STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

Appeal No. 16AP88-CR
Dane County Case No. 12CF412

KARL W. NICHOLS,
Defendant-Respondent.

APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE ELLEN K. BERZ PRESIDING

RESPONSE BRIEF OF THE DEFENDANT-RESPONDENT

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Table of Contents

Table of Authorities

Wisconsin State Statutes

Other

Issues Presented

I. Did the circuit court correctly decide that the evidence the State failed to preserve was apparently exculpatory, and that the State acted in bad faith when it failed to preserve exculpatory evidence?

The circuit court found that the evidence was apparently exculpatory.

The circuit court found that the State acted in bad faith.

II. Does this Court have jurisdiction to hear this appeal?

This issue was not before the circuit court.

This court by one judge denied a motion to dismiss, and by another judge a motion for clarification.

III. Is this appeal frivolous?

This issue was not before the circuit court.

Position on Oral Argument and Publication

The criteria by which the Court decides whether oral argument is necessary in light of its incredible case load are stated in Wis. Stat. § 809.22(2). As the Defendant-Respondent believes the contentions of the Plaintiff-Appellant are plainly contrary to relevant legal authority and are without merit on their face, we believe oral argument is unnecessary in that regard. However, as the Court of Appeals sometimes decides cases on issues not briefed by the parties (*see, e.g.*, *State v. Daley*, 2006 WI App 81, ¶19, 292 Wis. 2d 517, 716 N.W.2d 146; *State v. Alexander*, 2015 WI 6, ¶83, 360 Wis. 2d 292, 858 N.W.2d 662 (Gableman, J. concurring), oral argument is welcomed for the purpose of allowing the court to ask questions of counsel. *See* Wis. Stat. § 809.22, Judicial Council Committee's Note, 1978.

The criteria for publication are stated in Wis. Stat. §809.23. Publication of a decision in this case would be appropriate, since this case:

1. Involves a rare finding of bad faith on the part of the State (*see, e.g.*, *State v. Luedtke*, 2015 WI 42, ¶96, 362 Wis. 2d 1, 863 N.W.2d 592 (Abrahamson, C.J., concurring, citing *State v. Weissinger*, 2014 WI App 73, n.1, 355 Wis. 2d 546, 851 N.W.2d 780, (Brown, J. Concurring)(discussed herein)), bringing the case within the scope of Wis. Stat. §§ 809.23(1)(a)1("Enunciates a new rule of law or modifies, clarifies or criticizes an existing rule") or 2 ("Applies an established rule of law to a factual situation significantly different from that in published opinions");
2. Involves a novel question of jurisdiction and the statutory allocation of State authority as an issue of first impression, bringing the case within the scope of Wis. Stat. §§ 809.23(1)(a)1 and 5 ("Decides a case of substantial and continuing public interest").;
3. Involves a question of frivolity as applied to State appeals, bringing the case within the scope of Wis. Stat. §§ 809.23(1)(a)4 ("Contributes to the legal literature by collecting case law or reciting legislative history") and 5.

Statement of the Case

The facts and procedural posture articulated the circuit court's Decision and Order, included in the Appendix to the State's Brief, are accurate.

Argument

The best response to the State's Brief is the Decision and Order of the circuit court itself (hereinafter *Decision*). The State's arguments are merely competing characterizations of evidence that are contrary to the circuit court's findings of fact.[1] But the State is not entitled to request that this court redraw inferences drawn by the trial court: Rather, this Court is bound by the circuit court's findings of fact unless they are clearly erroneous. The circuit court's findings are not clearly erroneous, and the State's request that this Court redraw inferences is frivolous. The Defendant renews his objection to this Court's jurisdiction on the basis that a Notice of Appeal was not timely filed by a party authorized to do so. Finally, the Defendant requests attorney's fees and costs for the State's filing of a frivolous appeal.

[1] The State also misconstrues that "[t]his case actually comes in the context of a claim of ineffective assistance of counsel." State's Brief at 8-9. This is false. *See* Postconviction Motion at 3, subheading I: "The Defendant Was Denied Due Process When the State Failed To Preserve or Disclose Exculpatory Evidence."

I. The Circuit Court's Decision Is Correct

A. *The Circuit Court's Finding that the Evidence Was Apparently Exculpatory Is Correct.*

The circuit court found that the evidence the State failed to preserve was apparently exculpatory. Evidence not preserved, lost or destroyed by the State must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994)(citing *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988)). As the materiality of the evidence rises above being potentially useful to clearly exculpatory, a bad faith analysis is not needed. *Greenwold*, 189 Wis. 2d at 68.

This Court applies the clearly erroneous standard of review to the trial court's findings of fact, and reviews de novo the application of the legal standard to those facts. *State v. Hahn*, 132 Wis. 2d 351, 356-57, 392 N.W.2d 464, 466 (Ct. App. 1986). Appellate courts decide constitutional questions independently, benefiting from the analysis of the circuit court. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352, 356-57 (1998).

> Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather**, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence**. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. **When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.**

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274, N.W.2d 647, 650 (1979)(internal citations omitted, emphasis added).

In this case, the circuit court's conclusion that the evidence was apparently exculpatory necessarily follows from the circuit court's extensive and thorough findings of fact, which were amply grounded in the record.

