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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 19 AP 2091-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHUN DANTE JACKSON,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

MILLER APPELLATE PRACTICE, LLC

Attorneys for the Defendant-Respondent-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. Edward F. Vlack III, presiding; and the Court of Appeals,
Dist. III.

ISSUE PRESENTED FOR REVIEW

1. Does double jeopardy bar a successive “party to a crime” conviction based on the same multi-county check cashing scheme alleged in a prior conspiracy conviction?

The Trial Court Answered: “No.”

The Court of Appeals Answered: “No.”

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STATEMENT OF CRITERIA RELIED UPON FOR PETITION FOR REVIEW

The issue presented examines the scope of double jeopardy protection from a prior conspiracy conviction. The conspiracy consisted of a check cashing scheme involving multiple banks in multiple counties. The conspiracy complaint, filed in Dunn County, alleged “crimes in multiple cities,” including Eau Claire, Menomonie and Turtle Lake. (55:3-4 (Appendix (A:) 8-9)). The underlying investigative report went further, describing the scheme in detail including the checks subsequently prosecuted in St. Croix County as PTAC. The checks in both cases were cashed by the same people, on the same day, using the same *modus operandi*. Jackson appeals his subsequent PTAC conviction in St. Croix County on double jeopardy grounds and Wis. Stat. § 939.72.

There are two sub-issues. The first is whether the factual scope of the Dunn County conspiracy conviction includes the two checks cashed in St. Croix County. See *State v. Schultz*, 2020 WI 24, ¶56, 390 Wis. 2d 570, 939 N.W.2d 519 (court must consider entire record to determine scope of double jeopardy protection). The second sub-issue is whether Wis. Stat. § 939.72 prevents a subsequent prosecution for two counts of bank fraud, PTAC, for the same two St. Croix County checks that were identified as part of the check cashing scheme in the Dunn County conspiracy conviction. Per Wis. Stat. § 939.72, the state cannot seek a PTAC conviction for the same crime “which is the objective of [a] conspiracy” conviction.

The court of appeals refused to apply Wis. Stat. § 939.72 on the grounds that the PTAC convictions in St. Croix County were factually distinct from the

“objective” of the conspiracy in Dunn County. Court of Appeals Decision, ¶30. The court reasoned that because enough checks were cashed in Dunn County to meet the \$10,000 threshold under Wis. Stat. § 943.91(4), the conspiracy charge was limited to Dunn County. *Id.* The court did not address the far broader check-cashing-scheme allegations in the complaint, or the police investigation which identifies multiple checks cashed in multiple counties including, specifically, the St. Croix County checks. In short, the court of appeals acknowledged *Schultz* but failed to apply it.

The application of constitutional principles to undisputed facts is a question of law. *Schultz*, at ¶16. The interpretation of a statute is a question of law. *State v. Chagnon*, 2015 WI App 66, ¶8, 364 Wis.2d 719, 870 N.W.2d 27. The Court should grant the petition for review to clarify how *Schultz* is applied when the prior criminal charge itself is broad enough to include, and is allegedly supported by, a single scheme of related and contemporaneous criminal acts in multiple counties. See Wis. Stat. § 809.62(1r)(a) & (c)1, 2 & 3.

STATEMENT OF THE CASE

On May 31, 2017, Dunn County prosecutors charged Jackson with three counts of conspiracy based on a check cashing scheme involving Jackson, Brian Augustus, Robin Santee, Tyler Santee and Peyton Heistand.¹

1 The charges were: 1) Conspiracy to commit fraud against financial institution (\$10,000 to \$100,000), contrary to Wis. Stat. §§ 939.31 and 943.82(1), a class G felony (Wis. Stat. § 943.91(4)) 2) Conspiracy to commit theft – Movable property (>\$10,000), contrary to Wis. Stat. §§ 939.31 and 943.29(1)(a), a class G felony (Wis. Stat.

According to the complaint, Jackson and Augustus recruited Heistand and the Santees at a Walmart parking lot in St. Paul Minnesota. Heistand and the Santees were parked at the lot because they were from Iowa and had run out of money. Jackson and Augustus approached their car claiming they had illegal Mexicans working construction for them. They offered to pay for help cashing checks in order to avoid the IRS. Heistand and the Santees agreed, and the next day Jackson and Augustus produced checks written out in their names from various businesses. Each check was approximately \$2,000. Jackson and Augustus drove them to multiple banks “in the area” where they cashed the checks. Jackson and Augustus received the money obtained from the cashed checks and in return Heistand and the Santees were paid \$175 for each check they cashed. Heistand recalled going to banks in Eau Claire, Menomonie and Turtle Lake but admitted there were additional banks in other cities he couldn’t remember. (55:4 (A:11)).

