STATE OF WISCONSIN

IN SUPREME COURT

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Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JAMES P. KILLIAN,

Defendant-Respondent.

RESPONSE TO PETITION FOR REVIEW

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CRITERIA FOR REVIEW

Although this is an important and novel decision, it is narrow-reaching and destined to remain that way if left to stand. It only impacts the rarest and most egregious prosecutorial misconduct, where a prosecutor has *intentionally* caused a mistrial and done so for the specific purpose of adding charges at a subsequent trial. This decision deters conduct that should never be accepted from any licensed attorney in any Wisconsin court. The State's concerns regarding prosecutors being hindered by a lack of clarity in the law are incredibly unlikely to materialize as actual barriers to justice, because it is rare for prosecutors to intentionally goad defendants into mistrial so that the prosecutor can revisit charging decisions.

Of much larger concern, reversal of the court of appeals decision would enable and incentivize prosecutors to bring and withhold charges so that trials could become coercive forums where defendants face the ever-present risk of having to run the gauntlet again if the respective prosecutor decides to sabotage the trial.

The court of appeals soundly dealt with a rather square peg, made square by the State, and rendered an opinion that will only ensure such conduct remains an aberration. Review is to be granted only when "special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). In light of the

narrow-reach of the decision and the prosecutorial misconduct involved, such reasons are not present in this case.

STATEMENT OF THE CASE

I. Allegations in 2015CF47 & 2016CF38

On March 17, 2015, the State in a one-count Complaint charged that "…on or about Monday, August 18, 2014, [Mr. Killian] did have sexual contact with [Britney] who had not attained the age of twelve years." (R. 1.) The facts asserted in the Complaint included allegations that Mr. Killian touched Britney's butt on five different occasions and touched her "boobies." (R. 1.) During the trial, occurring over two years later, the State alleged additional conduct, the defendant "rubbing his penis on her [in bed]," mentioned during the State's opening statement (R. 78: 48) and "a vagina rub," stated to the court, (R. 82:20.) (hereinafter "the allegations involving Britney").

On March 15, 2016, the State filed an additional Complaint, Case No. 2016CF38, charging Mr. Killian with repeated sexual assault of Ashley, occurring from April 1994 through December 1999. (R. 3.) As a factual basis, the State described assaults ranging from touching of intimate parts to intercourse, occurring "every day for several years," and that the assaults started in 1988 and ended "around December of 1999," (R. 3:2.) (Hereinafter "the allegations involving Ashley").

The two cases were joined for purposes of jury trial and all other proceedings, on November 2, 2016. (R. 8.)

II. Pretrial Proceedings

a. Motion Hearing October 5th, 2016

On October 5th, 2016, the court heard motions at a final pretrial conference, including the defendant's other acts motion (R. 73), ultimately resulting in the court continuing the trial. (R. 73: 81.) Regarding the defendant's other acts motion, the court found that grooming behavior was admissible but other acts of sexual assault were inadmissible at trial. (R. 73:73.)

b. Motion Hearing May 31, 2017

On May 31st, 2017, at the adjourned pretrial hearing, the court excluded the State's expert witness, criticizing the State for providing the expert's report only 3 days prior to the hearing and for the expert failing to attend prepared. (R. 72:71, 73.) The court also ruled that recordings of Britney's forensic interviews were inadmissible because the State did not establish the necessary showing under Wis. Stat. § 908.08(4). (R. 21:6.)

III. Trial Day 1

On June 15th, 2017, two days before trial, the State filed a motion to increase the date range of the allegations involving Britney from August 18th, 2014, to the period between January

and August 18th, 2014. (R. 21:8.) In an affidavit, the State claimed, "on June 13, 2017, in the course of witness preparation I met with [Britney]. In discussing with [her] when the sexual assault occurred, [she] disclosed *they* happened over a course of time staring in January 2014 and ending on August 18, 2014." (R. 21: 8.)(emphasis added). The motion was heard the morning of trial. (R. 75:17.)

