STATE OF WISCONSIN
IN SUPREME COURT

Case No. 93-2546-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross Respondent-Petitioner,

v.

WANDELL LEE,

Defendant-Respondent-Cross Appellant.

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross Respondent-Petitioner,

v.

THOMAS CASEY,

Defendant-Respondent-Cross Appellant.

ON REVIEW OF A DECISION
OF THE COURT OF APPEALS

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS-CROSS APPELLANTS

ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 E. Mason Street
Milwaukee, Wisconsin 53202-3868
(414) 276-5115

Counsel for Defendants-Respondents-Cross Appellants

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ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction where, as here, the petitioner complains not of the end result of the court of appeals decision, but only of that court's rationale for reaching that decision.

The court of appeals did not address this issue.

2. Does the court of appeals have the authority to deny a motion for voluntary dismissal or, prior to remittitur, to reconsider a decision granting such a motion.

After this appeal and the defendants' cross-appeal were fully briefed and awaiting submission in the court of appeals, the state moved for an order voluntarily dismissing the appeal. Lee and Casey objected to such dismissal, but the presiding judge, Hon. Ted. E. Wedemeyer, nonetheless entered an order purporting to dismiss the state's appeal. Prior to remittitur, the full panel subsequently reconsidered and vacated the dismissal order and denied the state's motion to dismiss.

3. Did the court of appeals properly exercise its discretion in this case when it vacated Judge Wedemeyer's order granting the state's motion for voluntary dismissal and then denied that motion.

By order dated March 6, 1995, the court of appeals recognized its discretionary authority to reconsider and vacate a dismissal order prior to remittitur and sought input from the parties considering whether it should exercise that authority in this case (P-Ap. at 118-19). After considering the parties' memoranda addressing the point, the court on March 30, 1995, entered an order holding that Judge

Wedemeyer's dismissal order had been "issued inadvertently" and therefore vacated that order. The court further exercised its discretion to deny the state's motion for voluntary dismissal, holding that the issue raised on the appeal "is one of statewide concern that undoubtedly would be frequently raised on appeal," so that interests of judicial economy would be furthered by denying dismissal. (P-Ap. 116-17).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Lee and Casey agree that, by granting review, this Court has indicated that both oral argument and publication are warranted.

STATEMENT OF THE CASE

With but a few exceptions, the state's Statement of the Case is accurate for purposes of this appeal. The state's errors, however, go to the core of this dispute.

Contrary to the state's assertion, it did not "g[i]ve notice ... that under Rule 809.18, Stats., it was voluntarily dismissing its appeal on the issue of Crime Lab retesting." State's Brief at 7. Rather, the state expressly moved for dismissal and provided grounds for that motion (P-Ap. 123-26):

> Pursuant to Rule 809.18, Stats., the State of Wisconsin ... respectfully moves for voluntary dismissal of appeal

for the reasons that follow.

. . .

> **THEREFORE**, for all of the foregoing reasons, the State of Wisconsin respectfully moves for voluntary dismissal of the above-captioned appeal.

(P-Ap. 123, 126).

Similarly, the court of appeals did not "affirm[] the state's dismissal on December 22, 1994." State's Brief at 7. Rather, the presiding judge, Hon. Ted E. Wedemeyer, entered an order purporting to overrule Lee's and Casey's objections to the motion for voluntary dismissal, *see* Defendants' Response to State's Motion to Dismiss Appeal (Dec. 16, 1994), and dismissing the state's appeal. (P-Ap. 120-22).

The court of appeals' order of March 6, 1995, did not request input on whether it "properly reached the merits of the state's voluntarily dismissed appeal on the issue of Crime Lab retesting." State's Brief at 8-9. Rather, it noted its discretionary authority to "reconsider and vacate a dismissal order prior to remittitur," and ordered the parties "to submit legal memorandum [sic] addressing the issue of whether this court should vacate the order dismissing the State's appeals [sic]." (P-Ap. 119).

