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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP565-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PIERSON T. LESKE,

Defendant-Appellant.

ON APPEAL FROM A NONFINAL ORDER APPOINTING A SPECIAL PROSECUTOR IN WAUPACA COUNTY, THE HONORABLE VICKI L. CLUSSMAN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This appeal concerns the circuit court's authority to appoint a special prosecutor sua sponte, without enumerating which, if any, of the statutorily enumerated reasons exist.

The State charged Leske with second-degree sexual assault of a victim who could not consent due to intoxication. To resolve the case, the State offered that Leske could plead no contest to third-degree sexual assault and substantial battery, and he would be offered a deferred prosecution agreement on the sexual assault.

At the hearing, V1[1] told the circuit court she did not agree with the proposed resolution. The circuit court adjourned the hearing so V1 could consult with her lawyer, who was not present. V1's attorney sent a letter to the court asking for the appointment of a special prosecutor because V1 did not believe the district attorney would try the case.

The circuit court appointed a special prosecutor on its own motion. Leske sought leave to appeal, which this Court granted.

This Court should reverse the circuit court's order appointing the special prosecutor. This Court should clarify the state of the law on appointing a special prosecutor. The

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[1] To protect the victim's privacy, the State uses V1, which was how the victim's attorney referred to her in prior filings. (R. 45:1.) This is in compliance with Wis. Stat. §§ (Rule) 809.19(1)(g) and (Rule) 809.86. The State notes that Leske refers to the victim as "complainant." (*See* Leske's Br. 8.) This is incorrect. V1 is not the complainant in this case. By definition, V1 has the legal status of a "victim" as she is "a natural person against whom a crime . . . has been . . . alleged to have been committed in the appeal or proceeding." Wis. Stat. § (Rule) 809.86(3).

To the extent that has done this to avoid referring to V1 as a victim, the State notes that victims have the right "[t]o be treated with fairness, dignity, and respect." Wis. Stat. § 950.04(1v)(ag).

earliest case from this Court interpreting the statute on appointing a special prosecutor held that the statute requires that one of the listed reasons for appointing be present. A subsequent case, also from this Court, held that when a court makes an appointment on its own motion, it need only state the cause to do so. Our supreme court has called that second case into question—if not overruling it. If the supreme court did not overrule this second case, then this Court should clarify that the first case controls because this Court lacked the power to modify or overrule the first case.

If the circuit court's order withstands statutory scrutiny, then this Court should hold that the appointment of a special prosecutor does not remove the elected district attorney from the case—that would be a violation of the separation of powers. The elected district attorney is accountable to the voters, and, absent a refusal to prosecute at all, a circuit court cannot remove them.

ISSUES PRESENTED

1. Was the circuit court's order appointing a special prosecutor valid?

This Court should answer: No. To appoint a special prosecutor, the circuit court must either certify that the appointment will be under six hours of work, that no other prosecutorial agency can take the case, or the court must indicate one of the enumerated reasons why the appointment was necessary. The circuit court did none of these.

2. Does the appointment of a special prosecutor remove the elected district attorney from the case?

The circuit court impliedly answered: Yes.

This Court should answer: No. Nothing about appointing a special prosecutor necessarily implies the authority to remove the district attorney from the case. Case law shows that there is only one circumstance where a circuit

court can remove the elected district attorney—when the district attorney refuses to prosecute the case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be warranted to clarify the law on appointing a special prosecutor and when a circuit court can remove the elected district attorney from a case.

STATEMENT OF THE CASE

A. The State charged Leske with second-degree sexual assault of a person under the influence of an intoxicant and made an offer to resolve the case with pleas to lesser charges.

After drinking at a party with friends, V1 blacked out and did not remember falling asleep. (R. 2:1.) The next morning, she awoke in a different location, a friend's house. (R. 2:1–2.) V1 did not remember anything from the prior night, nor how she got to her friend's house. (R. 2:2.) Others at the party had seen Leske on top of V1 with her clothes off after she had fallen asleep or passed out. (R. 2:2.) This witness saw Leske "thrusting underneath the blanket" while V1 was "sleeping, her eyes were closed and she was laying on her back." (R. 2:2.) Leske had told people at the party that he was going to have sex with V1. (R. 2:2.) Witnesses saw Leske drinking alcohol, but "he remained in control of his faculties, not slurring his words or stumbling around." (R. 2:2.) By contrast, V1 was stumbling around, had a lot to drink, and passed out. (R. 2:2.) V1 did not consent to having sex with Leske. (R. 2:2.)

