STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP002686-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

LUIS C. SALINAS,

Defendant-Appellant.

On State's Petition for Review of a Decision of the Wisconsin Court of Appeals Reversing a Judgment and Remanding for New Trials in the Circuit Court for Brown County, the Honorable Marc A. Hammer, Presiding

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RESPONSE BRIEF OF DEFENDANT-APPELLANT

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SUMMARY OF ARGUMENT

The state's petition and brief give the reader the impression that the court of appeals decision lacks depth and cogent, comprehensive analysis. That is not accurate. The decision thoroughly explains the court's reasoned judgment, applying the facts of the case to the proper, and longstanding, legal standard. This brief will, in essence, let the decision speak for itself, with some supplementary facts provided for clarity.

This case gives the Court an opportunity to reinforce the policy underlying joinder law: while the statute is to be broadly construed in favor of joinder, there are limits to that breadth. The law is not a vehicle for the state to introduce character evidence by joining disparate, horrifying counts against a single defendant. And, in Mr. Salinas' case, the joined charges were, indeed, disparate, as even the state concedes:

> The evidence of the sexual assault crimes was so different from the crimes that led to the domestic abuse charges. It is far more than a stretch to suggest that because the jury heard that Salinas harmed and threatened M.S. and their shared son, that he necessarily sexually assaulted V.G. If the crimes were similar, the concern of prejudice would be heightened.

(State's brief at 15).

In this case, the state disagrees with the appellate court's conclusions regarding misjoinder and harmlessness. However, the court of appeals meticulously analyzed the complex facts of the case, and came to proper

legal conclusions despite the emotionally-charged nature of the allegations. This Court should therefore affirm the lower court's decision.

The state, in its petition as well as its brief, brushes aside much of the court of appeals' analysis, and makes only conclusory statements regarding prejudice caused by the misjoinder of the cases.

The jury deciding Mr. Salinas' two cases – a) allegations of repeated sexual assault, and b) misdemeanor intimidation, itself related to a *third* case – heard details of that third case: a horrific domestic violence incident, in which M.S., V.G.'s mother, suffered strangulation / suffocation and battery with a dangerous weapon. In the same incident, Mr. Salinas allegedly threatened his own life, and that of his young son, as Mr. Salinas stood by the child while brandishing a knife. The state argues that this was admissible evidence in Mr. Salinas' trial on multiple allegations of sexual assault against V.G., the latest of which was charged as having occurred *prior to* the domestic-violence incident. All of the sexual assault allegations were reported *after* the disposition of the domestic violence case.

The only thread connecting the domestic violence evidence to the sexual assault allegations was the misjoined misdemeanor victim intimidation case, in which Mr. Salinas allegedly sought to buy a favorable sentencing statement from V.G. through M.S.'s provision of a cell phone or prepaid phone card. That is too thin a thread to join the intimidation charges with the sexual assault accusations by V.G. And, by joining the counts, the circuit court allowed the admission of evidence that Mr. Salinas had beaten and strangled M.S. and threatened to kill himself and their child.

This was, simply, impermissible character and propensity evidence. The state returned to the domestic violence case, and its horrifying facts, throughout the trial, from opening statements though closing argument. The jury heard repeatedly that Mr. Salinas was a dangerous, potentially filicidal man. This evidence should not have come in, under any of the state's theories, including the newly advanced argument that this was "panorama" evidence.

SUPPLEMENTAL TIMELINE OF CHARGES AND JOINDER PROCEEDINGS

The following timeline will give this Court the context and sequence of events underlying the misjoinder of the sexual assault and intimidation / domestic cases.

A. The domestic violence charges, No. 09-CF-1267.

October 26, 2009: Officers from the Green Bay Police Department were dispatched to Mr. Salina's home, where M.S., M.S.'s daughter, V.G., and Mr. Salinas' son (with M.S.) lived. (143:4; Pet. App. 124). There, officers spoke first with M.S. (*Id.*). She provided a written statement outlining her allegations against Mr. Salinas. (*Id.*).

> [M.S.] stated she and the defendant had been arguing because the defendant wanted to take the children to Mexico because he believed they don't behave properly. She stated they continued to argue and the defendant hit her on the side of the face. She stated she told the defendant they were breaking up and the defendant then threw a small object at her. [M.S.] stated the defendant said he was going to kill her and grabbed a computer chair, so she started to leave the residence. She stated the defendant then grabbed her and grabbed a hold of her neck, using both hands to choke her. She stated the

> defendant pressed her against the wall while he choked her and she could not breathe. She stated the defendant choked her for less than a minute and at the time, it hurt. [M.S.] stated she began to pull the defendant's hair to get him to let her go and she was able to get away. She stated the defendant then grabbed a knife in the kitchen and at that point, she yelled for V.G. to leave the residence and V.G. did run out of the house. [M.S.] stated the defendant then stood in the doorway with their six year old son, having their son tell [M.S.] to come back to the residence. [M.S.] stated V.G. then ran across the street and called the police. She stated the defendant told [M.S.] that if she didn't come back to the residence, he would kill their son and kill himself.

(143:4; Pet. App. 124).

Police then spoke with V.G., then 15 years old. (143:4-5; Pet. App. 124-125). V.G. gave a statement to officers. (*Id*. at 5; Pet. App. 125).

> …on October 26, 2009, at around 3:00 a.m., her mother, [M.S.], was preparing to go to work when [M.S.]'s live-in boyfriend, the defendant, became angry with [M.S.] and said she couldn't go to work because of the way she was dressed. V.G. stated she laid in her bed and the defendant came into the room, hit her on the right side of her face and the back of her head, made her get up and yelled at her for about an hour. She stated she went back to bed and woke up around 8:00 a.m. to the sound of her mother and the defendant arguing. She heard the defendant threatening to kill her mother and then she heard a loud noise that sounded like furniture being thrown. V.G. stated she saw the defendant grab her mother by the neck with both hands. She yelled at the defendant to let her mother go. She stated the defendant was yelling back at her and at one point, she heard her

> mother yell for her to get out of the house, so she did and ran out of the house and went across the street to call the police.

(143:5; Pet. App. 125).

October 27, 2009: In Brown County Case No. 09-CF-1267, Mr. Salinas was charged with four counts arising from the previous day's incidents: Strangulation and Suffocation-Domestic Abuse, a felony, Physical Abuse of a Child-Intentionally Causing Bodily Harm, a felony, Battery-Domestic Abuse-Use of a Dangerous Weapon, a misdemeanor, and Disorderly Conduct-Domestic Abuse-Use of a Dangerous Weapon, a misdemeanor. (143:4; Pet. App. 124).

March 8, 2010: Mr. Salinas entered Alford pleas to two counts: Strangulation and Suffocation-Domestic Abuse and Battery-Domestic Abuse-Use of a Dangerous Weapon. The other two counts charged were dismissed and read-in. (76:Exh. 3:7; 143:5; Pet. App. 125).

