STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEBRA L. RIPPENTROP Juneau County Case No. 19-CF-58
Appeal No. 2022AP000092-CR

and

STEVEN E. RIPPENTROP, Juneau County Case No. 19-CF-59
Appeal No. 2022AP000092-CR

Defendants-Appellees.

ON APPEAL OF JUDGMENT ENTERED IN JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE STACY M. SMITH, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLEES DEBRA L. AND STEVEN E. RIPPENTROP

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STATEMENT OF THE ISSUES

I. DID THE COURT HAVE THE AUTHORITY TO DISMISS THIS MATTER WITH PREJUDICE AS A RESULT OF WHAT IT DEEMED TO BE PROSECUTORIAL MISCONDUCT?

The trial court answered: yes.

II. DID THE DELAY IN THIS CASE VIOLATE THE RIPPENTROPS' CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL?

The trial court answered: no.

III. DID THE COURT PROPERLY FIND THAT ALTHOUGH THERE WAS AN AGREEMENT BETWEEN THE RIPPENTROPS AND THE JUNEAU COUNTY DISTRICT ATTORNEY'S OFFICE NOT TO PURSUE THE CHARGES AT ISSUE HERE AGAINST THEM, THAT AGREEMENT WAS UNENFORCEABLE BECAUSE IT WAS VOID AS AGAINST PUBLIC POLICY?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT

Counsel anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, the Rippentrops are not requesting oral argument, although they do not object to such argument.

STATEMENT ON PUBLICATION

Publication is merited, as the issue as to whether the agreement the court found to exist between the Rippentrops and the Juneau County District Attorney's office was enforceable and/or void as against public policy has a dearth of published case law on point; in fact, this precise issue has not been previously addressed in any decision of the appellate courts of the State of Wisconsin, published or otherwise.

STATEMENT OF THE CASE

The State's recitation of the facts and procedural posture of this case is largely accurate, and as such, the Rippentrops adopt it with the exception of noting that all references to R1, the criminal complaint in this matter, should be treated as what they are, mere allegations in a criminal complaint; they do not constitute proven facts. The Rippentrops add to the State's recitation as follows below.

As a necessary precursor to the ruling the State challenges in this appeal, the circuit court made a prior finding that there did exist a contract or agreement between the Juneau

County District Attorney's Office and the Rippentrops to the effect that the State agreed that it would not prosecute the Rippentrops for their alleged maltreatment of the child Mark so long as they agreed to and in fact did voluntarily consent to the termination of their parental rights to Mark. (R67: 103-05). Notwithstanding that fact, the circuit court went on to find that although there was a valid contract formed in the sense of there having been an offer, acceptance, and consideration, the court would not enforce it on account of the agreement being void as against public policy. (R67: 112).

Specifically, the court ruled that the agreement here was comparable to a contract to do harm to another, finishing that thought by stating that "I can't think of any more harm than forcing someone to terminate their parental rights." (R67: 112). The court further based its ruling that the agreement was void as against public policy because the Rippentrops did not inform the termination of parental rights judge at the hearing on their request to voluntarily terminate their parental rights of the agreement between themselves and the State, declaring that because of this the Rippentrops had "unclean hands." ***Id.*** As a result, the court denied the Rippentrops' motion for specific performance in the form of dismissal of the charges against them. ***Id.***

Afterwards, the defense filed a motion to compel production of discovery, R69: 1-156, which took some number of months to litigate to conclusion, followed by the motion to dismiss the case with prejudice for prosecutorial misconduct which is the subject of this appeal. (R76: 1-6). In that motion, the defense asserted that dismissal was required as a remedy for both prosecutorial misconduct rising to the level of a due process violation and because the conduct of the Juneau County District Attorney's Office had impaired their constitutional right to a speedy trial. ***Id.*** The circuit court ultimately granted the motion and dismissed the case with prejudice, although in so doing it relied exclusively on prosecutorial misconduct rising to the level of a due process violation, and held (without any elaboration as to why it so held) that the Rippentrops' constitutional right to a speedy trial was not implicated. (R89: 51-52).

The State filed a notice of appeal, and this appeal

follows. Further facts shall be stated as necessary below.