After the assault, witnesses saw V1 was naked from the waist down with her legs spread apart "so that her feet were at the corners of the mattress." (R. 2:2.) Her clothing was at

her feet, and she was "limp" and could not be awakened. (R. 2:2.)

The State charged Leske with one count of second-degree sexual assault for having sexual intercourse with a person under the influence of an intoxicant such that the person was incapable of giving consent. (R. 2:1.)

To resolve the case short of trial, the State made an offer where Leske would plead no contest to third-degree sexual assault and substantial battery. (R. 42:2.) The judgment of conviction on the sexual assault would be withheld, and Leske would enter a deferred prosecution agreement; upon successful completion, the sexual assault count would be dismissed. (R. 42:2.)

B. Before the scheduled plea and sentencing hearing, the victim's attorney sent the court a letter saying the victim was aware of the offer.

Prior to the hearing, counsel for V1 sent the circuit court a letter. (R. 35.) Counsel represented that V1 was "aware of the offer that has been made to the defendant and did participate in a victim conference with the State." (R. 35.) V1's counsel informed the court about V1's victim impact statement and asked that the court give V1 the opportunity to address the court. (R. 35.) Counsel could not be present for the hearing, but the letter expressed that V1 was aware of that and wanted the hearing to proceed. (R. 35.)

C. At the hearing, the victim expressed reservations with the offer.

At the scheduled plea and sentencing hearing, the State informed the circuit court that V1 was present and wanted to address the court. (R. 42:2.) The circuit court asked the State for V1's "position regarding the [c]ourt's acceptance of this particular plea agreement." (R. 42:2.) The State stated it

would "obviously defer to the victim" but "at no time did she express dissatisfaction with the agreement." (R. 42:3–4.) The State indicated that it had "also spoken with [V1's attorney], who expressed that the victim was satisfied with the agreement." (R. 42:4.) The court noticed that it saw "in the back, there are heads that are shaking no." (R. 42:4.) The State noted V1 was an adult, and her parents had "expressed dissatisfaction," but they were "not victims." (R. 42:4.)

The circuit court wanted to hear from V1 because it felt that it was "a favorable plea agreement for" Leske. (R. 42:4.) V1 confirmed that she spoke with the State about the plea agreement, but she did not "think [she] fully understood it, though." (R. 42:5.) Noting that the agreement did not call for any upfront jail time, V1 voiced that she did not agree with that—jail time was "something that [she] would want." (R. 42:6.) V1 said that "[a]t the time" the agreement was explained to her, she "went along with what was recommended." (R. 42:6.) She felt differently at the time of the hearing. (R. 42:6.)

Turning to Leske, the circuit court pointed out that the charges Leske would be pleading to did not "really reflect the situation regarding what took place." (R. 42:6–7.) Leske responded that the case was "highly negotiated" and the charges "were amended with specific purposes in mind. And they do not necessarily reflect the original allegation as written in the [c]omplaint." (R. 42:7.) The State agreed and represented that it and V1's attorney "had a lengthy conversation regarding the plea agreement, the conditions of the plea agreement. And she expressed that she had explained it in detail to her client. And so there was an additional opportunity made available to meet with the victim, and she declined." (R. 42:7.)

The circuit court asked V1, in the event that it did not accept the plea deal, whether she would be willing to testify

at trial; V1 said she would. (R. 42:7.) With that, V1 asked that the circuit court not accept the plea agreement. (R. 42:7–8.)

The circuit court rescheduled the hearing. (R. 42:8.) It had "concerns about the plea agreement that was reached in this matter." (R. 42:8.) It wanted V1's attorney present so V1 could have any questions answered by counsel. (R. 42:8.)

D. The circuit court declined to approve the plea agreement if the victim was opposed.

By letter, the circuit court told the parties and V1's counsel that the plea agreement "included pleas to offenses unsupported by the criminal complaint and a deferred prosecution agreement on the sexual assault." (R. 41:1.) The court stated that it was" unwilling to accept the current plea agreement unless [it] hear[d] from the alleged victim or her attorney that her position has changed." (R. 41:2.)

E. The victim expressed her lack of confidence in the district attorney's office and asked for a special prosecutor to be appointed.

By letter, V1's attorney informed the circuit court that V1 conferred with the State alone and was not given a written copy of the plea agreement. (R. 45:1.) V1's attorney claimed that she had not told the State that she explained the plea agreement to V1 "in detail." (R. 45:2.)

