No. _____

In The
Supreme Court of the United States

PHILIP B. CAMINITI,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if any, does the due process right of parents to raise, teach, and discipline their children extend to protect the right of parents to use corporal punishment to discipline their children?

2. Under what circumstances, if any, does the compelling state interest standard for assessing "hybrid situations" in which a free exercise of religion claim is paired with another constitutional claim under cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), survive the decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)?

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court and Wisconsin Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Philip B. Caminiti, respectfully asks that the Court issue a writ of certiorari to review the judgment of the Wisconsin Court of Appeals which affirmed the judgment of conviction and final Order denying his post-conviction motion on direct appeal.

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OPINIONS BELOW

The unpublished decision of the Wisconsin Court of Appeals, *State v. Philip B. Caminiti*, 353 Wis. 2d 553, 846 N.W.2d 34 (3/20/14) is in Appendix A (A:1-A:33).

The unpublished order of the Wisconsin Circuit Court denying Caminiti's post-conviction motion (3/20/13) is in Appendix B (B:1).

The unpublished oral findings of the Wisconsin Circuit Court denying Caminiti's due process claim (3/20/13) is in Appendix C (C:1-C:3).

The unpublished oral findings of the Wisconsin Circuit Court denying Caminiti's free exercise of religion claim (5/10/12) is in Appendix D (D:1-D:7).

The unpublished Order of the Wisconsin Supreme Court denying discretionary review, *State v. Philip B. Caminiti*, Appeal No. 2013AP730-CR (8/4/14), is in Appendix E (E:1-E:2).

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JURISDICTION

The Wisconsin Court of Appeals entered judgment on March 20, 2014. The Wisconsin Supreme Court denied Caminiti's timely petition for review on August 4, 2014. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a) & 2101(d) and Supreme Court Rules 13.1 & 13.3. As he did below, Mr. Caminiti asserts the deprivation of his rights to freedom of religion and to due process secured by the United States Constitution

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the Free Exercise Clause of the First Amendment to the United States Constitution which provides:

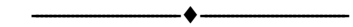
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

U.S. Const. amend. I.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV.



STATEMENT OF THE CASE

Procedural History

Philip Caminiti and others in the Aleitheia Bible Church ("A.B.C.") interpret the Christian Bible literally. Based on his interpretation of the Bible's teachings on child discipline, and the actions of other church members following the same interpretation, he now stands convicted in Wisconsin state court of eight felony counts of inchoate conspiracy to commit intentional child abuse in violation of Wis. Stat. §§948.03(2)(b) & 939.31.[1]

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[1] As relevant here, Wis. Stat. §939.31 provides that

> whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime . . . .

Wis. Stat. §948.03(2)(b) provides that "[w]hoever intentionally causes bodily harm to a child is guilty of a Class H felony." "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Wis. Stat. §939.22(4). A Class H felony is subject to "a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both." Wis. Stat. §939.50(3)(h).

Caminiti did not personally abuse any children, nor was he charged as a party to such abuse. Rather, the charges were based on his expressing his belief as a church elder that the Christian Bible mandates graduated discipline by loving parents, including measured use of a wooden spoon or "spanking stick" on even very young children, as deemed necessary and appropriate by the parents, when all lesser forms of discipline have failed. Each of the eight counts against Caminiti alleged a conspiracy to abuse a particular child.

Following an eight day trial, the jury convicted Caminiti on all eight counts.

The circuit court, Honorable Maryann Sumi presiding, subsequently denied Caminiti's motion to dismiss on state and federal freedom of religion grounds. Focusing primarily on more protective state constitutional law, the court held that Caminiti sincerely held his beliefs in a literal view of Biblical teachings on corporal punishment but that those beliefs were not burdened by this prosecution. The court therefore did not address and made no factual findings regarding whether the state had met its burden of showing a compelling interest in prosecuting Caminiti and that there exist no less restrictive means of satisfying that interest. (*See* D:2-D:7).

The court then sentenced Caminiti to a total of two years initial confinement and six years extended supervision.

Caminiti's post-conviction motion (as part of his direct appeal) raised, *inter alia*, a challenge to the state's theory of prosecution on the grounds that Caminiti was entitled to rely upon the presumption that parents will act in the best interests of their children and the parents' due process rights to guide the upbringing of their children absent a compelling state interest to the contrary. The circuit court summarily denied that motion as well without discussing the merits of the claim. (*See* C:2-C:3).

Caminiti raised the freedom of religion and due process challenges again on his direct appeal, but the Wisconsin Court of Appeals affirmed the convictions on March 20, 2014 (A:1-A:33).

On Caminiti's religious freedom argument, the state conceded that the circuit court had erred in concluding that Caminiti's sincere religious beliefs were not burdened by this prosecution, but argued that the state statute defining child abuse as including anything causing unspecified pain to a child, *see* Footnote 1, *supra*, served a compelling state interest in preventing child abuse that could not be served by less restrictive means (*see* A:13-A:16). Caminiti had raised an "as applied" challenge based in part on the absence of any state interest in preventing the minor, transient pain and unintended marks or minor bruising at issue in this case and common in any instance of corporal punishment. The Court of Appeals nonetheless held that it was sufficient that the law itself served a compelling state interest in preventing

serious child abuse without regard to the facts of this case. (*See* A:15-A:16).

On the due process claim, the Court of Appeals acknowledged that Caminiti's religious freedom and due process arguments were intertwined, that Caminiti was entitled to assert the parents' due process rights given the nature of the conspiracy charge, and that the parents' rights to discipline their children are protected by due process (A:16). It nonetheless concluded that the statutory "reasonable discipline" defense is adequate to protect those interests (A:16-A:23). At the same time, despite the fact that Caminiti was charged solely with inchoate conspiracy, the court upheld the jury instructions in this matter that focused the "reasonable discipline" privilege entirely on whether specific acts of discipline by the parents were reasonable, without regard to whether Caminiti agreed to or intended those specific acts of discipline (A:29-A:32).

The Wisconsin Supreme Court summarily denied discretionary review on August 4, 2014 (E:1-E:2).

Trial Evidence

The relevant facts for purposes of this petition are undisputed.

Several witnesses testified that Caminiti spoke with young married couples regarding many issues, including his beliefs that "rod discipline" was a Biblically mandated part of a graduated system of discipline

by loving parents of even very young children under the age of one.

