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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2022AP92-CR, 2022AP93-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DEBRA L. RIPPENTROP and
STEVEN E. RIPPENTROP,

Defendant-Respondent.

PETITION FOR REVIEW

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INTRODUCTION

This appeal concerns the validity of a verbal agreement between a former district attorney and two people subject to a criminal investigation. This case also concerns whether the trial court properly dismissed two criminal cases with prejudice, in order to discipline a former district attorney for misconduct.

Steven and Debra Rippentrop 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 not to return to the Rippentrop home. He made an offer to the Rippentrops and their attorney, whereby he agreed not to bring criminal charges if they would voluntarily terminate their parental rights to Mark. The Rippentrops agreed. The agreement was never put in writing, and neither Solovey nor the Rippentrops disclosed its specific terms to relevant county officials. The Rippentrops terminated their parental rights,

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[1] Unless otherwise indicated, citations to the record are to Case No. 2022AP92-CR, *State v. Debra L. Rippentrop*. Duplicate copies of the cited documents are available in the record for Case No. 2202AP93-CR, *State v. Steven E. Rippentrop*.

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

but they did not disclose to the TPR court that they had entered into this agreement.

After Solovey left office, the new Juneau County District Attorney 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 also found that the Rippentrops did not have clean hands, due to their failure to disclose the agreement to the court at the TPR hearing.

The Rippentrops then filed a second motion to dismiss, this time for prosecutorial misconduct. The circuit court granted the motion. It decided 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.

The State appealed, and the court of appeals affirmed on the alternative ground that the non-prosecution agreement was valid and enforceable against the State. The court did not decide whether the trial court had authority to dismiss the criminal cases with prejudice.

This Court should grant review and reverse. The verbal agreement between Solovey and the Rippentrops was void and unenforceable. And the circuit court did not have authority to 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 precedent from this Court compels reversal for this reason alone. Setting that aside, dismissing criminal cases, especially pre-trial, is a drastic remedy that this 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.

STATEMENT OF THE ISSUES

1. Was the former district attorney's verbal agreement with the Rippentrops void and unenforceable because it was contrary to public policy and the unclean hands doctrine precluded its enforcement?

The circuit court answered yes.

The court of appeals answered no, and concluded that the agreement was enforceable and binding against the State.

This Court should grant review and answer yes.

2. Did the circuit court have authority to dismiss the Rippentrops' criminal cases with prejudice on the ground of prosecutorial misconduct, when the defendants' constitutional right to a speedy trial was not implicated, and when the circuit court did not make findings as to whether the Rippentrops would receive a fair trial notwithstanding the misconduct?

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

The court of appeals did not address the question.

This Court should grant review and answer no.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

This case meets two of the court's criteria for review. A decision from this Court on the first issue will help develop, clarify or harmonize the law, and "[t]he question presented is a novel one, the resolution of which will have statewide impact." Wis. Stat. § (Rule) 809.62(1r)(c)2. Very little case law

exists with respect to non-prosecution agreements. *State v. Rippentrop*, Nos. 2022AP92-CR, 2022AP93-CR, 2023 WL 2169787, ¶ 40 (Wis. Ct. App. Feb. 23, 2023) (recommended for publication). The agreement in this case involves the intersection of criminal law and the Wisconsin's Children's Code, because it involves a requirement that the parents terminate their parental rights in exchange for non-prosecution. Prosecutors and the public would benefit from this Court's guidance as to how to enter into enforceable non-prosecution agreements that implicate CHIPS or TPR proceedings.

The second issue presents "[a] real and significant question of federal or state constitutional law." Wis. Stat. § (Rule) 809.62(1r)(a). It concerns the intersection of prosecutorial discretion to bring criminal charges with the Rippentrops' allegation that their state and federal constitutional rights were violated.