All five were arrested in Menomonie on May 25, 2017 after Heistand and Robin Santee cashed checks at the Dairy State Bank in Menomonie. An employee recognized the pair from an alert the bank had received from one of their branches in Barron County (Turtle Lake). The employee followed their van until the police arrived. The police recovered 21 uncashed checks hidden in the ceiling of the van and more than \$20,000 in cash between Augustus and Jackson. Police also found keys to the Hyatt Regency Hotel in Bloomington, Minnesota. The complaint alleged more cash would likely be located at the hotel “due to them committing

943.29(3)(c)); and 3) Conspiracy to commit forgery, contrary to Wis. Stats. §§ 939.31 and 943.38(1), a class H felony.

these crimes in multiple cities.” (55:3-4 (A:8-9)). Menomonie police obtained a warrant to search the hotel in Minnesota. (54:14-15 (A:24-25)).

After the arrests Menomonie Detective Kelly Pollack investigated the case and prepared a report. (54:4-15 (A:11-25)). While not all the information in her report was cited in the complaint, the Dunn County prosecutors were aware of her investigation as Pollack’s name was twice mentioned in the complaint as a source of information.²

According to Pollack, the checks cashed in Menomonie were “part of a larger check fraud scheme that had been traveling around various location[s] in Western Wisconsin and Eastern Minnesota.” (54:4 (A:11)). Pollack interviewed Robin Santee who admitted they had been “cashing checks at different bank locations from the Twin Cities area, into the Eau Claire area and the Menomonie area.” (54:7 (A:16)). Santee did not know the names of all the cities they had stopped in or the banks they had been to. *Id.*

Pollack also investigated the uncashed checks recovered from Jackson’s van. They were stolen from multiple Wisconsin businesses located in Durand, Eau Claire, Altoona, Osseo, Bloomer, Holcomb, Elmwood, and Menomonie; as well as Minnesota businesses located in Ramsey, Brooklyn Park, and Clear Lake. (54:9-14 (A:17-24)). Many of these checks had already been altered to name Robin Santee, Tyler Santee or

² “Inv. Kelly Pollack conducted a full interview of Robin Santee....” (55:4 (A:9)) “After consulting with Inv. Pollack, it was believed it was probably (sic) they had more money in the hotel rooms due to them committing these crimes in multiple cities.” (55:4 (A:9)).

Peyton Heistand as payee. (54:7 (A:15)). After contacting several of the business owners, Pollack confirmed that checks had also been cashed in Durand (54:9 (A:18)) and River Falls (54:10 (A:18)). Pollack specifically noted the two checks from Construction Install Services, Inc, of Durand, Wisconsin that were cashed in River Falls about two hours before checks were cashed in Menomonie—one by Tyler Santee and the other by Peyton Heistand. (79:42; 55:3 (A:8)).

On September 8, 2017, Jackson entered a guilty plea to the first count of the complaint, Conspiracy to Commit Fraud Against Financial Institution (\$10,000 to \$100,000), contrary to Wis. Stat. §§ 939.31,³ 943.82(1),⁴ & 943.91(4). Counts two and three were dismissed on the prosecutor's motion. (56:2). Jackson was sentenced to 40 months, with 14 months of initial confinement and 26 months of extended supervision. (12:1-2 (A:26-27)).

3 Wis. Stat. § 939.31 Conspiracy:

Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

4 Wis. Stat. § 943.82 Fraud against a financial institution:

(1) Whoever obtains money, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution by means of false pretenses, representations, or promises, or by use of any fraudulent device, scheme, artifice, or monetary instrument may be penalized as provided in s. 943.91.

On March 6, 2018 St. Croix County filed a three count complaint against Jackson based on the checks cashed in River Falls. One of the counts was Fraud Against Financial Institution, PTAC, contrary to Wis. Stat. § 943.82(1) & 943.91(3) (\$500-\$10,000). Each count was alleged to have occurred on May 25, 2017—the same day checks were cashed in Menomonie. *Id.* The factual basis for the complaint is a verbatim recitation of Menomonie Investigator Pollack’s 2017 report. (54:4-15 (A:11-25)). The case was dismissed on August 6, 2018. (73:5).

