

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. \_\_\_\_\_  
\_\_\_\_\_ County Case No. \_\_\_\_\_

\_\_\_\_\_,

Defendant-Petitioner.

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**PETITION AND MEMORANDUM FOR LEAVE TO APPEAL A NONFINAL  
ORDER OF THE CIRCUIT COURT FOR \_\_\_\_\_ COUNTY,  
\_\_\_\_\_, PRESIDING**

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Name  
Address  
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Attorney for Defendant-Appellant

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**PETITION**

Pursuant to Sections 808.03(2) and (Rule) 809.50 of the Wisconsin Statutes,<sup>1</sup> (defendant’s name), by attorney \_\_\_\_\_, petitions for leave to appeal the \_\_\_\_\_, Order of the \_\_\_\_\_ County Circuit Court, the Honorable Judge \_\_\_\_\_ presiding, denying (defendant’s name) motion for a hearing under Wis. Stat. § 118.15 (5) (b) 2.

**STATEMENT OF ISSUE PRESENTED**

Did the court err in ruling that § 118.15 (5) (b) 2. calls for a post-trial post-conviction evidentiary hearing, rather than a pre-trial evidentiary hearing as the plain language of the statute indicates?

**STATEMENT OF FACTS**

A complaint was filed \_\_\_\_\_ charging (defendant’s name) with failure to cause child to attend school, contrary to §§ 118.15 (1) and (5) and 118.16 (5)<sup>2</sup>. APPENDIX CITE. Section 118.15 (1) requires any person who has control of a child between the ages of six and 18 years to “cause the child to attend school regularly[.]”

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<sup>1</sup> Textual references to the Wisconsin Statutes are hereinafter indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.”

<sup>2</sup> Section 118.16 (5) enumerates the steps that must be taken by the school attendance officer before any proceeding may be brought under Section 118.15. The following steps must be taken in the year the truancy occurred: (a) meet or attempt to meet with the child’s parent or guardian to discuss the child’s truancy; (b) provide the child with the opportunity for educational counseling to determine whether a change in curriculum would resolve the truancy; (c) evaluate the child for learning problems that may be the cause of truancy and take the necessary steps to overcome any learning problems. If the child has undergone similar testing in the previous year and those tests indicate that the child is performing at his or her grade level, no evaluation is necessary; and (d) conduct an evaluation to determine if social problems are the root of the child’s truancy, and if so, take any appropriate action necessary.

First-time offenders of the Compulsory School Attendance law face a maximum \$500 fine or 30 days imprisonment or both. Wis. Stat. § 118.15 (5) (a) 1. a.

The complaint alleges that (defendant's name)'s son/daughter (defendant's child's name), a student enrolled at \_\_\_\_\_, missed 94 of 168 school days, of which 83.5 were unexcused absences during the \_\_\_\_\_-\_\_\_\_\_ school year. The matter was eventually set for jury trial before the Honorable Judge \_\_\_\_\_. On the day of trial, \_\_\_\_\_, the matter was administratively transferred to the Honorable Judge \_\_\_\_\_ pursuant to Chief Judge Directive (number). APPENDIX CITE

On \_\_\_\_\_, (defendant's name) filed a motion requesting a hearing pursuant to § 118.15 (5) (b) 2. for a pre-trial determination of whether or not the child's disobedience prevented his/her compliance with § 118.15 (1). APPENDIX CITE. (Defendant's name) requested a date to be heard on his/her motion. APPENDIX CITE. Under § 118.15 (5) (b) 2., "if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed and the child shall be referred to the court assigned to exercise jurisdiction under ch. 48."

The Court found that the motion was premature and denied the motion without a hearing, ruling that the requested evidentiary hearing should be held post-conviction. APPENDIX CITE. The Circuit Court held that § 118.15 (5) (b) 2. "doesn't apply unless there's already been the conviction under [§ 118.15] (5) (a)." Appendix Cite Tr. 2:13-14. Additionally, the Circuit Court found that if a defendant is found not guilty at trial, the Court never reaches the issue of whether the defendant could not comply with the statute

based on the disobedience of the child. Tr. 2:21-23. In making its ruling the Circuit Court said:

“I think there has to be a conviction under paragraph (5) (a) for paragraph (5) (b) to apply because paragraph (5) (b) starts out number 1, paragraph (a) does not apply to a person who has under his or her control a child who has been sanctioned [*sic*] under 49.26 (a) (h) and then number 2 says in a prosecution under paragraph (a), so I think that there has to [be] a conviction first before the Court can get to that point so the request for the motion hearing is denied at this time as premature.” Appendix Cite Tr. 2:24-3:8.

