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FIRST COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
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NO. 01-24-00630-CR
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IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
Clerk of The Court

STATE OF TEXAS
Appellant
v.

TOM PETERSON
Appellee

Cause Number 1824051 (State's Underlying Indicted Charge)
Cause Number 1871092 (Pre-Trial Writ of Habeas Corpus)
From the 263rd District Court of Harris County, Texas

Appellee's Brief in Response

ORAL ARGUMENT NOT REQUESTED

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263rd District Court

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

After being indicted for two cases of "Indecency with a Child" against the same complainant in Causes 1713727 & 1713730, Appellee was brought to trial before a jury on June 9, 2023. (R.R. Vol. 1.) Juror misconduct took place mid-trial and the trial court declared a mistrial without manifest necessity and without Appellee's consent. (R.R. Vol. 5.) Two days after the mistrial, the State filed a third charge against Appellee, this time alleging Appellee had committed the offense of "Continuous Sexual Abuse of a Child" against the same complainant. (C.R. 21—Cause 1871092) The "Continuous Sexual Abuse" indictment in Cause 1824051 is the exclusive subject of this appeal.

Appellee filed a motion for dismissal of all three cases (both "Indecency" charges and the "Continuous") based on double jeopardy. (C.R. 110—Cause 1824051) Appellee also filed virtually identical writs of habeas corpus in each trial court cause. (C.R. 4, Cause 1824051) Once filed, the writs each generated their own cause numbers--1871090, 1871091, 1871092. On June 7, 2024, the trial court held a hearing and granted relief in all six cause numbers, dismissing all three of the State's pending indictments. (R.R. Vol. 6) At the hearing, the State conceded that its two original "Indecency with a Child" causes (Causes 1713727 & 1713730—Writ Causes 1871090 & 1871091) were jeopardy barred due to the trial court's mistrial declaration. (R.R. Vol. 6 at 4) As a result, both "Indecency" charges and the State's appeals of their corresponding writs have been dismissed.

The only pending trial court causes before this Honorable Court are the "Continuous Sexual Abuse" charge--Cause 1824051-- and its corresponding writ--Cause 1871092. The issue presented in both causes of action is identical.

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument.

JURISDICTION

Appellee does not dispute the State's statement of jurisdiction.

ISSUE BEFORE THIS COURT

The timeline of Appellee's alleged misconduct is vague and the law involving double jeopardy can be difficult to analyze. However, the question before this court is straightforward: Could either of the two mistried indictments from Causes 1713727 & 1713730 be lesser included offenses of the "Continuous Sexual Abuse" indictment in Cause 1824051? If either of the two jeopardy barred indictments for Indecency with a Child *could be* a lesser included offense of the Continuous Sexual Abuse indictment, then the Continuous Sexual Abuse indictment is also jeopardy barred and the trial court's dismissal should be affirmed.

STATEMENT OF FACTS

Appellee allegedly committed several acts of sexual abuse against the complainant over the course of several years. At times the complainant alleged the abuse began at age 3 and continued until she was 11. (SX 6 p5) At other times, the abuse purportedly began when she was "6 or 7" and ended when she was "9 or 10". (R.R. Vol. 4 at 151) According to the complainant, Appellee exposed his sexual organ to her on several occasions and, after exposing himself, Appellee would sometimes contact the complainant's sexual organ or cause the complainant to contact his sexual organ. (R.R. Vol. 4 at 130-4) However, according to the complainant, there were also occasions when Appellee merely exposed himself and did not make physical contact with her. (R.R. Vol. 4 at 127-9)

The complainant was the final witness in the trial and her testimony took place just before the court recessed for the day. (R.R. Vol. 4 at 157-8) Both sides rested immediately after the complainant testified and the trial court excused the jury until the following morning. As the complainant was waiting at the courthouse elevators with a witness advocate employed by the Harris County District Attorney's Office, a juror in the case was also exiting. (R.R. Vol. 5 at 4) The juror approached the complainant, "forgot herself," and attemped to talk to the complainant and give her a hug. (R.R. Vol. 5 at 10) The witness advocate for the D.A.'s Office intervened to prevent any further interaction between the complainant and the juror. (R.R. Vol. 5 at 10) The advocate then promptly notified the prosecutors of the incident. (R.R. Vol. 5 at 18) However,

the prosecutors did not inform anyone else until the following day when the parties returned to court. The defense attorney was told the next morning at around 10:15am. (R.R. Vol. 5 at 19) The trial court was not informed until 11:30am. (R.R. Vol. 5 at 18) Importantly, by the time the trial court was notified, the jurors—including the juror who had engaged in the misconduct-- had been waiting together in the jury room for "two hours." (R.R. Vol. 5 at 21)