ARGUMENT

I. UNDER THE UNIQUE CIRCUMSTANCES PRESENTED HERE, THE CIRCUIT COURT PROPERLY DISMISSED THESE MATTERS WITH PREJUDICE AS A SANCTION FOR THE PROSECUTORIAL MISCONDUCT IT FOUND, EVEN IF ITS RULING WAS NOT A MODEL OF CLARITY, AS THE DEFENDANTS WERE PREJUDICED BY THE CONDUCT THE COURT IDENTIFIED AS MISCONDUCT AND THE RESULTING DELAY IN PROSECUTION, AND FURTHER, THE DELAYS IN THIS CASE RESULTING FROM THE STATE'S MISCONDUCT VIOLATED THE RIPPENTROPS' CONSTITUIONAL RIGHT TO A SPEEDY TRIAL.

A. The State's Conduct Here, If It Was In Fact Misconduct As Found By The Circuit Court, Prejudiced The Rippentrops In Violation Of Their Right To Due Process.

To begin, the Rippentrops concede that the State is correct in stating the holding in ***State v. Braunsdorf***, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980): "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." That said, that holding, while clear and unambiguous, cannot be completely true, as it is also clear that courts in the State of Wisconsin do possess the power to dismiss a case where improper tactics on the part of the state result in substantial prejudice to the defendant, such that continuation of the prosecution would represent a denial of due process. In a much more recent case than ***Braunsdorf***, the Supreme Court of Wisconsin held as follows:

> Where a defendant seeks to avoid prosecution based upon prosecutorial delay, it is clear that it

> must be shown that the defendant has suffered actual prejudice arising from the delay and that 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. It is at least implicit in this statement of law that any dismissal for prosecutorial delay must be with prejudice; if it were not, the remedy would be meaningless in that it would fail to accord any benefit to the defendant other than further delay, an absurd result.

The State acknowledges that ***McGuire*** exists, but asserts that the circuit court made no finding that the delay was due to prosecutorial impropriety, and further that the court made no finding that there was any prejudice to the Rippentrops flowing from any such impropriety. The first assertion appears to read out the language "such as to gain" out of ***McGuire***'s holding and implicitly reads that holding as requiring that only delay so as to gain a tactical advantage over the accused is sufficient to make out a prejudicial delay due process violation requiring dismissal.

This reading turns language which is clearly meant to signify a non-exhaustive list into and exclusive condition, and is therefore incorrect. *See*, *e.g.*, ***United States v. Chappell***, 854 F.2d 190, 195 (7th Cir. 1988) ("A pre-indictment delay will not violate due process unless the defendant is able to prove that the delay caused actual and substantial prejudice to his or her fair trial rights and that the government delayed indictment for tactical advantage or *some other impermissible reason.*") (emphasis added).

Here, the State's argument ignores the fact that the circuit court did indeed find that the delay in charging and prosecuting these matters arose from what it believed to be an improper purpose on the part of the State – to coerce the Rippentrops into voluntarily agreeing to terminate their parental rights to Mark. (R67: 112). If the circuit court was correct that in particular then-DA Solovey's agreement with the Rippentrops to decline to prosecute them so long as they did in fact voluntarily terminate their parental rights to Mark

constituted misconduct and was unethical, then a substantial portion of the delay in prosecuting the Rippentrops arose from an improper motive on the part of the State, and as such, the improper purpose prong of the ***McGuire*** due process analysis is satisfied.

As to prejudice, the State is once again incorrect in asserting that the circuit court did not find that the Rippentrops were prejudiced by the State's improper delay in proceeding against them in these matters. To begin, the child in need of protection or services (CHIPS) proceedings and concurrent referral for criminal charges to then-DA Solovey took place in August of 2015 (R57: 9), and the termination of parental rights proceeding (TPR) regarding Mark took place in June of 2016 (R57: 12). The complaint in this matter was not filed until February 19, 2019, nearly three years after the conclusion of the TPR proceeding and nearly 40 months after the initial criminal referral. This in itself is a substantial delay, and said delay arose solely because of the conduct on then-DA Solovey's part which the circuit court found to constitute misconduct.

The circuit court found all of the following regarding the prejudice to the Rippentrops arising from the decision to charge them regardless of the agreement between the Rippentrops and the now-former Juneau County District Attorney: that the State's conduct had violated the Rippentrops' due process rights, their rights to remain silent, and their fundamental right to parent their child. (R89: 51). And while the circuit court did not elaborate on why it believed that the Rippentrops' right to due process was violated by continuation of the prosecution of these cases, they asserted in their motion to dismiss for prosecutorial misconduct all of the following:

> ■ Exercising their right to remain silent: As a result of former DA Solovey's promise, the Defendants made statements regarding the underlying allegations that they would not have otherwise made. Such statements include agreeing, under oath, to the factual background of a report prepared by Juneau County Human Services at the June 6, 2016 termination of

parental rights hearing.