Finally, the court's order of March 30, 1995, did not "indi-

cate[] that it had 'inadvertently' affirmed the state's notice of voluntary dismissal." State's Brief at 9. Rather, the full panel there held that Judge Wedemeyer's order granting the state's motion for voluntary dismissal "was issued inadvertently," and the court therefore "invoke[d] its inherent power to correct this error by vacating this order." The court further "invoke[d] its inherent power to exercise its discretion to deny the State's motion for voluntary dismissal" on the grounds that the Crime Lab issue "is one of statewide concern that undoubtedly would be frequently raised on appeal" so that "the interests of judicial economy" would be furthered by denying the state's motion to dismiss. (P-Ap. 116-17).

ARGUMENT

I.

THIS COURT LACKS JURISDICTION IN THIS CASE

Before addressing the merits of the issues upon which the Court granted review, Lee and Casey note that there are serious problems with the Court's jurisdiction in this case. Specifically, the state's argument makes clear that it challenges not the court of appeals decision affirming the circuit court's Crime Lab testing orders, but the court's reasoning. A question concerning the Court's

jurisdiction may be raised at any time. *E.g.*, *Kohnke v. Industrial Comm'n.*, 52 Wis.2d 687, 191 N.W.2d 1, 2 n.1 (1971).

Pursuant to Wis. Stat. §808.10, "[a] decision of the court of appeals is reviewable by the supreme court" upon its grant of a petition for review. This statute acts as a limitation upon the appellate jurisdiction of this Court. *First Wisconsin Nat'l Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 274 N.W.2d 704, 706 (1979). Rule 809.62(1) provides that "[a] party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 . . . ." Wis. Stat. (Rule) 809.62(1). "Decision" in Wis. Stat. (Rule) 809.62, and thus in §808.10, means the result, disposition, or mandate reached by the court, not its opinion or the court's particular reasoning in reaching that result. *Neely v. State*, 89 Wis.2d 755, 279 N.W.2d 255 (1979).

The court of appeals here affirmed the trial court's orders granting Lee's and Casey's requests for Crime Lab testing (P-Ap. 107). The state in this Court argues not that this end result was wrong, *see* State's Brief at 20,[1] but that the court of appeals reached

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[1] The state asserted in its Petition for Review at 17-18 that "[b]y voluntarily dismissing its appeal [sic], the state was no longer contesting the trial court's ruling that entitles the defendants to Crime Lab retesting," and at 19 that "the effect of the state's voluntary dismissal on defendant's Lee and Casey is that (continued...)

the correct result in an erroneous manner or for the wrong reason. According to the state, the court of appeals should have affirmed the trial court's order by granting the state's motion for voluntary dismissal rather than by addressing the merits of that appeal. *See* State's Brief at 14 n.3, citing *Haner v. Town of Polk*, 6 Wis. 350, 352-53 (1857) ("the legal effect and operation of dismissing the appeal was to restore the judgment").

The Court addressed a similar issue in *Neely v. State*, 89 Wis.2d 755, 279 N.W.2d 255 (1979). In dismissing the state's petition for review, the Court there noted:

> The state does not challenge the court of appeals affirmance of Neely's judgment of conviction; the state only disagrees with the court of appeals rationale on the one issue.
>
> * * *
>
> Because the decision is only the result reached by the court of appeals in a case, a party to whom the result is favorable may not petition for review of the decision simply because that party disagrees with the rationale expressed in the opinion.

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[1](...continued)
they have won on the issue of State Crime Lab retesting in their cases." (Emphasis in original). *See also* State's Brief at 16, 20. The state made no such assertion in the court of appeals. Indeed, its motion for voluntary dismissal implied to the contrary, that it simply sought to have the case sent back to the trial court without a decision so it could request reconsideration in the lower court (P-Ap. 124-26). *see* Defendants' Response to State's Motion to Dismiss Appeal at 2-4 (Dec. 16, 1994).

279 N.W.2d at 256, 257.

Here, as in *Neely*, the state received the end result it desired in the court of appeals. Here, as in *Neely*, therefore, the proper result in this Court is dismissal of the state's petition.

II.

THE COURT OF APPEALS HAS THE AUTHORITY TO DENY A MOTION FOR VOLUNTARY DISMISSAL OR TO RECONSIDER THE GRANT OF SUCH A DISMISSAL AND DID NOT MISUSE ITS DISCRETION BY DOING SO IN THIS CASE

The court of appeals has the discretionary authority both to deny voluntary dismissal in a given case and, prior to remittitur, to reinstate a previously dismissed appeal. Because the court of appeals properly exercised that authority in this case, it's decision on this point should be affirmed.