May 11, 2010: Mr. Salinas was sentenced for the two counts in 09-CF-1267 to which he pled. (143:5; Pet. App. 125). Both M.S. and V.G. made statements indicating that they wanted Mr. Salinas to come back home. (*Id.*). There was a joint recommendation for two years of probation with 12 months in jail as a condition. (76:Exh. 3:6). Mr. Salinas, in his allocution, apologized to his family and took responsibility for his actions. (76:Exh. 3:9). He also admitted to a violent past, but said, as his attorney had, that he was sick on the day of the offenses, and "wasn't thinking right." (76:Exh. 3:12). He noted that his most recent criminal conviction was ten years earlier, his most recent felony was six years before that. (*Id.*). Mr. Salinas said that he now knew how grave his mistake was, and that he now understood his priorities and had experienced compassion, pain and

heartache. (*Id.*). Sentence was withheld, and Mr. Salinas was placed on probation for three years, with a total of nine months in jail as a condition. (76:Exh. 3:13). He was also ordered not to have contact with M.S. or other family members for a period of six months, though he was allowed contact with M.S. at their common place of employment. (76:Exh. 3:16). Mr. Salinas was given credit for 197 days of presentence custody against his condition time. (76:Exh. 3:15, 17).

B. The sexual assault charges, No. 10-CF-542.

May 13, 2010: V.G. provided a written statement to police, accusing Mr. Salinas of having sexually assaulted her repeatedly over a two-and-a-half year period. (1:1-2; Pet. App. 118-119). The period spanned April 24, 2007, to October 26, 2009. (*Id.* at 1; Pet. App. 118).

V.G. told police that the assaults had occurred when her mother, M.S., was not at home. (1:2; Pet. App. 119). V.G. said that if her younger brothers were not with M.S., they would be sent outside or to the park. (*Id.*). V.G. said that the sexual assaults occurred six to twelve times a month, beginning when she was 13 years old. (*Id.*). The last alleged assault occurred on October 26, 2009. (*Id.*).

If V.G. resisted or rejected Mr. Salinas' sexual advances, she stated, Mr. Salinas would "hit her, and he would sometimes punch and slap her." (1:2; Pet. App. 119). She also told police that Mr. Salinas said that if V.G. told M.S., Mr. Salinas would say that V.G. was making advances to him. (*Id.*). If V.G. were to go to the police, Mr. Salinas said that the police would take V.G.'s brothers from M.S. (*Id.*).

On October 26, 2009, according to the 10-CF-542 complaint, after M.S. left for work,[1] Mr. Salinas ordered V.G. to come over by him. (1:2; Pet. App. 119). V.G. inferred that this meant that Mr. Salinas wanted to have sex with her. (*Id.*). V.G. told Mr. Salinas no, that she was not going to do so and she "was tired of doing it." (*Id.*). V.G. said that Mr. Salinas was going to tell M.S., and blame it on V.G. (*Id.*). Mr. Salinas then hit her in the face with his hand, and forced her to have sexual intercourse. (*Id.*). V.G. said that afterward, Mr. Salinas began arguing with and yelling at V.G. (*Id.*).

On May 13, 2010, V.G. told her boyfriend that Mr. Salinas had been assaulting her. (1:2; Pet. App. 119). Her boyfriend made her tell M.S., who brought her to the police station to make a statement. (*Id.*). The same day, M.S. gave a statement, saying that she and V.G. had recently learned that Mr. Salinas would soon be released from jail [for the domestic abuse case]. (*Id.*). M.S. said that V.G. had not come home from school on May 13. (*Id.*). M.S. said that she believed that V.G. was afraid that Mr. Salinas might return home and assault V.G. (*Id.*). M.S. stated "for the past three years, V.G. has told her that she did not want the defendant living with them anymore. She also remembers the defendant asking her to have V.G. not live at the house anymore. [M.S.] stated she never understood why he would ask her that." (*Id.*).

May 19, 2010: A criminal complaint was filed in Brown County Case No. 10-CF-542, charging Mr. Salinas with the repeated sexual assault of V.G. (1; Pet. App. 118-120).

[1] This would have been around 3:00 a.m. (143:5; Pet. App. 125).

C. The intimidation charges, No. 10-CM-1571.

August and September, 2010: Police listened to, and translated from Spanish, recorded jail calls from Mr. Salinas to M.S. (143:2-3; Pet. App. 122-123). Police then interviewed M.S. and V.G. regarding the calls. (143:2-4; Pet. App. 122-124). Each of them provided a statement. (*Id*. at 3-4; Pet. App. 123-124).

According to the criminal complaint in 10-CM-1571, between April 15 and 19, 2010, Mr. Salinas attempted to call M.S. from jail many times. (143:2; Pet. App. 122). On four occasions, Mr. Salinas and M.S. had conversations, which were recorded. (*Id*.).

In a call recorded on April 15, Mr. Salinas referred to a letter:

> Mr. Salinas: Did you get my letter?
>
> M.S.: Yes.
>
> Mr. Salinas: Then you know what to do that is enough.
>
> M.S.: I don't have to do anything, Luis. You are wrong. We don't want nothing to happen to you. We don't want you to hurt yourself. We don't want none of that.

(143:3; Pet. App. 123).

In two calls recorded on April 19, Mr. Salinas expressed frustration and anger with M.S. (143:2-3; Pet. App. 122-123). Mr. Salinas acknowledged that M.S. was the mother of his son, and because of that, Mr. Salinas said that he didn't "want to be mean" to M.S. (*Id*. at 3; Pet. App. 123). In other portions of the conversations, Mr. Salinas insulted M.S., using obscene language. (143:2-3; Pet. App. 122-123). Some of Mr. Salinas' comments were threats to M.S.: "you don't know what I'm able to do;" "[y]ou

don't know what I have done or what I could do;" "you don't know who I am;" "you better start thinking that one day I'm coming out;" "you don't want me to kick your ass;" "you are going to piss me off and I'm going to send someone there and you are not going to like it;" "[i]f I get out, you are going to be sorry, my darling." (143:2-3; Pet. App. 122-123).

During one of the April 19, calls, a letter was again discussed.

> M.S.: I didn't pay my daughter to write you or dictated the letter to her.
>
> Mr. Salinas: You were going to pay her last time so she could go to court and say you know what.
>
> M.S.: Yes, because you were the one telling me to do that.

(143:2-3; Pet. App. 122-123).

