whether the court intended that lower courts follow the plain language concerning the proper analysis based on the defendant's challenge is quickly eradicated by the

supplementary examples of different analyses to employ.

II. Fawcett and R.A.R. Are Not in Conflict and Together Provide An Adequate Reasonableness Test to Determine the Constitutional Sufficiency of a Complaint in Child Sexual Assault Cases

The Court of Appeals' incorrect interpretation of Fawcett resulted in the determination that Fawcett and R.A.R. conflict. Decided approximately seven months after Fawcett, R.A.R. confirmed and clarified that the Fawcett court's reasonableness test analysis is dependant upon the nature of the notice challenge of the defendant. R.A.R. is distinguishable from, but does not conflict with Fawcett.

A. Fawcett's Notice Challenge to the Complaint is Distinguishable from R. A.R's

In both Fawcett and R.A.R., the analysis was restricted to the charging documents. In R.A.R., the court determined that "the validity of a complaint

must stand or fall on its contents, since a motion challenging the complaint can be made whether or not a preliminary examination is necessary or conducted. R.A.R., 148 Wis. 2d at 413, n.1.

The State complains that nothing in Fawcett suggests that Fawcett alleged the State was not diligent (State's br. at 25). That is false. In Fawcett, the court explained:

> Fawcett was originally charged with one count of first-degree sexual assault contrary to sec. 940.0225(1)(d), Stats. This complaint alleged that the assault took place on December 7, 1985. An amended complaint charged Fawcett with two counts of first-degree sexual assault an done count of enticing a child for immoral purposes, contrary to sec. 944.12, Stats., during the "six months preceding December 1985." The amended complaint also charged Fawcett with additional counts of sexual assault and enticing a child for immoral purposes (both later dismissed). These latter offenses were alleged to have occurred in late November or early December of 1985. Fawcett, 145 Wis. 2d at 257, n.1.

The State misleads this Court when it characterizes Fawcett's motion solely as one to "make more definite and certain the allegations in the information." (State's br. at 25). In its brief, attached in the supplemental appendix of this reply brief, Fawcett explained that on February 7, 1986, the State filed the amended complaint, noted above. On February 11, 1986, Fawcett filed a motion to dismiss the amended complaint, which was argued prior to the preliminary hearing on February 11, 1986. Defendant's brief in State v. Fawcett, No. 87-0692-CR (Wis. Ct. App.). The court denied Fawcett's motion in a written decision on March 6, 1986. Id. On April 28, 1986, Fawcett then filed motions to make more definite and certain the allegations in the information. Id. Those motions were denied and Fawcett was ultimately convicted of two counts first-

degree sexual assault "during the six months preceeding December, A.D. 1985." (sic). Id.

In his appellate brief, Fawcett posited,

> "The correctness of the appellant's position becomes clearer when this court considers that at the preliminary hearing appellant was prepared to present and in fact did present an alibi defense based upon the date contained in the original complaint: December 7, 1985. It was not until after the state learned of the appellant's intention to present an alibi defense at the preliminary hearing that the complaint was amended prior to the preliminary hearing to read "during the six months preceding December of 1985." (Fawcett's br. at 6-7).

The import of this footnote is evident when Fawcett's brief-in-chief is taken into context. Fawcett clearly raises a lack of diligence challenge. The initial charging period in Fawcett consisted of one day. The State modified the charging period to six months when it discovered that Fawcett could successfully defend his innocence against that

charge. While an alibi defense does not change the nature of the charges against the defendant or incorporate time as a necessary element of the offense where it otherwise would not be,[2] it certainly prejudices the defendant when one would be available but for the broadening of the charging period by the State. The Fawcett court, familiarized with both the procedural history and appellate briefs was aware of the amendments to the charging period and took them into consideration when applying all seven factors.

In R.A.R., no such modifications exist. Each count charged specified a season: the spring of 1982 (Count One); the spring of 1982 (Count Two); the summer of 1982 (Count Three); and the summer of 1983 (Count Four). Plaintiff's brief in State v.

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[2] *State v. Fawcett*, 145 Wis. 2d at 257, n.3 (citing *State v. Hoban*, 738 S.W.2d 536, 541 (Mo. Ct.App. 1987).

R.A.R., No. 88-1008-CR (Wis. Ct. App.). After being bound over for trial following the preliminary examination, the defendant moved both for a dismissal of the charges or, in the alternative, to make them more definite and certain. Id. However, unlike in Fawcett, there was no argument by R.A.R. that the State could have been more definite in their charging ability. That is further demonstrated by the fact that the State did not initially expand its charging period, nor attempt to more narrowly tailor the charging document when the trial court dismissed the case.

Because the cases are distinguishable, not contradictory as the State would argue, both are still good law and should remain good law. This Court should clarify that the Fawcett reasonableness test is the appropriate analysis for all courts to use, subject to the type of notice challenge brought by the

defendant. This will protect the constitutional rights afforded to all citizens.

