STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018 AP 651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

KELLY JAMES KLOSS,

Defendant-Appellant-Petitioner

RESPONSE BRIEF OF DEFENDANT-APPELLANT-PETITIONER

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant-Petitioner
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of St. Croix County, Hon. Eugene Harrington,
Circuit Judge, presiding; and the Court of Appeals, Dist. IV.

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ISSUE FOR REVIEW

1. Is double jeopardy violated when one solicited crime is a lesser included of the other?

The Trial Court Answered: "No."

The Court of Appeals Answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested.

ARGUMENT[1]

I. SEPARATE CONVICTIONS FOR SOLICITING FIRST DEGREE RECKLESS INJURY AND SOLICITING FIRST DEGREE RECKLESSLY ENDANGERING SAFETY ARE MULTIPLICITOUS AND VIOLATE DOUBLE JEOPARDY.

1. Legal Standards.

The double jeopardy clause of both the Wisconsin and U.S. Constitutions embody three protections: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." *State v. Lechner*, 217 Wis. 2d 392, ¶10, 576 N.W.2d 912 (1998), *citing State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

Multiplicity challenges generally consist of two types: 1) the "lesser-included offense" claim, where the defendant claims he or she was punished for committing both a greater and a lesser-included offense; and, 2) a "continuous offense" claim, where the defendant argues that he or she has been punished for two or more counts of the same offense arising out of one criminal act. *Lechner*, at ¶11.

A defendant may be charged and convicted of multiple crimes arising out of one criminal act only if the legislature

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1 Kloss relies on his Statement of the Case in his First Brief. Facts material to Kloss' argument are included in the Argument section of this brief.

intends it. *Lechner*, at ¶12, citing *State v. Kuntz*, 160 Wis. 2d 722, 754, 467 N.W.2d 531 (1991). In determining the legislature's intent, the court must consider: (1) whether each offense is identical in law and in fact; and (2) whether the legislature intended to allow multiple convictions for the offenses charged.

When both offenses have the same factual basis, a "lesser-included offense" challenge focuses on whether the offenses are identical in law. The determinative inquiry is whether the criminal statutes define one offense as a lesser-included offense of the other. Whether one offense is a lesser-included offense of another is controlled by the "elements only" test set out in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932) (codified in Wis. Stat. § 939.66(1))[2]. *Lechner*, at ¶15. Under this test, two offenses are different in law if each statutory crime requires proof of an element which the other does not. *Id*. If one offense is not a lesser included of the other based on the *Blockburger* test, the court presumes the legislature intended to permit cumulative punishments for both offenses. This presumption is rebutted only if other factors clearly indicate a contrary legislative intent. Factors that may indicate a contrary legislative intent regarding multiple punishment include the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishment. *Lechner*, ¶¶17-18.

Whether a criminal defendant has a double jeopardy claim is a question of law reviewed de novo. Statutory interpretation

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2 **Wis. Stat. § 939.66 Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

also presents a question of law. *State v. Jackson*, 2004 WI App 190, ¶5, 276 Wis. 2d 697, 688 N.W.2d 688 (Ct. App. 2004).

2. The solicitation convictions are identical in law.

The State first argues that while reckless endangerment and reckless injury[3] are identical in law, solicitation of reckless endangerment and solicitation of reckless injury are not. The elements of the solicited offenses are not elements of solicitation, but rather are "relevant only to show that the acts intended by the solicitor are prohibited by statute." (State's Brief, p. 15). The State relies on *Jackson*, a conspiracy case, for the proposition that the elements of the solicited offenses are irrelevant. The *Jackson* court "did not consider the elements of the underlying offenses; the dispositive factor was that the arson and intentional homicide were different felonies." (State's Brief, p. 17). The solicited offense must be viewed as only *one* element of a solicitation charge. As reckless injury and reckless endangerment are separate offenses, they provide a distinguishing element to each of the solicitation charges. As Kloss was charged with soliciting two different felonies, they are distinguishable in law.

