

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

K.H., A.S. F., AND M.W.

Petitioners

v.

STATE OF WISCONSIN,

Respondent

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

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QUESTIONS PRESENTED

1. Is it a violation of due process and a parent's constitutional right to the care, custody and control of their children when the factual basis for a no contest plea to a petition to involuntary terminate parental rights is established after the plea colloquy and is based upon testimony that the parent disputes and was not previously in the record?

2. Is it a violation of due process and a parent's constitutional right to the care, custody and control of their children for the trial court to rely on the unenforceable promises of a proposed adoptive placement regarding future contact when determining if severance of the substantial relationship between the parent and child will be harmful to the child?

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STATE OF WISCONSIN,

Respondent

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

Petitioner, K.H. respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, Appellate District I, filed on July 25, 2017, and the order of the Wisconsin Supreme Court denying review of that decision entered on January 12, 2018.

Petitioner, A.S.F. respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, Appellate District I, filed on July 11, 2017, and the order of the Wisconsin Supreme Court denying review of that decision entered on January 12, 2018.

Petitioner, M.W. respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, Appellate District I, filed on July 11, 2017, and the order of the Wisconsin Supreme Court denying review of that decision entered on January 12, 2018.

OPINION BELOW

The unpublished opinions of the Wisconsin Court of Appeals issued on July 25, 2017, July 11, 2017, and July 11, 2017, are attached as Appendix A. The Wisconsin Supreme Court's orders denying review dated January 12, 2018, are attached as Appendix B. (J. Abrahamson and J. Bradley dissenting).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decisions of the Wisconsin Court of Appeals for which petitioners seek review were issued on July 25, 2017, July 11, 2017 and July 11, 2017. The Wisconsin Supreme Court orders denying petitioners' timely requests for review were issued on January 12, 2018. This petition is filed within 90 days of the Wisconsin Supreme Court's order denying discretionary review, under rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions that are relevant to this petition are: The Fourteenth Amendment to the United States Constitution, Section 1.:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Wisconsin statutory provisions and court rules that are relevant to this petition are reprinted in Appendix C.

STATEMENT OF CASES

The State of Wisconsin utilizes a bi-furcated process for the involuntary termination of parental rights. The party seeking termination, which in these cases is the State of Wisconsin, must prove to the level of clear and convincing evidence one or more grounds for involuntary termination pursuant to Wis. Stats. 48.415. This initial phase is referred to as the grounds phase, and Wisconsin statutes provide for a trial by jury if requested. Wis. Stats. 48.422(4). If grounds are found, a subsequent proceeding, known as the dispositional hearing is held before the juvenile court. Wis. Stats.

48.424(4). At this hearing, the court's focus is on the best interests of the child, and the court must enter one of the dispositions provided under Wis. Stats. 48.427, and in reaching that decision must consider the mandatory factors under Wis. Stats. 48.426.

This petition involves three mothers, all of whom had their children removed from their care and placed in foster care under the supervision of the Bureau of Milwaukee Child Welfare, represented by the State of Wisconsin. These three mothers present two issues:

Is it a violation of due process and a parent's constitutional right to the care, custody and control of their children when the factual basis for a no contest plea to a petition to involuntary terminate parental rights is established after the plea colloquy and is based upon testimony that the parent disputes and was not previously in the record?

Is it a violation of due process and a parent's constitutional right to the care, custody and control of their children for the court to rely on the unenforceable promises of a proposed adoptive placement regarding future contact when determining if severance of the substantial relationship between the parent and child will be harmful to the child?

STATEMENT OF FACTS

Petitioner K.H.:

Petitioner K.H., (hereinafter “K.H.”) gave birth to her son M.E.H.G., on December 7, 2013. On December 10, 2013 the Bureau of Milwaukee Child Welfare received a telephone call alleging concerns of possible neglect to the child. (63:Exh.2:2)¹ The caller alleged that the mother had a history of seizures, bi-polar disorder and schizophrenia and was not currently being treated for any of those conditions. (63:Exh.2:2) The child was also alleged to have been born positive for Benzodiazepine and Marijuana, and the mother denied use of both substances. (63:Exh.2:2) On January 31, 2014 a Petition for Protection or Services (CHIPS) was filed by the State of Wisconsin alleging that the child had been neglected as a result of the mother’s mental illness history. (63:Exh.2:1-13) On August 11, 2014 the Milwaukee County Juvenile Court entered a dispositional order finding that the child was in need of protection and services pursuant to an allegation of neglect. (63:Exh.4:1) The child was placed out of home in a foster home. (63:Exh.4:2).

On March 12, 2015, the State filed a petition for termination of parental rights alleging Continuing Need of Protection and Services (Wis. Stats. 48.415(2)(a) and Failure to Assume Parental Responsibility (Wis. Stats. 48.415(6)). The matter was eventually set for a pretrial October 2, 2015. (66:4)

¹ All citations are to the Record in the Wisconsin Court of Appeals.

