92-0926

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 92-0926-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MICHAEL J. KURZAWA,

Defendant-Appellant.

On Petition For Review Of A Decision Of The Court Of Appeals, District II, Reversing The Order Of The Circuit Court For Walworth County, The Honorable James L. Carlson, Presiding

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BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed on or about April 29, 1989, Michael Kurzawa was charged in Milwaukee County Circuit Court with two counts of embezzling more than $2,500 in violation of Wis. Stat. §§943.20(1)(b) & (3)(c). The basis for the charges was that, between May, 1983 and March, 1986, Mr. Kurzawa illegitimately obtained over $96,000 from the Greater Milwaukee Bank checking accounts of Drs. Robert and Clarice Beckes by writing and cashing unauthorized checks to himself on those accounts (S.App.

1-2; R6:1-2 & Exh. A).[1]

On September 24, 1990, the Milwaukee County case against Mr. Kurzawa proceeded to jury trial on an amended information charging him with two counts of felony theft by fraud in violation of Wis. Stat. §§943.20(1)(d) & (3)(c) (S.App. 2; R6:2 & Exh. B). To prove the allegations of theft, the state relied upon Mr. Kurzawa's alleged withdrawal of the complainants' funds by writing a number of checks to himself on their accounts, forging their names as the drawers of the checks, and cashing the checks. At trial the state presented evidence which, when taken in the light most favorable to the state, established the following conduct:[2]

a. From the late 1970's through March, 1986, Dr. Robert Beckes, a surgeon, and his wife, Dr. Clarice Beckes, a dentist, conducted separate professional practices in Milwaukee County, Wisconsin, although they operated their offices together.

b. Proceeds from the Beckeses' practices were deposited in checking

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[1] Throughout this brief, reference to the record will take the following form: (R__:__), with the "R__" reference denoting the record document number and the following ":__" reference denoting the page number of the document. Where the referenced material is contained in the Supplemental Appendix, it will be further identified by Appendix page number as "S.App. __." References to the exhibits to the stipulation (R6) will take the form "Exh. __."

[2] Although Mr. Kurzawa vigorously contested a number of these allegations at the trial (see generally, R6 Exh. D at 15-35), only the state's theory and the conduct which it relied upon are of relevance here.

accounts held in their separate personal and business names at the Greater Milwaukee Bank, located in Milwaukee County, Wisconsin.

c. From the late 1970's through March, 1986, Michael J. Kurzawa was retained by the Beckeses as an accountant and financial manager in connection with their professional practices. Michael Kurzawa's duties allowed him to have access to and control over the professional checking accounts of the Beckeses.

d. Michael Kurzawa conducted his business as an accountant and financial manager for the Beckeses' professional practices both on location at their office in Milwaukee County and at his office in Walworth County, Wisconsin.

e. Between a date prior to May, 1983 and the end of March, 1986, Mr. Kurzawa wrote a number of checks to himself or his business on the Beckeses' business accounts, forging their names as the drawers of the checks. These checks included the same checks which are set forth in Walworth County Case No. 91-CR-378, Counts 1 through 54. Those checks were presented for cashing by the defendant, resulting in money being taken from the Beckeses' accounts held at the Greater Milwaukee Bank.

f. Neither Dr. Robert Beckes nor Dr. Clarice Beckes gave the defendant permission to make the checks, to sign their names to the checks, to present the checks for cashing or to take the money represented by the checks from their accounts held at the Greater Milwaukee Bank.

(S.App. 2-4; R6:2-4).

In his opening statement, the prosecutor summarized his theory and the conduct of Mr. Kurzawa upon which he would rely:

> [O]ver the past several years Michael Kurzawa was writing checks on both of their accounts and withdrawing funds from their accounts without their knowledge and their permission.

(R6 Exh. D at 13).

On September 28, 1990, the trial court, Honorable William D. Gardner, presiding, granted Mr. Kurzawa's motion for a judgment of acquittal and judgment was entered accordingly (S.App. 4; R6:4 & Exh. C).

On or about April 10, 1991, the District Attorney for Walworth County filed a criminal complaint in the present case, charging Mr. Kurzawa with 54 counts of uttering a forged writing in violation of Wis. Stat. §943.38(2) (R1). Each count refers to Mr. Kurzawa's alleged uttering as genuine of a forged check drawn on the Greater Milwaukee Bank checking account of either Clarice or Robert Beckes. Evidence of Mr. Kurzawa's alleged forgery and uttering of each of the 54 checks which form the bases for the charges in the present case was included in the state's proof of Mr. Kurzawa's alleged theft by fraud in the prior Milwaukee County case (S.App. 3; R6:3).