The State's argument on appeal directly contradicts its argument to the trial court. (135:9). In response to the circuit court's concern about whether any of the solicitation charges were a lesser included of another, the State responded:

> As a final point, the State responds to something else, which the court mentioned at the most recent hearing—namely whether any of these offenses are lesser included offenses of any of the others. ….

3 For the sake of brevity, Kloss will alternatively refer to First-Degree Recklessly Endangering Safety, contrary to Wis. Stat. § 941.30(1), as "reckless endangerment" and First-Degree Reckless Injury, contrary to Wis. Stat. § 940.23(1), as "reckless injury."

> If, then, any of these counts were to be lesser included offenses of the others, *that would require the underlying felony to be a lesser included offense of one of the other underlying felonies. That is not the case here*.
>
> Per se lesser included offenses are defined under Wis. Stat. § 939.66. The court can review Wis. Stat. § 939.66 and the elements of each offense in the current information in detail and so the State does not propose to go through each here. Suffice it to say here that the State does not see any per se lesser included offenses under Wis. Stat. § 939.66 in this case.
>
> That said, within the information, some of the currently charged offenses themselves have lesser included offenses, which might then be the same as or lesser includeds of other offenses in the information. For instance, aggravated battery (count 5) has a lesser included of battery (Wis. Stat. § 939.66(2m)), as does battery to a police officer (count 4), so those two might conceivably conflict. Similarly, 1st degree reckless injury (count 6) has a lesser included of 2nd degree reckless injury, which is itself a lesser included of aggravated battery (count 5) (Wis. Stat. § 939.66(3)).

(emphasis added) *Id*. (135:9). First-degree recklessly endangering safety (Wis. Stat. 941.30(1)) is a lesser included of first-degree reckless injury (Wis. Stat. 940.23(1)(a)). *State v. Weso*, 60 Wis.2d 404, 407-408, 201 N.W.2d 442 (1973). Based on the legal test the State argued to the trial court, solicitation of reckless endangerment is a lesser included of solicitation of reckless injury.

The court should apply judicial estoppel. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (a position on appeal that is inconsistent with that taken at trial is subject to judicial estoppel). Judicial estoppel has three "identifiable boundaries: (1) the party's position is clearly inconsistent with his or her prior position; (2) the party to be estopped succeeded in selling its position to the court below;

and (3) the facts at issue are the same." *State v. Johnson*, 2001 WI App 105, ¶10, 244 Wis. 2d 164, 628 N.W.2d 431.

First, the State's argument on appeal is "clearly inconsistent" with its argument to the trial court. Second, the trial court accepted the State's position that solicitation of reckless endangerment is not a lesser included of solicitation of reckless injury *because*, as the state argued, reckless endangerment is not a lesser included of reckless injury. (215:30, 31, 33). The circuit court concluded reckless injury was not identical in law because it requires the defendant to cause great bodily harm, while reckless endangerment does not. (215:21-22). On appeal the State does not dispute reckless endangerment *is* a lesser included of reckless injury. (State's Brief, pp. 9-10). It should not be permitted to disavow the legal test it advocated to the trial court simply because it no longer produces the result it wants. Third, the issue now in dispute is identical to the one raised at the prior hearing. (215:11-33). Therefore, the State should be estopped from arguing that solicitation of reckless endangerment is not a lesser included of solicitation of reckless injury.

Alternatively, the State's argument fails because it ignores the essential test of what constitutes a lesser included offense. Greater and lesser included offenses are identical in law because proving the greater necessarily proves the lesser. The lesser doesn't require proof of any additional fact. See Wis. Stat. § 939.66(1); *Lechner*, at ¶11; *State v. Ziegler*, 2012 WI 73, ¶60, 342 Wis.2d 256, 816 N.W.2d 238 ("two offenses are identical in law if one offense does not require proof of any fact in addition to those which must be proved for the other offense.") The court of appeals correctly rejected the State's argument because it "does not come to grips with [this] core lesser included offense test." (COA Decision, at ¶24.) By proving solicitation of reckless injury, the State necessarily proves solicitation of reckless endangerment. Because it doesn't require proof of any additional fact, solicitation of reckless

endangerment is identical in law to solicitation of reckless injury. (COA Decision, ¶25-27).