Caminiti's religious views require loving parents to be consistent in discipline to avoid giving children mixed messages. They require graduated discipline, beginning with a simple "no," progressing to grabbing an arm or a leg or the like and, only if lesser means were unsuccessful, a swat with a rod or wooden spoon on the bare buttocks when deemed necessary and appropriate by the parent.

The purpose of such discipline is not to injure or bruise, but to cause only enough pain to get the child's attention. Caminiti believes the Biblical requirement of rod discipline on the bare bottom appropriate and effective because spanking is more immediate than time outs and spanking with a hand or over clothing or a diaper risks hitting too hard or in anger. He taught that the rod should never be used in anger.

Disrespect, disobedience, or selfishness by even very young children could merit discipline – including rod discipline – depending on the circumstances and individual parents' understanding of the child.

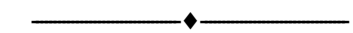
The parents incorporated corporal punishment, sometimes with "spanking sticks," in their graduated systems for disciplining children, including very young children under one year old. They believed that such methods are Biblically mandated when lesser means prove unsuccessful. The parents limited discipline to those circumstances which they believed,

based on past experience with the child, resulted from intentional misbehavior rather than other causes.

Such discipline resulted in pain and sometimes unintentionally left a red mark or small bruise.

The state presented no evidence that any child was disciplined – by corporal punishment or otherwise – during or immediately after Caminiti's discussions regarding child discipline. Moreover, no one but Kurtis Hahn and Patsy Ubert (who had left A.B.C.) claimed that Caminiti directed or encouraged any parent to use corporal punishment on any particular child at any particular time for any particular reason. At most, Caminiti directly witnessed A.B.C. parents discipline three children, though not at Caminiti's urging, and Ubert, Hahn, and Hahn's mother testified that Caminiti occasionally "gave a look" during church services to parents of misbehaving children, after which the children were removed and sometimes disciplined.

No one claimed that Caminiti insisted that the parents beat the children or intentionally cause bruising. Indeed, Caminiti suggested to two parents that they were overdoing discipline or doing it for other than loving reasons and suggested that another parent not spank at all. At least one other parent confessed that she spanked more than Caminiti suggested.



REASONS FOR ALLOWANCE OF THE WRIT

CERTIORARI REVIEW IS APPROPRIATE TO DETERMINE WHETHER ADVOCACY OF ONE'S VIEWS THAT CORPORAL PUNISHMENT OF VERY YOUNG CHILDREN IS MANDATED BY THE CHRISTIAN BIBLE AS PART OF A GRADUATED SYSTEM OF DISCIPLINE WHEN DEEMED APPROPRIATE BY LOVING PARENTS IS A CONSTITUTIONALLY ACCEPTABLE BASIS FOR A CRIMINAL CONVICTION

Few previously would have anticipated that the state would pursue felony charges of conspiracy to commit child abuse against one who advocates that loving parents employ a system of graduated discipline including, when the parent deems it necessary, physical child discipline he believes is mandated by the Christian Bible, which inflicts no long-term physical harm to the child and which creates no short-term harm beyond the modest pain and occasional, inadvertent red marks or minor bruising that accompany any form of corporal punishment. *See* Wis. Stat. §118.31(1) (defining "corporal punishment").

That novelty is heightened because (1) the disciplinary actions evidenced here would not even be criminal, let alone felonies, in many states[2] or according

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[2] *See, e.g.*, Or. Rev. Stat. §§163.205; 161.015(7); 16 Pa. Cons. Stat. §§2703, 2701; W. Va. Code §§61-8D-3, 61-8B-1(9); Wyo. Stat. §§6-2-503, 14-3-202(a)(ii)(B).

to the Model Penal Code, Model Penal Code §3.08(1) (1981),[3] regardless of the reasonableness of those actions, given the minor, transitory pain and minimal unintentional marks or bruising involved, (2) many parents use corporal punishment, even on very young children such as those here,[4] and (3) the Wisconsin Legislature (like those of virtually every state) has refused to enact the type of "no spanking" law apparently desired by the state and its experts.

However, "[t]here is likely no more hotly contested issue than the use of corporal discipline." Garner, Richard, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases – A Parental Perspective*, 30 U. Tol. L. Rev. 1, 4 (1998).

The novelty and emotional nature of this prosecution raise significant issues worthy of Supreme

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[3] Model Penal Code §3.08(1) (1981) provides that child discipline is justifiable if:

> (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. . . .

[4] Roughly 50% of the parents of toddlers and over 65% of the parents of preschoolers regularly use corporal punishment. Socolar, Rebecca R. S., *A Longitudinal Study of Parental Discipline of Children*, 200 S. Med. J. 472, 474 (2007). *See also* Straus, Murray, "Corporal Punishment and Primary Prevention of Physical Abuse," 24 *Child Abuse and Neglect* 1109 (2000) (94% of the parents of toddlers and 35% of parents of infants reported using corporal punishment).

Court review. Specifically, review is appropriate to define the constitutional limits to the state's power to intrude upon the religious and due process rights of those, like Caminiti, whose views on discipline differ from the controlling political orthodoxy of a particular locality.

A. Review is Appropriate to Determine Whether and When the Parents' Due Process Right to Raise and Discipline their Children Protects the Imposition of Corporal Punishment

Fourteenth Amendment protection extends to the "liberty of parents and guardians to direct the upbringing and education of children under their control," *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Due Process protects "freedom of personal choice in matters of . . . family life" and, consistent with that protection, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944). This protection includes the rights of "parents to give [children] religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it." *Id*. at 165.

A parent's right to raise, teach, and discipline his or her child warrants deference and protection, absent a powerful countervailing interest. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). This right to discipline is "perhaps the oldest of the fundamental liberty interests recognized by the Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality decision).

Imposing discipline is an inherent part of caring for children, since a parent may not be able to care properly for, or exercise control over, an unruly child without the ability to impose discipline. *See Ingraham v. Wright*, 430 U.S. 651, 661, 670, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (suggesting that parents are privileged to use force to discipline their children inasmuch as the Court observed that the prevalent rule in this country today permits teachers to use "such force as [the] teacher . . . reasonably believes to be necessary for (the child's) proper control, training, or education." (internal quotation marks and citations omitted)). Such discipline has included corporal punishment. *See id.* at 661 ("Professional and public opinion is sharply divided on the practice [of corporal punishment], and has been for more than a century. Yet we can discern no trend toward its elimination.").

