STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP002222-CR
Circuit Court No. 17CM2797

DOMINIQUE ANWAR,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON DECEMBER 22, 2017, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE THOMAS WOLFGRAM, PRESIDING
TRIAL COURT CASE NO. 17CM2797
AND FROM THE DECISION AND ORDER DENYING POST CONVICTION RELIEF DATED OCTOBER 29, 2018, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE CYNTHIA M. DAVIS, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

I. Whether the State's failure to provide the defendant with a copy of the information contained in a confidential child protective services investigation that

it used at sentencing violated the procedural due process to be sentenced in a fair manner.

The post conviction court held that the failure to provide the information did not violate the defendant's right to be sentenced in a fair manner.

Position on Oral Argument and Publication

Oral argument is not required, publication is not requested.

Statement of the Case

The Criminal Complaint charged Dominique Anwar with a sole county of child neglect. On November 27, 2017, the State and Ms. Anwar entered into a plea deal. A sentencing hearing was scheduled for December 20, 2017. During sentencing the State referenced statements made by Ms. Anwar's six year old son, King, to child protective services (CPS). The statements had not been previously turned over to the defense. Ms. Anwar filed a timely Notice of Intent to Pursue Post Conviction Relief.

This appeal relies on the case law for presentence investigations holding that defendants have a right to be sentenced in a fair manner by timely reviewing information (like PSIs) that the State intends to use prior to their sentencing.

Statement of the Facts

The charges in this case stem from an incident that occurred on August 9, 2017. The Complainant, Police Officer Jose Lazo, based his complaint on the police reports

of officer Alexander Verreault and Detective Rodney Gonzales. (R1: 1)

The complaint alleged that on August 9, 2017, officers arrived to 2903 W. Michigan Avenue #6 for a fire at 4:36am. *Id*. At the residence officers located a child identified as KM, 5/3/15. *Id*. The fire department had located the child alone when they were evacuating apartment #7. *Id*. Officers obtained Ms. Anwar's identity as the mother of the child from relatives living in apartment #4. Ms. Anwar returned home by 5:30am after speaking to officers. *Id*.

After speaking to Ms. Anwar, officers learned that she had left her apartment around 3:45am to assist her mother at a nearby residence where a family fight was occurring. *Id*. Thinking she would only be there shortly, Ms. Anwar left KM alone. *Id*. Ms. Anwar returned home when contacted by police. *Id*. A mirandized statement was later obtained whereby Ms. Anwar provided a similar account. (R1: 2).

On November 27, 2017, Ms. Anwar and the State entered into a plea agreement and a sentencing hearing was scheduled for December 20, 2017. During sentencing arguments the State referenced statements made by Ms. Anwar's six year old son to CPS investigators. The State argued "his statements were provided as part of the basis for the CHIPS case, and it's my understanding that the six year old told investigators that his mother would leave him and his brother home pretty often, that she would do so to go to Potawatomi and lose all their money, was that statement of the six year old." (R51: 5)

The State later returned to the six year old's statements arguing "I should note that the six year old also talked about his mom having dope in the house and cooking it into cookies and brownies. So that's my basis for asking for that [AODA] assessment as well." (R51: 7).

The sentencing court then relied upon these statements from the six year old while sentencing Ms. Anwar noting that

it was "disturbed" by the statements. (R51: 14). The sentencing court imposed a maximum term of incarceration upon Ms. Anwar, but stayed the sentence and placed her on probation. A term of Ms. Anwar's probation included 30 days upfront conditioned time.

On July 30, 2018, the defense filed a notice of motion and motion for post conviction relief alleging three errors. The defense argued that (1) Ms. Anwar was not sentenced in a fair manner in violation of due process (R15: 3-5); (2) Ms. Anwar was not sentenced on accurate and reliable information in violation of due process (R15: 5-8); (3) the court abused its discretion by failing to consider the *Gallion* factors. (R15: 8-11). The State filed a response brief on September 28, 2018, which was followed by the defense's reply brief on October 12, 2018. On October 29, 2018, the circuit court entered an order denying the defense's motion for a new sentencing hearing.

Argument

I. Ms. Anwar was not sentenced in a fair manner, which violates due process.

A. Standard of Review

Questions of constitutionality are reviewed under a two-part standard. Circuit court findings of historical or evidentiary fact are reviewed under the clearly erroneous standard. State v. McMorris, 213 Wis. 2d 156, 165 (1997). Whether the evidentiary facts satisfy the constitutional standard is a question appellate courts review de novo. Id.

B. The State's failure to provide confidential information gathered during a CHIPS proceeding that it intended to use during

sentencing arguments violated due process.

Defendants possess a due process right under the Fourteenth Amendment to be sentenced in a fair manner. *United States v. Salerno*, 481 U.S. 739, 746 (1987)(citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Incumbent in the right to be sentenced in a fair manner is the ability and opportunity to timely receive information that will be used against you during sentencing. This right has traditionally been invoked in the context of presentence investigations (PSIs).