STATEMENT OF THE CASE

A. Conduct underlying charges.

According to the criminal complaints, when Mark was a young adolescent, he ran away from home, and law enforcement recovered him. (R. 1:2.) Mark reported that he had been regularly restrained at his house for over a year. (R. 1:2.) He reported 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.) In addition to the wrist restraints, his parents often blindfolded him by placing a hand towel over his head, with tape securing it to prevent him from seeing anything within the home. (R. 1:2–3.) Mark stated that every night at bedtime, he was tied up and blindfolded. (R. 1:3.) He reported being placed in a tent-like enclosure, which was monitored via closed circuit video. (R. 1:3.)

During a non-custodial interview, Debra told law enforcement that she and Steven 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.) In public, Mark did not wear the restraints. (R. 1:5.) The Rippentrops' extended family was not aware of the restraints. (R. 1:5.)

B. Criminal investigation and CHIPS proceeding.

The Juneau County Sheriff's Department referred the matter to former District Attorney Solovey to consider criminal charges. *Rippentrop*, 2023 WL 2169787, ¶ 9. In addition to the criminal investigation, county corporation counsel initiated a CHIPS case. *Id.* The Rippentrops retained Attorney Kerry Sullivan-Flock to represent them in the CHIPS case. *Id.*

Solovey did not immediately file charges against the Rippentrops. (R. 41:12–14.) After speaking to 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. *Rippentrop*, 2023 WL 2169787, ¶ 11. He believed that Mark did not want to return to the home either. (R. 41:22.)

C. Solovey's oral agreement with the Rippentrops.

On October 8, 2015, Solovey met with Attorney Sullivan-Flock and the Rippentrops. *Rippentrop*, 2023 WL 2169787, ¶ 12. Solovey made an oral proposal: he would not bring criminal charges related to the abuse, if the Rippentrops fulfilled certain conditions, including terminating their

parental rights to Mark. *Id.* A week later, Sullivan-Flock informed Solovey that the Rippentrops agreed to the proposal. (R. 41:26.) The agreement was never put in writing.

Solovey informed the Juneau County Sheriff and the lead investigator that day that he had made the Rippentrops a proposal that he was "confident" would be in the best interests of Mark. *Rippentrop*, 2023 WL 2169787, ¶ 13. He further informed them that "at the present time," no criminal charges would be filed. *Id.* Solovey similarly informed Juneau County corporation counsel of his proposal and his decision not to file charges "at the present time." *Rippentrop*, 2023 WL 2169787, ¶ 14.

On November 3, 2015, Sullivan-Flock informed corporation counsel that she and the Rippentrops met with the district attorney and discussed a global resolution that "would require the county's participation at some level." *Rippentrop*, 2023 WL 2169787, ¶ 15. She also stated that, "[w]ithout disclosing all the details, the concepts of guardianship and termination of parental rights were both discussed." *Id.* Corporation Counsel responded:

> Neither the Department of Human Services nor I knew anything about what the DA was offering. He has not discussed anything with us, which is surprising [because], as you noted, his offer requires the County's participation. Also, I don't think the DA can incorporate termination of parental rights into an agreement. That is extortion. From our standpoint, we are going to proceed down our own track, separate from the criminal aspect, towards a guardianship with the [proposed guardians]. Assuming [they are approved] for placement, I would be willing to dismiss the CHIPS action against the Rippentrops.

Id.

On November 9, 2015, Solovey wrote to a detective with the sheriff's office and informed him they had decided to decline prosecution of the Rippentrops. (R. 31:2.) He stated

that there was "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]." (R. 31:2.) Solovey said he would revisit his decision if "further admissible evidence is brought to my attention." (R. 31:2.)[3]

D. The John Doe proceeding.

County officials "blew up" when Solovey told them of his decision not to prosecute. (R. 41:33.) To compel a criminal complaint, Juneau County corporation counsel initiated a John Doe proceeding in early 2016. (R. 57:180–81.) Two John Doe hearings were held 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; 57:181.)