On October 2, 2015, K.H. was in court with her counsel. Her trial counsel indicated that he had not had a chance to speak with his client, K.H., recently because her phone had been off. After a break to allow him to speak with K.H. regarding a plea, the court then accepted a no contest plea from K.H. on the continuing need ground, and the failure to assume parental responsibility ground was dismissed.

During the plea colloquy K.H., when asked if she understood the petition, indicated that “Not exactly, but I kind of took a little bit of it.” (67:9, 10). The following exchange took place during the colloquy between the Court and K.H.:

Q. So then the next allegation that you didn’t meet those goals and conditions while the order wasn’t—while the order was in effect?

A. I did do counseling. I did do a little bit of counseling. I requested – I asked for a different counselor because I didn’t feel like I was getting help and I’m taking medicine. I also have a doctor apartment (sic) for that coming up. (67:12)

There is then an exchange between the court, the State and defense counsel, and following that the court asks K.H. if she is pleading no contest to the allegation that she hasn’t met the conditions, to which she replied - yes. (67:13)

Later during the colloquy the court learns that K.H. is supposed to be taking 5 medications and is only taking two of them because she needs to see her psychiatrist. (67:15-16). The court asks

Q. Do you feel like you’re able to fully understand what we’re doing in court even though you don’t have all of your prescriptions filled right now?

A. I’m trying to understand. My problem is – uh --

Q. Okay. I'm not sure I can take a plea if you're not currently in a place where you've had all your medications or if you're not sure you feel ready at least medically to go forward today. Do you feel like you're fully mentally and emotionally able to understand everything we're talking about?

Q. Yes. (67:16)

Later the court questions her about her medications, and again asks:

Q. But again, you feel like you're ready to go forward? You're mentally, emotionally able to make this decision today.

A. Yes. (witness cries).

K.H. continued to demonstrate a deficient understanding of the process. When asked if she knew the role of the guardian ad litem, she answered no. (67:24)

Following the colloquy the State then called the social worker to testify. After her testimony, when asked by the court if she agreed that the testimony given was substantially true, K.H. indicated that "[s]ome of them are true but not all of them are true." (67:47) K.H. then went on to assert she disagreed with the State's position on the conditions relating to AODA, domestic violence counseling, therapy, and indicated that the Bureau hadn't found her a new therapist when asked. (67:47) The exact exchange between the Court and K.H. is set forth below:

Q. When you say some?

A. Just the AODA. I did go for the evaluation, but I was told that I didn't have to do it because I didn't meet the requirements.

I went for the DV, was told I did not meet the requirements for that because it's not an open case. You have to have an open case for a class. They say we did not meet that because we didn't have an open case.

Q. Okay. How about the therapy?

A. The therapy, I've also asked to find me another therapist.

Q. Okay. You didn't attend therapy for sounds like a fair amount of time?

A. I did attend therapy until I stopped going after my mother died because I went to talk to my therapist about that. Only things he told me was, well, get over it. People just die. I asked--

Q. Okay.

A. So I asked her if she could find me another therapist that I could be able to talk to instead of them talk to me like I was her friend.

Q. Okay.

Q. So there is a lot you disagree with that Miss Tiemenapp said, but I can't accept your plea if you're saying that nothing she said was correct and that's my concern.

A. It's just that the therapy—the therapy—

The Court: Ms. Kiefer. (Assistant District Attorney representing the interests of the State of Wisconsin, Milwaukee County)

Ms. Kiefer: I think that [K.H.] just has to agree that the testimony can support a factual -- can make the factual basis to support a plea today. I know she doesn't agree with everything. That is why she's not stipulating to the grounds. Rather, she's pleading no contest. So I'm not surprised she doesn't completely agree with everything that was testified to, but I do believe she could agree that it would establish a factual basis for her no contest plea.

(67:47-48)

At no time during the colloquy did the court inform K.H. of the burden of proof – clear and convincing evidence. The court also did not inform K.H. that there was a different focus at fact-finding, as opposed to disposition when the focus would be solely the best interest of the child.

