STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case Nos. 2022AP92-CR; 2022AP93-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEBRA L. RIPPENTROP,

Defendant-Respondent (2022AP92-CR)

and

STEVEN E. RIPPENTROP

Defendant-Respondent (2022AP93-CR).

ON APPEAL FROM ORDERS GRANTING DEFENDANTS' MOTIONS TO DISMISS, ENTERED IN THE JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE STACY A. SMITH, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

This case concerns whether the circuit court properly dismissed two criminal cases prior to trial, effectively with prejudice, in order to discipline a former district attorney for misconduct. The circuit court ruled that the defendants' right to a speedy trial was not at issue. The court did not make any finding that the defendants would not receive a fair trial, nor did the court find that the defense's ability to put on its case was prejudiced in any way by the misconduct.

Steven and Debra Rippentrop (together, the Rippentrops) were charged with second degree recklessly endangering safety, false imprisonment, physical abuse of a child, and mental harm to a child, all as a party to a crime. (R. 1.)[1] The charges stemmed from allegations of serious abuse against their adopted son, "Mark."[2] While the Juneau County Sheriff's Office and District Attorney's Office investigated the allegations, Juneau County corporation counsel initiated a Children in Need of Protection or Services (CHIPS) proceeding, and later a termination of parental rights (TPR) proceeding, against the Rippentrops with respect to Mark.

Former Juneau County District Attorney Michael Solovey decided that it would be in Mark's best interest to ensure that he would not return to the Rippentrop home. In light of this conclusion, he made an offer to the Rippentrops and their attorney, whereby he agreed not to bring criminal charges if they fulfilled certain conditions, including voluntary termination of parental rights to Mark. The

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[1] Unless otherwise indicated, citations to the record are to Appeal No. 22AP92-CR, *State v. Debra L. Rippentrop*. Duplicate copies of the cited documents are available in the record for Appeal No. 22AP93-CR, *State v. Steven E. Rippentrop*.

[2] This brief refers to the victim by a pseudonym. Wis. Stat. § 809.86(4).

Rippentrops consulted with their attorney and agreed. They eventually terminated their parental rights, but they did not disclose to the TPR court that they had entered into this agreement. Solovey informed the Juneau County Sheriff's Department that he would not be pursuing charges. He did not disclose the details of the agreement. At various times, Solovey expressed concern that the State would not be able to prove the charges beyond a reasonable doubt.

Juneau County corporation counsel commenced a John Doe proceeding in an effort to compel criminal action against the Rippentrops. The John Doe court found probable cause and appointed a special prosecutor to consider bringing charges against the Rippentrops.

After Solovey left office, the new Juneau County District Attorney took the case back from the special prosecutor and commenced criminal complaints against the Rippentrops.

The Rippentrops moved to dismiss, arguing that the State was bound by Solovey's agreement not to bring charges. After several hearings and lengthy briefing, the circuit court concluded that the oral agreement existed, but it was void as contrary to public policy. The court noted its belief that both Solovey and the Rippentrops' attorney had behaved unethically in forming the agreement. The court also found that the Rippentrops themselves did not have clean hands, due to their failure to disclose the agreement to the court at the TPR hearing.

After that, the Rippentrops filed a second motion to dismiss, this time for prosecutorial misconduct. The circuit court agreed with the Rippentrops that misconduct occurred and dismissed the cases, finding that Solovey's conduct violated the Rippentrops' parental rights, their Fifth Amendment right to remain silent, and the Due Process Clause of the Fourteenth Amendment.

This Court should reverse. The circuit court did not have authority to effectively dismiss the cases with prejudice because jeopardy had not yet attached, and the defendants' constitutional right to a speedy trial was not at issue. Binding Wisconsin Supreme Court precedent compels reversal for this reason alone. Setting that aside, dismissing criminal cases, especially pre-trial, is a drastic remedy that the Wisconsin Supreme Court says must be approached with caution. Numerous interests must be carefully balanced, and courts must consider whether the misconduct impairs the defendants' ability to receive a fair trial. The circuit court failed to engage in this analysis, and therefore, it erroneously exercised its discretion.

Even if the proper analysis had been conducted, it would firmly establish that dismissal is not the proper remedy. The gravity of the offenses, the public's interest and victim's interest in seeing justice done, and the absence of any indication that the defendants will not receive a fair trial, all favor these criminal cases going forward. Any unethical conduct on the part of the former district attorney could be addressed through other means. The State respectfully requests that this Court reverse the circuit court's dismissal of the cases.

STATEMENT OF THE ISSUES

1. Whether the circuit court had authority to dismiss the Rippentrops' criminal cases, effectively with prejudice, prior to the attachment of jeopardy, when the defendants' constitutional right to a speedy trial was not implicated?

The circuit court did not directly address this question, but implicitly answered yes.

This Court should answer no.

2. Whether the circuit court properly exercised its discretion when it dismissed the Rippentrops' criminal cases, without making findings as to whether the Rippentrops would receive a fair trial and without considering the other factors set forth by the Wisconsin Supreme Court.

The circuit court implicitly answered yes.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication and oral argument are not warranted. The first issue is dispositive, and this Court can resolve that issue on the basis of controlling precedent. No reason appears for questioning or qualifying the precedent. Wis. Stat. § 809.23(1)(b)3. Further, the facts and procedural history are highly unusual, and this case therefore lacks value as precedent.