In *State v. Skaff*, 152 Wis. 2d 48, 53 (Ct. App. 1989), the Court of Appeals determined that in order to ensure the integrity of the sentencing proceeding, defendants must be given a copy of the PSI in a timely manner. This is necessary because the defendant is in the best position to "refute, explain, or supplement the PSI" if it contained errors and it was likely that any such errors could significantly impact the sentence meted out "given the wide range of statutory sanctions." *Skaff*, 152 Wis. 2d at 57. *Skaff* followed the United State Supreme Court's decision in *Gardner v. Florida*, 430 U.S. 349, 362 (1977). *Gardner* realized that the sentencing procedure, like trial, must satisfy the demands of due process. *Gardner*, 430 U.S. at 358. The Supreme Court held in *Gardner* that the sentencing process violated due process when the "sentence[d] was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id*. at 362

Central to these decisions were the defendant's ability to know what information the sentencing court would rely upon during sentencing. These cases answered separate questions from whether or not the information used was accurate. Instead, *Skaff* found a due process violation in the "denial of means to ascertain whether there was any

misinformation." 152 Wis. 2d at 58. This appellate court reasoned that "until *Skaff* reads his PSI, its correctness is unknown to anyone. . . . given the wide sentencing discretion possessed by the trial court, a possibility exists that such errors [in the PSI] skewed the sentence." Id. As such, because the information was not presented to *Skaff* in a timely manner, *Skaff* was entitled to a new sentencing hearing. Id.

In a similar manner here, Ms. Anwar's procedural due process right to be sentenced in a fair manner was violated by the State's use of the confidential statements from a CHIPS proceeding without disclosing them to the defense. These statements rendered the CHIPS investigation into a quasi-PSI. However, unlike a PSI, the defense was given no notice of the statements, nor was the defense given a meaningful opportunity to contest the statements. Like a PSIs, no one but the defendant is in a better position to "refute, explain, or supplement" the information gathered. Similar considerations are in play here. As noted with a PSI, any significant inaccuracies in a CHIPS investigation "quite probably would affect the sentence, given the wide range of statutory sanctions."

The post conviction court erroneously denied the motion for a new sentencing hearing because the defendant and defense counsel had an opportunity to speak after the State made its comments. (R36: 3). The post conviction court was similarly satisfied because the information the State used had been placed on the record in open court. However, the court used the wrong legal standard in reaching this result. *Id*. However, the evil remedied by *Gardner* and *Skaff* is exactly what occurred to Ms. Anwar.

Gardner followed developments in law and questioned whether a capital sentencing procedure "permits a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." *Gardner*, 430 U.S. at 358 (emphasis

added). *Gardner* declared that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing process." *Id*. *Skaff* extended *Gardner* to all sentencing proceedings in Wisconsin.

The failure to disclose these statements prior to sentencing arguments turned the entire sentencing procedure into an ambush. The refusal to grant a new sentencing hearing places each defendant with collateral CHIPS proceedings in a precarious position where they may not know what statements or accusations about their conduct are to be used against them. Defendants like Ms. Anwar are unable to explain, refute, or counter any unknown accusations made against them. These situations leave the defense without time to adequately prepare for such remarks, and provide the defense with no reasonable opportunity to counter the allegations or provide an alternative explanation.

Sentencing hearings are often times quick; an ambush with confidential information may leave the defendant or defense counsel minutes or in some situations only seconds to provide a counter argument. Either way, the defense is left without an opportunity to supplement the sentencing hearing with statements from others contesting such allegations. This denies a defendant "a procedure conducive to sentencing based on correct information," which is exactly what *Skaff* and *Gardner* were determined to correct. The ambush nature of such usage denies a defendant the right to be sentenced in a fair manner.

Conclusion

This Court therefore should reverse the decision of the post conviction court, vacate the judgment of convict, and remand this case for a new sentencing.

Dated at Milwaukee, Wisconsin this 21st day of January, 2019.

Respectfully submitted,

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APPENDIX

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Certification of Form & Length

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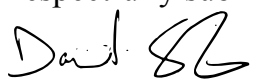
Respectfully submitted,



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Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issue raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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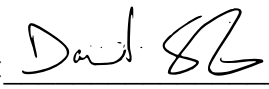
Signed:  ,

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Certification of Electronic Brief

Pursuant to Rule 809.19(12)(f), I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed: _____,
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AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Daniel Sevcik, being sworn, states:

1. On January 21, 2019, I electronically filed the appellant's brief/appendix.
2. On January 21, 2019, I mailed, by UPS with appropriate postage, a brief/appendix in this matter to the Milwaukee County District Attorney's Office at: 821 W. State St., Rm. 405, Milwaukee, WI 53233.
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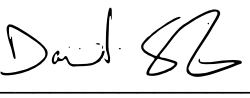
Signed: 

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