Once informed, the trial court called the attorneys for both sides into her chambers and indicated that she intended to declare a mistrial. (R.R. Vol. 5 at 16) Everyone returned to the courtroom and the trial court questioned the witness advocate about the juror misconduct. (R.R. Vol. 5 at 4) The judge then asked Appellee's attorney if he had a motion and Appellee's attorney moved for the specific juror in question to be removed. (R.R. Vol. 5 at 8) Appellee's attorney also suggested to the court that an alternate juror could be used to replace the removed juror. (R.R. Vol. 5 at 8) The judge then brought the entire jury into the courtroom and questioned the individual juror about her improper interactions with the complainant, and then *sua sponte* declared a mistrial. (R.R. Vol. 5 at 10)

Two days after the court declared a mistrial, the State filed an additional charge of "Continuous Sexual Abuse" against Appellee based on the trial testimony of the same complaining witness. (C.R. 21—Cause 1871092)

SUMMARY OF THE ARGUMENT

Both sides agree that the trial court *sua sponte* declared a mistrial without manifest necessity and without Appellee's consent in Causes 1713727 & 1713730. The record uniformly supports this agreed factual finding. As a result, both sides agree that double jeopardy bars the State from retrying Appellee for the Indecency with a Child indictments in Causes 1713727 & 1713730. Additionally, any lesser included offenses of either of these charges are jeopardy barred, as well as any offenses of which either indictment could be a lesser included offense. This "lesser included" principle is well established in both Texas and United States jurisprudence and the State does not appear to dispute it. Therefore, the parties appear to agree—at least in principle—that the State may not prosecute Appellee using a charging instrument that subsumes the elements of the indictments in Causes 1713727 & 1713730.

Nevertheless, the State, seeking to circumvent its double jeopardy prohibition of Appellee, indicted Appellee for Continuous Sexual Abuse of a Child and argues its new indictment alleges distinct acts of abuse from the mistried indictments. The State, however, has neglected to consider the jeopardy implications of Texas Code of Criminal Procedure article 38.37 which permits the State to offer evidence of extraneous bad acts in child sex abuse prosecutions. When, as happened here, the State presents multiple allegations of abuse pursuant to article 38.37 and does not elect which specific act of abuse is described by the indictment, caselaw holds that jeopardy attaches to all of the presented allegations. This is because it will be impossible to know which of the

multiple acts of alleged abuse was the specific act described by the indictment. This caselaw should preclude Appellee's retrial for any alleged abuse of the complainant that pre-dates Appellee's trial.

However, even if Appellee does not have blanket immunity and may be retried for acts that are clearly distinct from the acts described in the mistried indictments, the State's new indictment must still be dismissed because it is not clear that the "Continuous" indictment alleges distinct acts of abuse. The analysis involved will require this Honorable Court to compare the elements of all three indictments to determine whether either of the mistried indictments (Causes 1713727 & 1713730) could be a lesser included offense of the State's new indictment (Cause 1824051).

The indictment in Cause 1824051 alleges Appellee committed both: 1) an "Aggravated Sexual Assault of a Child" without a specified manner and means and 2) an "Indecency with a Child by Contact" without a specified manner and means. As a result, in Cause 1824051, *any* act of Aggravated Sexual Assault of Child could be a basis of the indictment and *any* qualifying act of Indecency with a Child by Contact could be a basis of the indictment. From here, this Honorable Court must consider whether *any* lesser included offense of *any* possible predicate offense could have the same elements as the mistried indictments. Because the State has opted to plead its new indictment with little specificity, there is no way to know that the conduct described in Causes 1713727 & 1713730 is different from, or part and parcel of, the conduct described in the State's "Continuous" indictment in Cause 1824051. Unless the State brings a

charging instrument that describes conduct that is assuredly distinct from the jeopardy barred indictments, it will be jeopardy barred from prosecuting Appellee for the alleged abuse of the complainant.

ISSUE PRESENTED ON APPEAL

Are either of the State's jeopardy barred indictments of Appellee for Indecency with a Child in Causes 1713727 & 1713730 lesser included offenses of the State's indictment of Appellee for Continuous Sexual Abuse of a Child in Cause 1824051?