Yet, the protection of parental prerogative is not unqualified. *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). "[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's

well being, the state['s] . . . authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Prince*, 321 U.S. at 166; *cf. Yoder*, 406 U.S. at 220 ("[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."); *Troxel,* 530 U.S. at 88 (Stevens, J., dissenting) ("A parent's rights with respect to her child have thus never been regarded as absolute . . . [and] a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*.").

Despite its suggestions in *Troxel* and *Ingraham*, however, this Court has not been squarely presented with the question whether or under what circumstances the right to care for children also includes a right to use corporal punishment to discipline them. *See Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1391 (9th Cir. 1997) (holding that there is no clearly established federal constitutional right of a parent to inflict corporal punishment on a child); *but see, e.g.*, *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) (regardless of "one's view of corporal punishment," a parent's "liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment"); *State v. Wilder*, 748 A.2d 444 (Me. 2000) (right to direct upbringing includes the

right to use reasonable or moderate physical force to control behavior; vacating parent's assault conviction for inflicting transitory pain as punishment).

The state's theory of prosecution in this case ignored both the constitutional presumption "that fit parents act in the best interests of their children," *Troxel*, 530 U.S. at 68, and the absence of any legitimate state interest (as reflected in the Legislature's refusal to ban all corporal punishment) in preventing the minor pain or unintentional marks evidenced here and inherent in any type of corporal punishment. In effect, if not in so many words, the state based its prosecution on the theory that *any* corporal punishment, at least below a certain age, necessarily is inherently unreasonable and thus child abuse and unprotected by due process.

The state Court of Appeals deemed the parents' (and thus Caminiti's) rights adequately protected by the statutory parental discipline privilege.[5] However, that defense authorizes "only such force as a reasonable person believes is *necessary*" (as opposed to appropriate) and "[t]he standard is what a person

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[5] Wis. Stat. §939.45(5)(b) provides the defense of privilege:

> (b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense." *State v. Kimberly B.*, 2005 WI App 115, ¶32, 283 Wis. 2d 731, 699 N.W.2d 641 (emphasis added).

Moreover, any corporal punishment necessarily involves some physical pain or harm, however minimal, *see* Wis. Stat. §118.31(1) (defining "corporal punishment"), and "[t]here is likely no more hotly contested issue than the use of corporal discipline," *A Parental Perspective*, 30 U. Tol. L. Rev. at 4. Accordingly, the "reasonable person" standard runs the risk that prosecutors or jurors in a particularly anti-corporal-punishment jurisdiction will substitute their judgment or prejudices for the parents' judgment and render criminal any and all corporal punishment. Indeed, the prosecutor expressly asked the jury to do just that in this case:

> I submit to you we're not here looking at reasonable discipline. You know what it is. You parents know what reasonable discipline is, and then here's the instruction [on reasonable discipline]. Very helpful. Very sensible. A parent can use reasonable force to discipline the child which is a force a reasonable person would believe is necessary. . . . A reasonable person. That's you. . . .
>
> . . . What would an ordinary person, an ordinarily intelligent and prudent person have believed in the parent's position under

> the circumstances that existed at the time of the alleged discipline. . . .
>
> Let's think about this for a minute. Ordinary, a person of ordinary intelligence and prudence. I think I'm looking at 15 of you right now.

(Quoted at A:26).

The question then is whether a "reasonable discipline" privilege is adequate to protect the due process rights of parents to guide the development of their children. Although overlooked by the state court here, an appropriate supplemental protection for parents and those like Caminiti who are entitled to rely on the constitutional presumption "that fit parents act in the best interests of their children," *Troxel*, 530 U.S. at 68, would be to acknowledge that there is a level of *de minimis* harm so divorced from the state's legitimate interests in preventing actual "child abuse" that due process precludes prosecution absent proof of some degree of malicious intent. Given the historic recognition of the appropriateness of corporal punishment, *see Ingraham*, 430 U.S. at 660-63, and the near universal rejection of "anti-spanking" laws, that dividing line presumably would be set higher than the level of moderate temporary pain and unintentional minor bruising or marks evident here and inherent in any form of corporal punishment.

More specifically in this case, the question is whether a "reasonable discipline" privilege is adequate

to protect Caminiti's own rights. Despite the fact that Caminiti was charged with inchoate conspiracy (*i.e.*, an agreement that the parents commit the crime of child abuse), the instructions limited the jury's consideration of that privilege solely to whether the parents' specific acts of discipline were "reasonable" without regard to Caminiti's own intent and agreement. The instructions likewise failed to account for the Constitutional presumption "that fit parents act in the best interests of their children," *Troxel*, 530 U.S. at 68, a presumption that Caminiti was as entitled to rely upon as the courts.

Resolution of the issue of whether and when due process protects the parent's right to use moderate or reasonable corporal punishment in the discipline of their children (and thus the right of those such as Caminiti to advocate its use) presents an important question of federal constitutional law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

B. Review is Appropriate to Clarify What "Hybrid Situation[s]" Combining Free Exercise Challenges with Other Challenges to Generally Applicable State Law Still Require Application of the Compelling State Interest Standard

The impact of the parents' (and Caminiti's derivative) rights to guide and discipline their children in this case is enhanced by the fact that the prosecution here simultaneously burdened Caminiti's and the

parents' First Amendment right to the free exercise of their religion.[6] *See, e.g.*, *Yoder*, 406 U.S. at 233:

> [T]he Court's holding in *Pierce* [*v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925),] stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.

Under *Yoder*, "the Court 'requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.'" *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S.Ct. 2751, 2791 n.8, 189 L.Ed.2d 675 (2014) (citation omitted).

For most purposes, this Court has abandoned application of the traditional "compelling interest" test for assessing the constitutional validity of a law that is neutral and of general applicability that nonetheless burdens an individual's exercise of religion,

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[6] The First Amendment's Free Exercise Clause applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

instead applying a "rational basis" test. *Employment Division v. Smith*, 494 U.S. 872, 884-85, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *see Burwell*, 134 S.Ct. at 2760-61. However, the Court in *Smith* distinguished rather than overruled decisions such as *Yoder*, *supra*, which present a "hybrid situation" involving interrelated due process and free exercise interests. *See Smith*, 494 U.S. at 881-82:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents to direct the education of their children . . . . Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. . . .
>
> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

(Citations omitted).

This Court has not, since the decision in *Smith*, addressed either the validity, application, or scope of

this theory for subjecting such hybrid claims to the compelling interest test.[7] Justice Souter did mention the hybrid rights theory in a concurring opinion, but only to criticize the Court's reliance on the concept:

> And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Souter, J., concurring in part).