STATEMENT OF THE CASE

Complaint Allegations

According to the complaints, on a morning in January 2015, Steven Rippentrop called the Juneau County Sheriff's Office to report that his thirteen-year-old adopted son Mark was missing. (R. 1:2.) That morning, law enforcement learned that Mark may have been located in the restaurant area of a nearby gas station. (R. 1:2.) An employee encountered a boy in the restaurant. (R. 1:2.) When Detective Benjamin Goehring of the Juneau County Sheriff's Department arrived, the employee told him she was concerned for the boy's safety. (R. 1:2.)

Detective Goehring noted what appeared to be tape residue on the boy's wrists and hands. (R. 1:2.) The boy said he had finally escaped because he could not handle being constantly "taped up" at home. (R. 1:2.) The boy stated that his parents would tape his hands behind his back, and he was in some form of restraint "24 hours a day seven days a week." (R. 1:2.)

The detective took the boy to the Sheriff's Office for an interview, and the boy revealed that he was "Mark," the Rippentrops' adopted son. (R. 1:3.) Mark said that he had been regularly restrained at his house with blue tape for over a year. (R. 1:3.) He reported being blindfolded by a hand towel being placed over his head, with tape securing it to prevent him from seeing anything within the home. (R. 1:3.) The tape holding the towel in place went around his eyes and forehead, and more tape was used around his chin and neck area. (R. 1:3.) He reported breathing through the towel. (R. 1:3.) If he was unable to breathe, Debra adjusted the towel and tape. (R. 1:3.)

Mark stated that every night as he tried to sleep, he was tied up and blindfolded as described above. (R. 1:3.) He reported being caged in an enclosure, which was monitored via closed circuit video. (R. 1:3.) The bunkbed had a tent-like enclosure with access zippers only on the exterior. (R. 1:3.)

The Rippentrops told Mark that he needed to be restrained because of his behavior. (R. 1:3.) Mark stated that the restraints hurt, depending on the position he was in. (R. 1:3.) The tape hurt as it pulled at his skin, sometimes leaving rashes. (R. 1:3.)

A deputy reported to the Rippentrops' residence to speak with them. (R. 1:3.) The Rippentrops took the deputy to Mark's room. (R. 1:3.) The deputy noted the enclosure Mark had described. (R. 1:3.) The deputy also noted a large amount of used tape in the bedroom's wastebasket. (R. 1:3.)

During a non-custodial interview with Debra, she told law enforcement that they had taken drastic measures as a result of Mark's poor behavior. (R. 1:4.) Debra said she got to a "desperation point" and came up with restraining Mark by use of tape and blindfolding him with the towel. (R. 1:4.)

Debra had been restraining Mark in this fashion for approximately one year, and Mark was taped for a portion of virtually every day. (R. 1:4.) When he went to bed at night, Mark would pull his legs up to his chest, with his restrained arms behind his knees, resulting in a quasi-fetal position. (R. 1:4–5.) Mark then typically fell asleep in a kneeling position with his face toward the bed and his knees beneath him. (R. 1:5.) In the morning, the restraints usually came off for breakfast. (R. 1:5.) After Mark was done eating, if he started to "misbehave," the restraints went back on. (R. 1:5.) After calming down, the restraints typically came off again. (R. 1:5.) While in public view, Mark did not wear the restraints. (R. 1:5.) The Rippentrops' extended family were not aware of the restraints. (R. 1:5.)

Debra stated she was at the point of "exhaustion," and restraining Mark was a way she could sleep at night, knowing that he was prevented from hurting himself or damaging property. (R. 1:5.)

During a non-custodial interview with Steven, he confirmed that he, along with other family members, had been taping Mark to restrict his movements and actions. (R. 1:5–6.) Steven stated that he was unsure if Mark was capable of hurting another person. (R. 1:6.) He did not say that Mark had ever harmed another person. (R. 1:6.)

Pre-charging Events

The Juneau County Sheriff's Department referred the matter to former District Attorney Solovey. (R. 31.) Solovey did not immediately file charges against the Rippentrops. (R. 41:12–14.)[3] Solovey stated that he saw a "variety of problems" with prosecuting the case, and further stated that he was waiting for "a comprehensive personality study of the victim." (R. 41:17–18.) After speaking to various county officials and Mark's foster care provider, however, Solovey concluded that it would not be in Mark's best interest to return to the Rippentrop home. (R. 41:21.) He believed that Mark did not want to return to the home either. (R. 41:22.)

During the summer of 2015, Solovey became aware of a pending CHIPS case that Juneau County corporation counsel had filed against the Rippentrops. (R. 41:19.) The Rippentrops hired Attorney Kerry Sullivan-Flock to represent them in the CHIPS action. (R. 41:19.)

