No. _____

IN THE

Supreme Court of the United States

ALEXANDER M. SCHULTZ,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Alexander Schultz was acquitted by a jury of having committed the crime of repeated sexual assault of a child, a crime which covered any and all sexual assaults of the child within a specified timeframe. In that first prosecution the State alleged that the crime had been committed during "the late summer to early fall" of 2012. Forty-eight days after his acquittal, the State launched a second prosecution alleging that Schultz had committed the lesser-included offense of sexual assault, upon the same child, "on or about October 19" of 2012. Schultz moved to dismiss the second prosecution on the grounds that it violated the Double Jeopardy Clause's prohibition against successive prosecutions for the same offense. On appeal, the Supreme Court of Wisconsin, in a closely divided decision, rejected Schultz's double jeopardy claim. The question presented is:

> For purposes of the Double Jeopardy Clause, what is the proper test, and assignment of burdens, for determining whether two prosecutions are factually identical when the State uses imprecise language in the charging documents of the first prosecution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Other Authorities

INDEX OF APPENDICES

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 939 N.W.2d 519 and reproduced in the Appendix at (App., *infra,* la-59a). The opinion of the Wisconsin Court of Appeals is reported at 922 N.W.2d 866 and is reproduced in the Appendix at (App., *infra,* 60a-75a). The opinion of the circuit court of Lincoln County, Wisconsin, is unreported and is reproduced in the Appendix at (App., *infra,* 76a-84a).

JURISDICTION

The Supreme Court of Wisconsin issued its decision on March 4, 2020. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb;..."

STATEMENT OF THE CASE

A. Introduction

Alexander M. Schultz was prosecuted for the crime of second-degree sexual assault[1] of a child, whose initials were M.T. Only days before he had been acquitted by a jury of the crime of repeated sexual assault[2] upon the same child, M.T. In the first prosecution the State alleged a timeframe of "the late summer to early fall of 2012". In the second prosecution the State alleged as its timeframe, "on or about October 19, 2012."

The first day of fall in 2012 was September 22nd, and the last day of fall was December 21st. Thus, the fall season in 2012 lasted for ninety-one days, and October 19th landed upon the twenty-seventh day, firmly within the first third of the season, that is to say, in the "early fall." Accordingly, Schultz filed a motion to dismiss on the grounds that his second prosecution violated his rights guaranteed by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The State conceded that the offenses charged against Schultz were identical in law, given that the offense of second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child. The only issue to be decided was whether the two prosecutions were identical in fact; specifically, whether the timeframe of the first prosecution, that of "the late summer to early fall," included the date of the sexual assault alleged in the second prosecution, namely, "on or about October 19."

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[1] in violation of Wis. Stat. § 948.02(2). (App., *infra*, 96a).

[2] in violation of Wis. Stat. § 948.025(1)(e). (App., *infra*, 96a-97a).

B. Schultz's First Prosecution.

On September 22, 2012, in an annual event known as the Fall Equinox, the Sun crossed the celestial equator and headed southward, marking the end of summer, and the beginning of the fall season. The fall season would last for a period of ninety-one days, until December 21st, when the Sun reached its lowest maximum daily elevation for the year. That day would be the shortest day of the year, and its night the longest. This event, known as the Winter Solstice, marked the end of the fall season, and the beginning of winter. [3]

Meanwhile, at some point in the month of December 2012, it came to the attention of the City of Merrill Police Department that M.T., a child of fifteen years of age, was pregnant with child. (App., *infra,* 4a). An investigation was launched to ascertain who was having sexual intercourse with M.T. during the late summer to early fall of 2012, such that she could conceive a child. (App., *infra,* 4a). That investigation ultimately identified Alexander M. Schultz as being one of the persons suspected of having sexual intercourse with M.T. during this period of time. *Id.*

A criminal complaint was filed on April 5, 2013, which charged Schultz with the crime of repeated sexual assault of the same child, a criminal offense that encompasses any and all sexual assaults committed within a specified period of time. (App., *infra,* 85a). As a timeframe for the commission of this crime, the criminal complaint, and the subsequent Information, alleged that Schultz committed this

[3] *Solstices & Equinoxes for Appleton, Wisconsin (2000—2049)*, TimeandDate.com, https://www.timeanddate.com/calendar/seasons.html?year=2000&n=3835 (accessed: June 23, 2017).

crime "in the late summer to early fall of 2012." (App., *infra,* 85a and 5a).

Attached to the criminal complaint were police reports by Officer Matthew Waid of the City of Merrill Police Department. (App., *infra,* 87a-94a). In one of those reports Officer Waid related an interview he had with a suspect, one Dominic Beckman, which was conducted on December 4, 2012. (App., *infra,* 87a). In that interview, Dominic admitted to having sexual intercourse with M.T. in "early to mid-October." *Id.* After this interview, Officer Waid called M.T. and asked her if she had sexual intercourse with anyone prior to that incident, and she told him that she had sexual intercourse with Alex Schulz approximately one month before having sexual intercourse with Dominic. *Id.*

In her December 4, 2012 interview, M.T. spoke of only a single instance of sexual intercourse with Schultz. *Id.* Later, however, Officer Waid conducted further interviews with M.T., on January 17 and 27 of 2013, during which she claimed there were other instances, "more than five," where she had sexual intercourse with Schultz in the year 2012. (App., *infra,* 87a and 92a). M.T. did not give any specific dates for these other sexual encounters; nor did she provide an end date for her sexual relations with Schultz. *Id.*

Officer Waid also interviewed a number of witnesses who M.T. said could corroborate her having a sexual relationship with Schultz. One was Jessica Nowak. Ms. Nowak told Officer Waid that she did not know of any sexual contact, but that she had seen Alex Schultz at M.T.'s residence numerous times during the "summer to early fall area" of 2012. (App., *infra,* 87a). Another witness, M.T.'s friend S.Y., said

that she was aware of sexual relations between M.T. and Schultz, which she told Officer Waid had "occurred during the late summer, to early fall area of 2012." (App., *infra,* 94a).