Whether the solicited felony is characterized as one element of solicitation or multiple elements makes little difference. The solicited "felony" is defined by statutory elements. To prove a *particular* "felony" was intended, the State must, as a practical matter, prove that each element of the solicited felony was intended. The "mens rea of solicitation is a specific intent to have someone commit a completed crime." (emphasis added). Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 116 (1989), p. 29. WIS JI-Criminal 550[4] requires a jury be instructed on the "elements and definitions" pertaining to the intended offense. See also, for example, *State v. Crowe*, 656 S.E.2d 688, 692 (N.C. Ct. App. 2008) (solicitation of murder requires the State to prove the solicitor "counseled, enticed, or induced another to commit each of the following [elements]: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation"). As the elements of reckless injury concededly include all the elements of reckless endangerment, the solicitation charges are identical in law.

Jackson does not support the State's argument. The issue in *Jackson* was whether a defendant could be charged with two counts of conspiracy—one for arson and one for intentional homicide—based on a single plan to commit arson and then

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4 According to WIS JI-CRIMINAL 550, the State must prove:

"1. The defendant intended that the crime of (name of felony) be committed.

The crime of (name of felony) is committed by one who [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed."

shoot people as they fled from the burning building. *Jackson*, at ¶2. *Jackson* did not specifically address whether elements of the intended crimes become elements of the conspiracy charge because it didn't need to. There was no dispute arson and intentional homicide are distinct felonies. There was no dispute that neither was a lesser included of the other. The conspiracy charges were not multiplicitous because *the underlying offenses* "*would have been charged as separate crimes had they been completed*." (emphasis added). *Id*., at ¶3. The two conspiracy counts were different not only in law but also in fact, as "each charge requires proof of facts that the other does not,…." *Id*., at ¶9. In contrast, solicitation of reckless endangerment does not require proof of any facts beyond those needed to prove solicitation of reckless injury.

While the court of appeals distinguished *Jackson* on the grounds that it was a conspiracy case, it also noted the court's finding that "each of the two charges at issue, conspiracy to commit both murder and arson, 'requires proof of facts that the other does not; they are different in fact and law.'" (COA Decision, ¶24, n. 5).

3. The solicitation convictions are identical in fact.

The State also argues the court of appeals improperly analyzed the potential multiplicity violation as conviction of both a greater and lesser included offense, when the analysis should have been based on a continuous offense. Consequently, the court did not review the record de novo to determine whether Kloss' continuous conduct consisted of two solicitations of two separate acts. Had it done so, it would have concluded Kloss committed at least two acts of solicitation and therefore the conviction on both counts was not multiplicitous. (State's Brief, pp. 19-20)

The State's lengthy discussion as to which analysis applies does not change the ultimate question. According to the State, the question under a "continuous offense challenge" is

whether the course of conduct constitutes multiple violations of the same statutory provision, *each with a different factual basis*. *State v. Anderson*, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998). (State's Brief, p. 21, 24). Under the lesser included analysis, the question of whether the two offenses are "identical in fact" requires consideration of whether distinct facts support separate crimes. *Ziegler*, at ¶¶66-67. If the facts show a person committed separate crimes, the lesser crime is not "included" in the greater crime. *State v. Steinhardt*, 2017 WI 62, ¶15, 375 Wis.2d 712, 896 N.W.2d 700. Whether analyzed as a lesser included or a continuous offense, the question is the same: Did the circuit court base the two convictions on the same course of solicited conduct or two distinguishable instances of intent and conduct?

The State invites the Court to review the factual record "de novo." (State's Brief, pp. 19, 24). It argues that Kloss committed two separate acts of solicitation when he advised Cheryl to shoot through the door *and* shoot at any officers running away. The problem with this invitation is two-fold: First, it fails to apply the standard of review to the circuit court's findings. Second, and alternatively, the solicited conduct is not "sufficiently different in fact to demonstrate that separate crimes were committed." *Ziegler*, at ¶60.