The circuit court had presided extensive pre-trial hearings in this case. *Decision* at 1-4; 23. The circuit court presided over the three-day trial of the Defendant. *Id.* The circuit court held postconviction motion hearings that also spanned several days. *Id.* The circuit court's view of the evidence the State failed to preserve and its importance is therefore informed by a thorough familiarity with the case.

Evidence is apparently exculpatory if it possessed an exculpatory value that was apparent, and was of a nature that the defendant is unable to obtain comparable evidence by other reasonably available means. *See, e.g.*, *Youngblood*, 488 U.S. at 67, *Greenwold*, 189 Wis. 2d at 67, *State v. Munford*, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264. The circuit court made exhaustive findings of fact

regarding the exculpatory evidence that the state failed to preserve in determining that it was apparently exculpatory. *Decision* at 16-25.

The circuit court found that the exculpatory nature of the list was apparent to Forensic Interviewer Holzrichter. *Id.* at 23-24.[2] The circuit court found that the exculpatory nature of the list was apparent to Detective Harris. *Id.* at 20-21.[3] The circuit court found that the Defendant could not obtain equivalent evidence by other reasonable means. *Id.* at 21; 24-25.

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[2] *Decision* at 23-24, a portion of the circuit court's findings of fact and inferences regarding Holzrichter:

> The exculpatory value of M.R.W.'s written corrections was apparent at the time of the 2nd Video. Interviewer Holzrichter was calm and patient until M.R.W. explained the first correction. Then, Interviewer Holzrichter hurried to change the subject, leave the room and stop the taping. She did not even pause to allow M.R.W. to discuss her other corrections. Instead, Interviewer Holzrichter pacified M.R.W. by saying they would discuss her list outside of the video room. . . . Clearly, M.R.W.'s written corrections were immediately recognized as exculpatory.

[3] *Decision* at 20-21, portion of the circuit court's findings of fact and inferences regarding Harris:

> Detective Harris acknowledged the significance of the one correction M.R.W. was allowed to discuss. Tr. 9/14/15 P.C. Hear. 99:23-100:10. At the same time, she maintained that she had not found M.R.W.'s written list of corrections significant at the time. *Id.* at 64:15-21. Detective Harris' acknowledgment of the one correction's significance, her apparent discomfort on the postconviction witness stand, her pauses to search for an answer in postconviction examination, and her erroneous description of M.R.W.'s written corrections in her police report leaves this Court incredulous. . . . Detective Harris was the lead case detective and participated by phone in the 2nd interview. She also reviewed the 2nd Video. She knew, at the time, that M.R.W. had brought a written list of corrections to the 2nd interview. She knew, at the time, that M.R.W. was allowed to divulge only one of her multiple corrections.
>
> Detective Harris also knew that her police reports were to include any exculpatory information. She knew those reports would be handed over to the defense during discovery. . . . To believe that Detective Harris' police report coincidentally erred in describing the coincidentally unpreserved evidence is simply unbelievable. Detective Harris' erroneous police report misled the defense and demonstrates bad faith.

These are all findings of historical and evidentiary fact entitled to the clearly erroneous standard of review. Since they are based in part on the circuit court's expressed observation of evidence and testimony, itself with citations to the record before the circuit court, there is evidence in the record to support them. The circuit court's conclusion that the evidence was apparently exculpatory necessarily follows from its findings of evidentiary and historical fact.

This Court must accept the circuit court's findings of evidentiary and historical fact unless they are clearly erroneous. *State v. Hahn*, 132 Wis. 2d 356-57. The circuit court found that the exculpatory value of the evidence was apparent. The circuit court found that the Defendant is unable to obtain comparable evidence by other reasonably available means. Therefore, the circuit court's determination that the evidence the state failed to preserve was apparently exculpatory is correct, and this Court must affirm.

B. *The Circuit Court's Finding that the State Acted in Bad Faith Is Correct.*

The circuit court found that the State acted in bad faith when it failed to preserve exculpatory evidence because State actors consciously suppressed the evidence. *Decision* at 27. Findings of bad faith on the part of the State are rare enough that a standard of review has not been articulated in Wisconsin. Under any standard of review, though, the circuit court's determination in this case must be affirmed as its findings of fact—supported by the record and entitled to clearly erroneous standard of review—are so tightly tied to the legal standard related to them.

The State cites to labor and insurance law cases in articulating the standard of review for circuit court "bad faith" findings without noting that the cases are from labor and insurance law, rather than the criminal realm:

> Whether the State or any of its agents acted in bad faith is a mixed question of fact and law. *Bosco v. LIRC*, 2004 WI 77, ¶ 18, 272 Wis. 2d 586, 681 N.W.2d 157; *Brown v. LIRC*, 2003 WI 142, ¶ 10, 267 Wis. 2d 31, 671 N.W.2d 279.
> The conduct of the actor is a question of fact. *Bosco*, 272 Wis. 2d 586 ¶ 18; *Brown*, 267 Wis. 2d 31, ¶ 10. The defendant has the burden to prove the facts said to show bad faith. *Greenwold*, 189 Wis. 2d at 70.
> But whether the person acted in bad faith is a question of law. *Bosco*, 272 Wis. 2d 586 ¶ 19; *Brown*, 267 Wis. 2d 31, ¶ 11. Therefore, an appellate court is not bound by a circuit court's conclusion that someone acted in bad faith. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 518, 385 N.W.2d 171 (1986).

