STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JAMES P. KILLIAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF DISMISSAL ENTERED IN TREMPEALEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN RADTKE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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INTRODUCTION

This is a case about limiting the State's power to revisit its charging decisions and start over after intentionally sabotaging a jury trial involving the same facts. The State's first attempt at prosecuting James Killian for these child sexual assault allegations ended in a dismissal of all charges based on the court's finding that the State egregiously and deliberately caused a mistrial. The court, the Honorable Anna Becker, presiding, specifically found that the prosecutor had intentionally defied court rulings to provoke a mistrial. Judge Becker found that the State's misconduct was aimed at obtaining an opportunity to "add more charges" in a new indictment, which the prosecutor attempted and threatened to do before and during the trial. Accordingly, Judge Becker held that retrial was barred by Double Jeopardy to avoid rewarding the prosecutor's misconduct.

The State never appealed the order but instead ignored it, adding more charges and initiating another prosecution. The Circuit Court, Judge Rian Radtke, presiding, dismissed the subsequent prosecution, finding the new charges violated Double Jeopardy and Judge Becker's Order in the previous case.

The State argues on appeal that because it successfully derailed the trial through its own misconduct, this Court should ignore the record and focus only on the charging documents. Likewise, the State argues on appeal that because it took the case away from the jury, it should remain free from the perils of issue preclusion. The State's conduct renders this case rather unprecedented. But giving the State the power to circumvent or limit the scope of double jeopardy by aborting a trial through its own misconduct seems contrary to the

fundamental principles underlying the constitutional protection.

ISSUES PRESENTED

I. Whether the Double Jeopardy Clause precludes the State from retrying this matter after intentionally causing a mistrial for the purpose of adding charges and starting over?

The court of appeals answered, "yes."

This Court should affirm.

II. Whether dismissal was warranted under the doctrine of issue preclusion, implicit in the Double Jeopardy Clause and the common law doctrine rooted in the Due Process Clause.

The court of appeals did not decide issue preclusion.

This Court should answer "yes," and affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Respondent requests oral argument and publication.

STATEMENT OF FACTS

I. Allegations in 2015CF47 & 2016CF38

On March 17th, 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. During its opening statement, the State alleged that the defendant was "rubbing his penis on her [in bed]," (R. 78: 48) and alleged "a vagina rub," when describing the charges to the court, (R. 82:20) (hereinafter "the allegations involving Britney").

On March 15th, 2016, the State filed an additional Complaint, Case No. 2016CF38, charging Mr. Killian with repeatedly sexually assaulting Ashley 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 trial. (R. 8.)

II. Pretrial Proceedings

a. Motion Hearing October 5th, 2016

On October 5th, 2016, the court heard motions including Killian's Other Acts Motion, finding 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. (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 the hand-to-buttocks contact that the State now claims was the only charge: "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 replied, "I figured you could take your pick." (R. 82:31.)

The court then recognized 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 occurred. (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 Defies Court Rulings to Cause 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 bringing a subsequent prosecution subjected Mr. Killian to double jeopardy, making the following findings relevant to this appeal:

"…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 the State attempted to goad Mr. Killian into moving for a mistrial so that it could add charges. Rather the State 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 as Violating Judge Becker's Order

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

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[1] The lower court's findings of fact regarding whether the defendant established actual vindictiveness is reviewed under the clearly erroneous standard. *State v. Johnson*, 2000 WI 12, ¶ 18, 232 Wis.2d 679, 605 N.W.2d 646. Because Judge Radtke did not make factual findings on prosecutorial vindictiveness, the case should be remanded for determination of that issue if the dismissal is reversed.

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.)

VIII. The Court of Appeals Affirmed

The court of appeals affirmed, applying *Blockburger* and the entire-record analysis recently applied in *Schultz.* The court of appeals recognized that an entire-record analysis demonstrated that the subsequent prosecution involved the same offenses since the State attempted to introduce the same evidence at the first trial and amend the information mid-trial. (Pet-App. 17.) Moreover, the court of appeals 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 prosecution's misconduct intended to obtain a mistrial so as to then add the additional charges in a subsequent prosecution[, and that] [a]llowing a retrial here disregards the protection required of a defendant's valued right under the Double Jeopardy Clause to complete his or her trial before the first tribunal." (Pet-App. 17.)

STANDARD OF REVIEW

This Court reviews *de novo* "whether a subsequent prosecution violates…double jeopardy." *State v. Jacobs,* 186 Wis.2d 219, 223, 519 N.W.2d 746 (Ct. App. 194). Whether issue preclusion applies involves a question of law also subject to *de novo* review. *In Interest of T.M.S.*, 152 Wis.2d 345, 354, 448 N.W.2d 282 (Ct. App. 1989).