V1's attorney also claimed that the State, by District Attorney Kat Turner, "claimed that V1's father had threatened to kill members of her staff and to bring a firearm to the courthouse" and that District Attorney Turner, Leske, and Leske's counsel "had to seek shelter in the District Attorney's Office from V1's mother." (R. 45:2.) V1's attorney also claimed that the State threatened to refer charges for V1's father if another incident took place. (R. 45:2.) V1's parents denied the claims. (R. 45:2.)

V1's attorney stated she had obtained a police report "that the District Attorney's Office had received a threatening phone call from V1's father indicating he was coming tomorrow (2/10/23) to bang on some door and to create a disturbance." (R. 45:2.) The sheriff's deputy wrote that the one message that had not been deleted "did not contain a statement that V1's father was coming down to the office and in the message, V1's father was not using vulgar words or threats." (R. 45:2.) The deputy contacted V1's father and "[h]e stated he was really mad because he was denied to be in on a zoom meeting with his daughter in regards to a victim impact panel and that he had received information that the case was being plead down from a 2nd degree which was really upsetting to him." (R. 45:2.) V1's father denied threatening to create a disturbance, and the emails that the deputy saw did not contain threatening language. (R. 45:2.)

V1 objected to a deferred prosecution agreement. (R. 45:3.) V1 was "opposed to any amendment to the original charge that deviates from the factual basis" in the criminal complaint. (R. 45:3.) V1 "believe[d] incarceration is appropriate and opposes expungement." (R. 45:3.)

V1 "lack[ed] confidence in this case being tried by the District Attorney's Office in Waupaca County" based on the State's comment that it would refer V1's father for criminal charges. (R. 45:3.) V1 was "highly upset[ ]" by this and it "put[ ] her in an extremely awkward position." (R. 45:3.) She complained that she "felt alone and vulnerable throughout this process." (R. 45:3.) She did "not understand why the State has presented offers to the defendant that deviate away from" the facts in the criminal complaint. (R. 45:3.) Therefore, she requested the appointment of a special prosecutor. (R. 45:3.)

F. The circuit court appointed a special prosecutor without indicating the reason for the appointment.

By letter, the circuit court could not "imagine why the District Attorneys office would require any victim (especially a young victim of sexual assault) to meet with them alone." (R. 49:1.) The court felt that, despite the allegations of threatening behavior, V1's parents "should have been allowed to accompany their daughter." (R. 49:1.) The court called the State's position "cruel." (R. 49:1.)

The circuit court also criticized the State's policy that it does not provide victims with written copies of the plea agreement. (R. 49:2.) It mused that "[i]t seems like a bad policy." (R. 49:2.)

The court accepted V1's attorney's statement that she did not tell the State that she had explained the plea agreement to V1 in detail. (R. 49:2.) The court found it "particularly disturbing" because V1's attorney appeared to be "alleging that the District Attorney's office may have violated the rules of professional conduct." (R. 49:2.) The court considered several possibilities. (R. 49:2–3.) The transcript of the hearing was accurate, so the error was not the court reporter's. (R. 49:2.) If the State misspoke, it asked the State to correct that. (R. 49:2.) It considered that V1's attorney could have, in fact, told the State that it had explained the plea agreement to V1, but was now telling the court she had not. (R. 49:2.) It also considered the possibility that the State made a false statement on the record. (R. 49:3.)

With no additional explanation, the circuit court also granted V1's request for a special prosecutor. (R. 49:3.) The circuit court filed an order appointing a special prosecutor; the form indicated that it was on the court's own motion but did not check any of the reasons for the appointment. (R. 52.)

The State responded in a letter to the court. (R. 51.) The State maintained that it had not been intentionally false or misleading. (R. 51.) The State's recollection was that V1's attorney, during their conversation, "indicated that she would take responsibility for explaining the plea agreement to her client." (R. 51.) The State "took for granted that would occur prior to the plea hearing." (R. 51.) The State took issue with V1's attorney's failure to inform the court that, after the hearing, they had spoken and came to understand their miscommunication. (R. 51.)

The circuit court, by letter, accepted the State's correction of the inaccurate statement made on the record. (R. 53:1.)

Leske petitioned this Court for leave to appeal the circuit court's appointment of a special prosecutor. (R. 55:7.) This Court granted leave to appeal. (R. 62:2.)

After Leske filed his petition for leave to appeal, the circuit court filed a document explaining why it appointed a special prosecutor.[2] (R. 59.) It noted the allegations of threats by V1's parents to the State, their denial of those allegations, the allegation that the State did not allow V1's parents to be present for a conference with V1, and the allegation that the State would not provide a written copy of the plea agreement. (R. 59.) It found that Leske "would not be harmed by having a special prosecutor appointed." (R. 59.)