Unlike a jury trial, the circuit court makes specific findings of fact which are subject to a deferential standard of review. In all actions tried without a jury, "*the court shall find the ultimate facts and state separately its conclusions of law thereon*." Wis. Stat. § 805.17. The circuit court's function is to "weigh the evidence, resolve conflicts in the evidence, choose among competing reasonable inferences from the evidence, or make credibility determinations." *Milbauer v. Transport Employes' Mut. Benefit Soc.*, 56 Wis. 2d 860, 865, 203 N.W.2d 135, 138 (1973). These findings are reviewed under the clearly erroneous standard. Wis. Stat. § 805.17. Only the trial court's conclusions of law *from* those fact findings are reviewed de

novo. See *First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

As the circuit court noted in its decision, "[t]he ultimate question here is what did Kelly Kloss unequivocally intend that Cheryl Kloss do? *These are the findings of fact.*" (225:117 (A:[5]6)). The relevant findings of fact as to both counts were:

> Three, *he intended that she shoot law enforcement officers that might happen* ***to come through or to her door*** for whatever purpose, questioning, searching, general discussion, perhaps even finding directions.
>
> Four, *he intended that* ***she shoot though the door*** **or** ***the wall*** with a 16-gauge shotgun or a .357 handgun.
>
> Five, *he intended that she shoot and then chase law enforcement officers down as they ran away.*

(emphasis added) (225: 117-118 (A:6-7)). As to Solicitation of First-Degree Reckless Injury, the Court specifically found in relevant part:

> …that Mr. Kloss unequivocally told his wife to get a firearm, *and if the police officers came to the door* ***to shoot through the door. Shooting through a door, shooting through a wall*** at somebody that may be outside the door is reckless conduct. ….
>
> Third element: The circumstances of the defendant's conduct *show utter disregard for human life*. …. There is no question in my mind and in the law **that** ***shooting a firearm though a door***—steel, metal, wood or otherwise—is criminally reckless conduct that creates a risk of great bodily harm or death that unreasonable and substantial, and that anybody that does that is aware that the conduct is unreasonable and substantial. Defendant is Guilty on 17.

5 Appendix references are to the Appendix attached to Kloss' First Brief.

(emphasis added) (225:128-129 (A:17-18)). As to Count 18, Solicitation of First-Degree Reckless Endangerment, the Court found in relevant part:

> Again, let's harken back to the elements of the findings of fact. The defendant endangered the safety of another person. *He instructed his wife to take the handgun and* ***shoot through the door.*** Criminally reckless conduct is the second element. ….
>
> Three, third element, the circumstances of the defendant's conduct showed *utter disregard for human life. Telling one* ***to shoot through the door*** *with a hand gun, a shotgun, or his real intent when he instructed his wife to chase them down and shoot more than satisfies that last requirement.*

(emphasis added) (225:129-130 (A:18-19)).

The circuit court clearly relied on "shooting through the door" as a factual basis for both counts. While the court specifically mentioned "chase them down and shoot more" in its findings for solicitation of reckless endangerment, it did so to illustrate Kloss' "utter disregard for human life." *Id*.

In addition, the circuit court expressly re-affirmed that both convictions were "identical in fact" in a post-verdict decision:

> These convictions for ***Counts 17 and 18 were based upon the same course of conduct*** *that Kelly Kloss encouraged Cheryl Kloss to engage in.* He was arrested. They talked over the phone. He, in pretty specific language, badgered her to be prepared the next time law enforcement came to her house.
>
> She was to get a firearm, and he used at various times reference to a handgun and also a long gun, and have it in the davenport, and ***when they came through the door shoot them, or shoot them outside the door, shoot them through the door, shoot through the wall, whatever.*** *That was the course of conduct.*

> *So the first prong of Blockburger and Davison is,*
> ***are the offenses identical in fact, and I find that they are. There isn't any question that they were.***

(emphasis added) (215:20).