In her statement about the jail calls, M.S. told police that:

> …she recalled that conversation and that the defendant had requested many times for V.G. to write him a letter, but V.G. had refused. She stated after V.G. refused to write him, the defendant began threatening to kill himself, so V.G. broke down and wrote him a letter. She stated this is what the defendant was talking about in the phone call. She stated the defendant did tell her to offer V.G. anything so that V.G. would come to court and say the defendant did not hit her. She stated she bought V.G. a $20 phone card so she would go to court. She stated the defendant said it would get worse if she didn't. She stated the defendant was threatening her and pressuring her to do this. She stated V.G. did go to court to speak on the defendant's behalf for [M.S.], so it would not be worse for [M.S.]. [M.S.] stated she would like to add that the statement she gave to the officers for the

> domestic violence offense [was] true and correct. She stated the defendant pressured her to change that statement that she originally gave to officers. She stated she and the defendant lived together for seven years. He continues to send her letters, but puts someone else's name on the envelope so that a third party would give them to her. She stated at no time did V.G. want to go to court and speak on the defendant's behalf unless it was going to be the truth about what happened. She stated the reason V.G. did go to court was because she pressured her to do so. [M.S.] stated the defendant told her it would make him look good to the judge that his family supported him.

(143:2-3; Pet. App. 122-123).

In her statement, V.G. said:

> …she was supposed to go to court to testify that the defendant did not hit her. She stated the defendant was writing her and her mother, [M.S.], and he called many times. She stated the defendant was pressuring them to change what they had said happened and she did not want to change what she said had happened. V.G. stated she did go to court for the defendant's sentencing. She stated she did speak to the court and told the judge that her brother wanted his father home and missed him. She stated she did this hoping that the defendant would stop pressuring her and her mother and he would stop annoying them and it would just go away. She stated her mother did give her a $20 phone card for going to court and talking to the judge. She stated she got the phone card after she went to court, but was told she would get the phone card if she went to court. V.G. stated the defendant would threaten her mother and herself when he called. She stated the defendant would also tell her brothers things to manipulate them into liking him and making them go against their mother and V.G.

(143:3; Pet. App. 123).

October 5, 2010: A criminal complaint was filed in Brown County Case No. 10-CM-1571, charging Mr. Salinas with two counts of Misdemeanor Intimidation of a Victim, Domestic Abuse, for the telephone calls. (143:1-2; Pet. App. 121-122). One count alleged intimidation of M.S.; the other, V.G. (*Id*.).

D. Joinder proceedings.

October 18, 2010: The state filed a motion to join files 10-CM-1571 and 10-CF-542 for trial. (15). The state argued that the cases shared common victims, the charges in the cases arose within six months of one another, the evidence in both cases overlapped, and joinder of the files would relieve the victims from having to testify twice regarding the events. (15).

October 20, 2010: The motion for joinder was heard. (121). The state's argument was brief:

> Thank you, Your Honor. The state did file the motion for joinder which outlines the reasons it believes the two files should be joined. The incidents in both files are close in time, involve the same victims, and the testimony would be intertwined because the files are related.
>
> For those reasons, we feel that joinder would be appropriate.

(121:2).

Counsel for Mr. Salinas opposed the motion.

> Your Honor, from around October to May my client was charged with making five hundred something phone calls to [M.S.], but it was not on the matter at hand now in 10-CF-542. It's not about a sexual assault of V.G. It was -- it was about another case on which he was

> revoked (*sic*) and for which he was going to be released from the jail on May the 20th. Charges in this matter were filed just about that time. In fact, my Order Appointing Counsel is dated May 20th of this year.
>
> So I really I just don't see what one has to do with the other. We can say that he -- he called [M.S.] and was rude to her and used curse words at her, but it didn't have anything to do with the sexual assault. He's not trying to intimidate anybody about the sexual assault because these charges weren't filed until after all the phone calls were over. So one case simply has nothing to do with the other.

(121:2-3).

The court found that the cases were appropriate for joinder, acknowledging the prejudice to Mr. Salinas.

> Well, but the fact that the charges hadn't been filed doesn't minimize the status of V.G. as a victim. I mean, the victimization occurs at the time of the assaults (*sic*) between April 15th and April 19th of 2010.
>
> This file, 10-CM-1571, has two counts. The second count, Misdemeanor Intimidation of a Victim, is directly related to V.G., the victim in the Repeated Sexual Assault of a Child in 10-CF-542. So that there would be a logical reason to connect those two for purposes of trial.
>
> The thought then occurs to me that were I to say that the first count, the Misdemeanor Intimidation of a Victim as it relates to [M.S.] on something unrelated should be separated for purposes of trial, I would expect that I'm going to get a motion for other-acts evidence to include these very instances to be part of the felony trial.
>
> So that what I'm really doing is allowing in all of the information without having an actual trial, and if there would seem to be a likelihood that I would consider

> other-acts evidence based upon the repeated contact, alleged repeated contact by Mr. Salinas with [M.S.], then I ought to try that case as well as Count 2 at the same time as I'm trying the felony case.
>
> I don't think that the jury is going to be confused by this. Certainly, this is something that is prejudicial to your client. All of these things are prejudicial, but the probative value outweighs that prejudice, under these circumstances.
>
> There is a strong likelihood that all of this evidence in this file would come in under other-acts evidence, and if that's the case, and since Count 2 is related to the felony file, Count 2 in the misdemeanor file related to the felony file, I see no reason not to include them as part of one trial in this matter.

(121:3-5).

March 18, 2011: The state filed an amended information, joining the felony and misdemeanor cases. (31).

August 23, 2011: The parties stipulated (43) to the filing of another amended information, this one clarifying the dates of the alleged offenses and the identity of the alleged victim in one of the misdemeanor intimidation charges. (44:1-2).

March 2, 2012: At a status conference pre-trial, defense counsel[2] raised the possibility that Mr. Salinas would enter pleas to the misdemeanor intimidation counts but go to trial on the felony charges. (133:5). The state said that it intended to present evidence related to the charges regardless of any resolution by pleas. (*Id.*). Defense counsel objected to the admission of the evidence under those circumstances.

[2] Mr. Salinas' new attorney was not the one who argued against joinder.

(133:6). Counsel noted that the intimidation involved sentencing on a strangulation case (09-CF-1267) in which M.S. was the victim. (*Id.*). Mr. Salinas had already been convicted in 09-CF-1267, and his "trying to get them (V.G. and M.S.) to consider a better sentencing recommendation from Mr. Salinas is completely separate from any sort of sexual assault allegation." (*Id.*).