On October 8, 2015, Solovey met with Attorney Sullivan-Flock and the Rippentrops (R. 41:20, 24.) The goal of the meeting was to "see if we could negotiate a settlement to the criminal part of th[ese] proceedings." (R. 41:23.) Solovey made a proposal: he would not bring criminal charges related to the allegations concerning Mark if the Rippentrops fulfilled certain conditions. (R. 41:25.) The conditions included that the Rippentrops would have no contact with Mark from that

[3] Tr. of Mtn. H'rg dated June 30, 2020 (morning); (*see also* R. 45, Appeal No. 22AP93).

day on, that they would voluntarily terminate their parental rights, and that they would fully participate with human services. (R. 41:25.) Within a week of that meeting, Attorney Sullivan-Flock informed Solovey that the Rippentrops agreed to the proposal. (R. 41:26.)

Solovey informed the Juneau County Sheriff and Detective Goering, the lead investigator on the case, that he had made the Rippentrops a proposal that he was "confident" would be in the "best interests of [Mark]." (R. 41:26–27.) He further informed them that "at the present time," no criminal charges would be filed. (R. 33; 41:27.) Solovey similarly informed Juneau County corporation counsel of his proposal and his decision not to file charges "at the present time." (R. 34; 41:29–30.) Solovey explained that he said "at the present time" because he would not go through with the proposal if the Rippentrops did not meet his conditions, and he was waiting for the results of the ongoing investigation. (R. 41:30.)

According to Solovey, as of October 2015, he had still not received the investigations he had been promised. (R. 41:22–23.) On November 9, 2015, Solovey wrote to Detective Goering and informed him as follows:

> Based upon my careful review of all of the above referenced materials and conversations with several members of the law enforcement and social services communities, I have decided to decline prosecution of the above referenced matters. There is insufficient admissible evidence either to support the filing of criminal charges, or upon which a jury could find, beyond a reasonable doubt, that these defendants or either of them, had a criminal intent or were legally reckless in regard to their treatment of [Mark]. In the event that further admissible evidence is brought to my

> attention I shall remain ready, willing and able to review my decision in this regard.

(R. 31:2.) According to Solovey, at that time, he still did not know if the Rippentrops would fulfill the conditions of his proposal. (R. 41:32.) County officials "blew up" when Solovey told them of his decision. (R. 41:33.) Solovey did not provide the officials details of the settlement offer, but he maintained that he did not believe he could prove the cases beyond a reasonable doubt. (R. 41:33–35.)

The John Doe Proceeding

In an effort to compel a criminal complaint, Juneau County corporation counsel initiated a John Doe proceeding in early 2016. (R. 57:180–81.)[4] Two John Doe hearings were held in April 2016 to determine whether there was probable cause to support criminal charges against the Rippentrops, and whether a special prosecutor should be appointed. (R. 36; 39;[5] 57:181.) Juneau County Circuit Judge John Pier Roemer presided over the John Doe proceeding. (R. 36:1.) The Rippentrops did not appear or testify at the hearings. (R. 36; 39.)

Solovey made an appearance at the two John Doe hearings. While he was not permitted to formally participate in the hearing, the court allowed him to give brief statements. (R. 36:96–102; 39:9–10; 41:38, 41.) Solovey maintained that there was not probable cause to support criminal charges.

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[4] Tr. Mtn. Hr'g, Aug. 12, 2020; (*see also* R. 62, Appeal No. 22AP93).

[5] Tr. John Doe Proceedings Apr. 12 and 26; (*see also* R. 33; 41, Appeal No. 22AP93).

At the conclusion of the hearings, Judge Roemer found probable cause to believe that the Rippentrops committed a crime with respect to their treatment of Mark. (R. 36:82–89.) The court referred the case to a special prosecutor "to make an independent determination as to whether or not a criminal charge shall lie based upon my specific findings." (R. 36:90–91.)

At no point did Solovey inform the court or corporation counsel of the details of his non-prosecution agreement with the Rippentrops. (R. 67:35–36.)[6] Nor did he notify the court presiding over the John Doe hearing or special prosecutor of the non-prosecution agreement. (R. 40:10–11;[7] 67:65.)

The TPR Proceeding

Corporation counsel initiated a TPR proceeding against the Rippentrops with respect to Mark. (R. 57:173.) On June 6, 2016, the Rippentrops appeared at a hearing in that matter. (R. 51.)[8] At that hearing, the Rippentrops testified in support of voluntary termination of their parental rights.

Attorney Sullivan-Flock led the Rippentrops through testimony at that hearing. Debra testified that she believed termination was in Mark's best interest. (R. 67:109; *see also* R. 51:14.) She further testified falsely that no one had promised her anything in order to get her to reach this decision for Mark. (R. 67:109–110; *see also* R. 51:15.) When asked if anybody threatened her or coerced her in any way to get her to reach this decision, Debra answered "no." (R. 67:110; *see also* R. 51:15.) Steven was asked substantially

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[6] Tr. Oral Ruling Motion for Specific Performance, Oct. 30, 2020; (*see also* R. 73, Appeal No. 22AP93).

[7] Tr. of Mtn. H'rg dated June 30, 2020 (afternoon); (*see also* R. 44, Appeal No. 22AP93).

[8] Confidential Tr. TPR Hr'g, June 6, 2016; (*see also* R. 56, Appeal No. 22AP93).

similar questions and gave substantially similar answers. (R. 67:110; *see also* R. 51:22–25.) At no point did the Rippentrops or their attorney inform the presiding judge about the agreement that if they terminated parental rights, Solovey would not bring criminal charges against them. (R. 67:110.)

