STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JAMES P. KILLIAN,

Defendant-Respondent.

PETITION FOR REVIEW

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The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. Killian*, No. 2020AP2012-CR, 2022 WL 2817282 (Wis. Ct. App. July 19, 2022) (recommended for publication). The court of appeals affirmed the circuit court's order dismissing the State's child sexual assault and incest charges against Killian on double-jeopardy grounds. It reasoned that Killian already was tried for those offenses.

ISSUE PRESENTED FOR REVIEW

Generally, when a defendant moves for a mistrial, the Double Jeopardy Clause does not bar a retrial. There's a narrow exception to this general rule: where a prosecutor intentionally goads a defendant into obtaining a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 672–73 (1982). When that happens, the State may not initiate a successive prosecution for the *same offense*. *Id.*

Here, Killian's first trial ended in a mistrial after the prosecutor violated the circuit court's ruling that he couldn't introduce other-acts evidence on grounds of prejudice. The court found that the prosecutor intentionally goaded a mistrial. Later, the State brought new charges; under a straightforward application of the *Blockburger*[1] test, they are not two prosecutions for the same offense.

Has the State exposed Killian to multiple prosecutions for the same offense in violation of double-jeopardy principles?

[1] *Blockburger v. United States*, 284 U.S. 299 (1932).

STATEMENT OF CRITERIA SUPPORTING REVIEW

This Court's decision "will help develop, clarify or harmonize the law, and . . . [t]he question presented is a novel one, the resolution of which will have statewide impact." Wis. Stat. § (Rule) 809.62(1r)(c)2.

This case presents this Court with an opportunity to develop the law on two important questions. First, how do courts determine the scope of jeopardy when a prosecution ends in a mistrial rather than a conviction or acquittal? Second, what does it mean to actually be in danger of conviction and punishment? Where a prosecutor talks about the *possibility* of adding charges to conform to *possible* trial evidence, does that put a defendant in actual danger of conviction and punishment for those hypothetical charges? What if there's no realistic threat that the court will allow such amendments to the Information? The bench and bar need guidance on both issues.

In *State v. Schultz*, 2020 WI 24, ¶ 2, 390 Wis. 2d 570, 939 N.W.2d 519, the first prosecution ended in an acquittal, and the issue was whether the State's successive prosecution was for the same offense. *Schultz*, 390 Wis. 2d 570, ¶ 1. To answer that question, Schultz wanted this Court to narrowly focus on the charging language. *Id.* ¶ 23. But after surveying numerous authorities, this Court concluded, "Regardless of whether the first prosecution results in an *acquittal* or a *conviction*, it is the record in its entirety that reveals the scope of jeopardy." *Id.* ¶ 32 (emphasis added).

Here, the court of appeals applied *Schultz*'s entire-record test to an entirely different context. Killian's first trial didn't end in an acquittal or a conviction. Rather, it ended when the prosecutor intentionally goaded a mistrial after three witnesses completed their testimony. That distinguishes this case from *Schultz* and the many cases it relies upon for the entire-record rule. *See Schultz*, 390 Wis. 2d

570, ¶¶ 26–30. Yet, the court of appeals assumed that *Schultz* applies. (Pet-App. 17.) Does it? The absence of binding or persuasive authority on this question alone warrants this Court's review.

Even if *Schultz*'s entire-record test applies to a subsequent prosecution after a mistrial, it requires an examination of the objective jeopardy faced by the defendant, not his subjective perception. In *Schultz*, this Court emphasized that jeopardy means "actual danger" of conviction and punishment. *Schultz*, 390 Wis. 2d 570, ¶ 31. It's well established that there must be a realistic threat of double jeopardy. *See State v. Fawcett*, 145 Wis. 2d 244, 255, 426 N.W.2d 91 (Ct. App. 1988). This Court therefore rejected Schultz's position that jeopardy is based "on the criminal defendant's fears, beliefs, or perceptions regarding his exposure in the first prosecution." *Schultz*, 390 Wis. 2d 570, ¶ 31.

