STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2017AP1977 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ALEXANDER M. SCHULTZ,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW AND APPENDIX

OF THE DEFENDANT-APPELLANT-PETITIONER

ALEXANDER M. SCHULTZ

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III. Statement of issues presented for review.

This petition presents the following issues for review:

First, when determining whether two offenses charged in successive prosecutions are the same in fact, for purposes of the Double Jeopardy Clause, may a court determine the scope of jeopardy in the first prosecution based upon testimony which was adduced at trial?

Or alternatively, must a court determine the scope of jeopardy based upon whether a reasonable person familiar with the totality of the facts and circumstances would have construe the initial charging documents, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the charging document of the subsequent prosecution?

To put it in plainer language, how do you determine the scope of jeopardy? Do you look at the charging documents in light of the facts and circumstances known when jeopardy attached, which in the case of a jury trial is when the jury is sworn, or may a court narrow the scope of jeopardy based upon testimony that was later adduced at trial?

The second issue presented would be, if there should be any ambiguity in the timeframe of a charging document, for purposes of the Double Jeopardy Clause, who should bear the burden resulting from the ambiguity, the defendant or the State?

In Schultz's case, the circuit court and the Court of Appeals concluded that there was an ambiguity in the timeframe charged in Schultz's first prosecution. The courts then narrowed the scope of jeopardy by relying upon testimony that was adduced at the first trial, and shifted the burden resulting from the ambiguity from the State and on to Schultz. The courts further determined that the timeframe of "on or about October 19, 2012," which was alleged in Schultz's second

prosecution, did not fall within the timeframe in Schultz's first prosecution, which was the "late summer of 2012 to the early fall of 2012."

The courts so found, notwithstanding the fact that the first day of fall in 2012 was September 22nd and the last day of fall was December 21st; a period of ninety-one days, during which October 19th landed upon the twenty-seventh day of the fall, firmly within the first third of the fall season, or the "early fall."

IV. Statement of Rule 809.62 Criteria Relied Upon For Review.

Schultz believes that there are special and important reasons for this Court to exercise its discretion to review the decision of the Court of Appeals because (1) "A real and significant question of federal or state constitutional law is presented" § 809.62(1r)(a), Wis. Stats; and (2) because this appeal presents a question which "is a novel one, the resolution of which will have statewide impact § 809.62(1r)(c)2, Wis. Stats.

Given the tens of thousands of cases interpreting the Double Jeopardy Clause, it is somewhat surprising how few cases there are which provide guidance as to how you are to determine whether two offenses charged in successive prosecutions are the same in fact. As the Court of Appeals acknowledges, there appear to be no Wisconsin cases which directly answer this question. (Opinion, ¶ 18; Appx. 24). This is novel case, and one of first impression in the State of Wisconsin. *Id.*

The leading federal case, however, is *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006). That case held that "[t]o determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent

prosecution." (emphasis added). In the case of a jury trial, "Jeopardy attaches ... when the selection of the jury has been completed and the jury sworn,"[1]

The Court of Appeals' Opinion in this case is at odds with *Olmeda* and host of other cases from the federal courts interpreting the Double Jeopardy Clause. To construe the scope of jeopardy in the light of the testimony and facts that were later adduced at trial, is contrary to the requirement that the courts examine the charging documents as a reasonable person would have understood them "*at the time jeopardy attached in the first case*." A reasonable person cannot construe the original charging document based upon facts later adduced at trial, for the simple reason that those fact did not yet exist at the time jeopardy attached in the first case. The Court of Appeals' opinion nonetheless holds that it acceptable to consult such testimony when resolving an ambiguous timeframe, and in so doing also ignores that caselaw which has held that it is the State, being the party which drafted the charging documents, who should bear the burden of any ambiguity in the charging documents.

This is a novel case involving a real and significant question concerning the Double Jeopardy Clause. How do you determine whether two successive prosecutions are identical in fact? The Court of Appeals' opinion has in a real, significant, and fundamental way reduced the protections afforded by the Due Process Clause. This Court should accept review.