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PRECLUDES RETRYING THIS MATTER AFTER THE STATE INTENTIONALLY CAUSED A MISTRIAL TO ADD CHARGES AND START OVER.

Ultimately this is a case of first impression in the State of Wisconsin. The State has not cited, nor has the defense found, a single case analyzing a State's deliberate sabotaging of a jury trial for the purpose of starting anew, under the guise of a different charging scheme, and then proceeding after a circuit court found doing so constitutes double jeopardy. Thus the court, Judge Rian Radtke, presiding, correctly found there was "more to this case" than that to which a typical *Blockburger*[2] comparison of charging documents would suffice. (R. 84:8.)

The circuit court and the court of appeals correctly applied *State v. Schultz*, finding that the scope of jeopardy to which Killian was exposed in the prior trial is determined not by the charging documents alone but by an examination of "the entire record of the first proceeding." (R. 84: 6-7; Pet-App 17 (citing *State v. Schultz*, 2020 WI 24, ¶ 25, 390 Wis.2d 570, 939 N.W.2d 519).)

a. The entire record including the State's misconduct defines the scope of jeopardy in this case, not the State's charging documents

This Court held in *Schultz* that it is the judgment rather than the charging document that determines the scope of

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

jeopardy. *State v. Schultz*, 2020 WI 24 at ¶ 30 (citing *United States v. Hamilton*, 992 F.2d 1126, 1130 (10th Cir. 1993)). This decision rests solidly on longstanding United States Supreme Court precedent, holding "the true test [of the sufficiency of an indictment]…is whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, *in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Cochran v. United States*, 157 U.S. 286, 290 (1895)(emphasis added); *see also Russell v. United States*, 369 U.S. 749, 764 (1962)(reiterating that defendants can rely upon not only the indictment but "other parts of the present record" in claiming a double jeopardy violation in subsequent proceedings).

The Seventh Circuit also recognized that the record as a whole, not the indictment, sets forth the conduct and time period to which the double jeopardy protection applies, even as it pertains to evidence the trial court deemed inadmissible and outside of the bill of particulars. *United States v. Roman*, 728 F.2d 846, 854 (7th Cir. 1984). In challenging the indictment, the defendant in *Roman* made the same argument the State makes here, that since the court ruled that some of the evidence the State sought to admit was inadmissible and outside of the bill of particulars, he could be subsequently charged with those acts in a newly tailored conspiracy trial. *Id.* at 854. The court held "the indictment is not deficient…since the record will protect Roman against any further jeopardy for the illegal conduct involved in the present case." *Id.*

The entire-record analysis involves determining whether "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *State v. Schultz*, 2020 WI 24 at ¶ 26 (internal citations

omitted). As stated in *Schultz*, this Court first adopted this test in *Anderson v. State*. *Schultz*, 2020 WI at ¶ 26 (citing *State v. Anderson*, 221 Wis. 78, 265 N.W. 210 (Wis. 1936)). Interestingly, *Anderson* involved comparing the discrepancy between an indictment and the evidence brought out at trial and deeming the indictment "amended to conform to the proofs" *Id.* at 213. Accordingly, the issue for double jeopardy purposes was whether *the evidence* in the former case was sufficient to warrant the convictions sought in the latter, and vice versa. *Id.* at 214. In conducting this analysis, this Court emphasized the importance of reviewing transcripts, pleadings and lower court decisions, findings and conclusions. *State v. Van Meter*, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976).

The evidence the State intended to submit in the preceding trial was sufficient to convict Mr. Killian of all the charges in the current case. With respect to Britney, the current charge is that Mr. Killian had sexual contact with Britney three or more times. (R. 36:4.) In the State's opening in the first trial, the State explained it would present evidence regarding "a course of conduct," including the defendant "touching her inappropriately" and "rub[bing] [his penis] on her." (R. 21:8.) The prosecutor explained the bases for the charge to the court in the first trial as "a breast rub…alleged humping, penis rubbing..also a vaginal rub, a butt rub…touching." (82:19-20.) The allegations in the criminal complaint in the second prosecution involve the same conduct. (R. 24:21-22). With respect to Ashley, the State explained to the empaneled jury, the evidence will show that Mr. Killian sexually assaulted Ashley from when she was about 6 years old[3] until she was 17, which included "hand jobs...oral sex…and sexual intercourse" (R. 78:50.) The second prosecution alleges the same conduct during the same time period, starting in 1990. (R. 24:1-4.)