At trial in the present case, the state intends to present evidence which, when taken in the light most favorable to the state, will establish the following conduct:

a. From the late 1970's through March, 1986, Dr. Robert Beckes, a surgeon, and his wife, Dr. Clarice Beckes, a dentist, conducted separate professional practices in Milwaukee County, Wisconsin, although they operated their offices together.

b. Proceeds from the Beckeses' practices were deposited in checking accounts held in their separate personal and business names at the Greater Milwaukee Bank, located in Milwaukee County, Wisconsin.

c. From the late 1970's through March, 1986, Michael J. Kurzawa was retained by the Beckeses as an accountant and financial manager in connection with their professional practices. Michael Kurzawa's duties allowed him to have access to and control over the professional checking accounts of the Beckeses.

d. Michael Kurzawa conducted his business as an accountant and financial manager for the Beckeses' professional practices both on location at their office in Milwaukee County and at his office in Walworth County, Wisconsin.

e. Between a date prior to May, 1983 and the end of March, 1986, Mr. Kurzawa wrote a number of checks to himself or his business on the Beckeses' business accounts, forging their names as the drawers of the checks. These checks included the checks which are set forth in Counts 1 through 54 of this information.

f. Mr. Kurzawa presented the checks set forth in Counts 1 through 54 of the information for cashing or deposit into accounts held in his name at the Walworth State Bank in Walworth County, Wisconsin.

g. Neither Dr. Robert Beckes nor Dr. Clarice Beckes gave the defendant permission to make the checks, to sign their names to the checks, or to present the checks for cashing anywhere.

(S.App. 5-6; R6:5-6).

On October 18, 1991, Mr. Kurzawa filed with the Circuit Court a Motion to Dismiss: Double Jeopardy (R4). The parties fully briefed the issues involved in this motion (R5, 7 & 8). No evidentiary hearing was held as the relevant facts were stipulated to by the parties (see S.App. 1-7; R6 & Exh. A-H).

On April 1, 1992, the trial court entered its decision denying Mr. Kurzawa's motion to dismiss (R9). The Court entered its written Order denying that motion on April 8, 1992 (R10).

The Court of Appeals granted Mr. Kurzawa's Petition for Leave to Appeal Non-Final Order (R11). Following full briefing, oral argument, and a failed attempt to certify the case to this Court, the Court of Appeals reversed the order of the trial court. The Court of Appeals remanded with directions to dismiss the criminal complaint on the grounds that the Walworth County prosecution following the acquittal in Milwaukee County denied Mr. Kurzawa his right to be free from double jeopardy. State v. Kurzawa, 173 Wis. 2d 769, 496 N.W.2d 695 (Ct. App. 1993).

ARGUMENT

CONTINUED PROSECUTION OF THIS CASE VIOLATES MR. KURZAWA'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

The Court of Appeals properly analyzed the issues as required by controlling United States Supreme Court precedent. Consistent with that precedent, the Court accurately determined that continued prosecution of Mr. Kurzawa on the Walworth County charges would violate his constitutional rights to be free from double jeopardy. Each issue raised by the state's brief is controlled by clear and binding precedent of the United States Supreme Court. The same legal precedent which constrained the Court of Appeals to rule as it did likewise binds this Court. See U.S. Const., Art. VI (Supremacy Clause).

A. The Significant Additional Interests At Stake In Successive Prosecutions Mandate Greater Double Jeopardy Protections Than In Single Prosecution Cases.

The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. It is enforceable against the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). See also Wis. Const., Art. I, §8(1) ("no person for the same offense may be put twice in jeopardy of punishment").

The Double Jeopardy Clause embodies three protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted); see Grady v. Corbin, 495 U.S. 508, 516 (1990). These three aspects of double jeopardy protection implicate different concerns and values.

1. The Interests At Stake.

The Supreme Court has described the dangers of multiple prosecutions as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity... .

Green v. United States, 355 U.S. 184, 187 (1957). That court has also noted that multiple prosecutions "give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged." Grady, 495 U.S. at 518 (citations omitted); see United States v. Scott,

437 U.S. 82, 91 (1978).

The defendant is not the only victim of multiple prosecutions. The same concerns for judicial efficiency and finality which underlie the principles of res judicata and collateral estoppel suffer from the misallocation of resources that attends successive prosecutions.

> In addition, successive prosecution exacts a substantial toll from the criminal justice system. Successive prosecutions generate the appearance of unjust oppression and persecution, thereby demeaning the justice system. They also generate dollar cost by investing governmental funds in arguably repetitive prosecutions.

Poulin, Double Jeopardy Protection Against Successive Prosecutions In Complex Criminal Cases: A Model, 25 Conn. L. Rev. 95, 117 (1992); see Poulin, Double Jeopardy: Grady and Dowling Stir The Muddy Waters, 43 Rutgers L. Rev. 889, 910 (1991) ("Double Jeopardy").