V. Statement of Case.

On June 27, 2016, Alexander M. Schultz entered of a plea of guilty to, and was convicted of, one count of second-degree sexual assault of a child, in violation of § 948.02(2), Wis. Stat.; and one count of perjury before the court, in violation of § 946.31(1)(a), Wis. Stat. (R.100:13 and R.39; Appx. 1). Both counts carried a habitual criminality enhancer pursuant to § 939.62(1)(b), Wis. Stat. *Id*.

[1] § 972.07(2), Wis. Stat.

On September 6, 2016 the Lincoln County Circuit Court, the Honorable Robert R. Russell, sentenced Schultz to four years in state prison for the perjury count, with two years of initial incarceration to be followed by two years of extended supervision. (R.101:14-15 and R.39; Appx. 1). For the count of second-degree sexual assault of a child, Schultz was sentenced ten years in state prison, with five years of initial incarceration to be followed by five years of extended supervision. Id. Each sentence was made concurrent with the other count, but consecutive to any other sentence the defendant was currently serving. Id.

Schultz timely filed his notice of intent to pursue post-conviction relief. (R.41). Thereafter, he filed a motion requesting the circuit court vacate his conviction for second degree sexual assault of a child on the grounds that the conviction was violative of the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. (R.55). An order was entered on September 26, 2017, denying Schultz his requested relief. (R.60; Appx. 13). Schultz then filed his notice of appeal. (R.61). On December 11, 2018, the Court of Appeals entered a decision and opinion affirming the judgment and orders of the circuit court. (Opinion; Appx. 18).

Schultz petitions this court to review his conviction for second-degree sexual assault of a child, on the grounds that the conviction was violative of the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. He requests his conviction to be vacated, and the case remanded for entry of a Judgment of Acquittal

VI. Statement of Facts

In this case Alexander M. Schultz was prosecuted for the crime of second-degree sexual assault of a child, herein referred to as M.T., after having been previously acquitted in a jury trial of the crime of repeated sexual assault of the same child, M.T. (Opinion ¶ 1; Appx. 18). In the first prosecution the Information alleged a timeframe for the commission of the crime of "late summer of 2012 to the early fall of 2012". (Opinion ¶ 1; R.90:1; Appx. 19). After Schultz's acquittal the first trial, paternity testing was obtained which established that Schultz had apparently impregnated M.T. "on or about October 19, 2012." Thereafter, the State initiated a second prosecution now alleging a timeframe of "on or about October 19, 2012." (Opinion ¶¶ 1 and 9; R.30:1; Appx. 19 and 22).

The State conceded that that the offenses charged against Schultz were identical in law, as the offense of second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child. (Opinion ¶ 16; Appx. 23). There was no issue as to the identity of the alleged victim, M.T. (R.19:1). The only issue was whether the two prosecutions were identical in fact; specifically whether the timeframe of the first prosecution, that of "late summer to early fall 2012," also included the alleged date of the sexual assault in the second prosecution, which was "on or about October 19, 2012." (Opinion ¶ 17; Appx. 23).

The first day of fall in 2012 was September 22nd; and the last day of fall in 2012 was December 21st. The fall season in 2012 thus lasted for ninety-one days, and October 19th landed upon the twenty-seventh day of the fall, firmly in the first third of the season, or "early fall." Accordingly, trial counsel for Schultz filed a motion to dismiss on the grounds that the court lacked jurisdiction over the defendant because the prosecution of the defendant in this case violated his rights guaranteed by the Double Jeopardy Clauses of 5th and

14th Amendments to the United States Constitution, and Article I, Section 8 of the Wisconsin Constitution. (R.5).

The State, however, contended that the testimony adduced at the jury trial in the first case "... was able to pin down a conclusion of her sexual encounters with Mr. Schultz to a date clearly preceding October 19, 2012." (R.20:1). The State argued that the crime charged in 14CF68 was therefore not the crime charged in 13CF110. The circuit court and the Court of Appeals agreed, finding that the timeframe that M.T. testified to at the first trial was July, August, and September of 2012, and therefore these charges were not identical in fact. (R.96:6; Opinion ¶ 17; Appx. 9 and 6).

