STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN

Plaintiff-Appellant,

Appellate Case No. 2020AP2072-CR

A;LEC ALFORD,

Petitioner-Defendant.

PETITION FOR REVIEW

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STATE OF WISCONSIN
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Plaintiff-Appellant,

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ALEC ALFORD,

Petitioner-Defendant.

PETITION FOR REVIEW

ALEC ALFORD, by his attorneys, REBHOLZ & AUBERRY, by ANN AUBERRY, petitions this Court to review the decision of the Court of Appeals, dated and filed on March 23, 2022.

ISSUE PRESENTED

When a circuit court properly dismisses[1] a case with prejudice for the State's failure to comply with §971.11(2), Wis. Stats., should the State be allowed to file new, but different, charges against the defendant arising from the same course of conduct?

GROUNDS FOR REVIEW

[1] The State did not argue and the Court of Appeals did not find the circuit court erred in applying the *Davis* criteria to Alford's case dismissing the original charge against him with prejudice. Thus, for purposes of this petition, Alford would assert the court reasonably and appropriately exercised its discretion to dismiss with prejudice.

In the instant case, the circuit court outlined the criteria set out in State v. Davis, 2001 WI 136, 248 Wis.2d 986, 637 N.W.2d 62, in determining the case against Alec Alford (Alford) should be dismissed with or without prejudice based upon the State's failure to comply with §971.11(2), Wis. Stats. Applying those criteria, the circuit court dismissed the case against Alford with prejudice.

The State subsequently filed new, but different, charges against Alford, but relied on the same set of facts alleged in the original Criminal Complaint. Alford filed a motion to dismiss the new case alleging they were multiplicitous and a violation of the double jeopardy clause of the United States and Wisconsin Constitutions. The State opposed the motion and argued there was no violation of the double jeopardy clauses because he was not acquitted of the original charges.

At the hearing, the circuit court acknowledged there was a dearth of applicable law in Wisconsin to address the issue, with the exception of civil and child support cases and stated it could not find any applicable criminal cases. Thus, the circuit court focused its analysis on the meaning of "with prejudice" in reaching the conclusion the State was precluded from issuing new charges against Alford after the original case was dismissed with prejudice (R.24, pp. 5-6).

The lack of guidance to circuit courts in Wisconsin when confronting this issue demonstrates a need for this Court to establish a policy regarding the re-issuing of new charges when the original case was dismissed with prejudice and the basis for the new charges arise from the same set of facts. §809.60(1r)(b). Additionally, a decision by this Court will help develop and clarify the law as it applies the law to this set of facts, as this case calls for application of a new doctrine rather than merely the application of well-settled principles to the factual situation and the question presented is a novel one which will have statewide impact. §809.60(1r)(c)1 and 2. Finally, the question presented is not factual in nature but rather is a question of law likely to recur unless resolved by this Court. §809.60(1r)(c)3.

STATEMENT OF CASE AND FACTS

In a Criminal Complaint, dated March 18, 2019, Alec Alford (Alford) was charged with Delivering Cocaine as a Second or Subsequent Offense in violation of Wisconsin Statutes 939.50(3)(f), 961.41 (1)(cm)1r and 961.48(1)(b). It was alleged he delivered cocaine to a confidential informant on March 14, 2018, at an Aldi's grocery store, located in Waukesha County (R.28).

He was incarcerated at the Milwaukee Secure Detention

Facility when he made a request for prompt disposition, pursuant to §971.11(2), Wis. Stats.,[2] of the above-referenced case on June 4, 2019 (R.29).

Subsequently, Waukesha County Deputy District Attorney Lesle Boese informed Waukesha County Circuit Court Judge Lazar of that request in a letter dated, June 13, 2019 (R.30)

Alford's case was not resolved in 120 days as required by statute and, thus, the charge against him had to be dismissed. The only question which remained was whether that dismissal should be with or without prejudice. On January 6, 2020, Alford filed a brief with the circuit court arguing his case should be dismissed with prejudice, citing State v. Davis, 2001 WI 136, 248 Wis.2d 986, 637 N.W.2d 62 (R.31). Specifically, he argued the factors identified in *Davis* required dismissal with prejudice because:

1. The State merely notified the circuit court of Alford's request and failed to follow through on its statutory obligation to ensure Alford's request was timely met.

2. The nature of the charge against Alford was not so complicated or unusual as to prevent adequate preparation for trial in 120 days.

3. Alford did not contribute to the delay of the

[2] Also known as the Intrastate Detainer Act.

proceedings.

4. Alford did not waive his statutory right to a prompt disposition either explicitly or implicitly.

5. Alford was harmed by the delay due to (a) the effect it had on his legal defenses (b) his inability to participate in programming and possible movement within his institution; (c) the effect it had on the orderly rehabilitation process within the Department of Corrections; (d) the effect it had on his possibility for a concurrent sentence; (e) the effect it had on his possible transfer to a less secure facility; (f) the effect it had on his opportunity for parole; (g) the effect it had on his possible transfer to another institution; (h) the effect it had on the public's interest in the prompt prosecution of crime; and (I) the lack of any harm a dismissal might have on a victim.