■ Exercising their right to contest the CHIPS/TPR proceedings: As a result of former DA Solovey's promise, the Defendants agreed not to contest the CHIPS/TPR proceedings; thus, giving up their parental rights and the ability to gain valuable evidence concerning the underlying allegations.

■ Exercising their right to a speedy trial. As a result of former DA Solovey's promise, the Defendants lost the opportunity to exercise their right to a speedy trial in close proximity to when the underlying allegations occurred. Had the Defendants been afforded this opportunity, a speedy trial demand would have increased the integrity of the fact-finding process (more reliable evidence, memories, witnesses, etc.) and allowed for negotiations with a DA who was more interested in Seth's placement than criminal prosecution.

■ Exercising their right to prepare a defense: As a result of former DA Solovey's promise, the Defendants made no effort to collect or preserve evidence relevant to their defense. They did not record their memories, interview witnesses or preserve relevant evidence. Instead, they moved on with their lives, trusting the State's promise that this matter was fully/finally resolved.

(R76: 5).

Accordingly, and contrary to the State's assertions, the circuit court did find improper conduct underlying the State's significant delay in charging the Rippentrops in these matters and, by determining that their right to due process was violated, the circuit court implicitly found that the Rippentrops had suffered prejudice to their substantial rights flowing from that delay occasioned by what it believed to be the State's improper conduct. Accordingly, under ***McGuire***, the circuit court's ruling should be affirmed by this court.

B. Contrary to the Circuit Court's Ruling, the Rippentrops' Constitutional Right to a Speedy Trial Is Implicated Here, and Has Been Violated By the Delays Occasioned By the State and the Court's Calendar.

In analyzing whether a defendant had been denied the constitutional right to a speedy trial, the court is to consider four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) prejudice to the defendant. ***State v. Borhegyi***, 222 Wis.2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). The first factor functions as a "triggering mechanism," such that delays of greater than one year are presumptively prejudicial. ***Id.*** at 510. The clock by which to measure the delay begins ticking when the ""[. . . defendant is *indicted, arrested, or otherwise officially accused*. . . ."" ***Id.*** (quoting ***United States v. MacDonald***, 456 U.S. 1, 6, 102 S.Ct. 1497 (1982)) (emphasis in original). In short, when a defendant is arrested on a particular charge or charges, regardless of how long the State waits to issue a formal complaint, that defendant has been subjected to an "official accusation" and thus speedy trial concerns attach at that point. ***Id.*** at 511 (citing ***State v. Lemay***, 155 Wis.2d 202, 202, 455 N.W.2d 233 (1990)).

When analyzing the second factor, delays caused by negligence or court congestion count against the State, but not heavily; however, deliberate attempts to delay the trial on the part of the state, as well as State conduct which evinces a cavalier disregard of the defendant's right to a speedy trial are to be "weighed most heavily against the State." ***Borhegyi***, 222 Wis.2d at 512-13. The third factor is essentially a yes-or-no question: did the defendant assert his right to a speedy trial? ***Id.*** at 514. That said, this factor, like all of the others, is not dispositive; in other words, the mere fact that the defendant has not asserted the right to a speedy trial does not necessarily mean that said right has not been violated. *See*, *e.g.*, ***Day v. State***, 61 Wis. 2d 236, 246, 212 N.W.2d 489 (1973) ("However, language in previous decisions to the effect that failure to demand a speedy trial constitutes a waiver is withdrawn.").

As the fourth factor, prejudice to the defendant, the analysis is guided by the interests the speedy trial right is designed to protect. ***Id.*** These interests include, at a minimum: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused anxiety and concern; and (3) limiting the possibility that the defense will be impaired." ***Id.*** In addition, a defendant is prejudiced when even though said defendant is detained for some reason other than being unable to post bond, "the failure to have a pending charge brought to trial completely eliminates the possibility that concurrent sentences could be imposed." ***Hadley v. State***, 66 Wis. 2d 350, 365 (1975); *see also* ***Smith v. Hooey***, 393 U.S. 374, 378, 89 S.Ct. 575 (1969) ("First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed."). Finally, prejudice due to delay in trial can accrue to an already-incarcerated defendant where the conditions under which the defendant must serve the other sentence are materially worsened as a result of the pending charges. ***Hooey***, 393 U.S. at 378.