The Court of Appeal additionally pointed to a police report attached to the original criminal complaint in which the investigative officer wrote that he believed M.T.'s pregnancy was result of a sexual assault by a codefendant named Beckman, which he contended occurred in "early to mid-October." (Opinion ¶ 31; Appx. 30). The investigative officer then wrote that he asked M.T. "if she had had sexual intercourse with anyone prior to this incident, and she told him she had had intercourse with Schultz `approximately one month before' the incident with Beckman—i.e., in September 2012." *Id.* The Court of Appeals also noted that on "the first morning of trial, before the jury was sworn, the State informed the circuit court that although Melanie had not yet received the results of a paternity test, it had been `imputed ... for months' that Beckman was the father of Melanie's child." (Opinion ¶ 32; Appx. 30). The Court of Appeal wrote that "[t]he only reasonable inference from this statement is that, consistent with the complaint, the State was not alleging that Melanie had had sex with anyone besides Beckman, including Schultz, in early-to-mid-October."

Among the facts from the first trial, that neither the circuit court nor the Court of Appeals took notice of, were the charges that were actually read to the

jury before the presentation of evidence. Those charges were:

> The Information that has been filed in this case by the district attorney's office charges that the defendant *in the late summer to early fall of 2012* at 1709A Water Street in the City of Merrill, Lincoln County, Wisconsin, did commit repeated sexual assaults involving the same child [M.T.], date of birth, May 3, 1997, where at least 3 of the assaults were violations of Section 948.02(1) or (2) of the Wisconsin Statutes.

(R.67:8-9 and R.69:75-78)(emphasis added). These charges were not limited to the months of July, August, and September of 2012. Nor did the final jury instructions given to the jury limit the timeframe for the commission of the crime to the months of July, August and September of 2012. The timeframe given to the jury in the final jury instructions was:

> Second element, at least three sexual assaults took place within a specified period of time. *The specified period of time is from the late summer to early fall of 2012.*
>
> Before you may find the defendant guilty, you must unanimously agree that at least three sexual assaults occurred between late summer or early fall of 2012, but you need not agree on which acts constitute the required three.

(R.69:77 and R.75:7-9)(emphasis added).

Nor did the jury's verdict limit the timeframe to a period of time prior to October of 2012; rather the jury gave its verdict in accordance with the allegations contained in the Information. *Id.* The jury's verdict was as follows:

> THE COURT: The Court will read the verdict. We, the jury, find the defendant, Alexander M. Schultz, not guilty of repeated acts of sexual assault of a child *as charged in the information* dated this 22nd day of January, 2014 signed by the foreperson.
>
> Madam Foreperson, did I correctly read the verdict?
>
> MADAM FOREPERSON: You did, sir.

(R.70:130 and R.74) (emphasis added). The verdict made no reference to the criminal complaint, pre-trial statements of State, nor to the testimony which was adduced at trial. The verdict referred only to the Information.

M.T.'s testimony at trial, as to when the incidents of sexual intercourse occurred, was in fact very imprecise. She testified that she began having sexual intercourse with Schultz in July of 2012. (R.67:130-31). She stated that they broke up around the beginning of September 2012. (R.67:134). There was no testimony, however, as to whether they may have had sexual intercourse after they broke up. M.T. could not give a specific date for any of the alleged acts of sexual intercourse. (R.67:153). She claimed that they had sexual intercourse more than five times, (R.67:134), but could not specify how many times she had sexual intercourse with the defendant, much less identify three specific occasion on which she had sexual intercourse with the defendant. (R.67:153). M.T. did not keep a diary, take notes, or send texts which would allow her to give a precisely date for when any of the alleged sexual assaults occurred. (R.67:146). She could not remember the dates on which she told the other witnesses about her sexual relations with Schultz. (R.67:153). With regard to whether M.T. had sexual intercourse with Schultz in the month of October, her testimony was as follows:

Q. Did he initially interview you about an incident that happened in the beginning of October of 2012?
A. Yes.
Q. And after he asked you about that incident, did he have occasion to ask you if you had sex with anyone in the month or so leading up to the beginning of October of 2012?
A. Yes.
Q. And what did you tell him?
A. I told him that I had sex with Alex.