The defense raised the concern that expanding the date range would open the door to other allegations identified in the Complaint. (R. 75:17-19.) The State replied, "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. But I don't think that's unusual. It happens at trial that more facts are accused and Informations are changed and juries deliberate on multiple issues." (R. 75: 20.)

The State goes on to say, "[a]nd I think that if the jury watches the forensic interview [ruled inadmissible], it is possible that there will be other facts before them that could in fact lead to further counts which is, I think, allowed under the law. If more facts are introduced at trial, the court can amend the Information and give that instruction to the jury." (R. 75:21.)

The Court responded, "[w]ell, it sounds to me like that's not the intent of your motion to add things because we've

clearly had motions." (R. 75:21.) The State answers: "That's not the intent, I just want an abundance of caution. I want to be clear that that's possible."

Judge Becker, in her eventual order dismissing based on prosecutorial overreaching, found that the State increased the date range as part of a plan "…to pursue prosecution for sexual assault(s) on a range of other acts that occurred over a significantly larger time span." (R: 21:8.)

Thereafter, jury selection and opening statements occurred.

During the State's opening statement, the State focused on a "course of conduct," alleging repeated acts of sexual assault, without ever mentioning hand-to-buttocks contact: "She told her mother that the defendant was touching her inappropriately. …[H]e would rub himself on her. …What you're going to hear is that she then is confronted several times by behavior that is inappropriate and illegal. That he sexually had—he was motivated by sexual gratification. There was no other reason for him to be...touching her. And where it started to get very bad is when she started to sleep with him in the bed while her grandmother was working…. You'll also hear that he was rubbing himself on her. And by himself, I mean his penis…It's an unmistakable course of conduct that leads one to have no doubt that it was sexually motivated." (R. 78: 46-48.)

As the opening turned toward the Ashley allegations, the State said: "…her father had been molesting her since she was about 6. …[H]er father started molesting her at about 6 or 7 years old and didn't stop until she was about 17. …[S]he'll go into detail about it. She's going to go into detail about hand jobs. She's going to go into detail about oral sex … about sexual intercourse …about him ejaculating on her stomach..." (R. 78:50.)

IV. Trial Day 2

a. State Argues Admissibility Of Other Sexual Assaults

At 11:00 a.m., the State indicated that Britney was the next witness but requested a 5-minute recess. (R. 82:2.) During the recess, the State requested to introduce the inadmissible forensic interview through Britney, indicating "I want to make it clear that I plan to talk to her about that interview and her experience there and then admit [it] as an exhibit." (R. 82:5.)

After the court again ruled that the video is inadmissible, the State shifted to arguing the admissibility of the other allegations directly: "Actually, I re-reviewed the Criminal Complaint. What is on trial, the course of conduct… Although there is one incident charged, the State doesn't have to charge every incident. The State had discretion. But in the Complaint, the course of conduct is there." (R. 82:15.)

The State then admitted its intent to have Britney testify to several sexual assaults…(R. 82:17), specifically "a breast rub…alleged humping, penis rubbing on her leg…also a vagina rub, a butt rub, a breast rub (sic)…touching." (R. 82:19-20.) The state indicated, "I could have charged each touch but I charged one over a course of time." (R. 82:23.) The State also argued that the additional acts are admissible and were in fact charged because the State charged "on or about August 18th, so the State doesn't have to leave the date of the offense." (R. 82:26.) The State indicated, "[i]t's sort of a quandary. Because if she were to testify and she goes and tells her story, Mr. Killian is facing more charges." (R. 82:27.)

The Court then explained that if Britney testifies about allegations other than what is alleged on August 18th, then it will be a mistrial (R. 82:27), finding that the State is "changing how it wants to try the case." (R. 82:28.) The State responded, "I don't think it's a reason for a mistrial. I think it would be the defendant's worst-case scenario that we file an amended Information charging more assaults." (R. 82:29.) The court explained, "the target keeps moving is the problem." (R. 82:31.) The State again referred to "a course of conduct" constituting one sexual assault. (R. 82:31.) When asked by the court, which one is it, the State answered, "I figured you could take your pick." (R. 82:31.)