K.H. testified at the post disposition hearing on October 1, 2016. K.H. testified that she had entered a plea of no contest because her trial counsel had told her that if she “was to plea no contest I wouldn’t have do a judge (sic) - a trial in front of the jury, I could do it in front of the judge.” (90:46) She added, “That – what I was thinking, there would be a witness here and then the judge – then I just talking to the judge, there wouldn’t be no jury. That’s how it was explained to me.” (90:49)

K.H. also testified that she was “told that we would get the six to nine months and everybody didn’t think we could, but we said that we could.” (90:50) When asked “what do you think you were saying when you said no contest to the judge?” K.H. answered “Like I said, it was going to be witness and just talk to the judge, no jury. That’s what I was expecting.” (90:51)

When asked if she understood her no contest plea meant that she was not disagreeing and not fighting any of the claims the State, K.H. answered “If I had known that’s what that mean, I wouldn’t of pled no contest.” (90:52)

As set forth above, K.H. voiced several disagreements with the social worker's prove up testimony. During the post dispositional hearing the following exchange took place:

Q. Did you understand after you told the judge all of the disagreements you had about the social worker testimony, and later he asked you, do you still want to plead no contest and you said yes, did you understand that by doing that the judge was then going to not rely on your disagreements regarding the social worker testimony? It would be like you had never disagreed; did you know that?

A No, ma'am. (90:56)

When asked if she had ever retracted or had taken back any of her testimony when she disputed the social worker's testimony during the plea hearing, K.H. consistently answered at the post disposition hearing that she had not retracted or taken back that testimony. She also indicated that she had never meant for the court to believe that she had withdrawn her earlier statements. K.H. emphatically stated, "I didn't take none of them back, it still stands." (90:57-58)

Later the following exchange took place:

Q. Okay. So when you entered a no contest plea you were agreeing to not fight the allegations in the petition?

A. No, I wanted to fight the allegations in the petition. (90:81)

It also is clear in the transcript from the October 1, 2016 hearing that K.H. did not understand that her no contest plea meant that she was not disputing the allegations in the TPR petition. (90:81-85) K.H. also testified that she did not understand that by entering her plea of no contest she would not be disputing the exhibits that

were later marked into the record, including the TPC order and the CHIPS petition as well as other exhibits. (90:86-88) K.H. had not been told before the entry of her plea that the State would be entering exhibits into the record, and was not shown a copy of those exhibits before she entered her plea. (90:85-86)

When cross-examined K.H. testified that “The only thing I didn’t want – the trial, the jury trial, that’s all I was pleading no contest for.” (90:95) Later when asked by State “When you entered your no contest plea, did you understand that that meant you weren’t agreeing to everything that everybody said in the petition, but rather that the State could prove it if you had a trial about.” K.H. responded “I wasn’t agreeing to anything.” (90:104) Later K.H. testified “I didn’t know what I was pleading no contest to. I keep telling you, I thought it was the jury.” (90:105)

At a subsequent post disposition hearing held on January 6, 2017, K.H.’s trial counsel was called by the State. Counsel testified that he recalled some of the disagreements voiced by K.H. with the testimony of the social worker that was placed on the record at the plea hearing. (90:70-77) Trial counsel also testified that he was trying to determine if K.H.’s disagreements with the testimony were valid:

Okay. So for example as I recall, she didn’t agree about a service that was referred to her, be it individual therapy or an AODA treatment. She stated to me that they dropped the ball. So then I would ask her, ‘Okay. Gosh, how did they drop the ball? What did they do that was not right?’ So I tried to address her concerns at the table and to be sure that she didn’t have legitimate concerns that were true and accurate. (90:70)

Later the following exchange took place upon examination:

Q. If it was new information to you while you were sitting at the plea hearing and it related to the issue of conditions and reasonable efforts, why did you not then ask the Court for an adjournment so that you could speak more with your client regarding this particular issue?

A. Because I needed to hear those answers from the ongoing case manager and to also listen to the client as to why she stated that and she objected to that. She was fairly argumentative that day and overall. So I didn't take any additional action, no. (90:76-77)

On appeal, the trial court, the Hon. Laura Gramling Perez denied K.H.'s post disposition motion. According to the court, the previous judge had gone through all of the factors required by Wis. Stat. §48.422(7).

The Wisconsin court of appeals denied K.H.'s appellate claim that establishing the factual basis after the plea violates due process by an order dated July 25, 2017.

Petitioner: A.S.F.

A.S.F. is the mother J.T.C. On September 22, 2014 the State filed a Petition for Termination of Parental Rights alleging that grounds existed to terminate A.S.F.'s parental rights pursuant to Wis. Stats. 48.415(2) – Child in Continuing Need of Protection and Services; and Wis. Stats. 48.415(6) – Failure to Assume Parental Responsibility. (1:1-16) A.S.F. was represented by Attorney Cheryl Ward appointed through the Wisconsin State Public Defender's Office. On March 17, 2016, the Milwaukee County Juvenile Court, the Hon. David C. Swanson presiding, entered an order terminating A.S.F.'s parental rights to her son.

The subject child, J.T.C., was born on August 7, 2012. The child remained in the mother's care until his removal on March 13, 2013. The child was placed under a dispositional order on July 2, 2013. (25:1-12) The child remained out of home during the pendency of the dispositional order; however, the mother progressed to unsupervised and overnight weekend placement prior to the State filing the TPR petition.