When balanced against these individual and societal interests, the prosecution's interest in reprosecution is minimal at best. Once the state has received one full and fair opportunity to prove its case,[3] the attempted reprosecution reflects nothing more than prosecutorial

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[3] Indeed, the Double Jeopardy Clause grants more weight to the defendant's interests even when the state has not received one full and fair opportunity. See, e.g., State v. Copening, 100 Wis. 2d 700, 303 N.W.2d 821, 826-27 (1981) (Double Jeopardy Clause bars reprosecution following mistrial not supported by "manifest necessity").

dissatisfaction with the initial result, whether an "erroneous" acquittal or an "insufficient" sentence following a conviction. In the one case, the prosecutor is dissatisfied with the results of the trial; in the other, he or she is dissatisfied with the trial court's sentencing decision. In either event, the prosecutor's interest in unilaterally trumping the decision of the original trial court is not worthy of recognition by this Court.

The values underlying the ban on multiple punishments in a single proceeding are not nearly so extensive as those supporting the ban on successive prosecutions:

> [T]he ban on successive prosecutions is necessary to protect the integrity of an acquittal, prevent harassment of defendants through repetitive litigation, and preclude an unauthorized second punishment when the first trial ends in a conviction.
>
> The prohibition of multiple punishments in a single proceeding is based on only the last of these values. Preventing multiple punishments does not protect the integrity of an acquittal because multiple punishment in a single proceeding necessarily flows from multiple convictions. The existence of a single conviction represents a judgment that the defendant is guilty, and the second conviction carries no additional risk of convicting an innocent person. There is obviously no repetitive litigation, and thus no harassment. Multiple convictions in a single trial, therefore, do not imperil the first two values.

Thomas, The Prohibition of Successive Prosecutions For The Same Offense: In Search Of A Definition, 71 Iowa L. Rev.

323, 341 (1986) ("Successive Prosecutions"); see Poulin, Double Jeopardy, 43 Rutgers L. Rev. at 907-08.

2. The Applicable Double Jeopardy Analysis.

Because these three aspects of double jeopardy protection implicate different concerns and values, they also operate differently. In the single prosecution situation, the defendant's interest in avoiding improper multiple punishment is protected by an analysis of legislative intent. See, e.g., Missouri v. Hunter, 459 U.S. 359, 366 (1983). "In that context, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" Grady, 495 U.S. at 516-17, quoting Hunter, 459 U.S. at 366. Under such circumstances, the so-called Blockburger test applies. See Blockburger v. United States, 284 U.S. 299 (1932). Under Blockburger, the Court must analyze whether the statutory definition of each offense "requires proof of a fact which the other does not." Id. at 304.

This Court applies a slightly more protective analysis for deciphering legislative intent in single prosecution situations than that in the strict Blockburger formulation:

> In order to effectively protect the double jeopardy interests of the defen-

> dant, Wisconsin utilizes a two-fold analysis to determine whether multiple punishments may be imposed upon the defendant. The first component of the test for multiplicity involves the application of the Blockburger "elements only" test... . If each charged offense is not considered a lesser included offense of the other, then this court shall presume that the legislature intended to permit cumulative punishments for both offenses... . The second component of the multiplicity test involves an inquiry into other factors which would evidence a contrary legislative intent.

State v. Sauceda, 168 Wis. 2d 486, 485 N.W.2d 1, 4-5 (1992) (citations and footnote omitted).[4]

The Blockburger/Sauceda analysis, however, does not take into account the significant additional double jeopardy interests at stake in the successive prosecution situation. "The Blockburger test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." Grady, 495 U.S. at 517 (footnote omitted), quoting Hunter, 459 U.S. at 366. Successive prosecutions, however, "raise concerns that extend beyond merely the possibility of an enhanced sentence." Grady, 495 U.S. at 518. Thus, "[e]ven when a state can bring multiple charges against an

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[4] Certain dicta in State v. Grayson, 172 Wis. 2d 156, 493 N.W.2d 23, 25 n.3 (1992), suggests that only the first step in Sauceda implicates double jeopardy, citing State v. Rabe, 96 Wis. 2d 48, 69, 291 N.W.2d 809 (1980). United States Supreme Court cases since Rabe, however, have held to the contrary. See Hunter, 459 U.S. at 367-68; Albernaz v. United States, 450 U.S. 333, 344 (1981).

individual under Blockburger, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding." Id. at 519.

Given the significant additional interests at stake in the successive prosecution situation, the Double Jeopardy Clause mandates additional protections. Even if a successive prosecution is not for the same offense as a prior prosecution under the Blockburger/Sauceda analysis,

> the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.

Grady, 495 U.S. at 521 (footnotes omitted). See also State v. Harris, 161 Wis. 2d 758, 469 N.W.2d 207 (Ct. App. 1991), rev. denied, 473 N.W.2d 504 (1991).