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[7] The issue raised here remains relevant despite the enactment of the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. §§2000bb et seq., which was intended to overrule *Smith*, *supra*. This Court held that Act unconstitutional as applied to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

"What the Court meant by its discussion of 'hybrid situations' in *Smith* has led to a great deal of discussion and disagreement" among the lower courts and commentators. *Parker v. Hurley*, 514 F.3d 87, 97 (1st Cir.), *cert. denied*, 555 U.S. 815 (2008), citing E. Chemerinsky, *Constitutional Law* §12.3.2.3, at 1262 (3d ed. 2006); *see, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 703 (9th Cir. 1999) (discussing confusion), *rev'd en banc on other grounds*, 222 F.3d 1134 (9th Cir. 2000). *See also* Lechliter, M.E., Note, *The Free Exercise of Religion and Public Schools: The Implication of Hybrid Rights on the Religious Upbringing of Children*, 103 Mich. L. Rev. 2209 (2005) (discussing and critiquing various conflicting analyses proposed by the lower courts).

One line of cases from the Second, Third, and Sixth Circuits, simply rejects the "hybrid situations" theory as *dicta* and refuses to apply a stricter standard to assertedly hybrid claims than the rational basis test of *Smith*. *See Combs v. Homer-Center School Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."), *cert. denied*, 555 U.S. 1138 (2009); *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (labeling the hybrid rights theory "completely illogical" and holding that, "until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard

than that used in Smith to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause"). *See also Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 85 P.3d 67, 87-89, 10 Cal.Rptr.3d 283 (Cal. 2004) (suggesting that hybrid rights theory may be "merely a misreading of *Smith*").

At the other extreme, decisions of the District of Columbia Circuit and some state courts could be read to conclude that the mere allegation of constitutional claims in conjunction with a Free Exercise challenge is sufficient to require application of the compelling interest standard to review of a neutral law of general applicability. *EEOC v. Catholic University of America*, 83 F.3d 455, 467 (D.C. Cir. 1996) (as alternative holding); *Diana H. v. Rubin*, 217 Ariz. 131, 171 P.3d 200, 205 (Ariz. App. 2007); *Shepp v. Shepp*, 588 Pa. 691, 906 A.2d 1165, 1173 (Pa. 2006) (applying hybrid approach and strict scrutiny under *Yoder* to uphold father's right to discuss religious import of polygamy despite state law banning bigamy), *cert. denied*, 550 U.S. 908 (2007); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 452-53 (Ind. 2001) (adopting hybrid approach and applying compelling interest standard without discussing strength of companion claim).

Several other courts have come down somewhere in the middle, acknowledging the hybrid approach while limiting the situations in which it would apply to require application of the compelling interests

standard. Again, however, these courts propose conflicting analyses.

One line of cases, exemplified by the First Circuit's decision in *Brown v. Hot, Sexy & Safer Products, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996), requires that, in order to receive stricter scrutiny, claimants must offer an independently viable claim in addition to their free exercise claim.

Another line of cases from the Ninth and Tenth Circuits rejects the "independently viable claim" approach for exactly the reasons stated in Justice Souter's concurrence in *Lukumi*, 508 U.S. at 567, *i.e*, that such an approach effectively renders the free exercise claim, and thus the hybrid approach, redundant where application of the stricter standard already is required by the independent constitutional claim. At the same time, these decisions hold that merely alleging a companion constitutional claim is insufficient. *E.g.*, *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) ("[A] plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."). Rather, these courts hold that the companion claim need only be independently "colorable" and not ultimately meritorious. *E.g.*, *Miller*, 176 F.3d at 1208; *Swanson By and Through Swanson v. Guthrie ISD I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

What constitutes a "colorable claim" under this test beyond the fact that it is something less than an outright violation of a companion right yet more than a simple allegation also is unclear. The Ninth and Tenth Circuits have defined it as "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits." *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d at 707; *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295, 1297 (10th Cir. 2004) (adopting Ninth Circuit's standard and rejecting district court's definition of colorable as "nonfrivolous").

The Seventh Circuit's analysis is unclear, although it appears to follow the "independently viable claim" approach. In *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004), the Court rejected the Appellants' hybrid claim argument for applying the compelling interest test on the grounds that all of their companion claims were "individually lacking the merit necessary to withstand summary judgment." Oddly enough, the Seventh Circuit cited the conflicting decisions in *Swanson*, *supra* (which applied a "colorable claim" approach), *Brown*, *supra* (which applied an "independently valid claim" approach), and *Kissinger*, *supra* (which rejected even the idea of a hybrid approach), as in accord with its holding.

Application of *any* of the standards that recognize the validity of the hybrid approach noted in *Smith* would inure to Caminiti's benefit given the

decision in *Yoder*, *supra*, and the strength of the due process claim. *See* Section A, *supra*.

Moreover, actual application of the compelling interest standard is straightforward and mandates relief in this case. The state conceded in the courts below both that Caminiti's religious beliefs in the Biblical requirement of corporal punishment as part of a graduated system of child discipline were sincerely held and that this prosecution burdens those beliefs. *See also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (explaining that to trigger strict scrutiny under the First Amendment a government burden must have a "tendency to coerce individuals into acting contrary to their religious beliefs"). The compelling nature of the state's interest in preventing actual child abuse, the only interest asserted by the state, is likewise undisputed.

The only issue in dispute under the compelling interest test is whether state "child abuse" statutes that criminalize the intentional infliction of *any* "physical pain or injury, illness, or any impairment of physical condition," Wis. Stat. §§948.03(2)(b) & 939.22(4), *see* Footnote 1, *supra*, subject only to a privilege based on what a juror believes is "necessary" for discipline, *see* Footnote 5, *supra*, and without any form of religious exemption, is narrowly tailored to further the state's compelling interest in preventing actual child abuse.

In addressing this question, courts must "look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). *See also Yoder*, 406 U.S. at 236 ("[I]t is incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."). Broad generalities about the importance of preventing "child abuse" are insufficient. Instead, the state must "offer[ ] evidence that granting the requested religious accommodations would seriously compromise its ability" to protect children from actual abuse. *See O Centro*, 546 U.S. at 435.

It is not sufficient, therefore, for the state to respond merely, as it did below, that it has a compelling interest in preventing "child abuse." Like the vast majority of states, Wisconsin law does not ban corporal punishment *per se*. It thus does not, as a matter of policy, view corporal punishment or the types of minor, transient pain and unintended marks or bruising inherent in *any* form of corporal punishment as themselves "child abuse" when inflicted by a parent as discipline, and it asserts no compelling state interest in preventing such minor harm under those circumstances. Despite its compelling interest in preventing actual child abuse, therefore, the state

has no such interest in criminalizing parental discipline that results in no harm more serious than that present here and inherent in *any* form of corporal punishment.