At trial the social worker testified that post TPR petition that A.S.F. progressed to exercising unsupervised overnight placement with J.T.C. from March until July of 2015. (113:7) The foster parent testified that some of those overnight placements included weekend placement with drop-off at daycare by A.S.F. (114:32, 36) The visitation worker who handled the supervised visits indicated that A.S.F. was very good with J.T.C., and that she had no concerns regarding A.S.F.'s parenting. The visitation worker also testified that when A.S.F. missed a visit, J.T.C. was upset that the visit didn't happen. (114:48) She also testified that J.T.C. didn't want to leave the visits. (114:48-52)

At trial the case manager testified that A.S.F. had completed the Parenting Network. (112:54) She also conceded that A.S.F. had her own housing, but then testified it was not safe because of A.S.F.'s continuing contact with V.C. (the father of the child who was also under a CHIPS order). (112:89) A.S.F. also submitted to U.A.'s when requested even though they were not part of the underlying CHIPS order. (112:119) A.S.F. also attended a DVO support group and

participated in anger management. (113:4-5) A.S.F. completed two psychological evaluations requested by the department. (113:11)

While J.T.C. was under a CHIPs order, A.S.F. gave birth to a second child. This child was placed under an in home safety plan which lapsed after 90 days. (113:7) A.S.F. also participated in a parenting program through the hospital and Blanket of Love programming. (113:11)

At trial, the foster parent was called to testify over the objection of A.S.F. (113:39-42) The foster parent testified that A.S.F. calls the foster home approximately 4-5 times a week. (114:16) She testified that A.S.F. had sent diapers, wipes, clothes and shoes for J.T.C. (114:20) The foster parent indicated that J.T.C. liked his visits and looked forward to them. (114:25) The foster parent also conceded that A.S.F. initiated most calls between them. (114:31)

A visitation specialist testified at trial that A.S.F. was good with J.T.C. at the visits. (114:48) She testified that A.S.F. would provide gifts for J.T.C., and that she would also teach him things, and engaged in potty training. (114:51) The visitation specialist had no concerns regarding A.S.F.'s parenting. (114:52)

At the conclusion of the fact finding hearing the court found that there was a strong relationship between A.S.F. and her son, J.T.C. (117:36) The court also found that the statutes "require you to exercise significant responsibility for J.T.C.'s daily supervision, education, protection and care and you are just not at that point." (117:36) The

court clearly found that because the child was placed out of home that A.S.F. had failed to assume parental responsibility.

During the dispositional hearing, the case manager testified that the visits between A.S.F. and her son J.T.C. went well. (119:22) She testified that there was a good relationship between J.T.C. and his younger brother. (119:23) She also testified that there was a substantial relationship between A.S.F. and J.T.C. (119:24) The case manager indicated that J.T.C. was bonded with V.C. (the father). (119:26) The case manager also testified that there was a substantial relationship between V.C. and J.T.C. (119:27)

The case manager later testified at disposition that J.T.C. calls A.S.F. "mama". (119:43) The case manager also testified that A.S.F. had a residence at the time of disposition and that she had seen the lease. (119:68) When questioned why A.S.F. was not being permitted to have her supervised visits in the community at that time, the case manager testified that A.S.F. had to earn community visits. (119:68)

The foster parent also testified at the disposition hearing. When questioned the foster parent indicated that she would allow contact between the parents and J.T.C. (119:101) The foster parent also indicated that she would maintain a relationship between J.T.C. and his younger brother. (119:101) The foster parent also indicated that she thinks the sibling relationship is important. (119:118) The foster parent indicated that she would support monthly contact. (119:118) The foster parent also indicated that in the past J.T.C. had indicated

to A.S.F. during a phone call that he 'wanted to go to your (A.S.F.'s) house.' (119:122)

The State conceded that a substantial relationship existed between A.S.F. and her son, J.T.C. (122:80) The State also recognized and conceded that it would be harmful to J.T.C. if he did not see his mother again. (122:83) The court concurred with the State: "There is no question that he (J.T.C.) has a substantial relationship with [A.S.F.]" (122:105) "It is clear that (J.T.C.) understands that A.S.F. is also his mother". (122:105)

The court then made the following ruling at disposition:

The next question for the Court: Will it will [sic] be harmful to the child to sever those relationships with biological family members.

[The foster parent] testified at length she was very willing to continue relationships with both parents and their extended families if those relationships are appropriate.

There has been a lot of work done before today to maintain those relationship (sic). I believe the parties in the case are willing and able to continue those relationships outside of court.

The Court only decides what the legal relationships are. I hope the parents realize a genuine desire on everyone's part to maintain family contact.

Those contacts would not be a part of a legal relationship. It would be part of a family relationship outside of court.