[3] The complaint alleges Ashely turned 6 in 1988. (R. 3:2)

The State argues that the subsequent charge regarding Britney is factually different because it omits the alleged buttock-contact as a basis for the charge of repeated sexual assault, whereas Killian and the court sought to limit the evidence at the first trial to "a butt touch" occurring on or around August 18th. (State's Br.: 30-31.) The State also argues that the allegations regarding Ashely are factually different because the first prosecution used 1994-1998 as a charging window and the second used 1990-1993. (State's Br. 32-34.) Considering the charging documents in a vacuum, the State's math is correct. But as explained in the preceding paragraph, the evidence the State promised to elicit renders any distinction between the two cases imaginary. Thus, the State argues that when it sabotages a trial, this Court should not look at the "hypothetical" charges it actually sought or the State's actual conduct but only those that were on paper in the charging documents. (States. Br. 30 n. 9.)

The State seeks refuge in the fact that there is no caselaw holding that courts should consider "uncharged" conduct when determining jeopardy after the State intentionally sabotages a trial to amend the charging scheme. (State's Br. 36.) But when the State defines actual evidence it submitted to support actual convictions as "uncharged conduct," it assumes the issue. The State's actual argument is that its zealous attempt to convict Killian on a broad range of conduct beyond the charging document and then its decision to sabotage the trial to start over is meaningless to double jeopardy analysis. On that novel argument, the State cites no authority.

Rather, the State argues that its attempt to convict Killian of charges yet to be amended into the complaint should be evaluated in the same light as other act evidence used by the prosecution in *United States v. Felix.* (State's Br. 37-38). In *Felix,* the government used conduct in one trial, admitted under Rule 404(b), to prove Felix's state of mind and then prosecuted Felix in a subsequent trial for the conduct admitted in the first trial. *United States v. Felix,* 503 U.S. 378, 385-386 (1992).

This Court has also permitted subsequently prosecuting acts used as other act evidence in a previous trial. *State v. Krueger*, 224 Wis.2d 59, 68-69, 588 N.W.2d 921 (1999). Importantly, the Supreme Court repeatedly emphasized in *Felix,* "[a]t the Missouri trial, the Government did not in any way *prosecute* Felix for the Oklahoma…transactions; it simply introduced those transactions as prior acts evidence…" *Felix*, 503 U.S. at 387 (emphasis supplied). In *Krueger*, this Court held that use of other act evidence in a subsequent trial does not "rise to the level of oppressive conduct warranting judicial circumscription of prosecutorial discretion." *Krueger*, 224 Wis. 2d at 68-69. But that is not what happened here. As explained below, the State presented the conduct underlying the subsequent prosecution not as other act evidence in the first trial but with the intent to include the evidence as charges in an amendment. (R. 21: 16.) *Felix* and *Krueger* do not apply to the State's misconduct here because however unsuccessfully, the State *was* prosecuting Killian for the conduct, rendering him in jeopardy. The State willfully sought to enter evidence as a basis for convictions from an empaneled jury, thus triggering jeopardy for the sought convictions.

The State cites "plenty of other courts" from around the country to argue that uncharged conduct can never form the basis for jeopardy. (State's Br. 38.) The cited cases shed dim light on the complexities of this case because none involve the State's actions in this case. *United States v. Gilbert* held that separate conspiracies can be charged separately and be based upon the same evidence, but has nothing to do with a prosecutor's attempt to submit evidence to support amendments of an information after jeopardy has attached. *United States v. Gilbert,* 31 F. Supp. 195, 201 (S.D. Ohio 1939); *see also, Davidson v. United States*, 48 A.3d 194, 206 n.17 (D.C. 2012)(cited dicta is off-point where the court found double jeopardy did prohibit prosecuting the defendant for involuntary manslaughter); *State v. Maisch*, 880 N.E.2d 153, 160 (Ohio Ct. App. 2007)(an indictment void for charging *no* offense should be dismissed but results in no jeopardy, off-point here where the State charged particular offenses and

sought to include those and additional charges); *State v. B.J.D.*, 799 So. 2d 563, 568 (La. Ct. App. 2001)(in a factually nuanced and distinct issue of Louisiana law, where the court found the defendant guilty of an offense other than the one charged, jeopardy did not attach upon successful appeal of that conviction); *State v. Tresenriter*, 4 P.3d 145, 149 (Wash. Ct. App. 2000)(involves a defective information and says nothing as to whether entering evidence after jeopardy attaches in order to amend an information exposes a defendant to jeopardy).

The State's attempt to lump this case in with cases involving the legitimate use of other act evidence is precisely why the entire record, not just the charging documents, must determine jeopardy. Without evaluating the record, the *Felix* court could not conclude that Felix was not "in any way" being prosecuted for the other act evidence. *Felix,* 503 U.S. at 386. Without evaluating the entire record, this Court could not have found that charging Schultz with sexual assault of a minor in "early fall" did not encompass the allegation that he committed the same offense against the same victim in October. *State v. Schultz*, 2020 WI 24, ¶ 35, 390 Wis.2d 570 (2020).