Schultz's first prosecution[4] was brought to a jury trial on January 21-22, 2014. (App., *infra,* 6a). After jury selection, but prior to the jury being sworn, the trial court heard a defense motion to introduce evidence of M.T.'s pregnancy, as well as her claim that Dominic Beckman was the father. (App., *infra,* 5a fn.6 and 53a). The State responded with a request for a continuance in order to consider Schultz's motion more fully. *Id.* During the motion hearing, the State indicated that it anticipated the results would show Dominic was the father. *Id.* But as to who, Dominic or Schultz, was actually the father of the child, that was still an open question. *Id.* The victim and her mother were clearly uncertain, and both supported a continuance so that the paternity testing could be completed prior to trial. *Id.* After M.T. and her mother made their preference known, Schultz indicated that he would prefer to go forward with his trial that day, and withdrew his motion. *Id.*

In its opening statement the State told the jury that Schultz and M.T. began having a sexual relationship during the "summer of 2012." (App., *infra,* 6a). However, at no point in its opening did the State indicate when it believed that relationship ended. *Id.* If the State had no intention of introducing evidence of sexual relations in the month of October, that message was not received by Schultz's trial counsel, for he stated in his opening that Schultz had been hit with "bombshell that occurred sometime in October of 2012," when friends had alerted him that M.T. been telling

[4] Lincoln County, Wisconsin, Case No. 13CF110.

others that she and Schultz were in a sexual relationship. (App., *infra,* 30a).

M.T. testified at trial that she began having sexual intercourse with Schultz in July of 2012, and that they broke up around the beginning of September of 2012. (App., *infra,* 6a). There was no testimony, however, as to whether they may have had sexual intercourse at any point after they broke up, as apparently they did. Other than the one instances of sexual intercourse in September, M.T. did not give a date, specific or otherwise, for any of the other alleged acts of sexual intercourse. *Id.* At no point during the trial did M.T. testify to having sexual intercourse with Schultz in the month of October. (App., *infra,* 7a).

In closing arguments, the State argued the intercourse between Schultz and M.T. started in July and ended in September. (App., *infra,* 7a). As observed earlier, at no point in its opening statement did the prosecutor opine when sexual intercourse between Schultz and M.T. had ended. It was only after M.T. and the other witnesses had testified, that the State argued sexual relations had ceased in September.

Notwithstanding any statements made by the prosecutor, the timeframe that was given to the jury at Schultz's trial was that of the "late summer to early fall of 2012." *Id.* And the actual verdict delivered by the jury was that Schultz was not guilty of "repeated acts of sexual assault of a child as charged in the information," which had charged Schultz with this crime during the timeframe of the "late summer to early fall of 2012." *Id.*

C. Schultz's Second Prosecution.

Five days after Schultz's acquittal, Officer Waid was informed by the Lincoln County Victim Service Coordinator that they had received the results of the paternity test showing that Alexander Schultz was the father of M.T.'s child. (App., *infra,* 8a). Officer Waid then obtained authorization from M.T. and her mother to contact M.T.'s obstetrician, who estimated the date of conception to be October 19, 2012. (App., *infra,* 9a). On March 11, 2014, forty-eight days after Schultz's acquittal, a second criminal complaint was filed in the circuit court of Lincoln County, Wisconsin,[5] charging Schultz with the sexual assault of a child under 16, namely M.T., "on or about October 19, 2012."[6] (App., *infra,* 9a).

Schultz moved to dismiss the sexual assault count on the grounds that it violated his constitutional protection against double jeopardy. *Id*. Schultz's argument, distilled to its essence, was that October 19, 2012, fell within the first thirty days after the fall equinox, that is within the first third of the fall season, or "early fall." *Id.* The circuit court denied Schultz's motion because it found that no evidence had been presented in the first prosecution of a sexual assault in October. (App., *infra,* 80a-81a). Based upon the testimony that was adduced at trial, the circuit court found that "late summer to early fall" meant July, August, and September, but not October. *Id*. If correct, for Schultz the "early fall" in 2012 lasted only eight days.

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5 Lincoln County, Wisconsin, Case No. 2014CF68.

6 Schultz was also charged with perjury before a court and obstructing an officer. Schultz ultimately pleaded guilty to the charge of perjury. The perjury conviction was not appealed. (App., *infra,* 10a).

Thereafter, Schultz pled guilty to the charge of sexual assault of child under 16, and was sentenced to a bifurcated ten-year prison term, consisting of five years initial confinement in prison, followed by five-years of extended supervision in the community. (App., *infra,* 10a). Schultz renewed his double jeopardy argument in a postconviction motion, which was also denied, and then appealed. *Id.*

The Wisconsin Court of Appeals took a slightly different approach from the circuit court, and began with a determination that the timeframe of "late summer to early fall of 2012" was "ambiguous." (App., *infra,* 67a). The Wisconsin Court of Appeals then concluded that where the timeframe is ambiguous, the court should determine the scope of jeopardy in light of the entire record of the proceedings, including testimony which was adduced at trial after jeopardy had attached. (App., *infra,* 67a-69). The Wisconsin Court of Appeals then found after its own examination of the record, relying heavily on testimony that was adduced during trial, that a "reasonable person familiar with the circumstances of [Schultz's] prosecution would not understand the phrase `early fall of 2012' to include any dates beyond September 30, 2012." (App., *infra,* 73a).

The Wisconsin Supreme Court granted Schultz' petition for review, and entered its own decision on March 4, 2020. (App., *infra,* 1a). It was a split decision with four justices in the majority, and three justices joining in a dissent.

The majority took a markedly different approach from either the circuit court or the Wisconsin Court of Appeals. In analyzing a double jeopardy claim the Supreme Court of Wisconsin held:

> The test to determine whether the earlier timeframe included the second is <u>not</u> what a

> reasonable person would think the earlier timeframe includes. Instead, the reviewing court ascertains the parameters of the offense for which the defendant was actually in jeopardy during the first proceeding by reviewing all of the evidence, testimony, and arguments of the parties.

(App., *infra,* 41a-42a; emphasis in the original).