On August 10, 2018 St. Croix County filed a second complaint, this time alleging four counts of conspiracy. One of the counts was Conspiracy to Commit Fraud Against Financial Institution (\$500-\$10,000). See Wis. Stat. § 943.82(1). The factual portion of the complaint was a condensed version of the previous complaint, but still consisted almost entirely of information from either Inv. Pollack or the Dunn County complaint. (57:2-4). The complaint confirmed that the checks cashed in River Falls were the same checks from “Construction Install Services” that Pollack noted in her report. (54:9-10 (A:18); 57:4). On August 29, 2018, the case was dismissed for lack of jurisdiction. (73:6).

The State filed a third complaint on August 31, 2018. This complaint was nearly identical to the preceding complaint. (3:1-4; 57:2-4). The complaint was amended on September 14, 2018 changing each count from conspiracy to party to a crime. (15:1-4).

The St. Croix County prosecution was not based on any material evidence beyond what the Dunn County investigation had uncovered. (79:44). In fact,

Menomonie Investigator Kelly Pollack testified at the preliminary hearing in St. Croix County and repeated the information contained in her report including how the defendants met; how the check cashing scheme was perpetrated; the geographical area the scheme covered, and how the defendants were caught and arrested. (79:9, 13, 15-17). She noted the checks were cashed in River Falls and Menomonie on the same day about 2½ hours apart. (79:42). As there was no direct evidence showing Jackson or Augustus were in River Falls when the checks were cashed, the St. Croix County prosecutor relied on “the entire fraudulent scheme” as evidence of Jackson’s participation. (79:12, 58-59). The prosecutor specifically asked the Court to take judicial notice of the Dunn County conviction. (79:49).

Jackson moved to dismiss the complaint on double jeopardy grounds. (see 19:1-4; 30:1-5; 35:1-2). The circuit court denied the motion:

With regard to the double-jeopardy, I’m not going to go into a lot of detail, but the issue is do I have identical charges in law or fact. And they are not identical. In fact, we’ve got different dates. I know one was the same date, but we also have different counties. The statute says Dunn County can’t bring this there. Federal law may be different, but this is State law. So, I checked the Wisconsin Constitution to see if there was some other provision that may have app -- I couldn’t find anything. So, with regard to double-jeopardy, I’m finding that there’s not a double jeopardy issue in this case. And if you look at the Schultz decision, I thought I gave a very good summary about – in Paragraph 15, to be free from double-jeopardy you provide 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. And in my

opinion the charging in this county is not the same offense as in Dunn County. Therefore, with regard to double jeopardy, those motions are denied.

(80:5-6 (A:5-6)).

Jackson then entered a plea to Count 2 of the information, Commit Fraud Against Financial Institution (\$500-\$10,000) – As a Party to a Crime, contrary to Wis. Stats. §§ 939.31 & 943.82(1). The remaining counts were dismissed. (80:14, 21-22). Jackson did not waive his right to challenge the conviction on double jeopardy grounds. (80). The court withheld sentence and placed Jackson on probation for two years. (80:27; 41:1-2 (A:1-2)).

ARGUMENT IN SUPPORT OF REVIEW

I. THE COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER DOUBLE JEOPARDY BARS A SUCCESSIVE “PARTY TO A CRIME” CONVICTION BASED ON THE SAME MULTI-COUNTY CHECK CASHING SCHEME ALLEGED IN A PRIOR CONSPIRACY CONVICTION.

1. Legal standards

A defendant is guaranteed the right to be free from double jeopardy by the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution. *State v. Steinhardt*, 2017 WI 62, ¶13, 375 Wis.2d 712, 896 N.W.2d 700. Whether this right has been violated presents a question of law reviewed de novo. *Id.*, at ¶12; *State v. Koller*, 2001 WI App 253, ¶32, 248 Wis.2d 259, 635 N.W.2d 838.

The right to be free from double jeopardy provides three protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Steinhardt*, at ¶13. In this case, Jackson argues that the State violated his right to be free from a second prosecution for the same offense after conviction. See *Morris v. Reynolds*, 264 F.3d 38, 49 (2nd Cir. 2001) (Double jeopardy clearly prohibits a second prosecution for the same offense following a guilty plea.)

A guilty plea does not forfeit a double jeopardy challenge if there was no “express waiver” *and* “it can be resolved on the record as it existed at the time the

defendant pled.” (emphasis original). *State v. Kelty*, 2006 WI 101, ¶¶19, 38, 294 Wis.2d 62, 716 N.W.2d 886.