The court[3] said that it was "having a difficult time right now understanding how counts 4 and 5, misdemeanor intimidation of a victim, are immediately relevant." (133:6). The court asked the state how the evidence would come in if defense counsel "didn't raise an inference as to motivation." (133:7). The state argued that it anticipated that the defense would challenge the delayed reporting of the alleged sexual assaults, and evidence of intimidation would be relevant. (*Id.*). In addition, the last sexual assault allegedly occurred on the day that Mr. Salinas was arrested on the strangulation charge. (*Id.*). The court then asked defense counsel why that evidence should not come in as other acts. (133:8). Counsel replied, "Other acts to what? How does – how does intimidating a witness relate to whether or not a sexual assault occurred?" (*Id.*). The court then advised defense counsel:

> That doesn't necessarily mean once you pled it that she [the assistant district attorney] can't talk about it. She may be able to talk about it depending upon your cross. Even if you stay away from it on cross, depending upon how the evidence is presented, I would-- and I'm telling you today I anticipate she's going to request an other acts evidence ruling and this may fall into the admission of

[3] The Honorable Mark Warpinski had recused himself from the proceedings, because he had imposed Mr. Salinas' probation and conditions in 09-CF-1267. The case was then transferred to the Honorable Marc Hammer.

> other acts when I run that three prong analysis in my brain. I can give the curative instruction so they don't convict in theory or base a conviction on other acts, but, boy, I think it goes to plan, scheme, intent basis. I think it's relevant. It meets both prongs of the relevance standard.
>
> Is it prejudicial? Sure, it is. But is it overly prejudicial? I'm not prepared to conclude at this point in time it is. She hasn't filed a motion. She hasn't even asked about it. I put those words in her mouth, but I don't want you to be caught off guard. Wait a minute, Judge. I wasn't prepared for that. I entered a plea in the belief this would be excised from the trial. Don't assume that.
>
> And to the extent that you were relying on that, then don't plead him, and she'll try those aspects too.
>
> What I don't want is for you to enter a plea with a belief you got some type of commitment from the DA's Office or you're able to forecast what I'm going to do because that would be wrong.
>
> She's ready to try the case. It sounds like she's ready to try all counts, so you can do with that what you want, and if you want to plea him, I'll take it on Tuesday. I don't know I'll take them -- well, if you want to plead, I'd like to try to take them as quickly as possible.

(133:8-10).

Mr. Salinas was tried over two days, March 6 and 7, 2012. (134; 135). Mr. Salinas elected not to enter pleas to any of the joined counts. (134:6).

ARGUMENT

I. The Court of Appeals Applied The Proper Standard to Complex Facts in Finding Joinder Inappropriate.

The three-judge panel's 17-page opinion analyzes the complex facts of this case, and finds that under the joinder statute, as explicated in longstanding caselaw, the intimidation and sexual-assault charges were improperly joined. (Slip op., ¶¶ 1-27; Pet. App. 101-112).

Under Wis. Stat. § 971.12(1), crimes charged against a defendant may be joined under only three circumstances:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, *are of the same or similar character* or *are based on the same act or transaction or on 2 or more acts or transactions connected together* or *constituting parts of a common scheme or plan*. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

Wis. Stat. § 971.12(1)(2011-12)(emphasis added).

In its first Issue Presented, the state says that the court of appeals concluded that the joined charges "were not similar acts or connected as part of a common plan." The court's actual conclusion was more comprehensive: that the charges "were neither 'of the same or similar character,' nor based on two or more acts either 'connected together' or 'constituting parts of a common scheme or plan.'" (Slip op., ¶ 21; Pet. App. 109-110).

The premise of the second issue is inferential, not factual. The state asserts, "Here, the evidence of sexual assault and victim intimidation was overwhelming."

At no point did the court of appeals state that the evidence against Mr. Salinas was "overwhelming." Indeed, the court of appeals characterized as "astonishing and absurd" the state's appellate argument that Mr. Salinas had conceded that the evidence was overwhelming. (Slip op., ¶¶ 35; Pet. App. 115-116).

The state argues that the joinder statute should be broadly construed to favor initial joinder. (State's brief at 5). This is a correct statement of the law, and it is the law that the court of appeals applied here.

Notably, the state does not argue that the court of appeals decision is in conflict with any particular joinder case. There are two case citations in the state's Argument Section B, concerning the law on joinder. The first case citation is inapposite; the second is controlling, and it was, in fact, applied by the court of appeals.

The state refers to ***Francis v. State***, 86 Wis. 2d 554, 560-561, 273 N.W.2d 310 (1979), for the proposition that crimes are connected together when they contain the same modus operandi, which tends to establish a common scheme or plan. (State's brief at 8). However, that is not all that ***Francis*** says:

> In the case at bar we conclude that counts one and two charging the defendant with rape and sexual perversion were properly joined with count 3 charging robbery. The crimes charged involve two or more acts or transactions exhibiting the same Modus operandi; these acts are connected together or constitute parts of a common scheme or plan *that tends to establish the identity of the perpetrator*. The perpetrator attacked a lone woman as she was starting her car. He forced his way into the driver's seat and blinded the woman by placing a knit hat over her head. He forced the woman to lie down on the car seat with her head placed on his lap and her

> hands under his right leg. He drove away in the woman's car. The purpose of Francis' scheme was to assault the woman. He accomplished this purpose in his attack on Ms. L. Although he did not accomplish this purpose in his attack on Ms. G., he indicated his purpose when, in response to her question asking what he wanted, the defendant answered, "I want you." The two incidents were close in time (thirty-five days); they both occurred within two blocks of each other. The evidence of each crime would be admissible at separate trials for each crime.

Francis v. State, 86 Wis. 2d at 560-561 (emphasis added)(citations omitted).

Francis concerns an unknown assailant whose modus operandi was sufficiently consistent to establish identity. Identity was not an issue in Mr. Salinas' case, and, as discussed further below, the court of appeals properly concluded that the joined counts did not constitute two or more transactions with a modus operandi connecting the transactions or making them part of a common scheme or plan.

The state also cites ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993), for the proposition that the "statute is to be construed broadly in favor of joinder." (State's brief at 10). But the court of appeals cited the same case, for the same proposition. (Slip op., ¶ 20; Pet. App. 109). Even under this standard, the court concluded that the state's argument for joinder:

> …paints with too broad a brush, and it fails to actually identify any common factors or evidence between the intimidation charges and the sexual assault charges. The argument also ignores the differing allegations with respect to the two victims. It appears the State may believe it was appropriate to join the cases because the victim intimidation and sexual assault allegations

> generally demonstrated Salinas's character trait of being manipulative. If so, that does not satisfy the joinder requirements of § 971.12(1).

(Slip op., ¶ 27; Pet. App. 112).

The court's decision resulted from a straightforward application of well-settled law to the unique facts of this case. In its brief, the state restates its appellate argument that joinder was proper because "the crimes are multiple acts connected together as part of Salinas' overarching, common plan to control, manipulation and abuse both M.S. and V.G." (State's brief at 10). That argument – in essence, that joinder is a vehicle for the introduction of character evidence – was considered, and properly rejected by the court of appeals.