Facts

The facts in this case are secondary to the legal analysis. Ultimately, as with any lesser included analysis, the conclusion is strictly based on "the pleadings approach" which is a comparison of the charging instruments and an evaluation whether disparate elements exist. This is strictly a question of law. *Hall v. State,* 225 S.W.3d 524 (Tex.Crim.App. 2007). *Blockburger v. U.S.,* 284 U.S. 299 (1932) However, to the extent that the facts of a case are always of some meaning, it is noteworthy that the complainant, pursuant to Texas Code of Criminal Procedure art. 38.37, testified to extensive and lengthy sexual abuse taking place over the course of several years. If believed beyond a reasonable doubt, her testimony would have established: 1) every statutorily allowed manner and means for committing Indecency with a Child by Exposure; 2) virtually every statutorily allowed manner and means for committing Indecency with a Child by

Contact; and 3) numerous manner and means for committing Aggravated Sexual Assault of a Child (R.R. Vol. 4 at 127-132). Nevertheless, despite the expansive nature of the complainant's accusations, she struggled to recount the details of specific incidents and her timeline of the alleged abuse was both unclear and inconsistent. On some occasions, Appellee's alleged abuse was limited to exposing himself. (R.R. Vol. 4 at 127-9) On some occasions, the abuse purportedly involved Appellee exposing himself and the complainant contacting him. (R.R. Vol. 4 at 131) On some occasions the complainant purportedly exposed her breasts and her sexual organ and Appellee purportedly contacted her in both areas. (R.R. Vol. 4 at 130, 149-50) On other occasions she alleged penetration of her mouth and genital to genital contact. (R.R. Vol. 4 at 132, 134) But rarely, if ever, during her testimony was she able to correlate a specific manner and means of purported abuse with a specific instance or occasion. She also provided a wide ranging and inconsistent timeline of the abuse. At trial, she testified the abuse started when she was "6 or 7" and ended when she was "9 or 10". (R.R. Vol. 4 at 151) On other occasions she said the abuse began when she was 3 and ended when she was 11. (SX 6 p5)

The wide ranging, yet unspecific, nature of her testimony made it nearly impossible to isolate the exact instances of alleged abuse for which Appellee stood trial in Causes 1713727 & 1713730. And, in fact, no one ever tried to nail this down. Appellee never filed a motion to elect and the State never opted to elect a specific instance of alleged abuse. Indeed, the State appeared disinclined to limit Appellee's

jeopardy to an isolated instance of alleged abuse. While attempting to admit evidence of an extraneous offense, the State explicitly asserted that it believed any of the multiple and varied alleged instances of abuse that met the elements of either indictment could provide the basis for conviction. The State told the judge,

> "In laymen's terms we are required to prove Mr. Peterson set in motion certain acts that led to him touching her breasts and exposing his penis. For example, how Mr. Peterson isolated Chloe from others before touching her breasts and exposing his penis. Other examples include how Mr. Peterson groomed Chloe by threats and rewards of money if she looked at or touched his penis, as well as allowing him to touch her breasts. " (R.R. Vol. 3 at 52)

The prosecutor later continued,

> "The jury has so far been equipped with enough evidence to show the defendant induced Chloe into multiple sexual acts to include exposing his penis, masturbating in her presence, ejaculating in front of Chloe, demanding Chloe to touch his penis, or look at his penis in exchange for money, touching her butt, the defendant's penis in contact with Chloe's vagina, all of which were done more than ten times over an eight year time period from ages 3 to 11." (R.R. Vol. 3 at 53)

From these comments, it is clear that the State intended for Appellee to face jeopardy for the totality of his alleged conduct, including all alleged instances of abuse meeting the elements of its indictments in Causes 1713727 & 1713730. Nothing about the State's comments indicates that it intended to limit Appellee's jeopardy to a specific, isolated instance of alleged abuse. So, even though the facts may be less important than the law in the Court's analysis, the facts emphasize the expansive, vague nature of the allegations, contributing to the breadth of the jeopardy bar.

Applicable Law

The double jeopardy bar in the Fifth Amendment of the United States Constitution forbids retrial of the same offense. U.S. CONST. amend V.; TEX. CONST. Art. 1 § 14. TEX CODE CRIM PROC. Art. 1.10 There are two exceptions to this prohibition: 1) consent of the accused; and 2) manifest necessity. *Garrels v. State,* 559 S.W.3d 517 (Tex.Crim.App. 2018).