The Circuit Court Denies the Rippentrops' Motion to Dismiss, Concluding that their Agreement with Solovey was Void as Against Public Policy

At the conclusion of the John Doe proceeding, Sauk County District Attorney Kevin Calkins was appointed special prosecutor for the Rippentrop cases. (R. 40:16; 67:74–75.) He did not take any charging action in the matter. (R. 40:16.) After current Juneau County District Attorney Kenneth Hamm took office, he "had conversations with Attorney Calkins, who had his own caseload, and eventually [District Attorney Hamm] ended up taking this case back." (R. 67:75.) Hamm decided to file charges.

District Attorney Hamm filed complaints against the Rippentrops on February 19, 2019. (R. 1.) The Rippentrops moved to dismiss the cases on the ground that Solovey agreed not to prosecute them if they voluntarily terminated their parental rights. (R. 13.) The Rippentrops contended that charging them constituted a breach of the agreement. (R. 13:2.) The State countered that, to the extent the agreement existed, it was void as against public policy. (R. 21:7.)

The parties engaged in extensive briefing on the matter. (R. 19; 21; 26; 27.) Several evidentiary hearings were held. (R. 40; 41; 57.) The parties supplemented with additional briefing. (R. 61; 63; 64.)

In an oral ruling on October 30, 2020, the circuit court found that the unwritten agreement existed, but it was invalid as a matter of public policy. (R. 67:111.) The court found that Solovey made an offer to the Rippentrops to decline prosecuting them if they agreed to voluntarily terminate their parental rights. (R. 67:98.)

The court commented that it did not think Solovey had the authority to enter into the agreement, but "he did the deal and he's the State." (R. 67:104.) The court thought both Solovey and Sullivan-Flock had engaged in unethical conduct. (R. 67:105.)

The court also found that the Rippentrops, through the questions Sullivan-Flock posed at the TPR hearing, failed to disclose a material fact to the court, namely, that they had agreed to give up their parental rights so they would not be prosecuted. (R. 67:109–111.) That meant the Rippentrops did not have clean hands, "and, therefore, the contract would have been void just based on that. They didn't fulfill their part of the contract." (R. 67:111.)

Further, the court ruled that the contract was void because it was against public policy to have such a contract. (R. 67:111.) Because the contract was against public policy, it was unenforceable. (R. 67:111–12.) The court set the cases for status hearings in order to assess how the cases would proceed forward from that point. (R. 67:117.) The cases proceeded through the discovery process. (R. 86; 87.)

The Court Grants the Rippentrops' Subsequent Motion to Dismiss for Prosecutorial Misconduct

Defense counsel again moved to dismiss the cases about a year later, on the ground that Solovey committed prosecutorial misconduct. (R. 76.) As part of its argument, the Rippentrops argued that their right to a speedy trial was violated. (R. 76:5.) The State opposed the motions. (R. 89:29–41.)

In an oral ruling on December 1, 2021, the circuit court granted the defendants' motion to dismiss. The court ruled that the defendants' speedy trial right was not implicated. (R. 89:51.) But Solovey's actions "clearly" constituted misconduct. (R. 89:47.) The court considered the appropriate remedy in light of that misconduct. (R. 89:47.)

The court acknowledged that "to show prosecutor misconduct, which would require dismissal of this case, a defendant usually has to show that a prosecutor willfully engaged in misconduct and that the misconduct was prejudicial to the defendant." (R. 89:51–52.) "But then there's case law I believe on point that says, even when the prosecutor did not act intentionally, a Court may still dismiss a case if the act of the prosecutor affected constitutional or fundamental rights in a substantial manner." (R. 89:52.) In the court's view, Solovey "violated the defendants' due process rights, parental rights, and their right to remain silent by his actions." (R. 89:51.) The court continued:

> My view is -- I hate my ruling -- I'll be honest. I wanted -- I feel a potential victim has a right to have a day in court, to have his voice be heard. His or her voice be heard. But I think Mr. Englund and Mr. Matousek brought out serious issues when it comes to justice.

(R. 89:52.) The court ruled that Solovey violated the defendants' constitutional rights "and the only recourse" for maintaining the integrity of the judicial system was dismissal of the cases. (R. 89:52.) The court entered an order of dismissal on December 6, 2021. (R. 81.)[9]

The State appealed.

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[9] *See also* R. 89, Appeal No. 22AP93.

STANDARD OF REVIEW

Whether a circuit court has authority to dismiss criminal cases with prejudice presents a question of law that this Court reviews de novo. *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, ¶ 12, 595 N.W.2d 635 (1999).

The determination of whether prosecutorial misconduct occurred and whether such conduct requires dismissal is within the trial court's discretion. *State v. Lettice*, 205 Wis. 2d 347, 352 (Ct. App. 1996). "An appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach." *Id.* (citation omitted).

Whether a defendant's right to due process was violated presents a question of law, which is reviewed de novo. *State v. McGuire*, 2010 WI 91, ¶ 26, 328 Wis. 2d 289, 786 N.W.2d 227.

