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SUPREME COURT

STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal Nos. 2022AP92-CR & 2022AP93-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

STEVEN E. RIPPENTROP and
DEBRA L. RIPPENTROP,

Defendants-Respondents-Respondents.

DEFENDANT-RESPONDENT-RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

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CRITERIA FOR REVIEW

Although the court of appeals' decision in this matter has been ordered to be published, and although it dealt with an issue that only rarely comes before appellate courts for decision, this Court's review of this case is completely unwarranted. In fact, this case, like the many others of its genre which never come to any court's attention, would never have come to any court's attention had the State honored its own promises. At bottom, what the State primarily complains of here is being made to adhere to its promises; it disingenuously argues that what is essentially a negotiated resolution to a potential criminal matter was against public policy because the threat of criminal prosecution being leveraged to induce the Rippentrops to agree to terminate their parental rights to the child who would have been the alleged victim in the criminal matter was somehow so egregious of a threat as to render the nonprosecution agreement at the heart of this case void as against public policy.

This argument is disingenuous for several reasons, but most importantly, it is the fact that the State routinely and successfully relies upon caselaw holding that the mere threat of additional charges should a defendant reject a plea offer is not and cannot be a fact that renders the defendant's subsequent plea in any way involuntary. The portion of the court of appeals' decision in this matter discussing this issue is worth repeating in full here:

> As we have previously explained, "[w]hether a guilty plea is voluntarily and intelligently made is a conclusion with respect

> to the state of mind of the accused." ***Verser v. State***, 85 Wis. 2d 319, 329, 270 N.W.2d 241 (Ct. App. 1978). When taking a defendant's plea, a circuit court is required to make an "[i]nquiry with respect to threats and promises … for the purpose of determining the accused's state of mind with respect to the voluntariness and intelligence of the guilty plea." Id. However, unless any promises or threats "coerce or induce the plea to an extent that deprives the accused of understanding and free will," the threats or promises "provide no basis" for determining that the accused's plea was involuntary. Id. Our supreme court has reached a similar conclusion in ***T.M.F.*** [***v. Children's Serv. Soc'y of Wisconsin***, 112 Wis. 2d 180, 194, 332 N.W.2d 293 (1983) (commonly referred to as "In re D.L.S.").], which addressed the voluntariness of a teenage mother's consent to a termination of her parental rights.

State v. Rippentrop, 2022AP92-CR & 2022AP93-CR, ¶55 (citing ***T.M.F.***, 112 Wis. 2d at 194 ("Parental advice, argument, or persuasion do not constitute coercion if the individual who has to make the decision acts freely when [the individual] gives consent, even though the consent might not have been executed except for the advice, argument, or persuasion.").

The court of appeals correctly applied extant law on the subject of nonprosecution agreements and enforcement of prosecutorial promises to facts which the State largely conceded in its briefing and continues to concede in its arguments for review. As is argued in greater detail below, none of the criteria for review specified in Wis. Stat. §

809.62(1r) are satisfied here; there are no special or important reasons for this Court's review. The case involves merely the application of well-settled principles of fundamental fairness and due process to a particular nonprosecution agreement, rendering Wis. Stat. § 809.62(1r)(c)2. inapplicable, (c)1. is also inapplicable, as no new doctrines are called for, (c)3. is inapplicable, because while there aren't factual disputes involved, the questions of law are neither novel nor difficult to resolve, and neither (1r)(d) nor (1r)(e) apply. The court of appeals followed established law, and there exist no compelling reasons to alter any of that law. This Court should deny the State's petition for review.

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).

Appellate Proceedings

The State appealed, and in a decision dated February 23, 2023, the court of appeals affirmed the circuit court's order dismissing the matter with prejudice, but rejected all of the circuit court's reasoning in the process. ***Rippentrop***, ¶¶1-2. After reciting the facts and procedural history of the case, the court of appeals determined that it need not address the circuit court's decision to dismiss the matter with prejudice as a result of prosecutorial misconduct because it found that the circuit court erred by failing to enforce the non-prosecution agreement, holding that said agreement was both binding and enforceable as against the State. ***Rippentrop***, ¶34. (citing ***Barrows v. American Fam. Ins. Co.***, 2014 WI App 11, 19,352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.")).