State's Brief at 19-20.

But that's not what these cases say:

> A determination of bad faith under § 102.18(1)(bp) presents a mixed question of fact and law. Id., P10. The historical conduct of a party constitutes an issue of fact, and we will sustain LIRC's factual determinations if they are supported by credible and substantial evidence. Id.

Bosco v. Labor & Indus. Review Comm'n, 2004 WI 77, ¶18, 272 Wis. 2d 586, 602, 681 N.W.2d 157, 165.

> ¶10 Our analysis in this case centers around the standard of review. The court of appeals correctly explained that a determination of bad faith under Wis. Stat. § 102.18(1)(bp) and Wis. Admin. Code § DWD 80.70(2) presents a mixed question of fact and law. The parties' conduct presents a question of fact. Courts will sustain LIRC's factual determinations so long as they are supported by credible and substantial evidence.

Brown v. Labor & Indus. Review Comm'n, 2003 WI 142, ¶ 10.

The cases that the State cites to clearly are clearly limited to "a determination of bad faith *under Wis. Stat. 102.18(1)(bp)*." *Id*., (emphasis added). Chapter 102 of the State Statutes is related to "Worker's Compensation." While the standards articulated in cases related to such reviews may be of persuasive value, they are not binding on this Court in this matter. Though, as noted, even under that standard, the circuit court ruling would be affirmed.

The question of what standard of review to use in assessing a circuit court determination of the State's bad faith in failing to preserve exculpatory evidence has not been decided in Wisconsin. Indeed, as noted in the concurrence in *Luedtke*, only 7 out of 1,500 published cases citing *Youngblood* found bad faith on the part of the State. *State v. Luedtke*, 2015 WI 42, ¶96, 362 Wis. 2d 1, 863 N.W.2d 592 (Abrahamson, C.J., concurring, citing *State v. Weissinger*, 2014 WI App 73, n.1, (Brown, J. concurring)). None of those seven cases were from Wisconsin. *See* Teresa N. Chen, *The Youngblood Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. Va. L. Rev. 421, 422 (2007)(*cited by State v. Weissinger*, 2014 WI App 73, ¶30 n.1, 355 Wis. 2d 546, 851 N.W.2d 780 (Brown, J. concurring). Nor do courts automatically employ a *de novo* standard when an issue is one of constitutional fact:

> The difference between constitutional facts, mixed questions of fact and law, and historical facts, or simply questions of fact, is often fuzzy at best. The [United States] Supreme Court itself acknowledges that it has not charted an entirely clear course in the elusive arena of distinguishing between legal and factual questions. Whether to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" often is more a matter of allocation than analysis, an allocation in which the Court recognizes that one judicial actor is better positioned than another to decide a matter.

State v. Byrge, 2000 WI 101, 237 Wis. 2d 197, 220, 614 N.W.2d 477, 487-88 (internal quotations and citations omitted). Indeed, in *Byrge*, our Supreme Court recognized that because of the circuit court's superior position in determining the evidence before it, the issue of competency to stand trial would be reviewed under the erroneous exercise of discretion standard.

That's not the only case. More similarly to the issue at hand here, the Wisconsin Supreme Court decided regarding *Batson* claims—which require a determination of discriminatory intent on the part of the State in striking jurors—that Wisconsin law is in accord with the U.S. Supreme Court, holding that discriminatory intent is a question of historical fact, and the clearly erroneous standard of review applies at each step of the *Batson* analysis. *State v. Lamon*, 2003 WI 78, ¶45, 262 Wis. 2d 747, 664 N.W.2d 607. The finding of "official animus or conscious effort to suppress" necessary to a finding of "bad faith" is not conceptually far removed from "discriminatory intent" in the context of *Batson*.

It would not be unique for this Court to hold the same when it comes to circuit court determinations of bad faith on the part of the State. At least one of those few published cases finding bad faith employed the clearly erroneous standard of review:

> We use the clearly erroneous standard to review the district court's conclusion that the government did not destroy potentially exculpatory evidence. The inquiry into allegations of prosecutorial bad faith presents a mixed question of fact and law in which "the quintessential factual question of intent" predominates.

United States v. Bohl, 25 F.3d 904 (10th Cir. 1994).

The State concedes that the conduct of an actor is a question of fact. As noted, the circuit court's determinations are reviewed only for an erroneous exercise of discretion, and will be sustained if the record arguably supports them. Likewise, the State cites *Greenwold* in support of its contention that the defense has the burden to prove that the facts show bad faith. State's Brief at 11. Again, whether a party has met its burden is a matter of fact, not law, and the Court of Appeals is obligated to

uphold a circuit court's finding. *State v. Kucharski*, 2015 WI 64, ¶44, 363 Wis. 2d 658, 866 N.W.2d 697.

All that remains, then, is to discern whether any of the trial courts findings of fact were clearly erroneous. They were not. To the contrary, they support the trial court's conclusion that the State acted in bad faith.