By asking this Court to ignore the State's conduct and intentions demonstrated by the entire record and let only the charging documents control, the State seeks an interpretation of Double Jeopardy jurisprudence that permits the State to (1) define the scope of jeopardy by drafting the Information; (2) prosecute crimes outside the scope of the Information in an attempt to amend the Information after jeopardy has attached; (3) sabotage the trial when court rulings, defense objections or witness problems get in the way; (4) redefine the scope of jeopardy at the next trial by amending the original charging document; (5) re-prosecute the same fact pattern, and repeat if necessary. Therefore, it seems an entire-record analysis, considering the State's actual conduct and intentions, more effectively guards against the evils the Double Jeopardy Clause seeks to avoid and better prevents the State from having unfettered control over not only the number of trials to which

the defendant can be subjected but also the rules governing those trials.

b. The entire record demonstrates that the State already prosecuted Killian for what is charged in this case.

A review of the record demonstrates what both circuit court judges and the court of appeals found: that the State intended to amend the charges against Mr. Killian during the trial to include charges for which he is again placed in jeopardy here. (R. 82:32-33; R.84:8; Pet-App. 17.) Thus the State was not entering evidence as "uncharged conduct," but rather the State was prosecuting Killian for that conduct.

Recall first that the prosecutor attempted to change the date on the morning of trial, which drew immediate defense concerns that the State was seeking to prosecute Killian beyond the Information. (R. 75:16-17 ("…My concern is that I think what the state's attempting to do is expand the date range in the hopes that it would make admissible evidence of other allegations that have not been charged").) The State responded by indicating "we do not have to prove the actual date of the allegation," begging the question as to the reason for requesting the amendment to begin with (R. 75: 19.) The State then added as if the thought first arose, "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 prosecutor added, "[the victim] did outline, in her forensic interview, the alleged touching. And I think that leaving broader will give the jury an opportunity to not consider that one date but allow them to understand that it's a timeframe." (R. 75: 20-21.)

Likewise, the State's opening referred to Mr. Killian "touching her" (R. 78:47), that "he was rubbing himself on her," "that she was confronted *several times* by behavior that is inappropriate and illegal," (R. 78: 47)(emphasis added), "an unmistakable course of conduct" (R. 78:48). With respect to Britney, the hand-to-buttock contact, the only thing the State now contends it was prosecuting, was never mentioned at all. Instead, the State presented evidence of the three acts specified as the bases of the "new" charges here: "rubbing his penis on her in bed" (R. 78: 48), and breast and pubic mound contact, (R. 83:28).

During the trial, the State remained purposefully vague as to with what specifically Killian was charged. The State explained, "what is on trial, the course of conduct…" (R. 82:15), which the State described as "a breast rub…some alleged humping, penis rubbing on her leg…a vagina rub, a butt rub, a breast rub (sic)…touching." (R. 82:20.) The State admitted, "I could have charged each touch but I charged one over a course of time." (R. 82:23.) When asked by the judge "which one" was charged, the State responded, "I figured you could take your pick." (R. 82: 31.) After deliberately causing the mistrial, the State testified that it intended all of the Britney allegations to constitute alternative bases to convict on the single count. (R. 74: 59-60.) During trial the State referred repeatedly to amending the Information midtrial (R. 75:20, R. 75:21, R. 82:27, R. 74:59), which the court found was the State's intent. (R. 84: 4.)

Throughout the matter, Judge Becker seemed inclined to presume good faith on the part of the State. Regarding the initial changing of the charging period, Judge Becker stated, "so what I'm understanding…you're not alleging there were additional things that happened. You're saying because she can't remember the exact date, it's the same events or package that we've heard about all along" (R. 75:21) / "it sounds to me like that's not the intent of your motion to add things…" (R. 75:21) / regarding the mistrial, "I don't think that what

happened here on the stand was the State trying to underhandedly throw this. I think it was an error." (R. 83:44). But after reviewing the entire record, transcripts and hearing testimony, Judge Becker came to the inescapable conclusion that "[the State] had decided to pursue prosecution for sexual assault(s) on a range of other acts that occurred over a significantly larger time span [and then deliberately terminated the trial when it did not work]." (R. 21:8.) The State declined to seek appellate review of Judge Becker's decision.

The record thus contradicts the State's characterization of "uncharged conduct" and demonstrates that Mr. Killian was zealously prosecuted for the exact conduct with which he is again charged here. As Judge Becker found, the State intentionally deprived Mr. Killian of any option of having a trial limited to one alleged sexual assault. (R. 57:21.)

While the State intentionally caused a mistrial prior to entering any evidence regarding Ashely, the State's opening statement referred to Mr. Killian "molesting" his daughter from when she was 6-7 years old until she was 17, from 1988 until 1999. (R. 78:50.) The evidence the State sought to introduce preceded 1994 and would have been sufficient to support a conviction for everything that is currently charged in this Complaint (R. 24), because it is the same alleged fact-pattern. The court of appeals correctly found that the State "actively prosecuted Killian in the first case for the acts currently charged." (Pet-App. 25.)