(R.67:135). As to when M.T. told her friend Samantha Yeskis that she was in a relationship with the defendant, M.T. testified as follows:

Q. What did you tell Sam?
A. I told Samantha I was in a relationship with Alex and that we had sex before.
Q. And when did you tell her that?
A. I don't remember.
Q. Was it in July?
A. No.
Q. August?
A. No.

Q. September?
A. Probably closer to October.
Q. Was it after you had stopped seeing Alex?
A. Yes.

(R.67:157). Significantly, at no point in her testimony does M.T. state that she did not have sexual intercourse with Schultz in the month of October 2012. (R.67:127-63). Given the results of the paternity test, apparently, they did.

Other witnesses were, if anything, even more imprecise as to when M.T. told them she was having sexual intercourse with Schultz. The witness Jessica Nowak testified to receiving a text from M.T. to the effect that she was having sexual intercourse with the defendant, but could not specify the time period in which she received this text any more accurately than "summer/fallish of `12". (R.67:169-70). The witness Lance Nowak testified to being aware that M.T. and the defendant were dating "in the late summer and early fall of 2012". (R.67:173).

From these facts, the Court of Appeals nonetheless concluded that no "reasonable person familiar with the circumstances of [Schultz's] prosecution would [] understand the phrase `early fall of 2012' to include any dates beyond September 30, 2012." (Opinion ¶ 32; Appx. 30).

VII. Argument.

A. Any burden resulting from any ambiguity in the charged timeframes of successive prosecutions should be borne by the State, not the defendant as was the case here.

"To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006) (emphasis added). "Jeopardy attaches ... (2) In a jury trial when the selection of the jury has been completed and the jury sworn." §

972.07(2), Wis. Stats. *See also, Crist v. Bretz*, 437 U.S. 28, 38 (1978) ("The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."); and *State v. Moeck*, 2005 WI 57, ¶ 34, 280 Wis.2d 277, 695 N.W.2d 783. Therefore, in a jury trial, jeopardy attaches prior to the presentation of any evidence. This is the point in the proceedings where the scope of jeopardy must be determined in a case where the matter has gone to a jury trial.

The State is given considerable flexibility in charging the timeframe in child sexual abuse cases. Accordingly, "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." *State v. Fawcett*, 145 Wis.2d 244, 255, 426 N.W.2d 91 (1988), citing *State v. St. Clair*, 418 A.2d 184, 189 (Me. 1980). "[A]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language, *see United States v. Inmon*, 568 F.2d 326, 332 (3d Cir.1977) (`[W]e also point to the obvious fact that it is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it.')." *Olmeda*, 461 F.3d at 283.

In its opinion the Court of Appeals declared that the timeframe of "late summer of 2012 to the early fall of 2012" was ambiguous. (Opinion ¶ 18 fn. 4; Appx. 24). For reasons that will be set forth in the next argument, Schultz's believes that this timeframe was not ambiguous. Nevertheless, even if this timeframe were ambiguous, the law is clear that the party who would bear "*any burden*" from an imprecision in the language of the charging documents was the State, not the defendant as the Court of Appeals has done here. *Fawcett, Inmon, Olmeda, supra.*

The State, and the Court of Appeals, both rely upon section 971.29, Wisconsin Statutes, to support their position that the scope of jeopardy may be narrowed by the testimony which is later adduced at trial. This position, however, is contrary to a host of prior decisions holding that "[p]rejudice has always been a consideration with regard to amending a charging document." *State v. Gerard*, 189 Wis.2d 505, 517 fn. 9, 525 N.W.2d 718 (1995), *citing State v. Wickstrom*, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) and *Whitaker v. State*, 83 Wis.2d 368, 265 N.W.2d 575 (1978); *see also, Wagner v. State*, 60 Wis.2d 722, 726, 211 N.W.2d 449 (1973) ("The rule in this state is then that the trial court may allow amendment of an information at any time in the absence of prejudice to the defendant."); *State v. DeRango*, 229 Wis.2d 1, 26, 599 N.W.2d 27 (1999) ("Section 971.29(2), stats., permits the amendment of criminal charges at trial in order `to conform to the proof where such amendment is not prejudicial to the defendant').