The State goes so far in its recasting of facts as to suggest—without support from the record—that Holzrichter was doing the State a favor, and cut the interview with MW short because the time for giving favors was up. State's Brief at 21-22. None of that conjecture is remotely supported by the evidence, or even by argument at the hearings. There was no testimony that Holzrichter was doing the State a favor. There was no testimony that she grew tired of doing them a favor. There was no testimony that because she was doing them a favor and grew tired of it, that she cut the interview with M.W. short, coincidentally at the point where M.W. started to retract statements. To the contrary, the finding of fact that the circuit court made was that Holzrichter cut the interview short *because* M.W. was presenting exculpatory evidence. That is a finding of historical fact, made by the circuit court, in its unique position to judge the credibility of witnesses and draw inferences from evidence.

Judge Berz found as a matter of fact that interviewer Hozrichter intentionally terminated the interview of MW when it became apparent to her that the interview was revealing exculpatory facts. *Decision* at 23-24, *supra* note 2. She found that Detective Harris knowingly suppressed the list of exculpatory

retractions. Id. at 20-21, *supra* note 3. She found that ADA Barnett failed in his duty to seek out and preserve evidence. *Id.* at 25; 27. These are findings of fact that will not be overturned unless they are clearly erroneous. They would only be clearly erroneous if they "are totally unsupported by facts in the record." *State v. Smith*, 2016 WI 23, ¶29, 367 Wis. 2d 483, 878 N.W.2d 135. However, there is ample evidence in the record to support the Judge's finding of fact. She delineated that evidence in her ruling with citations to the record before her. *See supra* note 2.

The State contends that Judge Berz' characterization of MW's list as "corrections" was clearly erroneous: That they were "changes." The State cites to dictionaries to underscore the distinction. But the characterization of MW's list as "corrections" didn't originate with Judge Berz: It's what Detective Harris herself wrote in her report:

> [M.R.W.] stated that she did watch the video of her and Holzrichter's interview and that what she said in the interview was true <u>with one correction.</u>
>
> *Id.* at 87:23-88:6 (emphasis added); 9/14/15 P.C. Exh. 18

Decision at 20 (emphasis in original).

Finally, assuming *arguendo* that the evidence was only potentially exculpatory, what is required for a finding of "bad faith" is "official animus or a conscious effort to suppress." CITE Judge Berz found as a matter of fact that the State did make a conscious effort to suppress the evidence:

> From the prosecutor's failure to affirmatively fulfill his constitutional duty to find, preserve and turn over exculpatory evidence, to Interviewer Holzrichter's intentional premature ending of the 2nd interview when confronted with M.R.W.'s multiple corrections, to Detective Harris' erroneously written police report that mischaracterizes and minimizes M.R.W.'s corrections, this Court finds that the State was aware of the exculpatory value of M.R.W.'s corrections *and made conscious efforts to suppress* that exculpatory evidence.

Id. (emphasis added). The circuit court's findings of fact again lead necessarily to the circuit court's conclusion.

Because the circuit court made required findings of fact entitled to deference by this Court, and applied the correct law to those facts in finding both that the evidence the State failed to preserve was apparently exculpatory and that the State acted in bad faith when it failed to preserve it, this Court must affirm.

II. This Court Lacks Jurisdiciton

This appeal is not properly before this Court, as it was initiated by the filing of a Notice of Appeal by an individual not authorized by statute to file it. Since the Notice of Appeal was invalid, this Court lacks jurisdiction to hear the appeal.

The Defendant previously filed a Motion to Dismiss containing much of the argument in this section. That Motion was denied by one judge, contrary to this Court's Internal Operating Procedures. The Defendant submitted a Motion for Clarification, which another judge on this Court construed as an impermissible motion for reconsideration and denied. Because the Defendant believes that the Motion to Dismiss should have been acted on by a three-judge panel consistent with this Court's Internal Operating Procedures, the Defendant incorporates the request for dismissal based on a lack of jurisdiction in this brief. First the posture of the

Motion to Dismiss and Motion for Clarification relative to this Court's Internal Operating Procedures is discussed, incorporating and expanding upon the arguments submitted in the Motion for Clarification. Then the substance of the move for dismissal, is addressed: That the District Attorney is not authorized to represent the State in felony appeals, rendering the notice of appeal invalid.

A. *Posture of this Issue.*

This Court's Internal Operating Procedures require that a motion to dismiss be acted upon by a three judge panel. When the Motion to Dismiss was denied, the Defendant submitted a Motion for Clarification. This was construed as a motion for reconsideration, and denied as motions for reconsideration are not permitted.

This Court's Internal Operating Procedures require that a motion to dismiss be considered by a three judge panel.

> The motions judge may act on all motions, except those that reach the merits or preclude the merits from being reached, which can only be acted on by the panel. The motions judge may direct that any motion be acted on by the panel. The panel considers motions that reach the merits, that preclude the merits from being reached, or that have been referred by the motions judge.

WIS. CT. APP. IOP VI (3)(c) (Nov. 30, 2009). A Motion to Dismiss is a motion that precludes the merits of the case from being reached. As such, this Court's IOP requires that it can "only be acted on by the panel." In the Order denying the Defendant's Motion for Clarification, another judge of this Court wrote that "[t]he motion to dismiss was denied and did not preclude the merits of the appeal from being reached. It was properly decided by the motions judge." In other words, the

motions judge can act upon a motion to dismiss by denying it, but not by granting it.