Hence, the Supreme Court of the United States in this context has also stated that "no court should overlook the possible impact pending charges might have on [a defendant's] prospects for parole and meaningful rehabilitation." ***Moore v. Arizona***, 414 U.S. 25, 27, 94 U.S. 188 (1973). Finally, it is not necessary that any actual impairment of the defendant's defense at trial be shown. ***Id.*** at 26 (rejecting notion that any affirmative showing of prejudice to the trial defense be made to sustain a speedy trial violation); *see also* ***Borhegyi***, 222 Wis.2d at 517-18 (declining to decide whether trial defense was actually impaired because Borhegyi's other interests had been prejudiced). Minimal prejudice is all that is required, particularly where the delay is long. ***Id.*** at 519; *see also* ***Doggett v. United States***, 505 U.S. 647, 652, 112 S.Ct. 2686 (1992) (holding that "the presumption that pretrial delay has prejudiced the accused intensifies over time.").

Here, the complaint was filed on February 19, 2019, R1: 1, which as of the date of the court's decision to dismiss the case with prejudice, December 6, 2021, R81: 1, constitutes a delay of more than 26 months, readily crossing the 12-month threshold necessary to require an analysis of whether the

Rippentrops' constitutional right to a speedy trial has been violated. Although the circuit court erroneously and without elaboration held that the Rippentrops' constitutional right to a speedy trial was not implicated, and as such made no findings regarding this issue, the record makes apparent that the reasons for the delay are virtually all due to (1) the need to litigate the motions for specific performance and dismissal due to prosecutorial misconduct (2) congestion of the court's calendar and (3) the need to litigate a motion to compel production of discovery, which was at least partially successful. (R69; R87: 9).

There is no indication in the record that either of the defendants ever requested a continuance of any hearing, and as such, the reasons for the delay must be weighed against the State. ***Borhegyi***, 222 Wis.2d at 512-13. As to the third factor, the Rippentrops arguably asserted their right to a speedy trial in their second motion to dismiss, R76: 5, but as was noted above, even if they did not, such an omission is not fatal to a finding that their right to a speedy trial has been violated. Finally, as to the fourth factor, prejudice to the defendant, there has been at least some prejudice to their ability to successfully defend against the charges here due to the passage of time, which was already egregious at the time that the complaint in this matter was filed, and which has only gotten worse with the additional passage of time.

Further, while there has been no pretrial incarceration of either Rippentrop, there has certainly been a great deal of anxiety and concern resulting from the pending charges in these matters. And where, as here, the length of the delay is great, only minimal prejudice need be shown, and actual impairment of the defendant's trial defenses is unnecessary. ***Borhegyi***, 222 Wis.2d at 517-19; ***Moore v. Arizona***, 414 U.S. 25, 26, 94 U.S. 188 (1973). This is so because the longer the delay, the more strongly a court is to presume prejudice. ***Doggett v. United States***, 505 U.S. 647, 652, 112 S.Ct. 2686 (1992) (holding that "the presumption that pretrial delay has prejudiced the accused intensifies over time.").

Accordingly, this Court should affirm the circuit court's order dismissing these matters with prejudice on the alternative basis that, contrary to the circuit court's unexplained rejection

of the Rippentrops' claim that their constitutional speedy trial rights have been violated, said rights have in fact been violated, and as such, these matters must be dismissed with prejudice. ***Borhegyi***, 222 Wis.2d at 520; *see also* ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶7, 250 Wis.2d 740, 642 N.W.2d 233 (this Court will affirm right result even if the circuit court reached it for an incorrect reason).

II. EVEN IF THE CIRCUIT COURT DID NOT PROPERLY DISMISS THESE MATTERS WITH PREJUDICE AS A SANCTION FOR WHAT IT IDENTIFIED AS PROSECUTORIAL MISCONDUCT AND EVEN IF IT WAS CORRECT IN RULING THAT THE RIPPENTROPS' SPEEDY TRIAL RIGHTS WERE NOT IMPLICATED, THE DISMISSAL MUST STAND, AS THE COURT ERRED IN FINDING THAT THE AGREEMENT THE JUNEAU COUNTY DISTRICT ATTORNEY'S OFFICE ENTERED INTO WITH THE RIPPENTROPS WAS VOID AS AGAINST PUBLIC POLICY, AND AS SUCH, THE AGREEMENT MUST BE ENFORCED.