While most cases examining the "prejudice requirement" focus on whether the amendment will prejudice the accused's ability "to understand the offense charged so he can prepare his defense" (*e.g. see Wickstrom*, 118 Wis.2d at 348), whether the amendment will prejudice to the defendant's constitutional protections under the Double Jeopardy Clause is also a consideration. *Holesome v. State*, 40 Wis.2d 95, 102, 161 N.W.2d 283, 287 (1968); *see also United States v. Stoner*, 98 F.3d 527, 536 (10th Cir. 1996) ("In addition to prejudicing a defendant's Sixth Amendment right to notice of the charges against her, a variance [to an indictment] can be so great as to violate the defendant's Fifth Amendment right against double jeopardy because `a conviction based on the indictment would not bar a subsequent prosecution for the same offense.'"); *Berger v. United States*, 295 U.S. 78, 83 (1935) (holding that a variance between the facts proven at trial and charges alleged in the indictment is impermissible where it deprives the defendant of the right against double jeopardy); *United States v. DiPasquale*, 740 F.2d 1282,

1294 (3rd Cir. 1984) (holding that a variance between overt acts is impermissible when it violates the defendant's right against double jeopardy); *and see United States v. Crowder*, 346 F.2d 1 (6th Cir. 1964) (holding that the variance between facts alleged in the indictment and facts proved at trial was permissible *because the variance protected him against another prosecution*).

The information thus serves two functions, the first is to ensure that the defendant understands the offense charged so he can prepare his defense, and the second is to preserve the defendant's constitutional protections under the Double Jeopardy Clause. The court in *Fawcett* held that the State is given considerable flexibility in charging the timeframe in child sexual abuse cases. *Id.* at 255. Accordingly, "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." *Id.* The opinion rendered below now gives the State a flexible Double Jeopardy analysis as well a flexible Due Process analysis, it should not have it both ways.

What the Court of Appeals' opinion fails to appreciate is that while the prosecutor may not have presented evidence at the first trial of sexual assaults by Schultz in the month of October 2012, Schultz still had to prepare a defense against potential testimony that he did indeed sexually assaulted M.T. in the month of October 2012.[2] Shultz was charged with sexual assaults within a timeframe which included portions of the month of October 2012. At the time jeopardy attached, that is when the jury was sworn, Schultz was certainly in jeopardy of being convicted of sexual assaults which may have occurred on or about October 19, 2012. If M.T. had testified at the first trial to a sexual assault on or about October 19th, and if Schultz had been convicted upon that testimony, could no

[2] Indeed, why would Schultz *not* have anticipated the possibility such testimony?

reasonable person have found that Schultz's crime fell within the timeframe that was alleged in the Information? Would Schultz's conviction be subject to reversal because there were some arguably contradictory statements to be found in the probable cause section of the criminal complaint, statements which suggested that sexual relations might have ceased in September? Likely not. *See, Mark v. State,* 228 Wis. 377, 280 N.W. 299 (1938) (the district attorney has authority to file an information containing such charge as the facts adduced at the preliminary examination warrant, whether or not the charge is the one contained in the complaint on which the examination was had).

When jeopardy attached in Schultz's first prosecution, conviction for sexual assaults occurring in the month of October was certainly on the table. By his second prosecution, Schultz was once again placed in jeopardy for a sexual assault which occurred in the month of October. "For whatever else that constitutional guarantee may embrace, *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. *Green v. United States*, 355 U.S. 184, 190, 78 S.Ct. 221, 225, 2 L.Ed.2d 199." *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970).