In this case, the court of appeals decided that Killian faced actual danger of conviction and punishment for charges that the State indisputably didn't bring in the first prosecution because the prosecutor made comments about the *possibility* of adding charges to conform to *possible* trial evidence. Considering that a defendant isn't in jeopardy for uncharged offenses (including conduct mentioned in other-acts evidence), does this constitute "actual danger" of conviction and punishment, as *Schultz* requires? *Schultz*, 390 Wis. 2d 570, ¶ 31.

Finally, in deciding what danger Killian actually faced at trial, should the court of appeals have narrowly focused on the prosecutor's statements and actions? It purported to apply *Schultz*'s entire-record test to this novel situation. (Pet-App. 21.) But it gave no weight to the circuit court's refusal to allow last-minute changes to the State's case—including the addition of charges—on account of prejudice to Killian. At trial, a court cannot allow an amendment of the Information

to conform to the proof if it's prejudicial to the defendant. *See* Wis. Stat. § 971.29. So, this aspect of the record is critically important to deciding the actual scope of jeopardy here. Yet, the court of appeals completely discounted the circuit court's gatekeeping role in deciding what charges Killian actually faced.

In short, the court of appeals concluded that the severe outcome here—barring the State from bringing child sexual assault and incest charges against Killian—is consistent with *Schultz*. (Pet-App. 31.) Is it? Review is warranted, and this Court doesn't need to take the State's word for it. Killian sought publication in the court of appeals because "this is a case of first impression in the State of Wisconsin, perhaps the country." (Killian's Br. 9, 19.)

STATEMENT OF THE CASE

Killian's first prosecution

The State's first prosecution of Killian involved two cases and two victims: Britney and Ashley.[2]

Britney's case. In March 2015, the State charged Killian with one count of first-degree sexual assault of a child under age 12. (Pet-App. 6.) This case involves Britney. (Pet-App. 6.) The complaint listed the timeframe for the assault as "on or about Monday, August 18, 2014." (Pet-App. 6.) In the probable cause section, the State alleged that on August 18, 2014, Killian grabbed Britney's buttocks. (Pet-App. 6.) The probable cause section also detailed Britney's forensic interview. (Pet-App. 6.) During that interview, Britney stated that Killian had squeezed her buttocks on five different occasions "starting when she was about eight years old." (R. 1:2.) Britney also reported that Killian "touched her 'boobies' underneath her clothes" one time in 2014. (R. 1:2.)

[2] These are pseudonyms. *See* Wis. Stat. § (Rule) 809.86.

Given the allegations beyond Killian touching Britney's buttocks on August 18, 2014, Killian filed a motion in limine to determine what he was being tried for. (R. 73:72; 75:16–17; 82:31–32.) At that hearing, the prosecutor stated that "the actual incident alleged . . . is one night." (R. 73:71.) He said that he planned to introduce evidence of grooming behavior, like Killian asking if he could be Britney's boyfriend or buying her gifts. (Pet-App. 7.) And the prosecutor intended to introduce other-acts evidence that the court had just deemed admissible: evidence of Killian's sexual assaults against Ashley between January 1988 and December 1999. (Pet-App. 7.) Beyond that, the prosecutor didn't object to Killian's request to exclude other-acts evidence. (Pet-App. 7.) So, the court granted Killian's motion. (Pet-App. 7.)

Ashley's case. Ashley's case started one year after Britney's case. (Pet-App. 6.) Ashley is Killian's daughter. (Pet-App. 4.) The State charged Killian with one count of repeated sexual assault of a child under age 16. (Pet-App. 6.) The charging period allegation was "April 1994 through December 1999."[3] (Pet-App. 6.) The probable cause section detailed Ashley's report to police, where she said that the assaults started when she was 6 years old and ended when she was 17. (Pet-App. 6.) According to Ashley, the assaults would have started around January 1988 and ended around December 1999. (Pet-App. 6.) They "ranged from Killian touching Ashley's vagina to Killian having sexual intercourse with her." (Pet-App. 6.)

Joint trial. Britney's and Ashley's cases were joined for trial. (Pet-App. 7.)