(R.31).

On June 9, 2020, Judge Lazar conducted a hearing at which she ordered Alford's case be dismissed with prejudice. In so doing, she found the *Davis* factors weighed in favor of dismissing with prejudice. Specifically, she found:

1. It was the State's obligation to follow through to ensure Alfords' statutory right to a prompt disposition was fulfilled and the State failed to do so (R.32, pp. 4-5).

2. The nature of the charge against Alford was not of such a nature as to require extensive preparation for trial (Id., p. 5).

3. Alford's conduct did not contribute to the delay (Id., p.5).

4. Alford did not waive the time limit (Id., p. 5).

5. There was harm to Alford from the delay due to

> (a) his inability to participate in programming and movement within the institution; (b) the effect it had on his rehabilitation; (c) the effect it had on his possibility for concurrent sentences; and (d) the effect it had on his possibility for parole (Id., pp. 5-7, 11).

In a Criminal Complaint filed on July 9, 2020, the State filed new charges against Alford in Waukesha County Case No. 20-CM-1192 (R.1). Relying on the same set of facts from the 2018 case which was dismissed with prejudice, the State charged Alford with five counts of Possession of Drug Paraphernalia as a Repeater, in violation of §§939.62(1)(a) and 961.573(1) Wis. Stats.

On September 15, and October 10, 2020, Alford filed motions to dismiss the new case, arguing the "multiplicitous charges" violated his constitutional rights not to be put in jeopardy twice for the same criminal conduct and due process (R.8;15). In a letter dated October 15, 2020, the State argued there was no violation of Alford's right not to be put in jeopardy twice for the same conduct because the circuit court's dismissal of the prior case with prejudice did not constitute either an acquittal or conviction and, thus, jeopardy did not attach in that case (R.16).

In a hearing conducted on October 29, 2020, Waukesha Circuit Court Judge Melvin summarized the respective

arguments of the parties and found the defense was arguing a violation of §971.71, Wis. Stats. (multiplicitous charges) and constitutional violation, while the State was arguing there was no double jeopardy issue (R.24, pp. 4-5). The court stated the arguments of the parties were interesting, "but appear that the parties are talking past each other" (Id., p. 5). The court found the real issue was the definition of dismissal with prejudice when the same set of facts are the basis for a subsequent prosecution (Id.). The court then found the State could not rely on those same facts in the instant case and granted the defense motion to dismiss the case (Id., pp. 5-7).

The State filed a Notice of Appeal on December 14, 2020 (R.18). The record was compiled and transmitted to the Court of Appeals on January 26, 2021 (R.27). The State filed its brief-in-chief and appendix on March 15, 2021.

Subsequently, the Wisconsin State Public Defender, Appellate Division, appointed undersigned counsel to represent Alford on appeal.

Undersigned counsel filed a motion to supplement the record with documents from the trial court record in Waukesha County Cse No. 19-CF-597 and, in an order dated October 27, 2021, the Court of Appeals granted the motion to supplement the record. The supplemented record was electronically filed

on November 17, 2021, which made Alford's response brief due for filing on December 16, 2021. However, the Court of Appeals extended the time for Alford to file the response brief until December 30, 2021.

On appeal, the State argued it had not violated Alford's constitutional right against double jeopardy when it filed the new charges against him based on the same facts as outlined in the original Criminal Complaint for the basis of the case dismissed with prejudice because he had not been acquitted on the merits of the case and cited Evans v. Michigan, 568 U.S. 313 (2013), in support of its position.

Alford did not address that argument; but, rather, focused on the history of the legislation regarding interstate and intrastate detainers and the intent of Congress when it passed that legislation. He argued in allowing states to enact legislation regarding intrastate detainers and to enter into interstate agreements with one another in which failure to comply may result in a dismissal of a criminal charge with prejudice, the United States Congress intended the sanction of dismissal with prejudice as having the effect of "bar[ring] any future prosecution against the defendant for charges of arising out of the same conduct" Clark, *The Effect of the Interstate Agreement on Detainers on Subject Matter Jurisdiction*, 54

Fordham L. Rev. 109 (1986) p. 1218, n. 47; *See also* 18 U.S.C. app. §2, Arts. III(d), IV(e) and V(c) (1982).

In its decision reversing the circuit court's dismissal of the charges subsequent to the dismissal with prejudice, the Court of Appeals addressed only the State's multiplicity and double jeopardy arguments and found Alford's decision not to address those arguments meant he had conceded those arguments were "persuasive" (Decision, p. 4; A-104). Additionally, the Court found Alford had provided no legal argument in support of the circuit court's dismissal of the subsequent charges (Decision, p. 3; A-103). Finally, the Court never addressed Alford's argument regarding the history of the legislation regarding intrastate and interstate detainers and the intent of Congress when it allowed states to draft similar legislation.

