STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT [redacted]

No. [redacted]

STATE OF WISCONSIN,

*Plaintiff-Respondent,*

*v.*

[redacted]

*Defendant-Appellant.*

**PETITION FOR LEAVE TO PURSUE PERMISSIVE APPEAL AND SUPPORTING MEMORANDUM**

Permissive Appeal From Bindover
[redacted] County Circuit Court,
Hon. [redacted], presiding
Case No. [redacted]

[redacted]
*Wisconsin Bar No.* [redacted]
*Counsel for ---*
[redacted].

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

CASES



CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

## PETITION AND MEMORANDUM

Petitioner [redacted], by counsel, now seeks leave to appeal from bindover after a preliminary hearing, and from the circuit court's refusal to vacate that bindover and dismiss the complaint. [redacted] files this petition and supporting memorandum pursuant to WIS. STAT. §§ 808.03(2), 809.50(1). The evidence at the preliminary hearing did not establish probable cause that a felony occurred. To the contrary, the state proved that this substitute teacher's actions fell squarely within the scope of lawful corporal punishment under WIS. STAT. § 118.31.

### *Statement of Issues*

Viewed in the light most favorable to the state, the evidence at the preliminary hearing showed that a substitute teacher intentionally inflicted at least some physical pain, and left a temporary mark with [redacted] finger, grabbing a student at the back of the neck and pushing [redacted] toward a seated position as a matter of classroom discipline. The general question is whether that evidence established probable cause that the teacher committed a felony. Specifically, the issues are:

1. Does WIS. STAT. § 118.31(3) make lawful certain acts of corporal punishment, defined under WIS. STAT. § 118.31(1) to mean "the intentional infliction of physical pain which is used as a means of discipline"?

The preliminary hearing judge below appeared to conclude that § 118.31(3) does not make lawful any conduct that falls within the definition of corporal

punishment under § 118.31(1). The trial judge in the circuit court below did not explicitly decide the question.

2. If Wrs.STAT.§118.31(3)(h) makes lawful a teacher's use of "incidental, minor or reasonable physical contact designed to maintain order and control," even when that contact fits within the definition of corporal punishment in § 118.31(1), did the preliminary hearing omit a finding of probable cause that [redacted] committed a felony?

Both the preliminary hearing judge and the trial judge in the circuit court below concluded that the preluding established probable cause to bindover [redacted] on a felony charge.

## *Statement of Facts*

On Friday, April 20, the [redacted] School needed a substitute art teacher. [redacted], a [redacted]-year-old substitute teacher, agreed to serve that day.[1] Preliminary Hearing Transcript 12-13, 14 (December 15, 2011) (App 1-29); App. 12-13, 14. Late that afternoon, as [redacted] prepared to dismiss a third-grade class and send those students back to their home room, [redacted] instructed the students to sit in a line on the floor. Instead of obeying, three of the [redacted] in the class remained standing or stood up. App. 4, 7-8. [redacted] approached one of the [redacted], [redacted] year old [redacted] and "grabbed" [redacted] by the back of [redacted] neck. App. 5, 6. [redacted] did this with one hand. App. 9. It felt "bad," according to [redacted] App. 5. [redacted] then agreed with the prosecutor that it hurt.

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[1] The facts come from the testimony at the preliminary hearing. At this stage, the Court both may assume the facts true and

view them in the light most favorable to the state.

App 5. [redacted] used the hand on [redacted] neck to push [redacted] back toward the seated position [redacted] had told the class to take. App. 9.

[redacted] said that [redacted] left a mark on [redacted] neck. App. 9. [redacted] could not remember what the mark looked like. App. 10. It was [redacted]'s finger that touched [redacted] neck, and [redacted] did not know if it was more than one finger. App. 10.

The state and [redacted] made no claim of actual injury, so the "bodily harm" element rests on physical pain. App. 16, 36-37; WIS. STAT.§ 939.22(4).

An investigating officer, Det. Sgt. [redacted], did not see the mark—indeed, [redacted] apparently never met [redacted] at all. App. 15. The state offered no other testimony or photograph of any mark.

Det. Sgt. [redacted] testified that [redacted] admitted grabbing the back of a [redacted]'s neck and directing [redacted] to where [redacted] was supposed to be. App. 13. [redacted] added that [redacted] described being "frustrated"[2] by the children's behavior in that class and by a clogged sink. App. 13.

