State of Wisconsin

Supreme Court

Case No. 2022AP2085

In re the termination of parental rights to K. M. J., a person under the age of 18:

Columbia County Department of Health and Human Services,,

Petitioner-Respondent-Respondent,

v.

S. A. J.,

Respondent-Appellant-Petitioner.

On Appeal from the Decision of the Wisconsin Court of Appeals,
District IV, and from the Circuit Court of Columbia County,
Hon. W. Andrew Voigt, Presiding

Mother's Petition for Review

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Statement of the Issues

Six weeks before a grounds trial as to termination of parental rights, S. A. J. tried to fire her trial counsel, alleging that counsel was not "doing her due diligence," was unfamiliar with her case, and seemed more interested in facilitating termination of her parental rights than presenting a defense. The circuit court found S. A. J. not credible. On the advice of trial counsel, S. A. J. then entered a plea to grounds, giving up her right to a grounds trial. On appeal, it became apparent that trial counsel had not reviewed large portions of relevant discovery and missed viable defenses to the TPR ground.

I. Did the court erroneously exercise its discretion when finding S. A. J.'s complaints that trial counsel was not doing her job "not credible" and denying her request for a new lawyer?

The trial court said it did not.

The court of appeals said it did not.

II. Did S. A. J. receive ineffective assistance of counsel such that she may withdraw her plea?

The trial court said she did not.

The court of appeals said she did not.

Reasons for Granting Review

In this termination of parental rights case, trial counsel did not interview witnesses (R. 173:33) or review discovery (R. 173:19). When S. A. J. wrote to the judge to complain, the judge refused to take S. A. J. seriously. (R. 104:18). On the advice of counsel—who, not having read discovery or interviewed witnesses, knew next to nothing about S. A. J.'s case other than what was alleged in the petition—S. A. J. entered a plea to grounds, figuring that since her lawyer wasn't going to defend her anyway, she may as well put off the inevitable and get a couple more visits

with her daughter. (R. 17356-57). She is arguing that (1) the circuit court erroneously exercised its discretion when it failed to grant her request for new counsel and (2) she received the ineffective assistance of counsel in her decision to plead to grounds and should therefore be allowed, under the "manifest injustice" standard, to withdraw her plea.

Whether counsel in TPRs premised on continuing CHIPS should be required to review discovery before advising clients to plead to grounds is a question of law that is, unfortunately, likely to recur unless resolved by the supreme court. Wis. Stat. § 809.62(1r)(c)(3). Though unpublished, this case will be citable for the proposition that defense attorneys need not bother with all those documents maintained by the human service agency, even though the entire reason for the statutory right to counsel in Wisconsin is "the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent" to litigants. Wis. Stat. § 48.422(7)(b).

Statement of the Case

~Trial proceedings~

SAJ's daughter KMJ was born on June 30, 2018. (R. 108:5). Just over two years later, Columbia County DH&HS ("The Department") filed a petition for termination of SAJ's parental rights to KMJ based on continuing need of protection and services under Wis. Stat. § 48.415(2) and failure to assume parental responsibility under Wis. Stat. § 48.415(6). (R. 6).

The State Public Defender appointed Karen Lueschow to represent SAJ on August 31, 2020. (R. 23). Ms. Lueschow only obtained eWisaciwis notes—the ongoing case manager's day-to-day notes about the case—from until January 2020, six months after the TPR petition was filed. (R. 173:6). Ms. Lueschow later testified she didn't "see the value" in case notes because most of the notes were about the child and the rest of the information was in the petition or available to the State through the social worker's testimony. (R. 173:20).

SAJ asked the trial court for a new attorney in a letter she wrote to the court on October 4, 2021. She wrote that Ms. Lueschow was not "doing

her due diligence," seemed unfamiliar with SAJ's treatment history, was slow to communicate with her, and that to SAJ she seemed more interested in facilitating the termination of SAJ's parental rights than in presenting a defense to it. (R. 48).