By moving to join 10-CM-1571 and 10-CF-542 at trial, the state was effectively moving to join 09-CF-1267 as well. Though that case was long closed, in order to find that M.S. and V.G. were *intimidated* victims, the jury first had to find that M.S. and V.G. were victims. Thus, the jury had to find that M.S. and V.G. had been strangled and battered, respectively, in 09-CF-1267. So, not only did the jury hear the disturbing jail calls and threats to M.S., the jury also heard the details of the violence in 09-CF-1267, including the horrifying accusation that Mr. Salinas, holding a knife, threatened to kill his and M.S.'s young son.

As Mr. Salinas conceded in appellate briefing, some of the counts in the three cases would or could have been properly joined, e.g., the two misdemeanor counts of victim intimidation. The jail phone calls comprised general threats to M.S. and resulted in M.S. providing a phone card to V.G. after V.G. made a favorable statement at Mr. Salinas' sentencing in 09-CF-1267. Those allegations involve a number of transactions constituting a common scheme or plan. The evidence for both counts is inextricably

intertwined, so it would be proper for a jury to decide both counts at a single trial. In addition, had the complaint in 10-CM-1571 charged that the phone calls were made prior to conviction in 09-CF-1267, then the intimidation charges would have been properly joined with the underlying 09-CF-1267 charges. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) (evidence of criminal acts of an accused which are intended to avoid punishment are admissible to prove consciousness of guilt of the principal charge).

However, the intimidation charges were not properly joined with the sexual assault charges in this case, and the joinder prejudiced the defense substantially. The jury not only heard the threatening jail calls; it also heard the details of the violence against M.S. which led to Mr. Salinas' convictions in 09-CF-1267. In addition to the physical violence, M.S. described *Mr. Salinas carrying a knife and threatening to kill their very young son*.

The timelines of the three cases at issue overlap, with some complexity, and the same three individuals are involved in each. But that does not mean that the evidence supporting the intimidation charges overlaps significantly with the evidence supporting the sexual assault charges. Indeed, the linkage between the two sets of allegations is minimal: V.G. and Mr. Salinas agree that he struck V.G. early in the morning on October 26, 2009. (134:86, 240). Later that day, that strike led to an argument between Mr. Salinas and M.S. The argument escalated, and Mr. Salinas was charged with several counts of domestic violence. (134:88-89, 136-144, 241-242). Eventually, V.G. said that Mr. Salinas had hit her because she had tried to resist his sexual advances. (1:2; Pet. App. 118-119). That is the sole fact that connects one of the sexual assault charges to the domestic violence allegations in 09-CF-1267, which in turn is connected to the

intimidation charges. However, that minimal, indirect connection does not satisfy the statutory criteria for joinder.

In its brief, the state argues that the intimidation / domestic violence evidence would have come in as other acts had the cases not been joined for trial.

However, the phone calls made by Mr. Salinas from April 15, 2010, through May 11, 2010, regarding 09-CF-1267, and the sexual assault allegations, were not "of the same or similar character, based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan," as required by Wis. Stat. § 971.12(1). Therefore, they should not have been joined, as the court of appeals concluded. Turning to each of the statutory criteria:

A. The intimidation charges and the sexual assault charges were not "of the same or similar character, based on the same act or transaction."

The appellate court carefully considered, and rejected, the contention that the intimidation / domestic violence evidence would have come in as other acts due to similarity or as components of the same act or transaction.

> The intimidation and sexual assault charges were not of the same or similar character because they were not the same type of offenses and there is little or no overlapping evidence. *See* ***Hamm***,[4] 146 Wis. 2d at 138. Making phone calls threatening or coaxing M.S., resulting in V.G. giving a positive statement at sentencing and receiving a phone card, was not the same type of offense as either a repeated or [singular] sexual assault. The charged offenses were not rendered similar

[4] ***State v. Hamm***, 146 Wis. 2d 130, 430 N.W.2d 584 (Ct. App. 1988).

> merely because the defendant and one victim, V.G., were the same in both cases.
>
> Further, the only potentially overlapping evidence was indirectly connected, via the underlying domestic abuse case. V.G. and Salinas both agreed that he struck V.G. early in the morning on October 26, 2009. Later that day, Salinas and M.S. argued about V.G. The argument escalated, and Salinas was arrested and charged with several counts of domestic abuse. V.G. later asserted Salinas hit her early that morning because she had tried to resist his sexual advances. That is the sole evidence that connects one of the sexual assault charges to the one read-in domestic abuse charge involving V.G., which in turn is connected to the one intimidation charge concerning V.G. Further, Salinas's *reason* for striking V.G. in the domestic abuse case—as opposed to the fact he had struck her, making her a victim—would not have been relevant in the intimidation case.

(Slip op., ¶¶ 22-23; Pet. App. 110).

The jury found Mr. Salinas guilty on all counts, including one count of sexual assault by use or threat of force. But the evidence supporting a finding of the use or threat of force did not come from the phone calls; it came from V.G.'s testimony: Mr. Salinas hit her, as even he conceded. (134:86, 240).

B. The two sets of charges were not based "on 2 or more acts or transactions connected together."

The court of appeals analyzed the facts of the case and concluded that the two sets of charges were not connected together.

> The intimidation and sexual assault charges also were not "based on the same act or transaction or on 2 or more acts or transactions connected together." *See* WIS. STAT. § 971.12(1). There was no connection between

> the jail phone calls and the sexual assault allegations. The coercive phone calls were related only to sentencing in the domestic abuse case. Indeed, the sexual assault allegations and charges did not arise until after the domestic abuse case sentencing hearing had concluded.

(Slip op., ¶ 24; Pet. App. 110-111).

There was no connection between the jail phone calls and the sexual assault allegations. The phone calls concerned sentencing in 09-CF-1267. (143:2-6; Pet. App. 122-126). The acts underlying 09-CF-1267 occurred after the most recent alleged sexual assault. (1:2; 143:4-5; Pet. App. 119, 124-125). 09-CF-1267 had concluded before the sexual assault allegations were made. (1; 143:5; Pet. App. 118-120, 125). The phone calls were not discovered until the state was investigating the sex charges. (143:2; Pet. App. 122).

C. The intimidation arising from 09-CF-1267, charged in 10-CM-1571, and the sexual assault allegations in 10-CF-542, did not constitute "parts of a common scheme or plan."

Finally, the court of appeals rejected the state's primary argument on appeal, that the joined acts constituted parts of a common scheme or plan.

> Similarly, the victim intimidation and sexual assault charges were not based on two or more acts or transactions constituting parts of a common scheme or plan. Salinas was not charged with victim intimidation related to the sexual assault allegations, and V.G. did not allege Salinas had threatened to physically harm her. His specific, lethal threats to M.S. were of an entirely different character than any attempts to manipulate V.G. to make a statement at sentencing in the domestic abuse case. There were no recorded jail calls in which Salinas was berating or threatening V.G. as he had M.S. Further, M.S. testified she did not relay Salinas's telephone

> threats to V.G., and V.G. told police she only spoke favorably of Salinas at the sentencing hearing because M.S. asked her to do so.
>
> Further, the inducement for V.G. to speak positively about Salinas at sentencing was the receipt of a gift, ultimately, a phone card. That sort of buying influence was never alleged as a modus operandi in the sexual assault case. V.G. did not tell police or the jury that Salinas had ever offered gifts to ensure her silence with respect to the sexual assault allegations.
>
> The State, for its part, recites WIS. STAT. § 971.12(1), but fails to identify which component of the statute it relies on to argue joinder was appropriate.