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[2] This second order was filed after Leske petitioned this Court for leave to appeal from the first order. Naturally, it was not addressed in the petition or the responses. Leske, however, did not separately petition for leave to appeal from this second filing. If this filing is merely explaining the original order, the State believes this Court can review it. However, if this is a second order appointing counsel, this Court would be without jurisdiction to review it. *See* sec. I.C., *infra*.

STANDARD OF REVIEW

To resolve this appeal, this Court must interpret Wis. Stat. § 978.045. This Court independently reviews questions of statutory interpretation. *State v. Popenhagen*, 2008 WI 55, ¶ 163, 309 Wis. 2d 601, 749 N.W.2d 611

Wisconsin Stat. § 978.045(1r)(bm) provides that "[t]he judge may appoint an attorney as a special prosecutor," and the use of the word "may" indicates a discretionary action. *Smiljanic v. Niedermeyer,* 2007 WI App 182, ¶ 12, 304 Wis. 2d 197, 737 N.W.2d 436. "An erroneous exercise of discretion will result '[i]f the record indicates that the circuit court failed to exercise its discretion, if the facts of record fail to support the circuit court's decision, or if this court's review of the record indicates that the circuit court applied the wrong legal standard.'" *Connor v. Connor*, 2001 WI 49, ¶ 18, 243 Wis. 2d 279, 627 N.W.2d 182 (citation omitted).

"Whether a statute is constitutional is a question of law which this [C]ourt reviews de novo." *State v. Horn*, 226 Wis. 2d 637, 642, 594 N.W.2d 772 (1999).

ARGUMENT

I. This Court should reverse the circuit court because it failed, as required by statute, to indicate a valid reason for appointing a special prosecutor.

A. The statute requires one of the listed reasons to exist before a court can appoint a special prosecutor.

1. Statutory interpretation seeks to give the statute its full intended effect.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its

full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "This Court begins statutory interpretation with the language of [the] statute." *State v. Quintana*, 2008 WI 33, ¶ 13, 308 Wis. 2d 615, 748 N.W.2d 447. When examining the nontechnical words in the phrase, a court may consult a dictionary to give the language "its common, ordinary, and accepted meaning." *Kalal*, 271 Wis. 2d 633, ¶¶ 45, 53.

Because a statute's context is important to its meaning, this Court may consider related statutes when it construes a statute's plain meaning. *State v. Harrison*, 2020 WI 35, ¶ 35, 391 Wis. 2d 161, 942 N.W.2d 310. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

Under Wis. Stat. § 978.045(1g), "[a] court on its own motion may appoint a special prosecutor under sub (1r)." Under Wis. Stat. § 978.045(1r)(am), "[a]ny judge of a court of record, by an order entered in the record *stating the cause for it*, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney." This does not give judges free reign to appoint special prosecutors; it merely states who can appoint a special prosecutor—any judge. Wis. Stat. § 978.045(1r)(am). This appointment power is cabined by the next subsection.

2. Wisconsin statute § 978.045 provides that a circuit court can appoint a special prosecutor but only when certain conditions are met.

Wisconsin Stat. § 978.045(1r)(bm) provides, in relevant part:

> **(bm)** The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime . . . . Except as provided under par. (bp), the judge may appoint an attorney as a special prosecutor only if the judge or the requesting district attorney submits an affidavit to the department of administration attesting that any of the following conditions exists:
>
> **1**. There is no district attorney for the county.
>
> **2**. The district attorney is absent from the county.
>
> **2m**. The district attorney, or a deputy or assistant district attorney for the district attorney office, is on parental leave.
>
> **3**. The district attorney has acted as the attorney for a party accused in relation to the matter of which the accused stands charged and for which the accused is to be tried.
>
> **4**. The district attorney is near of kin to the party to be tried on a criminal charge.
>
> **5**. The district attorney is unable to attend to his or her duties due to a health issue or has a mental incapacity that impairs his or her ability to substantially perform his or her duties.
>
> **6**. The district attorney is serving in the U.S. armed forces.
>
> **7**. The district attorney stands charged with a crime and the governor has not acted under s. 17.11.
>
> **8**. The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

The meaning of this subsection is plain: a court can appoint a special prosecutor only if it, or the district attorney, submits an affidavit to the department of administration that swears one of these listed reasons exists. Wis. Stat. § 978.045(lr)(bm). Leske agrees with this reading. (Leske's Br. 11–14.)