To so construe this Court's IOP is to invalidate it. The IOP does not say "shall be referred to the panel if it passes the motions judge's initial review." Rather, it says "[t]he panel *considers* motions . . . that preclude the merits from being reached." To "consider" presumably means just what it says: That a motion to dismiss would be considered—whether for granting or denying—by the panel. To maintain a contrary position necessarily begs the question: If a motion is determined to preclude the merits from being decided, it must be acted upon. To deny a motion is to act upon it.

The Order dismissing the Motion for Clarification also cites to this Court's prerogative to disregard its IOP in its discretion. This Court's IOP's caution as much. WIS. CT. APP. IOP Introduction. But discretion is key, and as this Court often holds in reviewing lower court rulings, an exercise of discretion requires articulation. It is unclear that one judge may exercise discretion to disregard an IOP that requires consideration by a panel of judges. Regardless, the Order denying the Motion to Dismiss did not say that it was being considered by one judge in an act of discretion in the furtherance of judicial economy. That this Court was disregarding its IOP in this instance came only as a post hoc justification once the Defendant raised the issue.

The observation in the Order denying the Motion for Clarification that "We need not act on the appellant's motion for reconsideration just because he labels it

a motion for clarification" was unnecessary. As noted in the motion for clarification itself, "[w]e are not under the impression that the Court of Appeals must explain its decisions to our satisfaction." But the Defendant respectfully submits that the grounds painstakingly detailed in the Motion to Dismiss and the Motion for Clarification merit proper review by a panel of judges of this Court. The Orders in these cases were dismissive regarding issues that by definition are determinative of this case. The Motion for Clarification was not a motion for reconsideration as much as it was a motion for proper consideration under this Court's IOP.

The Order denying the Motion to Dismiss leaves the Defendant uncertain as to the reasons the Motion was denied. The Order states that an appeal is commenced when the notice of appeal is forwarded from the circuit court to the court of appeals. The Order states that the District Attorney is impliedly authorized to file a Notice of Appeal. Both of these were addressed in our Motion, as discussed below.

The Order reads "Not until the notice of appeal is filed and transmitted to the court of appeals by the clerk of the circuit court, is an appeal commenced and docketed. Rule 809.11(2). After that occurrence, the Attorney General takes over representation in felony appeals." As discussed in our Motion, this is inconsistent with the Statutes. The statute cited in the Order concerns transmittal, not commencement. An appeal is initiated by filing a notice of appeal. Wis. Stat. § 809.10(1)(a); Motion to Dismiss at 2. Filing a notice of appeal is a phase of the appeal. *State v. Seay*, 2002 WI App 37, ¶ 6, 250 Wis. 2d 761, 641 N.W. 2d 437; Motion to Dismiss at 2.

The Order reads "Implicit in § 974.05(3), is that the district attorney is authorized to file a notice of appeal." This, too, was addressed in our Motion. Motion at 2-5. The Legislature has been clear when it has authorized a District Attorney to initiate proceedings. *See e.g.* Wis. Stat. § 978.05(6); Motion at 4; Our Motion discussed how filing and service are distinct. Wis. Stat. § 809.80; Motion at 2-5. There are many examples throughout the Statutes in which a person who initiates a matter is also responsible for service. *See e.g.* Wis. Stat. § 133.17 (District Attorney responsible for both initiating and serving). There are also instances in which service is required of a person or entity that has not initiated a matter. *See e.g.* Wis. Stat. §§ 971.17(4)(b), 971.17(5), 980.08(2) (Person files, court serves); 111.39(4)(d) (examiner finds, department serves); 811 (judge issues writ, sheriff serves); 51.20(2) (court issues order of detention, law enforcement officer serves). As discussed at length in our Motion, § 974.05(3) authorizes only service of a Notice by a District Attorney, not filing of it or initiation of an appeal. *See* Motion to Dismiss.

It is well established that statutory interpretation begins with the language of the statute, and if the meaning there is plain, the inquiry ordinarily ends. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110, "In all Ango-American jurisprudence, a principal obligation of a judge is to explain his reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined." *McCleary v. State,* 49 Wis. 2d 263, 280-81, 182

N.W.2d 512, 521 (1971). It seems odd that this Court would find implicit in the Statutes a privilege or duty of the District Attorney without discussion as to how it arrived at that conclusion. The conclusion that the District Attorney is implicitly authorized by statute is contrary to well established jurisprudence related to interpretation of statute.

B. *The Notice of Appeal was Invalid.*

This case originated when the State charged the Defendant with 1st degree sexual assault of a child, a class B felony. The State was represented by ADA Paul Barnett at extensive pretrial proceedings. The Defendant was convicted after a jury trial, at which ADA Barnett represented the State. The Defendant timely filed a Motion for Postconviction Relief. Several postconviction motion hearings were held, at which ADA Barnett continued to represent the State. The trial court found that various agents of the State, including ADA Barnett, had acted in bad faith in failing to preserve exculpatory evidence. The trial court by written decision on December 1, 2015 therefore vacated the judgment of conviction and dismissed the case with prejudice. ADA Barnett filed a Notice of Appeal on January 7, 2016.