The Court then summarized the State's scheme: "…at the eve of trial, now you've changed to a date range. So now that buys…into your theory that we can charge one thing and have five different allegations, possibly six. They can take their pick. That is not how this case was brought. That's the problem. …. Now you've changed the parameter of the charge and the other acts by filing this last-minute Information that gives the date range and [Killian] addressed that yesterday. That's the concern." (R. 82:32-33.)

The State then shifted focus to a mistrial: "I understand, Judge. And so maybe what I can do to avoid a mistrial, is talk to the witness and make sure she understands we're going to talk about the butt grab." (R. 82:33-34.) As Judge Becker explained in her findings, that conversation never happened. (R. 21:19.)

b. State threatens more charges if Killian keeps objecting

During the lunch break, instead of working with Britney, the State opted to appeal to defense counsel to permit the other act evidence. (R. 83:39-40 *see also* R. 21:19). Specifically the State threatened that if Killian did not acquiesce to the admission of the other charges, and there is a mistrial, then Killian will face more charges "unless he can prove prosecutorial misconduct." (R. 83:39-40.)

When the parties returned to court, the State immediately resumed arguing for the admission of the other sexual assaults. (R. 82:34-48.) The court concluded: "the Court's going to rule, because I'm concerned about a mistrial, that the State can bring in anything that they would like to regarding other acts that are grooming type activities but not other sexual assaults…" (R. 82:48.)

c. State Causes a Mistrial

The State then called Britney, who waded unobstructed into the inadmissible evidence. (R. 83:28.) Britney clarified that she was referring to a conversation with her mother allegedly occurring "during Spring." (R. 83:27.) The State then asked her what she told her mother, to which she disclosed allegations of sexual contact involving "breasts" and "my private spot." (R. 83:28.)

The court found, "despite having been granted liberal questioning latitude by the court with the child, the prosecutor posed an open-ended question in a context where it was clear that she was not focused on the proper timeframe relevant to the charged conduct." (R. 21:20.)

The defense immediately moved for a mistral (R. 83:28), with prejudice, (R. 83:34). The State argued against the mistrial and in regards to the lunch recess threat stated, "we provided defense counsel a copy of the case *State v. Grande*,

[169 Wis.2d 422, 485 N.W.2d 282 (Ct. App. 1992)]… and let them know that it would be difficult and possible that the witness would not follow perfectly the questions. And that if they move for a mistrial, we would object of course. *But also attempt*—well, let me restate. If they move for a mistrial, we would object, period." (R. 83:34-35) (emphasis added).

Judge Becker found that the State "clearly educated himself that the only way he would be barred from retrial if a mistrial was declared was if there was prosecutorial overreaching and he discussed this research with the defense team moments before the child was to testify. There would be no other purpose to call in the defense counsel over lunch other than to lay out what he intended to do if they objected to the introduction and a mistrial was declared." (R. 21:18.)

V. Judge Becker Rules State Cannot Refile

After briefs and an evidentiary hearing, Judge Becker ordered that retrying Mr. Killian was prohibited by Double Jeopardy and made the following findings:

"…the prosecutor (despite disagreeing with the court's rulings) did in fact understand and know what the ruling was… This conclusion is supported by the history of the case and… the affidavit filed days before trial wherein the State placed its reasons for again amending the Information. The affidavit asserts 'the law permits amendments to charges…not only

before the trial but at trial, to conform to the proof.'" (R. 21: 15-16.)

"…[T]his testimony was planned and in fact alleged to be part of the sexual assaults that were charged." (R. 21: 16.)

"The State plowed ahead with its original plan and that has become even more clear with the additional testimony provided…and…transcripts." (R. 21:17.)

"The discussion with the defense attorneys over the noon break and immediately preceding [Britney's] call to the…stand further supports the prosecutor's utter frustration with the Court's ruling and his intent to find a way around them." (R. 21:17.)

"The case was not going well for the prosecutor either." (R. 21:17.)

"The prosecutor knew that if he retried the case, he might fare better and the defendant could face more ominous charges…" (R. 21: 19.)