The court of appeals began by noting that under Wisconsin law, prosecutors have been recognized to have the authority to enter into nonprosecution agreements, that such agreements are enforceable against the State, and that such agreements have their roots in the nearly unfettered discretion possessed by prosecutors "to charge or not charge crimes in the interest of justice." ***Rippentrop***, ¶¶38-39 (citing ***State v. Jones***, 217 Wis.2d 57, 576 N.W.2d 580 (Ct. App. 1998) and ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶30, 271 Wis. 2d 633, 681 N.W.2d 110). The court of appeals then also correctly noted that the State did not challenge on appeal the circuit court's finding that then-district attorney Solovey had entered into a nonprosecution agreement with the Rippentrops and that a contract had thereby been formed between the State and the Rippentrops. ***Id.***, ¶41.

Turning to the State's arguments as it understood them to be on appeal, the court of appeals first rejected what it perceived to be a possible argument that State raised to the

effect that because nonprosecution agreements are not subject to judicial oversight, they are unenforceable. In doing so, it summarized the reasoning underlying its decision in ***Jones*** by first noting that a prosecutor's discretion as to whether or not to issue charges is "almost limitless," and that the goal of a district attorney is "justice, not convictions." ***Id.***, ¶44 (citing ***Jones***, 217 Wis.2d 57, ¶¶64-65). The court of appeals then stated that ""if it is within the discretionary power of the district attorney not to bring a criminal charge, it is also within [the district attorney's] power to enter into a precharge, nonprosecution agreement in exchange for information if it is determined that doing so will further the administration of justice."" ***Id.*** (quoting ***Jones***, 217 Wis.2d 57, ¶64).

The court then further held that any argument that nonprosecution agreements do not bind the State fails because, at least under Wisconsin law, any prosecutorial promise may become binding if a party detrimentally relies upon said promise. ***Id.***, ¶45; *see also* ***State v. Bond***, 139 Wis.2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987) ("Once a defendant has [detrimentally] 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.") The court of appeals noted that the State did not contest the circuit court's finding that the Rippentrops had detrimentally relied upon the State's nonprosecution promise by voluntarily terminating their parental rights to A.B., and that the Rippentrops further cannot now be returned to the position they were in prior to doing so, but also further stated that the record in any event supported that determination, and concluded that the nonprosecution agreement was "a binding agreement that should be enforced unless the agreement [was] unenforceable on some other ground." ***Id.***, ¶¶46-47 (brackets added).

The court of appeals then addressed and rejected the two arguments advanced by the State for refusing to enforce the agreement. First, and primarily, the State argued that the agreement violated the public policy expressed by the statute providing for voluntary termination of parental rights, Wis. Stat. § 48.41, and that it violated that statute because, according to the State, the Rippentrops were not truly acting voluntarily in asking that their parental rights be terminated because of the existence of the nonprosecution agreement, and thus the State argued that because the Rippentrops consented to termination of their parental rights in exchange for avoiding criminal exposure for child abuse, their consent was "necessarily involuntary." ***Id.***, ¶52.

The court of appeals correctly looked to the law regarding plea bargaining and the voluntariness of negotiated pleas, and rejected this argument. ***Id.***, ¶54. It first noted that the contract defense the State relied upon in making that argument, whereby courts will refuse to enforce an otherwise valid contract if the contract itself violates public policy, only applies in cases that are "free from doubt." ***Id.***, ¶53 (citing ***Northern States Power Co. v. National Gas Co., Inc.***, 2000 WI App 30, ¶8, 232 Wis.2d 541, 606 N.W.2d 613. The court of appeals concluded that the State had not met its burden to prove that the agreement violated any public policy, stating that "Much like it does not violate public policy for a criminal defendant to enter into a plea agreement that induces the defendant to waive valuable rights in exchange for receiving the agreement's benefits, the State does not persuade us that the provision in the nonprosecution agreement that required the Rippentrops to voluntarily terminate their parental rights violated any public policy clearly expressed by WIS. STAT. § 48.41 or [the common law]." ***Id.***, ¶56 (brackets added).

Turning to the State's second argument against the enforceability of the nonprosecution agreement, the court of appeals first noted that there is in fact a public policy against any plea agreement that requires the State to withhold relevant information from a sentencing court. ***Id.***, ¶62. The court of appeals, however, rejected the State's attempt to characterize the agreement as analogous to an agreement to withhold information from a sentencing court, noting first that the State itself acknowledged that the agreement itself did not contain an explicit term requiring anyone to engage in such withholding, and further noting that the State did not (likely because it could not) point to any evidence in the record suggesting the presence of an implicit agreement to withhold information from any court. ***Id.***, ¶63. The court further pointed out that DA Solovey had informed both corporation counsel and the guardian ad litem who represented A.B.'s interests in the TPR proceedings of the existence and terms of the agreement, and while corporation counsel in particular strongly disapproved of the agreement, he did not hesitate to avail himself of its benefits, and indeed assisted the Rippentrops in drafting and filing their petition to voluntarily terminate their parental rights to A.B. ***Id.***, ¶64.