At the start of the trial, the circuit court addressed the prosecutor's late request to amend the Information in two

[3] This was later changed to April 1994 through November 30, 1998, to account for Ashley's correct birthdate. (R. 14; 75:15.)

ways. (Pet-App. 7.) First, he wanted to expand the charging period allegation for Britney, from on or about August 18, 2014, to on or between January 2014 and August 18, 2014. (Pet-App. 7.) Second, he wanted to charge Killian with one count of incest in Ashley's case, occurring sometime between April 1994 and December 1999. (Pet-App. 7.)

The circuit court denied the prosecutor's request to add the incest charge, finding it extremely prejudicial to Killian. (Pet-App. 8.) The court said that it was "inexcusable that we have this charged this late in the game." (R. 75:14–15.) The prosecutor commented that "maybe the proof at the trial will be sufficient to convince the Court that more sexual intercourse occurred which would be a basis for this charge." (R. 75:15–16.) The court responded: "And, again, the [S]tate's lack of preparation should not prejudice the defendant. The state's had ample opportunity to make those considerations. . . . So I'm not going to allow it." (R. 75:16.)

Consistent with that logic—that "the [S]tate's lack of preparation should not prejudice the defendant"—the court allowed the prosecutor to amend the charging period allegation for Britney with an important caveat. It ruled that the broadening of the charging period was just to give "a window" for when Killian touched Britney's buttocks, *not* to allow the prosecutor to get in other-acts evidence previously deemed inadmissible. (R. 75:16–22; Pet-App. 7.) Responding to defense counsel's concern that the prosecutor was asking to "present evidence of other sexual acts and then have the jury consider those," the circuit court stated, "We've clearly had a motion in limine on that. If there were intentions to introduce those at trial, then those were required to have been

addressed and they were not addressed at all. So there's already been a ruling on that."[4] (R. 75:22.)

Before the jury was empaneled, the circuit court also addressed the prosecutor's request that it "reconsider its previous order not allowing the recording [of Britney's forensic interview] to be played." (R. 75:36.) Defense counsel objected on grounds of prejudice, noting the pretrial ruling. (R. 75:40.) The court denied the prosecutor's request, opining, "[T]o come up with this the morning of trial is absolutely ridiculous and inexcusable. This was addressed a long time ago." (R. 75:42, 44.)

During opening statements, when talking about Britney's case, the prosecutor mentioned Killian rubbing his penis on her. (Pet-App. 9.) The prosecutor said that Britney was "confronted several times by behavior that is inappropriate and illegal." (Pet-App. 9.) He stated that there was "an unmistakable course of conduct that leads one to have no doubt that it was sexually motivated." (Pet-App. 9.) As for Ashley's case, the prosecutor noted that Killian had assaulted her when she was "6 or 7 years old and [it] didn't stop until she was about 17. So approximately 10 years." (Pet-App. 9.) He said that Ashley would testify about the types of sexual assault she endured. (Pet-App. 9.)

Three of the State's witnesses completed their testimony before the circuit court declared a mistrial: Britney's mom, Britney's grandmother, and Britney's forensic

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[4] Defense counsel's concern arose because during this discussion, the prosecutor stated, "We are charging one sole act. Interestingly, it appears to me that if more acts are disclosed at trial, the Information could be changed. And it could, in fact, I think naturally prejudice the defendant more." (R. 75:20.) Later, the prosecutor reiterated, "If more facts are introduced at trial, the Court can amend the Information." (R. 75:21.)

interviewer. (Pet-App. 9.) The mistrial occurred during Britney's testimony.

Before Britney testified, the prosecutor argued that "other-acts evidence of Killian touching Britney should be admissible because the complaint alleged a 'course of conduct.'" (Pet-App. 10.) He maintained that evidence of Killian touching Britney's breast or vagina, or that Killian humped her or rubbed his penis on her, wasn't subject to the court's pretrial ruling barring other acts. (Pet-App. 10.)