(Slip op., ¶¶ 25-27; Pet. App. 111-112).

Mr. Salinas was not charged with victim intimidation related to the sexual assault allegations. And, Mr. Salinas' specific, lethal threats to M.S. were of an entirely different character than any attempts to manipulate V.G. to make a statement at sentencing in 09-CF-1267. V.G. did not allege that Mr. Salinas had threatened to kill her. M.S. testified that Mr. Salinas had made homicidal and suicidal threats to M.S., once while standing next to their son and holding a knife. There were no recorded jail calls in which Mr. Salinas was berating or threatening V.G. as he had M.S. *Indeed, M.S. testified that she did not relay Mr. Salinas' telephone threats to V.G.* (134:159). The homicidal threats to M.S. were horrifying, but they were not among the accusations in the sexual assault complaint, and were therefore not part of a common scheme or plan across the joined cases.

Part of the inducement for V.G. to say something good about Mr. Salinas at sentencing was apparently the receipt of a phone card. (134:159-160). This sort of buying influence was not alleged as a modus operandi in the sexual assault

case, i.e., it was not a scheme or plan employed in both the intimidation and sexual assault cases. V.G. did not tell police or the jury that Mr. Salinas had ever offered gifts to ensure V.G.'s silence with respect to the sexual assault allegations.

The state's position seems to be that there should be little or no restriction on the joinder of multiple charges against a defendant. After all, with one defendant, it is possible to find some common thread to just about any crimes charged against that defendant: geographic proximity, intoxication, motivation, antisocial attitude, recklessness, and so on. In the state's view, when, if ever, would joinder be inappropriate?

This overbroad view of joinder is illustrated by the state's argument regarding prejudice:

> The evidence of the sexual assault crimes was so different from the crimes that led to the domestic abuse charges. It is far more than a stretch to suggest that because the jury heard that Salinas harmed and threatened MS and their shared son, that he necessarily sexually assaulted VG. If the crimes were similar, the concern of prejudice would be heightened. But here, they were so different, and the evidence of the sexual assaults so compelling with detailed testimony from the victim, that any concern of prejudice was low.

(State's brief at 15-16).

Having argued that the cases were properly joined because there was a "common plan to abuse, manipulate, intimidate and harm M.S. and V.G.[,]" the state ultimately argues that there was no danger of undue prejudice because the crimes were "so different." If the crimes were "so different," why join them, unless to paint Mr. Salinas as an irredeemably violent man?

The differences between the charged acts may have minimized the danger of juror *confusion*. However, the conclusion that the differences minimized *prejudice* finds no support in the record.

II. The Court of Appeals Correctly Found That The Improper Joinder Was Not Harmless.

The court of appeals was not persuaded by the state's argument that joinder was harmless. In doing so, the court cited, at length, ***State v. Bettinger***:

> [T]he defendant suffers a risk of prejudice when he [or she] is tried on the basis of an information containing multiple counts. The risk of prejudice arising under these circumstances is related to the prejudice which arises when evidence of other crimes or wrongful acts is admitted improperly at trial. … When a jury is informed of the accused's previous wrongful conduct, it is likely that it will consider that the defendant is a "bad person" prone to criminal conduct. It is also possible that the jury will confuse the issues and will be incapable of separating the evidence. Therefore there is a serious risk that a conviction will result without regard to the facts proven relative to the crime charged. Similarly, when some evidence is introduced to prove the commission of multiple criminal acts joined in one information, there is a risk that the defendant will be convicted not because the facts demonstrate guilt beyond a reasonable doubt but because the jury may conclude that the accused is predisposed to committing crimes and that "some" evidence is "enough" evidence to return a conviction. In a trial on joint charges, there is also the possibility that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were separately tried.

> ***State v. Bettinger***, 100 Wis. 2d 691, 696-97, 303 N.W.2d 585 (1981) (citations omitted).

(Slip op., ¶ 28; Pet. App. 112-113).

A. The evidence, especially as to the sexual assault charges, was not overwhelming.

As it had in the lower court, the state now argues that there was "overwhelming" evidence against Salinas. (State's brief at 11-13). In doing so, the state disagrees with the court of appeals' characterization of this prosecution as a "he-said, she said" case. (*Id*. at 11-12). Here, the state is making a fundamental error: it argues that a large number of allegations constitutes overwhelming evidence. But the number of allegations from a complainant does not necessarily make the evidence "overwhelming." In other words, a dozen allegations from a single source are not as persuasive as a single allegation, corroborated by a dozen independent sources.

Here, the state cannot point to evidence corroborating the alleged sexual assaults. There was no physical evidence, and there were no third-party witnesses to sexually assaultive behavior. *All of the sexual-assault evidence came directly from V.G., or indirectly from others she had spoken to*. The trial was, in fact, a credibility contest between Salinas and V.G., i.e., a "he-said, she said" case, as the court of appeals concluded.

> In any event, the sexual assault evidence against Salinas was not overwhelming. This was a classic "he-said, she-said" case with no physical evidence or witnesses. It is the nature of such cases that they turn on the jury's perceived credibility of the defendant and victim. Additionally, V.G. did not report the sexual assault allegations until just after she and her mother learned Salinas would be released from jail relatively

> soon on the domestic abuse case. Further, on cross-examination, V.G. gave a detailed chronological account of the events and her whereabouts preceding and following the sexual assault, but was then unable to recall where in the house the sexual assault occurred. Salinas therefore had a viable fabrication argument.[5] Thus, given the weaknesses of the State's case, we cannot say, beyond a reasonable doubt, that the highly prejudicial evidence—some plainly irrelevant—had no effect on the outcome of the case. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 ("For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'") (quoted source omitted).
>
> [5]We understand that memory may be imperfect, especially regarding traumatic events, and intend to suggest no inference as to the veracity of the victim's account. Rather, we merely recognize the weaknesses of the prosecution's case.

(Slip op., ¶ 36; Pet. App. 116-117).

In its brief, the state complains that the court of appeals mischaracterizes the state's evidence at trial, and more generally misunderstands the type of evidence presented in child sexual assault cases (state's brief at 12-13):

> While there were no eyewitnesses to the assaults, or physical evidence, there is rarely this type of evidence in child sexual assault case; the lack of this evidence does not make the State's case weak.

(State's brief at 13).