The court of appeals further noted that while it would have been better for the Rippentrops to have expressly disclosed the nonprosecution agreement's terms to the TPR court, Debra Rippentrop later testified that she and her husband had assumed that everyone involved knew about the agreement, and in addition, their attorney had disclosed to the TPR court the existence of a global agreement that included the Rippentrops' agreement to the termination of their parental rights. ***Id.***, ¶66.

Finally, in a footnote, the court of appeals made short shrift of the State's related argument that the Rippentrops had

"unclean hands" and therefore could not insist on enforcement of the nonprosecution agreement. The court of appeals first noted that in order for a plaintiff in equity to be denied relief under the unclean hands doctrine, "it must clearly appear that the things from which the [party guilty of misconduct] seeks relief are the fruit of [that party's] own wrongful or unlawful course of conduct." ***Id.***, ¶66 n. 12 (quoting ***State v. Kaczmarski***, 2009 WI App 117, ¶15, 320 Wis. 2d 811, 772 N.W.2d 702). The court of appeals then correctly noted that the State's only attempt to connect the facts of the case to this doctrine was to argue that the Rippentrops bear some responsibility for any prejudice they incurred as a result of terminating their parental rights in reliance upon the nonprosecution agreement because they failed to disclose the existence of said agreement to the TPR court. ***Id.*** The court of appeals, also correctly, held that this was not a properly developed argument, and that the State had failed to connect its disapproving sentiment to the requirements of the unclean hands doctrine, and deemed the State to have abandoned any such argument on appeal therefore. ***Id.***

Lastly, the court of appeals noted that enforcement of the agreement was not only equitable, but the need to enforce the agreement was in fact compelling. First, the court reiterated that "a contract will be determined to be void as against public policy only if "the interests in enforcing the contract are clearly outweighed by the interests in upholding the policy that the contract violates," ***Rosecky*** [***v. Schissel***, 2013 WI 66, ¶68, 349 Wis.2d 84, 833 N.W.2d 634, and only "in cases free from doubt," ***Northern States Power Co.***, 232 Wis. 2d 541, ¶8." ***Id.***, ¶67.

The court went on to state that first, there is a strong public policy in favor of enforcing contracts generally, and

then, analogizing to plea bargaining law, stated that in this context, considerations of substantive due process and principles of fundamental fairness "render[ed] the enforcement of this prosecutorial promise even more compelling." ***Id.***, ¶68 (citing ***State v. Castillo***, 205 Wis.2d 599, 607, 556 N.W.2d 425 (Ct. App. 1996) ("[A]ny violation of a prosecutorial promise triggers consideration of fundamental fairness and a deprivation of due process.") (internal citation omitted)). Accordingly, the court of appeals concluded that the State had not met its burden to show that the nonprosecution agreement was void as against public policy, and given that it had failed to advance any other argument against enforcement of the agreement via an order for specific performance, affirmed the dismissal of the complaint in this matter with prejudice. The State then filed a petition for review on March 24, 2023 with this Court.

ARGUMENT

I. Contrary to the State's argument in its petition for review, there is nothing novel, special, or unusual about the court of appeals' decision in this matter, and as such, this Court's criteria for review have not been met.

The State argues in its petition for review that this case involves a novel issue whose resolution will have statewide impact and that it also involves a "real and significant question of federal or state constitutional law." Petition, 8-9 (quoting Wis. Stat. § 809.62(1r)(a)). Both assertions are false. First, while it is true that there is not an abundance of law on the subject of nonprosecution agreements, it is false to say that there is none, and it is therefore also false to say that the question presented is in any sense novel. Caselaw has already been established holding that: (1) nonprosecution agreements