"There were numerous Informations filed, with various charges, changing dates, and changing penalties up to and during the trial itself." (R. 21: 20.)

"The facts viewed as a whole, and viewed objectively, point to the prosecutor taking direct and intentional action believing that one of two things would happen if he proceeded

in his quest to introduce the other acts. One,…the defense would not object and he had gotten it before the jury; or, two, if the defendant objected and a mistrial was declared, the State could retry the case and add additional charges, thereby increasing its chance of conviction." (R. 21:21.)

"The Court finds…that the prosecutor's conduct was designed to create another chance to convict, and was an act done so as to allow the State another 'kick at the cat'—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 and incriminating evidence into the record in the hopes of solidifying the State's chances of a conviction." (R. 21:21.)

VI. State Refiles as Case No. 2019CF163

The State did not appeal Judge Becker's finding that it attempted to goad Mr. Killian into moving for a mistrial so that it could add charges. Rather it simply filed more charges a year and a half later, in Case No. 2019CF163, based on the same factual allegations. (R. 24.) The charges and exposure regarding Ashley increased from one count totaling 10 years exposure, (R. 14: 1), to nine counts totaling 140 years exposure, (R. 36:4). The charge regarding Britney alleged three or more violations of § 948.02(1), but the exposure remained 60 years. (R. 36: 4.) Judge Rian Radtke presided over 2019CF163.

VII. Judge Radtke Dismisses Case No. 2019CF163

Mr. Killian moved to dismiss 2019CF163, arguing (1) that it clearly violates Judge Becker's un-appealed order; (2) Double Jeopardy and Issue Preclusion prohibit retrying Killian; and (3) prosecutorial vindictiveness. (R. 52.)

Judge Radtke dismissed 2019CF163 finding, "[t]he State's plan [at the initial trial] was to bring all of the alleged acts into trial and then seek to amend the Information after testimony to conform to the evidence." (R. 84:8.)

"It's clear from Judge Becker's order that its scope is meant to encompass future prosecutions involving the same facts alleged in 15-CF-47 where additional charges may be added in future prosecutions, and that's precisely what the State threatened to do in 15-CF-47. Accordingly, the Court here today finds that the scope of Jeopardy, in light of the record, which includes Judge Becker's order, includes all facts contained in the Complaints that were later joined and amended…" (R. 84:11.)

ARGUMENT

I. The court of appeals decision applies only to the State's unprecedented egregious conduct, which is not likely to recur if the decision is left to stand.

The petition requests review to determine law pertaining to "mistrials" and the lack of precedent for applying

the *Schultz*[1] entire-record rule to "mistrials." (Pet. 18.) However, this case will never apply to the vast majority of mistrials, even mistrials caused by prosecutorial harassment and overreaching. *Oregon v. Kennedy,* 456 U.S. 667, 675-676 (1982). Double jeopardy concerns only arise where the prosecutor "intends to subvert the protections afforded by the Double Jeopardy Clause…" and goads the defendant into moving for a mistrial. *Id.* at 676. "Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, 'the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.'" *Id*. at 676 (quoting *United States v. Dinitz*, 424 U.S. 600, 609 (1976)).

Accordingly, the court of appeals expressly limited its holding to mistrials where "…the State purposely and egregiously induced a mistrial in the first case, with the express purpose of adding more charges in a later-filed case based on facts that had been alluded to many times throughout the first case proceedings." *State v. Killian,* No. 2020AP2012-CR, ¶ 58; (Pet-App. 5.)

The parties have found not a single case where the State *intentionally* goaded the defense into requesting a mistrial for

[1] *State v. Schultz,* 2020 WI 24, 390 Wis. 2d 570, 939 N.W.2d 519.

the purpose of retrying the case under a new charging scheme.[2] The utter lack of similar cases demonstrates it is extremely rare for prosecutors to scheme to intentionally sabotage their trials in order to seek a redo on their charging decisions. Thus this case creates a factual nuance in double jeopardy law that will not resurface so long as the State does not intentionally cause mistrials for the purpose of circumventing the Double Jeopardy Clause.