(Defendant’s name) filed a Motion to Reconsider on date\_\_\_\_\_. APPENDIX CITE. His/her motion was denied on \_\_\_\_\_. APPENDIX CITE. A written order denying (Defendant’s name)’s request for a hearing under § 118.15 (5) (b) 2. was entered into the record on \_\_\_\_\_.

### **STATEMENT SHOWING NECESSITY FOR REVIEW**

There are three reasons why the Court of Appeals should grant a permissive appeal on the Compulsory School Attendance law now. First and foremost, an immediate review will clarify an issue of general importance in the administration of justice. There are several similar cases pending in \_\_\_\_\_ County alone where different courts are applying different interpretations of § 118.15 (5) (b) 2. As a result, an immediate review will provide consistency in the court system regarding the correct interpretation of § 118.15 (5) (b) 2.

Second, immediate review and a decision will clarify further proceedings, not only in this case, but in pending cases. In addition to the cases currently pending as

described below, there have been 86 new cases charged in \_\_\_\_\_ County alleging violations of the Compulsory School Attendance law. Appendix (newspaper) article. While not all of them will allege disobedience of the child as a reason for noncompliance, several may. A review from this Court will clearly indicate what steps are to be taken when disobedience of the child is an issue.

Finally, an immediate appeal will prevent substantially injury to (defendant's name) and to his/her son/daughter. (Defendant's name)'s showing of his/her son's/daughter's disobedience will result in the action against him/her being dismissed. Additionally, his/her son/daughter will be referred to a court with appropriate jurisdiction that may be able to provide his/her son/daughter with resources necessary to resolve the underlying issues that have resulted in his/her son's/daughter's truancy.

**I. (DEFENDANT'S NAME) HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON APPEAL**

The Circuit Court erroneously held that § 118.15 (5) (b) 2. requires an evidentiary hearing only after a defendant has been convicted under § 118.15 (1). Not only does this ruling present significant procedural problems, but it also belies the plain language of the statute. Additionally, the legislature's use of the language "shall be dismissed" indicates that a pre-trial evidentiary hearing is necessary. Consequently, the Court's Order should be vacated and a pre-trial evidentiary hearing should be ordered to determine whether disobedience of the child prevented the defendant from complying with the law.

**A. The Plain Language of the Statute Requires Dismissal**

An examination of § 118.15 (5) and all of its subparts is essential to understanding the applicability of § 118.15 (5) (b) 2. Section 118.15 (5) (a) reads: "1.

Except as provided under par. (b) or if a person has been found guilty of a misdemeanor under s. 948.45, whoever violates this section may be penalized as follows...” The section subdivides into two parts that codifies the penalties for a first and a second or subsequent offense. Wis. Stat. §§ 118.15 (5) (a) 1. a. and b. Section 118.15 (5) (a) 2. and its subpart provide the court with the authority to impose community service work or counseling in lieu of the penalties previously explained and outlined in § 118.15 (5) (a) 1. Wis. Stat. §§ 118.15 (5) (a) 2. and 118.15 (5) (am). Finally, we reach the section that is the focus of this petition – Section 118.15 (5) (b). This section is further subdivided into two parts:

“1. Paragraph (a) does not apply to a person who has under his or her control a child who has been sanctioned under s. 49.26 (1) (h). 2. In a prosecution under par. (a), if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed and the child shall be referred to the court assigned to exercise jurisdiction under ch. 48.”

When interpreting statutes, the Court must first look to the plain language of the statute. Here, the language is clear: “if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed...” In examining the statute, the Court “give[s] effect to every word of a statute, if possible, so that no portion of the statute is rendered superfluous.” *State v. Dane County*, 214 Wis. 2d 605, 619, 571 N.W.2d 385, 390 (1997).

The Circuit Court misread the plain language of the statute in ruling that a conviction of a misdemeanor is a prerequisite for a hearing under § 118.15 (5) (b) 2. APPENDIX CITE. A complete reading of the statute, as outlined above, reveals that a

conviction of a misdemeanor *under section 948.45* is an exception to the applicability Section 118.15(5). However, (defendant's name) was not charged under this section and this exception as outlined does not apply.<sup>3</sup>

In applying § 118.15 (5) to (defendant's name), then, the statute essentially begins with the language “whoever violates this section...” Reading on, it's clear that he/she is subject to the penalties outlined in § 118.15 (5) (a) 1. a. because he/she is charged with a first offense. Reading further, § 118.15 (5) (b) 1. does not apply because (defendant's name)'s child has not been sanctioned under § 49.26.<sup>4</sup> Continuing, it's clear that sub. (2) applies. Here, the reference to “par. (a)” refers to § 118.15 (5) (a). Section 118.15 (5) (a) only applies if a person has been charged with § 118.15(1). Because DEFENDANT has been charged under § 118.15 (1), § 118.15 (5) (a) applies and, consequently, § 118.15 (5) (b) 2. also applies.