On October 21, the court acknowledged that SAJ had written "some time ago." (R. 104:7). But it stated that SAJ was now "at some very significant disadvantage" because it was only hearing the motion now, and the trial date was only three weeks away. (Id). Addressing SAJ, it asked, "[h]ave things changed at all, [SAJ], or is it necessary that we discuss your request for a different attorney today?" SAJ indicated that she wanted a different attorney: "I still feel the same." (R. 104:7-8).

The court replied, "Do you understand, ma'am, that is going to create some challenges to find a different attorney who can be on board in this case and prepared to represent you in three weeks?"

[SAJ] replied, "I mean, she's made it very clear that she is not willing."

The court responded, "I want to caution you what you say related to this case because a record of this is being made. So just bear that in mind before you make any additional comments." (R. 104:9). The court went on to say that it is difficult to find attorneys willing to handle TPRs for the State Public Defender and asked SAJ, "you want to what, delay the trial?" (R. 104:10).

[SAJ] replied, "If that's what it takes, yeah. Because I have a right to be represented so I feel if that's what is what's necessary." (R. 104:10).

The court then asked Ms. Lueschow if she wanted to comment. Ms. Lueschow said,

> Your Honor, I'm prepared to go to trial. I didn't file any motions in limine because I didn't have any to file and our—I guess what I would say is that my client's expectations for what an attorney can do in a TPR case and what my role is there, has been a disconnect in that. So I believe that I can still represent my client. I am familiar with the case. I have done trials

> before on repeated occasions but my client's discomfort is an issue.

(R. 104:11). She then asked if she could speak with SAJ; the court said she could. She added, "I respect my client's desire to have an attorney that's prepared. And if you do notices, that attorney is going to prepare, but that leads to delay, and I think some other people in this courtroom might have something to say about that." (R. 104:11).

The guardian ad litem weighed in:

> I understand that [SAJ] might have a disagreement with her attorney about her attorney's opinion about the case. I don't think that reflects necessarily on Ms. Lueschow's ability to represent her client.
>
> And I think that given the opportunity for Ms. Lueschow to speak to her client about that, I think this might resolve that problem. And, you know, attorneys have to tell their clients all the time information they don't want to hear.
>
> That doesn't mean they can't represent them . . . You know, I think that is often times in any type of representation simply in regards to prodding, a lot of attorneys probably disagree with their clients. That doesn't mean they don't represent them to the best of their ability.
>
> I'm very confident that attorney Lueschow can and would represent [SAJ] to the best of her abilities trying to attain [SAJ]'s goal.
>
> But I think the reality and I think this is where Ms. Lueschow was coming from if you read the letter, the reality of the situation is her goal might not be very attainable.
>
> In talking to her client about that doesn't mean that you aren't willing to represent them."

(R. 104:14-16).

The court said, "[W]hile I don't have any particular reason to believe that it is true at present, certainly it would not be difficult for the Court to wonder about how sincere [SAJ] is in trying to change attorneys versus simply trying to find a reason to delay the trial." (R. 104:16).

SAJ responded, "your Honor, Miss Lueschow has made it perfectly clear she is not here to represent me. She told me that on the phone. That's why I wrote you that letter." (R. 104:18).

The court responded, "[SAJ], to be blunt, that doesn't make any sense." (Id).

SAJ responded, "My social worker was sitting right here when she was on the phone and told me that. I was on the speaker phone." (R. 104:17-18).

The court then reiterated that the case needed to be resolved, it would not be able to reschedule it until the summer, and that so much delay was "unacceptable under the circumstances." (R. 104:18). After addressing the issue of the father's counsel, the court said:

> So it seems to me maybe the better course of action to pause to allow Miss Lueschow to resume the Zoom meeting so she can have a private conversation with [SAJ] and to figure out what, if any, options there might be there.
>
> Because, frankly, I mean at this point one of the things the Court is seriously considering is simply denying the request because it is absolutely true that [SAJ] is entitled to competent counsel.
>
> This Court has no reason to believe that Miss Lueschow is not competent for purposes of this type of case. In fact, she is more than competent in this Court's opinion.
>
> However, Miss Lueschow is correct in my opinion that the role of counsel in a TPR case is pretty limited to the confines of the TPR case, and there are very plain boundaries for that.
>
> And [SAJ] may well, and I think it's pretty clear may well disagree with what those boundaries are because of the other case and the associated issues here. But Miss Lueschow's representation has very defined limits and --

Here SAJ broke in: "She is representing you guys, not me. (R. 104:21-22).