ARGUMENT

The circuit court did not have authority to effectively dismiss the Rippentrops' criminal cases with prejudice. Jeopardy had not yet attached, and the defendants' constitutional right to a speedy trial was not at issue. Wisconsin Supreme Court precedent compels reversal for this reason alone. That aside, the circuit court erroneously exercised its discretion by dismissing the cases, because the court did not examine relevant facts or apply a proper standard of law. The court erred in ruling that Solovey's misconduct violated due process. And the other bases the court relied upon, regarding the Rippentrops' rights as parents and their right to remain silent during the TPR proceeding, did not warrant the drastic sanction of dismissing the criminal cases. The State respectfully requests that the circuit court's orders of dismissal be reversed.

I. The circuit court lacked authority to dismiss the cases with prejudice.

The circuit court's orders implicitly dismissed the two criminal cases with prejudice, given the court's reasoning during its oral ruling on December 1, 2021. But binding case law prohibits dismissal with prejudice absent a violation of the defendants' right to a speedy trial. Because there was no such violation here, this Court must reverse.

It is well settled that "trial courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial." *State v. Braunsdorf*, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980). This is because "the power to dismiss a criminal case with prejudice before the attachment of jeopardy, regardless of how judiciously it is used by trial courts, is too great an intrusion into the realm of prosecutorial discretion." *Id.*

In *State v. Krueger*, a defendant asked the Wisconsin Supreme Court to expand *Braunsdorf*'s holding to allow for exceptions, such as when the circuit court's sense of fairness is violated. *State v. Krueger*, 224 Wis. 2d 59, ¶¶ 3, 14, 588 N.W.2d 921 (1999). The supreme court unanimously declined. *Id.* ¶ 4. The facts of *Krueger* are instructive.

In that case, a defendant was charged with publicly exposing his genitals in the vicinity of young children. *Id.* ¶ 5. The State moved to admit evidence showing that the defendant engaged in the same general conduct on a separate occasion in February 1995. *Id.* During a motion hearing to admit this "other acts" evidence, the circuit court ruled that the other acts evidence was admissible, over the defendant's objection. *Id.* ¶ 6. However, the court commented that if the State introduced the February 1995 "other acts" evidence at trial, the State could not later prosecute the defendant for the February 1995 conduct if the defendant was acquitted. *Id.*

The case proceeded to trial, and the State introduced the February 1995 "other acts" evidence. *Id.* ¶ 7. The defendant was acquitted. *Id.* After acquittal, the State filed a new complaint, charging the defendant on the basis of the February 1995 conduct. *Id.* ¶ 8. The defendant moved to dismiss the complaint, citing the circuit court's comments during the other acts ruling in the earlier criminal case. *Id.* ¶ 9. The circuit judge (who had presided in the earlier case) dismissed the criminal complaint with prejudice on "general due process grounds." *Id.* As part of its ruling, the court explained its reasoning as to why it would be unfair to allow the new case to proceed:

> There are a number of things that have been lost, a number of things have gone over the dam that we can't get back. One of them has to do with this question of whether he would or would not have testified. Another would have been consolidation. He would have had a right to move to consolidate those two cases and have them tried at one time at considerable [less] expense to him economically and emotionally. He has been deprived of that by the procedure that's been followed by the state in this case.

Id. ¶ 15.

The State appealed, and this Court reversed. Citing *Braunsdorf*, this Court held that because the defendant had not claimed that his constitutional right to a speedy trial was violated, this Court had no alternative but to reverse the circuit court's dismissal of the criminal case. *Id.* ¶ 10. This Court concluded that a circuit court has no authority to admit evidence on a condition that prohibits the State from later exercising its discretion to prosecute on the basis of that evidence. *Id.* This Court reached that conclusion despite its opinion that it seemed unfair for the State to have another chance to convict the defendant using the same evidence used

in the earlier trial, which resulted in a jury's not guilty verdict. *Id.* ¶ 19.

In a unanimous opinion authored by Chief Justice Abrahamson, the Wisconsin Supreme Court affirmed. *Id.* ¶ 4. The court declined to expand *Braunsdorf* to permit a circuit court to dismiss a prosecution because the circuit court's sense of fairness had been violated. *Id.* ¶¶ 4, 14. Given the "well-accepted law governing prosecutorial discretion in charging decisions," the court concluded that the State "lawfully exercised its charging discretion in bringing the present prosecution." *Id.* ¶ 20. "The circuit court's conclusion that the State's conduct violated a sense of fairness cannot displace the State's lawful exercise of well accepted prosecutorial discretion." *Id.*

This case compels the same result as in *Braunsdorf* and *Krueger*. The circuit court found (correctly) that the defendants' speedy trial rights were not implicated by virtue of any delay in the State filing charges. *See United States v. Lovasco*, 431 U.S. 783, 788–89 (1977) (citation omitted) ("[A]s far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since . . . only 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections' of that provision.") Further, jeopardy, which means "exposure to the risk of a determination of guilt or innocence," had not attached in either case. *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992); *see also* Wis. Stat. § 972.07. Thus, the court did not possess the power to dismiss the criminal cases with prejudice. *Braunsdorf*, 98 Wis. 2d at 586.

Regardless of whether the court approved of the State's decision to maintain charges in light of what occurred between Solovey and the Rippentrops, *Braunsdorf* does not allow for dismissal with prejudice, even when a circuit court perceives unfairness in the State's decision. *See Krueger*, 224 Wis. 2d 59, ¶ 20. For this reason alone, reversal is warranted.