Based upon [the foster parent's] stated intention to continue these family relationships, the Court does grant the termination of parental rights in this case.

(122:107)

An appeal followed. A post dispositional hearing was held on February 24, 2017 before the Hon. Laura Gramling-Perez. A.S.F. alleged that the trial court's reliance on the foster parent's of future contact was impermissible and that trial counsel had been ineffective for failing to object to that testimony. Judge Gramling-Perez found that counsel's conduct was not deficient (123:57) The court indicated that "I believe that there was very little reliance based on that testimony by the court in ultimately making a decision that termination of parental rights was in TJC's best interest." (123:58) Even so, Judge Gramling Perez found that Judge Swanson had relied upon the foster parent testimony in deciding to terminate A.S.F.'s parental rights:

Judge Swanson considered – he found that it would not be harmful to sever the legal relationship. He based that on a number of different things. He based that on the work that had been done already to maintain contact between the biological parent and child, on the foster mother's stated willingness to maintain contact at least under certain circumstances.

(123:59)

The Wisconsin court of appeals denied A.S.F.'s appellate claim that establishing the factual basis after the plea violates due process by an order dated July 11, 2017.

Petitioner M.W.:

On April 29, 2015, a petition to involuntarily terminate the parental rights of M.W. was filed. On February 4, 2016 M.W. entered a stipulation to grounds under 48.415(2) for the children M.W. and D.T. On February 4, 2016, M.W.'s trial counsel indicated that M.W. was going to enter a plea of no contest to the ground plead under Wis. Stats. 48.415(2), and that the State would be dismissing remaining ground. At the hearing on February 8, 2016 the court conducted a colloquy with M.W. (67:25-32) Following the colloquy the court indicated that it would conduct the prove-up hearing (establish the factual basis) at a later date, and further proceedings were scheduled for March 15, 2016. (67:36-37) The prove up hearing was to be held in combination with the contested dispositional hearing.

At the hearing on March 15, 2016, the court first conducted the prove up hearing. (68:33-61) Initially, M.W. was appearing by telephone. The State presented evidence from social worker Kimberly Keegan. (68:33) During the prove up testimony, the mother, M.W. asserted that she was "not liking the fact that what's being said is not truthful" and asserted that she hadn't "had a chance to sit down and talk to my lawyer". (68:40).

Significant testimony elicited at the prove up consisted of information or allegations not contained in the termination of parental rights petition, and therefore unanticipated by the parent. Those portions of Ms. Keegan's testimony that constituted allegations not set

forth in the petition for termination of parental rights are summarized below:

- Ms. Keegan testified that “especially in more recent months, [M.W. has] shown some type of disconnect from the kids”. (68:43)
- Ms. Keegan also testified that in regard to attending the children’s medical appointments that “[M.W.] was pretty consistent and over the course of the past year she hasn’t been very consistent.” (68:44)
- Ms. Keegan also asserted that “there have been more periods of time where [M.W.] hasn’t been as consistent in checking in with the kids.” (68:45)
- Ms. Keegan also testified “The specific reasoning for the therapeutic visits was due to an incident in August of 2015 in which [M.W.] became very upset with me when I stopped by her supervised visit per her request, and she became upset with me and began threatening me in front of the kids and I ended up having to call the police and it was pretty traumatic experience for both of the children. (68:46)

At the conclusion of the testimony of social worker Kimberly Keegan the court recessed to complete the prove up colloquy with M.W. in person. When the court inquired if M.W. will be able to get to court later that day, M.W. indicated that she still needed to talk to her attorney and wanted to know if she can bring her witnesses with her. (68:57).

Upon resuming the hearing, the court indicated that it was going to complete the prove-up. The following exchange took place between the court and trial counsel (Attorney Strigenz):

The Court: So the court did accept that plea previously, and Ms. Keegan's testimony related to that plea, and what that testimony – Well, what Ms. Keegan was testifying to were facts that would provide a factual basis for the Court to accept that plea. And Ms. Strigenz, I'm just going to ask you if [M.W.] disagrees with that factual basis?

Ms. Strigenz: Well, [M.W.] disagrees with what Ms. Keegan testified to. She feels that she believes that she did complete a number of things that Ms. Keegan indicated that she had not completed. But there are things such as the housing situation that led us to make my client to make her no contest plea. So I will tell you, Judge, my client was very upset by the testimony of Ms. Keegan this morning that she had heard because she felt that Ms. Keegan was not being truthful in regards to some of the things but I still believe there is a basis for a no contest plea because my client does admit there were certain things that were not done, primarily housing issue and therapy issue.

The Court: So [M.W.] you just heard what Ms. Strigenz said, is that right?

M.W.: Yes.

The Court: Would you agree with what Ms. Strigenz said?

M.W.: Yes.