Defense counsel objected, saying that he'd ask "for a mistrial if that comes out at any point in this trial because that's been thoroughly litigated and decided." (R. 82:16.) The court responded, "Correct." (R. 82:16.) Referencing the allegation that Killian touched Britney's buttocks, counsel said, "That was the only thing that was charged." (R. 82:21.) The court unequivocally agreed:

- "[I]f you look at your Complaint, the Complaint talks about the butt touch on August 18th."
- "The one charged in the Complaint was the butt."
- "[C]learly, the act that's being alleged as the offense is the August 18th butt grab, for the lack of a better description."

(R. 82:33, 39.)

The circuit court was equally clear about what would happen if the prosecutor tried to introduce the prohibited other-acts evidence at trial:

- "It will be a mistrial."
- "The court's going to rule, because I'm concerned about a mistrial, that the state can bring in . . . grooming type activities but not other sexual assaults."
- "It's going to be prejudicial to the defense when they had a ruling that was different."

(R. 82:27, 48–49.)

And the circuit court wasn't shy about its dissatisfaction with the State's last-minute attempts to change its case:

- "[Y]ou don't change your charging document until a day before the trial. That's the problem here."
- "The target keeps moving is the problem."
- "But now we're at trial and defense is basically blindsided."
- "[I]t's a bit disingenuous to pull the rug out from counsel based on those prior rulings."

(R. 82:27, 31, 37, 46.)

Finally, the circuit court doubled down on its previous signal that there'd be no amending the Information to conform to the prohibited evidence. The prosecutor proposed letting "the child speak" and "then at the end of our case, if there's more information, more charges can be brought. The information can be changed." (R. 82:25.) The court responded, "But there was a ruling on that. And then at the eve of trial, you changed the period. . . . You're changing the game on them. If you wanted to include that, then we should have addressed that." (R. 82:25.)

Given the circuit court's ruling, the prosecutor said he'd talk to Britney over the lunch break to make sure she understood "we're going to talk about the butt grab." (Pet-App. 10.) After lunch, he asked the court to reconsider its decision regarding the inadmissible other-acts evidence of Killian touching Britney. (Pet-App. 10–11.) The court denied the motion. (Pet-App. 11.)

Britney testified about inappropriate conversations she'd had with Killian. (Pet-App. 11.) The subject then shifted to what she reported to her mom about him. (Pet-App. 11.) When questioned whether she told her mom something

"relating to a private part of your body," Britney revealed that Killian rubbed on her breast and her private spot. (Pet-App. 11.)

Defense counsel immediately objected and asked for a mistrial because of the violation of the circuit court's other-acts ruling. (Pet-App. 12.) The court agreed and granted the mistrial. (Pet-App. 12.) It later dismissed the case with prejudice, finding that the prosecutor intentionally goaded a mistrial. (Pet-App. 12.) The court found that the prosecutor's conduct "was designed to create another chance to convict . . . a chance to prepare more thoroughly and with a better understanding of the issues, a chance to file different motions and obtain more favorable pretrial rulings, and a chance to add more charges" to increase the likelihood of conviction. (Pet-App. 13.)

The State didn't appeal the circuit court's decision.

Killian's second prosecution

In October 2019, the State charged Killian with ten crimes concerning Britney and Ashley. (Pet-App. 13.) Unlike the first prosecutions, which involved separate complaints joined only for trial, this time one complaint made allegations involving both victims. The Complaint made allegations that were different both as to the conduct and relevant time periods from the original Complaints.

The first nine counts charged Killian with sexual contact and sexual intercourse with Ashley. (Pet-App. 13.) Three of the nine offenses alleged first-degree sexual assault of a child. (Pet-App. 13.) The remaining six charges alleged incest with a child. (Pet-App. 13.) "Each count was confined to approximately a two-year period, starting as early as around 1990 and ending as late as around 1997." (Pet-App. 13.)

The tenth charge covered Britney. (Pet-App. 13.) It alleged repeated sexual assault of the same child. (Pet-App. 13–14.) The complaint specified that "Killian had touched

Britney's breast and pubic mound and had pressed his erect penis against her body." (Pet-App. 13–14.) The charging period allegation was "in or around June 2012, and no later than August 17, 2014." (Pet-App. 14.)