This is a felony case, and therefore Assistant District Attorney Barnett is not authorized under statute to file a Notice of Appeal. ADA Barnett purported to appeal "under the authority of Wis. Stat. § 974.05(1)(b)." (*See* Notice of Appeal). However, responsibility for appeal of felony cases rests with the Attorney General's office. Wis. Stat. § 165.25(1). Since the District Attorney's office is not the representative of the State in felony appeals, the Notice of Appeal is invalid.

Further, as the time for filing a Notice of Appeal has now run, this Court lacks jurisdiction to hear the appeal.

"Appellant" means a person who files a notice of appeal. Wis. Stat. § 809.01(2). "Appeal" means a review in an appellate court by appeal of a judgment or order of a circuit court. Wis. Stat. § 809.01(1). An appeal is initiated by filing a notice of appeal with the circuit court in which the judgment or order appealed from was entered. Wis. Stat. § 809.10(1)(a). Filing a notice of appeal is one of the phases of an appeal. *State v. Seay*, 2002 WI App 37, ¶ 6, 250 Wis. 2d 761, 641 N.W. 2d 437. The Attorney General represents the State in felony appeals. Wis. Stat. § 165.25(1).

The one responsibility of the District Attorney in any State's appeal is to *serve* a copy of the Notice of Appeal upon the Defendant. Wis. Stat. § 974.05(3). But service is distinct from filing. *See* Wis. Stat. § 809.80.

A District Attorney's duties in representing the State are subordinate to legislative direction as to the cases in which he shall proceed. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis.2d 368, 380, 166 N.W.2d 255 (1969)(citing *State v. Coubal*, 248 Wis.247, 21 N.W.2d 381(1946). The duties of the District Attorney are enumerated in Wis. Stat. § 978.05. Particularly relevant in this case is (5), "Criminal Appeals." In whole, the subsection reads

> CRIMINAL APPEALS. Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from a county within his or her prosecutorial unit to the court of appeals or supreme court. The district attorney for the prosecutorial unit in which the case was filed shall represent the state in any appeal or other

> proceeding if the case is decided by a single court of appeals judge, as specified in s. 752.31 (3).

In just this subsection, one can observe the difference in the duties of a District Attorney between felony and misdemeanor cases. In felony cases, the District Attorney may upon the request and under the supervision and direction of the Attorney General *brief and argue* criminal cases. In contrast, in misdemeanor appeals, the district attorney shall *represent* the State in any appeal. The District Attorney's duties in misdemeanor cases encompass the whole of representing the State, whereas in felony cases, the duties may only be to brief and argue. In effect, the Attorney General still represents the State in felony appeals, but after requesting and while supervising and directing the District Attorney, may delegate briefing and argument to the District Attorney.

A District Attorney may only brief and argue criminal cases brought by appeal "[u]pon the request and under the supervision and direction of the attorney general." Wis. Stat. § 978.05(5). Even upon that request, direction, and supervision the District Attorney is only authorized to "brief and argue" a criminal case brought by appeal, not to perform duties such as filing a Notice of Appeal. *Compare* Wis. Stat. § 978.05(5)(authorizing the District Attorney to brief and argue criminal cases brought by appeal) *with* Wis. Stat. § 978.05(6)(authorizing the District Attorney to institute, commence or appear in other actions and proceedings). It was clear that the Attorney General had not requested that the District Attorney's office brief and argue case, as Assistant Attorney General

Tiffany Winter had promptly filed a notice of appearance. Even if the Attorney General had requested as much, the Attorney General would still have been responsible for filing a Notice of Appeal, as the filing of a Notice of Appeal is neither briefing nor arguing.

Other statutes underscore the distinction between the Attorney General and a District Attorney in terms of who represents the State. The duties of the Department of Justice are enumerated by statute: Just as the District Attorney shall represent the State in misdemeanor appeals, so the Department of Justice shall represent the State in appeals and on remand. Wis. Stat. § 165.25, *See also* Wis. Stat. § 752.31(4). Likewise, Wis. Stat. § 809.80(2)(b) requires that papers in felony appeals be served on the Attorney General. It follows that as a Notice of Appeal would be directed to the Attorney General in a felony case, so the Attorney General would file the Notice of Appeal in a felony case.

That a Notice of Appeal is required to be filed with the circuit court rather than with the Clerk of the Court of Appeals is of no consequence: The appeal itself is still to the Court of Appeals, the filing of a Notice of Appeal is a phase of the appeal, and the Attorney General is the only body authorized to represent the State in felony appeals.

As the Attorney General represents the State on appeal in felony cases, the Attorney General was responsible for filing a Notice of Appeal in this felony case. Filing a Notice of Appeal is not among the enumerated duties of the District

Attorney, nor among the responsibilities the statutes permit the Attorney General to delegate.