A. Wisconsin Appellate Courts Have the Discretionary Authority to Deny a Motion for Voluntary Dismissal or to Reconsider a Grant of Such Dismissal

Traditionally in this state, courts have had the power to police motions for voluntary dismissal in order to protect other parties and the public. *See State v. Kenyon*, 85 Wis.2d 36, 270 N.W.2d 160, 164 (1978) ("Prosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court

to grant or refuse a motion to dismiss 'in the public interest'"); *Russell v. Johnson*, 14 Wis. 2d 406, 111 N.W.2d 193, 196 (1961) ("leave to discontinue [a civil action] may be denied in the discretion of the court if the rights of defendants, third parties, or the public will be substantially prejudiced by discontinuance" (citation omitted)).

The state suggests that Wis. Stat. (Rule) 809.18 relieves the court of appeals of its duty to ensure that voluntary dismissal is in the public interest. The state is wrong.

Rule 809.18 provides as follows:

> **809.18 Rule (Voluntary dismissal).** An appellant may dismiss an appeal by filing a notice of dismissal. The notice must be filed in the court or, if not yet docketed in the court, in the trial court. The dismissal of an appeal does not affect the status of a cross-appeal or the right of a respondent to file a cross-appeal.

Wis. Stat. (Rule) 809.18. The rule's language itself is ambiguous concerning whether it was intended to overrule the traditional power and obligation of the courts to deny voluntary dismissals not in the public interest. While the Judicial Council Committee Note to this provision suggests that "[a]n appeal may be dismissed by the appellant at any time prior to a court decision on the appeal without approval of the court or the respondent," and that "the appellant is

authorized to dismiss the appeal at will," both practice and caselaw are to the contrary.[2]

Indeed, both this Court and the court of appeals have recognized the discretionary authority of an appellate court either to deny voluntary dismissal or to reconsider a prior dismissal (at least prior to remittitur). This Court recognized that authority regarding the attempted dismissal of an appeal by denying a joint "stipulation to dismiss" under Rule 809.18 in *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 440a-440b, 477 N.W.2d 608 (1991), 480 N.W.2d 444 (1992) (on reconsideration).[3] Indeed, the Court subsequently formalized that construction of Rule 809.18 in its Internal Operating

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[2] While the Judicial Council Committee Note is a valid aid in interpreting the rule, *see In re Estate of Haese*, 80 Wis.2d 285, 259 N.W.2d 54, 59 (1977), it is not controlling.

[3] The court of appeals' order of March 30, 1995, indicates that this Court similarly denied the parties' motion for voluntary dismissal by unpublished order in *Hefty v. Hefty*, 172 Wis. 2d 124, 493 N.W.2d 33 (1992) (P-Ap. 117 n.1). Counsel is uncertain whether he properly can rely upon this Court's unpublished *order* in *Hefty* in light of Wis. Stat. (Rule) 809.23(3)'s bar on citation to unpublished *opinions*. The court of appeals plainly relied upon that order as "precedent" or "authority." *See State v. Higginbotham*, 162 Wis.2d 978, 471 N.W.2d 24, 32 (1991). On the other hand, the court of appeals has construed Rule 809.23(3) as barring only citation to unpublished court of appeals decisions. *Brandt v. Labor & Industrial Review Comm'n*, 160 Wis.2d 353, 466 N.W.2d 673, 676-77 (Ct. App. 1991), *aff'd*, 166 Wis.2d 623, 480 N.W.2d 494 (1992). *See also In re Amendment of Section (Rule) 809.23(3), Stats.*, 155 Wis.2d 832, 456 N.W.2d 783, 783 (1990) ("(Rule) 809.23(3), Stats. ... provides that *unpublished opinions of the court of appeals* are of no precedential value and prohibits the citation of those opinions in any Wisconsin court as precedent or authority...." (Emphasis added)).

Procedures:

> 4. *Voluntary Dismissal.* If a notice of voluntary dismissal of a proceeding on a petition for review, petition for bypass or certification or of an original action or supervisory writ proceeding is filed before all of the briefs in the proceeding are filed, the chief justice may act on the notice; if a notice of voluntary dismissal is filed after all of the briefs in the proceeding are filed, the chief justice shall bring the notice to the court for action.