When Kloss raised multiplicity at the postconviction hearing, the State directly contradicted its position at trial by arguing there were multiple solicitations because there were multiple phone conversations. The circuit court adopted the State's new theory, finding that two convictions were justified based on "*the number of efforts* that Mr. Kloss made to persuade his wife to engage *in both*…recklessly endangering injury and recklessly endangering safety,…." (emphasis added) (229:6, 13-14 (A:25, 32-33)).

The court of appeals rightly rejected this approach. (COA Decision, ¶¶28-31). Before trial Kloss sought clarity on the factual basis for each count. (142; 143). The State refused to identify any particular conversation or point in time as constituting a completed crime. Instead, it repeatedly insisted that Kloss' multiple phone calls constituted a single course of conduct: "The charges in this information flow from a continuous course of conduct spanning a (sic) ten (10) days…." (104:1; 224:60-61). The circuit court agreed with the State, and denied defense motions requiring the State to identify which phone calls supported which counts in the information:

> I am satisfied, particularly given [the prosecutor's] statement here about his theory, *his course of conduct, rather than each telephone [call]* constitutes a separate crime of thus and such.

(emphasis added) (224:67). The court's holding directly impacted Kloss' trial strategy since it now required him to defend each count based on the totality of phone calls. The court of appeals correctly found the State could not "change tack and argue that each phone call constituted a separate solicitation, in direct opposition to the position it took before trial,…." (COA Decision, ¶30). *Michels*, at 97-98. Rather, the State was bound

by its election to charge the case as a continuous course of conduct. *State v. George*, 69 Wis.2d 92, 100, 230 N.W.2d 253 (1975). The charges were multiplicitous because they are identical in law and, based on the same course of conduct, were identical in fact. (COA Decision, ¶30).

The State no longer claims that multiple phone calls justify multiple solicitation charges. Rather, it allegedly relies on the entire course of conduct. According to the State, the entire course of conduct demonstrates multiple independent solicitations and therefore supports multiple charges. (State's Brief, p. 38-39).

Even if the State could charge multiple counts from a single course of conduct, it doesn't change the circuit court's findings. Those findings show both convictions are based on the same course of conduct. The State's request for a "de novo" review of the record presumably means this Court should ignore the circuit court's findings and substitute them with findings of its own. The Court must reject this argument because it fails to apply the standard of review.

Alternatively, the State's argument is flawed because it directly contradicts another finding made by the circuit court. According to the State, Kloss is guilty of soliciting reckless injury *because* he intended to cause great bodily harm. (State's Brief, pp. 13-15, 34). The circuit court, however, found the opposite. It made an express finding Kloss did not intend to cause "bodily harm."[6] (225:127 (A:16)). Rather, the "great bodily harm" element of reckless injury was met because the conduct Kloss solicited created an "unreasonable and substantial *risk* of death or great bodily harm."[7] (emphasis added) (225:128-

6 "…[solicitation of] aggravated battery,…requires a specific intent to go out and cause bodily harm to another person; and quite frankly, just shooting through the door in and of itself in my view wasn't enough. Mental purpose to cause bodily harm to another human being. Not guilty."

129 (A:17-18)). As the circuit court's findings reject the premise underlying the State argument, it necessarily fails.

The State's focus on the circuit court's post-conviction decision is likewise misplaced. In particular, the State relies on the circuit court's post-conviction comment that while "[t]he behavior that Mr. Kloss encouraged his wife to engage in was somewhat the same over the course of these conversations," it was also "dissimilar in various facts." (229:6 (A:25)). The circuit court did not articulate which facts were "dissimilar," much less find shooting through the door and shooting at fleeing police were two separate solicitations. Nor did it identify which acts were solicitation of reckless endangerment and which were solicitation of reckless injury. Rather, it referred to its findings at trial which base both convictions on the same course of conduct. (229:6-7 (A:25, 26)).