Also relevant is the fact that Wisconsin grants a secular reasonable discipline privilege protecting the parent's right to impose physical harm, short of "great bodily harm or death," if deemed necessary by a reasonable person, Wis. Stat. §939.45(5)(b), *see* Footnote 5, *supra*. That privilege does not, by its terms, account for religious necessity and the trial court refused to instruct the jury here that it could consider the defendant's religious beliefs on the issue of necessity. The existence of that privilege, however, demonstrates that the state's compelling interest in preventing "child abuse" is not harmed by granting a similar Constitutional privilege where the particular discipline is necessary for religious purposes, at least where the resulting harm is as minor as that at issue here. *See, e.g.*, *O Centro*, 546 U.S. at 432-34 (existence of exception to Controlled Substances Act for religious uses of peyote undermined assertion that government had compelling interest in avoiding similar exception for such use of DMT).

The state has never suggested any reason why its compelling interest in preventing actual child abuse would be adversely affected by exempting religious parental discipline resulting in the minor discomforts associated with *any* form of corporal punishment and evidenced here, as many states and the Model Penal Code have, *see* Footnotes 2-3, *supra*. The state

accordingly is unable to satisfy its burden of proving that the application of Wisconsin's child abuse laws to criminalize the type of religious corporal punishment at issue in this case is narrowly tailored to further a compelling state interest.

* * *

Review thus is appropriate to resolve the important questions of whether, and if so when, due process protects the right of parents to use corporal punishment and under what circumstances, if any, "hybrid" constitutional claims pairing a Free Exercise of Religion claim with a related claim, such as the parent's due process right to raise their children, requires application of the controlling interest test. Until this Court acts, the conflicts identified in this Petition will cause unnecessary confusion and litigation in the lower courts. *See* Sup. Ct. R. 10(b) & (c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Court of Appeals.

Dated at Milwaukee, Wisconsin, November 3, 2014.

Respectfully submitted,

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APPENDIX A

Appeal No. 2013AP730-CR Cir. Ct. No. 2011CF479

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PHILIP B. CAMINITI,

DEFENDANT-APPELLANT.

COURT OF APPEALS DECISION DATED AND FILED

March 20, 2014

APPEAL from a judgment and an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Philip Caminiti appeals the circuit court's judgment of conviction for eight counts of conspiracy to commit child abuse. He also appeals the order denying his motion for postconviction relief. Caminiti was convicted after an eight-day jury trial at which the prosecutor elicited evidence that Caminiti, as the leader of a small, close-knit religious community or church, instructed and pressured

attendees to discipline infants starting as young as two or three months of age by striking their bare bottoms using wooden spoons and dowels with an amount of force that caused significant bruising.

¶2 Caminiti raises several challenges to his convictions, organized into three main groupings. First, Caminiti argues that the prosecutor's theory of prosecution violated three constitutional rights, which Caminiti characterizes as: (1) his right to advocacy, (2) his right to freedom of religion, and (3) the parents' right to raise their children as they see fit. Second, Caminiti argues that the circuit court committed two evidentiary errors: admitting expert testimony on the parents' statutory reasonable discipline privilege, and admitting evidence that one of the parents pled guilty to and was convicted of child abuse. Third, he argues that trial counsel was ineffective by failing to object to two alleged errors in the jury instructions. In addition, Caminiti argues that the cumulative effect of errors was not harmless and that we should reverse in the interest of justice. We reject Caminiti's arguments, and affirm.

Background

Nature Of The Charges Against Caminiti

¶3 The eight counts against Caminiti were for conspiracy under WIS. STAT. § 939.31 (inchoate conspiracy) to commit child abuse under WIS. STAT.

§ 948.03(2)(b).[1] Thus, the State had to show for each count that Caminiti, "with intent that [the crime of child abuse] be committed, agree[d] or combine[d] with another for the purpose of committing [child abuse]" and that "one or more of the parties to the conspiracy [did] an act to effect its object." *See* § 939.31.[2] As applicable to this case, child abuse is "intentionally caus[ing] bodily harm to a child." *See* § 948.03(2)(b). "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4).

¶4 Each of the eight counts pertained to a different child. Count 1 involved discipline of a child by a non-parent, the child's mother's boyfriend; Counts 2 through 8 involved discipline of a child by

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[1] All references to the Wisconsin Statutes are to the 2011-12 version. We use the current version of the statutes for ease of reference. Caminiti does not contend that there have been any relevant changes in the statutes since the times his crimes were committed.

[2] The inchoate conspiracy statute provides:

> Except as provided in ss. 940.43(4), 940.45(4) and 961.41(1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

WIS. STAT. § 939.31.

the child's own parent or parents. In none of the charged instances was it alleged that Caminiti personally struck a child.

¶5 As an affirmative defense, Caminiti relied on the parents' statutory privilege to reasonably discipline their children. Pertinent here, persons "responsible for the child's welfare" are privileged to engage in "reasonable discipline" under WIS. STAT. § 939.45(5), which provides:

> **Privilege.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:
>
> . . . .
>
> (5) . . .
>
> (b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

¶6 We address the privilege in greater detail below, particularly as relevant to two of Caminiti's arguments: (1) that the prosecution's theory violated the parents' constitutional rights and (2) that the

circuit court erred by admitting expert testimony on the reasonable discipline privilege. There is no dispute that Caminiti may assert defenses based on the parents' constitutional rights and on the reasonable discipline privilege.

Evidence At Trial

¶7 The prosecutor presented a number of non-expert, fact witnesses, including a detective and other law enforcement officers who interviewed Caminiti and parents, parents who testified under use immunity, and former church attendees. Caminiti testified in his defense. We summarize some of the fact-witness testimony against Caminiti.[3]

¶8 Most of the evidence we summarize relates to all of the children. Some of the evidence relates to particular children but is representative. Caminiti does not make child-specific arguments.

¶9 Caminiti was the pastor or "head elder" of a close-knit religious community or church consisting of approximately fifteen families. He emphasized strong theological unity among attendees, enforced by the practice of "disassociation" or "shunning" of attendees when unity fails. One former attendee explained that

[3] We summarize the expert testimony in the discussion below when addressing Caminiti's arguments relating to that testimony.

he "feared [Caminiti] more than I feared my relationship with God."