B. Binding precedent confirms this reading of the statute.

Case law interpreting a court's appointment power under Wis. Stat. § 978.045 is inconsistent. This Court first discussed appointment under Wis. Stat. § 978.045(1g) and (1r) in *In re Commitment of Bollig*, 222 Wis. 2d 558, 569, 587 N.W.2d 908 (Ct. Ap. 1998). It found that the primary purpose of Wis. Stat. § 978.045 was to limit Department of Administration (DOA) expenditures "either by requiring prior DOA approval and a subsequent court order, . . . or by limiting the circumstances for which an appointment may be made to those listed in the statute." *Bollig*, 222 Wis. 2d at 570–71. Under Wis. Stat. § 978.045(1g), a court can appoint on its own motion, but "[i]f the appointment involves more than six hours per case, the court or the district attorney must certify to the Department of Administration (DOA) that no other prosecutorial unit is able to do the work." *Bollig*, 222 Wis. 2d at 569. However, under (1r), the court, on its own motion, can appoint a special prosecutor but "there are only eight stated reasons for which the court may make an appointment." *Bollig*, 222 Wis. 2d at 569. Because the reasons were limited by statute, "no prior DOA approval is required." *Id.*

However, in *State v. Carlson*, 2002 WI App 44, ¶ 9, 250 Wis. 2d 562, 641 N.W.2d 451, this Court held that a circuit court may appoint a special prosecutor on its own motion under Wis. Stat. § 978.045(1r) as an exercise of its discretion, without reference to any of the enumerated reasons. This Court read Wis. Stat. § 978.045 as providing "two distinct ways in which a court may appoint a special prosecutor,"

either at the request of the district attorney or own its own motion. *Carlson*, 250 Wis. 2d 562, ¶ 8. The enumerated list of nine reasons only applies when a district attorney moves for the appointment of a special prosecutor. *Id.* ¶ 9. When a court appoints a special prosecutor on its own motion, "it is constrained only in that it must enter an order in the record stating the cause for the appointment." *Id.*

A subsequent supreme court decision calls into question the continuing validity of *Carlson*. Our supreme court called "*Carlson* . . . problematic to the point of being suspect" because it "disregard[ed] the fact that one of the nine conditions enumerated under Wis. Stat. § 978.045(1r) *must* exist for the appointment of a special prosecutor, regardless of whether the appointment is made on the court's own motion or at the district attorney's request." *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 127, 363 Wis. 2d 1, 866 N.W.2d 165. *Carlson*'s "failure to import this language from the governing statute is an inexplicable-and very likely fatal-defect in its holding." *Id.* Despite that, our supreme court declined, at that juncture, to explicitly overrule *Carlson* because of the procedural posture of the case before it. *Id.* ¶ 127 & n.41.

Justice Prosser, in a concurrence joined by three other justices, wrote that "[i]f none of the enumerated conditions exists, the judge is not authorized to make an appointment under subsections (1g) and (1r). . . . [O]ne of the nine conditions *must* exist in order for the court to make an appointment." *Id.* ¶¶ 208–09 (Prosser, J. concurring). This concurrence was cited by the per curiam denial of reconsideration of *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49 (per curiam). *State ex rel. Three Unnamed Petitioners*, 365 Wis. 2d 351, ¶ 9 ("For the reasons set forth in Justice Prosser's July 16, 2015 concurring opinion, we hold that Attorney Schmitz's appointment as the special prosecutor in the John

Doe II proceedings pending in each of the five counties was invalid.") (per curiam and on denial of reconsideration).

Therefore, a majority of our supreme court has recognized that appointments under Wis. Stat. § 978.045(1g) and (1r) can only be made if one of the listed conditions is met. *State ex rel. Three Unnamed Petitioners*, 365 Wis. 2d 351, ¶ 9. Leske argues that this overruled *Carlson*. (Leske's Br. 18–19.) This Court should recognize that *Carlson* has been overruled.

If this Court does not read the denial of reconsideration that way, *Cook v. Cook,* means that the earlier decision, *Bollig*, is controlling because *Carlson* could not have overruled *Bollig*. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

The principle of stare decisis applies to the published decisions of the court of appeals. *Id*. at 186. In *Cook*, our supreme court held this Court lacks the "power" to overrule, modify or withdraw language from a published opinion of the court of appeals. *Id*. at 190.