As was just noted above, this Court will affirm the circuit court so long as it reached the correct result, even if it did so for incorrect reasons. ***Bartow***, 250 Wis.2d 740, ¶7. Here, as was also noted above, the circuit court denied the Rippentrops' motion for specific performance (and therefore dismissal with prejudice) of the charges against them in these matters even though it found that a valid and otherwise enforceable contract existed on the basis that the contract was, according to the circuit court, void and unenforceable because it was against public policy.

It is evident from even a casual reading of the court's statements on this subject that it found the idea of trading anything of value for one's parental rights, even when they are already threatened as a result of the filing of a petition for termination of those rights following a CHIPS proceeding, as was the case here, to be viscerally abhorrent. (R67: 111-14). As an alternative rationale supporting its ruling the circuit court

also reasoned that because the Rippentrops denied being promised anything in return for agreeing to voluntarily terminate their parental rights, which was clearly not the actual fact, they had unclean hands and therefore could not enforce the contract.

As shall be shown below, the circuit court erred in determining that agreeing to voluntarily terminate one's parental rights in exchange for a non-prosecution promise from the State is not against any identifiable public policy articulated in the caselaw, and further, is consistent with similar tradeoffs made on a daily basis by criminal defendants throughout the State of Wisconsin and indeed the nation. The circuit court's alternative basis likewise fails, as the notion of unclean hands generally does not apply outside of requests for equitable relief, and even where it does, the unclean hands at issue must be present with respect to the contracting party, not some third party.

"While analogies to contract law are important to the determination of questions regarding the effects of a plea bargain, such analogies are not solely determinative of the question as fundamental due process rights are implicated by the plea agreement." ***State v. Rivest***, 106 Wis. 2d 406, 413, 316 N.W.2d 395 (1982). As was stated decades ago by the Supreme Court of Wisconsin:

> A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Wills***, 187 Wis.2d 529, 536, 523 N.W.2d 569 (Ct.App. 1994) aff'd, 193 Wis.2d 273, 533 N.W.2d 165 (1995) (citing ***Mabry v. Johnson***, 467 U.S. 504 (1984)). Due process concerns arise in the process of enforcing a plea agreement. ***Wills***, 187 Wis.2d at 537[.] "Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." 187 Wis.2d at 537[.]

State v. Smith, 207 Wis.2d 258, 271, 558 N.W.2d 379 (1997).

As to public policy concerns implicated by plea bargaining, the only instance counsel has been able to identify in the case law wherein a plea bargain was found to be void as against public policy are bargains which require the prosecution to withhold relevant information about the defendant from the court. ***Grant v. State***, 73 Wis. 2d 441, 448 (1976) ("Agreements by law enforcement officials, whether they be by the police or prosecutors, not to reveal relevant and pertinent information to the trial judge charged with the duty of imposing an appropriate sentence upon one convicted of a criminal offense, are clearly against public policy and cannot be respected by the courts."). There exists in the caselaw no other ground upon which a court had determined that a plea bargain was void and unenforceable as against public policy, and the circuit court certainly did not identify any such case in its ruling.

As was noted above, the principal ground upon which the circuit court rested its determination that the agreement it found existed between the State and the Rippentrops was void was that it required them, as the main consideration for the State's promises, to agree to voluntarily terminate their parental rights to Mark. (R67: 111-12). This was error, as there is no such public policy to the effect that a defendant cannot trade one valuable thing in exchange for another, and in the context presented here, wherein the Rippentrops faced a CHIPS action followed by a petition to involuntarily terminate their parental rights, an agreement to resolve the action in favor of the State and in a way that ensures the child at issue is no longer endangered by the alleged abusive conduct of the Rippentrops is far from against public policy.

This is so because such an agreement in this context represents good public policy insofar as good public policy places the protection of children from harm by their caregivers above the desire of society to punish those who harm others. Further, the policies noted above in connection with promises made by the State in its prosecutorial guise to potential defendants militate strongly in *favor* of enforcement of the agreement here, as the sole means available to vindicate the Rippentrops' right to due process.