Where, as here, the prosecution for the lesser crime follows that of the greater, the second step of the Grady analysis is adjusted accordingly:

> Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense.

Grady, 495 U.S. at 521 n.11. This "obvious corollary" of

the analysis set forth in the text in Grady, see State v. Woodfork, 478 N.W.2d 248, 252 (Neb. 1991), necessarily flows from the principle that whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser offense. Brown v. Ohio, 432 U.S. 161, 169 (1977). See also Anderson v. State, 221 Wis. 78, 86-87, 265 N.W. 210 (1936) ("The defense of jeopardy cannot depend on the mere circumstance of the order of the trial of the two actions").[5]

The state's brief exhibits some confusion concerning when proof of conduct in one prosecution may be deemed "necessar[y]" under Grady. State's Brief at 23-24, 36-40. Application of the Double Jeopardy Clause turns not on the theoretical necessity of particular evidence, but rather on whether the defendant in fact was prosecuted for the same conduct in separate proceedings. See United States v. Felix, 112 S.Ct. 1377, 1383 (1992). In Grady, for instance, the state sought to rely upon three forms of conduct to establish elements of the homicide and assault charges, i.e., the defendant's driving while intoxicated,

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[5] The state argued in the trial court (R7) and in the Court of Appeals that Grady applies only if the smaller offense was tried first. Given Grady's express statement and the other direct authority to the contrary, the state understandably abandons that argument before this Court. Nonetheless, it still alleges confusion despite the clarity of this point of law. See State's Brief at 18-20.

his failure to keep right of the median, and his driving at an excessive speed. 495 U.S. at 523. Because he had previously been convicted of driving while intoxicated and failure to keep right, the Supreme Court held that the state's reliance on such conduct would violate Grady's double jeopardy rights. The Court noted, however, that its holding would not bar the prosecution were the state to rely solely upon conduct other than that for which he previously was prosecuted. Id. Thus, use of the previously prosecuted conduct would have violated the Double Jeopardy Clause even though such use would not have been necessary to the homicide and assault prosecution, the prosecutor having other conduct upon which to rely.

Of course, "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." United States v. Felix, 112 S.Ct. 1377, 1383 (1992) (footnote omitted). The defendant is prosecuted only for his or her offense conduct. See id. The conduct at issue in Grady's "same conduct" analysis thus is the defendant's conduct which directly constitutes the offense with which he or she is charged.

In contrast, a defendant is not prosecuted for his or her "other acts," evidence of which may be used to prove something other than the defendant's offense conduct, see Fed. R. Evid. 404(b); Wis. Stat. §904.04(2).

Proof of such "other acts" thus is not "necessar[y]" in terms of the Grady footnote and use of evidence of that conduct is not prosecution for that conduct. Compare Grady, supra (defendant's prior convictions for crossing median and drunk driving bar use of such conduct in subsequent prosecution for criminally negligent homicide and assault resulting from the same acts) with Dowling v. United States, 493 U.S. 342 (1990) (evidence that defendant committed prior robbery admissible in subsequent prosecution for different robbery on issue of identity under Fed. R. Evid. 404(b), despite acquittal on prior robbery). The issue thus is whether the conduct is offered as part of the offense itself, in which case double jeopardy applies, or merely as circumstantial evidence of intent, knowledge, plan, etc., in which case Double Jeopardy does not apply. See Felix, 112 S.Ct. at 1383 (fact that government used evidence of Oklahoma drug offenses to prove defendant's criminal intent with respect to a separate transaction in Missouri did not bar subsequent prosecution for Oklahoma offenses).

The Grady analysis applies regardless whether the defendant was acquitted or convicted in the first prosecution. Grady, 495 U.S. at 518; United States v. Calderone, 917 F.2d 717, 720 (2d Cir. 1990), vacated and remanded on other grounds, 112 S.Ct. 1657 (1992); Poulin, Double Jeopardy, 43 Rutgers L. Rev. at 930; Thomas, A Modest

Proposal To Save The Double Jeopardy Clause, 69 Wash. U.L.Q. 195, 201 (1991). Indeed, Professor Poulin observes that, although Grady involved a prior conviction, the defendant's interests in the post-acquittal situation are even stronger. Poulin, Double Jeopardy, 43 Rutgers L. Rev. at 897-900, 907-10; see also Scott, 437 U.S. at 91 ("[T]he law attaches particular significance to an acquittal"). The double jeopardy bar likewise applies regardless whether the prior verdict of acquittal was returned by a jury or directed by the trial court as in this case. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

Finally, when, as here, "'a defendant puts double jeopardy in issue with a non-frivolous showing that an [information] charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses.'" Grady, 495 U.S. at 522 n.14, quoting United States v. Ragins, 840 F.2d 1184, 1192 (4th Cir. 1988).