(68:59-60)

Despite the clear indications that M.W. was contesting much of the prove up testimony, even going so far to accuse Ms. Keegan of lying, the court indicated that it “does find there are sufficient facts in the record to establish a factual basis for the court to accept the plea.”

(68:61) Following this determination, the court then proceeded to the contested dispositional hearing.

At the dispositional hearing the State called the foster parent to testify. Trial counsel did not object to this testimony. The foster

parent testified about plans to continue contact with between M.W. and her children should termination occur. (68:79) The foster parent indicated that she believed the children “would not benefit from not being able to see their mom”. (68:79) The foster parent testified that M.W.(child) was “very concerned about not being able to see his mom”. (68:85)

The following day on March 16, 2016 the social worker, Kimberly Keegan again testified. The worker indicated that M.W.(child)’s relationship with his mother was “pretty significant for him”. (69:7) The social worker testified that the foster parent plans to keep in “pretty frequent contact” with mom. (69:10) The social worker also testified that the child (M.W.) had made it clear that he wanted to see his mother. (69:41) The social worker indicated that she was not worried about the fact that the foster parent’s promises of maintaining future contact were not enforceable because she believed that the foster parent will follow through with the contact.” (69:42)

Following this testimony the State encouraged the court to terminate the parental rights of M.W., despite the significant relationship she had with her children, citing that the foster parent’s promised continuing contact between the mother and the children was a reason to grant the termination. (69:64) The State argued that while termination would sever the legal relationship, termination didn’t mean that the actual relationship would be severed. (69:40)

The Court found that a substantial relationship existed between M.W. and her children. Adopting the rationale of the State the court

indicated that there were legal relationships and real relationships, and noted that it had never seen a better relationship between foster parents and birth parents before. (69:74)

The court then held that despite the existence of a substantial relationship between M.S. and her children, it would not be harmful to legally sever that relationship because there had been “extensive testimony” that the relationship will continue even if termination were to occur, and that the court believed the ongoing contact would continue. (69:80) The court then indicated that it “would ask both mothers to continue to work together”. (69:81)

An appeal followed the involuntary termination of M.W.’s parental rights. At the hearing on February 17, 2017, the trial court summarily denied M.W.’s motion to withdraw her plea, and also denied her motion regarding the reliance on the foster parent promises of future contact.

I do not believe that the appellant has established a prima facie case that the plea was not knowingly and voluntarily, and therefore, I don’t believe that Ms. Williams is entitled to an evidentiary hearing on the issue of the knowingness and voluntariness of the plea.

(70:16)

Despite M.W.’s arguments to the contrary, the court also indicated:

Then Judge Swanson was required to make such inquiries necessary to satisfactorily establish that there was a factual basis for acceptance of the plea, and although he put off finally

accepting the plea until a later date and established that factual basis later, I believe that he did make sufficient inquiry to satisfactorily establish that there was a factual basis for acceptance of the plea. So because of that, I don't believe that M.W. has established a prima facie case that she is entitled to an evidentiary hearing, and I find at this time that the plea was made knowingly and voluntarily. Now, as for the factual basis. I disagree and I don't believe that Ms. Schmieder has cited any case law that indicates that upon entry of a no contest plea, it is necessary for the Court and party to come to a meeting of the minds as to exactly which facts are true and are not true.

(70:18)

The court then permitted M.W. to proceed with the ineffectiveness portion of her post disposition motion. When trial counsel was questioned about why she did not object to the testimony of the foster parent at disposition, she indicated that she did not do so because the foster parent and M.W. had a very good relationship.

(70:27) Trial counsel also did not object because she did not think it prudent to object when the foster parent was indicating "all the positive things that would happen between herself and M.W. if in fact a termination did occur." (70:28)

The court found that trial counsel was not ineffective, first finding that counsel had a strategic reason for not objecting, and then concluding that even if deficient there was no prejudice to M.W. (70:43) The court also found that the trial judge had not "placed any reliance on the testimony regarding the likelihood of ongoing contact,

or to the degree he did place some reliance on it, I think that it was very, very minimal.” (70:50)

The Wisconsin court of appeals denied M.W.’s appellate claim that establishing the factual basis after the plea violates due process by an order dated July 11, 2017.

FOR GRANTING THE PETITION

The Wisconsin Supreme Court by declining to address the issues herein has adopted the rationale and practice of the lower courts, a rationale which has permitted and sanctioned the following two unconstitutional practices: (1) establishing the factual basis of a no contest plea after rather than before the colloquy with the parent, and (2) relying on the unenforceable promises of a foster parent to determine if severance of the conceded substantial relationship between and parent and a child is in the child’s best interests. Both of these practices violate a parent’s fundamental right to Due Process under the Fourteenth Amendment.