The state does not cite to any authority or portion of the record to support its argument that "there is rarely this type of evidence" in child sexual assault cases. Regardless,

the fact that there was such a lack of corroboration undeniably weakens the state's case.

> And for the court of appeals to isolate one statement of VG's from cross-examination – that she could not remember in which room one of the assaults occurred – after she had given numerous details about houses, rooms and clothes that were involved in all of the sexual assaults, is an unfair characterization of the evidence.

(State's brief at 13; see also *id*. at 12).

This is, somewhat ironically, a mischaracterization of the lower court's decision. It is clear from the portion excerpted on the previous page that the court was discussing the final alleged assault, which was the basis for two of the three sexual assault counts. Elsewhere, the court of appeals recounted V.G.'s testimony that Mr. Salinas had sexually assaulted her "more than like 40 or 50 times" over the two and a half years charged in the first count. (Slip op., ¶ 8; Pet. App. 103-104). The court's focus on the final alleged assault in no way meant that the court was unaware of V.G.'s allegations of prior sexual assaults.

B. The intimidation evidence would not have come in as other acts because the minimal probative value was far outweighed by extreme prejudice.

The state asserts that the intimidation / domestic violence evidence would have been admissible as other acts regardless of joinder. (State's brief at 14-16). The court of appeals correctly rejected this claim as well.

In arguing harmlessness in its brief, the state omits essential facts, going to prejudice, that the court of appeals highlights. The intimidation charges arose post-plea and pre-sentencing in the domestic violence incident. (Slip op., ¶¶ 2-5; Pet. App. 102-103). The domestic violence case was

disposed of prior to the filing of the intimidation or sexual-assault charges. (*Id*., ¶¶ 4-6; Pet. App. 102-103).

Extremely prejudicial information – Mr. Salinas' treatment of M.S., including threats to kill her and their son – was irrelevant to the sexual assault allegations made by V.G. And the prejudicial effect was *not* negated by overwhelming evidence supporting the sexual assault charges. There was no physical evidence, and no third-party witnesses to any assaults. V.G. testified that she was sexually assaulted; Mr. Salinas denied the accusations. A jury trying to decide who is telling the truth is not likely to credit a defendant who was said to be willing to kill his own child. That is why the improper joinder of 10-CF-542 and 10-CM-1571, which necessarily included 09-CF-1267, was not just presumptively but demonstrably prejudicial.

By joining the intimidation charges and the sexual-assault charges, the state was allowed to introduce the facts of the underlying domestic-abuse incident. As the court of appeals notes, the state used these facts in its opening, evidence and closing. (Slip op., ¶¶ 7-11, 17; Pet. App. 103-106, 108). These were not passing references, and they were extremely prejudicial.

The tenor of the state's use of the domestic-violence evidence at trial was exemplified by the state's opening statement…

> You'll also hear from [M.S.] today. And where this story begins in terms of [M.S.], it really begins October 26, 2009, although it dates back further than that but that is the date that [M.S.] will tell you she came home from work. The defendant was angry, indicated he had hit [V.G.], that he was mad at her, wanted her to send her away. [M.S.] disagreed with this. They got into an argument. That is the day, ladies and gentlemen, that the

> defendant strangled [M.S.], that he did that in front of [V.G.], that in the kitchen she was struggling to get away from him, that she yelled to [V.G.] get out, call the police, that she was able to get away from the defendant, that she ran out herself, and when she turned around, what did she see? More violence and intimidation. She saw the defendant standing with his 4-year-old son, [A.], to one side and a knife to the other telling [A.], "Tell your mother to come back inside."
>
> That is a day of horror but that is also a day that stopped what was happening to [V.G.]. That is the day that family got help. That is the day that [V.G.] stopped being assaulted from the defendant. And we also know that day is the last day he assaulted her.

(134:55-56).

…and by the state's closing remarks:

> And, ladies and gentlemen, I would submit at this point the defendant is very concerned. To this point he's been able to keep them from calling the police. He's been able to intimidate them, use threats, use violence to make sure the police don't get involved. But this time they're out of the house. And what does he do in a last [d]itch effort and desperation? He takes a knife and he takes his little boy, the little boy he claims to love more than anything. He has a knife in one hand and he's telling [M.S.] get back in the house. He's telling the little boy, "Tell your mother to get back in the house or I'm going to kill myself and I'm going to kill the boy."

(Slip op., ¶¶ 17; Pet. App. 108).

Considering the admission of that evidence, the court of appeals concludes:

> The evidence concerning the domestic abuse incident with M.S. was not relevant to the charges of sexually assaulting V.G. Yet, the jury heard repeatedly, in the

> State's opening and closing statements and from multiple witnesses, about how Salinas strangled M.S. and then threatened to kill their son while holding a knife. Thus, aside from whether any evidence relating to the joined intimidation charges would have been admissible as other-acts evidence, the misjoinder was prejudicial because it resulted in the admission of the highly prejudicial domestic abuse evidence underlying the intimidation charges. *Introduction of that evidence alone renders the misjoinder not harmless.*

(Slip op., ¶ 34; Pet. App. 115)(emphasis added).

Therefore, the court of appeals correctly found misjoinder not harmless, and the domestic violence evidence inadmissible as other acts, given the state's reliance on, and repetition of, the unduly prejudicial evidence at trial.

C. The domestic abuse evidence was not the "panorama" evidence that was deemed admissible in the cases cited by the state.

Though the state did not make such an argument in the court of appeals, the state now advances an alternate legal theory for the admission of the intimidation / domestic violence testimony: that it was part of the "panorama" of evidence. (State's brief at 16). However, the "panorama" cases cited by the state – ***State v. Jensen*** and ***State v. Dukes*** – are substantively distinguishable from Mr. Salinas' case.

In ***State v. Jensen***,[5] 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, the court of appeals held that evidence of Jensen's "campaign of emotional torture" was admissible to

[5] Habeas corpus granted on other grounds, ***Jensen v. Schwochert,*** 2013 WL 6708767 (E.D. Wisconsin); aff'd, ***Jensen v. Clements***, 800 F.3d 892 (7th Cir. 2015).

show motive. ***Id.***, ¶¶ 85-86. Jensen had left pornographic photographs for his wife, Julie, to find around their home. ***Id.***, ¶¶ 52, 83. He knew that she thought that they had been left by a former paramour. ***Id.***, ¶ 52. The appellate court found that the evidence, and evidence of similar photographs on the home computer, was proper "panorama" evidence. ***Id.***, ¶¶ 85-86. Similarly admissible was evidence that Jensen had quizzed his *new* wife about sexual activity similar to that shown in the photographs. ***Id.***, ¶ 89.