[redacted] objected to bindover, relying on WIS. STAT. §§ 118.31(3)(h) and 939.45(5)(b). App. 16-19, 20. With explanation, the preliminary hearing court eventually bound over. App. 21-25. The preliminary hearing court acknowledged that, "I don't-I don't feel that it-that it is an easy call." App. 25. But that court appeared to conclude that any conduct within the definition of

[2] If the case proceeds to trial, that state claim will be sharply disputed.

corporal punishment, Wrs.STAT.§118.31(1), is prohibited notwithstanding§ 118.31(3). *See* App. 22.

In the trial branch, [redacted] timely challenged the bindover by motion and supporting brief. R12. At a hearing, the trial court entertained argument and then denied the motion to vacate the bindover and dismiss. R15. That court explained in part:

> I can envision a scenario that would generate that kind of evidence that would meet the criteria of the abuse statute. I can also envision one that would fall within the parameters of reasonable physical control under section 118.31. If somebody were to clamp on to a child's neck, grab with substantial force, and inflict pain and push a child to the ground and leave a red mark that lasted for a substantial period of time, that could be conduct that would fall within the prohibition of the physical abuse statute. If, on the other hand, this consisted of a brief and not substantial grabbing of the child by the neck and directing him to the ground, so to speak, in order to maintain some semblance of control within the classroom, it was brief, it was not an exaggerated grip that resulted in any substantial pain, I could see that falling within the protection of privileged conduct that's defined in 118.31.

Hearing Transcript 8 (February [redacted] 20[redacted] (App. 30-40); App. 37.

Because the trial judge viewed the evidence as "not developed to the point where this Court can make that

kind of factual determination at this point," App. 38, [redacted] declined to dismiss. "On the record that exists,[redacted] added, "the defendant's arguments could be very plausible in terms of the interpretation of what transpired, and to put somebody through this sort of prosecution for something like that would be abusive. On the other hand, there may be significantly more behind the scenes that I have not heard or seen, in the form of testimony or reports or records." App. 38. The order denying the motion was entered on February[redacted]20. RI App. [redacted].

[redacted] faces trial on one felony count of intentional physical abuse of a child, for causing bodily harm. WIS. STAT.§ 948.03(2)(b); R9. [redacted] seeks interlocutory relief.

## *Statement of Grounds*

For more than 20 years, Wisconsin has required a criminal defendant to seek leave to appeal permissively an error at the preliminary hearing, including an erroneous bindover. A fair and errorless later trial "cures" failings at the preliminary hearing. ***State v. Webb,*** 160 Wis. 2d 622, 628,467 N.W.2d 108,110 (1991). The ***Webb*** court discussed the standards for permissive appeals, such as [redacted] pursues here, to address mistakes at preliminary hearings. ***Webb,*** 160 Wis. 2d at 632, 467 N.W.2d at 112. It contemplated such permissive appeals. ***Id.*** at 636, 467 N.W.2d at 114.

A permissive appeal here will serve all three statutory purposes of interlocutory consideration in this Court.

1. *Materially Advance Termination of Litigation or Clarify Further Proceedings.*

Because the circuit court should not have bound over [redacted] at all, appellate review now will advance materially the termination of this case. *See* WIS. STAT. §§ 808.03(2)(a), 809.50(1)(c). This Court can end the case now, as the circuit court should have.

Further,short of dismissal, this appeal would clarify further proceedings below. The issues here-whether § 118.31(3)(h) explicitly makes lawful [redacted]'s conduct and, relatedly, whether the preliminary hearing established probable cause that anything unlawful happened-will recur if there is a trial. So even if this Court did not set aside the bindover and order the case dismissed, its opinion now would guide the circuit court in instructing the jury at trial and in considering a motion to dismiss when the prosecution rests.

Note, too, that the comment to the jury instruction that implements the privilege of reasonable discipline, WIS. STAT. § 939.45(5), assumes, in the absence of clear case law in Wisconsin, that the privilege applies to teachers. WIS. JI-CRIM 950, Comment n.3 (2006). This Court can clarify that, as well as the relationship between§ 118.31(3) and § 939.45(5).