Solovey made an appearance at the John Doe hearings. While he was not permitted to formally participate, 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.

At the conclusion of the hearings, the court 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. (R. 36:90–91.)

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[3] At various points, 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.) According to Solovey, as of October 2015, he had still not received the investigations he had been promised. (R. 41:22–23.)

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

E. The TPR proceeding.

Corporation counsel initiated a TPR proceeding against the Rippentrops with respect to Mark. (R. 57:173.) The Rippentrops appeared at a hearing in that matter on June 6, 2016, where they testified in support of terminating their parental rights. (R. 51.)

Attorney Sullivan-Flock led the Rippentrops through testimony at that hearing. Debra testified that no one had promised her anything in order to get her to reach her decision to terminate her parental rights for Mark. (R. 67:109–10; 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; 51:15.) Steven was asked substantially similar questions and gave substantially similar answers. (R. 67:110; *see also* 51:22–25.) At no point did the Rippentrops or their attorney inform the judge about the agreement with Solovey. (R. 67:110.)

F. Criminal proceedings commence, and the trial court rules that the non-prosecution agreement is void and unenforceable.

At the conclusion of the John Doe proceeding, the Sauk County District Attorney was appointed special prosecutor for the Rippentrop cases. (R. 40:16; 67:74–75.) After current Juneau County District Attorney Kenneth Hamm took office, he took the case back, due to the Sauk County District Attorney's workload. (R. 67:75.) DA Hamm decided to file charges.

The State filed complaints against the Rippentrops in February 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.) They asked for a court order enforcing the agreement and dismissing the charges. (R. 13:2.)

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

In an oral ruling on October 30, 2020, the circuit court found that the unwritten agreement existed. (R. 67:111.) 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. 67:109–11.) That meant the Rippentrops did not have clean hands, "and, therefore, the contract would have been void just based on that." (R. 67:111.)

Further, the court ruled that the contract was void because it was against public policy to have such a contract. (R. 67:111–12.)

G. The trial court dismisses the criminal cases for prosecutorial misconduct.

A year later, the defense moved to dismiss the cases on the ground that Solovey committed prosecutorial misconduct. (R. 76.)

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.)

While the court "hate[d]" its ruling because a potential victim would not have his day in court, 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.)

H. The Wisconsin Court of Appeals affirms the circuit court's ruling on the alternative ground that the agreement was valid and enforceable.

The State appealed. The court of appeals affirmed the circuit court on the alternative ground that the agreement must be enforced against the State, thereby overturning the circuit court's earlier ruling that the agreement was void and unenforceable.

The court held that the State had not met its burden to show that the agreement was void as against public policy.[4] Further, the court was not concerned that neither the former DA nor the Rippentrops disclosed their agreement to the TPR court or the John Doe court. The court "assume[d] without deciding" that, had the non-prosecution agreement *required* either party to withhold relevant information from those courts, it might be void on public policy grounds. *Rippentrop*, 2023 WL 2169787, ¶ 62. The court also found that requiring enforcement of the contract was the "most equitable" thing to do, considering "substantive due process and principles of fundamental fairness." *Rippentrop*, 2023 WL 2169787, ¶ 68.

The State now seeks this Court's review.

ARGUMENT

I. A decision from this Court as to the agreement's enforceability will help develop the law pertaining to non-prosecution agreements.

The circuit court found that the unwritten non-prosecution agreement existed.[5] But the court concluded that it was invalid for two reasons: (1) it was void as a matter of

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[4] The State appealed the circuit court's adverse ruling that the cases must be dismissed with prejudice; it did not appeal the circuit court's earlier, favorable ruling that the agreement was void and unenforceable. Thus, the State only addressed the agreement's non-enforceability in its reply, after the Rippentrops argued that dismissal could be affirmed on this alternative ground.