The jeopardy was not a matter of hypothesizing (State's Br. 36), or a speculative yet unfounded fear of jeopardy. Rather Mr. Killian was fending off a prosecutor's attempt to convince a jury that he committed multiple offenses and then to convince a judge to amend the Information based on that evidence. This was acknowledged by every judge who evaluated the case and ultimately by the prosecutor himself. (R. 75: 21.) To say it was Killian's imagination ignores the record.

c. Jeopardy arose from the prosecutor's attempt to convict Killian of crimes in front of an empaneled jury regardless of the likelihood the State would succeed.

The State finally argues that this Court should ignore what the State so zealously sought out to do because in hindsight it was probably never going to work anyway. (Pet. Br. 41-43.) Like the "uncharged conduct" argument, this argument notably suggests that deceiving the court and submitting evidence in defiance of court orders is superfluous petulance that should just be ignored. Nonetheless, whether or not the State was going to be successful is irrelevant. It was the active pursuit of convictions in front of an empaneled jury that created actual jeopardy.

Jeopardy begins at the moment the jury is sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 1353 (1977). At the end of the proceeding, what determines the scope of jeopardy is the *judgment* not only the indictment. *State v. Schultz*, 2020 WI 24, ¶ 30 (citations omitted, emphasis added). In evaluating the ruling, "[f]orm is not to be exalted over substance." *Sanabria v. United States*, 437 U.S. 54, 66 (1978).

The judgment in the dismissed case is Judge Becker's Order, which explicitly found that the State was prosecuting Killian for more than the charges contained in the indictment: "[the State] had decided to pursue prosecution for sexual assault(s) on a range of other acts that occurred over a significantly larger time span." (R. 21:8.) Judge Becker also specifically barred further prosecution of this mater: "the State is barred from retrial in this matter due to prosecutorial overreaching." (R. 57: 21.) Judge Becker described the matter as follows: "The Court finds also that the prosecutor's conduct [in provoking a mistrial] 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*..." (R. 57: 21.)(emphasis added).

Judge Radke found, "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…" (R. 84: 10.)

Thus, as the court of appeals found, the State's mission was to convict Mr. Killian of all of the conduct the State sought at trial, through an amended information. (Pet-App 22-23.) When the State realized that it was likely to fail, it sabotaged the trial so that it could start over, but only after jeopardy had attached.

The State's contention that a prosecutor's intent and actions are meaningless until the Court actually amends the charges is problematic in that the amendment if granted would have been at the close of the trial. Thus Killian, according to the State's reasoning, would not be in jeopardy until he had no opportunity to defend against the charges. Likewise it permits the State to take a wait-and-see approach to trials, entering evidence of other conduct and then determining at the end of the trial whether to expend jeopardy on this proceeding or save it for the next. The State could even coerce defendants during the trial (as occurred here), threatening to amend or refile if things do not go as planned. Accordingly the prosecutor must remain accountable under double jeopardy analysis for its actions in seeking convictions beyond the original indictment once jeopardy attaches and for depriving the defendant of the right to a determination of the issues by the empaneled tribunal.

d. A *Blockburger* analysis that ignores the State's egregious misconduct permits

the chief evils against which the Double Jeopardy Clause protects.

By the same token, an analysis of the prosecutor's actions and intentions through an entire-record analysis is required in cases where a prosecutor seeks to expand an indictment midtrial to include uncharged conduct because a *Blockburger* comparison of the two indictments in such a case does not safeguard the principal evils of double jeopardy: the defendant's right to have the trial completed by the first tribunal, *Arizona v. Washington*, 434 U.S. 497, 503 (1978); the State "with all its resources and power" repeatedly subjecting a defendant to the emotional and financial expense of trial, *United States v. Jorn*, 400 U.S. 470, 479 (1971); the State "using superior resources" to "harass or achieve a tactical advantage over the accused," *Washington,* 434 U.S. at 508; and undermining the public interest in the finality of judgments, *Washington*, 434 U.S. at 503. The most extreme cases in the history of double jeopardy violations are "cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." *Arizona v. Washington*, 434 U.S. 497, 507 (1978).

If the Court permits this trial under double jeopardy analysis, there is nothing preventing the State from repeating the same conduct. The State could have 10 trials all involving the same evidence, until Killian stops objecting. Such a narrow definition of jeopardy, constrained to the charging document despite the record, would also marginalize circuit court judges, who would have no power to prevent the State from sabotaging the trial and starting over with deliberately withheld counts. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *State v. Schultz,* 2020 WI 24 at ¶ 20

(quoting *Bartkus v. Illinois*, 359 U.S. 121, 151 (Black, J., dissenting)).