- 1. It is a violation of due process and a parent’s constitutional right to the care, custody and control of their children when the factual basis for a no contest plea to a petition to involuntary terminate parental rights is established after the plea colloquy and is based upon testimony that the parent disputes and was not previously in the record.**

This court has long recognized that a parent has a fundamental liberty interest in the care, control and custody of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1971). This court has also held that the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) *quoting*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Due Process Clause of the Fourteenth Amendment requires that a parent is entitled to a hearing on her fitness as a parent before her children are taken from her. *Stanley*, 405 U.S. at 657-58. As stated by this court in *Santosky v. Kramer*, 455 U.S. 745 (1982), until the state has proven unfitness, the courts must adopt procedures that presume that the best interests of the child lie with maintaining the integrity of the family:

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act §631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

Id. at 760-761.

The plea practice routinely utilized by the State of Wisconsin and the Milwaukee County Juvenile Court system violates the Due Process Clause of the Fourteenth Amendment because it permits a parent to be found unfit on facts not yet in the record at the time the parent enters their no contest plea. In Wisconsin, a finding of one of the grounds for termination means that the court must find a parent to be unfit, see Wis. Stat. 48.424(4), and one of the possible grounds is Continuing Need of Protection or Services, see Wis. Stats. 48.415(2)(a). Specifically, Wis. Stats. 48.415(2)(a) requires a finding of unfitness where the state has proven:

(a)1. That the child has been adjudged to be a child or an unborn child in need of protection and services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders....

(a)2.a. In this subdivision, “reasonable effort” means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstance of the case.

(a)2.b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

(a)3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.

Termination of parental rights “work[s] a unique kind of deprivation,” and for that reason, “[a] parent’s interest in the accuracy and justice of the decision ... is... a commanding one.” *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 27 (1981). A parent’s interest is “indeed more precious than any property right.” *Santosky*, 455 U.S. at 758-59. Therefore a parent’s interest in their relationship with their children is “fundamental.” *Id.* at 753. *See also Id.* at 774 (Rehnquist, C.J., White J., O’Connor, J., dissenting) (“I do not disagree with the majority’s conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interest protected by the Fourteenth Amendment”). When state laws impinge on personal rights protected by the Constitution, they must serve a compelling state interest and be narrowly tailored. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

This court has consistently stated that waiver of fundamental rights requires a knowing, intelligent, and voluntary waiver on the record. This court’s ruling in *Boykin v. Alabama*, 395 U.S. 238 (1969) is most analogous to the situation presented here. In that case, this Court said that:

The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran*, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas v. Alabama*, 380 U.S. 415, 422.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 242. The accompanying footnote provides that:

A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466.

Id. at fn. 5. Similarly, a waiver of the right to counsel must be "knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400 (1993). Wisconsin law requires that before a court accepts an admission to the facts in a termination of parental rights petition it

must “determine that the admission is made voluntarily and understandingly.” Wis. Stat. § 48.422(7).

There exists no reason for a different rule to apply in this case than the rule for criminal pleas. Like an admission, a no contest plea in a termination of parental rights case affects a fundamental interest and requires fundamentally fair procedures. Sanctioning a no contest plea under the practice employed by the State of Wisconsin and sanctioned by the Wisconsin Supreme Court is fundamentally unfair. The practice of establishing the factual basis for a plea after the plea itself would not be acceptable in a criminal case because it defeats the reason that the court must establish a factual basis for the plea before accepting it. *See Mitchell v. United States*, 526 U.S. 314, 323 (1999) (The purpose of factual basis inquiry was to ensure that the defendant understood the charges and that there was a factual basis for them.). The practice of establishing a factual basis after accepting a plea defeats this purpose. This court should hear and decide whether the practice violates due process of law.

2. It is a violation of due process and a parent’s constitutional right to the care, custody and control of their children for the trial court to rely on the unenforceable promises of a proposed adoptive placement regarding future contact to determine if severance of the substantial relationship between the parent and child will be harmful to the child.

This court should accept review to decide whether it violates the Due Process Clause of the Fourteenth Amendment to permit the State of Wisconsin to allow trial courts to consider unenforceable promises made by an adoptive resource to allow future contact between a parent

and child when considering whether severance of the substantial relationship between the parent and child would be harmful to the child if the involuntary termination of parental rights were granted. The statements of promised future contact are illusory because they are unenforceable, and because they are unenforceable they are unreliable. Allowing reliance on such statements violates a parent's fundamental right to Due Process.

This court has previously held that the constitutionality of the best interests standard depends on specific factors and is often best left to the states on a case-by-case basis. However, this court has nonetheless recognized that “[t]he protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. *Troxel v. Granville*, 530 U.S. 57, 101, 120 S. Ct. 2054, 2079, 147 L. Ed. 2d 49, 78 (2000).