In its examination of the record in Schultz's case the majority found "an unambiguous complaint." (App., *infra,* 25a-27a). While acknowledging that the term "early fall," standing alone, could be viewed as "ambiguous," the majority found that the police reports attached to the criminal complaint removed any ambiguity and made it "unambiguous" that the "early fall" in Schultz's case did not include the month of October. *Id.* The court further found that there was no evidence presented at trial of incidents of sexual assaults in the month of October. (App., *infra,* 28a-30a). Based upon this review of the record, the Wisconsin Supreme Court determined that Schultz was never in actual jeopardy for acts of sexual assault in the month of October, and that Schultz's double jeopardy protection was therefore not violated. (App., *infra,* 31a and 42a).

The majority rejected Schultz's assertion that the proper test is that found in *United States v. Olmeda*, 461 F.3d 271 (2d Cir. 2006). (App., *infra,* 34a-39a). In *Olmeda*, the Second Circuit Court of Appeals held that:

> 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.

Id. at 282. *Olmeda* further held that "[a]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language."

In rejecting the test found in *Olmeda,* the majority in Schultz's case wrote that "[t]he point at which jeopardy attaches has nothing to say about the actual scope of jeopardy." (App., *infra,* 16a-17a fn.13). For the majority, the only significance to the attachment of jeopardy, is that it will prevent a prosecutor from dismissing a case in mid-trial, only to refile the same charge in a second complaint. *Id.* The majority also rejected *Olmeda's* "reasonable person" test. (App., *infra,* 35a-39a). The majority noted that the Fifth Amendment does not include the word "reasonable," and determined that adopting a "reasonable person" standard into the analysis would be tantamount to inserting words into the constitutional text. (App., *infra,* 37a).

There was a dissent. (App., *infra,* 43a-59a). The dissent argued that "[w]hen asking whether a second charge is based on the same facts, the test is whether the facts alleged under the second complaint would, if proved, support a conviction under the first complaint." (App., *infra,* 43a). Applying this test, the dissent concluded that evidence of a sexual assault on October 19 would have supported a conviction for repeated sexual assault during the "late summer to early fall," and consequently, was of the opinion that Schultz's second prosecution violated his constitutional protection against double jeopardy. (App., *infra,* 44a and 51a).

The dissent noted that "the constitutional protection against double jeopardy features both front-end and back-end safeguards; that is, our double jeopardy cases examine whether the protection is secure both at the time an original complaint is filed and when a subsequent prosecution is brought." (App., *infra,* 44a). On the front end those safeguards entail a charging document which informs the defendant of the nature and

cause of the accusations against him, sufficient so that he can enter a plea, prepare a defense, and which will provide a bar against another prosecution for the same offense. *Id.* That includes advising the defendant when the crime is alleged to have occurred. Nonetheless, the dissent observed, in child sexual assault cases, owing to the "vagaries of a child's memory" in recalling specific dates, Wisconsin has come to view these front-end protections through a "more flexible lens." (App., *infra,* 44a-45a). Consequently, in Wisconsin "complaints alleging child sexual assault generally pass constitutional muster despite featuring more expansive and imprecise charging periods than other criminal offenses." *Id.*

"[T]his charging flexibility," the dissent wrote, "necessitates a counterbalancing assurance—that is, because the prosecution is held to a less-exacting standard for charging period precision, the defendant's protection against double jeopardy must be firmly and rigidly guarded." *Id.* Reviewing decisions from other jurisdictions, the dissent determined that a "rigid double jeopardy analysis" requires that a broad charging period must be paired with a "blanket bar" against future prosecutions for the same offense "unless the second charge is clearly separate and apart from the first." (App., *infra,* 48a and 50a). Further, that "vague allegations should likewise be coupled with a scope of jeopardy as broad as the charging language may be fairly read." *Id.*

Both the dissent and the majority agreed that the whole record may be consulted in order to determine the scope of jeopardy, but they differed as to how that information was to be applied. (App., *infra,* 52a). For the dissent, the key difference between their views "is that the majority draws on the record to establish a date certain that the State did not

delineate for what was actually a deliberately vague and imprecise charging period." (App., *infra,* 56a). Looking at the record in Schultz's first prosecution the dissent found that it was unclear at the time the trial commenced when the alleged sexual activities between M.T. and Schultz ceased. (App., *infra,* 52a). "Although the majority finds a date certain (mid-September) in the police report and testimony, that's not the charging period allegation." *Id.* The end-point in the charging allegation was "early fall." If the police report definitively excluded any conduct in the month of October; then why, asked the dissent, use that imprecise language? (App., *infra,* 54a). The answer was "[b]ecause that is the imprecise language witnesses used throughout the initial investigation, and undoubtedly the State hoped to capture the full array of evidence that could have emerged at trial to support a conviction." *Id.* "By casting a wider net, the State was empowered to present evidence of any and all acts occurring during the entire charging period that supported its charge of repeated sexual assault." (App., *infra,* 55a).

Returning to its original test, whether the facts alleged under the second complaint would, if proved, support a conviction under the first complaint, by reading the charging language "as broad as it can be fairly read," the dissent wrote:

> if the results of the paternity test showing an estimated conception date of October 19 had been presented at the first trial, that evidence would have supported a conviction for repeated sexual assault during the charging period without any need for the State to amend its complaint. The same would be true if M.T. testified that she and Schultz had sex through the middle of October—that is, testimony that merely days later would be proven true by way of the paternity test results.

Id. That being the case, the dissent concluded that the State's second prosecution for sexual assault of a child violated Schultz's constitutional protection against double jeopardy, and that the charge should have been dismissed. (App., *infra,* 58a).

REASONS FOR GRANTING THE PETITION

I. The decision below directly conflicts with a decision of a United States court of appeal, namely, *United States v. Olmeda*, 461 F.3d 217 (2d Cir. 2006).

In a narrow sense, the issue presented in this petition could have been phrased "does October 19th" land within the timeframe of "late summer to early fall"? Many dictionaries,[7] calendars,[8] almanacs,[9] and perhaps even the builders of Stonehenge,[10] would say yes. In year 2012, the interval between the fall equinox (September 22, 2012) and the winter solstice (December 21, 2012) was a period of ninety-one (91) days.[11] Thus, October 19, 2012 would have fallen on the twenty-seven (27) day of the fall, as astronomically defined; that is, within the first third of the 2012 fall season, or "early fall." In a very 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.