Alternatively, advising Cheryl to shoot at the door *and* fleeing officer(s) does not constitute two separate solicitations. They are not "separate in time or [] of a significantly different nature." *State v. Multaler*, 2002 WI 35, ¶56, 252 Wis. 2d 54, 643 N.W.2d 437. While the separation in time "is not resolved by a stopwatch approach," there must be "sufficient time for reflection between the acts such that the defendant re-committed himself to the criminal conduct." *Id.* Similarly, whether the charged acts are significantly different in nature is not limited to a straightforward determination of whether the acts are of different types. Acts may be "different in nature" even when they are the same types of acts as long as each required "a new

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7 "…Mr. Kloss unequivocally told his wife to get a firearm, and if police officers came to the door to shoot through the door. Shooting through a door, shooting through a wall at somebody that may be outside the door is reckless conduct. It's conduct which creates a risk of death or great bodily harm to another person, and the risk of death or great bodily harm is unreasonable and substantial, and the defendant was aware that his or her conduct created the unreasonable and substantial risk of death or great bodily harm."

volitional departure in the defendant's course of conduct." *Id*., at ¶57. As a general proposition:

> …the question is one of fundamental fairness or prejudice to the defendant. A defendant ought not be charged, tried, or convicted for offenses that are substantially alike when they are a part of the same general transaction or episode. To do so would impose jeopardy of multiple trials or convictions for a single offense.

State v. Eisch, 96 Wis. 2d 25, 34, 291 N.W.2d 800 (1980). See also *State v. Hirsch*, 140 Wis. 2d 468, 475, 410 N.W.2d 638 (1987) (given the short time frame, defendant did not have sufficient time for reflection between the assaultive acts to again commit himself. There was no pausing for contemplation nor was there a significant change in activity.)

The fundamental problem with applying this test is that none of the solicited conduct has occurred. There are no facts from which the State can argue the number of shots fired, how quickly they were fired, whether there was a break in the action, or whether more than one victim was endangered or injured. All of these details are missing. What matters, according to the State, is Kloss' intent. There is no evidence, however, that Kloss intended for Cheryl to pause and "recommit" between shooting at the door and shooting at the fleeing police. If anything, one would have to accomplish both in immediate succession, without pause or reflection, or the opportunity would be lost.

The only factual distinction the State offers to justify multiple counts is the "potential" for more than one victim. (State's Brief, pp. 35-36). The State offers no suggestion for how the number of potential victims would be determined under these circumstances; nor does it justify its assumption that more than one officer would be at Kloss' door. Nothing in the circuit court's findings suggest the number of potential victims was a factor in distinguishing the two convictions. No finding was made that Kloss intended to harm a specified number of

persons. No finding was made of the number of potential victims.

Any assumption as to the number of potential victims would, in any event, be arbitrary and speculative. There was no way anyone—Kloss included—could have anticipated how many police officers, if any, would ever be standing at the door. In *Jackson*, for example, the plan was to cause a fire and then shoot "people fleeing" from the building. *Jackson*, at ¶2. Despite the "potential" for multiple victims, Jackson was only charged with one count of conspiracy to commit homicide. *Id*., at ¶¶1-2. Indeed, the number of potential victims supported by the record is none. Even if Kloss' threats were taken seriously, he would have never expected police officers to put themselves in danger at his front door after he informed them of what would happen if they did.

4. Alternatively, the legislature only intended one unit of prosecution per solicitation regardless of the number of crimes or potential victims that could hypothetically result.

The unit of prosecution is directly related to the underlying harm a statute seeks to prevent. *Blenski v. State*, 73 Wis.2d 685, 695, 245 N.W.2d 906 (1976). In *Blenski*, for example, the defendant was charged with multiple counts of Wis. Stat. § 440.41(10), which makes illegal the unauthorized use of any person's name when soliciting charitable contributions. As the purpose of the statute is to protect the public from being misled, rather than the person whose name is being used, the unauthorized use of multiple names does not support multiple counts. *Id*. Unless the legislative intent is clear that multiple counts are allowed, moreover, any ambiguity must be resolved in favor of a single count. *State v. Rabe*, 96 Wis.2d 48, 69-70, 291 N.W.2d 809 (1980).