The judge placed SAJ and Ms. Lueschow in a breakout room. (R. 104:23). When they returned, the court asked Ms. Lueschow, "Where are we from our perspective at this point?" (Id).

Ms. Lueschow responded,

> We did spend a considerable amount of time clarifying the parameters in more detail than what Your Honor had alluded to and definition of my representation.
>
> As well as more in depth discussion about what trial means. I think that as an attorney, I throw that word out there and it's not as clear to my client.
>
> So we did talk quite a bit aboubetween [sic] trial means and the difference betweens CHIPS and TPR. We also made an arrangement for me to drive to Fond du Lac to the Beacon House to meet with [SAJ] tonight to talk about some of these trial issues and based on those representations, I believe she is now more accepting of me representing her.
>
> So if you could just clarify that on the record, I believe that's what I understood from that meeting, but it sounds to me sometimes we have a communication disconnect.

(R. 104:24). The court then asked SAJ if Ms. Lueschow had accurately described the situation. SAJ replied, "I guess I'm good, whatever." (R. 104:25).

The court concluded that the "representation issues" had been resolved but also said, "it's I think safe to say based on what has been said and how it has been said, that she may well be in position to be addressing this again, as it relates to [SAJ]'s relationship with Ms. Lueschow." (Id). [1]

On November 8, 2021, Ms. Lueschow filed a motion to adjourn the trial. (R. 63:1). At court, Ms. Lueschow stated SAJ did not feel emotionally prepared for trial. (R. 105:6). The court declined to reschedule.

[1] This section is lengthy for a petition for review, but necessary to include because the court of appeals condensed this exchange into two paragraphs, leaving out the parts where SAJ most clearly articulated her concerns—that Ms. Lueschow seemed more interested in the State's position than in hers, was not "doing her due diligence," and "she is representing you guys, not me." (Opinion ¶6 – ¶7; App. 3-4).

The next court date was for a jury trial on November 16, 2021. SAJ waived the trial and entered a no-contest plea to grounds. The only reason given for SAJ's change of plea was to "request that the dispositional hearing be set after December 13," so she could "be through that treatment to be better equipped to proceed through that process." (R. 106:13).

The court terminated SAJ's rights in a contested dispositional hearing on May 23, 2022. (R. 108).

~Postdisposition proceedings~

SAJ filed a notice of appeal (R. 114) and this court remanded the matter for postdisposition proceedings. (R. 120). She filed a postdisposition motion on January 25, 2023 alleging that the court did not conduct an adequate inquiry into SAJ's reasons for requesting new counsel and that Ms. Lueschow did not provide her with effective assistance of counsel because she did not obtain and review discovery or investigate witnesses. (R. 138).

On remand, SAJ testified that, in addition to what she wrote in her letter to the court, Ms. Lueschow told her she would not win the case because she was an addict. (R. 173:57). Every time they met, Ms. Lueschow encouraged SAJ to consider a voluntary TPR. (R. 173:57-58). She continued to do this even when SAJ asked her to stop: "I asked her why she kept bringing it up when she knew I didn't want my rights terminated." (R. 173:65).

She continued with Ms. Lueschow after she asked the court for a new attorney because she felt she had no choice. (R. 173:55-56). She also stated that she did a no-contest plea simply because Ms. Lueschow told her she could have more time with her daughter if she did so. (R. 173:56-57).