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[7] "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...." *Autumn. Dictionary.com Unabridged*. Random House, Inc., http:// www.dictionary.com/browse/autumn (accessed: June 23, 2020); *see also*, *Autumn*, Black's Law Dictionary (6th ed. 1990) ("Fall. One of the four seasons of the year, embracing in the Northern Hemisphere, the three months commencing with the 21st of September and terminating with the 20th of December. Autumn.").

[8] *Getting' Squirrelly 2020; 18-Month Calendar,* Willow Creek Press, 2020, (indicating that for the year 2020 the fall equinox will fall on September 22nd and the winter solstice will fall on December 21st).

[9] "In the Northern Hemisphere, the summer solstice marks the beginning of summer ... the autumnal equinox marks the beginning of autumn." *Why We Have Seasons,* The Old Farmer's Almanac at 119 (2020 ed.). Schultz's trial counsel cited the Old Farmer's Almanac for the proposition that in the year 2012, fall began around September 22nd and ended around December 21st.

[10] *See*, *Archaeoastronomy and Stonehenge*, Wikipedia, https://en.wikipedia.org/wiki/Archaeo astronomy_and_Stonehenge (accessed: June 23, 2020).

[11] *Solstices & Equinoxes for Appleton, Wisconsin (2000—2049). supra.*

Be that as it may, the Supreme Court of Wisconsin reckoned otherwise. In doing so, the Supreme Court of Wisconsin expressly rejected the test found in *United States v. Olmeda,* 461 F.3d 271 (2d Cir. 2006), for determining whether two charges are factually identical.[12] In *Olmeda*, the Second Circuit Court of Appeals held that:

> 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.

Olmeda, 461 F.3d at 282. *Olmeda* further held that "[a]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language." *Id.* at 283, *citing 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").

In *Schultz,* the Supreme Court of Wisconsin created a very different standard:

> The test to determine whether the earlier timeframe included the second is <u>not</u> what a reasonable person would think the earlier timeframe includes. Instead, the reviewing court ascertains the parameters of the offense for which the defendant <u>was actually in jeopardy</u> during the first proceeding by reviewing all of the evidence, testimony, and arguments of the parties.

(App., *infra,* 41a-42a; emphasis in the original). In so holding, the Supreme Court of

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[12] *Olmeda* has been cited with approval by the Fourth Circuit Court of Appeals, *United States v. Schnittker*, 807 F.3d 77, 82 (4th Cir. 2015), and by federal district courts, *see*, *United States v. Bruno*, 159 F.Supp.3d 311, 315 (E.D. N.Y. 2016); and *United States v. Gross*, 2017 WL 4685111, 33 (S.D. N.Y. Oct. 18, 2017); *United States v. Carpegna*, No. CR 08-14-M-DWM, 2008 WL 11449340 (D. Mont. Apr. 30, 2008); *United States v. Araujo*, No. 17-CR-438 (VEC), 2018 WL 3222527 (S.D.N.Y. July 2, 2018); *see also, United States v. Basciano*, 599 F.3d 184, 197 (2nd Cir. 2010).

Wisconsin rejected three distinct aspects of the *Olmeda* decision, each of which provides a key protection against successive prosecutions for the same offense.

First, *Olmeda* emphasized that the scope of jeopardy for the first prosecution must be analyzed "at the point at which jeopardy attached in the first case." *Olmeda*, 461 F.3d at 282. In a case with a jury trial, that point is when the jury is sworn. *Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); *State v. Moeck*, 2005 WI 57, 280 Wis.2d 277, 695 N.W.2d 783. The Supreme Court of Wisconsin rejected this component of *Olmeda* in its entirety, writing that "[t]he point at which jeopardy attaches has nothing to say about the actual scope of jeopardy," and declared the notion that the point at which jeopardy attaches in anyway delimits the scope of jeopardy is "fundamentally wrong." (App., *infra,* 16a-17a, fn. 13).

Second, the Court rejected the application of any standard of reasonableness in determining the scope of jeopardy. (App., *infra,* 35a-39a). *Olmeda* would tether the analysis to how "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." *Olmeda*, 461 F.3d at 282. The Supreme Court of Wisconsin expressly held that "[t]he test to determine whether the earlier timeframe included the second is <u>not</u> what a reasonable person would think the earlier timeframe includes." (App., *infra,* 41a; emphasis in the original)..

Finally the Court simply ignored *Olmeda's* holding that "[a]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language." *Olmeda*, 461 F.3d at 282. It did so,

incredibly, by finding that the term "early fall" was, in Schultz's case, actually "unambiguous." (App., *infra,* 25a-27a).

The majority opinion in *Schultz* untethered its double jeopardy analysis from each of these anchors. The result being that defendants who go trial in Wisconsin will now risk having their double jeopardy protections constructively narrowed to the evidence which is adduced at trial. (*See*, App., *infra,* 39a-41a and 98a, holding that the pleadings will be amended by operation of Wisconsin Statute section 971.29 to conform with the proof presented at trial).

But jeopardy is not simply the evidence which was adduced at trial; "jeopardy is '[t]he risk of conviction and punishment that a criminal defendant faces at trial.' See *Jeopardy*, Black's Law Dictionary (11th ed. 2019) (emphasis added)." (App., *infra,* 57a). Consequently, that "risk" should include not just the evidence the State actually presented at trial, but should include the evidence the State could have presented to secure a conviction. That is no longer the case in Wisconsin. About the Double Jeopardy Clause this Court has written "[f]or whatever else that constitutional guarantee may embrace, ..., it surely protects a man who has been acquitted from having to 'run the gantlet' a second time.'" *Ashe v. Swenson*, 397 U.S. 436, 445-46, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469 (1970) *quoting, Green v. United States*, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199 (1927); (internal citations omitted). Running the gantlet or gauntlet refers to a former method of punishment, chiefly military, in which the subject was made to run between two rows of men who struck at him as he passed."[13] Presumably when running the gantlet

[13] *Running the gauntlet*, Wikipedia, https://en.wikipedia.org/wiki/Running_the_gauntlet (accessed June 23, 2020)..

it would come to pass that some soldiers would fail to strike blows upon the subject which superiors might feel should have been struck. Nonetheless, custom was apparently not to make the subject run the gantlet twice. In Schultz's first prosecution evidence of a sexual assault on October 19th could have been presented at his trial in order to secure a conviction, but was not. That does not mean he did not run the gantlet.