To take the hypothetical presented in the petition as an example, the hypothetical involves a drunk driving allegation from December 31st, and a prosecutor stating during opening that the defendant also drove drunk weeks earlier. (Pet. 18.)[3] The State's first witness details the events of December 31st, and "during this testimony the prosecutor intentionally goads a mistrial[4]." (Petition 18.) This circumstance would never implicate double jeopardy or the analysis in this case unless the prosecutor intentionally defied court rulings with the specific

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[2] The Petitioner cites *United States v. Elmardoudi* as the only case it found "addressing sameness in the context of a government-provoked mistrial," but even that case only touches upon the matter in dicta as the court specifically found that the *Elmardoudi* prosecutors never sought to cause a mistrial. *United States v. Elmardoudi*, 611 F. Supp. 2d 864, 869 (N.D. Iowa 2007).

[3] There is no indication of the prosecutor's intent in admitting this other act or whether the other act was the subject of prior court orders.

[4] Petitioner omits any details regarding how the prosecutor "goaded a mistrial" or the purpose behind the goading of the mistrial, a fact the Court of Appeals found pivotal. *Killian,* 2020AP2012, ¶ 58; (Pet. App. 30)

purpose of preventing the defendant from completing the jury trial so that it could re-charge the case involving both counts. (R. 57: 21); *Killian,* 2020AP2012, ¶ 22; (Pet-App. 14.) The court stated, "we cannot ignore the circuit court's findings in the first case—which were never appealed and which the State never argues were clearly erroneous or contrary to law—that the prosecutor's misconduct intended to obtain a mistrial so as to then add the additional charges in a subsequent prosecution." *Killian,* ¶ 29; (Pet-App. 17.) With such a dirty-handed prosecutor, the concern should not be confusion over how *Schultz* applies in that context, but rather deterring any licensed attorney from ever engaging in that conduct. As discussed below, this decision does that. Therefore, it is not necessary for this Court to further expound upon applying settled principles of law to this very rare fact-pattern.

II. The Court of Appeals Decision Will Only Deter Future Egregious Behavior

As discussed above, the Court of Appeals decision will not impact trials where prosecutors make mistakes or even intentional overreaches due to misinterpretation or overzealousness. The law in such instances is sound, and such cases are readily distinguishable from this case. The court of appeals decision here will only deter prosecutors from

intentionally sabotaging a trial *for the specific purpose* of adding charges that could have been brought at the outset.

If review were granted, the State would undoubtedly ask this Court to craft the law to permit the State to benefit from the fruits of this misconduct, by letting the State declare the jury trial a dress rehearsal and start anew, implicating the most fundamental protections of the Double Jeopardy Clause: the defendant's right to have the trial completed by the first tribunal, *Arizona v. Washinton,* 434 U.S. 497, 503 (1978); precluding the State "with all its resources and power" from repeatedly subjecting a defendant to the emotional and financial expense of trial, *United States v. Jorn*, 400 U.S. 470, 479 (1971); preventing the State from "using superior resources" to "harass or achieve a tactical advantage over the accused," *Washington,* 434 U.S. at 508; and promoting the public interest in the finality of judgments. *Id.* at 503.

The State also contends that the entire-record rule may not be "a good fit" when applied to mistrials because "where a trial ends in a verdict, there's value in seeing how everything played out." (Pet. 18.) This seems brazenly self-serving in a case where the State concedes that the State intentionally sabotaged the trial so that it could never play out in front of the jury. (Pet. 16.) The reason there is not a more complete record in the James Killian trial is that the State deliberately caused a mistrial for the purpose of circumventing double jeopardy and adding the charges at issue here. Such would be the case in

every case to which this opinion applies. Thus, reversal of the court of appeals on that ground would reward the State's wrongdoing and enable the State to avoid an entire-record analysis by bailing out of the trial before it ever reaches the jury.