Killian moved to dismiss the complaint on double-jeopardy grounds. (Pet-App. 14.) He argued that he already was tried for the above offenses. (Pet-App. 14.) The circuit court agreed and dismissed the case. (Pet-App. 14.)

The State appealed, and the court of appeals affirmed in a decision recommended for publication. (Pet-App. 31.) It flagged the "key question" as "how to properly identify the offenses for which Killian was in jeopardy of being convicted during his first case." (Pet-App. 16.) The court of appeals utilized *Schultz*'s entire-record test to answer that question. (Pet-App. 17.) But while it said that it would review "the record of the first prosecution in its entirety," it narrowly focused on the prosecutor's statements and actions in deciding the actual scope of jeopardy. (Pet-App. 17–29.)

Because the prosecutor talked about the possibility of adding charges to conform to Britney's possible testimony, because the prosecutor mentioned conduct other than Killian touching Britney's buttocks during opening statements, and because the prosecutor elicited testimony about such uncharged conduct while questioning Britney, the court of appeals held that Killian was in actual danger of conviction for the State's current allegation against him. (Pet-App. 21–25.) It gave *no* weight to the circuit court's clear statements that (1) Killian only was on trial for touching Britney's buttocks, and (2) it would not allow last-minute changes to the State's case—like adding charges—on grounds of prejudice. (Pet-App. 21–25.) Nor did it matter to the court of appeals that, as promised, the circuit court declared a mistrial as soon as evidence of other sexual assaults came in. (Pet-App. 21–25.)

As for Ashley's case, she never testified. But because the prosecutor tried to add an incest count before trial, made a comment about the possibility of adding that charge based on possible trial evidence, and mentioned admissible other-acts evidence of Killian assaulting her during opening statements, the court of appeals held that he was in jeopardy for the State's current allegations against him. (Pet-App. 25–29.) Again, it gave *no* weight to the circuit court's comments and rulings, including that it would *not* allow amendment of the Information to add the incest charge. (Pet-App. 25–29.)

The State petitions this Court for review.

ARGUMENT

This Court should grant review to (1) decide how courts ascertain the scope of jeopardy when there's a mistrial, and (2) provide guidance on what it means to actually be in danger of conviction and punishment.

To be clear, the State has not and does not challenge the circuit court's finding that the prosecutor intentionally goaded a mistrial in Killian's first prosecution.[5] But this case is about what the Double Jeopardy Clause requires as a result of that misconduct. It mandates that the State cannot charge Killian with the same offenses—no more, no less. *Kennedy*, 456 U.S. at 672–73. The clause doesn't require the government to bring all viable charges against a defendant in one proceeding. *Id.* at 672. The court of appeals' decision went too far.

[5] Nor could the State challenge that finding, anyway.

A. In crafting its entire-record rule, *Schultz* didn't consider prosecutions that end in a mistrial.

As noted, the first prosecution in *Schultz* ended in an acquittal: the jury found him not guilty of repeated sexual assault of a child in "late summer to early fall of 2012." *Schultz*, 390 Wis. 2d 570, ¶ 1. When the State later charged Schultz with an assault occurring "on or about October 19, 2012," the question was whether it exposed him to multiple prosecutions for the same offense because the timeframe for the first offense encompassed the dates of the second offense. *Id.* Schultz asked this Court to resolve that issue by looking at the charging language in the first case and asking how a reasonable person would construe it at the time jeopardy attached. *Id.* ¶ 23. The State argued that if the charging language in the first case was ambiguous, the entire record should determine the scope of jeopardy. *Id.*

In a close call, this Court held that even in the face of an unambiguous complaint, courts may consider the entire record—"all of the evidence, testimony, and arguments of the parties"—in determining the scope of jeopardy. *Schultz*, 390 Wis. 2d 570, ¶¶ 33–40, 55. It adopted the entire-record rule after concluding that "substantial authority indicates courts may review the entire record of the first proceeding to determine the scope of jeopardy." *Schultz*, 390 Wis. 2d 570, ¶¶ 2, 25. That authority consisted of one of this Court's decisions and 11 decisions from federal circuit courts. *See id.* ¶¶ 26–30. All those cases involved prosecutions that ended in an acquittal or a conviction. *Id.* This Court also consulted historical sources, noting that in the English common law, "If the defendant had already been acquitted, convicted, or pardoned of the offense, he could advance the appropriate plea, backed by the facts underlying the first case." *Id.* ¶ 31.