Under *Garrels*, consent for a mistrial can be express or implied. *Id.* Consent must be affirmatively given; the failure to object does not establish implied consent. *Id.* It is an abuse of discretion for a court to find consent based on an accused's failure to object. *Id.* When the accused has not consented to a mistrial and manifest necessity does not exist to declare a mistrial, double jeopardy will bar retrial for the same offense. *Id.*

Under *Ex parte Garza,* 337 S.W.3d 903 (Tex.Crim.App. 2011), declaring a mistrial based on "manifest necessity" is an extreme action that should only be made after consideration on the record of less drastic options. When a juror becomes unable to serve, a less drastic option that the trial court must consider and investigate is whether the trial can be completed with other or fewer jurors. *Id.* If a trial court that is considering a mistrial does not make an inquiry into less drastic options, it abuses its discretion. *Id.* If a trial court abuses its

discretion in declaring a mistrial based on "manifest necessity," double jeopardy bars a retrial. *Id.*

Under *Cosio v. State,* 353 S.W.3d 766 (Tex.Crim.App. 2011), when the State alleges child sexual abuse and, pursuant to Texas Code of Criminal Procedure art. 38.37, presents evidence of multiple instances of alleged abuse, a defendant may request that the State be forced to elect the specific act of abuse on which the State is seeking conviction. When the defendant seeks such an election, double jeopardy will not bar the accused's retrial for other instances of alleged abuse. *Id.* However, when the defense does not move for election, the State is jeopardy-barred from retrying any of the offenses of alleged sexual abuse against the same complainant that were presented at trial. *Id.* This is because it will be impossible to determine which particular incident of alleged criminal conduct is described by the indictment. *Id. See also Owings v. State,* 541 S.W.3d 144, 150 (Tex.Crim.App. 2017) (holding when one particular act of sexual assault is alleged in the indictment and more than one incident of that same act of sexual assault is shown by the evidence, jeopardy will attach to all of the incidents of alleged abuse.) *Ex parte Pruitt,* 233 S.W.3d 338 (Tex.Crim.App.2007); *Dixon v. State,* 201 S.W.3d 731, 735 (Tex.Crim.App.2006).

An offense may be a lesser included offense if it is established by proof of the same or less than all the facts required to establish the charged offense. TEX. CODE CRIM. PROC art. 37.09.

When double jeopardy bars prosecution for an offense, it also bars prosecution for any lesser included offense and for any greater offense of which the barred offense is a lesser included offense. *Brown v. Ohio,* 432 U.S. 161, 169 (1977); *Ex parte Amador,* 326 S.W.3d 202, 208 (Tex.Crim.App. 2010). "Indecency with a Child by Contact" and "Indecency with a Child by Exposure" are, or at least can be, lesser included offenses of "Aggravated Sexual Assault of a Child" and, by extension, Continuous Sexual Abuse of a Child. *Alvarez v. State,* 694 S.W.3d 847)Tex.App.—Houston (14th Dist.) 2024, no pet.) *See Evans v. State,* 299 S.W.3d 138, 143 (Tex.Crim.App. 2009); *Price v. State,* 434 S.W.3d 601, 603 (Tex.Crim.App. 2014).

The State is not bound by the date on or about which the indictment alleges an offense to have been committed. *Mitchell v. State,* 330 S.W.2d 459, 462 (Tex.Crim.App. 1959). "It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period." *Sledge v. State,* 953 S.W. 253, 255-6 (Tex.Crim.App. 1997)(en banc). In a "Continuous Sexual Abuse of a Child" case, the State need not prove the exact dates of offense, only that there were

two or more acts of sexual abuse that occurred during a period that was thirty or more days in duration. *Pelacastre v. State,* 654 S.W.3d 579, 584 (Tex.App.—Houston (14th Dist.) 2022 pet. ref'd.)

Analysis

A. No Element Comparison Between Indictments Required

In the prosecution of child sex abuse cases, the Texas Code of Criminal Procedure broadly allows the State to present evidence of other, extraneous offenses between the accused and the complainant. TEX. CODE CRIM. PROC. Art. 38.37. In Appellee's trial, pursuant to art. 38.37, the State presented evidence that Appellee had repeatedly sexually abused the complainant. (RR Vol. 4 at 127-140) The Texas Court of Criminal Appeals has issued multiple opinions describing the double jeopardy implications for these extraneous offenses once they have been presented at trial. According to the high court, double jeopardy attaches to all of the presented instances of alleged abuse if the State does not specify the instance of abuse that is described by the charging instrument. A defendant may make motion that the trial court order the State to elect the specific instance of abuse on which the jury will render its verdict. But the defendant's decision to elect is "purely strategic." *Cosio,* 353 S.W.3d at 775. When, in cases involving multiple instances of alleged abuse, a defendant chooses not to force the State to elect, "the State is jeopardy-barred from

prosecuting any of the offenses that were in evidence." *Id.* The risk in not making a motion to elect is that, without specifying the instance of abuse, "the State would be permitted to proceed under several incidents of criminal conduct, as opposed to just one." *Id. Owings ,* 541 S.W.3d at 150; *Dixon,* 201 S.W.3d at 735; *Pruitt,* 233 S.W.3d at 338. Alternatively, the risk in making a motion to elect is that, if there is a jury acquittal, the State could still prosecute the accused for a different alleged instance of abuse. *Cosio,* 353 S.W.3d at 775.