B. Application Of The Double Jeopardy Analysis For Successive Prosecutions Mandates Dismissal.

As the Court of Appeals aptly determined, application of the Grady analysis to the present facts is a simple matter. Given the differing statutory elements, uttering a forged instrument is not a lesser included

offense of theft by fraud under the Blockburger/Sauceda analysis. See Kurzawa, 173 Wis. 2d at 775-76 n.6. Nor has counsel found any compelling evidence of legislative intent to bar simultaneous prosecution for theft and uttering. Cf., 1951 Wis. Sen. Bill No. 784, Legislative Council Comment at 105 ("Forgery is, basically, an attempt to steal, i.e., to obtain property by means of deceit; but it is considered serious enough to warrant punishing it as a separate crime").

Nonetheless, the Court of Appeals properly concluded that this prosecution fails the second test under Grady because the state's evidence in the theft by fraud case, if believed, "necessarily ... proved the conduct comprising all of the elements of" the present charges. Grady, 495 U.S. at 521 n.11. Indeed, the stipulation demonstrates that the state intends to rely on exactly the same conduct in this case as it did in the first trial. Compare Stipulation §I, ¶4 with id. §II, ¶1 (S.App. 2-6; R6:2-6).

The Walworth County prosecution for uttering is based upon exactly the same conduct which the state had hoped would prove Mr. Kurzawa guilty in the Milwaukee theft case. As the state summarized its allegations of the offense conduct in the theft case, "Michael Kurzawa was writing checks on both [the Beckeses'] accounts and withdrawing funds from their accounts without their know-

ledge and their permission." (R6 Exh. D at 13). The state now simply wants to rely on a different legal characterization of that same conduct.

The state's theory in the theft by fraud case was that the false representation consisted of the defendant's unauthorized signing of the complaining witnesses' names to checks written out to himself and his submission of those checks as authentic for payment, the exact offense charged here. The knowledge element is the same in each case. Thus, to prove its case, the state in the theft by fraud prosecution presented evidence concerning every element of the charge of uttering a forged instrument with regard to every check set forth in the present case. In other words, the conduct relied upon to prove the false representation and knowledge elements of the theft by fraud charge likewise comprises all of the elements of the current uttering offenses. See Grady, 495 U.S. at 521 n.11. Proof of the component acts of uttering was absolutely necessary to the state's theory in the prior case.

The chart used by the Court of Appeals in State v. Harris, 469 N.W.2d at 209, helps further illustrate the point:[6]

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[6] The original headings for columns A and B in Harris, i.e., "First Prosecution" and "Second Prosecution" are altered to reflect that it is irrelevant for double jeopardy purposes whether the greater or the lesser offense is prosecuted first. See Brown, 432 U.S. at 169.

	(A) PROSECUTION FOR "LESSER" OFFENSE	(B) PROSECUTION FOR "GREATER" OFFENSE	(C) CONDUCT OFFERED TO PROVE (B)	(D) WILL CONDUCT (C) PROVE ESSENTIAL ELEMENT OF (A)
CORBIN:	operate auto across median	homicide; assault	operate auto across median	YES
CORBIN:	operate auto while intoxicated	homicide; assault	operate auto while intoxicated	YES
HARRIS:	operate auto while revoked	operate auto without consent	operate auto without consent	NO
POVEDA:	operate auto without consent	auto theft	operate auto without consent	YES
KURZAWA:	knowingly uttering forged checks as genuine	theft by fraud	knowingly uttering forged checks as genuine	YES

Of course, the state will seek to focus more specifically in the present case upon Mr. Kurzawa's presentation of the checks for cashing or deposit into accounts held in his name at the Walworth State Bank in Walworth County, Wisconsin (R6:6; S.App. 6), while the state needed only to prove in the theft case that "[t]hose checks were presented for cashing by the defendant," with the result that money was taken from the Beckeses' accounts (R6:3-4; S.App. 3-4). As such, the state seeks merely to be a bit more precise with regard to its presentation in the present case. The actual conduct

relied upon by the state, however, i.e., the uttering of the forged checks knowing them to be false, remains the same.[7]

The identity of the entity to which the defendant uttered the checks, while relevant in terms of notice to the defense and evidentiary issues, is not an element of the offense of uttering a forged writing. See Wis. J.I. -- Crim. 1492. It is mere evidentiary detail irrelevant to the issue at hand. What is relevant is that the state's theft by fraud case relied upon the defendant's conduct in cashing the checks in question and thus necessarily uttering them as genuine.