II. The decision below is wrong

The *Schultz* decision presents two strikingly different interpretations of the protections provided by the Double Jeopardy Clause. For the majority, these protections extend no further than what the defendant was "actually in jeopardy during the first proceeding by reviewing all of the evidence, testimony, and arguments of the parties;" that is, the scope of jeopardy will be constructively narrowed to the evidence which was adduced at trial. (App., *infra,* 41a-42a and 57a).

For the dissent, the scope of double jeopardy protection is not limited to the evidence which was actually presented at trial, but includes "the evidence that could have been presented under the charge as brought." (App., *infra,* 57a). Hence, the test is whether the facts alleged under the second complaint would, if proved, support a conviction under the first complaint, by reading the charging language "as broad as it can be fairly read." (App., *infra,* 55a).

The dissent, adhering to basic principles found in *Olmeda*, would focus the analysis on the possibilities that existed at point when jeopardy attached, examine the record and the charging language according to a standard of reasonableness, and place the burden of any imprecision in the charging documents upon the State. The majority would not.

A. The decision below is wrong in holding that "the point at which jeopardy attaches has nothing to say about the actual scope of jeopardy."

The majority held that "the point at which jeopardy attaches has nothing to say about the actual scope of jeopardy." (App., *infra,* 16a-17a fn.13). But this Court has written far more expansively of the significance of the attachment of jeopardy; "the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." *United States v. Jorn*, 400 U.S. 470, 480, 91 S. Ct. 547, 555, 27 L. Ed. 2d 543 (1971).

The test in Wisconsin has long been "where the issue is whether the charges are identical in fact, double jeopardy is violated if the facts alleged under the second complaint would, if proved, support a conviction under the first complaint." (App., *infra,* 73a; J. Hagedorn, dissenting; *citing*, *Anderson v. State*, 221 Wis. 78, 87, 265 N.W. 210, 214 (1936); *State v. George*, 69 Wis. 2d 92, 98, 230 N.W.2d 253, 256 (1975); and *State v. Van Meter*, 72 Wis. 2d 754, 758, 242 N.W.2d 206, 208 (1976)).

This test was in accord with federal cases. *See, United States v. V. Castro*, 776 F.2d 1118, 1124 (3rd Cir. 1985) (the two offenses are the same "when the evidence required to support a conviction upon one of [the indictments] would have been sufficient to warrant a conviction upon the other."); *United States v. Roman*, 728 F.2d 846, 854 (7th Cir. 1984) ("[t]he defendant must show 'the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other' indictment.' ").

Implicit in this test is the notion that jeopardy in the first prosecution was not

limited to that evidence which was actually presented at the first trial, but extends to that evidence which could have been presented at trial. This standard is about potentialities, not actualities. To determine whether evidence in the second prosecution could have been presented in the first prosecution to secure a conviction, it is necessary to examine the scope of jeopardy *at the time jeopardy attached*, for that is the point at which all potentialities at trial are still in play. In Schultz's case, that comes down to the question: could evidence of sexual intercourse on the date of October 19th have been presented in his first prosecution in order to secure a conviction?

The dissent applied this test and concluded that evidence of sexual intercourse in the month of October could have been used to convict Schultz in his first prosecution. (App., *infra,* 55a). And the majority agreed! While the majority claimed to be applying the same test as the dissent, it also wrote that "[u]nremarkably, if the results of the pregnancy test had been presented at the trial, double jeopardy would foreclose the second prosecution...." (App., *infra,* 29a fn. 17, and again 35a-36a fn. 19). But this acknowledgement is actually quite remarkable, for if true, then October 19th must have been within the scope of jeopardy in the first prosecution when jeopardy attached. The admission that evidence of sexual intercourse on October 19th could be used to secure a conviction in the first prosecution cannot be squared with the majority's profession that it was applying the test in *Anderson, George,* and *Van Meter.*

The dissent spotted this error in the majority's analysis and wrote:

> The majority dismisses this as a hypothetical [the presentation of the paternity results in Schultz's first prosecution], and then says that if evidence of an October 19 sexual assault was introduced at the first trial, Schultz's second prosecution would be barred under double jeopardy. Majority op.,

> ¶37 n.17. This is true, but misses the point being made in this dissent. If the majority is correct that the ambiguous phrase "early fall" meant nothing beyond mid-September, then an effort by the State to introduce evidence of an October 19 sexual assault would have required amending the complaint. Why? Because that date, the majority concludes, was outside the original charging period.

(App., *infra,* 55a-56a).

Presenting evidence outside the charging timeframe would, of course, constitute a constructive amendment broadening the scope of the charging document, a fatal error, reversible per se. *Stirone v. United States,* 361 U.S. 212, 217, 80 S. Ct. 270, 273, 4 L. Ed. 2d 252 (1960). Consequently, recognizing this risk exists when imprecise timeframes are used in child sexual assault cases, the majority wrote that "we reaffirm a principle already established in cases involving child sexual assaults: the law does not require definitive dates in charging documents in such cases." (App., *infra,* 41a). And this is not an unreasonably position to take. The Second Circuit in *Olmeda* similarly recognized that prosecutions may in good faith plead charges using expansive language that includes "places or persons other than those specifically alleged are involved in the charged conduct, even if the particulars of those places or persons are not yet known." *Olmeda*, 461 F.3d at 284. And that is what the prosecution did in Schultz's case. Instead of alleging a definitive end-point date, such as "September 30," the State chose to allege the more imprecise "early fall" language in order "to capture the full array of evidence that could have emerged at trial to support a conviction." (App., *infra,* 54a). As the majority acknowledges, by using the imprecise "early fall" language the State availed itself the possibility of securing a conviction based on evidence of sexual intercourse on October 19th in the first prosecution.

However, if the State is allowed to plead imprecise and expansive language in order

to enjoy the full array of evidence which could emerge at trial, then the defendant should also receive a double jeopardy protection that is at least as expansive as the evidence which could have emerged at trial.[14] That requires an evaluation of the scope of jeopardy as it existed when jeopardy attached, when the full reach of the government's case was in play.