Ms. Lueschow testified that she had been prepared to go to trial on the day SAJ entered her plea. (R. 173:6). She admitted that during her preparation for the trial, which was scheduled for November 2021, she only had case notes up until January 2020. (Id). Asked why she did not obtain the rest of the case notes, she stated that the petition and the

information she got from SAJ were "sufficient" to defend against both grounds. (Id). Later, she said that she did not obtain the case notes or review the ones she had because she knew she would never use them at trial, because in her experience "imbedded [sic] in the entire case notes that has 64 things that can be brought up that are not beneficial . . . and social worker's case is strength based so they are usually pretty cooperative with that." (R. 173:19).

Appellate counsel asked, "It's often useful to have those notes in your file for impeaching or refreshing recollection. Wouldn't you agree with that?"

Ms. Lueschow said,

> No. Because like I said, the information that I'm bringing out that strength based, social workers are well aware of those strengths. They are always ready, willing and able to provide as many positives for the client as possible.
>
> So I don't do and I've seen, I've watched other attorneys do exactly what you are saying. And I think it's a disaster. It provides way too much opportunity to bring out a negative of my client, and I'm not going to answer that."

Counsel asked whether she saw any benefit to at least having the notes in the file. Ms. Lueschow replied,

> I don't find the value in eWisacwis notes the same way other people do. Because my client, especially a client like [SAJ] who is a great historian and everything that she said was, you know, backed up by the social worker, by the Petition. So I don't need to dive into those eWisacwis notes. 90 percent of it, like 50 percent of it is about the kid, which is not part of this trial.

(R. 173:20).

When asked what her strategy at trial would have been, Ms. Lueschow testified that it was "just to put the other parties to their burden of proof" and "not help the other side . . . [w]e didn't have a particularly—we didn't really have a strong defense other than she has a right to parent." (R. 173:9-10).

Ms. Lueschow testified that in every conversation she has with her clients she talks about the "options for resolution," which she said include "involuntary, jury trial, court trial, admission and no contest plea and then a voluntary order." (R. 173:22). During these sorts of conversations,

> [T]he clients become, including [SAJ], become upset because I can't go back and change what's going to be presented from the other side in getting the client to understand . . . what is the Petitioner going to be presenting and really focusing on that petition and getting them to understand if we go to trial, this is the information that's going to be presented and trying to build a defense around that."

Ms. Lueschow stated she had "legally assessed" that SAJ had not met the conditions of return under Wis. Stat. § 48.415(2)(a)(3) (R. 173:11) and that since case management, referrals, and visitation had been provided to SAJ, there was no way to challenge reasonable efforts as defined in § 48.415(2)(a)(2). (R. 173:12-13). Ms. Lueschow acknowledged that SAJ repeatedly said that she was not getting visits in the way that she wanted, but that this was not something Ms. Lueschow needed to investigate prior to trial because "it's not about the quality of the visits. It's not about, it's whether or not there is a visitation plan." (R. 173:15).

She stated that she did not know why SAJ decided to waive her right to a grounds trial except that "[SAJ]'s fight was more at Disposition because she did so well with her visits when she visited . . . I thought [SAJ] would have a great defense at that phase." (R. 173:26). Ms. Lueschow acknowledged that part of the inquiry in failure to assume parental responsibility is whether the parent "has expressed concern for or interest in the support, care, or well-being of the child." *See* Wis. Stat. § 48.415(6)(b). (R. 173:28). Asked why the positive information about the visits could not also have been used to defend against failure to assume parental responsibility, Ms. Lueschow said that information would not have even arguably been relevant:

> Ms. Lueschow: The visits are their own thing. Expressing concern would have been did [SAJ] call up the foster parents or call up the social worker and say how it's going. That's not something that was happening.
>
> Ms. Bayer: It's arguable, though, right?

> Ms. Lueschow: No. I don't think it's arguable at all.
>
> Ms. Bayer: Well, we are arguing about it right now, aren't we?
>
> Ms. Lueschow: No. I'm steadfast on I would not have asked those questions at court because [SAJ] did not call up and express concern. She did work really hard to have good visits with her daughter and attend those visits when she was available.
>
> Ms. Bayer: And but that's not --
>
> Ms. Lueschow: And not the thing.