B. This Court Should Not Create a New Test that Violates An Accused Individual's Right to Constitutionally Sufficient Notice of the Charges Against Them

The State complains that the current approach of Wisconsin courts ignores the mandate that child sexual assault cases require greater flexibility. (State's br. at 36). Fawcett does mandate some flexibility, but courts maintain enough flexibility in the analysis of the latter four factors. Fawcett does not stand for the subjugation of an accused's constitutional right to due process at the hands of the State's desire to pursue a conviction.

The State fears that by obligating the courts to apply the case law as stated in both Fawcett and R.A.R., the factors "may potentially limit"prosecutorial authority and discretion in child

sexual assault cases. (State's br. at 36). In the same section, the State acknowledges that the legislature has already "greatly expanded that authority since the court of appeals decided Fawcett and R.A.R. by expanding the statute of limitations for child sexual assault cases. (State's br. at 36-37). The State argues that it may not be able to narrowly tailor a case involved an alleged assault from decades ago because evidence that would have been useful to limit the charging period, such as "calendars, diaries and employment records" are less readily available. (State's br. at 38). The issues directly affect an accused person's ability to prepare an adequate defense in the same case when given a broad charging period. The steady erosion of what constitutes sufficient notice must end.

Article I, sec. 7 of the Wisconsin constitution and the Sixth Amendment of the United States

Constitution are still the law of the land. The Federal and State Constitutions require that the government meet their burden of providing sufficient notice to the accused so that they may prepare an adequate defense. An accused person in a child sexual assault case does not have fewer constitutional rights than any other type of defendant. A person is entitled to constitutional due process no matter how abhorrent the court finds the alleged conduct to be. The United States criminal justice system is based on the concept an assumption of innocence; the courts cannot violate a person's due process rights because its finds the alleged conduct appalling.

III. The Complaint Failed to Provide Constitutionally Sufficient Notice

Although already in the record, Kempainen reasserts that the factors, as applied, result in a

finding that complaint lacked constitutionally sufficient notice.

Fawcett's fourth factor, requiring that courts compare the length of the alleged period of time in relation to the number of individual criminal acts alleged, favor Kempainen on each count. 145 Wis. 2d at 253. The charging period in count one of the complaint is from August 1, 1997 to December 1, 1997 based on LRT's statement that the incident occurred at the beginning of her second-grade school year. (R1 at 1).

Given the statement that the incident occurred at the start of the school year, the charging period is overly broad and therefore the period-to-act ratio favors a finding of unreasonableness.

Count two alleged one act within a three-and-a-half month period. In Fawcett, this court held that two alleged acts within a six month period against a

ten-year-old was reasonable. Fawcett, 145 Wis. 2d at 254. Similarly, in R.A.R., a charging period of three single acts within three separate three-month periods was shorter than the time designated in Fawcett, but the complaint was held insufficiently definite. R.A.R., 148 Wis. 2d at 412.

The fifth and sixth factors require courts to evaluate the time between the alleged act and criminal charges or proceedings. Fawcett, 145 Wis. 2d at 253. In Count One, fifteen years separate the alleged incident and the charge. This is three times as long as R.A.R., 148 Wis. 2d at 412, with four and five year gaps between the alleged conduct and the charges. Fifteen years separating a single alleged incident is unreasonable and unfairly denies due process to the accused.

In Count Two, the fifth and sixth factors indicate an eleven-and-a-half year period between the

alleged conduct and the charges, weighing in favor of Kempainen. The alleged incident occurred four years before LRT's mother and Kempainen divorced, while seven years passed since the divorce before any charges were filed.

The seventh factor addresses LRT's ability to particularize the date and time of the alleged offense, Fawcett, 145 Wis. 2d at 253. Both counts favor Kempainen. LRT offers no descriptors as to the season in Count One and in Count Two, LRT is unable to particularize the date and time of the alleged offense. LRT is unable to articulate the month and can only describe it as being "warm outside". (R1 at 2). The last day of the charging period is LRT's birthday, yet she fails to describe the date of the incident in relation to it.

The trial court correctly applied the case law, and found that the criminal complaint failed to

provide constitutionally sufficient notice of the charges alleged against Kempainen.

CONCLUSION

Kempainen respectfully reasserts that the Court of Appeals erred when they determined that the trial court must apply all of the Fawcett factors to determine whether a complaint is sufficiently definite in a case involving delayed allegations of sexual assault.

For the foregoing reasons, Kempainen respectfully asks that this Court affirm the decision of the circuit court dismissing the complaint.

Dated this 3rd day of December, 2014.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

- Table of Contents -

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,997 words.

Dated this 3rd day of December, 2014.

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CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of December, 2014.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Dated this 3rd day of December, 2014.

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CERTIFICATE OF DELIVERY

I hereby certify that this brief and appendix was hand-delivered to the Clerk, Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin, December 3, 2014.

Dated this 3rd day of December, 2014.

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