Solicitation is no different. The purpose of criminalizing solicitation is not to deter a person from committing the

contemplated crime(s) but rather, to deter a person from *enticing* another person to commit a crime. *State v. Jensen*, 195 P.3d 512, ¶22 (Wash. 2008). Thus:

> …it is not incongruous to punish more severely a person who entices four people in four separate conversations to commit a single murder than one who entices one person to commit four murders in a single transaction. Four separate enticements produce more of the harm the solicitation statute aims to prevent. Separate enticements are more blameworthy because they increase the risk a completed crime will occur by exposing several people rather than one to the corrupting influence of the enticement.

Jensen, at ¶25. Consequently, imposing cumulative punishment when the solicitor's objective is multiple crimes does nothing to deter crime that is not already deterred by punishing the completed crime. The number of potential victims or crimes solicited is secondary to the enticement. *Jensen*, at ¶¶2, 15. Neither does punishment based on the number of solicited crimes advance the statute's purpose of permitting state intervention before a completed crime occurs. The ability of the State to intervene before a contemplated crime occurs is triggered by the solicitor's request, whether the solicited crime is single or several. *Jensen*, at ¶24. Therefore, the unit of prosecution for solicitation centers on the act of enticement, regardless of the number of crimes or the objects of the solicitation. *Id*., at ¶40. See e.g. *State v. Schleifer*, 121 A. 805 (Conn. 1923) (union leader charged with one count of solicitation for urging striking workers to "[t]ake [scabs] in a dark alley and hit them with a lead pipe").

Nor is the unit of prosecution tied directly to the number of conversations. Solicitation is an "inherently continuous offense." It constitutes a course of conduct, not a single act, as the object is to engage another person to commit a crime. *Jensen*, at ¶34. See also *Melina v. People*, 161 P.3d 635, 640 (Colo. 2007) (evidence of 30 emails between defendant and detective constitute a single solicitation as the object remained

the same). A separate unit of prosecution arises only when the defendant entices a different person, at a different time and place, to commit a distinct crime. *Jensen*, at ¶40.

The *Jensen* court warned that of all the inchoate offenses, solicitation has the greatest risk of an unduly harsh penalty:

> In the crime of solicitation, criminal liability may attach to words alone. Solicitation involves no more than asking someone to commit a crime in exchange for something of value.[8] Unlike conspiracy and attempt, it requires no overt act other than the offer itself. The risk of imposing an unduly harsh punishment is greater than in the crime of conspiracy because in the case of solicitation no steps to complete the potential crime are taken.

Jensen, at ¶20.

In *Jensen*, the defendant was convicted on four counts of solicitation, one count for each putative victim. While in jail for threatening to kill his wife, he told a fellow inmate he wanted his wife and children killed believing he would inherit a sizable estate. They discussed various proposals over the next few days during which Jensen ultimately offered the inmate $100,000 to kill his wife, sister-in-law, daughter, and son, with a $50,000 bonus if he "did it right." The inmate agreed to kill the three women but declined to kill Jensen's son, stating he "doesn't do minors." Jensen nonetheless arranged for the inmate to receive $2,500 of front money, which the inmate collected a few hours after he was released from jail. He returned to jail shortly thereafter having spent the money on drugs and alcohol.

Back in jail, the inmate contacted the police and told them about his conversation with Jensen. A detective asked the inmate to call Jensen and tell him his sister "Lisa" would visit him to confirm the details of their plan. Posing as "Lisa," an

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8 Wisconsin's solicitation statute does not require "exchange for something of value" but relies solely on the request.

undercover police detective visited Jensen. She showed him a letter, written by the inmate, outlining their agreement. Jensen told her to have the inmate go ahead and promised to supply additional front money as soon as possible. A few days later "Lisa" visited Jensen again, this time wearing a body wire. Jensen confirmed the details of the plan. Lisa explained, however, that she and a "buddy" would commit the killings because the inmate would not be out of jail in time. Jensen then offered "Lisa" an extra $50,000 to have his son killed. Lisa assured him that unlike her brother, her "buddy" had no scruples about killing a child. Jensen's final words before parting were "Okay. Make it look like an accident." *Id*., at ¶¶3-8.