But that is not what the majority decided in *Schultz*. The majority would simultaneously allow imprecise and expansive timeframes in child sexual assault prosecutions, allowing the State to enjoy the full array of evidence which could emerge at trial, while also constructively narrowing the scope of double jeopardy protection to the evidence that was actually presented at trial. In short, the majority would allow the State a flexible due process analysis on the front-end, and subject the defendant to a constricting double jeopardy analysis on the back-end.

The majority devotes a considerable portion of its opinion driving home the point that the entire record of the first prosecution may be consulted in determining the scope of jeopardy. (App., *infra,* 18a-25a). But this point was not disputed by the parties. Clearly, the entire record may be consulted in determining the scope of jeopardy. *Olmeda*, 461 F.3d at 282 (the determination of whether two offenses are the same in fact "will require examination of the plain language of the indictments in the two prosecutions,

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[14] Indeed, prior to *Schultz*, that unquestionably was Wisconsin law. In *State v. Fawcett*, 145 Wis.2d 244, 255, 426 N.W.2d 91, 96 (Ct. App. 1988). the Wisconsin Court of Appeals held that the State enjoys considerable flexibility in charging the timeframe in child sexual abuse cases, but at the same time "[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."

as well as 'the entire record of the proceedings' "). And the dissent agreed, "examining the record is appropriate and necessary to determine the scope of jeopardy in certain circumstances. ... The parties in this case do not disagree on whether the record may be consulted; they simply part ways over how such information can be used." (App., *infra,* 52a fn. 6).

While caselaw clearly establishes that the entire record may be consulted in determining the scope of jeopardy, it provides little guidance as to how that record is supposed to be used in determining the scope of jeopardy in the first prosecution. To the petitioner's knowledge, *Olmeda* is the only federal case which provides specific guidance on how to determine if two successive prosecutions are factually identical. Namely, by (1) examining the record to determine how a reasonable person would have understood charging documents, (2) at the point when jeopardy attached, (3) while placing the burden resulting imprecise language upon the government, it being the party which drafted the charging documents.

For the majority, however, the double jeopardy analysis consists of little more than an examination of the evidence which was adduced at trial. The dissent identifies the problem with this approach:

> Problematically, the majority's approach in this case seems to endorse the idea that the scope of jeopardy is limited to and reduced by the evidence presented. But jeopardy is "[t]he risk of conviction and punishment that a criminal defendant faces at trial." *See Jeopardy, Black's Law Dictionary* (11th ed. 2019) (emphasis added). Here, that jeopardy attached when the jury was sworn. *State v. Moeck*, 2005 WI 57, ¶34, 280 Wis. 2d 277, 695 N.W.2d 783. Schultz was therefore at risk of conviction and punishment based not solely on the evidence presented at trial, but on the evidence that could have been presented under the charge as brought. On the other hand, if the scope of jeopardy is now defined simply by "the evidence, testimony, and arguments of the parties," nothing stops that definition from shrinking until it resembles only the evidence presented. Majority op., ¶55. That is not consistent with the protections provided by our state and federal constitutions.

(App., *infra,* 57a; emphasis in original). The dissent observed that the Second Circuit in *Olmeda* warned that double jeopardy protections are "threatened when broad or imprecise charging language is implicitly narrowed after the fact based on the lack of certain evidence." (App., infra, 57a-58a; *see also*, *Olmeda*, 461 F.3d at 287 n.15). The dissent wrote, "*Olmeda's* warning is aimed at exactly what the majority does here—not formal amendment, but constructively narrowing a charge based on evidence presented after jeopardy attaches."

It matters not that M.T. did not testify to having sexual intercourse with Schultz through the middle of October. The point is that she could have so testified, and Schultz's could have been convicted on that evidence. When jeopardy attached in the first case, Schultz was most certainly in jeopardy of conviction on such evidence. The majority is wrong, the attachment of jeopardy has everything to say about the scope of jeopardy.

B. The decision below is wrong in holding the analysis of double jeopardy claims is not subject to any standard of reasonableness.

The majority opinion rejected *Olmeda's* use of a reasonable person standard in determining whether successive prosecutions are factually identical. (App., *infra,* 35a-39a). It did so largely because the Double Jeopardy Clause of the Fifth Amendment does not contain the word "reasonable," and the majority felt adopting such a standard was tantamount to inserting words into the constitutional text. (App., *infra,* 37a). But "reasonable person" and "reasonableness" standards are hardly unknown to this Court's Fifth Amendment jurisprudence, or to constitutional law in general. "The concept of reasonableness pervades constitutional doctrine." Brandon L. Garrett, *Constitutional Reasonableness*, 102 Minn. L. Rev. 61, 61 (2017). Putting

aside the jurisprudence for the Fourth Amendment, which admittedly does contain the word "reasonable," we can find examples of reasonableness standards in many contexts in the Fifth Amendment,[15] the Sixth Amendment,[16] and the First Amendment.[17] You will search in vain for the word "reasonable" in the First, Fifth,

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[15] For Fifth Amendment jurisprudence, *see, Thompson v. Keohane,* 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383 (1995) ("Two discrete inquiries are essential to the [custody] determination [for Miranda purposes]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."); *Yarborough v. Alvarado*, 541 U.S. 652, 662, 124 S. Ct. 2140, 2148, 158 L. Ed. 2d 938 (2004) ("custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances); *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011) ("so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test); *F.C.C. v. Fox Television Stations*, *Inc*., 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited"); (emphasis added in preceding quotes).

[16] For Sixth Amendment jurisprudence, *see, Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness."; emphasis added).