**B. The Statute Calls for a Pre-Trial Evidentiary Hearing Rather than a Post-Trial, Post-Conviction Hearing**

The trial court has the power to dismiss a case where there is statutory authority to do so. *State v. Clark*, 162 Wis. 2d 406, 410, 469 N.W.2d 871 (Ct. App. 1991); *State v. Davis*, 2001 WI App 63, 242 Wis. 2d 344, 626 N.W.2d 5 (Ct. App. 2001). Here, § 118.15 (5) (b) 2. explicitly directs the trial court to dismiss an action upon proof by the defendant that the child's disobedience prevented her from complying with the law.

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<sup>3</sup> Section 948.45 is entitled Contributing to Truancy and provides that “any person 17 years or age or older who, by any act or omission, knowingly encourages or contributes to the truancy, as defined under s. 118.16(1)(c), of a person 17 years of age or under is guilty of a Class C misdemeanor.”

<sup>4</sup> The Court ruled that this section did not apply to (defendant's name) and (defendant's name) does not challenge that part of the Circuit Court's ruling. APPENDIX CITATION.

The trial court should exercise its statutory authority to dismiss under § 118.15 (5) (b) 2. after a pretrial evidentiary hearing. To do otherwise creates an intolerable burden on the court system and is inherently impractical. The Circuit Court's Order calls for a hearing under § 118.15 (5) (b) 2. only if the defendant has been convicted of a misdemeanor. APPENDIX CITE. If a defendant is acquitted, the court never reaches a determination regarding the child's disobedience and the defendant's ability to comply with the Compulsory School Attendance law. APPENDIX CITE. Following this logic, then, once a defendant is convicted, the defendant must move to suspend entry of the verdict and request an evidentiary hearing. At the hearing, the defendant would have to convince the court that the child's disobedience interfered with his/her ability to comply with the law. However, the jury – in convicting the defendant – found the opposite to be true, as an element of failure to cause child to attend school is control of the child. Wis. Stat. § 118.15 (1). The same witnesses who testified at trial would testify at this evidentiary hearing and the burden would, arguably, be lower than the burden at trial. The defendant, then, using the same witnesses, presenting the same testimony, using a lower burden of proof, would have to convince the Court that the disobedience of the child did indeed interfere with his/her ability to comply with the law. Essentially, the defendant must convince the judge that the jury got it wrong. If the defendant is successful, the court would vacate the jury's verdict and order the case dismissed. If the defendant is unsuccessful, the jury's verdict of guilty is accepted and a judgment of conviction is entered into the record.

This procedure is long and a waste of the court's resources. Rather than waiting until the trial has been concluded, the better process is to conduct a pretrial hearing. The determination of whether a defendant could comply with the law based on the child's disobedience should not hang on the verdict returned by the jury.

**C. The Legislature Intended Cases to be Dismissed Pretrial Rather than Post-Trial, Post-Conviction**

The Compulsory School Attendance law was enacted in 1889, and has since undergone several changes. As early as 1901, the Compulsory School Attendance law (then called Compulsory Education) contained language that allowed a defendant to use evidence of the child's disobedience as a defense for not complying with the law. 1899-1906 Wis. Stats. Supp. § 439a. Throughout the years the law underwent changes, but none as notable as the change in 1967, when the legislature revamped and renumbered all of the statutes relating to the public schools. 1967 Wis. Laws c. 92 § 17.

Throughout the years, the statute was clear that the language regarding the effect of the disobedience of the child was applicable to a person charged with a violation of the Compulsory School Attendance law. It wasn't until 1987 that the legislature relocated the language regarding the effect of the disobedience of a child into its own subparagraph. 1987 Wis. Laws Act 285 §§ 21-22. In 1997, the legislature added the exception that is present in the statute today, upon which the Circuit Court relied in making its decision. 1997 Wis. Laws Act 239 §§ 8-15. However, a look at the history of the Compulsory School Attendance law reveals that the legislature always meant for the language regarding the effect of the disobedience of the child to apply to defendants

charged with a violation of Section 118.15 (1) and that a conviction was not a necessary prerequisite.