¶10 Caminiti instructed parents who were part of the church to discipline their children by striking the children's bare bottoms with wooden spoons and dowels. If church attendees approached him and said that they were having trouble with the discipline, Caminiti would "counsel them on the correct way." Caminiti "interpreted how, when, [and] why [a rod] would be used." Caminiti instructed that the child's bottom must be bare, and the rod should be an instrument such as a "wooden dowel or the rung off of a chair . . . about three-quarters of an inch in diameter and approximately a foot long." The purpose of the discipline was "[t]o cause pain," and Caminiti did not consider bruises a "sign of something bad."[4]

¶11 In Caminiti's view, an infant could be guilty of a "selfish cry." Specifically, Caminiti instructed that, if an infant's basic needs were met but the infant persisted in crying or fussing, "it would be a selfish cry and warrant a rod spanking."

¶12 Caminiti would hold meetings with parents to discuss and demonstrate rod discipline. During at least one meeting, "[h]e used the rod and he hit his leg with it, and he told [the parents] that he was showing them how to use the rod for training their

[4] The parties refer to the type of discipline that Caminiti taught as "rod discipline." We follow the parties' lead and refer to it that same way.

children." Caminiti said at the meeting that more than one strike was required, and also said he had once hit himself so hard during a demonstration that "he made himself cry."

¶13 Sunday services were held at Caminiti's house or another residence. Parents would carry a wooden dowel or "stick" to services in their hands, pockets, or diaper bags.

¶14 According to a former church attendee, Caminiti taught "[t]hat the Bible has a specific instruction and a specific tool for disciplining [one's] child," which took the form of "a dowel approximately 16 to 18 inches long and about three-quarters round." Caminiti explained that "that specific rod" is what "the Bible says . . . you should use, and he hit his leg to show . . . how to use the dowel on [a] child." Exclaiming "'Ow, that really hurt,'" Caminiti struck himself "much harder than [the former attendee] would ever consider striking any child, let alone [his] 14-month-old." The former attendee had no doubt that Caminiti was demonstrating the degree of force to be applied to the children.

¶15 A typical incident involving the rod discipline Caminiti taught involved a nine-month-old child who was being "fussy" in her high chair while being fed:

> [The child] began getting fussy, and evidently [the parent] went through telling the child no and giving a squeeze to the leg or the arm, and she still remained fussy. At that

> point it was determined that [the child] was being selfish. [The parent] then removed her from the highchair, laid her face down on the kitchen floor. He pulled down her diaper and hit her with a wooden rod twice on the bare butt.

In another typical incident, a parent testified about teaching her nine-month-old infant the difference between "loud and quiet" and spanking the child's bare bottom with a wooden spoon when the child did not comply.

¶16 While these two examples involve nine-month-old children, there was evidence that children of church attendees were subjected to forms of discipline using a rod starting as young as two or three months of age. Some of the parents denied this, but even these parents admitted to using rod discipline before their children had reached one year of age. Caminiti believed that a child as young as one and a half months old could be disciplined with a rod.

¶17 The rod discipline Caminiti taught often left marks or bruises. At least one parent feared taking her child to the doctor because the bruising would be detected. In one instance, a child bled after being disciplined, although the parent stated that it was "just a little bit of blood."

¶18 When small children fussed or cried during services, Caminiti would give the parents a "look" that the parents understood meant that they needed

to take action. According to witnesses, what happened next was:

> "[P]arents would take their children out of the assembly and go into a basement or a back room, and we could hear a whack whack whack, and then the scream of a child."
>
> "[Y]ou would hear . . . a rod hitting skin. It was unmistakable," followed by "bloodcurdling screams from these babies."
>
> "[You would hear] [t]he sound of the dowel coming down, and cries."

¶19 In Caminiti's testimony, he confirmed that he believes a parent can recognize a "selfish cry" when an infant fusses or cries for no apparent reason. He said that he follows what he contends is a literal interpretation of the Bible that, in his view, "teaches . . . spanking with a spanking stick" for child discipline. Caminiti testified that the purpose of rod discipline is to cause pain. Caminiti explained: "[Y]ou want to cause enough pain to make the action that [the children are] being disciplined for regrettable, and so they change their mind. . . ."

Discussion

¶20 We address Caminiti's arguments using his three main groupings. We reference the evidence above and other evidence as needed for discussion of particular arguments.

A. Whether The Prosecution Violated Caminiti's Right To Advocacy, Caminiti's Right To Freedom Of Religion, Or The Parents' Right To Raise Their Children As They See Fit

1. Right To Advocacy

¶21 Caminiti argues that his prosecution violated his free speech right to advocacy under ***Brandenburg v. Ohio***, 395 U.S. 444 (1969). ***Brandenburg*** explains that advocacy of the use of force is constitutionally protected, within limits:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in ***Noto v. United States***, [367 U.S. 290, 297-98 (1961)], "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

Id. at 447-48 (footnote omitted).

¶22 We begin by noting that Caminiti's free speech argument is not well developed. It consists of three paragraphs in his principal brief and several additional, but somewhat repetitive, paragraphs in his reply brief that do little to flesh out the legal basis for his argument. We address the arguments Caminiti makes. We do not develop arguments for

him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge.").

¶23 Caminiti argues that the evidence does not show that he "instructed anyone to spank a specific child at any specific time." As we understand it, Caminiti is arguing that this shows he was merely advocating the use of force in the abstract. We are not persuaded.

¶24 The ***Brandenburg*** test is not, to paraphrase Caminiti's argument, a "specific [victim] at a[ ] specific time" test; it is an "inciting or producing imminent lawless action" test. *See* ***Brandenburg***, 395 U.S. at 447-48. And, Caminiti provides no support for the proposition that the evidence here is insufficient to show that he incited or produced "imminent" lawless action. We conclude that the jury could have reasonably inferred that Caminiti was inciting or producing the imminent use of abusive force against the children, particularly (but not only) when Caminiti gave parents a "look" or other indication during church services, causing the parents to promptly remove their children from the room in order to mete out the rod discipline Caminiti had taught them. Stated another way in terms of ***Brandenburg***, the jury could reasonably infer that Caminiti was "'preparing a group for violent action

and steeling it to such action.'" *See* ***id.*** at 448 (quoted source omitted).[5]

2. Right To Freedom Of Religion

¶25 Caminiti argues that his prosecution violated his right to freedom of religion. We disagree.