Separate prosecutions are for the "same offense" if the convictions are identical both in law and in fact. *Steinhardt*, at ¶14. If the offenses are identical in law and fact, a presumption arises that the legislature did not intend to authorize cumulative punishments. *State v. Ziegler*, 2012 WI 73, ¶61, 342 Wis.2d 256, 816 N.W.2d 238.

Whether two offenses are identical in law typically depends on the *Blockburger*⁵ test, which compares the statutory elements of each crime. Under *Blockburger*, two offenses are identical in law if they share the same elements or one is a lesser included of the other. *State v. Stevens*, 123 Wis.2d 303, 321-22, 367 N.W.2d 788 (1985); see also Wis. Stat. § 939.66(1) (“actor may be convicted of either the crime charged or an included crime, but not both.”). In other words, two offenses are identical in law if one offense does not require proof of any fact beyond those necessary to prove the other offense. *Ziegler*, at ¶60.

In this case, however, the double jeopardy analysis is governed by Wis. Stat. § 939.72, which applies to a conspiracy conviction. Wis. Stat. § 939.72 prohibits a prosecution for both “conspiracy and s. 939.05 as a party to a crime which is the objective of the conspiracy.” By legislative directive, the “objective” of the conspiracy is effectively identical in fact and in law to a subsequent PTAC charge based on the same facts.

The question then turns on whether the scope of

5 *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

the Dunn County conspiracy conviction includes the St. Croix County checks.

In *Schultz*, this Court adopted the rule that all evidence of record must be considered when deciding the scope of a previous prosecution:

A court's determination of the scope of jeopardy in a prior criminal prosecution is based upon the entire record of the first proceeding, including the evidence introduced at trial. It is the entire record of the first proceeding that reveals the details of the offense for which the defendant was actually in jeopardy during the first prosecution. The record of Schultz's first criminal prosecution—including the indictments, the police report, and trial testimony—establish the scope of jeopardy....

Schultz, at ¶56.

The holding in *United States v. Crowder*, 346 F.2d 1 (6th Cir. 1964) illustrates the scope of double jeopardy protection in circumstances similar to those here. Crowder was charged with conspiracy to transport stolen and forged money orders in interstate commerce. The indictment, however, specifically listed only twelve money orders that the defendant was alleged to have possessed, even though 235 money orders had been recovered. The defendant raised a due process challenge, arguing that the indictment, by failing to list all 235 money orders, failed to protect him "against subsequent jeopardy for the same offense." The Sixth Circuit rejected this argument, concluding that the record as a whole, which included evidence of all 235 money orders, protected against a subsequent prosecution related to all of the money orders, not just the twelve listed in the indictment. *Id.*, at 3. See also *United States v. Roman*, 728 F.2d 846,

853-854 (7th Cir. 1984) (Defendant charged with conspiracy to distribute LSD protected against subsequent prosecution in other states based on evidence possessed by the government but not admitted into the record); *United States v. Castro*, 776 F.2d 1118, 1124 (3rd Cir. 1985) (Defendant may rely on record showing activity related to drug conspiracy charge which occurred in other states to prevent subsequent prosecution even though those activities were not alleged nor formed the basis for the charges in current indictment.)

On September 8, 2017 Jackson was convicted of Conspiracy to Commit Fraud Against a Financial Institution (value exceeds \$10,000 but does not exceed \$100,000), contrary to Wis. Stats. §§ 939.31, 943.82(1), & 943.91(4) in Dunn County Case No. 17 CF 231. (12:1-2 (A:26-27)). Two other conspiracy counts were dismissed as the result of a plea bargain: Conspiracy to Commit Theft – Movable Property (greater than \$10,000), contrary to Wis. Stats. §§ 939.31 & 943.20(1)(a)&(3)(c); and Conspiracy to Commit Forgery, contrary to Wis. Stats. §§ 939.31 & 943.38(1). (56:2).