2. *Protect Petitioner from Substantial or Irreparable Injury.*

At worst, a [redacted]-year old substitute teacher did this to warrant a felony charge: [redacted] grabbed the back of a [redacted]-year old student's neck with one hand, pushed [redacted] back toward the seated position on the floor that had instructed students to take, and in doing so left a mark with a finger. The [redacted] thought that it felt "bad" and hurt. [redacted] did not slap or otherwise strike the [redacted]; [redacted] did not repeat [redacted] action; did not

cause any injury. Compare

***State v. Kimberly B.,*** 2005 WI App 115, 1/1/3, 20-28, 283 Wis. 2d 731, 737-38, 743-48, 699 N.W.2d 641, 644, 647-49 (sufficient evidence of intentional physical abuse of a child where mother hit 9-year old daughter with closed fist six to nine times, hit her with an umbrella, and left a bruise and swelling beneath right eye, marks on left arm, and a portion of skin peeled off due to being poked with the umbrella).

The trial court below acknowledged that, if [redacted] is right, subjecting [redacted] to a felony trial would be "abusive." App. 38. The costs in lawyer's fees (counsel is retained), stress, and reputational injury to a teacher with no prior criminal record for a misguided felony trial all are substantial. Those injuries also are irreparable, at least in part. No statute will allow [redacted] to recover [redacted] attorney's fees if [redacted] is acquitted. Then, too, stress and anxiety are not recouped and erased. *See* Wrs. STAT. §§ 808.03(2)(b), 809.50(1)(c).

Last, while an acquittal might help to restore reputation and remedy that injury, it never will do *so* completely; some friends, neighbors, and members of the public in small communities like [redacted] always will harbor lingering doubts. President Reagan's first Labor Secretary, Raymond J. Donovan, got it right. When he walked out of the Bronx County Courthouse, after a jury acquitted him of all counts in a messy fraud and larceny trial, the assembled media expected a triumphal response from the exonerated former Cabinet secretary. Instead, he looked directly into the cameras and asked simply, "Which office do I go to to get my reputation back?" *See* Selwyn Raab, Donovan *Cleared of Fraud Charges by Jury in Bronx,* NEWYORKTIMES (May 26, 1987). [redacted] will face the same sort of lasting injury.

3. *Clarify an Issue of General Importance.*

Three issues here have general importance. First, is § 118.31 in truth not "the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline," as the criminal jury instruction committee's comment assumes? *See* WIS. JI-CRIM 950, Comment n.3. An appellate resolution would give more certainty than the committee's assumption.

Second, does the privilege for reasonable discipline by a person responsible for a child's welfare, WIS. STAT. § 939.45(5), apply to teachers as the criminal jury instruction committee also assumes? WIS. JI-CRIM 950, Comment n.3.

And third, may a circuit court, in considering the propriety of bindover, "envision" other possible "scenario[s]" beyond the evidence and reasonable inferences at the preliminary hearing in the case at bar, and continue proceedings in one case because it properly could do so in a hypothetical next case? *See* App. 37-38. That is what the trial judge below did, at least on one fair reading of [redacted] oral decision.

Finally, statutory criteria aside, [redacted] is likely to prevail on a permissive appeal. ***Webb,*** 160 Wis. 2d at 632, 467 N.W.2d at 112. Both circuit court judges below seemed to recognize that bindover was a close call here. App. 25, 38. Properly understood, 118.31(3)(h) clearly applies to [redacted]'s case, and provides not just an affirmative defense: it establishes a safe harbor for corporal punishment under these circumstances, and makes lawful the very contact that [redacted] had with this pupil. The state did not prove at this preliminary hearing that [redacted] probably committed a felony. It proved instead

beyond reasonable dispute that [redacted] did *not* commit a felony.

## CONCLUSION

[redacted] asks this Court to grant leave to pursue a permissive appeal, challenging the bindover and asking this Court to order dismissal. This appeal will advance termination of the case, spare [redacted] the substantial financial and reputational injury that a jury trial will cause, clarify law in this case and generally, and foreclose a possible appeal after a jury trial.

Dated this■day of [redacted], [redacted].

Respectfully submitted,

[redacted]
Counsel for [redacted],
*Defendant-Appellant*

[redacted]
*Wisconsin Bar No.* [redacted]

## CERTIFICATION

I certify that this petition conforms with the rules contained in WIS. STAT.§§ 809.50(1), and is produced with proportional serif font. The length of this petition and supporting memorandum is [redacted] words. See WIS. STAT. §§ 809.19(8)(c)2., 809.50(4).

Dated this [redacted] day of [redacted], [redacted].

[redacted]
Counsel for [redacted]

[redacted]
*Wisconsin Bar No.* [redacted]