¶26 We analyze Caminiti's freedom of religion claim under the state constitution, because Caminiti relies on it and because it provides broader freedom of religion protection than the First Amendment. *See* ***State v. Miller***, 202 Wis. 2d 56, 64, 549 N.W.2d 235 (1996) (referring to "the more expansive protections envisioned by our state constitution").

¶27 Applying the state constitution, we use a four-part, burden-shifting test:

> [T]he challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief[ ] (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling

[5] In his principal brief, Caminiti makes statements in passing suggesting that the jury should have received an instruction on his First Amendment right to advocacy. We agree with the State, however, that Caminiti fails to develop this argument on appeal. We therefore decline to address it. Caminiti's attempt to build on this argument in his reply brief is too little too late.

> state interest, (4) which cannot be served by a less restrictive alternative.

Id. at 66.[6]

¶28 The State concedes that Caminiti has a sincerely held religious belief in rod discipline that is burdened by the child abuse statute. Thus, the question becomes whether the State has demonstrated that it has a compelling interest that cannot be served by a less restrictive alternative.

a. Compelling Interest

¶29 The State argues that it has a compelling interest in preventing child abuse, including abuse by a child's own parents. We agree. That this interest is compelling is not seriously debatable, and Caminiti does not contest the general proposition that it is. Rather, Caminiti asserts more specifically that the State lacks a compelling interest in "preventing the minor, transient pain and unintended marks or

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[6] In ***State v. Miller***, 202 Wis. 2d 56, 549 N.W.2d 235 (1996), our supreme court explained that the United States Supreme Court in ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872, 879 (1990), "repudiated use of the compelling state interest standard in claims based solely on the Free Exercise Clause of the First Amendment." *See* ***Miller***, 202 Wis. 2d at 67; *see also* ***Coulee Catholic Schs. v. LIRC***, 2009 WI 88, ¶39 n.13, 320 Wis. 2d 275, 768 N.W.2d 868 (noting that the Supreme Court in *Smith* "held that there is no individual religious exemption from neutral laws of general applicability").

bruising . . . that are the normal consequence of any form of corporal punishment."

¶30 Caminiti's argument is unpersuasive because it does not address the pertinent question under ***Miller***: whether "the law" at issue – here, the child abuse statute – is based on a compelling interest – here, preventing child abuse. *See* ***id.*** at 66. Clearly it is. The question is not, as Caminiti seems to think, whether the State has a compelling interest in prohibiting all "normal consequence[s] of any form of corporal punishment." The laws at issue here do not prohibit corporal punishment generally. Caminiti's framing of the question goes nowhere because it fails to address the actual prohibited behavior: the unreasonable and intentional infliction of bodily harm on a child. *See* WIS. STAT. §§ 939.45(5) and 948.03(2)(b).

¶31 Alternatively, if Caminiti means to argue that his right to freedom of religion protects him from prosecution for teaching conduct that involves only "minor, transient pain and unintended marks or bruising . . . that are the normal consequence of any form of corporal punishment," we are not persuaded. In this respect, Caminiti seems to ask us to assume facts favorable to him, namely, to assume that what he did was merely to teach normal and reasonable corporal punishment. Caminiti points to evidence favorable to his point of view. However, Caminiti provides no reason for why we would review the evidence in a light most favorable to Caminiti's defense. Rather, we must view the evidence in a light that supports the jury's verdict. *See* ***State v.***

Kimberly B., 2005 WI App 115, ¶21, 283 Wis. 2d 731, 699 N.W.2d 641 ("If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict. . . ."). Here, the jury could have reasonably inferred from the evidence that Caminiti was instructing and pressuring the parents to engage in punishment that was more severe than minor, transient pain involving only unintended marks or bruising, or other "normal consequence[s] of any corporal punishment."

b. No Less Restrictive Alternative

¶32 The State argues that its compelling interest in preventing child abuse cannot be served by an alternative that is less restrictive of religious freedom than affording an accused the reasonable discipline privilege. As we understand it, the State argues that anything less restrictive would allow a person's religious beliefs to prevent the prosecution of egregious cases of child abuse. We agree with the State and find Caminiti's limited arguments to the contrary unpersuasive.

¶33 Caminiti argues that other states have less restrictive alternatives that allow parents to discipline their children even if the discipline causes only "the type of transitory pain and minor, unintended marks at issue here." Again, however, Caminiti shifts the analysis from the law at issue to a view of the

evidence that favors him. And, once again, he provides no support for an analysis that requires us to view the evidence in a light suggesting that the punishment was in fact limited and reasonable, rather than unreasonably excessive in light of the ages of the children and other circumstances.

¶34 We acknowledge that Caminiti may be making an additional argument relevant to his free speech and freedom of religion claims, namely, that he was prosecuted based on a "per se" theory that all corporal punishment of infants and toddlers is child abuse. However, to the extent this argument is developed, Caminiti develops it in the section of his briefing addressing the parents' constitutional rights and reasonable discipline privilege. We address and reject that argument in the next section.

3. Parents' Constitutional Rights And Reasonable Discipline Privilege

¶35 Caminiti argues that his prosecution violated the parental right to raise children as the parent sees fit. There is no dispute that the parental right to the custody and control of children includes a right to discipline the children. *See, e.g.,* ***Doe v. Heck***, 327 F.3d 492, 522 (7th Cir. 2003). And, as we have noted, the State does not dispute that Caminiti may assert defenses based on parental rights.

¶36 A parent's right to discipline is not unlimited. It is subject to a reasonableness standard marking the line between constitutionally protected

discipline and child abuse. In ***Kimberly B.***, we explained and summarized this "reasonable discipline" privilege, as codified in WIS. STAT. § 939.45(5):

> Pursuant to WIS. STAT. § 939.45(5), a person responsible for the welfare of a child, such as a parent, enjoys a privilege to reasonably discipline the child by use of physical force. Section 939.45(5)(b) provides that a parent's conduct is privileged:
>
> > When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.
>
> This privilege constitutes an affirmative defense to a criminal charge of physical abuse of a child under WIS. STAT. § 948.03. *See* § 939.45 ("The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct."). Once parental privilege is raised as an affirmative defense, the burden shifts to the State to disprove the parental privilege defense beyond a reasonable doubt.

. . . [T]he plain language of § 939.45 requires that (1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; *and* (3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death. If parental conduct fails to satisfy even one of these prongs, then the parent is not protected by the privilege. Thus, to overcome the privilege of parental discipline in Wisconsin, the State must prove beyond a reasonable doubt that only one of these three prongs is not present.