(R. 173:29)

Ms. Lueschow also claimed SAJ could not have called KMJ because "this child is too young to accept calls on her own." (R. 173:28).

Ms. Lueschow stated that SAJ did ask her to interview witnesses who were familiar with her success in drug treatment but she did not do so because she could tell, based on passing conversations with the receptionist, that any testimony from anyone at the facility would be negative. (R. 173:33).

She stated that "[SAJ] was an instrumental part of preparing for this trial" (R. 173:20) but also insinuated that SAJ was frequently unavailable, making preparation for trial difficult. (R. 173:7, 21).

When appellate counsel asked Ms. Lueschow to confirm that SAJ had written to the court to ask for another attorney, trial counsel responded, "Yes. It's typical." (R. 173:29). She concluded her testimony by stating that it was normal for parents to try to fire her (R. 173:37) and that "the angry hang ups, I don't even really pay attention any more. I just wait until the next day and I call them again." (R. 173:41).

~Postdisposition discovery and argument~

After the hearing, appellate counsel obtained and reviewed the eWisacwis notes. Counsel compiled the pages that mentioned SAJ into a

229 page document, highlighted the relevant portions, and filed them as an appendix. (R. 178).

The notes show that SAJ was unavailable during the pendency of the TPR exactly once, from around July 12, 2021 to July 30, 2021. (R. 178:127 to R. 178:137). Counsel argued that, although Ms. Lueschow insinuated SAJ's periodic absences made representing her difficult, that one two-week absence was not enough to materially limit Ms. Lueschow's representation. (R. 177:4).

Counsel likewise argued that Ms. Lueschow was simply wrong when she said SAJ did not contact KMJ or KMJ's foster mother. (R. 177:6). The case notes show SAJ called the foster mother's home weekly or more until August of 2021, and spoke with the foster mother and with KMJ. (R. 178:2, 17, 18, 31, 32, 43, 44, 48, 49, 50, 51, 55, 57, 62, 68, 78, 81, 82, 84, 87, 89, 91, 93, 107, 130). Beginning in September, SAJ arranged to call the foster mother's home twice a week. (R. 178: 170).

The notes show that SAJ went to prison in November 2019 and that the Department made a discretionary decision not to bring KMJ to visit with SAJ in prison because she had revoked her release of information for her counseling organization. (R. 178:3). Counsel pointed this out in argument, writing that "A defense attorney could have argued, and a jury could have found, that it was unreasonable for the Department to deny [SAJ] visits—a key court-ordered service—just because [SAJ] had revoked a release of information for a service provider she was no longer actively working with now that she was in prison."(R. 177:3).

The notes also show that SAJ signed the necessary releases to have visits in February 2020 (R. 178:7) but the Department did not make KMJ available for visits until more than a year later, April 14, 2021. (R. 178:75). Taycheedah allowed video visits starting in March of 2020. (R. 178:46). But between March 12, 2020 (R. 178:14) and May 13, 2020 (R. 178:20) there is no indication that the case worker made any contact with Taycheedah about the options for visits during the pandemic, much less that she arranged to speak with SAJ personally during that time. SAJ was calling KMJ multiple times a week at her foster home. (R. 178:17-18). But the case worker had no contact at all with SAJ while she was in prison until May 29, 2020. (R.

178:26). And she did not call her again that year until SAJ initiated email correspondence on the prison email system—at some expense—to ask why she had not been allowed Zoom visits with her children. (R. 178:46).

Counsel argued in writing that that "A reasonably competent attorney would have argued that the Department's lack of contact with [SAJ], who was in frequent contact with her child and had requested visits, was not making 'earnest, good-faith' efforts to manage the case, and a jury might reasonably have agreed."(R. 177:3).