So, while the *Schultz* Court admittedly used broad language to describe its holding, it's not clear that it applies

to prosecutions ending in a mistrial given the underlying facts and authorities consulted.

For its part, the dissent would have determined the scope of jeopardy by construing the charging period allegation most favorably to the defendant. *Schultz*, 390 Wis. 2d 570, ¶ 86 (Hagedorn, J., dissenting).

B. Does *Schultz*'s entire-record rule apply in the context of prosecutions ending in a mistrial?

The court of appeals didn't cite any authority specifically holding that the entire-record rule applies when a first prosecution ends in a mistrial. (Pet-App. 17.) Nor did the parties offer any such authority in their briefs.

There are reasons why the entire-record rule might not be a good fit in the context of a mistrial. Where a trial ends in a verdict, there's value to seeing how everything played out. A reviewing court can consider all the evidence admitted at trial, what the prosecutor argued in closing statements, and what charges actually were submitted to the jury. This process should only serve to *clarify* the actual scope of jeopardy.

But that's not necessarily true when a reviewing court looks beyond an unambiguous complaint to determine the actual scope of jeopardy when the prosecution ends in a mistrial. Consider a complaint charging a single count of drunk driving on December 31, 2021. The probable cause section details the defendant's conduct on December 31. At trial, during opening statements, the prosecutor talks about December 31. However, she also tells the jury that the defendant drove drunk with a minor passenger a few weeks before December 31. The State's first witness details the events of December 31, and during this testimony the prosecutor intentionally goads a mistrial. In this situation, applying *Schultz*'s entire-record rule (which includes the

parties' arguments) seems to only complicate what should be an easy determination of the actual scope of jeopardy.

The bottom line is that it's not obvious whether *Schultz*'s entire-record rule applies to determine the scope of jeopardy when a prosecution ends in a mistrial, or that it should. Notably, in the single case that the State could find addressing sameness in the context of a government-provoked mistrial, the court focused on the charging language of the first and second prosecutions to resolve the double-jeopardy challenge. *See United States v. Elmardoudi*, 611 F. Supp. 2d 864, 869–71 (N.D. Iowa 2007). Clarification is necessary.

C. Jeopardy means actual danger of conviction and punishment.

An "accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. 377, 393 (1975). Wisconsin cases consistently define jeopardy as "exposure to the risk of determination of guilt." *State v. Seefeldt*, 2003 WI 47, ¶ 16, 261 Wis. 2d 383, 661 N.W.2d 822 (citing *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992)). That's consistent with Supreme Court precedent. *Serfass*, 420 U.S. at 391–92 ("Without risk of a determination of guilt, jeopardy does not attach."). Stated otherwise, a defendant is in jeopardy when he's been placed "before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.'" *Id.* at 391 (citation omitted).

In *Schultz*, this Court clarified that there must be *actual* exposure to the risk of conviction, not hypothetical exposure. Jeopardy means "the actual danger to which a person is exposed, as opposed to the danger a person fears." *Schultz*, 390 Wis. 2d 570, ¶ 31. Requiring real danger or risk of conviction and punishment isn't a new concept. *See State v. Witte*, 243 Wis. 423, 429, 10 N.W.2d 117 (1943) ("And so the 'putting in jeopardy' means a jeopardy which is real."). That's why this Court rejected Shultz's claim that jeopardy should

be based on "the criminal defendant's fears, beliefs, or perceptions regarding his exposure in the first prosecution." *Schultz*, 390 Wis. 2d 570, ¶ 31.