In narrowing the scope of jeopardy by evidence which was adduced at trial, the courts below have lost sight of who is the finder of fact in a jury trial. It is the jury, not the judge, who is the finder of fact in a jury trial. *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 506-7. The jury's verdict was that Mr. Schultz not guilty of committing repeated acts of sexual assault of the child M.T. during the timeframe alleged in the Information, which was "the late summer to early fall of 2012." (R.69:130 and R.74; Appx. 21). The fact that the jury was not presented with testimony to the effect that Schultz had

sexual intercourse with M.T. in the month of October in no way invalidates its verdict; rather, it confirms the verdict. The jury did not limit its verdict to the months July, August and September of 2012. It made no reference to the criminal complaint, pre-trial comments of the State, or the testimony presented at trial. Rather, the jury found that Schultz was "not guilty of repeated acts of sexual assault of a child *as charged in the information*. (R.70:130 and R.74)(emphasis added). In narrowing the scope of jeopardy, the circuit court and Court of Appeals substituted their own findings of fact, for those of the jury. That is to say, the courts determined that the jury's verdict was something other than the verdict which the jury actually delivered.

The Court of Appeals, realizing that there exists the potential that their decision might "... be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions," wrote that:

> ... well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal—or, in the alternative, move to make more definite and certain the allegations against him or her—of charges based on allegedly overbroad or ambiguous timeframes in a charging document. *See generally* Wis. Stat. § 971.31; *see also Fawcett*, 145 Wis. 2d at 250-21; *State v. Miller*, 2002 WI App 197, ¶¶8-9, 257 Wis. 2d 124, 650 N.W.2d 850.
>
> By doing so, a defendant requires a circuit court to consider whether the charged timeframe is definitive enough to provide double jeopardy protections to the defendant. *See Fawcett*, 145 Wis. 2d at 255. Here, Schultz did not do so

(Opinion ¶¶ 35-36). But look at what the Court of Appeals has done. It has now shifted the burden of the ambiguity in a charging document from the State and on to the defendant. It is now the defendant's burden to perceive that there might be an ambiguity in the Information. It is now the defendant's burden to file motion for a more definite statement. It is now the defendant's burden to examine the Information against facts that are alleged in the probable cause section of the criminal complaint, to see if there is a disparity between the Information's timeframe and facts alleged in the criminal complaint. It is now the defendant's

burden to anticipate how the testimony will play out at trial *during the State's case in chief*. It is now the defendant's burden to as anticipate future events that were unanticipated prior to trial (e.g. the results of the paternity testing). This is simply unreasonable.

Again, if there was an ambiguity in the charged timeframe, the State is the party which should bear "*any burden*" resulting from imprecise language in the charging documents, not the defendant. *Fawcett*, *Inmon*, *Olmeda*, *supra.* In its Opinion, the Court of Appeals has ignored this aspect of the law. Schultz presented a rational argument, based on the definition of "Fall" which is to be found in common dictionaries and almanacs, a definition which is grounded in science, and which would hold that October 19th fell within the early fall of 2012. How is it that the State can then search the court record and transcripts to find some rationale, however tenuous, for excluding October 19th from the early fall of 2012, when the law is that "as between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language"?

B. Ignorance of the sciences does not make a person reasonable; and conversely a knowledge of the sciences does not make a person unreasonable.

The "fall" has a very definite beginning and a very definite end. These are facts which are beyond dispute; they are facts governed by the very movement of the planet Earth. "Fall" or "autumn", is "the season between summer and winter; fall. In the Northern Hemisphere it is from the September equinox to the December solstice...."[3] In the northern hemisphere, the September equinox is the moment in the year when the Sun is exactly above the equator and day and night are of equal length; it is when the ecliptic (the Sun's annual pathway) and the

[3] See, *Autumn*. *Dictionary.com Unabridged*. Random House, Inc. http://www.dictionary.com/browse/autumn (accessed: December 15, 2017).