Relying solely on "[c]ommon sense" the state baldly asserts that the alleged uttering of forged instruments is not the same thing as theft. State's Brief at 38. On the facts here, the state is plainly wrong. See Kellett v. State, 577 So. 2d 915, 922 (Ala. Crim. App. 1990) (Bowen, J., concurring) (under Alabama's conduct-based lesser included offense analysis, possession or uttering of forged instruments is a lesser included offense of theft by deception based on the use of the forged instrument to deceive and to deprive the owner of its property), cert. denied, 577 So. 2d 922 (Ala. 1991); cf., Ex Parte Oliver, 518 So. 2d 705 (Ala. 1987) (on facts of

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[7] Mr. Kurzawa also notes that the checks themselves were admitted into evidence in the prior case. As such, the endorsements on those checks which showed where they were cashed likewise were in evidence in that case.

case, issuing a worthless check was a lesser included offense of theft by deception).

The state has failed to meet its burden of proving that the uttering offenses here are separate from the prior theft charges. Mr. Kurzawa previously was prosecuted and acquitted of every alleged act of theft concerning which evidence was presented at the Milwaukee County trial, regardless whether such evidence was technically "necessary" for conviction. Cf., Wis. Stat. §971.36(4) (acquittal or conviction in multiple theft case charged as single offense "does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge"). The conduct for which he was prosecuted in that case consisted of his uttering of 103 checks; the same conduct regarding 54 of those checks makes up the current charges against him.

The state relied upon the entirety of the conduct for which the defendant stands charged in this case to establish essential elements of the prior theft by fraud charges. The Double Jeopardy Clause thus bars this successive prosecution. See Grady, 495 U.S. at 523. The Court of Appeals had no choice but to order this prosecution dismissed. Compare Felix, 112 S.Ct. at 1382 (no double jeopardy violation where "[t]he actual crime charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses").

C. Because This Case Involves Neither A Conspiracy Nor A Complex-Compound Offense, The Limited Exception To Grady Set Forth In United States v. Felix Is Inapplicable.

The state attempts to avoid the requirements of the Double Jeopardy Clause by asking first whether the subsequent prosecution test set forth in Grady v. Corbin is the appropriate double jeopardy test to apply to "a subsequent prosecution when the charges involved in the two prosecutions are complex and multi-layered as to time and place." State's Brief at 1. Although this is an interesting philosophical question, it has absolutely no relevance to the facts of this case. As the state itself concedes, State's Brief at 31, this case simply does not fall into the type of complex, multi-layered conspiracy prosecution in which Grady analysis was found to be improper in United States v. Felix, 112 S.Ct. 1377 (1992).

The state's assertion that the theft charges were somehow complex and multi-layered while each alleged uttering involved separate conduct is inaccurate. See State's Brief at 29. Each theft charge in the prior prosecution was composed of a number of individual component theft charges properly but artificially consolidated under Wis. Stat. §971.36(3)(a). Each alleged uttering in this case is directly connected to an alleged component theft in the prior case. Each component theft required the defendant's unauthorized signing of one of the complainant's

names to a check written out to himself and his submission of that check as authentic for payment, knowing it was falsely made.

As such, each time the defendant committed one of the alleged component thefts under the state's theory of prosecution, he necessarily committed an uttering offense at the same time. For instance, the defendant's conduct in uttering as genuine the $897.12 check alleged to have been forged in Count 1 of the information in this case (R3:1) is the exact conduct used by the state in attempting to prove his theft of that same $897.12. His conduct in uttering as genuine the $1,513.27 check alleged to have been forged in Count 2 (R3:1) likewise is the exact conduct the state hoped would prove his guilt of the theft of that same $1,513.27 in Milwaukee, and so on.

The Milwaukee theft charge covered "multiple layers of place and time," State's Brief at 31, only because of the state's artificial charging decision. The state could have charged a separate theft based upon each alleged uttering in the prior case, but instead chose to consolidate the theft charges under Wis. Stat. §971.36(3)(a).

For double jeopardy purposes, however, the component thefts are viewed individually. Acquittal on the resulting consolidated theft charges constitutes an acquittal on each component theft for which evidence was submitted at that trial. See Wis. Stat. §971.36(4). Mr.

Kurzawa's double jeopardy rights thus cannot be so easily circumvented by the state's decision to charge only two consolidated thefts rather than 54 individual ones. See Sanabria v. United States, 437 U.S. 54, 72 (1978); Brown v. Ohio, 432 U.S. 161, 169 (1977).

D. The Purported Lack Of Venue Does Not And Cannot Deny Mr. Kurzawa His Double Jeopardy Rights.

The state's venue argument, State's Brief at 32-36, fails on numerous grounds. First, venue over the alleged thefts would lie in Walworth County as well as in Milwaukee County. It is well established that, where a defendant takes action in one county causing a prohibited result in another, venue properly lies in either county. State ex rel. Brown v. Stewart, 60 Wis. 587, 595-96, 19 N.W. 429 (1884) (where property obtained in one county based upon misrepresentations made in another, venue lies in either); State v. Pauley, 12 Wis. 537 (1860) (where wound inflicted in one county and resulting death occurs in another, venue lies in either); see Wis. Stat. §971.19(2). The totality of Mr. Kurzawa's conduct in the theft case, i.e., uttering each allegedly forged check, took place in Walworth County even though the consummation of the "theft," under the state's theory of criminal liability in the Milwaukee case, took place in Milwaukee County. Walworth County thus would have had venue over both the theft and the uttering charges.