D. What does actual danger of conviction and punishment mean?

Where a prosecution ends in a verdict, it seems easy enough to determine the charges for which the defendant was in actual danger of conviction and punishment. As noted above, a court can review all the admissible evidence, the prosecutor's closing statement, and the charges that were submitted to the jury. But even then, difficult questions about the scope of jeopardy may arise, as the closely divided *Schultz* decision demonstrates.

Where a prosecution ends in a mistrial, things get even more complicated, as this case shows. In deciding the scope of jeopardy in Killian's first prosecution, the court of appeals acknowledged that the record had its "limitations." (Pet-App. 24.) And it seemed to recognize that the scope of jeopardy can't be based on "unlikely hypothetical[s]." (Pet-App. 23.) Yet, that's exactly what happened here.

The crux of the court of appeals' opinion is that because the prosecutor talked about the *possibility* of adding charges to conform to *possible* trial evidence, Killian was in jeopardy for those hypothetical charges. (Pet-App. 22–29.) That cannot be right. How is the trier of fact poised to determine the question of guilt or innocence on such hypothetical charges? *See Serfass*, 420 U.S. at 391. It's not: a defendant is not in jeopardy for an uncharged crime unless it is a lesser-included offense of a charged crime.[6] *See State v. Jacobs*, 186 Wis. 2d

[6] It is axiomatic that a defendant is not in jeopardy for an uncharged offense. "One cannot be put in jeopardy on account of an offense with which he is not charged and that without regard to

219, 223–25, 519 N.W.2d 746 (Ct. App. 1994). That's why a defendant is not in jeopardy for conduct mentioned in other-acts evidence—the conduct doesn't form the basis of a charged crime. *See, e.g.*, *United States v. Felix*, 503 U.S. 378, 385–87 (1992). The court of appeals seems to say that jeopardy may be based on a defendant's fears regarding his exposure—not his actual exposure—a proposition that this Court flatly rejected in *Schultz*.

Further, even if courts are permitted to engage in such a speculative exercise to determine a defendant's actual exposure to the risk of conviction, the court of appeals' approach here remains flawed. It suggested that it wasn't an "unlikely hypothetical" that more charges would have been added at the close of the evidence, noting that the prosecutor repeatedly discussed the possibility of amending the Information. (Pet-App. 22–23, 27–28.) But the prosecutor didn't get to decide whether more charges would be submitted to the jury—the court did. *See* Wis. Stat. § 971.29(2). The court could allow amendment of the Information only in the

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whether the evidence in the case tends to prove that he is also guilty of other offenses." *United States v. Gilbert*, 31 F. Supp. 195, 201 (S.D. Ohio 1939) (quoting *United States v. Brimsdon*, 23 F. Supp. 510, 512 (W.D. Mo. 1938)). "There is no constitutional guaranty against a second incidental proving of the same offense if that offense be an offense which has not heretofore been charged and prosecuted." *Id.* (quoting *Brimsdon*, 23 F. Supp. at 512). *See also, e.g.*, *Davidson v. United States*, 48 A.3d 194, 206 n.17 (D.C. 2012) ("Involuntary manslaughter was not charged in the first indictment, so appellant has never been in jeopardy for that offense."); *State v. Maisch*, 880 N.E.2d 153, 160 (Ohio Ct. App. 2007) (holding defendant was not in jeopardy because he "was never charged with an offense"); *State v. B.J.D.*, 799 So. 2d 563, 568 (La. Ct. App. 2001) (holding defendant was not in jeopardy for an offense to which he pled guilty because "he was never charged with that offense"); *State v. Tresenriter*, 4 P.3d 145, 149 (Wash. Ct. App. 2000) (noting "conviction of a crime not charged is a nullity and a defendant so convicted has never been in jeopardy").

absence of prejudice to Killian. *See* Wis. Stat. § 971.29(2). And as discussed above, the record is replete with instances of the court refusing to take any action that would prejudice Killian (true to its word, it granted a mistrial as soon as the State added to its criminal theory at trial). The court was quite clear with how it felt about the State adding charges so "late in the game." (R. 75:14–15.)