The well-established entire-record doctrine enables courts to consider the prosecutor's charging decision, intent and actions in determining the scope of the prosecution. Where, as in this case, it is undisputed that the State prosecuted a trial with the intent to present evidence to support convictions beyond the original charging document, in part did so, and when obstructed deliberately caused a mistrial to start over, permitting the State to start over violates the Double Jeopardy Clause.

II. THE COURT'S DISMISSAL WAS WARRANTED UNDER THE DOCTRINE OF ISSUE PRECLUSION, IMPLICIT IN THE DOUBLE JEOPARDY CLAUSE AND THE COMMON LAW DOCTRINE OF ISSUE PRECLUSION ROOTED IN THE DUE PROCESS CLAUSE.

The parties briefed issue preclusion[4] when litigating Killian's motion to dismiss to the trial court (R. 52:16, R. 58:9) and in the court of appeals (Pet-App. 5 n.4**)**. While neither the circuit court nor the court of appeals addressed issue preclusion, Killian, as the prevailing party, may assert any grounds to support the judgment. *Dandridge v. Williams,* 397 U.S. 471, 476 n. 6 (1970); *see also Cynthia E. v. La Crosse County Human Servs. Department (In the Interest of Jamie L.),* 172 Wis. 2d 218, 232-33, 493 N.W.3d 56 (1992).

[4] Pursuant to *State v. Jacobs,* 2000 WI App. 71, ¶ 2 n.1, 234 Wis. 2d 151, 610 N.W.2d 512, the term "issue preclusion" is used in place of collateral estoppel except when directly quoting a decision.

Issue preclusion is routed in the Double Jeopardy Clause but "operates beyond double jeopardy's bar against a second prosecution for the same offense." *State v. Henning*, 2004 WI 89, ¶ 24, 273 Wis.2d 352, 681 N.W.2d 871. "Collateral estoppel'…stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). "The collateral-estoppel effect attributed to the Double Jeopardy Clause…may bar a later prosecution for a separate offense where the government has *lost* an earlier prosecution involving the same *facts." United States v. Dixon*, 509 U.S. 688, 705 (1993)(emphasis on "facts" added). This Court recognized that issue preclusion under the Double Jeopardy Clause "is a doctrine to prevent prosecutorial misconduct and give finality to judicial determinations…" *State v. Canon*, 2001 WI 11, ¶ 13, 241 Wis. 2d 164, 622 N.W.2d 270.

Applying issue preclusion, courts should avoid a "hypertechnical" approach and instead, "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (internal citations omitted). The "legal theory" in the first trial, not the *Blockburger* test, determines the issue precluded in a second trial. *State v. Vassos*, 218 Wis.2d 330, 344, 579 N.W.2d 35 (Wis. 1998).

The previous prosecution and the current prosecution involve the same facts. (R. 84:11.) The State's theory of the case was that Mr. Killian committed a "course of conduct" involving Britney 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, with respect to Britney, it would be irrational to believe that a jury accepted that sexual contact occurred in this case but not as alleged in the previous case. It is unreasonable to believe an acquittal would have turned on when or what intimate part was touched. Recall the State's opening alleged a "course of conduct …. touching inappropriately …. [being] confronted several times by behavior that is inappropriate and illegal." An acquittal would involve a rejection of the same narrative involved in this case, meaning that the jury did not find the testimony sufficiently reliable given the external influences impacting Britney's statements.

In regards to Ashley, where the theory of defense was that the allegations were false and made after being questioned about an extortion attempt, it would be irrational to believe a jury's acquittal of the 2016 charge would turn on a jury's belief that only the allegations that occurred after 1994 were fabricated. An acquittal would mean the jury did not find the narrative sufficiently credible.

As in *Ashe* the trials would be identical, but for the State seeking to bolster its case. The government's theory (that Killian sexually assaulted Ashley and Britney), the alleged facts, and the defense would be the same in each trial and in

subsequent trials. Thus had the original trial resulted in full acquittals, issue preclusion would prohibit this prosecution under the *Ashe* doctrine. Just as the defendant in *Ashe* did not have to defend a second trial pertaining to a separate victim, where he'd already convinced a jury that there was reason to doubt that he was involved, Killian should not have to repeatedly assert the same defense to the same fact-pattern in front of multiple juries. By the State's own conduct in forcing a mistrial, the State deprived Killian of having this tribunal determine these ultimate issues. Likewise, the State's argument that issue preclusion should not apply is fueled only by the consequences of its own misconduct.

a. Allowing the State to avoid the perils of issue preclusion by intentionally bailing out of the jury trial violates the fundamental principles of Double Jeopardy.

In determining whether issue preclusion applies to a judgment, "[r]requirements of fundamental fairness under the due process clause ultimately control." *United States v. Kaytso*, 868 F.2d 1020 (9th Cir. 1989).