Internal Operating Procedures II, L, 4 (Wis. 1992). There would be no rational basis for "bring[ing] the notice to the court for action" if, as the state asserts, dismissal is simply a ministerial task.

Contrary to the state's suggestion, State's Brief at 19, there is no suggestion that the Court in this provision intended to "reserve[] for itself the option to reject voluntary dismissal of a matter that has come before it." Rather, Rule 809.18 applies to this Court as well as to the court of appeals. *See* Wis. Stat. (Rule) 809.63. Accordingly, if Rule 809.18 bars judicial review of motions for voluntary dismissal by the court of appeals, it likewise bars such review by this Court.

The state's suggestion that the Court's internal operating procedures are "rules," which therefore may trump rather than simply implement the Rules of Appellate Procedure, State's Brief at 19-20, simply ignores Chief Justice Heffernan's introduction to those

procedures:

> These procedures are intended for the advice of counsel practicing in the Supreme Court and for information to the public; *they are not rules of appellate procedure.*
>
> * * *
>
> *It should be reemphasized that these are not rules.* They do not purport to limit or describe in binding fashion the powers or duties of any Supreme Court personnel. These internal operating procedures are merely descriptive of how the court currently functions. Any internal operating procedure may be suspended or modified by majority vote of a quorum of the court.

Internal Operating Procedures (Wis. 1992) (Introduction) (Emphasis added).

At the state's request, the court of appeals similarly has recognized its authority to deny voluntary dismissal or to reinstate an appeal previously dismissed under Wis. Stat. (Rule) 809.18. *See State v. Thiel*, 171 Wis. 2d 157, 491 N.W.2d 94 (Ct. App. 1992). In that case, the trial court suppressed certain statements on *Miranda* grounds but held that the statement was otherwise voluntary. The trial court likewise denied a motion to dismiss the complaint and another motion to suppress evidence seized pursuant to a search warrant. The state appealed from the suppression order and the defendant cross-appealed from denial of his other motions. 491 N.W.2d at 94-95.

Three weeks after the defendant filed his cross-appeal, and apparently before briefing had even begun, the state simultaneously filed a notice of voluntary dismissal pursuant to Wis. Stat. (Rule) 809.18 and a motion to dismiss the defendant's cross-appeal. The state argued that dismissal of its appeal mandated dismissal of the cross-appeal as well. The court of appeals entered an order dismissing the state's appeal, but denied the motion to dismiss the cross-appeal. *Id.* at 95.

Its ploy having backfired, the state then moved to reinstate its own appeal. While noting that it was "loathe to condone" the state's manipulative tactics in that case, the court of appeals granted the state's motion to reconsider its prior dismissal order, citing Wis. Stat. (Rule) 809.24 as authority:

> We do so pursuant to Rule 809.24, Stats., which permits this court to reconsider a decision at any time prior to remittitur when no petition for review is filed or within thirty days of the filing of a petition for review. There has been no remittitur or petition for review in this case. Consequently, while we are not required to vacate our dismissal order merely because Thiel's cross-appeal remains pending, we are permitted to do so. The matter is addressed to our sound discretion....

Id. at 95.[4]

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[4] The state is correct that the other decision relied upon by the court of (continued...)

Thiel raises two points relevant here. First, the court there recognized that the proper exercise of the authority to reconsider a dismissal order was "addressed to [its] sound discretion," taking into account both whether the circumstances warrant the Court's action and the resulting prejudice to other parties. *Id.* The state does not dispute that this discretionary standard applies if the court of appeals has the power either to deny a motion for voluntary dismissal or to vacate such a dismissal, nor could it reasonably do so. As this Court has explained:

> In *McGovern v. Eckhart*, 200 Wis. 64, 227 N.W. 300 (1929), we departed from our tradition of rigid adherence to the law of the case doctrine and held that we could reconsider a prior ruling in a case "whenever cogent, substantial, and proper reasons exist." *Id.* at 78, 227 N.W. 300. "[I]t is within the power of the courts to disregard the rule of 'law of the case' in the interests of justice." *Id.* at 75, 227 N.W. 300. . . . Because the law of the case is a question of court practice, and not an inexorable rule, *McGovern*, 200 Wis.2d at 75-76, 227 N.W. 300, it requires the exercise of judicial discretion.