All of that evidence went directly to the state's argument that the motive for the murder was hostility and desire to seek revenge for the Julie's affair. ***Jensen***, 331 Wis. 2d 440, ¶ 84. "…[L]ong ago, our supreme court recognized that in cases of uxoricide, evidence of the defendant's ill feeling toward his wife is relevant to prove motive." ***Id***. (Footnote and citation omitted). Further, that evidence duplicated other evidence put on "to show that Jensen had never forgiven Julie for her affair." ***Id.***, ¶ 52.

The planted photographs involved the relationship between the principal actors in the case, Jensen and Julie. ***Jensen***, 331 Wis. 2d 440, ¶ 85. The similar photographs found on the computer were relevant to show that it was likely Jensen who planted the photographs, not the paramour. ***Id.***, ¶ 87. One of the state's more important pieces of evidence was a series of internet searches about toxins and other means to end a life. ***Id.***, ¶¶ 5-7, 37. Jensen's questioning of his new wife showed a preoccupation with the sexual activity depicted on the digital and paper photographs, supporting the state's theory that it was Jensen, not Julie, who was the primary computer user and who had done the internet searches. ***Id.***, ¶¶ 88-89.

In sum, the "panorama" evidence all went to motive for the murder, and linked Jensen to internet searches

showing intent. In Mr. Salinas' case, none of the intimidation or domestic violence evidence went to a motive or intent to sexually assault V.G. Likewise, the allegations of sexual assault were not the basis for the violence toward M.S., the homicidal threat to her son, or the intimidation charges. As the court of appeals noted:

> Further, the only potentially overlapping evidence was indirectly connected, via the underlying domestic abuse case. V.G. and Salinas both agreed that he struck V.G. early in the morning on October 26, 2009. Later that day, Salinas and M.S. argued about V.G. The argument escalated, and Salinas was arrested and charged with several counts of domestic abuse. V.G. later asserted Salinas hit her early that morning because she had tried to resist his sexual advances. That is the sole evidence that connects one of the sexual assault charges to the one read-in domestic abuse charge involving V.G., which in turn is connected to the one intimidation charge concerning V.G. Further, Salinas's *reason* for striking V.G. in the domestic abuse case—as opposed to the fact he had struck her, making her a victim—would not have been relevant in the intimidation case.

(Slip op., ¶ 23; Pet. App. 110)(emphasis in original).

This is not the panorama evidence presented in Jensen, which concerned, directly or circumstantially, Jensen's actions toward Julie. Both V.G. and Mr. Salinas agreed that Mr. Salinas slapped V.G. in the early morning hours of October 26, 2009. The slap was relevant to one of the sexual assault counts, requiring the use or threat of force, and the slap evidence would have been admissible in the sexual assault case if the charges had not been joined. It was not necessary to join the charges to introduce that testimony.

However, the violent confrontation later in the day, and the intimidation leading up to sentencing for

that confrontation, were not related to the allegations of sexual assault. M.S. was not a victim of sexual assault. V.G. did not receive threats of homicidal violence, as had M.S. and her son. The only line connecting Mr. Salinas to M.S., their young child, and V.G. was inadmissible evidence: that Mr. Salinas had an unchecked character for violence. Panorama evidence is not synonymous with character evidence.

The state also relies on ***State v. Dukes***, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515, to support its panorama evidence argument. (State's brief at 16). In ***Dukes***, the defendant was charged with, inter alia, keeping a drug house, as a party to the crime. ***Dukes***, 303 Wis. 2d 208, ¶ 5. At trial, the state presented evidence of a drug purchase made at Dukes' house approximately a month prior to his arrest. ***Id.***, ¶¶ 6-8.

Dukes challenged the admission of that evidence on appeal, but he did not prevail. The court of appeals characterized the drug purchase evidence as part of the panorama of evidence "needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." ***Dukes***, 303 Wis. 2d 208, ¶ 28. That is because it was intended to show that Dukes' residence was indeed a drug house, an element of maintaining a drug house. ***Id.***, ¶ 30. In addition, Dukes' knowledge of illegal activities at his home was corroborated by other evidence, including Dukes' recorded telephone calls explicitly mentioning drugs and encouraging others to remain silent. ***Id.***, ¶ 24.

The court of appeals concluded that the drug purchase evidence "*was certainly not an impermissible attempt to introduce character evidence about Dukes*. Rather, the evidence was introduced to show that Apartment 1 at 450 North 33rd Street was a drug house. This was an element

of count three, maintaining a drug house…with which Dukes was charged." ***Dukes***, 303 Wis. 2d 208, ¶ 30 (emphasis added).

The evidence underlying the domestic abuse and intimidation charges was not "inextricably intertwined" with V.G.'s testimony regarding sexual assaults. The single thread tangentially connecting the two cases was the slap of V.G. That evidence would necessarily have been introduced in the intimidation case, and it would have been relevant and admissible regarding one of the sexual assault counts, had the cases not been joined for trial.

The court in ***Dukes*** found that the admitted evidence did not generate undue prejudice, that is, it would not arouse in the jury "a sense of horror or desire to punish." ***Dukes***, 303 Wis. 2d 208, ¶ 30, *citing* ***State v. Opalewski***, 2002 WI App 145, ¶ 23, 256 Wis. 2d 110, 647 N.W.2d 331. The misjoinder of Mr. Salinas' cases allowed the state to introduce extremely damning character evidence, the admission of which was not harmless beyond a reasonable doubt. The jury deciding all counts heard that Mr. Salinas, holding a knife and standing with his son, threatened to kill the child in front of his mother. It is difficult, if not impossible, to conceive a more shocking, terrifying threat. For that reason, the misjoinder was not harmless:

> The evidence concerning the domestic abuse incident with M.S. was not relevant to the charges of sexually assaulting V.G. Yet, the jury heard repeatedly, in the State's opening and closing statements and from multiple witnesses, about how Salinas strangled M.S. and then threatened to kill their son while holding a knife. Thus, aside from whether any evidence relating to the joined intimidation charges would have been admissible as other-acts evidence, the misjoinder was prejudicial because it resulted in the admission of the

> highly prejudicial domestic abuse evidence underlying the intimidation charges. *Introduction of that evidence alone renders the misjoinder not harmless*.

(Slip op., ¶ 34; Pet. App. 115)(emphasis added).

In the state's view, what distinguishes panorama evidence from, say, the details of a defendant's criminal record, which a jury is generally barred from considering?

In sum, the panel on the court of appeals reached the correct result by applying settled joinder law to a complicated, and disturbing, set of facts. Joinder was improper, and not harmless, because by improperly joining two sets of charges, the state effectively joined a third, and relied on the facts of the third to introduce extremely prejudicial character evidence.

CONCLUSION

The per curiam court of appeals decision properly applied longstanding joinder law to the undisputed facts of this case, finding the charges improperly joined, and the misjoinder not harmless.

For all of the above reasons, Luis Salinas respectfully requests that the Court affirm the decision of the court of appeals.

Dated this 3rd day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,608 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 3rd day of November, 2015.

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