II. The circuit court erroneously exercised its discretion in dismissing the cases.

Braunsdorf aside, the circuit court's decision was nevertheless an erroneous exercise of discretion. The court erred in ruling that Solovey's misconduct violated due process. And the other bases the court relied upon, regarding the Rippentrops' rights as parents and their right to remain silent during the TPR proceeding, did not warrant the drastic sanction of dismissing the criminal cases. The circuit court's orders of dismissal should be reversed.

A. Dismissing a case for prosecutorial misconduct is a drastic remedy that should be approached with extreme caution.

The State could not locate controlling authority that supports dismissing criminal cases prior to trial as a means of addressing prosecutorial misconduct, absent a finding that the misconduct compromised the trial's fairness or resulted in prejudice to the defendant's ability to effectively present his or her case. The most relevant cases address the proper remedy for prosecutorial misconduct during *postconviction* proceedings. Some forms of misconduct rise to the level of a due process violation. Other forms are viewed as a statutory or ethical violation. Whether characterized as a constitutional violation or not, a common component of the analysis is whether the misconduct prejudiced the defendant's criminal case in some way, or whether the defendant received, or will receive, a fair trial notwithstanding the misconduct.

1. Misconduct constituting a due process violation.

Prosecutorial misconduct can sometimes rise to such a level that it deprives the defendant of the due process right to a fair trial. *Lettice*, 205 Wis. 2d at 352. If the misconduct "poisons the entire atmosphere of the trial," it violates due process. *Id*. (citing *United States v. Pirovolos*, 844 F.2d 415, 425 (7th Cir. 1988)). When the seriousness of prosecutorial misconduct and the weakness of evidence of guilt cause the reviewing court to question a trial's fairness, a court "will not hesitate to reverse the resulting conviction and order a new trial." *Id*. (citation omitted). "Unless the government can demonstrate beyond a reasonable doubt that the error was harmless, reversal is warranted." *Id*.

Lettice provides a helpful illustration as to when prosecutorial misconduct warrants a new trial. There, the defendant was charged with sexually assaulting his young daughter. *Id*. at 349. Prior to trial, defense counsel sought to introduce a medical report that contained information that the victim had named a perpetrator other than Lettice. *Id*. at 350. The court had earlier ruled that those notes were not confidential treatment records. *Id*.

Three days prior to trial, the State served defense counsel with a criminal complaint charging him with publicly disclosing a confidential medical record. *Id*. at 349. As a result, defense counsel spent the next few days researching the law applicable to the charge against him, rather than preparing for trial. *Id*. at 351. He was unable to sleep for several nights because he was preoccupied with the charge. *Id*.

The jury trial proceeded, and defense counsel made several errors, including failing to object to prejudicial testimony. *Id*. at 354–55. An observer stated that defense counsel looked like a "whipped dog" during trial. *Id*. at 355. Another attorney described him as "incoherent" at times, and his hands were visibly shaking on occasion. *Id*. The trial court described the case as extremely close, but ultimately the jury convicted Lettice on all counts. *Id*. at 351.

Two days after trial ended, the State filed a motion to dismiss the criminal charges against defense counsel. *Id*. Lettice filed a postconviction motion, arguing that prosecutorial misconduct created a conflict of interest that interfered with defense counsel's ability to effectively represent Lettice. *Id*. The trial court ordered a new trial in the interest of justice, because the prosecutor's misconduct deprived Lettice of his rights to counsel and due process. *Id*.

This Court upheld the court's decision as a proper exercise of discretion. Given the earlier ruling that the report was not a confidential health care record, there was no probable cause to support the criminal charge against defense counsel. *Id*. at 353. The evidence showed that the district attorney filed the charge either to disqualify defense counsel or to delay the jury trial. *Id*. at 354. The district attorney's "intentional misconduct had a profoundly negative impact on [counsel's] ability to effectively represent Lettice." *Id*. The cumulative effect of defense counsel's errors during Lettice's trial, which were the direct result of his distress over the criminal charges against him, deprived Lettice of his due process right to a fair trial. *Id*.

Further, the misconduct was prejudicial. *Id*. at 354–55. Defense counsel testified that the charge filed against him hampered his trial performance, and his demeanor contributed to the jury's guilty verdicts. *Id*. The trial court attributed defense counsel's ineffectiveness to the district attorneys' misconduct. *Id*.

Sometimes cases are dismissed pre-trial as a result of prosecutorial delays. In *United States v. Lovasco*, the United States Supreme Court considered whether an indictment must be dismissed because of a delay between the commission of an offense and the initiation of a prosecution. *United States v. Lovasco*, 431 U.S. at 784. The court noted that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id*. at 790.

Wisconsin has adopted a two-part test to determine whether pre-indictment delay constitutes a due process violation: (1) whether the defendant has suffered actual prejudice arising from the delay; and (2) whether the delay arose from an improper motive or purpose such as to gain a tactical advantage over the accused. *State v. McGuire*, 2010 WI 91, ¶ 45, 328 Wis. 2d 289, 786 N.W.2d 227. Courts in other circuits likewise analyze whether actual prejudice resulted. *See, e.g.*, *United States v. Cederquist*, 641 F.2d 1347, 1350–52 (9th Cir. 1981).