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[4](...continued)
appeals here, *In re Peter B.*, 184 Wis.2d 57, 516 N.W.2d 746 (Ct. App. 1994), is not directly applicable to the question of that court's power to deny voluntary dismissal. State's Brief at 18. Because the state there did not oppose voluntary dismissal of the defendant's petition for leave to appeal, the court of appeals did not decide the scope of its authority and Rule 809.18. *See id.*, 516 N.W.2d at 750.

State v. Brady, 130 Wis.2d 443, 388 N.W.2d 151, 153-54 (1986).[5]

Second, the State of Wisconsin in *Thiel* took exactly the opposite position with regard to the court of appeals' authority to vacate a previous order granting voluntary dismissal than that which it asserts in this case. The state having successfully asserted in *Thiel* that the court had that authority, it should be judicially estopped now from asserting a directly contrary position in this case.

Judicial estoppel is intended "to protect against a litigant playing 'fast and loose' with the courts by asserting inconsistent positions." *State v. Fleming*, 181 Wis.2d 546, 510 N.W.2d 837, 841 (Ct. App. 1993) (quoting *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993)). It bars a party from doing exactly what the state has done here, successfully assuming a position and then subsequently adopting a clearly inconsistent position. *See Coconate v. Schwanz*, 165 Wis.2d 226, 477 N.W.2d 74, 75 (Ct. App. 1991). It is irrelevant that Lee and Casey were not parties in *Thiel*. Because

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[5] The decision in *Brady* makes clear that the court of appeals in *Thiel* did not even have to rely upon Rule 809.24 as authority for its power to reconsider the dismissal order. The court of appeals, like other courts in this state, have the inherent discretionary power to reconsider its orders so long as it still has jurisdiction over the case. Rule 809.24 is not the source of that authority. Rather, it *limits* the authority of the parties to move for reconsideration of *decisions or opinions*, and only those, and sets the time limit on the court of appeals' jurisdiction to act on its own motion to reconsider such a decision or opinion when a petition for review is filed.

the doctrine of judicial estoppel focuses not on the parties' relationship but on the integrity of the judicial process, it does not require privity, reliance or prejudice. *Fleming*, 510 N.W.2d at 841 (citation omitted).

The state's change of position is not only unbecoming of an institution supposedly dedicated to the pursuit of justice, but also directly inconsistent with its actions in this very case. The state did not simply notice its voluntary dismissal, which is all that would be necessary under the state's current reinterpretation of Rule 809.18. Rather, the state acknowledged that dismissal under Rule 809.18 rests in the court of appeals' discretion by moving that court for dismissal and providing grounds for that motion (P-Ap. 123-26):

> Pursuant to Rule 809.18, Stats., the State of Wisconsin ... respectfully moves for voluntary dismissal of appeal for the reasons that follow.
>
> . . .
>
> **THEREFORE**, for all of the foregoing reasons, the State of Wisconsin respectfully moves for voluntary dismissal of the above-captioned appeal.

(P-Ap. 123, 126).

Moreover, even if the court of appeals did not otherwise have the authority to deny a proper notice of dismissal under Rule 809.18, the state's actions here gave that court the authority to act as it did

because the state waived any supposed right to dismissal on demand. Although it cited Rule 809.18 and labeled its document, the state in fact did not invoke any right to dismissal on demand. The state chose instead to invoke the court of appeals' discretionary authority by expressly *moving* that court for an order dismissing the appeal and stating grounds for that request (P-Ap. 123-26). Having made the choice of one procedural means for obtaining a certain result, the state invoked the totality of that procedure, including the court's possible exercise of its discretion to deny the motion, and should not now be heard to complain that its choice may have turned out to be a mistake from its perspective.

In short, both this Court and the court of appeals have acknowledged that the appellate courts retain the discretionary authority either to deny a motion for voluntary dismissal in the first place or subsequently to reconsider and vacate such a dismissal. The state likewise has acknowledged that authority, both in *Thiel* and in this very case. Also, even if this Court were to decide that everyone has been wrong in the past and that there is some right to dismissal on demand, the state waived that supposed right by not invoking it here and instead relying upon a motion addressed to the court's discretion.