In Appellee's case, no motion to elect was pursued by the defense and the State never elected to specify the instance of abuse described by the indictments in Causes 1713727 & 1713730. As a result, once those indictments became jeopardy barred, so did all of the extraneous instances of abuse that were presented during the trial of those indictments. *Id.* The language in *Cosio, Owings, Dixon,* and *Pruitt* suggests no comparison of an indictment's elements is necessary. Rather, the jeopardy bar precluding further prosecution applies to all of the alleged abuse that was presented at trial. The reasoning is that, if jeopardy did not globally attach to all of the allegations, the State could endlessly re-prosecute the accused, limited only by the quantity of the complainant's allegations.

B. Elemental Analysis

Nevertheless, to the extent that this Honorable Court seeks to perform an elemental comparison, the indictments in Causes 1731727 & 1731730

indisputably *could be* lesser included offenses of Cause 1824051. As a result, per *Hall v State,* limiting the analysis to an elemental comparison of the indictments in Cause 1824051 with the indictments in Causes 1731727 & 1731730, this Honorable Court must find Cause 1824051 is jeopardy barred. 225 S.W.3d at 535.

To begin, the predicate offenses for "Continuous Sexual Assault of a Child" that are alleged in the indictment of Cause 1824051 will be lesser included offenses. *Price v. State,* 434 S.W.3d at 606. "Aggravated Sexual Assault of a Child" is one of the two predicate offenses and it is therefore a lesser included offense of the indictment in Cause 1824051. This is because it is established by proof of the same or less than all the facts required to establish the charged offense of "Continuous Sexual Abuse of a Child." TEX. CODE CRIM. PROC art. 37.09. The second predicate offense in the indictment of Cause 1824051 is "Indecency with a Child by Contact." Similarly, then, "Indecency with a Child by Contact" is a lesser included offense of the indictment in Cause 1824051 because it is established by proof of the same or less than all of the facts required to establish the charged offense of "Continuous Sexual Abuse of a Child." TEX. CODE CRIM. PROC art. 37.09.

Next, these two predicate offenses must be compared to the jeopardy barred indictments in Causes 1731737 & 1731730. If either one of the jeopardy barred indictments in Causes 1713727 & 1713730 can established by proof of

the same or less than the facts necessary to prove either of the predicate offenses, double jeopardy will also bar prosecution of the indictment in Cause 1824051. *Brown,* 432 U.S. at 169; *Amador,* 326 S.W.3d at 208. Below is a review of the four-comparison matrix.

1. "Aggravated Sexual Assault of a Child" --predicate offense Cause 1824051

VS.

"Indecency with a Child by Contact (with breast)" Cause 1713730

Lesser included offense NOT established

In the jeopardy barred indictment in Cause 1713730, Appellee was charged with "Indecency with a Child by Contact" with the complainant's breast. The statute for "Aggravated Sexual Assault of a Child" exclusively forbids sexual activity with a "sexual organ" or "anus," but makes no mention of "breast" and there is no way to commit Aggravated Sexual Assault with a breast. TEX. PEN. CODE § 22.21. Caselaw holds that an Indecency with a Child by Contact will be a lesser of Aggravated Sexual Assault of a Child when both offenses are "predicated on the same act." *Evans v. State,* 299 S.W.3d 138, 142 (Tex.Crim.App. 2009) An Aggravated Sexual Assault of a Child cannot be predicated on contact with a "breast", making the word "breast" in Cause 1713730 a "disparate element." The indictment in Cause 1713730 therefore describes an act that is not a lesser included offense of "Aggravated Sexual Assault of a Child." *Quinn v. State,* 991 S.W.2d 52, 55 (Tex.App.—Fort Worth (1998) pet. ref'd.); *Myers v.*

State, 2002 WL 220655 (Tex.App—Houston (14th Dist) 2002) pet. ref'd.)(not designated for publication).