The fact that the agreement here was entered into prior

to the institution of criminal charges, that it not only did not call for a plea to a criminal charge but in fact called for the State to bind itself to not issuing criminal charges at all, is of no moment. It was made clear long ago that promises not to prosecute which are, as here, detrimentally relied upon by the potential defendant, are to be analyzed in the same fashion that promises which induce guilty pleas are. *See*, *e.g.*, ***State v. Bond***, 139 Wis.2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987) ("…due process analysis that a prosecutorial agreement with a defendant is binding has applicability in bargaining contexts outside of plea bargains. Essentially, any violation of a prosecutorial promise triggers considerations of fundamental fairness and is a deprivation of due process.").

"Once a defendant has relied upon a prosecutorial promise in any way and the state does not fulfill its promise, the promise is to be held enforceable against the state." ***Id.*** It is in fact irrelevant whether the bargain at issue even involves criminal charges, so long as the defendant has detrimentally relied upon the State's promises; this is so because "[t]he law is clear that the concept of fundamental fairness prohibits the government from breaching an agreement which induced a person to take action otherwise detrimental to himself or herself in reliance on the agreement." ***State v. Castillo***, 205 Wis.2d 599, 611, 556 N.W.2d 425 (Ct. App. 1996) (citing ***State v. Beckes***, 100 Wis.2d 1, 6, 300 N.W.2d 871 (Ct. App. 1980).

Here, the circuit court at no point took into account any of the above-cited cases, and ignored completely the due process implications of a prosecutorial promise upon which a citizen has relied to their detriment. There State does not dispute on appeal the court's finding that there was an agreement between it and the Rippentrops which had these essential elements: the State would not prosecute the Rippentrops for the conduct alleged in the complaints in these matters and which also was the conduct underlying the CHIPS and TPR actions in exchange for the Rippentrops voluntarily terminating their parental rights to Mark. Nor could it, as none of those findings are clearly erroneous. Nothing about that agreement required the Rippentrops to truthfully advise the TPR court of the existence of the agreement, and as such, by voluntarily terminating their parental rights, the Rippentrops performed their end of the bargain scrupulously, and have

clearly detrimentally relied upon the State's promises.

The circuit court's alternative "unclean hands" basis for refusing to enforce what it found to be an otherwise valid and enforceable agreement with the State is a non sequitur, for at least the reason that the Rippentrops did not agree to disclose the existence of the agreement to the TPR court, and for the further reason that as a general matter, the concept of "unclean hands" where the relevant 'uncleanliness' does not constitute a breach of the agreement with the State by the defendant simply does not apply in this context. *See*, *e.g.*, ***Bloom v. Grawoig***, 2008 WI App 28, ¶11, 308 Wis. 2d 349, 746 N.W.2d 532 ("[e]ven when sitting in equity, a court must nonetheless follow the law.") (brackets added). Further, this alternative basis again ignores the substantial due process concerns implicated by the Rippentrops' acceptance of the agreement and more importantly, their full performance of and thus detrimental reliance upon said agreement. Such performance and reliance entitles them to specific performance of the State's end of the bargain, not just as a matter of contract law, but as a matter of fundamental due process. ***Castillo***, 205 Wis.2d at 611.

Just as it is the case that where specific performance is impossible, plea withdrawal is the remedy for a breach of a plea agreement on the State's part, *see* ***id.***, here, plea withdrawal (of the TPR plea) is impossible in light of the fact that Mark is no longer a minor, but specific performance is abundantly possible – this Court can and should simply hold the State to its bargain by affirming the order dismissing these matters with prejudice, albeit on different grounds than those relied upon by the circuit court.

CONCLUSION

For the reasons stated above, the circuit court's order dismissing these matters with prejudice should be affirmed by this Court, for all of the following reasons: (1) the circuit court incorrectly held that the State's promise not to prosecute the Rippentrops in exchange for their performance of an agreement to voluntarily terminate their parental rights to Mark was void as against public policy, when in fact it was an enforceable and valid agreement implicating their fundamental

rights; (2) even if the circuit court was correct in finding that the agreement was unenforceable, the circuit court was incorrect in finding that the speedy trial rights of the Rippentrops were not implicated and not violated; and (3) assuming that the agreement made by DA Solovey constituted prosecutorial misconduct, under ***McGuire*** dismissal is nonetheless required in order to vindicate the Rippentrops' rights to due process. In the alternative, on remand this court should order the circuit court to more fully consider whether the Rippentrops' constitutional rights to a speedy trial have been violated.

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CERTIFICATION

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 4,792 words.

Dated 09/08/2022:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). 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.

Dated 09/08/2022:

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