[17] For First Amendment jurisprudence, *see, Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S. Ct. 2294, 2303, 33 L. Ed. 2d 222 (1972) ("Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted."); *Pope v. Illinois*, 481 U.S. 497, 500–01, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) (first amendment vagueness; imposing a reasonable person standard in the obscenity context.); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629, 104 S. Ct. 3244, 3256, 82 L. Ed. 2d 462 (1984) (The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *United States v. Kosma,* 951 F.2d 549, 556–57 (1991) (first amendment vagueness; imposing reasonable person requirement in the context of the presidential threat statute); *United States v. Orozco–Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990), *overruled on other grounds in United States v. Hanna*, 293 F.3d 1080 (9th Cir.2002) ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent of harm or assault."); *Am. Civil Liberties Union of Kentucky v. Mercer Cty., Ky*., 432 F.3d 624, 636 (6th Cir. 2005) ("Under the endorsement test, the government violates the Establishment Clause when it acts in a manner that a reasonable person would view as an endorsement of religion."); (emphasis added in preceding quotes).

and Sixth Amendments, and yet the jurisprudence is densely populated with "reasonable people." The argument that *Olmeda* articulated a standard which is contrary to the Constitution, simply because the word "reasonable" is not found in the text of the Fifth Amendment, is not persuasive.

Unless your objective is to constructively narrow the scope of jeopardy to the evidence which is actually presented at trial, any double jeopardy analysis of two successive prosecutions will, by necessity, have to resort to some standard of reasonableness. *Olmeda* held that standard to be "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." *Olmeda*, 461 F.3d at 282 (emphasis added). The dissent in *Schultz* would ask whether the facts alleged under the second complaint would, if proved, support a conviction under the first complaint, "by reading the charging language as broad as it can be fairly read." (App., *infra,* 56a; emphasis added). Both approaches would require an objective test which examines the charging language as broadly as that language could "fairly" or "reasonably" be read, at the moment jeopardy attached. By contrast, the majority in *Schultz* have created a standard which mechanically reduces the scope of double jeopardy to the evidence presented at trial. That is a standard which is both unfair and unreasonable.

C. The decision below is wrong in relieving the State of any burden resulting from the use of imprecise language in a charging document.

Olmeda wrote that "we 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, *citing*, *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir.1977) ("[a]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language").

That did not occur in *Schultz's* case. Instead, the majority avoided the issue, incredibly, by simply declaring that the State's timeframe of "the late summer to early fall" was "unambiguous." (See, App., infra, 3a fn. 2). But as the dissent observed, it is implicit in the majority's reasoning that the term "early fall" is ambiguous, (App., *infra,* 51a). "We can quibble over the descriptor for what the majority is doing, but there would be no need to explore the record to define an end date not chosen by the State if the complaint was clear on its face." *Id.* at fn. 5. Failing to recognize the ambiguity in the term "early fall" was essential for the majority, for that allowed the majority to ignore "the important principle … that the tie goes to the runner—in this case, the defendant. This is so because any imprecision in the phrase 'early fall' is a product of the pleading flexibility that allows vague charging language like this in the first place." (App., *infra,* 51a-52a).

Wisconsin has relaxed its pleading requirements for timeframes in child sexual assault cases, viewing such cases through a "more flexible" lens. *State v. Hurley*, 2015 WI 35, ¶34, 361 Wis. 2d 529, 861 N.W.2d 174, *quoting Fawcett*, 145 Wis. 2d at 254,

426 N.W.2d 91. This flexibility has been granted owing to the "vagaries of a child's memory," which is often unable to recall specific dates, but may be able to correlate instances of sexual abuse with events such as a holiday, a birthday, or school semesters. *Id.* Consequently, in Wisconsin "complaints alleging child sexual assault generally pass constitutional muster despite featuring more expansive and imprecise charging periods than other criminal offenses." (App., *infra,* 44a-45a; J. Hagedorn, *dissenting*).

In Wisconsin, this relaxation of the pleading requirements previously came with a promise that there will be a "rigid double jeopardy analysis" should the State seek to prosecute a defendant a second time for sexual assault of the same child during the same time frame. *Fawcett*, 145 Wis.2d at 255, 426 N.W.2d at 96. Other jurisdictions, have recognized a similar dynamic in cases involving broad and vague charging language; holding that relaxed pleading requirements in child sexual assault cases should be balanced by a rigid double jeopardy analysis should the State seek to prosecute a defendant for a second time. [18]

[18] The dissent cited the following cases as examples, *State v. D.B.S.*, 216 Mont. 234, 240, 700 P.2d 630, 635 (1985) (explaining, in reference to a charging period of "January 1, 1983 to October 28, 1983," that less charging period specificity required in cases involving sexual abuse of a child but also that double jeopardy concerns are alleviated because "[t]he State is barred by [the state constitution] from retrying the defendant for the offense to this particular victim during the time in question"), overruled on other grounds by *State v. Olson*, 286 Mont. 364, 951 P.2d 571, 577 (1997); *State v. Lakin*, 128 N.H. 639, 517 A.2d 846, 847 (1986) (explaining that the broad timeframe alleged in a sexual assault does not implicate fear of the possibility of double jeopardy because "[c]ourts may tailor double jeopardy protection to reflect the scope of the time period charged in an earlier prosecution"); *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680, 695 (1989) ("Because of the scope of the indictment in this case, the state would not be permitted in the future to charge defendant with any sexual offenses involving his two children during the time encompassed by the counts in the indictment."); *State v. Wilcox*, 808 P.2d 1028, 1030, 1033–34 (Utah 1991) (explaining, in reference to charging period of "on or between January, 1985, and September 4, 1987," that although less charging period specificity is required when young children are involved, "[o]nce a prosecutor chooses to prosecute on such vague allegations, a necessary quid pro quo under our

As to what a "rigid double jeopardy analysis" would look like, the dissent in *Schultz* pointed to two cases for specific guidance, *State v. Martinez*, 250 Neb. 597, 601, 550 N.W.2d 655, 658 (Neb. 1996), and *State v. Hebert*, 448 A.2d 322, 326 (Me. 1982). In *Martinez,* the Nebraska Supreme Court wrote that "[u]nless the offense charged in the second prosecution is clearly separate and apart from the offense charged in the first prosecution, the timeframe alleged in the first prosecution acts as a 'blanket bar' for subsequent prosecutions." (emphasis added). In *Herbert*, the Maine Supreme Court wrote that:

> It is clear, however, that when a defendant is placed in jeopardy under a valid indictment, he or she may not thereafter be placed in jeopardy for any offense of which he properly could have been convicted under that indictment. The scope of jeopardy created by an indictment is therefore as broad as that indictment may be fairly read. The ambit of the constitutional bar to subsequent prosecution is co-extensive with the scope of jeopardy created in the prior prosecution.