The old Compulsory School Attendance law, found in § 40.77, was divided into three main parts. The first subpart was entitled “General Provisions,” and laid out the elements of the offense, persons to whom the statute did not apply, and substitute schooling. 1959 Wis. Stat. § 40.77 (1) (a) through (c). The second subpart was entitled “Vocational and Adult Education Schools” and defined the school requirements for unmarried people between the ages of 16 and 18. 1959 Wis. Stat. § 40.77 (2). The final subpart was entitled “Penalty.” 1959 Wis. Stat. § 40.77 (3). In addition to laying out the minimum and maximum penalties, the law also included the following sentence: “In a prosecution under this section, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, it shall be a good defense and such child shall be proceeded against as delinquent in the manner and in the courts specified in ch. 48.” Here, a person charged with a violation of § 40.77(1) was entitled to use the disobedience of the child as a defense, under § 40.77 (3).

In 1967, the legislature reviewed this language and removed it. The legislature directed the education committee to revise and codify the statutes regarding public schools. 1967 Wis. Laws c. 92, page 304, Prefatory Note. To achieve this, a subcommittee was appointed. *Id.* In overhauling the laws regarding public schools, the intentions of the subcommittee were made clear:

“It was the primary goal of the subcommittee to make the school laws readily understandable to legislators, school boards, school administrators and the general public. In accordance with its directive, the subcommittee adhered to the following guidelines in completing its assignment:

- (1) Reorganize the school laws in a more logical manner.
- (2) Restate clearly the language in the various sections.
- (3) Eliminate obsolete material.
- (4) Remove ambiguities and conflicts.”

1967 Wis. Laws c. 92, page 305, Prefatory Note.

In accordance with these goals, the legislature removed the language “shall be a good defense” and replaced it with “shall be dismissed.” APPENDIX CITE. A review of the Wisconsin Drafting Records reveals that this change wasn’t made accidentally. The Drafting Records show that the language “shall be a good defense” was literally crossed out and the language “this action shall be dismissed” was added in the margin with a circle around it. APPENDIX CITE.

The newly created Section 118.15 now reveals five subparts, rather than the three contained in Section 40.77. The first subpart codifies the elements of failure to cause a child to attend school. 1967 Wis. Stat. § 118.15 (1). The next subsection allows for the attendance of vocation, technical and adult education school in lieu of traditional high school with the approval of parents and the school board. 1967 Wis. Stat. § 118.15 (2). The third defines persons to whom the section does not apply. 1967 Wis. Stat. § 118.15 (3). The next subsection states that instruction at another school can be substituted. 1967 Wis. Stat. § 118.15 (4). Finally, § 118.15 (5) lays out the penalties for violating § 118.15 (1) and provides for dismissal upon a showing that the disobedience of the child interfered with the defendant’s ability to comply with the law. No prior conviction is required and it’s clear that sub. (5) refers to a prosecution commenced under sub. (1).

The next notable change occurred in 1987 when the legislature added the exception that leads off § 118.15 (5) (a) and increased the maximum penalties. 1987

Wis. Laws. Act 285 §§ 21-22. It also relocated the language about the effect of disobedience of the child into § 118.15 (5) (b). *Id.* It wasn't until 10 years later, in 1997, that the legislature further subdivided § 118.15 (5) (b) into two more parts, making the "shall be dismissed" language its own subpart 2. 1997 Wis. Laws Act 239 10 – 15. While the location of the language has moved, the legislature's intent that it apply pretrial has not changed.

## **II. THIS CASE MEETS THE CRITERIA FOR IMMEDIATE REVIEW**

Under § (Rule) 808.03(2), the Court of Appeals is empowered to grant an appeal from any non-final order if the Court determines that the appeal will have any of the following effects:

- (1) Materially advance the termination of litigation or clarify further proceedings in the litigation;
- (2) Protect the petitioner from substantial or irreparable injury; or
- (3) Clarify an issue of general importance in the administration of justice.

As (defendant's name) demonstrates below, his/her Petition meets each of these criteria.

### **A. An Immediate Appeal Will Clarify an Issue of General Importance to the Administration of Justice by Resolving an Issue with Different Interpretations from Courts throughout \_\_\_\_\_ County**

Inconsistent judicial determinations by different branches within the \_\_\_\_\_ County Circuit Court require guidance from the Court of Appeals in interpreting Wisconsin's Compulsory School Attendance law. In addition to the case at bar, there are currently three other cases similarly charging defendants in which the disobedience of the child is an issue.

