**Permissive or Interlocutory Appeals in SPD cases**

Please consult the following guidelines when contemplating whether to request an interlocutory or “permissive” appeal[[1]](#footnote-1).

**Executive summary:**

The court of appeals rarely permits interlocutory appeals, so petitions for leave to appeal a nonfinal order should be reserved for circumstances where: (1) a preliminary decision essentially prevents you from mounting a defense, (2) your client would be otherwise irreparably harmed (such as a juvenile waiver into adult court), or (3) a petition is necessary to preserve an issue for appeal under the ordinary course. The petition is filed by the trial attorney and must conform to strict content and time requirements. If the petition is granted, appellate counsel is then appointed.

The procedure for pursuing a permissive appeal is governed by Wis. Stat. §§ 809.50 and 809.52. The criteria the court of appeals applies when deciding whether to entertain a permissive appeal are found in Wis. Stat. § 808.03(2).

**When is an Interlocutory Appeal Appropriate?**

Litigants need permission from the court of appeals to appeal a non-final order, *i.e.* an order (or judgment) that does not dispose of “the entire matter in litigation.” Wis. Stat. § 808.03(1).

The court of appeals *may* grant permission if the appeal will:

* + materially advance the termination of the litigation or clarify further proceedings
	+ Protect the petitioner from substantial or irreparable injury
	+ Clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2).

In practice, there are two types of cases where the court of appeals will grant the defendant an interlocutory appeal. In the first category, the trial court has made a fairly clear mistake that would significantly handcuff the defense. For example, in one case the trial court had wrongly determined that it could not entertain a motion to reconsider a dispositive suppression motion. *State v. Seymour*, 2019 WI App 48, ¶ 10, 388 Wis. 2d 475, 934 N.W.2d 575. In another, the trial court had wrongly denied the defendant’s motion to continue the trial and amend a witness list to add expert witnesses. *State v. Allen*, 2015 WI App 37, ¶ 1, 363 Wis. 2d 655, 862 N.W.2d 903.

The court of appeals will also allow interlocutory appeals in order to prevent irreparable harm to significant constitutional rights. For this reason, “a petition for [interlocutory] review of an order waiving juvenile jurisdiction should ordinarily be granted.” *State v. Villegas*, 2018 WI App 9, ¶ 39 & n. 14, 380 Wis. 2d 246, 273, 908 N.W.2d 198, 212. The court similarly granted an interlocutory appeal in order to resolve the interpretation of a statute involving the termination of parental rights. *In re T.L.E.-C.*, 2021 WI 56, ¶ 12, 960 N.W.2d 391, 396.

Finally, in rare instances it may be appropriate to file a petition for leave to appeal a non-final order to preserve the issue for consideration when the final judgment is appealed. For instance, the filing of a permissive appeal will preserve issues with preliminary hearings and bail determinations, even if the court of appeals does not grant the petition. *See State v. Webb,* 160 Wis. 2d 622, 631, 636, 467 N.W.2d 108 (1991); *State v. Wilcenski*, 2013 WI App 21, ¶ 2 n. 2, 346 Wis. 2d 145, 158–59, 827 N.W.2d 642, 649–50. In such cases, the court’s authority to grant permissive appeals in order to protect your client from “substantial or irreparable injury” should be invoked. Still, even if the issue is “preserved” for the subsequent appeal, the defendant must show that the error prejudiced the trial or plea. *Wilcenski*, 2013 WI App 21, ¶ 20; *State v. Wolverton*, 193 Wis. 2d 234, 255, 533 N.W.2d 167, 174 (1995).

**Filing the Petition for Leave to Appeal a Non-Final Order**

Trial counsel is responsible for filing the petition for leave to appeal a non-final order. A sample petition can be found on the SPD’s website.

**Content.** The content requirements are set out in Wis. Stat. § 809.50(1). Specifically, the petition[[2]](#footnote-2) must include:

1. A statement of the issues;
2. A statement of the facts;
3. The argument explaining why the petition meets the criteria discussed above
4. A copy of the judgment or order

**Deadline.** The petition must be **filed within 14 days** of the “entry” of the judgment or order. Thus, to file a petition a written order must be signed and filed with the circuit court clerk. Wis. Stat. §§ 806.06 (1)(b), 807.11(2).

**Filing.** The petition and supporting memorandum must be **electronically filed in the court of appeals**. Do not file it with the circuit court. To e-file the petition, first navigate to the court of appeals e-filing homepage, and then click on the “File a new case” link. In the “Court type” drop-down menu select “court of appeals,” and in the “Filing Type” menu select “permissive appeal.” You will then be able to enter the Circuit Court county and case number. Next, indicate whether or not you are a “government filer,” *i.e.*, whether you are SPD staff or a private bar attorney. Click “continue,” and in the next page add the parties and attorneys. Once complete, you will be taken to the pages to upload and then file the petition. These directions can also be found on the Wisconsin Court System website under appellate efiling.

**Word/page limit.** The petition and supporting memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.50(1). A statement must be appended to the petition attesting to the type of font used (monospaced or proportional serif). If a proportional serif font is used, the statement must include a word count. Wis. Stat. § 809.50(4).

**Response.**  The opposing party must file a response within 14 days of service of the petition, with the same page and word limits listed above. Wis. Stat. § 809.50(2).

**Suggestions on Content**

As a practical matter, the petition should contain everything the court would need to decide the case on appeal. Include a discussion of the merits (legal and factual) sufficient to demonstrate to the court that the petitioner is likely to prevail on appeal. Also, emphasize why an appeal later is an insufficient remedy.

In addition, because the court will have no record before it, relevant portions of the transcripts, motions, orders, exhibits, etc., must be attached to the petition or response. If the petition is inadequate in this regard, the court is likely to deny it rather than order supplementation. If necessary portions of the record cannot be obtained in time, set forth the essential facts in an affidavit.

**After the Petition is Filed**

The act of filing the petition does not automatically stay circuit court proceedings. If you want the circuit court case to stop while the petition is being considered, file a motion to stay with the circuit court. If the court denies the stay motion, you may file a motion to stay with the court of appeals. Wis. Stat. §809.52.If the petition is granted, that operates as a notice of appeal, and the circuit court is precluded from taking most, but not all, actions. *See* Wis. Stat. § 808.075.

In addition, if your petition is granted **immediately** inform the appellate office at madisonappintake@opd.wi.gov so appellate counsel can be appointed. Likewise, if the state appeals a non-final order, pursuant to Wis. Stat. § 974.05, or the court grants the state’s permissive appeal request, **immediately**send the notice of appeal or order granting review to madisonappintake@opd.wi.gov so appellate counsel can be appointed.

1. The term “interlocutory appeal” does not appear in the statutes. Rather, it is the generic term for any appeal of a nonfinal order. *See, e.g., State v. Jendusa*, 2021 WI 24, ¶ 15. In most instances, an appellate court must grant permission to appeal nonfinal orders, so the term “permissive appeal" may also be used for these kinds of appeals. Wis. Stat. § 808.03(2). There are limited circumstances where a litigant has a right to file an interlocutory appeal of a nonfinal order, such as the state’s right to appeal an order suppressing evidence. Wis. Stat. § 974.05(1)(d). This memo addresses only permissive interlocutory appeals under Wis. Stat. § 808.03(2). [↑](#footnote-ref-1)
2. Technically a party may file a petition and a separate supporting memorandum, but there is no discernable advantage to filing two documents instead of just one petition that meets all the statutory requirements. [↑](#footnote-ref-2)