Therefore, when "presented with a published decision of [this C]ourt that arguably overrules, modifies or withdraws language from a prior published decision of this court, [this Court] must first attempt to harmonize the two cases." *Garfoot v. Firemans Fund, Ins. Co.,* 228 Wis. 2d 707, 723, 599 N.W.2d 411 (Ct. App. 1999). "That is, if there is a reasonable reading of the two cases that avoids the second case overruling, modifying or withdrawing language from the first, that is the reading [this Court] must adopt." *Id*.

Bollig and *Carlson* cannot be reconciled. *Bollig* held that "the purpose behind the different ways in which a special prosecutor may be appointed is targeted at controlling DOA's expenditures . . . either by requiring prior DOA approval and a subsequent court order, . . . or by limiting the circumstances for which an appointment may be made to those listed in the statute." *Bollig*, 222 Wis. 2d at 570–71 (footnote omitted). It

made no distinction between the circuit court appointing a special prosecutor on its own motion or at the request of the district attorney. *Id.*

But this Court in *Carlson* provided two alternative ways that a court could appoint a special prosecutor. *Carlson*, 250 Wis. 2d 562, ¶ 8. It concluded that the control of expenditures only applied to requests by the district attorney. *Id.* ¶ 8 n.3. It addressed *Bollig* only in two footnotes and, while it acknowledged the primary purpose of the statute that *Bollig* annunciated, it provided no reason why controlling expenditures only applied to the district attorney. *Id.* ¶¶ 8 n.3, 9 n.7.

This conflict has already been recognized by our supreme court. *State ex rel. Two Unnamed Petitioners*, 363 Wis. 2d 1, ¶ 127. There is no way to reconcile them in any way that does not expressly overrule or modify *Bollig*.

When conflicting precedents cannot be reconciled, this Court is obligated to apply the earlier decision, because this Court had no authority to overrule the prior decision. *See State v. Bolden*, 2003 WI App 155, ¶¶ 9–11, 265 Wis. 2d 853, 667 N.W.2d 364. This Court should recognize that *Cook* means that courts are obligated to follow *Bollig*—and not *Carlson*.

C. The circuit court's order appointing counsel did not provide one of the listed reasons for doing so, and it is therefore not valid.

Applying *Bollig*, this Court should reverse the circuit court's appointment of a special prosecutor. The circuit court did not check any of the boxes for the enumerated reasons on the form appointing the special prosecutor. (R. 52.)

After Leske petitioned for leave to appeal this order, the circuit court filed an explanation for its appointment. (*Compare* R. 55 *with* R. 59.) Normally, a notice of appeal "does

not bring before the appellate court orders filed *after* the judgment or order appealed from is entered." *State v. Baldwin*, 2010 WI App 162, ¶ 61 n.13, 330 Wis. 2d 500, 794 N.W.2d 769. This Court granted leave to appeal, and the order granting leave to appeal has the effect of filing the notice of appeal. Wis. Stat. § (Rule) 809.50(3). Leske did not petition for leave to appeal from this second filing, so if this Court determines that it is a second order, then this Court does not have jurisdiction to review it. *Baldwin*, 330 Wis. 2d 500, ¶ 61 n.13.

However, the filing merely explains why it made the original appointment. (R. 59.) It does not appoint a second, different attorney as a special prosecutor. (R. 59.) To that end, it is not a separate order. It is also defective because it also failed to list any of the enumerated reasons. (R. 59.) It noted the allegations of threats by V1's parents to the State, their denial of those allegations, the allegation that the State did not allow V1's parents to be present for a conference with V1, and the allegation that the State would not provide a written copy of the plea agreement. (R. 59.) It found that Leske "would not be harmed by having a special prosecutor appointed." (R. 59.)

These fail under *Bollig*; the circuit court plainly failed in its mandatory obligation to either certify to DOA that either the work would be less than six hours, obtain DOA prior approval by certifying that no other prosecutorial unit was able to do the work, or find that one of the listed reasons applied. *Bollig*, 222 Wis. 2d at 569–71. By not checking any of the boxes for the statutory reasons, the circuit court engaged in an erroneous exercise of discretion because the circuit court was operating under an incorrect legal standard. *Connor*, 243 Wis. 2d 279, ¶ 18. Therefore, this Court should reverse the order appointing a special counsel.