Wisconsin courts have examined the sufficiency of notices of appeal in several cases. In these cases, the courts have considered whether the signature of a non-attorney or an attorney not licensed to practice law rendered a notice or complaint fundamentally defective. In *Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 562 N.W.2s 401 (1997) the Wisconsin Supreme Court considered whether the Notice of Appeal was fundamentally defective when the president of a corporation filed a Notice of Appeal rather than an attorney, and decided it was, primarily due to the dangers posed by the unauthorized practice of law. *Life Science Church v. Shawano County*, 221 Wis.2d 331, 585 N.W.2d 625 (1989), essentially applies *Jadair* to trustees of an organization, reaffirming that non-lawyers may not initiate an appeal. In *Brown v. MR Group, LLC*, 2004 WI App 122, 274 Wis.2d 804, 683 N.W.2d 481, the Court of Appeals decided that an attorney's signature affixed by his legal assistant, who was not authorized to practice law in Wisconsin, rendered a Notice of Appeal fundamentally defective. The Court of Appeals found that the Notice was fundamentally defective due to both concerns about the unauthorized practice of law and the subscription requirement of the statutes. In *Town of Dunkirk v. City of Stoughton*, 2002 WI App 280, 258 Wis. 2d 805, 654 N.W.2d 488, the Court of Appeals held that the signature of an attorney licensed to practice law in Wisconsin who signed a complaint while he was suspended for failure to report CLE credits was fundamentally defective. In

In Schaefer v. Riegelman, 2002 WI 18, 250 Wis.2d 494, 639 N.W.2d 715, the Wisconsin Supreme Court found a summons and complaint fundamentally defective when it was signed by an attorney who was not licensed in Wisconsin at the instruction of an attorney who was licensed in Wisconsin. The Court in *Schaefer* underscored the protection that proper subscription affords:

> As evidenced by the above rules and statutes, the subscription requirement is not simply putting ink on paper. Rather, it is a deliberate process by which the lawyer guarantees the validity of a claim. When a lawyer signs a pleading, it is not merely a pro forma act of notarization. Before affixing a signature to pleadings, the lawyer is expected to engage in a moment of reflection, review the facts, consider the law, and satisfy himself or herself that there is a good faith basis on which to commence the action. In this way, the subscription requirement provides an essential protection for the people and businesses of the state to remain free from being sued frivolously or improperly—a protection that is at the core of an attorney's professional responsibility. If we were to adopt Schaefer's argument, we would eliminate the necessary safeguard that the statute provides. . . .
>
> We disagree with Schaefer's argument and we now overrule *Novak* to the extent that the court of appeals held that the subscription defect was technical rather than fundamental. As we have stated, the purpose of requiring a handwritten signature, made by the attorney of record, is not only to clarify who is accountable for an invalid claim, but also to guarantee that an attorney who is familiar with the procedural and substantive laws of this state has read the claims and has made an assessment of the claims' validity. Authorizing rubber-stamped signatures or allowing someone who is not licensed to practice law in Wisconsin to sign a pleading runs counter to this guarantee. To hold that a failure to meet the subscription requirement is merely technical jeopardizes judicial economy, erodes attorney accountability, and lessens the essential protection that the subscription requirement affords to defendants.
>
> *In Schaefer v. Riegelman*, ¶¶ 30; 32.

In this case, we deal not with an individual not authorized to practice law, but rather with an individual not authorized under statute to represent the State in a felony appeal. Nonetheless, the same principle discussed in *Schaefer* applies. Assistant District Attorney Barnett does not represent the State in this matter. The filing of a notice of appearance by Assistant Attorney General Winter indicated

that ADA Barnett will not brief and argue the case on appeal. Subscription by Assistant District Attorney Barnett is therefore unable to provide the all of the essential safeguards required by *Schaefer* to be afforded to defendants through subscription by an attorney who actually represents the State and who, after reflection, review and consideration would be satisfied that there is a good faith basis to commence an appeal.

The circuit court's written decision in this case was entered December 1, 2015. The State had 45 days from the date of the decision in which to file a Notice of Appeal. Wis. Stat. § 808.04(4). The Attorney General, who would have been the representative of the State in this matter, therefore would have had until January 15, 2015 to submit a Notice of Appeal. Since the Attorney General has not timely filed a Notice of Appeal, this Court lacks jurisdiction to hear an appeal.

Failure to timely file a Notice of Appeal deprives this Court of jurisdiction. Wis. Stat. § 809.10(e). In particular, it deprives this Court of jurisdiction in a State's appeal. The time for filing a Notice of Appeal cannot be enlarged. Wis. Stat. § 809.82(2)(b). Appeals by a defendant are an explicit exception. *Id.* (permitting the enlargement of time in Wis. Stat. §§ 809.30 and 809.32 cases). The statutes governing a defendant's appeal and a State's appeal are different. In the most obvious example, a defendant has twenty days in which to file a Notice of Appeal (Wis. Stat. § 809.30(2)(j))., whereas the State has forty-five days (Wis. Stat. § 808.04(4)). In this case, the Defendant's appeal was authorized under Wis. Stat. § 974.02. That statute requires that a postconviction motion be made in the time and

manner provided under Wis. Stat. § 809.30, for which extensions are permitted. A State's appeal is authorized under Wis. Stat. § 974.05(1)(b). That statute requires that the appeal be taken in the manner provided for civil appeals under chs. 808 and 809. That is to say, time for the State to submit a Notice of Appeal may not be extended. *State v. Williams*, 2005 WI App. 122, n.3, 284 Wis. 2d 488, 699 N.W.2d 249.

Since the Assistant District Attorney was without statutory authorization to file a notice of appeal in this felony case, the notice of appeal is invalid, and this Court is without jurisdiction to hear an appeal.