2. "Indecency with a Child by Contact" predicate offense in Cause 1824051

VS

"Indecency with a Child by Contact" (with breast) in Cause 1713730

Lesser Included Offense NOT established

The indictment in Cause 1713730 alleges Appellee committed Indecency with a Child by Contact with the complainant's breast. However, as the State emphasizes, the Continuous Sexual Abuse of a Child statute does not authorize "Indecency with a Child by Contact" as a predicate offense when the "Indecency" alleges contact with a "breast." TEX. PEN. CODE §21.02(c)(2). The only qualifying predicate "Indecency" offenses are those that allege "contact" with either a "sexual organ" or "anus." TEX. PEN. CODE §21.02(c)(2). To be a lesser included offense, an offense must be established by proof of the same or less than all of the facts required to establish the charged offense of "Continuous Sexual Abuse of a Child." TEX. CODE CRIM. PROC art. 37.09. Appellee acknowledges that Indecency with a Child by Contact with the Breast includes a disparate element—specifically, contact with a breast. The offense of "Continuous Sexual Abuse of a Child" cannot be committed by contact with a breast and, as

a result, the indictment in Cause 1713730 is not a lesser included offense of Cause 1824051.

3. "Aggravated Sexual Assault of a Child" predicate offense Cause 1824051

VS

"Indecency with a Child by Exposure" – Cause 1713727

Lesser Included Offense IS established

The jeopardy barred indictment in Cause 1713727 charged Appellee with "Indecency with a Child by Exposure" of Appellee's sexual organ. Recent published caselaw from this Honorable Court's jurisdictional territory holds that "Indecency with a Child by Exposure" is, or at least can be, a lesser included offense of "Aggravated Sexual Assault of a Child." *Alvarez v. State,* 694 S.W.3d 847 (Tex.App. --(Houston) 14th Dist. 2014) no pet.) [1] Moreover, recent *dicta* from the Court of Criminal Appeals states, "indecency with a child by exposure is a lesser-included offense of aggravated sexual assault of a child." *Ex parte*

[1] The State's brief in *Alvarez,* also from the Harris County District Attorney's Office, is worth reviewing if only for the striking contrast with the State's brief in Appellee's case. Although the State vigorously advocated for the ultimate ruling in *Alvarez,* the State now asserts that the *Alvarez* holding is "wrong." *State's brief* p.20 Apparently, then, the State has conveniently changed its mind and now agrees that Mr. Alvarez should have been acquitted because he was convicted of an improperly presented lesser included offense. *Stephens v. State,* 806 S.W.2d 812 (Tex.Crim.App. 1990) (holding conviction for improperly presented lesser included offense is an implicit acquittal of the charged offense). If so, the Texas Code of Criminal Procedure and the Texas Disciplinary Rules of Professional Conduct require the State to contact Mr. Alvarez in prison and advocate for his immediate release and exoneration. TEX CODE CRIM. PROC. art 2.01; TEX. DISC. R. PROF'L COND. 3.09.

Kibler, 664 S.W.3d 220, 223 n. 1 (Tex.Crim.App 2022). However, other Court of Criminal Appeals decisions have held that the question turns on whether the charges are "predicated on the same act" and this determination must be made on a case by case basis. *Evans,* 299 S.W.3d at 142. *Ochoa v. State,* 982 S.W.2d 904 (Tex.Crim.App. 1998).

For example, if an accused exposes his sexual organ to a child in the course of contacting the child's mouth and ultimately penetrating the child's mouth, Indecency with a Child by Exposure will be a lesser included offense of Aggravated Sexual Assault of a Child. *Alvarez,* 694 S.W.3d at 894. This example factually tracks the complainant's allegations. Describing multiple interactions over an extended period of time, Appellee's alleged abuse sometimes included penetration of the mouth, but sometimes was limited to his exposure. (R.R. Vol. 4 at 127-40) Based on the complainant's testimony, it is difficult to separate which instances of abuse involved which elemental offenses. As a result, the specific act described in the Indecency with a Child by Exposure indictment in Cause 1713727 *could be* predicated on an act of Aggravated Sexual Assault of a Child, therefore qualifying as a lesser included offense of the indictment in Cause 1824051. *Alvarez,* 694 S.W.3d at 894; *Evans,* 299 S.W.3d at 142.

However, *Hall v. State* requires a pleadings analysis that strictly ignores the factual evidence and focuses exclusively on the elements of the pleadings. 225 S.W.3d at 535. Under this analysis, it is even more clear that the "Indecency with

a Child by Exposure" indictment in Cause 1713727 *could be* a lesser included offense of the predicate offense of "Aggravated Sexual Assault of a Child" in Cause 1824051.