The Washington Supreme Court reversed two of the four convictions because neither the number of potential victims nor the number of crimes solicited were relevant to the unit of prosecution for solicitation. *Id*., at ¶15, 28. Up until Jensen's second conversation with "Lisa," he was only guilty of one count of solicitation. His conversations with the inmate represented a single plan with a single actor. His first conversation with "Lisa" was not a separate enticement because she was merely acting as the inmate's "emissary," confirming the details. *Id*., at 35. The second conversation with "Lisa," however, was different. When Jensen learned that "Lisa" and her "buddy" would do the killings rather than the inmate, he offered $50,000 more to have his son killed. Because the inmate had previously refused to kill the boy, Jensen's offer constituted a fresh enticement. The facts thus supported two counts of solicitation. *Id*., at ¶39.

A separate count may be supported only when a new or distinct request is made. *Id*., at ¶35. A defendant may be charged with two counts, for example, when the defendant's request was rejected by one person and then made to a second person at a different time and place. *Id*., at ¶35. See also *Putty v. Commonwealth*, 30 S.W.3d 156 (Ky. 2000) (affirming four convictions of solicitation to murder a single victim, where the defendant made repeated offers to two different people after

being rejected by each at different times and places, and having offered additional consideration to enhance the enticement).

Nothing in the language of Wis. Stat. § 939.30[9] requires multiple charges be issued rather than a single charge with multiple modes of commission. When faced with the question of whether the legislature "create[d] multiple offenses or a single offense with multiple modes of commission," this Court analyzes the following four factors: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. *United States v. Sahm*, 2019 WI 64, ¶7, ___ Wis.2d ___, 928 N.W.2d 545.

The statutory language clearly focuses on enticement as the culpable event. A person violates Wis. Stat. § 939.30 when, "with *intent* that *a felony* be committed, *he advises another to commit that crime*…." (emphasis added). The statute makes no reference to the number of potential victims or the number of potential crimes solicited, but merely requires, at a minimum, the solicitation of conduct which would constitute a felony offense. Solicitation is a class H felony regardless of the solicited felony's severity.[10] The enticement itself is thus the harm the legislature seeks to deter and punish. The original Judiciary Committee Report likewise focuses on the enticement: "The act required is the *advising, inciting, commanding, or*

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9 **939.30(1) Solicitation.**
(1) Except as provided in sub. (2) and s. 961.455, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class H felony.

10 The enticement to commit any felony crime is punishable as a class H felony regardless of which "felony" or felonies the defendant may have solicited. The exception is when the crime solicited is penalized by life imprisonment, in which case the actor is guilty of a Class F felony. For a solicitation to commit a Class I felony, the actor is guilty of a Class I felony. Wis. Stat. § 939.30(2).

soliciting of another to commit a crime." (emphasis added). Intent that a crime be committed "is an abbreviated way of stating that *the result* which the actor desires or which he believes will be caused if *his acts* are successful must be prohibited by a criminal statute." (emphasis added). 5 Wisconsin Legislative Council, *Judiciary Committee Report* at 25 (1953). The prescribed "acts" are by nature a continuous offense, moreover, and therefore commonly treated as a single count. Lastly, punishment for "multiple" offenses based on one solicitation does not further state policy goals. *Jensen*, at ¶¶2, 15, 22, 14, 24, 40. In this case, as the enticement involved the same solicitor, the same solicitant, the same overall plan, and a single course of conduct, only one count of solicitation is supported.

CONCLUSION

WHEREFORE, for the alternative reasons stated, this Court should affirm the court of appeals decision to reverse Kloss' conviction for solicitation of first-degree recklessly endangering safety.

Respectfully submitted this 1st day of August 2019.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant-Petitioner
P.O. Box 655
River Falls, WI 54022
715-425-9780

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MILLER APPELLATE PRACTICE, LLC

By_____

Steven L. Miller #01005582
Attorney for the Plaintiff-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780