The Honorable Judge \_\_\_\_\_, Br. \_\_\_\_, in a pending case, ruled that § 118.15 (5) (b) 2. called for a pre-trial evidentiary hearing on the child's disobedience. PULL JUDGMENT DOCKET FROM COURT FILES AND ADD AS APPENDIX. *See State v. \_\_\_\_\_*, \_\_\_\_\_ County Circuit Court Case No. \_\_\_\_\_. Briefs have been submitted on a similar motion before the Honorable Judge \_\_\_\_\_, Br. \_\_\_ and a hearing is scheduled for (date)\_\_\_ to determine whether a hearing should be conducted pre-trial. APPENDIX CITE. *See State v. \_\_\_\_\_*, \_\_\_\_\_ County Circuit Court Case No. \_\_\_\_\_. In \_\_\_\_\_ County Circuit Court Branch \_\_\_\_, the Honorable Judge \_\_\_\_\_ scheduled a pre-trial evidentiary hearing after reviewing briefs and hearing arguments from the parties. APPENDIX CITE. *See State v. \_\_\_\_\_*, \_\_\_\_\_ County Case No. \_\_\_\_\_. The State filed a Motion to Reconsider and a hearing was held on (date)\_\_\_\_\_. *Id.* A briefing schedule has been set and the parties are scheduled to be heard on (date)\_\_\_\_\_ regarding the Court's authority to dismiss the case. *Id.* It's clear that this law is subject to multiple interpretations and guidance from this Court will help to ensure consistent enforcement of the law.

**B. An Immediate Appeal Will Materially Clarify Further Proceedings in This and Pending Litigation and Will Conserve the Court's and the Parties Resources**

In addition to the pending cases described above, the \_\_\_\_\_ County District Attorney's Office summoned \_\_\_ different people to court for violations of the Compulsory School Attendance law. APPENDIX CITE. Front Page, newspaper, date\_\_\_\_\_. Of the \_\_\_ parents, only \_\_\_ appeared and warrants have been issued for

the remaining \_\_\_ parents. As a result, \_\_\_ new cases have been charged and are pending in \_\_\_\_\_ County.

A decision regarding the pre-trial or post-trial applicability of § 118.15 (5) (b) 2. will allow the \_\_\_\_\_ County Circuit Court to issue consistent rulings. A decision eliminates duplicate efforts on behalf of defense attorneys, the State, and the various courts hearing the cases. As a result, review and a decision from this Court will allow for a better use of resources.

**C. An Immediate Appeal Will Protect Defendant and his/her Son/Daughter From Substantial and Irreparable Injury**

(Defendant's name)'s likely success on the merits as previously described would result in a pre-trial evidentiary hearing to determine whether his/her child's disobedience interfered with his/her ability to comply with the law. If he/she is successful at such a hearing, the result will be dismissal of the case against him/her and referral of his/her child to the appropriate court under chapter 48. This referral would allow the children's court to evaluate and address the underlying reasons for the child's failure to attend school. This, in turn, would allow (defendant's name) to be able to work in concert with the court system to help his/her son get the education that he/she needs.

If the court does not hear this issue now, the referral to children's court will be delayed. The child will not get the protective services potentially available under chapter 48 that could facilitate addressing the underlying issues regarding school attendance. The child will continue to fall further behind and the problems may be harder to address and resolve as time passes. The irreparable harm to (defendant's name) is reflected upon the child. (Defendant's name) is forced to take time off of work and to devote his/her time

and efforts to facing the charges against him/her, rather than focusing his/her attention on his/her child's needs.

### CONCLUSION

For the foregoing reasons, (defendant's name) respectfully requests the Court grant this petition for leave to appeal the non-final order entered on (date), in the \_\_\_\_\_ County Circuit Court, the Honorable \_\_\_\_\_ presiding.

Dated at \_\_\_\_\_, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Respectfully submitted,

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Attorney name  
State Bar. No. \_\_\_\_\_  
Attorney for the Defendant-Appellant

Address  
Phone number

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. \_\_\_\_\_

Milwaukee County Case No. \_\_\_\_\_

(Defendant's name),

Defendant-Petitioner.

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FORM AND LENGTH CERTIFICATION

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I hereby certify that this petition conforms to the rules contained in Section 809.50 of the Wisconsin Statutes for a petition and memorandum produced with a proportional serif font. The length of this petition and memorandum is (COUNT) words.

Dated at \_\_\_\_\_, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

Respectfully submitted,

\_\_\_\_\_  
Attorney Name

State Bar. No. \_\_\_\_\_

Attorney for the Defendant-Appellant

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