The notes show that, when SAJ was released, the Department decided that visits with SAJ were not in KMJ's best interest and instead had them by zoom, even when SAJ and KMJ were living in the same town. (R. 178:208-209). Counsel wrote, "These were not "earnest, good faith" attempts to provide [KMJ] with the opportunity to visit with and interact with her child. Rather, they were a way of technically providing visits as required while making sure [SAJ] was not able to fulfill the real purpose of visits—form a bond with her daughter. A jury could have found that reasonable efforts were therefore not made." (R. 177:4).

~Trial court's decision~

The trial court denied SAJ's postdisposition motion in an oral ruling on October 30, 2023.

As to the issue of whether the trial court made an adequate inquiry into the reasons for wanting to fire Ms. Lueschow, the trial court stated that it told SAJ to be careful what she said only because she was beginning to talk about the facts of the case. (R. 197:5). It said that when the hearing was over it believed SAJ and Ms. Lueschow had reached an uneasy truce. (Id). It said it ultimately believed that SAJ's statements at the end of the October 21st hearing were "an agreement to postpone any decision on her request for a different attorney and maybe a withdrawal of that request." (R. 197:7). It said that the fact that SAJ later asked to delay the trial again until after her treatment proves SAJ had no true complaints about Ms. Lueschow and just wanted to delay the case. (R. 197:6).

As to whether trial counsel was ineffective, the court wrote that "the parties all appear to assume that if [SAJ] meets the ineffective part of the test, the prejudice is effectively guaranteed or automatic." (R. 197:8). It stated that in its view, Ms. Lueschow's only plausible deficiency was failing to obtain the case notes. (R. 197:9; App). But it said that "the rest is simply strategic differences of opinion." (R. 197:9-10). It said that Ms. Lueschow had prepared a defense (R. 197:10) and that her defense was the same one undersigned counsel described. (Id).

The trial court characterized SAJ's complaints about Ms. Lueschow in this way: "It appears that [SAJ], like many others, assumed that their lawyer whether appointed or otherwise must be on their case 24/7 for the duration of it, and they can't possibly tell their clients things they don't want to hear." (Id). It went on,

> Attorney Lueschow's failure to obtain these transcript notes might be ineffective of counsel, but there is no connection of that to the choice to plead instead of going to trial, especially in the face of Attorney Lueschow's testimony about strategic reasons for her approach, her substantial experience in this very specialized field, and [SAJ]'s contradictory testimony from the plea hearing on November 16th of 2021 and a motion hearing from April 18th of this year.
>
> [SAJ] has appeared before this Court literally dozens of times over the years. Most of them in matters related to this child, but not exclusively. And it is this court's firm belief that [SAJ] is much more savvy than most of the world gives her credit for. As a result, it is difficult, if not impossible for this Court to believe that she did not know exactly what she was doing on November 16th, 2021."

(R. 197:11-12).

The court of appeals affirmed. SAJ now petitions for review.

Argument

1. This court should accept review to clarify that, when addressing a parent's request for new counsel on appeal, if a parent alleges that the lawyer is not providing adequate representation, the judge fails to make an adequate inquiry, the parent enters a plea, and counsel turns out to in fact have performed deficiently, the remedy is plea withdrawal.

The court of appeals' reading of SAJ's brief is puzzling. It accuses her of arguing that plea withdrawal automatically follows from a finding that a court did not conduct an adequate inquiry into a request for new counsel. (Opinion ¶ 29, App. 12). Of course, the remedy under the relevant law is a retrospective hearing on the issue of counsel's performance. *State v. Lomax*, 146 Wis. 2d 356, 362, 432 N.W.2d 89 (1988). The court of appeals accuses SAJ of not acknowledging that she already obtained the relief of a retrospective hearing. (Opinion ¶31, App. 13). But SAJ explicitly conceded that the judge may have conducted a retrospective hearing. (SAJ's Br. 20-21). She argued that, even so, the court erroneously found that it denied her request for new counsel. (SAJ's Br. 20-22). She therefore asked for plea withdrawal.