Even if this Court were to search the record for reasons to affirm the circuit court's decision, none of the listed reasons

in Wis. Stat. § 978.045(1r)(bm) can be met. The District Attorney was present and prosecuting the case. Wis. Stat. § 978.045(1r)(bm)1.–2m., 5.–6. (*See also* R. 42:2.) There is no indication in the record that the District Attorney had ever represented Leske (and Leske does not so claim), nor is there any suggestion that she and Leske are "near of kin." Wis. Stat. § 978.045(1r)(bm)3.–4. The District Attorney has not been charged with a crime.[3] Wis. Stat. § 978.045(1r)(bm)7. And finally, the District Attorney has not determined that there is a conflict of interest. Wis. Stat. § 978.045(1r)(bm)8. ("*The district attorney determines* that a conflict of interest exists regarding the district attorney or the district attorney staff."). Leske agrees that none of these conditions exist. (Leske's Br. 15.) This is another reason why the circuit court erroneously exercised its discretion—there are no facts in the record to support its exercise of discretion. *Connor*, 243 Wis. 2d 279, ¶ 18.

In the circuit court's second filing on appointing a special prosecutor, it lists the various allegations, but does not purport to make any findings. (R. 59.) To the extent that the circuit court may have been making a finding about a conflict of interest between V1 and her family and the district attorney's office, that is not, of itself, sufficient to appoint a special prosecutor. The statute is clear that the district attorney has to believe there is a conflict of interest; the statute does not empower a circuit court to find one as a reason to make an appointment. Wis. Stat. § 978.045(1r)(bm)8. Leske agrees with this conclusion. (Leske's Br. 15–16.)

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[3] A CCAP search for the Waupaca District Attorney, Kat Turner, yields no relevant results. This Court can take judicial notice of CCAP records. *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 5 n.3, 318 Wis. 2d 216, 768 N.W.2d 53.

To the extent that the second filing mentions possible violations of the V1's rights as a victim, a violation of victim's rights is not a sufficient reason to appoint a special prosecutor. *See* Wis. Stat. § 978.045(1r). Chapter 950 provides a mechanism for victims to seek redress for violations of their rights—obtaining an appointment of a special prosecutor is not an available remedy. Wis. Stat. §§ 950.04(1v)(zx); 950.09(2); 950.11.

In short, the circuit court failed its mandatory duty under *Bollig* to either certify that the work would take less than six hours, certify that no other prosecutorial unit was able to take the case, or indicate which listed reason applied. *Bollig*, 222 Wis. 2d at 569–71. Therefore, this Court should reverse the order appointing a special prosecutor.

II. A circuit court's ability to appoint a special prosecutor with cause does not remove the elected district attorney, and case law only authorizes removal of the elected district attorney when he or she refuses to prosecute a case.

If this Court affirms the circuit court's order appointing a special prosecutor, the appointment raises a separation of powers issue—the judicial branch removing the elected district attorney from a criminal case it was actively prosecuting and selecting a replacement. If this Court reverses the circuit court, it is unnecessary to reach this issue. *State v. Blalock,* 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (holding that this Court decides cases on the narrowest possible grounds).

It is not immediately clear that the Waupaca County District Attorney's office was removed from the case. The form the court used does not say that the district attorney is removed from the case. (R. 52.) In its letter to the parties, the circuit court did not say that it was removing the district

attorney's office from the case. (R. 49:1–3.) The victim requested the appointment of a special prosecutor because she "lacked confidence in this case being tried by the District Attorney's Office." (R. 45:3.) However, the circuit court stated that it appointed a special prosecutor on its own motion. (R. 53:2.) The courts second filing on the appointment did not say it was removing the district attorney's office from the case. (R. 59.) The parties appear to presume that the appointment was intended to remove the district attorney as well.

"Wisconsin's separation of powers principle prohibits a substantial encroachment by one branch of government on a function that has been delegated to another branch." *State v. Dums,* 149 Wis. 2d 314, 321, 440 N.W.2d 814 (Ct. App. 1989). "The issue in separation-of-powers cases is whether the statute in question 'materially impairs or practically defeats' the proper function of a particular branch and the exercise of powers delegated to it." *Id.* (citation omiteed). "It is a well settled principle of Wisconsin constitutional law that one branch of the government has no authority to compel a co-ordinate branch to perform functions of judgment and discretion that are lawfully delegated to it by the constitution." *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 39–40, 155 N.W.2d 639 (1968).

With reference to prosecutorial discretion, Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney. *Dums*, 149 Wis. 2d at 321. It is also recognized that the district attorneys broad discretion to commence a prosecution is almost limitless. *Id.* A "trial court may review the exercise of prosecutorial discretion to terminate or amend pending prosecution pursuant . . . to its own power." *Id.* at 322. "A circuit court has the power to accept or reject a plea agreement reducing or amending charges; it should consider the public interest in making its decision about the plea agreement and should make a complete record of the plea

agreement." *State v. Comstock*, 168 Wis. 2d 915, 927 n.11, 485 N.W.2d 354 (1992).