B. The Court of Appeals Did Not Misuse its Discretion in Vacating Judge Wedemeyer's Order and Denying the State's Motion for Voluntary Dismissal

There being no real question either of the court of appeals' authority under Rule 809.18 or of the applicable standards for that court's exercise of its authority, the only remaining issue is whether that court properly exercised its own discretion in this particular case. Plainly, the state has failed to establish that the court of appeals in any way misused its discretion with regard to the state's motion for voluntary dismissal.

First, however, it is important to clarify exactly what the court of appeals did in its order of March 30, 1995. As noted in the Statement of the Case, the original order purporting to grant the state's motion for voluntary dismissal was issued by Judge Wedemeyer alone, sitting as presiding judge (P-Ap. 120-22). The internal operating procedures of the court of appeals, however, expressly provide that "[t]he motions judge may act on all motions, *except those that reach the merits or preclude the merits from being reached, which can only be acted on by the panel.* . . . The panel considers motions . . . that preclude the merits from being reached...." Internal Operating Procedures, VI (3)(c) (Ct. App. 1994) (emphasis added). Although the court of appeals does not expressly so state, it

appears that it is this error which resulted in Judge Wedemeyer's order having been "issued inadvertently" and led to the full panel's decision on March 30, 1995, to "correct this error by vacate this order" (P-Ap. 116-17). The earlier order purporting to dismiss the state's appeal simply was not valid because Judge Wedemeyer was not authorized to enter such an order.

The question then became whether the full panel, in the sound exercise of its discretion, should grant the state's motion for voluntary dismissal. After granting the parties ample opportunity to submit memoranda presenting their views (P-Ap. 118-19) and having reviewed those memoranda, the court held that the state's motion should be denied:

> Moreover, the issue addressed in the opinion released on February 28, 1995, [concerning Crime Lab testing] is one of statewide concern that undoubtedly would be frequently raised on appeal. Accordingly, in the interests of judicial economy, this court invokes its inherent power to exercise its discretion to deny the State's motion for voluntary dismissal. *See State v. Thiel*, 171 Wis.2d 157, 491 N.W.2d 94 (Ct. App. 1992); *see also In re Peter B.*, 184 Wis.2d 57, 516 N.W.2d 746 (Ct. App. 1994).

(P-Ap. 117).

The state's challenge to this decision ignores the standard of review in cases such as this. The question is not, as the state

suggests, whether a different decision would have been better or whether this Court would have reached a different conclusion in the first instance. Rather, a discretionary decision is reviewed simply "'to determine whether the [lower] court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion.'" *State v. Pittman*, 174 Wis.2d 255, 496 N.W.2d 74, 79-80, *cert. denied*, 114 S.Ct. 137 (1993). This Court will not reverse a lower court's exercise of discretion unless that court's use of discretion is "'wholly unreasonable.'" *Id.*, 496 N.W.2d at 80 (citation omitted).

The court of appeals' resolution of the state's motion took into account all relevant facts, applied the proper legal standard, *see* Section II,A, *supra*, and was totally reasonable.

While the state is correct that the appellate courts generally are not in the business of deciding abstract or moot cases, *Reserve Life Ins. Co. v. LaFollette*, 108 Wis.2d 637, 323 N.W.2d 173, 176 (Ct. App. 1982), this simply was not a moot or abstract case at the time the court of appeals acted. "A case is moot 'when a determination is sought upon some matter which, ***when rendered***, cannot have any practical legal effect upon a then existing controversy.'" *Id.*, 323 N.W.2d at 176, *quoting Milwaukee Police Ass'n. v. Milwaukee*, 92

Wis.2d 175, 285 N.W.2d 133, 137 (1979).

At the time the court of appeals rendered the decision challenged here, the state had not (and indeed has not to counsel's knowledge) complied with the testing order, nor had it confessed error. Indeed, neither the state's motion to dismiss (*see* P-Ap. 123-26), nor its subsequent memorandum to the court of appeals on this point even suggested that it would comply with the order. Rather, the state's motion, with its generalized allegations of new evidence, suggested the opposite, that it merely sought dismissal so it could attempt to have the testing order reconsidered in the trial court (*see id.*). Only when this case finally reached this Court did the state indicate that it would comply with the testing order rather than seek reconsideration in the circuit court. *See* Petition for Review at 17-18, 19; State's Brief at 16, 20.