The court of appeals' decision finds that the court did not erroneously exercise its discretion in denying that request. It does so by ignoring relevant facts. SAJ alleged that her attorney was not doing her "due diligence." It later turned out that trial counsel had not obtained or reviewed discovery or interviewed witnesses. The court of appeals "assumed, without deciding" that this amounted to deficient performance by counsel. (Opinion ¶41). But the court upheld the circuit court's finding that SAJ had no real complaints about counsel and was only trying to delay the trial.

What takes review of this case beyond mere error-correction, however, is the court of appeals' suggestion that plea withdrawal is not an appropriate remedy when the court fails to conduct an adequate inquiry into a parent's meritorious reasons for wanting new counsel. (Opinion ¶29, App. 12). This justifies clarification and review.

Under *Lomax,* after the retrospective hearing, the court must take appropriate action to remedy errors. To obtain a new trial, *Lomax* states that the defendant must meet the same standard required to obtain a new trial for ineffective assistance of counsel. 146 Wis. 2d, 264. This reasoning supports SAJ's argument that an erroneous failure by the court to allow her to discharge counsel can entitle her to plea withdrawal if she can show that the failure to give her new counsel resulted in manifest injustice.

2. This court should accept review to affirm that in TPR cases premised on continuing CHIPS it is necessary for defense counsel to review the human service agency's case notes before advising a parent to waive all reasonable efforts defenses and admit to grounds.

Although it repeats trial counsel's claims that it was not necessary for her to review discovery or interview witnesses, and upholds the circuit court's finding that these were credible, strategic reasons, the court of appeals cannot quite bring itself to find that she did not perform deficiently. (Opinion ¶41).

In criminal cases, failure to review discovery is deficient performance:

> In a felony case where the client potentially faces significant prison time, it falls below objective standards of reasonableness to fail to read all portions of discovery that may have the potential to educe information that is either beneficial or damaging to the client's cause. We can perceive no strategic or tactical advantage for a criminal defense attorney not to read discovery provided by the prosecution that may yield exculpatory evidence. The discovery documents in this case could have contained, and did contain, information that would have benefited Thiel's defense.

State v. Thiel, 264 Wis. 2d 571, 595 (Wis. 2003). Note that the court in *Thiel* acknowledged that adducing negative information before trial is just as important as adducing positive information. TPRs involve at least as serious a deprivation of a liberty interest as a felony charge does, and the same logic obtains. There is no reason for the law in this state to say it is deficient performance not to review discovery in a felony case, but in TPR cases, reviewing discovery is optional. The only purpose of such a finding

would be to imply that termination of parental rights cases are not as serious as felony cases.

Pleas to TPR grounds give up the right to present a defense against grounds. In continuing CHIPS cases, proving that the human service department did not make reasonable efforts to provide the parents with court-ordered services is a complete defense. Wis. Stat. § 48.415(2)(a)(2)(b). One reason the legislature assigns counsel to parents, even though it is not constitutionally mandated, is to advise parents what defenses they are giving up if they choose not to contest the facts in TPR petitions. Wis. Stat. § 48.422(7)(b). This opinion's finding that review of a primary source—the department's case notes—is really optional, and that the lawyer can have a strategic reason for not doing so before advising a parent to plead to grounds, undercuts the idea that it is counsel's job to help parents identify viable defenses to grounds.

Conclusion

For these reasons, SAJ asks this Court to grant review.

Dated this 13th day of March, 2024.

Respectfully submitted,

Electronically signed by Kimberley Bayer
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I, S J give my attorney, Kimberley Bayer, permission to file a petition for review on my behalf.

March 13, 2024

Certification

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,852 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, which complies with the requirements of § 809.19(12) and § 809.62(4)(b). I further certify that the electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

I hereby certify that filed with this petition, either as a separate document or as part of this brief, is an appendix that complies with § 809.62(2)(f) and that contains at minimum: (1) the decision and opinion of the court of appeals; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the court's reasoning regarding those issues.

I further certify that portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of March, 2024.

Electronically signed by Kimberley Bayer
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