The "Continuous" indictment in Cause 1824051 alleges an "Aggravated Sexual Assault of a Child" without specifying a manner and means. As a result, *any* lesser included offense of *any* possible manner and means of committing "Aggravated Sexual Assault of Child" *could* qualify and would be jeopardy barred.

To be sure, the State is entitled to omit the manner and means of predicate offenses in its pleadings. *Buxton v. State,* 526 S.W.3d 666 (Tex.App.—Houston (1st Dist) 2017 pet. ref'd.) Further, when no manner and means is pleaded, the State may establish the predicate offense through any statutorily available manner and means. *Id.* In most cases it is to the State's advantage to omit predicate specificity because it allows the State greater flexibility in its proof. However, in this case, there is a clear downside to the State's strategy. By affording itself more flexibility in its proof, the State simultaneously broadens Appellee's jeopardy to any statutory manner and means. In turn, the potential for double jeopardy is also broadened.

Despite the expansive nature of the potential jeopardy, the State maintains that the Indecency with a Child pleading has a disparate element: "the intention to arouse or gratify the sexual desire of some person." *State's brief* at page 22.

However, the State's argument is exactly the opposite of what it argued in *Alvarez* where it asserted, "Under the proper, functional-equivalence test, the indictment's allegations of sexual assault by oral-genital contact made indecency with a child by exposure a valid lesser-included offense." *State's brief*, p.9, Case No. 14-22-00896-CR.

Ultimately, in *Alvarez,* the Court of Appeals agreed with the State's logic and found that Indecency with a Child is, or at least can be, a lesser included offense of Aggravated Sexual Assault of Child. With the State opting to omit any manner and means in it predicate offenses in Cause 1824051, the Indecency with a Child by Exposure indictment in Cause 1713727 *could be* a lesser included offense of the "Aggravated Sexual Assault of a Child" predicate offense. As a result, the indictment in Cause 1824051, like the indictment in Cause 1713727, is jeopardy barred. *Evans,* 299 S.W.3d at 142.

4. "Indecency with a Child by Contact" predicate offense in Cause 1824051

VS

"Indecency with a Child by Exposure" in Cause 1713730

Lesser Included Offense IS established

Indecency with a Child by Exposure is, or at least *can be* a lesser included offense of Indecency with a Child by Contact if the exposure was "demonstrably part of the commission of" the sexual contact.. *Alberts v. State,* 302 S.W.3d 495, 502 (Tex.App.—

Texarkana 2009, no pet.); *Pacheco v. State,* 2012 WL 566072 page 6, (Tex.App.—San Antonio (2012) no pet.) (not designated for publication) In the present case, the indictment in Cause 1713727 alleges Appellee exposed his sexual organ to the complainant. If he did this as part of the commission of sexual contact with his sexual organ, he would be committing an act that qualifies as both the predicate offense of "Indecency with a Child by Contact" as alleged in Cause 1824051 and the indictment alleged in Cause 1713727. This would make Cause 1713727 a lesser included offense of Cause 1824051 and it would mean that, like Cause 1713727, Cause 1824051 is jeopardy barred.

Date Specificity

Finally, the State argues that Appellee stood trial for a specific instance of abuse and that there should be no confusion about the specific act because of the date that the State pleaded in its indictment. The State bases this argument on the fact that Appellee allegedly exposed himself to the complainant on March 4, 2020, the date that police were contacted. (R.R. Vol. 4 at 80.) This is the date included in the indictment for Cause 1713727. (DX 2; CR 20—Cause 1871092) According to the State, the date of its pleading limits Appellee's jeopardy protection to this specific act on this specific date.

The State is incorrect both factually and legally. Factually, during Appellee's trial, the State gave no indication that it was limiting its prosecution of

Appellee to his alleged act from March 4, 2020. In fact, the State appeared to embrace the expanse of the complainant's accusations and argued to the court that it had proven multiple instances of elementally identical abuse. The prosecutor argued:

> "In laymen's terms we are required to prove Mr. Peterson set in motion certain acts that led to him touching her breasts and exposing his penis. For example, how Mr. Peterson isolated Chloe from others before touching her breasts and exposing his penis. Other examples include how Mr. Peterson groomed Chloe by threats and rewards of money if she looked or touched his penis, as well as allowing him to touch her breasts." (R.R. Vol. 3 at 52)

The prosecutor continued,

> "The jury has so far been equipped with enough evidence to show the defendant induced Chloe into multiple sexual acts to include exposing his penis, masturbating in her presence, ejaculating in front of Chloe, demanding Chloe to touch his penis, or look at his penis in exchange for money, touching her butt, the defendant's penis in contact with Chloe's vagina, all of which were done more than ten times over an eight year time period from ages 3 to 11." (R.R. Vol. 3 at 53)

These comments show Appellee faced criminal liability for the totality of the complainant's testimony. Understood in combination with the absence of a specific election that might isolate the act of abuse described by the indictment, the State's present contention that Appellee's jeopardy can be limited to the specific date of March 4, 2020 is inconsistent with its view at trial.