2. Misconduct that does not rise to the level of a constitutional violation.

Absent a constitutional violation, the Wisconsin Supreme Court has used a balancing test to decide whether a conviction should be reversed in light of prosecutorial misconduct. Reversing a conviction as a means of preserving the integrity of the judicial process and deterring prosecutorial misconduct "should be approached with caution." *Lettice*, 205 Wis. 2d at 352 (citing *State v. Ruiz*, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984)). "A court should take the drastic step of reversing a conviction because of prosecutorial misconduct only after a careful balancing of the many interests involved." *Ruiz*, 118 Wis. 2d at 202. To

determine whether a new trial is warranted, the court balances a number of considerations, including the following:

> the defendant's interest in being tried on evidence validly before the jury; the public's interest in having the guilty punished; the public's interest in not burdening the administration of justice with undue financial or administrative costs; the public's interest that the judicial process shall both appear fair and be fair in fact; and the interest of the individuals involved—the witnesses and family of the victim—not to be subjected to undue trauma, embarrassment or inconvenience.

Ruiz, 118 Wis. 2d at 202.

Ruiz provides an example of how these factors are analyzed. There, a prosecutor breached his statutory duty to disclose statements made by the defendant concerning the alleged crime. *Id.* at 196–98, 201. The court of appeals concluded that "the nondisclosure was a result of, if not a deliberate act of suppression, a complete and total disregard of duty and indifference to present legal obligations on the part of the Kenosha prosecutor's office." *Id.* at 201 (citation omitted). The court noted that the Kenosha County district attorney's office seemed to be engaging in a continuing pattern of nondisclosure and cited a case where the supreme court characterized the same district attorney's nondisclosure as "inexcusable" and "an insult to the institutional values of an orderly trial." *Id.* at 201–02 (citation omitted). Faced with what it perceived as a continuing pattern of nondisclosure and an apparent obstinacy in the face of lesser measures, the court of appeals concluded that it must take the extreme step of reversing the conviction, in order to impress upon the district attorney the necessity of abiding by the law. *Id.* at 202.

The Wisconsin Supreme Court reversed. Analyzing the relevant interests in the case, the court reasoned that the defendant received a fair trial, as exclusion of the evidence would not have affected the result. *Id*. at 203. Other considerations weighed against retrying the defendant as well, including the expense and burden on an already crowded court system, the practical difficulties in trying the defendant after the passage of four years, and the trauma associated with reviving memories "for those innocently affected by this heinous crime." *Id*. at 203.

While the supreme court concluded that the drastic remedy of reversal was not warranted, the court made clear that it was not condoning the district attorney's conduct. *Id*. The court noted that attorney misconduct is a matter for the attorney discipline system. *Id*. at 203 n.5.

B. Under the standards described above, dismissal was not warranted.

In this appeal, the State does not contest the circuit court's finding that Solovey engaged in some form of misconduct. However, the misconduct does not amount to a due process violation that would warrant dismissal. Solovey's misconduct is properly addressed by the Office of Lawyer Regulation. *See id.* But the Rippentrops cannot show that Solovey's misconduct prejudiced their ability to present their defense or compromised their ability to receive a fair trial.

The circuit court made no findings of fact to support a conclusion that Solovey's misconduct would prohibit the Rippentrops from receiving a fair trial. *Lettice*, 205 Wis. 2d at 352. Nor could it have. The criminal cases were dismissed prior to the plea or trial stage. Any findings pertaining to the trial's fairness would be speculative at best. Nothing suggests that potential witnesses are unavailable. And the trial court could take appropriate remedial measures to address any potential fairness issues that stem from the misconduct. For

example, the defense could seek to exclude any inculpatory statements the Rippentrops provided during the TPR proceedings in reliance on the void agreement.

Even if one were to analyze this case under the pre-indictment delay line of cases, such as *Lovasco* and *McGuire*, dismissal would likewise be unwarranted for two reasons. First, the court made no finding that there was an improper delay in this case. Second, even if it had made that finding, the court made no finding that the Rippentrops sustained actual prejudice in their criminal cases as a result of that delay. For these reasons, the misconduct does not rise to the level of a due process violation.

Due Process Clause aside, dismissal is not warranted as a disciplinary measure against the former district attorney. To the extent one can prospectively analyze the *Ruiz* factors pre-trial, they support allowing the cases to go forward. Given the gravity of the charged offenses, where the Rippentrops kept their adopted child tightly bound and blindfolded for the vast majority of every day for over a year, including when he slept, the public and the victim have a compelling interest in allowing these criminal cases to proceed. Nothing indicates that the defendants will not be tried on valid evidence before the jury. Since there has not yet been a trial, there is no concern about a duplicative trial contributing to undue financial or administrative costs. To the extent any financial and administrative costs are implicated by the age of the allegations, these costs are justified, given the severity of the alleged offenses, and the interest of the public and victim in seeing the prosecution through to conclusion.