(emphasis added).

Reviewing the caselaw from other jurisdictions, the dissent in *Schultz* concluded that "[w]hen imprecise allegations are considered for double jeopardy purposes; any imprecision must be read at its broadest to ensure that the subsequent offense is clearly separate and apart. This guarantees that the State's pleading flexibility is not acting as both a sword and a shield against the defendant." (App., *infra,* 49a).

The dissent in *Schultz,* and the Second Circuit in *Olmeda*, are correct in placing the burden for any imprecision in the charging documents upon the State. That is

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constitutional notice provision is that to protect the defendant from double jeopardy, the prosecutor should be precluded from bringing further charges that fall within the general description of the charging allegations"); *and see, People v. LaPage*, 53 A.D.3d 693, 694–95, 860 N.Y.S.2d 329 (N.Y. App. Div. 2008) (finding child sex offense charging period of "late summer or early fall of 2006" provided constitutionally sufficient notice)

especially true in cases of child sexual assault. Jurisdictions across the nation have afforded prosecutors greater flexibility when alleging timeframes in child sexual assault cases. And rightly so, for these are indeed unique cases where the victims are often unable to give a precise date to the crime, but may be able to correlate instances of sexual abuse with events such as a holiday, a birthday, school semesters, or even the seasons. But that flexibility on the front-end, must come with a "rigid double jeopardy analysis" on the back-end. The dissent put it succinctly:

> Where that relaxed standard leads to expansive and imprecise allegations, the State must be held responsible for any flexibility it exercises when those same allegations are considered from a double jeopardy perspective. This means a broad charging period must be paired with a blanket bar on subsequent prosecutions involving the same victim and the same timeframe. And vague allegations should likewise be coupled with a scope of jeopardy as broad as the charging language may be fairly read.

(App., *infra,* 50a).

III. The question presented is important, and this case presents an ideal vehicle for deciding it.

How do you determine the scope of jeopardy when the State uses an imprecise timeframe? And what burden, if any, does the State bear for using an imprecise timeframe in its charging documents? For that matter, how do you determine the scope of double jeopardy protection in any situation? It is curious that this Court has had so little to say on the matter given how fundamental these issues are to the Double Jeopardy Clause. These issues are important, and this Court should address them.

In one respect this case is somewhat unique. As one delves into the double jeopardy jurisprudence, you find there are few cases in which a defendant has actually gone to trial, been acquitted, and then is prosecuted a second time, in the

same court, for what was arguably the same offense.[19] Instead what you tend find are multiplicity cases,[20] cases where the defendant was challenging the sufficiency a charging document,[21] second prosecutions after a conviction,[22] cases where there was a variance between the indictment and the evidence at trial,[23] and conspiracy cases.[24]

Schultz presents that rare case in which the defendant actually "ran the gantlet," and was then forced to "run the gantlet" a second time. That in itself makes this case a better vehicle than most of the cases which have preceded it. Beyond that, the facts in this case (unlike most conspiracy cases) are at once simple and yet confounding. There are two timeframes presented here. The second timeframe was precise, "on or

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[19] Of the cases cited in *Schultz* decision, only two involved a second prosecution after an acquittal. *Anderson v. State*, 221 Wis. 78, 265 N.W. 210 (1936) (finding a charge of embezzlement on October 20, 1932 was not factually identical to an earlier charge of embezzlement on August 1, 1932, for which Anderson was acquitted); and *United States v. Crumpler*, 636 F. Supp. 396 (N.D. Ind. 1986) (Crumpler moved to dismiss an indictment charging conspiracy to engage in drug smuggling in Indiana, after his acquittal on an indictment charging conspiracy to engage in drug smuggling in Florida. The court found the defendant failed to show the government was impermissibly splitting a single overarching conspiracy). Neither case involved imprecise language in the charging documents.

[20] *E.*g., *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009); In Wisconsin, *see e.g., State v. Sauceda*, 168 Wis. 2d 486, 485 N.W.2d 1 (1992).

[21] *E.g.*, *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984); In Wisconsin, *see e.g., State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988).

[22] Notably, *United States v. Olmeda*, 461 F.3d 271 (2d Cir. 2006) (a reasonable person would have understood defendant's earlier guilty plea to ammunition possession during same month "within the Eastern District of North Carolina and elsewhere" to also cover possession of ammunition in New York during the same month); In Wisconsin, *see e.g., State v. Stevens*, 123 Wis. 2d 303, 367 N.W.2d 788 (1985) (holding offenses were not the same in fact because they were separated by a significant period in time).

[23] *E.g.*, *United States v. V. Castro*, 776 F.2d 1118 (3d Cir. 1985); *United States v. Hamilton*, 992 F.2d 1126 (10th Cir. 1993).

[24] In conspiracy cases the double jeopardy issue will often revolve around whether the successive prosecutions involved separate conspiracies, or a single overarching conspiracy. *E.g.*, *United States v. J. Castro*, 629 F.2d 456 (7th Cir. 1980); *United States v. Vasquez-Rodriguez*, 978 F.2d 867 (5th Cir. 1992).

about October 19th". The first timeframe was anything but; "Late summer to early fall." What exactly does that mean? How should such a phrase be evaluated in the context of a double jeopardy challenge to a second prosecution? Who should bear the burden arising from the imprecision in this language?

Finally, this was a case involving a child sexual assault. As stated above, jurisdictions across the country have relaxed the pleading requirements in these cases, particularly with regard to timeframe allegations. This flexibility has, and will in the future, result in timeframes being alleged which are expansive and imprecise. That has resulted in "profound tensions" between the government's need for pleading flexibility in these unique cases, and the constitutional rights of the accused. *Martinez*, 250 Neb. at 601, 550 N.W.2d at 658. If such is to be the practice in our courts, then the government's greater pleading flexibility needs to be balanced by a "rigid double jeopardy analysis." *Fawcett,* 145 Wis.2d at 255, 426 N.W.2d 91. The *Schultz* case provides an ideal vehicle for this Court to provide guidance as to what a "rigid double jeopardy analysis" should look like.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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