The law is even more compellingly contrary to the State's position. "It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is

anterior to the presentment of the indictment and within the statutory limitation period." *Sledge v. State,* 953 S.W. at 255-6. When, as happened here, the defense in a sexual assault case with 38.37 extraneous evidence does not move for election, the State is jeopardy-barred from retrying any of the offenses of alleged sexual abuse against the same complainant that were presented at trial. *Cosio,* 353 S.W.3d at 766. The State's wishful contention that, in retrospect, it can limit Appellee's jeopardy to a specific instance is simply unsupported in Texas jurisprudence.

Nevertheless, the State relies on *dicta* from a different appellate jurisdiction for the proposition that "a defendant may be convicted of both continuous sexual abuse of a child and an independent offense listed as a predicate offense in section 21.02(c) against the same child as long as they did not occur within the same time frame." *State's brief,* at 23 citing *Aguilar v. State,* 547 S.W.3d 254, 262 (Tex.App. –San Antonio 2017, no pet.) To the extent that *Aguilar* is persuasive, its facts are distinguishable. In *Aguilar*, the defendant was tried and convicted of several different sexual offenses, each alleged in separate counts of the same indictment. One of the counts against him alleged continuous sexual abuse during a specific time frame. Another count alleged a discrete act of sexual abuse that took place outside that time frame. Presumably, the facts in *Aguilar* supported each of these allegations and so the jury was entitled to believe that: 1) continuous sexual abuse of the alleged complainant

took place over a period greater than thirty days; and 2) beyond the alleged time period of the continuous sexual abuse, an additional act of sexual abuse against the complainant took place. If both of these things were proven beyond a reasonable doubt to the jury, the *Aguilar* holding is valid because, as the State notes, each instance of sexual abuse is an allowable "unit of prosecution." *Ex parte Hawkins*, 6 S.W.3d 554, 556 (Tex.Crim.App. 1999).

But this appeal is not about the definition of the "unit of prosecution" in a sex abuse case. This is about whether the State, having intentionally failed to identify a specific "unit of prosecution," may do so retrospectively. The problem for the State is that, in the present case, the State specifically chose to try Appellee while leaving the unit of prosecution unidentified. It cannot now, after subjecting Appellee to jeopardy for multiple instances of abuse, argue that it really only meant to subject him to jeopardy for a single, specific occasion. Moreover, the State's brief gives an obvious tell that it still does not know which instances of abuse are the ones alleged in its "Continuous" indictment. The State writes, "…the underlying predicates of the continuous offense (Cause 1824051) were *presumably* based upon extraneous evidence on unadjudicated acts admitted in the trial." *State's brief,* at p28. (emphasis added) According to the State, these underlying predicates were "*probably* mentioned during the mistrial cases." *Id.* (emphasis added) In essence, the State is arguing that, even though it never identified a specific act of abuse in Appellee's first trial and, even though

it still is not certain which acts of abuse would be alleged in his second trial, this Honorable Court should rest assured that there is no overlap. The State is like a magician who, without performing the trick, promises not to pick the wrong card and expects the audience to take it on faith.

Conclusion

Appellee's situation is rare and undoubtedly vexing for the State. On the verge of securing a guilty plea and a lengthy prison sentence (R.R. 5 at 11), the State presently finds itself unable to pursue prosecution. But consider if Appellee had been acquitted. It would, quite naturally, be both unfair and unconstitutional to re-prosecute him. The courts and our community would accept the jury's decision as final. Of course, the distinction in Appellee's case is that he was not acquitted. Instead, he was mistried and a final adjudication of his culpability never arrived. But Appellee finds no distinction in the law of double jeopardy between an acquittal and a mistrial. Appellee's alleged abuse of the complainant is no longer susceptible to prosecution because he is presently in the identical position as if he had been acquitted. While this is an unusual situation, it is critical to prevent the State from vindictively seeking re-prosecution once it has failed to obtain a conviction. The trial court order dismissing Cause 1824051 must be upheld on appeal.

PRAYER

For the reasons stated above, Appellee prays this Honorable Court will affirm the trial court's order dismissing the State's indictment in Cause 1824051 with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via electronic service on the day the brief was filed.

/s/ Mark Hochglaube
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Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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