It's striking that the court of appeals gave no weight to this aspect of the record when applying *Schultz*'s entire-record test. How could Killian have been on trial for touching Britney's breast and pubic mound, and for pressing his erect penis on her body, when the circuit court plainly ruled that he was on trial for touching her buttocks and—as promised—declared a mistrial as soon as the evidence went beyond the charged crime? And even if Killian hadn't requested a mistrial, how is it anything more than an unlikely hypothetical that charges would have been added when the court repeatedly denied the State's attempts to add to its criminal theory because of prejudice to Killian? The court of appeals does not meaningfully explain. (Pet-App. 21–25.)

Such a narrow review of the record wasn't limited to Britney's case. For example, in explaining why it believed Killian already was tried for the State's current allegations regarding Ashley, the court of appeals noted that after the circuit court refused to add an incest charge, the prosecutor talked about the possibility that the trial evidence would change the court's mind. (Pet-App. 27–28.) The court of appeals deemed this significant to the likelihood that not just one, but *multiple* incest charges would have been added at the close of the evidence. (Pet-App. 28.) Yet, immediately after the prosecutor's comment, the court said, "And, again, the [S]tate's lack of preparation should not prejudice the defendant. The state's had ample opportunity to make those considerations . . . . So I'm not going to allow it." (R. 75:16.) Why isn't that important to the analysis when the court was

responsible for deciding whether charges would be added at the close of the evidence?

Here and at other parts in its analysis, the court of appeals narrowly focused on the prosecutor's statements and actions, which isn't consistent with *Schultz*'s entire-record test, assuming it applies.

Finally, it's worth discussing some other problems with the court of appeals' narrow focus on the prosecutor's statements and actions. Its heavy emphasis on the prosecutor's desire to add charges at the close of the evidence is noteworthy because prosecutorial misconduct aimed at getting a conviction doesn't trigger *Kennedy*'s rule barring retrial. *See United States v. Oseni*, 996 F.2d 186, 187–88 (7th Cir. 1993) ("The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by improper means."). By stressing the prosecutor's intent to add charges at the close of the evidence, the court of appeals' opinion has the effect of undermining the circuit court's finding that the prosecutor was trying to abort the trial—a finding that's necessary to run a double-jeopardy analysis in the first place. *See id.* The court of appeals' analysis therefore misses the mark.

Along similar lines, the court of appeals attached great significance to the circuit court's finding that the prosecutor intended to bring more charges against Killian if there was a mistrial. (Pet-App. 5, 12–13, 15, 17–18, 26, 30.) But the prosecutor didn't need to induce a mistrial to bring additional charges against Killian: "[t]he Double Jeopardy Clause . . . does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Kennedy*, 456 U.S. at 672. So, it's not entirely clear to the State why this aspect of the prosecutor's intent was so important to the court of appeals' analysis. In terms of inducing a mistrial, the intent that matters is the prosecutor's desire to sabotage the trial to improve his chances of conviction on the charges he's already

brought. *See State v. Quinn*, 169 Wis. 2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992). The circuit court found that the prosecutor had that intent, which is why the bar against retrial on the same offenses is at play here. (Pet-App. 12–13); *Quinn*, 169 Wis. 2d at 624. The court of appeals' focus on the prosecutor's intent to bring additional charges upon a mistrial, which the Double Jeopardy Clause doesn't prohibit, appears misplaced.

* * * *

The issues in this case are novel. The stakes are high. This Court's review is warranted.

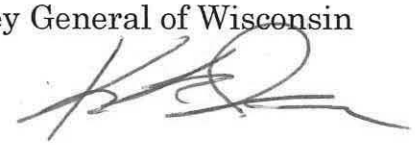
CONCLUSION

This Court should grant the State's petition for review.

Dated this 17th day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 5,721 words.

Dated this 17th day of August 2022.

KARA L. JANSON
Assistant Attorney General

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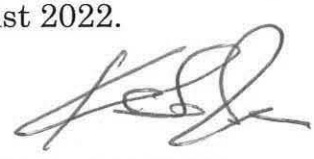

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