There's no dispute that the "objective" of the conspiracy charge was to commit bank fraud by cashing fraudulent checks. The checks that had been cashed and were yet to be cashed were all less than \$3,000. Therefore, to exceed the minimum threshold of \$10,000 under Wis. Stat. 943.91(4), multiple checks were required. Thus, a combination of checks totaling no less \$10,000 but up to \$100,000 supplied the "objective" of the Dunn County conspiracy count.⁶

⁶ Jackson did not argue the Dunn County checks failed to meet the \$10,000 threshold under Wis. Stat. § 943.91(4) and

The complaint did not limit itself to Dunn County banks. It alleged that “on Thursday, May 25, 2017, in the City of Menomonie, Dunn County, Wisconsin, [Jackson] *conspired to obtain money* owned by or under the custody or control *of a* financial institution by means of false pretenses, representations, or promises where *the value of the money exceeded \$10,000 but conspired to not exceed \$100,000,....*” (emphasis added) (55:2 (A:7)). In support of this charge, the complaint alleged a single scheme of fraudulent activity “in the area,” including Turtle Lake (Barron County), Menomonie (Dunn County) and Eau Claire (Eau Claire County). (55:4 (A:9)). It alleged Twenty-one checks found in Jackson’s van had been stolen from businesses in eight Wisconsin cities. (55:3-4 (A:8-9); 79:42).

Pollack’s report investigative report, which forms the basis of the Dunn County charges and was known to both the Dunn and St. Croix County prosecutors, outlined a common scheme to cash checks at banks throughout Western Wisconsin. (54:4 (A:11)). Nothing in the Dunn County record limits the charge to Dunn County Banks. In fact, Pollack’s report addresses in detail the Construction Install Services checks stolen in Durand and cashed in River Falls on the same day, by the same people, and in the same manner as the checks cashed in Menomonie. The Dunn County record as a whole, which includes “the indictments, the police

therefore additional checks from other counties had to be included to meet this minimum. See Court of Appeals Decision, ¶¶24-25. Rather, Jackson argued simply that multiple checks were required to meet the minimum threshold. Neither the charge, the complaint, nor the investigative report excluded the checks cashed in other counties, including St. Croix County.

report, and trial testimony” “reveals the details of the offense for which the defendant was actually in jeopardy during the first prosecution.” *Schultz*, at ¶56.

As the conspiracy took place throughout Western Wisconsin, including Dunn County, Dunn County can support its conspiracy charge with predicate offenses regardless of which Wisconsin county the predicate offenses occurred. *State v. Lippold*, 2008 WI App 130, ¶ 16, 313 Wis.2d 699, 757 N.W.2d 825 (a crime is properly venued in a county if at least one of the elements necessary to the offense occurs in that county); see also Wis. Stat. § 971.19(2).

Alternatively, there is no “dual sovereignty” among state actors. Under the dual-sovereignty doctrine, a single act can be prosecuted successively by each separate sovereign whose laws that single act offends. *Commonwealth v. Valle*, 136 S.Ct. 1863, 1867 (2016). Thus, a single act can be prosecuted by the federal government and a state government. This doctrine does not extend to prosecutions by multiple entities within a single state, however, because the prosecutorial powers of each subdivision of a state have the same ultimate source: the state itself. *Id.*, at 1871-72; *Waller v. Florida*, 397 U.S. 387, 393-395 (1970).

The actions of a county prosecutor bind the state. See e.g. *State v. Scott*, 230 Wis. 2d 643, 662, 602 N.W.2d 296 (Ct. App. 1999) (State bound by plea bargain as “[p]rosecutors are agents of the State, and it is the State rather than the individual prosecutor which is bound by the agreement.”) The State chose to act through the agency of the Dunn County District Attorney, and by so doing, bound itself under Wis. Stat. § 939.72(2) to not pursue further conviction under Wis. Stat § 939.05 as a party to a crime “which is the

objective of the conspiracy."

On January 10, 2019, Jackson was convicted in St. Croix County circuit court of Fraud Against a Financial Institution (value exceeds \$500 but not \$10,000), as party to a crime, contrary to Wis. Stat. 943.82(1) for the same Construction Install Services checks stolen in Durand and cashed in River Falls that are discussed in Pollack's report. As each these St. Croix checks are expressly included as part of the same scheme detailed in the Dunn County record, they constitute an "objective" of the conspiracy. Per Wis. Stat. § 939.72(2), the subsequent St. Croix County charges are prohibited.

The Court should grant the Petition for Review as the court of appeals mis-applies both *Schultz* and Wis. Stat. § 939.72(2).

CONCLUSION

WHEREFORE, for the reasons stated, this Court should grant the Petition for Review.

Respectfully submitted this March 3, 2021.

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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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

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I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an

appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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Dated this March 3, 2021.

MILLER APPELLATE PRACTICE, LLC

By _____
Steven L. Miller #1005582
Attorney for the Appellant-Defendant-Petitioner
P.O. Box 655
River Falls, WI 54022
715-425-9780

APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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