The State suggests that issue preclusion should not apply here because the case did not proceed to a jury verdict. In addition to *Ashe*, the State cited *Yeager v. United States*, 557 U.S. 110 (2009) and *Currier v. Virginia*, 138 S.Ct. 2144 (2018). (State Ct. App. Reply Br. 7-8.) As explained below, both declined to apply issue preclusion to mistrials. As is true throughout, however, none of the cases cited by the State involved a prosecutor seeking an advantage by deliberately sabotaging a jury trial.

Yeager held that issue preclusion applied to a deadlocked count, despite it being dismissed without prejudice,

because the count shared a common element with an acquitted count. *Yeager v. United States*, 557 U.S. at 120. The State argued incorrectly that *Yeager* held that *all* mistrials were "nonevents" for purposes of issue preclusion. (State's Ct. App. Reply, 8.) *Yeager* did not turn on there being a mistrial, rather it concluded that deadlocked counts were a failure of a jury to speak and thus could not be used to *negate* the issue preclusion of the counts the jury did decide. *Id* at 121. The case in no way decided whether prosecutorial misconduct aimed at taking the case from the jury could shield the State from issue preclusion.

Similarly, the State cited *Currier* for the proposition that the *Ashe* doctrine does not apply to mistrials. (State's Reply, p. 7). *Currier*, however, rested upon the fact that the defendant moved to sever two counts, thereby *consenting* to a second trial only to then claim the *Ashe* doctrine forbade it. *Currier*, 138 S.Ct. at 2152. The holding does not preclude applying issue preclusion here, and the language in fact supports it. *Currier* recognized "the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Id.* at 2149. Providing further guidance, the Court continued, "at the same time, this Court has said, the Clause was not written or originally understood to pose an insuperable obstacle to the administration of justice *in cases where there is no semblance of these types of oppressive practices.*" *Id.* at 2149 (emphasis added). *Currier* like cases discussed below focused on the absence of prosecutorial misconduct and oppressive practices. It cannot be read to condone or apply to the State's misconduct in this case.

Failing to apply issue preclusion to dismissals that do not involve a prosecutor deliberately sabotaging the jury trial is consistent with Double Jeopardy jurisprudence. Allowing a

retrial after a deadlocked jury promotes "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. Likewise, when a defendant requests a mistrial, even due to *error* (not sabotage) on the part of the judge or the prosecutor, the defendant is deemed to have waived his right to proceed with the first jury, so long as "the defendant retains primary control" over the decision to abandon the trial. *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

Where, as here, the prosecutor deliberately sabotages the trial, it is the State that deprives the defendant and all non-parties of the right to a decision by the vested tribunal. Double Jeopardy jurisprudence draws a sharp distinction where a prosecutor takes the control away from the defendant by intentionally goading him into requesting a mistrial, in which case the matter cannot be retried. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

There is no compelling interest served by distinguishing between a jury verdict adverse to the State and a judge determining that the matter cannot be retried because the State intentionally sabotaged the case specifically to prevent the seated tribunal from deciding the ultimate issues. To hold otherwise allows a prosecutor, upon believing the trial is going badly, to intentionally goad the defense into moving for a mistrial and then remain free from the perils of issue preclusion, which is exactly what happened in this case.

The State argued below that the distinction recognized in *Kennedy* does not pertain to issue preclusion. (State's Ct. App. Reply Br. 9.) The State cited a 9th Circuit opinion for the proposition that issue preclusion does not apply to an erroneously-declared mistrial that did not meet the manifest necessity standard, calling that "functionally the same" as what

happened here. (State's Ct. App. Reply Br. 9 (citing *United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011).) *Carothers* diverges sharply from this case because it involved no deliberate government attempt to sabotage the jury trial. Neither *Carothers* nor any cases cited by the State supports this "functionally the same" assertion. In fact, *Carothers* points out that its decision not to apply issue preclusion to the retrial is precisely because there were no indications of serious prosecutorial misconduct. *Id.* at 965.

In short, the State's arguments ignore its egregious role in preventing Killian's right to have *one* jury determine these issues. Revisiting *Ashe* details the flaw in the state's self-serving argument. Agreeing with the State means that had the prosecutor in *Ashe*—upon recognizing the witnesses were underperforming—simply violated court rules to goad Ashe into requesting a mistrial, then the State would be free to resort to the first trial as a dress rehearsal and bring a subsequent trial involving a second victim and the same facts. While the record would be different, the double jeopardy concerns would remain the same.