It has long been recognized that:

> [t]he prosecuting attorney has wide discretion in the manner in which his [or her] duty shall be performed, and such discretion cannot be interfered with by the courts unless he is proceeding, or is about to proceed, without or in excess of jurisdiction. Thus, except as ordained by law, in the performance of official acts he may use his own discretion without obligation to follow the judgment of others who may offer suggestions; and his conclusion in the discharge of his official liabilities and responsibilities are not in any wise subservient to the views of the judge as to the handling of the state's case.

State v. Johnson, 74 Wis. 2d 169, 174, 246 N.W.2d 503 (1976) (citation omitted). The extending of a plea agreement is one of a prosecutor's discretionary powers; defendants do not have a right to be offered a plea agreement. *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). Therefore, a court's—or victim's—dissatisfaction with a proposed plea agreement does not provide a basis to remove the elected district attorney from a case. The court's power is limited to refusing to accept the plea agreement as not in the public interest. *Comstock*, 168 Wis. 2d 915, 927 n.11. The circuit court exercised this power, and the State does not contest its decision to do so. (R. 41:2.)

District attorneys are elected officers, normally accountable only to the electorate by recall or losing reelection. *State v. Braunsdorf*, 98 Wis. 2d 569, 577, 297 N.W.2d 808 (1980) ("a district attorney generally is answerable not to the courts or the legislature but to the people"); *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969) (an elected district attorney "is answerable to the people, for if he fails in his trust he can be recalled or defeated at the polls"). Further, the Legislature has already provided how an elected district attorney may be removed or suspended—by the governor under Wis. Stat.

§ 17.06(3) or Wis. Stat. § 17.11. The Legislature has not provided courts with the ability to remove elected district attorneys.

Nothing in Wis. Stat. § 978.045 discusses removal of an elected district attorney actively prosecuting a case. To the contrary, Wis. Stat. § 978.045(1r)(bm) contemplates appointing a special prosecutor "to assist the district attorney in the prosecution of persons charged with a crime." Most of the enumerated reasons for appointing a special prosecutor do not implicate removal of the elected district attorney because they pertain to when the elected district attorney is unavailable or otherwise unable to prosecute the case. Wis. Stat. § 978.045(1r)(bm)1.–8.

Case law on removing a district attorney presents only one situation: where the elected district attorney refuses to prosecute a case, a court can deny the State's motion to dismiss and appoint a special prosecutor. *Braunsdorf*, 98 Wis. 2d at 573–74. "[A] trial court may appoint counsel to prosecute when the district attorney refuses to continue the action. A trial court should specifically make a finding with respect to whether the prosecutor has refused to continue the action." *State v. Lloyd*, 104 Wis. 2d 49, 56, 310 N.W.2d 617 (Ct. App. 1981). While a refusal to prosecute is not listed as a reason to appoint a special prosecutor, there are specific findings that need to be made. *Id*. The circuit court did not make any findings that the district attorney refused to continue. This limited situation is not present because the elected district attorney was actively prosecuting the case and offered Leske a proposed resolution. (R. 42:2.)

As explained above, there is no mechanism in which a court can remove the elected district attorney from a case for a violation of victim's rights. Normally, victims alleging a rights violation may make a complaint to the crime victim's rights board. Wis. Stat. § 950.09(2). While victims have standing to assert their rights in court under Wis. Stat.

§ 950.105, removal of the elected district attorney has not been established as an available remedy.

This reading of Wis. Stat. § 978.045 also comports with constitutional avoidance, where this Court will choose a reasonable "construction of a statute to avoid a constitutional conflict." *In re Commitment of Hager*, 2018 WI 40, ¶ 31, 381 Wis. 2d 74, 911 N.W.2d 17.

Therefore, the appointment of a special prosecutor does not, and cannot, effect the removal of a district attorney actively prosecuting the case. Leske agrees with this. (Leske's Br. 24.) Neither the court, nor the victim, nor the defendant get to choose who prosecutes a criminal case—the voters do. *Kurkierewicz*, 42 Wis. 2d at 378. This Court should reverse the order appointing a special prosecutor as a violation of separation of powers.

CONCLUSION

This Court should reverse the circuit court's order appointing a special prosecutor.

Dated this 4th day of October 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,821 words.

Dated this 4th day of October 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

CERTIFICATE OF EFILE/SERVICE

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

Dated this 4th day of October 2024.

Electronically signed by:

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