Second, even if venue for the alleged thefts did not lie in Walworth County, venue is not a question of jurisdiction, but rather a personal right of the defendant which may be waived. State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12, 35 (1986).[8] The circuit courts have original jurisdiction over all criminal matters in this state. Wis. Const. Art. VII, §8; Wis. Stat. §753.03. Both the Milwaukee County Circuit Court and that for Walworth County thus had jurisdiction to try both the alleged utterings and the alleged thefts.

Third, and in any event, the defendant's federal constitutional right to be free from double jeopardy is not subservient to state attempts to divide itself into "separate sovereign entities, each capable of imposing punishment for the same alleged crime." Waller v. Florida, 397 U.S. 387, 391 (1970); see U.S. Const., Art. VI (Supremacy Clause). See also United States v. Wheeler, 435 U.S. 313, 318-22 (1978). The state is but a single

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[8] Indeed, had these cases been prosecuted together, the defendant would have had the opportunity to decide for himself whether to waive his venue rights or his double jeopardy rights. Cf., State v. Harrell, 85 Wis. 2d 331, 270 N.W.2d 428, 431 (Ct. App. 1978) (by moving for mistrial, defendant waives double jeopardy rights). By prosecuting the cases separately, however, the state denied him that opportunity. Now, the state seeks to benefit from its own conduct and essentially seeks to impose upon the defendant a waiver of his double jeopardy rights. This it must not be allowed to do. Neither the state nor the court legally can force waiver of a constitutional right upon a defendant. See State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260, 267 (1977).

sovereign bound by the Double Jeopardy Clause no matter how it chooses to subdivide that sovereignty. Waller, 397 U.S. at 391-92. See also Poulin, Double Jeopardy, 43 Rutgers L. Rev. at 922-26.

The state's attempt to distinguish Waller fails. State's Brief at 34 n.17, 36. The state suggests no reasoned basis why a different double jeopardy analysis should apply simply because a state has subdivided its sovereignty. Indeed, none exists; the double jeopardy interests at stake remain exactly the same, calling for exactly the same analysis in these circumstances. See §A, 1 & 2, supra. Merely applying Sauceda analysis in multiple prosecution cases simply does not account for the substantial additional constitutional interests at stake beyond those Sauceda was meant to protect. See Grady, 495 U.S. at 519.

The state's reliance upon Curtis v. Commonwealth, 414 S.E.2d 421 (Va. App. 1992), is misplaced. Here, unlike in Curtis, both courts had jurisdiction over both cases. See Bangert, supra. More importantly, however, Curtis is directly contrary to controlling Supreme Court precedent in Waller.

Potts v. State, 410 S.E.2d 89, 93 (Ga. 1991), cert. denied, 112 S.Ct. 3040 (1992), also is irrelevant as the defendant there was charged in separate counties based upon separate acts: kidnapping in one county which resulted in bodily injury, and murder of the same victim in

another. Unlike the present case, different offense conduct was involved in each of the two prosecutions, even though the offenses involved a single criminal transaction. By its terms, Grady thus did not bar the separate prosecutions. See also State v. Van Meter, 72 Wis. 2d 754, 242 N.W.2d 206 (1976) (separate prosecutions proper where based on different acts in each of two different counties).

E. Reprosecution Also Is Barred Under Pre-Grady Analysis.

Although clearly barred under Grady, this prosecution also is barred even under pre-Grady analysis.[9] In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was first convicted of felony murder after his co-defendant shot a clerk in the course of a robbery. The defendant later was charged and convicted of robbery with a firearm for the same conduct. Although the two prosecutions were not for the "same offense" under Blockburger, the Supreme Court unanimously held that the robbery conviction violated the Double Jeopardy Clause because "'it was necessary for all the ingredients of the underlying felony of Robbery with Firearms to be proved'" in the

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[9] Mr. Kurzawa raised this issue in both the trial court (R5:9-10) and before the Court of Appeals. Although the Court of Appeals decided the case in his favor on other grounds, Mr. Kurzawa raises the issue again here to ensure that he has not waived it. See State v. Johnson, 153 Wis. 2d 121, 449 N.W.2d 845, 846 (1990).

felony murder trial. 433 U.S. at 682-83 & n.* (quoting Brief in Opposition 4). The robbery was "a species of lesser-included offense," Illinois v. Vitale, 447 U.S. 410, 420 (1980), even though felony murder could be established by proof of any felony, not just robbery.