The doctrine of issue preclusion is not about the sanctity of a verdict as much as it is about preventing prosecutorial misconduct. *See Canon*, 2001 WI 11 at ¶ 13. Allowing the State to cause a mistrial to avoid a jury's verdict would in no way prevent prosecutors from using trials as "dry runs," which is the "primary concern" of the Supreme Court in *Ashe*. *Id.* The double jeopardy interests in prohibiting this practice are fundamental: preventing the state from causing a mistrial to buttress its case, *Arizona v. Washington*, 434 U.S. at 497; preventing the State from "refin[ing] his presentation in light of the turn of events at the first trial," *Ashe v. Swenson*, 397 U.S. at 447; preventing the State from prosecuting charges seriatim, *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984);

protecting the defendant's right to have the original tribunal render a final verdict, *State v. Seefeldt*, 2001 WI App 149, ¶ 15, 256 Wis.2d 410, 647 N.W.2d 894.

As another court aptly stated in discussing double jeopardy, "[a] scheming prosecutor cannot be rewarded by being handed the very thing toward which he connived." *Fields v. State,* 96 Md.App. 722, 744, 626 A.2d 1037 (Md. App. 1992). Whereas the State in this case schemed to cause a mistrial precisely so that it could relitigate the facts and issues under new rules and a different charging scheme, the double jeopardy principles justifying issue preclusion apply at least as much as after an acquittal by a jury where the State followed the rules.

b. Because the State litigated, lost and did not appeal Judge Becker's Order prohibiting adding charges and refiling, the common law doctrine of issue preclusion precludes the State from relitigating it here.

Under the doctrine of issue preclusion, "a judge's ruling on an issue of law or fact in one proceeding binds in a subsequent proceeding the party against whom the judge had ruled, provided that the ruling could have been…challenged on appeal..." *Loera v. United States,* 714 F.3d 1025, 1029 (7th Cir. 2013).

Issue preclusion is a common law principle with due process roots that is applicable in a criminal case beyond the topic of double jeopardy. *Id.* at 1029. A judgment based on "substantive law," has the same preclusive effect as a judgment "upon the ground of innocence." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916). Issue preclusion also applies to decisions that do not resolve the factual merits.

United States v. Kaytso, 868 F.2d 1020, 1022 (9th Cir. 1989); see also *United States v. Harvey*, 900 F.2d 1253, 1257 (8th Cir. 1990)(applying issue preclusion to the government's attempt to relitigate the existence of an immunity agreement).

Issue preclusion applies here because the State litigated whether it could prosecute Killian a second time, which the court and parties knew would involve the charges the State sought to add as amendments to the original charge. (R. 21:21**.)** Judge Becker found that double jeopardy prevents the State's adding charges and getting "another kick at the cat." (R. 21:21.)

The State argued below that the issue preclusion should not apply because, according to the State, Judge Becker only decided whether the State could re-charge Killian for the charges in the original indictment, not whether the State could add charges and prosecute the crimes with which it sought to amend the original information mid-trial. (State's Ct. App. Br. 9 (citing *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485).) For the following reasons, Judge Becker's Order clearly ruled that the State could not bring these charges.

In construing written judgments, courts consider the "circumstances at the time of entry…and the context of the whole judgment." *Cashin v. Cashin*, 2004 WI App 92, ¶ 11, 271 Wis. 2d 754, 681 N.W.2d 255. Judge Becker originally dismissed case number 2015CF47, knowing that the State intended to add charges and refile. (R. 83: 46.) The parties then litigated whether adding charges and refiling violated double jeopardy. (R. 15:10, R. 83:46-47.) Judge Becker considered the briefs of the parties and held an evidentiary hearing (R. 74), ultimately deciding 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.)

Judge Radtke found that Judge Becker's Order prevented the State from filing this case: "…Judge Becker's order…essentially found the scope of jeopardy extended to future prosecutions from the facts that were part of 15-CF-47; and, therefore, the Court finds that double jeopardy bars…19-CF-163 consistent with Judge Becker's ruling." (R. 84:11-12.)

Considering both the language and the context, Judge Becker's order was clear: double jeopardy prevented the State not only from relitigating the indictment that it never adhered to in the first place, but it prevented the State from recharging the matter at all, that double jeopardy precluded getting "another kick at the cat," a concept that explicitly included "preparing more thoroughly" and "adding charges." (R. 21:21.) If the State was confused about the judgment, the State should have sought clarification below. If the State believed that Judge Becker erred, it should have appealed. Where the State failed to appeal or seek clarification, and simply ignored the judgment, just as it ignored Judge Becker's trial court rulings, issue preclusion prevents the State from relitigating it here. Specifically, the State is estopped from asserting here that the Double Jeopardy Clause permits adding charges and retrying Killian on charges that the State sought to add to Killian's first trial because the State already litigated that issue in front of Judge Becker and lost. (R. 21:21.)

CONCLUSION

For the above-stated reasons, the defendant-respondent respectfully requests that the decision in the court of appeals be AFFIRMED.

Dated this 13th day of March, 2023.

Respectfully submitted,

Electronically signed by:
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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 9923 words.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief in compliance with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 13th day of March, 2023.

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