The result should not be to develop the law so that the malfeasor can benefit from the uncertainty created by the wrongdoing. The result should deter defying court orders and intentionally sabotaging jury trials. That is what this decision does. In the very limited context to which it would ever apply, the decision takes away an incentive for the State to strategically cause a mistrial and deprive the parties and community of a determination by the original tribunal.

III. Reversing the decision would enable and incentivize prosecutors to repeat the conduct here by defying court rules and coercing defendants to acquiesce.

One need only look to the facts underlying this case to see the necessity of the court of appeals decision. As discussed below, it is undisputed that the prosecutor was aware of all of the conduct charged in this case at all relevant times prior to starting the first trial. This is not a case where the State screwed up case A and the defense is seeking double jeopardy protection of unrelated case B. The circuit court found that the prosecutor brought one charge intending to amend the charging document mid-trial to include "all of the alleged acts." (R.

84:8); *see also Killian*, ¶ 22; (Pet-App. 14.) The court of appeals held that the State's mission was to prosecute the defendant for all of the charges. *Killian*, ¶ 29; (Pet-App. 17.) It is also undisputed that, when prohibited from admitting the evidence underlying the "new" charges in the second trial, the prosecutor intentionally sabotaged the trial for the specific purpose of adding the charges to the information. *Killian,* ¶ 29; (Pet-App. 17.); (Pet. 16).

If the Court of Appeals decision is reversed, the practical implications are that the State can do exactly what was done here: withhold charges from the charging document, seek to prove up the withheld charges, and use the potential of bringing the new charges at a subsequent trial as an attempt to coerce the defendant *during* the jury trial. The State can use the threat of charges discretionarily left off the charging document to coerce the defense to acquiesce to the State defying trial court rules.

Even again in this case, if the court of appeals case is reversed, the prosecutor could limit the new trial to, say, Count 10, punishable by 60 years in prison. Then the prosecutor could bring forth evidence of all 10 counts, intending to either add them at the close of trial or at least benefit from the prejudicial impact of the evidence. If the defense objects, the prosecutor can threaten the defendant, saying "if you object and cause a mistrial, you will face another trial involving

Counts 1-9, totaling 140 years." The prosecutor can also defy the circuit court judge's trial rules trusting that either the defendant will be rational enough to stop objecting or a mistrial will ensue rendering the current trial a dress-rehearsal. This might seem factitious but for it is *exactly* what happened already in this case.[5]

The fact that there is no precedent for this sort of prosecutorial misconduct is hopefully a result of conscience coupled with a presumption that the Double Jeopardy Clause forbids it. The court of appeals decision only reinforces the former and clarifies the latter. Thus it will not impede any clean-handed advocate, but will keep this sort of egregious

[5] In the original trial judge's finding, which the State never appealed, Judge Becker writes: "The facts viewed as a whole, and viewed objectively, point to the prosecutor taking direct and intentional action believing that one of two things would happen if he proceeded in his quest to introduce the other acts. One, if he introduced the prohibited testimony the defense would not object and he had gotten it before the jury; or, two, if the defendant objected and a mistrial was declared, the State could retry the case and add additional charges, thereby increasing its change of conviction. Given a chance at a new trial, the State would likely have a better outcome because their strategy would change, and thus the motions would be posed and ruled upon differently and more favorably to the State. His witnesses would be better prepared as well. … The Court finds also that the prosecutor's conduct was designed to create another chance to convict, and was an act done so as to allow the State another 'kick at the cat'--…, and a chance to add more charges and incriminating evidence into the record in the hopes of solidifying the State's chances of conviction." (R. 21: 21.) For references to threatening the defendant during trial with more charges if he objects, *see* (R. 83:39-40); *see also* (R. 21:19).

behavior at bay. Reversing the court of appeals, however, could drastically change the landscape. The prosecutor who perhaps never thought to engage in such coercive conduct may now feel that zealous advocacy requires marginalizing and defying the judge and utilizing a coercive charging scheme at trial, since it will have been condoned.

The court of appeals decision is sound, narrowly-tailored to the facts of this egregious case and should be allowed to stand.