are within the authority of a prosecutor to enter into with potential defendants when, in the exercise of the prosecutor's discretion doing so will further the interests of justice, *see* ***Jones***, 217 Wis. 2d at 64-65; (2) nonprosecution agreements are to be analyzed using the same principles which surround plea bargains, and as such, a breach of a nonprosecution agreement, like an alleged breach of a plea agreement, must be material and substantial to warrant relief, *see* ***State v. Lukensmeyer***, 140 Wis.2d 92, 102, 409 N.W.2d 395 (Ct. App. 1987); (3) the party seeking to invalidate a nonprosecution agreement must prove a material and substantial breach of the agreement by clear and convincing evidence, but most only prove one such breach in order to obtain relief from the agreement, *see* ***State v. Whitman***, 160 Wis.2d 260, 268, 466 N.W.2d 193 (Ct. App. 1991); and (4) nonprosecution agreements, because they are precharging decisions authorized by the nature of the district attorney's nearly limitless discretion to charge or not charge crimes, are not governed by Wis. Stat. § 972.08 (the statute governing post-charging offers of immunity) and thus not subject to judicial scrutiny, *see* ***State v. Miller***, 231 Wis. 2d 447, 465, 605 N.W.2d 567 (Ct. App. 1999).

Further, as was noted in ***Jones***, this Court has on at least one occasion implicitly approved of nonprosecution agreements, *see* ***State v. Nerison***, 136 Wis.2d 37, 45, 401 N.W.2d 1 (1987) (holding that nonprosecution agreements entered into by a district attorney in exchange for testimony against another person were not corrupt and implicitly holding that the agreements were valid). And, as the ***Jones*** court also stated, "it is important to note that the case law is replete with instances in which a district attorney during the course of a criminal investigation entered into a nonprosecution agreement in exchange for information or testimony against a defendant . . . [and i]n none of these cases

has it ever been questioned whether the practice of nonprosecution agreements is an invalid exercise of a district attorney's discretionary power." ***Jones***, 217 Wis.2d at 66.

The State attempts to manufacture a novel question by noting that this case involves the intersection of criminal law with the Children's Code, but this is merely a specific application of general principles of law to a specific set of facts. As was noted in the court of appeals decision in this matter, there is nothing in Wis. Stat. § 48.41 that precludes parties from entering into agreements a portion of which require one party to voluntarily terminate their parental rights, and there is nothing in the law surrounding plea bargains that would render an otherwise voluntary plea involuntary simply because the defendant had to make a choice between competing fundamental rights. *See* ***Rippentrop***, ¶¶53-54. It bears repeating the court of appeals' observation in this case that this Court has explained that ""[a] voluntary and intelligent choice always involves two or more alternatives, each having some compelling power of acceptance," and "[t]he fact that a defendant must make a choice between two reasonable alternatives and take the consequences [of that choice] is not coercive of the choice finally made." ***Id.***, ¶54 (quoting ***Rahhal v. State***, 52 Wis.2d 144, 151, 187 N.W.2d 800 (1971)).

The State also argues that because this case involves a claim by the defendants that their prosecution in this matter violates their due process rights in a situation involving an exercise of prosecutorial discretion, it thus presents a real and substantial question of federal or state federal law and therefore merits this Court's review pursuant to the criteria specified at Wis. Stat. § 809.62(1r)(a). This is nonsense, as the intersection of prosecutorial discretion with state and federal rights to due process in the conceptually quite similar

area of the enforcement of plea bargains is very well-developed, and there is no question here that there was a nonprosecution agreement, that the Rippentrops relied upon said agreement to their detriment, and that their due process rights are implicated simply because they acted in reliance upon a promise made by the State. *See* ***Castillo***, 205 Wis.2d at 607. In fact, the law has been clear for a very long time that a prosecutor who violates any promise made to a person who has detrimentally relied upon that promise has violated that person's right to due process. *See, e.g.*, ***Bond***, 139 Wis.2d at 188 ("Once a defendant has [detrimentally] 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.").

The State also attempts to analogize this matter to the situation in ***Jezeski v. Jezeski***, 2009 WI App. 8, 316 Wis.2d 178, 763 N.W.2d 176 is completely inapt; there, the court of appeals invalidated a contract to hide assets from a spouse and family court during the course of a divorce proceeding because it found that the contract assisted one of the spouses in violating a specific disclosure requirement in a civil statute which provided for a penalty for its violation, namely, Wis. Stat. § 767.127(1). ***Id.***, ¶¶13-14.