The State is cognizant of the public's interest "that the judicial process shall both appear fair and be fair in fact." *Ruiz*, 118 Wis. 2d at 202. One could understandably argue that the judicial process does not appear fair in this case, because the former prosecutor agreed not to bring charges against the Rippentrops if they terminated their parental

rights, and they terminated their parental rights in apparent reliance on that agreement. However, the circuit court found that this agreement is *void*, in part because the Rippentrops' hands were not clean by virtue of their failure to disclose the agreement to the TPR court. (R. 67:111.) Further, any concern about the appearance of unfairness must be balanced against the absence of actual unfairness in their criminal cases. There is no reason to think the Rippentrops will not receive a fair trial. If their cases run their course and they do not believe they received a fair trial, this concern can be addressed in postconviction proceedings.

Finally, and perhaps most importantly, one must consider the interests of all of the individuals involved in this criminal proceeding, including the victim. *Ruiz*, 118 Wis. 2d at 202. In 2020, the people of Wisconsin enacted an amendment to the "Victims of crime" provision in the Wisconsin Constitution, commonly known as Marsy's Law. The amendment gives victims sixteen enumerated rights "[i]n order to preserve and protect victims' rights to justice and due process" throughout the criminal and juvenile justice process. Wis. Const. Art. I § 9m(2). These rights were elevated to constitutional status under Marsy's law after *Ruiz* was decided, and this Court must take that into consideration when balancing the *Ruiz* factors. The abuse allegations with respect to Mark are horrifying. The John Doe court found probable cause to pursue them in criminal cases. In keeping with the spirit and purpose of Marsy's Law, this consideration weighs strongly in favor of allowing the criminal justice process to play out.

C. The circuit court erred by dismissing the cases without finding that the Rippentrops' defense was prejudiced or that they would not receive a fair trial.

In the circuit court's view, Solovey "violated the defendants' due process rights, parental rights, and their right to remain silent by his actions." (R. 89:51.) As a sanction, the court ordered dismissal of the cases, acknowledging that for dismissal to be warranted, "a defendant usually has to show that a prosecutor willfully engaged in misconduct and that the misconduct was prejudicial to the defendant." (R. 89:52.) "But then there's case law I believe on point that says, even when the prosecutor did not act intentionally, a Court may still dismiss a case if the act of the prosecutor affected constitutional or fundamental rights in a substantial manner." (R. 89:52.) The court did not identify the case law that it was relying on, and the State could not locate case law that fit this description.

The circuit court erroneously exercised its discretion. The defendants' due process rights were not violated in the criminal cases, as explained above. Regarding the Fifth Amendment right to remain silent, neither the defendants nor the court identified authority supporting that this right was violated when they made statements at the TPR hearing in support of terminating their parental rights. Even if this right was implicated, the court erred in dismissing the criminal cases on that ground, absent authority showing that this error was prejudicial to the defense. As noted above, any incriminating statements made at the TPR hearing in reliance on the void agreement could be excluded as necessary and appropriate.

The court's ruling that the Rippentrops were denied parental rights might derive from prejudice that occurred in the TPR case, when they gave up their parental rights after making an oral agreement with Solovey. The State acknowledges that the Rippentrops cannot get those rights back because the victim is now an adult. But Solovey's misconduct is appropriately addressed by the Office of Lawyer Regulation. And no authority supports dismissing the *criminal* cases as the proper remedy to address what was given up in the TPR case. The Rippentrops gave up their ability to contest termination during the TPR proceeding; it is unknown whether they would have prevailed if they had opposed termination. And, though their attorney, they were not forthright in the TPR case about their agreement with Solovey. They bear some responsibility for any prejudice that occurred.

Because the court did not make factual findings that the Rippentrops would not receive a fair criminal trial, and likewise did not analyze whether dismissal was the appropriate remedy under the correct legal standards, the court erroneously exercised its discretion.

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In *Lettice*, this Court cited the Seventh Circuit decision *U.S. v. Pirovolos*. *Lettice*, 205 Wis. 2d at 352 (citing *Pirovolos*, 844 F.2d at 425). That case analyzed whether reversing Pirovolos' conviction was proper in light of prosecutorial misconduct. Concluding that it was not, the Seventh Circuit made the following observations in closing:

> We emphasize that we do not reverse convictions to punish prosecutors. "It is better to punish the prosecutor directly; there is no lack of sanctions for a lawyer's misconduct, of which improper advocacy is a well-recognized species." When the seriousness of prosecutorial misconduct and the

> weakness of evidence of guilt cause us to question a trial's fairness, we will not hesitate to reverse the resulting conviction and order a new trial. Here, however, "[t]he evidence against the appellant was overwhelming; it included substantial eyewitness evidence . . . as well as physical evidence . . . It is almost inconceivable that if the prosecutor had refrained from making the remarks that he did, the appellant[] would have been acquitted."

Pirovolos, 844 F.2d at 427 (citations omitted). Though not controlling, there is wisdom in this rationale. Reversing convictions or dismissing cases to punish prosecutors does not further the interests of the public or the victims, especially when the evidence supports conviction. The State respectfully requests that this Court reverse the dismissals and let the criminal justice system run its course.

CONCLUSION

The State respectfully requests that this Court reverse the orders of dismissal and remand for further proceedings.

Dated: June 14, 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7609 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 14th day of June 2022.

Electronically signed by:

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