ISSUES UNRESOLVED BY THE COURT OF APPEALS

I. Whether the *Ashe* doctrine of issue preclusion, implicit in the Double Jeopardy Clause, warrants dismissal.

Killian also argued that the *Ashe* doctrine prohibited retrial under the Double Jeopardy Clause. (Killian's Br. 21.) *Ashe* held that when an issue of ultimate fact, such as identity, is determined by a verdict or final judgment, then the Double Jeopardy Clause prohibits relitigating the issue. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Specifically, where the State lost a trial involving a burglary against person A, and the ultimate issue was the defendant's identity, then the State could not retry the defendant for burglarizing person B under the same fact patten. *Ashe*, 397 U.S. 436 at 446. The Ashe doctrine applies were the State "*lost* an earlier prosecution involving the

same facts." *United States v. Dixon*, 509 U.S. 688, 705 (1993)(emphasis supplied).

Here, the State's theory of the case was that Mr. Killian committed a "course of conduct" involving Brittany that included numerous instances of sexual contact (78: 46-48), and that he "had been molesting [Ashley]" since she was 6 years old until she was 17. (R. 78: 50.) The theory of defense was that the allegations never happened, that Britney was susceptible to biased interviewing from her mother, tainted by her mother's own sexual assault history, and that Ashley fabricated the allegations against Killian after Britney's mother questioned Ashley about a documented extortion attempt, where Ashley, during her parents' divorce, threatened to accuse Killian of sexual assault if he did not pay her $20,000. (R. 79:5-14.) Thus, it would be irrational to believe an acquittal turned on confusion about how many times or during which dates the alleged assaults occurred or upon whether Ashely and Killian were relatives. An acquittal would mean the jury did not find the accusations sufficiently credible or reliable to meet the burden. The *Ashe* doctrine mandates that Killian does not have to relitigate this fact pattern in front of separate juries at separate trials on each count.

For the same reasons that support applying the *Schultz* entire-record rule to this mistrial, the *Ashe* doctrine should also apply to this mistrial, as otherwise, the State would

be able to escape the perils of issue-preclusion by intentionally causing a mistrial to prevent the jury from determining the ultimate issues. (Killian's Br. 25-26.) The court of appeals did not address this argument after affirming on other grounds. *Killian*, ¶ 4 n. 4. (Pet-App. 5.)

II. Whether the common law doctrine of issue preclusion rooted in the Due Process Clause warrants dismissal.

Killian also argued that the State was estopped from bringing the second prosecution because it litigated whether it could prosecute Killian for more charges in front of Judge Becker, lost, and never appealed. Killian explained that issue preclusion also applies to decisions that do not resolve the factual merits. (Killian's Br., 27 (citing as examples *United States v. Kaytso,* 868 F.2d 1020, 1022 (9th Cir. 1989) and *United States v. Harvey*, 900 F.2d 1253, 1257 (8th Cir. 1990)). Killian argued that Judge Becker explicitly found that double jeopardy precluded the State from getting "…another 'kick at the cat'—a chance to prepare more thoroughly…and a chance to add more charges…" (R. 21:21.) Because the State did not appeal the order, but rather it simply took another kick at the cat, prepared more thoroughly and added more charges, the State is estopped from re-litigating whether double jeopardy permits this prosecution.

The court of appeals did not address this argument after affirming on other grounds. *Killian*, ¶ 4 n. 4; (Pet-App. 5.)

CONCLUSION

For the above-stated reasons, This Court should deny the petition for review in this matter.

Dated this 31st day of August, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 5,564 words.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

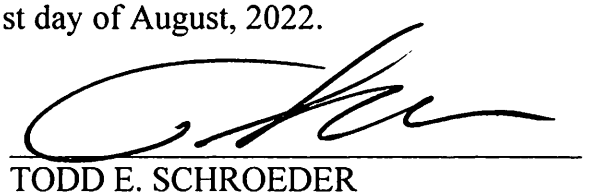
I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of S. Ct. Order 19-02B and 20-07B, 2022 WI 62 and Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12). (2019-20)

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 31st day of August, 2022.



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