That decision, dated March 23, 2020, makes Alford's petition for review due for filing with this Court on April 22, 2022.

ARGUMENT

When a Circuit Court Properly Dismisses a Case with Prejudice for the State's Failure to Comply with §971.11(2), Wis. Stats., the State Should Be Precluded from Filing New, but Different, Charges Against the Defendant Arising from the Same Course of Conduct.

As noted earlier in this petition, the State of Wisconsin has no case law directly dealing with this issue and it is imperative this Court offer guidance to circuit courts in Wisconsin when confronting this issue. It also demonstrates a need for this Court to establish a policy regarding the re-issuing of new charges when the original case was dismissed with prejudice and the basis for the new charges arise from the same set of facts. §809.60(1r)(b). Additionally, a decision by this Court will help develop and clarify the law as it applies the law to this set of facts, as this case calls for application of a new doctrine rather than merely the application of well-settled principles to the factual situation and the question presented is a novel one which will have statewide impact. §809.60(1r)(c)1 and 2. Finally, the question presented is not factual in nature but rather is a question of law likely to recur unless resolved by this Court. §809.60(1r)(c)3.

What is of assistance to this Court in addressing this issue is the history of Council of State Governments in proposing legislation regarding both intrastate and interstate detainers lodged against prisoners as far back as 1956. Clark, *The Effect of the Interstate Agreement on Detainers on Subject Matter Jurisdiction*, 54 Fordham L. Rev. 109 (1986). These were referred to by the drafters of the proposed legislation as

the Uniform Mandatory Disposition of Detainers Act (UMDDA), which governed intrastate detainers, and the Interstate Agreement on Detainers (IAD).

In allowing states to enact legislation regarding intrastate detainers and to enter into interstate agreements with one another in which failure to comply may result in a dismissal of a criminal charge with prejudice, the United States Congress described the sanction of dismissal with prejudice as having the effect of "bar[ring] any future prosecution against the defendant for charges of arising out of the same conduct." Id., p. 1218, n. 47; *See also* 18 U.S.C. app. §2, Arts. III(d), IV(e) and V(c) (1982). This view is consistent with the Council's intent in proposing the laws regarding both intrastate and interstate detainers and the sanctions for failing to expeditiously resolve them. Council of State Governments, Handbook in Interstate Crime Control 134 (1978) (because legislation regarding intrastate and interstate detainers is remedial in nature it should be construed liberally in favor of the prisoner). *See also* U.S. v. Mauro, 436 U.S. 340 (1978) (no reason to give an unduly restrictive or miserly meaning to the language of legislation regarding intrastate or interstate detainers).

In the instant case, Judge Melvin found neither the

State nor the defense were correct in assessing the correct outcome of the motion to dismiss the new case was governed by the principles of multiplicity or double jeopardy; but rather, should hinge upon the definition of "with prejudice." His reasoning was in keeping with that of Congress in defining the meaning of the sanction of dismissing with prejudice for failing to resolve both intrastate and interstate detainers in a timely fashion. If the State is able to re-charge a defendant with new charges, via different statutes, based upon the same conduct, then the sanction of dismissal with prejudice has no true impact or meaning to a defendant harmed by the State's failure to comply with §971.11(2), Wis. Stats., and is contrary to the holding of *Mauro* that courts should not give an unduly restrictive or miserly meaning to the detainers legislation.

The lack of guidance to circuit courts in Wisconsin when confronting this issue demonstrates a need for this Court to establish a policy regarding the re-issuing of new charges when the original case was dismissed with prejudice and the basis for the new charges arise from the same set of facts. §809.60(1r)(b). Additionally, a decision by this Court will help develop and clarify the law as it applies the law to this set of facts, as this case calls for application of a new doctrine rather than merely the application of well-settled principles to the

factual situation and the question presented is a novel one which will have statewide impact. §809.60(1r)(c)1 and 2.. Finally, the question presented is not factual in nature but rather is a question of law likely to recur unless resolved by this Court. §809.60(1r)(c)3.

CONCLUSION

For all of the above reasons and because this an unsettled area of the law which needs to bedeveloped, this Court should grant review.

Dated at Wauwatosa, Wisconsin this 19th day of April, 2022.

Respectfully submitted,

REBHOLZ & AUBERRY

Electronically signed by:

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CERTIFICATION

I certify this Petition conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Petition for Review prepared using the following font:

> Proportional sans serif font: 12 characters per inch, double spaced; 2.0 margins on the left and right sides and 1 inch margins on the other two sides. The length of this Petition is 2689 words.

Dated: April 19, 2022

Electronically signed by:

Attorney Ann Auberry

E-FILE/SERVICE CERTIFICATION

I certify that in compliance with Wis. Stat. §801.18(6), I electronically filed this petition, along with the appendix, with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: April 19, 2022

Electronically signed by:

Attorney Ann Auberry

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