The principle underlying Harris v. Oklahoma is not limited to the situation in which one criminal statute incorporates another by reference. The Court there relied on the much older decision in Ex Parte Nielsen, 131 U.S. 176 (1889). In that case, Mr. Nielsen first was charged and convicted of unlawful cohabitation with two women through May 13, 1888. He subsequently was charged and convicted for adultery with one of the women the following day, May 14, 1888. The Supreme Court determined that cohabitation was a continuing offense, permitting only a single conviction for conduct up through the date of indictment. Id. at 185-86. The cohabitation charge thus covered the time period of the alleged adultery.

The Nielsen Court also addressed whether adultery was the "same offense" as unlawful cohabitation. The Court held that it was. 131 U.S. at 186-87. Even though adultery and cohabitation were not the same offense under what later became known as the Blockburger test, the Court found a double jeopardy violation because "the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment." Id.

at 187. As the Court concluded, "Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." Id. at 188.[10]

Nielsen emphasized the factual inclusion of one crime within the other, rather than just a statutory analysis, as defining the "same offense" in successive prosecution cases. See also Brown, 432 U.S. at 16 n.6 (because prosecutions violated Blockburger test, no need to consider additional protections under Nielsen); Grafton v. United States, 206 U.S. 333, 352 (1907) ("[T]he same acts constituting a crime ... cannot, after the acquittal or conviction of the accused ... be made the basis of a second trial of the accused for that crime...;" separate prosecutions for homicide and assassination based on same killing barred). As noted by Professor Thomas, the United States Supreme Court has either applied or endorsed the Nielsen analysis in a number of successive prosecution cases. Thomas, Successive Prosecution, 71 Iowa L. Rev. at

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[10] Although Mr. Nielsen was convicted in his first trial, and the Court expressed no opinion on whether the same rule would apply had he been acquitted, see 131 U.S. at 187, subsequent Supreme Court decisions demonstrate that the same double jeopardy rule applies regardless whether the defendant was acquitted or convicted in the first trial. See §A, 2, infra.

347-54.[11]

Uttering of a forged instrument is a "species of lesser included offense" in the present case. Although theft by fraud may be established by proof of any knowingly false representation, not just uttering a forged instrument, "it was necessary for all the ingredients of the underlying [uttering of forged instruments] to be proved" if the state was to win conviction in the Milwaukee theft by fraud case. See Kellett v. State, 577 So. 2d 915, 922 (Ala. Crim. App. 1990) (Bowen, J., concurring) (possession or uttering of forged instruments is lesser included offense of theft by deception based on the use of the forged instrument to deceive and to deprive the owner of its property), cert. denied, 577 So. 2d 922 (Ala. 1991); Ex Parte Oliver, 518 So. 2d 705 (Ala. 1987) (on facts of case, issuing a worthless check was a lesser included offense of theft by deception). See also 1951 Wis. Sen. Bill No. 784, Legislative Council Comment at 105 ("Forgery is, basically, an attempt to steal, i.e., to obtain property by means of deceit... .").

The circuit court's attempts to distinguish Harris v. Oklahoma, Kellett and Oliver are in error (R9:3;

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[11] Professor Thomas found only one case, Gavieres v. United States, 220 U.S. 338 (1911), in which the Supreme Court allowed a successive prosecution based solely on a Blockburger-type analysis. As he points out, the Gavieres rationale is highly questionable and inconsistent with the vast majority of Supreme Court precedent. See Thomas, Successive Prosecution, 71 Iowa L. Rev. at 346.

App. 4). That court is correct that, generally, the peculiar facts of a given case are irrelevant in Wisconsin to the identification of lesser included offenses tried together with the greater offense. The issue in Nielsen and Harris v. Oklahoma, however, and the issue here, is not whether one offense is a lesser included offense in the strict state law sense. Rather, the question is whether "it was necessary for all the ingredients of the underlying felony ... to be proved" if the government was to win conviction in the prosecution for the greater offense. See Harris v. Oklahoma, 433 U.S. at 682-83 & n.*.

The Nielsen/Harris v. Oklahoma analysis involving separate prosecutions necessarily involves an analysis of the particular facts of the case, regardless what standard the state might apply in single prosecution situations. As such, the persuasive logic in Oliver and the Kellett concurrence is fully applicable here under Harris v. Oklahoma. This prosecution accordingly violates Mr. Kurzawa's double jeopardy rights even under pre-Grady analysis.

CONCLUSION

The trial court erred in denying Mr. Kurzawa's motion to dismiss this prosecution on the grounds of double jeopardy. Because the continued prosecution of the charges in this case would subject him to double jeopardy in violation of the state and federal constitutions, the

Court of Appeals properly reversed the trial court and ordered this case dismissed.

Dated at Milwaukee, Wisconsin, May 25, 1993.

Respectfully submitted,

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