[5] A valid contract consists of an offer, acceptance, and consideration. *Piaskoski & Assocs. v. Ricciardi*, 2004 WI App 152, ¶ 7, 275 Wis. 2d 650, 686 N.W.2d 675. The existence of these elements are factual questions, not legal ones. *Id.* While the State challenged the existence of the contract in circuit court, the circuit court found that the agreement existed, and the State does not challenge that ruling on appeal.

public policy; and (2) it was unenforceable because the Rippentrops did not have clean hands. (R. 67:111.) The court of appeals reached the opposite conclusion, and held that the agreement was valid and must be enforced against the State.

This Court should grant this petition. A decision from this Court as to the agreement's enforceability will help develop, clarify, and harmonize the law. Non-prosecution agreements are common, but caselaw on non-prosecution agreements is slim. And resolution of the novel question presented (incorporating a requirement that the parents terminate their rights to a child) will have statewide impact. Prosecutors and the public would benefit from this Court's guidance as to how to enter into enforceable non-prosecution agreements that implicate CHIPS or TPR proceedings.

The agreement in this case is not enforceable as a matter of law because it was contrary to public policy. Further, the Rippentrops, acting through their TPR attorney, did not have clean hands, and the circuit court properly exercised its discretion when it declined to order that the agreement be enforced.

A. This agreement was void because it was contrary to public policy.

The application of public policy considerations to a contract is a question of law that appellate courts review de novo. *Northern States Power Co. v. National Gas Co. Inc.*, 2000 WI App 30, ¶ 7, 232 Wis. 2d 541, 606 N.W.2d 613.

"A contract will not be enforced if it violates public policy." *Rosecky v. Shissel*, 2013 WI 66, ¶ 68, 349 Wis. 2d 84, 833 N.W.2d 634; *Jezeski v. Jezeski*, 2009 WI App 8, ¶ 11, 316 Wis. 2d 178, 763 N.W.2d 176. Public policy may be expressed by a statute. *Rosecky*, 349 Wis. 2d 84, ¶ 11. "A court may declare a contract void on public policy grounds only if it determines . . . that the interests in enforcing the contract are

clearly outweighed by the interests in upholding the policy that the contract violates." *Id.*

Relevant here, Wis. Stat. § 48.41 expresses a policy that voluntary termination of parental rights must be, in fact, voluntary. A court "may terminate the parental rights of a parent after the parent has given his or her consent as specified in this section." Wis. Stat. § 48.41(1). Further, "[t]he judge may accept the consent only after the judge has explained the effect of termination of parental rights and has questioned the parent, or has permitted an attorney who represents any of the parties to question the parent, and is satisfied that the consent is informed and voluntary." Wis. Stat. § 48.41(2)(a).

A parent's consent to terminate their rights must be free of coercion. Wis. Stat. § 48.41; *In Int. of D.L.S.*, 112 Wis. 2d 180, 194, 332 N.W.2d 293 (1983). During a TPR hearing, parents answer questions to show that consent to terminate is voluntary in this respect. (R. 67:109–10; *see also* R. 51:14–15, 22–25.)

In this case, the Rippentrops' and their attorney's failure to disclose the existence of the agreement to the TPR court prevented the court from ascertaining whether, notwithstanding the agreement, the Rippentrops were voluntarily giving up their parental rights. By skipping over the procedural safeguards inherent in Wis. Stat. § 48.41, the TPR court could not ask questions and ensure that the termination was voluntary. Compounding this problem is the fact that the Rippentrops' attorney and Solovey did not disclose the agreement to corporation counsel.

The court of appeals stated that the record "belies any suggestion that the parties to the nonprosecution agreement agreed to keep its existence secret." *Rippentrop*, 2023 WL 2169787, ¶ 64. But the circuit court found that the Rippentrops and their attorney failed to disclose the

agreement to the TPR court. (R. 67:106–07, 110–11.) This finding is supported by the record. Further, the record shows that Solovey and the Rippentrops did not disclose the *specific* terms of the agreement to corporation counsel, who was handling the CHIPS and TPR proceeding on behalf of the county. *Rippentrop*, 2023 WL 2169787, ¶ 15; (R. 67:38–39.) And Solovey did not disclose the specific terms of the agreement to the John Doe court. (R. 67:65.)