The issue, whether a court should be permitted to rely on promises of future contact between a parent and a child when determining if termination is in the child's best interest, requires this court's review for two reasons.

First, allowing the Wisconsin children's court to consider statements of intent, which might be manipulated or changed, allows the courts to avoid their statutory duty to consider, “Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.” Wis. Stat. §48.426(3)(c). Such statements should be inadmissible because they allow a court to avoid the difficult decision

of whether to truly sever a substantial relationship between a mother and a child. Such statements should not be admissible because they are compelling despite being both unenforceable and unreliable. A parent's right to due process is violated when a court is permitted to determine best interests based upon evidence that is illusory.

Second, while the determination of best interests does require an individualized analysis, often best left to the state trial court without interference, such a determination must still meet the minimum threshold of fundamental due process. Permitting reliance on these promises of future contact, denies the parents the right to have the best interests of their child properly determined by addressing the mandated dispositional factors. Wis. Stats. §48.426. When a child has a substantial relationship with a parent (a conceded fact in these cases), the court must weigh the harm of severance of that relationship in determining the child's best interest, and whether the severance will be harmful to the child. Allowing reliance on a foster parent's promises of maintaining contact...promises which may never come true and can never be made true...allows the court to avoid determining if severance is harmful, because the court can be lulled into believing that severance will not actually occur.

The Wisconsin Supreme Court has addressed the issue of foster parent promises previously, but in so doing did not address (and has declined again herein) the issue raised in these cases. ***State v. Margaret H.***, 234 Wis. 2d 606, ¶29, 610 N.W.2d 475 (2000). In ***Margaret H.*** both the circuit court and the appellate court got it

wrong. *Margaret H.* involved twin boys whose mother was subject to a termination petition in Milwaukee County. *Margaret H.*, 2000 WI 42, fn 1. The boys had been in a variety of placements and the agency had voiced an intention to pursue a permanent relative placement with Margaret H. *Margaret H.*, ¶5. The agency had indicated that Margaret H.'s housing was not adequate in size, and the twins remained in foster care as Margaret H. sought more suitable housing. *Id.* A short time later the twins were placed in a prospective adoptive foster placement. Approximately two years later Margaret H., after saving money, was able to purchase a suitable home. *Id.* at ¶6. However, approximately one month later the termination petition was filed. *Id.*

The trial court, in *Margaret H.*, after finding grounds as to the mother, held a dispositional hearing. *Id.* at ¶7. At that hearing, maternal aunt, psychologists, social workers, Debra G. (the foster parent), and Margaret H. all testified. *Id.* The psychologists and social workers favored termination and eventual adoption of the twins by Debra G. *Id.* at ¶8. Debra G. testified that she intended to support the twins' relationship with their birth family and envisioned continuing contact after adoption. *Id.* At the conclusion of the hearing the trial court found that a substantial relationship existed between the twins and Margaret H. and that severance would be harmful to the boys. *Id.* at ¶10.

An appeal followed, and the Wisconsin court of appeals reversed, specifically finding that:

Significantly, the [circuit] court's focus on what we have denominated as point one in its expressed rationale is, on its face, wrong; no one - not Debra G., not any of the psychologists, not any of the social workers, and not even the grandmother opined that either termination or continued placement with Debra G. would sever the twins' relationships with their blood relatives. Thus, absent some support in the record, and we perceive none, the [circuit] court's apparent assumption that the twins' relationships with their blood relatives would be severed is "clearly erroneous." (emphasis supplied).

Margaret H., ¶12, quoting *In re the Termination of Parental Rights to Darryl T.-H. and Durrell T.-H.*, 229 Wis. 2d 737, 600 N.W.2d 56 (Ct. App. July 27, 1999).

However, the Wisconsin Supreme Court held that the court of appeals conclusion was contrary to well-established law. **Margaret H.**, ¶24. The court found that the court of appeals' focus on whether the termination of parental rights would lead to an actual severance of ties between the children and family was an approach that conflicted with precedent and was based upon an erroneous interpretation of the law. **Margaret H.**, ¶26.

This court should accept review because the practice of considering foster parent statements regarding intent to allow future contact rests disposition on illusory and unenforceable facts. At the same time it detracts from the court's duty to consider the harm of severing a parent's familial bond with their child. Again analogy to the criminal law highlights the due process violation created by this practice. A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*,

2006 WI 66, ¶10, *citing United States v. Tucker*, 404 U.S. 443, 447 (1972). Similarly, a parent facing the grievous and permanent loss of their fundamental right to parent their child should have disposition entered on evidence that is accurate and not illusory or even subject to manipulation.

This court should hear and decide whether the Due Process Clause of the Fourteenth Amendment allows a parent's parental rights to be terminated based on illusory or unenforceable information.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated this 11th day of April, 2018.

Respectfully submitted,

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