celestial equator intersect. At this time the Sun crosses the celestial equator going south.[4] The December solstice is that moment during the year when the path of the Sun in the sky is farthest south in the Northern Hemisphere (December 21 or 22). At the winter solstice the Sun travels the shortest path through the sky, and that day therefore has the least daylight and the longest night.[5]

Trial counsel for Schultz cited the Old Farmer's Almanac as authority for the proposition that in the year 2012, fall began around September 22nd and ended around December 21st. (R.21:1). A venerable treatise, this is also in accord with astronomical tables of the United States Naval Observatory, which indicate that in the year 2012 the September equinox was on September 22nd at 2:49 p.m., and that the December solstice fell on December 21st at 11:12 a.m.[6]

If a portion of the fall has been designated in the timeframe as "early fall," then common language usage would to dictate that there must be a "late fall," and possibly a "middle fall" as well. However, it would be unreasonable to assume a division beyond thirds. The interval between September 22, 2012 and December 21, 2012 was ninety-one (91) days. The interval between September 22, 2012 and October 19, 2012 was a period of twenty-seven (27) days. Thus, October 19th would have fallen within the first third of the 2012 fall season, or in the "early fall." Schultz's continues to maintain that in a certain real sense, to deny that October 19th lands within the "early fall," is to deny the very movement of the celestial bodies; to deny that the Earth orbits the Sun.

The Court of Appeals in its opinion characterized this definition as "hypertechnical and arbitrary" and concluded that "... a reasonable person familiar with the circumstances of that prosecution would not understand the phrase "early

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4 See, *Equinox. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/equinox - astronomy (accessed: December 17, 2017).

5 See, *Winter Solstice. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/ winter-solstice (accessed: December 17, 2017).

6 See, *Earth's Seasons. Equinoxes, Solstices, Perihelion, and Aphelion.* United States Naval Observatory. http://aa.usno.navy.mil/data/docs/EarthSeasons.php (accessed: December 15, 2017).

fall of 2012" to include any dates beyond September 30, 2012." (Opinion ¶ 18 fn. 4 and ¶ 30; Appx. 24). Schultz will leave it to the State to explain why a reasonable person must be ignorant of the sciences; but how, pray tell, did it become unreasonable for a person to have a basic knowledge of the science underlying the passage of the seasons?

There is nothing "hypertechnical and arbitrary" in consulting an almanac to ascertain the start or conclusion of a season. Farmers have been consulting the Old Farmer's Almanac for the start and conclusion of the seasons since 1792.[7] No less a lawyer than Abraham Lincoln famously relied upon an almanac in a murder trial to establish the phases of the moon.[8] Was consulting an almanac "hypertechnical and arbitrary" there as well? As for consulting the movement of the sun through the sky to mark the seasons, this is practice that has been known for millennial; it is practice that was known even unto the builders of Stonehenge.[9] Schultz has presented definition of "fall" that is very old, logical, and indisputably scientific. How is that unreasonable? If on the other hand, it *is* reasonable to understand the beginning and end of the falls as science currently understand the passage of the season; then the courts should accept that definition, given that any burden of an ambiguity in the charging documents should be born by the State, not the defendant.

VIII. Conclusion.

Wherefore, Schultz respectfully requests that this Court grant review and reverse the decisions of the circuit court and Court of Appeals, vacate his Judgment of Conviction on the charge of second-degree sexual assault of a child,

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7 See, The Old Farmer's Almanac, https://www.almanac.com (accessed: December 25, 2018).

8 See, *Abraham Lincoln, The Almanac, And A Murder Trial; When Lincoln Famously Used The Almanac*. The Old Farmer's Almanac, https://www.almanac.com/lincoln-almanac-murder (accessed: December 25, 2018).

9 See, *Archaeoastronomy and Stonehenge*, Wikipedia, https://en.wikipedia.org/wiki/Archaeoastronomy_and_Stonehenge (accessed: December 25, 2018).

and remand this case to the circuit court for the entry of a Judgment of Acquittal on that same charge.

Respectfully submitted December 28, 2018.

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IX. Certifications.

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 5726 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this petition, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated December 28, 2018.

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