The court of appeals also noted that many of its cases found an agreement that included an express provision to withhold information from a court as contrary to public policy. *Rippentrop*, 2023 WL 2169787, ¶ 64. But the express inclusion of such a provision is not a prerequisite for treating a contract as void. In *Jezeski*, a husband transferred a significant asset to his brother to hide it from his wife and the family court during a divorce proceeding. *Jezeski*, 316 Wis. 2d 178, ¶ 1. The agreement did not include a specific provision to withhold information about the asset from the family court. Nevertheless, the court of appeals held that the husband "concocted a scheme to avoid his statutory duty to fully disclose all assets to his wife and the family court." *Id.* ¶ 21. The contract between the husband and his brother was "void and unenforceable because it assisted [the husband] in violating a statute and public policy." *Id.*

In a similar manner, the agreement in this case enabled the Rippentrops and their attorney to avoid statutorily-required candor to the court about promises they were made during the TPR colloquy. This agreement is contrary to public policy.

B. The non-prosecution agreement is unenforceable because the Rippentrops did not have clean hands.

The circuit court ruled that the contract was unenforceable for a second reason, namely, that the

Rippentrops and their attorney failed to disclose the agreement to the TPR court. This provides an independent reason to conclude the agreement was not enforceable against the State.

The clean hands doctrine refers to "the equitable doctrine that a plaintiff who seeks affirmative equitable relief must have 'clean hands' before the court will entertain his plea." *S & M Rotogravure Serv., Inc., v. Baer*, 77 Wis. 2d 454, 466, 252 N.W. 2d 913 (1977). "For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief. *Security Pac. Nat'l Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). In other words, "it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." *Id.* (emphasis omitted) (citation omitted).

Whether to give equitable relief is in the trial court's discretion. *Timm v. Portage Cnty. Drainage Dist.*, 145 Wis. 2d 743, 752, 429 N.W.2d 512 (Ct. App. 1988). Appellate courts "will uphold the trial court's discretionary decision if it examined the relevant facts of record, applied the correct legal standard, and reached a conclusion that a reasonable judge could reach." *Hall v. Gregory A. Liebovich Living Trust*, 2007 WI App 112, ¶ 10, 300 Wis. 2d 725, 731 N.W.2d 649.

Here, the Rippentrops sought specific performance of the State's end of the contract, a form of equitable relief. (R. 13:2.) They argued that they relied on the prosecutor's promise not to prosecute, and this reliance was detrimental because they cannot get their rights to Mark back, since he is an adult. (R. 13:2.) The circuit court declined to enforce the contract in part because the Rippentrops did not disclose the agreement to the TPR court.

To be clear, many valid non-prosecution agreements never come to the attention of any court. But in this case, the circuit court properly exercised its discretion when it declined to enforce the agreement against the State. The Rippentrops' failure to disclose the agreement to the TPR court caused the harm for which they seek relief. They argued that they would not have terminated their parental rights if Solovey had not promised to refrain from prosecution in exchange. (R. 54.) But if they would have disclosed the agreement to the TPR court, the court may not have allowed the termination to take place. (R. 67:110–11.) The court's termination of their rights to Mark was the fruit of their misconduct, and therefore, the trial court appropriately exercised its discretion in concluding that specific performance was unwarranted.[6]

II. Whether the circuit court could dismiss the criminal cases with prejudice in light of Solovey's misconduct presents a real and significant question of constitutional law.