Here, the statute upon which the State relies is Wis. Stat. § 48.41, specifically § 48.41(2)(a), which reads in full as follows:

> The parent appears personally at the hearing and gives his or her consent to the termination of his or her parental rights. The 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). As can be seen, Wis. Stat. § 48.41(2)(a) does not require anything of the parties to a voluntary termination of parental rights proceeding other than that the parents personally appear and submit to questioning, either from the court or their attorney, designed to ensure that their consent to termination of their parental rights is intelligent and voluntary, nor does it provide for any penalty to be levied against the parties should the statute be violated. Further, nothing in the statute or other caselaw suggests that a parent's failure to be completely candid with a TPR court in any way renders the parent's consent to termination of their parental rights either unintelligent or involuntary, and nothing in the record here suggests that the Rippentrops' consent to termination of their parental rights was in any way involuntary or unintelligent.

As such, and contrary to the State's argument, this case does not present a novel question of statewide importance, but rather involves the application of settled law to a specific fact pattern, and as a further result, this case does not satisfy the criteria for this Court's review specified at Wis. Stat. § 809.62(1r)(c)2. This Court accordingly should deny review.

II. The unclean hands doctrine simply does not apply here, as there is no connection between the Rippentrop's less than complete candor with the TPR court and the nonprosecution agreement, as it did not require the Rippentrops to either withhold or provide any particular information to the TPR court, but rather only required that they in fact voluntarily terminate their parental rights, and as such, settled law dictates that the unclean hands

doctrine does not apply, and review by this court is unnecessary.

As was noted by the court of appeals in footnote 12 of its decision in this matter, unclean hands cannot be raised as a defense to enforcement of a contract via an order for specific performance where, as here, the party seeking specific performance's own wrongdoing did not cause the evil of which that party complains. ***Kaczmarski***, 320 Wis.2d 811, ¶15. First, it is not clear that there was in fact any wrongdoing at all on the Rippentrops' part, and if there was, it was when they stated that they had not been promised anything in exchange for agreeing to terminate their parental rights during the course of the TPR proceeding. Second, that wrongdoing, if wrongdoing it was, has literally no connection at all with the evil the Rippentrops complain of here, namely, the State's violation of its promise not to criminally prosecute them for their alleged abuse of A.B.

Nothing in either law or logic establishes any sort of connection between the Rippentrops' alleged failure of candor to the TPR court and the State's decision to violate the nonprosecution agreement; in fact, corporation counsel knew of the nonprosecution agreement and its requirement that the Rippentrops voluntarily terminate their parental rights when that same counsel initiated the John Doe proceeding which ultimately spurred the issuance of the complaint in this matter. (R48: 1-2; R52: 1-2).

If anything, corporation counsel's determination, knowing of the nonprosecution agreement, to both accept the benefit of the agreement by drafting and filing the Rippentrops' petition for voluntary termination of their parental rights to A.B. and then turn around and seek to force the State to violate that agreement by having criminal charges

issued constitutes the egregious misconduct in this case. If anyone's hands are unclean here, it is those of the county and the State. None of that in any way justifies refusing to enforce the nonprosecution agreement, quite the contrary, and as such, this Court should deny review.

III. The State's Remaining arguments are also the subject of well-settled law, and moreover were not addressed by the court of appeals, and as such, the issues involved do not merit this Court's review.

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.

None of what follows was addressed by the court of appeals, owing to the fact that it decided the case based on the alternative ground that the circuit court erred in failing to grant the Rippentrops' motion for specific performance of the nonprosecution agreement discussed above. That said, the Rippentrops in the interest of completeness will address alternative grounds for believing the court of appeals' decision to be correct at least in the mandate.

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 an 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. Further, in light of the fact that corporation counsel was aware of the nonprosecution agreement and the fact of the Rippentrops' detrimental reliance upon it, the fact that corporation counsel sought issuance of a complaint against the Rippentrops without regard to the promises made by the State to them is in itself serious misconduct.

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.").

Finally, as can be seen, neither issue discussed in part III of this brief constitutes a novel question or a "real and substantial question of federal or state constitutional law," and as such, review by this Court is inappropriate. To the extent that the court of appeals' elaboration of how the law surrounding nonprosecution agreements applies to the factual circumstances here provides any new guidance to the bench and bar, this Court's intervention is likewise unnecessary, as the court of appeals' decision in this matter has been ordered published and is therefore binding law.

Accordingly, this Court should deny review and let stand the court of appeals' order dismissing these matters with prejudice on at least 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).

CONCLUSION

For the reasons discussed above, this Court should deny the State's petition for review.

Dated this 18th day of April, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (d) as well as Rule 806.62(4)(a) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,158 words.

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 Rule 809.19(12) and Rule 809.62(2)(f). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 18th day of April, 2023.

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