Even if the state's motion could have rendered the appeal moot, the court of appeals was not obliged to dismiss it. This Court has noted that "the great weight of authority supports the proposition that an appellate court may retain an appeal for determination if it involves questions of public interest even though it has become moot as to the particular parties involved." *Mueller v. Jensen*, 63 Wis.2d 362, 217 N.W.2d 277, 279 (1974) (footnote and citation omitted).

The appellate court thus may "entertain a moot case when the issues are of significant public import or are likely to arise again." *King v. Village of Waunakee*, 175 Wis.2d 300, 499 N.W.2d 237, 239 (Ct. App. 1993) (citations omitted), *aff'd*, 185 Wis.2d 25, 517 N.W.2d 671 (1994). *See also In re Peter B.*, 184 Wis.2d 36, 516 N.W.2d 755, 750-51 (Ct. App. 1994) (court of appeals' constitutional supervisory authority over the circuit courts enables it to address issues of statewide concern in the interests of judicial economy and as guidance to the lower courts despite mootness).

These are exactly the reasons stated by the court of appeals for denying its motion for voluntary dismissal (P-Ap. 117). Moreover, the state would be hard pressed to dispute them. After all, the state initiated this interlocutory appeal by petition for leave to appeal pursuant to Wis. Stat. §808.03(2)(c) and Wis. Stat. (Rule) 809.50(1)(c), asserting that decision was necessary to

> clarify an issue of importance in the administration of the criminal law: identifying the parameters that govern a trial court's exercise of discretion under sec. 165.79(1), Stats., to order the State Crime Lab to conduct "analyses of evidence on behalf of [a] defendant."

Petition for Leave to Appeal Non-Final Order Entered in the Circuit Court for Milwaukee County, the Honorable John A. Franke,

presiding at 7-8. In stating that publication may be warranted, the state's court of appeals brief similarly recognized that the Crime Lab issue "appears to be novel under state law and apt to recur." State's Court of Appeals Brief in Chief at 2.

The interests of judicial economy also strongly supported the court of appeals' actions. The state did not move for voluntary dismissal of its appeal until nearly 14 months after the court of appeals had granted the state leave to appeal and just prior to submission. The construction of Wis. Stat. §165.79(1) had been fully briefed by the parties for two months at that time. At the state's request, the parties and the court of appeals expended substantial time and effort researching and resolving this issue which the state conceded to be "of general importance in the administration of justice." *See* Wis. Stat. §808.03(2)(c); (Rule) 809.50(1)(c).

The court of appeals properly decided that it should not simply write off all of that effort as wasted. The resolution of this issue is no less necessary to the interests of justice simply because the particular resolution was not to the state's liking. The state itself noted that this same issue has arisen in other cases (*see* P-Ap. 126), and counsel for the defendants assured the court of appeals that this issue had been and will be raised throughout the state. *See* Defen-

dants' Memorandum in Support of Order Vacating Dismissal at 4.

The court of appeals properly took into account the fact that some panel of that court would have to face this issue again if it were not resolved in this case. The court thus reasonably determined that judicial economy and the public interest would be better served by denying the state's motion to dismiss and resolving the issue than by requiring some other panel of that court to waste its valuable time reinventing this particular wheel.

CONCLUSION

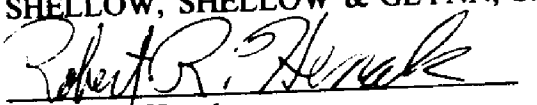
For these reasons, the court of appeals plainly had the discretionary authority to deny a motion for voluntary dismissal and did not misuse that discretion in denying the state's motion in this case. The decision of the court of appeals therefore should be affirmed.

Dated at Milwaukee, Wisconsin, June 28, 1995.

Respectfully submitted,

WANDELL LEE and THOMAS CASEY,
Defendants-Respondents-Cross
Appellants

SHELLOW, SHELLOW & GLYNN, S.C.



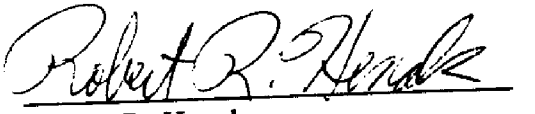
Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,625 words.



Robert R. Henak

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