III. The Appeal is Frivolous

Just because a case presents an issue of first impression doesn't mean it's arguable. As delineated above, under any standard of review, the State's submission must fail. Having conceded that this Court is bound by the factual determinations of the circuit court, any argument that the State's opposite characterizations constitute the great weight and clear preponderance of the evidence is frivolous. A request to this court to redraw the inferences drawn by the trial court cannot succeed on appeal. *In Matter of Estate of Koenigsmark*, 119 Wis. 2d 394, n.1., 351 N.W.2d 169 (Ct. App. 1984).

Potential sanctions for a frivolous appeal range from dismissal to various monetary sanctions. See Wis. Stat. § 809.25(3). In this case, it is a matter of record that the Defendant spent over $35,000.00 defending against the charges at trial. CITE. It is further a matter of record that postconviction/appellate counsel was not

appointed by the State Public Defender. Having already spent an extraordinary sum of money defending against charges that were dismissed due to State impropriety on several levels, it is inappropriate that the Defendant should further bear the financial burden of defending against a frivolous appeal.

In order to find an appeal or cross-appeal to be frivolous, a court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Though the circuit court made a finding of bad faith on the part of the State when it failed to preserve exculpatory evidence, the Defendant possesses no evidence that this appeal was initiated "solely for the purposes of harassing or maliciously injuring" the Defendant. However, as should be clear from the discussion above, the Attorney General's office knew, or should have known, that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

The lack of reasonable basis is apparent in the State's Brief in Chief. The State makes no argument for a modification or reversal of existing law. It's

argument for an extension of insurance and labor law standards of review to bad faith in a criminal case is only implicit rather than developed, and even under that standard the appeal must fail. Finally, having conceded that this Court must employ a clearly erroneous standard of review to the circuit court's thorough and laboriously articulated findings of fact, then suggested that this Court make contrary findings based on mere conjecture about time-stamps, is unreasonable.

An example of the frivolity of the State's argument can be witnessed as juxtaposed with the circuit court's findings of fact.

The State's conjecture, unfounded by the record:

> So at the second interview, Holzrichter was just doing a favor for authorities in another jurisdiction that had no relation to any crime or other activities that occurred in her jurisdiction. And she was simply conducting a follow up to fill in some of the blanks in her first interview . . . The most reasonable inferences that can be drawn from these undisputable facts are that Holzrichter had set aside one hour to do a second interview with MW at the request of the authorities in another jurisdiction.
>
> When that hour was up, Holzrichter considered her favor to be done. It was time for her to move on to other matters that were more relevant to her responsibilities in Kansas.

State's Brief at 21-22.

The circuit court's findings of fact:

> Interviewer Holzrichter was calm and patient until M.R.W. explained the first correction. Then, Interviewer Holzrichter hurried to change the subject, leave the room and stop the taping. She did not even pause to allow M.R.W. to discuss her other corrections. Instead, Interviewer Holzrichter pacified M.R.W. by saying they would discuss her list outside of the video room. . . . It is counterproductive to the goal of obtaining the truth when an interviewer stops the taped interview upon realizing that inaccuracies have been said and corrections will be forthcoming. Clearly, M.R.W.'s written corrections were immediately recognized as exculpatory.

Decision at 23-24.

A request to this court to redraw the inferences drawn by the trial court cannot succeed on appeal. Such a request is frivolous. *In Matter of Estate of Koenigsmark*, 119 Wis. 2d 394, n.1., 351 N.W.2d 169 (Ct. App. 1984).

Argument A1 of the State is that the changes elevated M.W.'s credibility. That is an inference that the circuit court soundly rejected. *Decision* at 22-23. Argument A2a is that it would not have changed the result of the trial. That is an inference the circuit court soundly rejected. *Decision* at 27-28. Argument A2b is that the defense could have gotten M.W. to write the list again. That is conjecture the circuit court soundly rejected. *Decision* at 24-25. Arguments B1, B2, and B3 are that the State and its agents did not act in bad faith. The circuit court delineated with clarity why the circuit court found that the State did act in bad faith. *Decision* at 25-27. Finally, argument C is premised on the forgoing arguments, not developed, and also contrary to the circuit court's finding. *Decision* at 28-29. Each of the State's arguments on appeal, then, are frivolous and without arguable merit. This Court should find as much and remand to the circuit court for a determination of attorney's fees. *In Matter of Estate of Koenigsmark*, 119 Wis. 2d 394, 399, 351 N.W.2d 169 (Ct. App. 1984).

Conclusion

This Court, by a panel of three judges, should decide that this Court lacks jurisdiction to hear this case since the Assistant District Attorney was without authority to file the Notice of Appeal. If a panel of this Court decides that it does have jurisdiction, it should decide that the circuit court's decision in this case was correct, and this court should affirm it. Finally, this Court should decide that the State's appeal is frivolous, and remand to the circuit court for a determination of attorney's fees.

Dated this 25th day of July, 2016.

Respectfully submitted,

_____
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Attorney for the Defendant-Appellant

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,030 words.

Further

I certify that under s. 809.19(3)(b), an appendix to this brief is not required, as the Plaintiff-Appellant's brief contains all the materials necessary to an understanding of the appeal.

Further

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____
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