A. Under Wisconsin law, dismissal of criminal cases with prejudice is a drastic remedy that should be rarely used.

1. Dismissal of cases with prejudice generally.

It is well settled that "trial courts of this state do not possess the power to dismiss a criminal case with prejudice

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[6] The court of appeals asserted that the State did not develop a sufficient argument in its reply brief on the clean hands doctrine, and therefore, the court did not analyze the doctrine in detail. The State did not forfeit this issue, but even if it did, forfeiture is a rule of judicial administration. *Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981). The important issues at stake here warrant review of the circuit court's discretionary decision not to enforce the contract against the State.

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 *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). This Court unanimously declined. *Id.* ¶ 4. The facts of *Krueger* are instructive.

There, a defendant was charged with publicly exposing his genitals around young children. *Id.* ¶ 5. The State moved to admit evidence showing that the defendant engaged in the same 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 observed that "a number of things have gone over the dam

that we can't get back," including the question of whether he would have testified, and whether the cases would have been consolidated. *Id.* ¶ 15.

The State appealed, and the court of appeals reversed, citing *Braunsdorf*. *Id.* ¶ 10. The 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, this Court affirmed. *Id.* ¶ 4. This Court declined to expand *Braunsdorf* to permit a circuit court to dismiss a prosecution on the basis that 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). 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); Wis. Stat. § 972.07. Thus, as a matter of law, the court did not possess the power to dismiss the criminal cases with prejudice. *Braunsdorf*, 98 Wis. 2d at 586.

2. Dismissal as a result of prosecutorial misconduct.

Braunsdorf aside, the circuit court's decision was also 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 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.

Prosecutorial misconduct can sometimes rise to such a level that it deprives the defendant of the due process right to a fair trial. *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). 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 involved the defense attorney's postconviction motion for a new trial on the ground of prosecutorial misconduct. The court of appeals held that a new trial was warranted. The district attorney's "intentional misconduct had a profoundly negative impact on [counsel's] ability to effectively represent Lettice." *Id.* at 354. 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.*

Sometimes cases are dismissed pre-trial as a result of prosecutorial delays. In *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. *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 (citation omitted). 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).

Absent a constitutional violation, this 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:

> 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.

This 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 this 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.

The Rippentrops may argue that Solovey's misconduct caused a pre-charging delay in violation of their due process rights under *McGuire*.[7] 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

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[7] In the court of appeals, the State agreed with the Rippentrops that if a defendant establishes a due process violation under *McGuire*, the logical result would likely be dismissal of the charges with prejudice. *McGuire* does not appear to be inconsistent with *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), which addressed whether a circuit court had inherent authority to dismiss charges with prejudice on non-constitutional grounds prior to jeopardy attaching. Regardless, both cases compel reversal here.

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 unenforceable, 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 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 circuit 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. 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 what occurred in the TPR case, when they gave up their parental rights after making an oral agreement with Solovey. The State acknowledges that the victim is now an adult. But 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, through their attorney, they were not forthright in the TPR case about their agreement with Solovey.

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 when it dismissed the criminal cases.

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The court of appeals decision in this matter is recommended for publication. This Court should grant this petition to give lower courts, prosecutors, and accused persons guidance on the complex and important issues described above. This Court should also grant this petition to assess and properly balance the competing interests at stake.

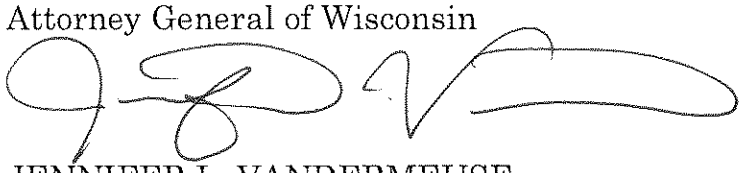
CONCLUSION

The State respectfully requests that this Court grant this petition for review.

Dated this 24th day of March 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 7,637 words.

Dated this 24th day of March 2023.

JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

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This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 24th day of March 2023.

JENNIFER L. VANDERMEUSE
Assistant Attorney General