. . . .

Reasonable force is that force which a reasonable person would believe is necessary. WIS JI – CRIMINAL 950. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. ***Id.*** The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. ***Id.***

"The test of unreasonableness is met at the point at which a parent ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain, rather than make a genuine effort to correct the child by proper means." There is no inflexible

> rule that defines what, under all circumstances, is unreasonable or excessive corporal punishment. Rather, the accepted degree of force must vary according to the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances. *See* WIS JI – CRIMINAL 950.

Kimberly B., 283 Wis. 2d 731, ¶¶29-33 (some citations omitted).

¶37 The reasonable discipline privilege strikes a balance between parents' constitutional rights to the care and control of their children and the State's interest in preventing child abuse. *See* ***Doe***, 327 F.3d at 520 (balance must be struck between the fundamental right to the family unit and the State's interest in protecting children from abuse).

¶38 As we understand it, Caminiti's primary argument based on the parental right to discipline and on the statutory privilege is that the prosecutor's theory of the case was contrary to the parents' rights and their privilege because the prosecutor advanced a "per se" theory that all corporal punishment of infants and toddlers was child abuse. Caminiti asserts that "the [prosecutor] theorized that Caminiti conspired to commit child abuse because . . . *all* spanking of infants and toddlers was inappropriate." Caminiti argues that this "per se" theory cannot be squared with the parents' rights to discipline and the privilege.

¶39 We need not resolve whether such a "per se" theory is constitutionally permissible because we disagree with Caminiti that it was the prosecutor's theory here. We also disagree with the implicit assumption in Caminiti's argument that the jury likely reached a verdict based on this per se theory. Rather, we agree with the State that the prosecutor advocated a "detailed, contextual child-abuse analysis, not a *per se* approach." This is evident from the extensive fact-witness testimony that the prosecutor elicited, the prosecutor's closing arguments, in which the prosecutor relied on that testimony after reviewing it at great length, and the jury instructions.

¶40 There would have been no reason to focus on and argue the specifics of this case in such detail if the prosecutor was relying on a per se theory. And, nowhere did the prosecutor argue that the jury should convict Caminiti because all physical discipline of infants and toddlers is criminal.

¶41 Consistent with the privilege as explained in ***Kimberly B.***, the instructions here informed the jury that it must assess reasonableness based on what an ordinary person in the parent's position would believe, considering *all* of the circumstances:

> The law allows a parent to use reasonable force to discipline that child. Reasonable force is that force which a reasonable person would believe is necessary.
>
> Whether a reasonable person would have believed that the amount of force used

> was necessary and not excessive must be determined from the standpoint of the parent at the time of the parent's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the parent's position under the circumstances that existed at the time of the alleged offense.
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

"We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶42 Caminiti's assertion that he was prosecuted based on a "per se" theory appears to be based primarily on the expert testimony that the prosecutor introduced and referenced during closing arguments. The prosecutor's experts were a medical doctor specializing in pediatrics and child abuse and a doctor of clinical psychology with extensive training and experience in child development.

¶43 The physician expert testified that the American Academy of Pediatricians does not recommend corporal punishment for children because it has been shown to have negative consequences and to be ineffective. She recommended against corporal punishment with an instrument because of the risk of physical injury if a parent gets carried away or

strikes the wrong body part. According to the physician expert, infants and young toddlers cannot control crying or moods. Also, children under 18 months old cannot associate pain with unwanted behavior and therefore it is not acceptable to use physical discipline on children under that age. The physician expert opined that children who are subjected to punishment as the children here were are subjected to child abuse.

¶44 The psychological expert testified that the Canadian Psychological Association forbids corporal punishment before age two and that the American Psychological Association is considering a proposal to forbid corporal punishment prior to age one. In addition, the psychological expert gave testimony generally tending to discredit the proposition that infants could engage in a "selfish cry" deserving of punishment and the proposition that corporal punishment was likely to be effective on infants and young toddlers.

¶45 It is obvious from our summaries of the experts' testimony that the *experts* would recommend the type of per se rule Caminiti is talking about. However, this does not show that Caminiti was prosecuted based on a per se theory, let alone that the jury reached its verdict based on such a theory.

¶46 Caminiti may be making an additional, implicit argument that the evidence was insufficient for the jury to find that the parents used an unreasonable level of discipline. If so, we disagree. Once

again, Caminiti mistakenly views the evidence in a light most favorable to him instead of to the jury's verdict. And, none of the supporting case law he cites involves comparable evidence of physical discipline directed at such young children.[7]

B. Whether The Circuit Court Erred By Admitting The Expert Testimony Or The Testimony That A Parent Pled Guilty To And Was Convicted Of Child Abuse

1. Expert Testimony

¶47 Caminiti argues that the circuit court erred by admitting the State's expert testimony and that the testimony was prejudicial. Caminiti argues that the expert testimony was irrelevant to the reasonable

---

[7] The case that comes closest is ***People v. Karen P.***, 692 N.E.2d 338 (Ill. App. Ct. 1998), but even then the facts are very different. In particular, the parent in ***Karen P.*** did not begin spanking the child with a wooden spoon until the child was two and a half years old, the spankings were administered over the child's clothes, and only once did the spankings result in a "very small" bruise, when the child was about three and a half years old. *See* ***id.*** at 339, 346. The other cases that Caminiti cites are more dissimilar. *See* ***Doe v. Heck***, 327 F.3d 492, 504, 521-22 (7th Cir. 2003) (spanking of fourth-grade child with a spatula or plastic paddle); ***State v. Wilder***, 748 A.2d 444, 446-48, 456-57 (Me. 2000) (grabbing and squeezing nine-year-old child's shoulder, and grabbing and squeezing child's mouth firmly enough to leave bruising); ***State v. Adaranijo***, 792 N.E.2d 1138, 1138-40 (Ohio Ct. App. 2003) (slapping teen-aged child on the face, hitting child on the thigh, and threatening to severely beat the child without carrying out the threat).

defense privilege and was therefore inadmissible. The State appears to agree that the dispositive question regarding the admissibility of the expert testimony is whether it was relevant to the reasonable defense privilege.

¶48 Caminiti's more specific arguments are difficult to make sense of. He appears to concede that the reasonable discipline privilege is an objective standard but nonetheless argues that "this objective reasonableness determination must be based on facts known to the person asserting the privilege at the time of the alleged offense." He argues: "Because there is no evidence that Caminiti knew the experts' opinions or theories, developed over decades of specialized training, those opinions lacked any legitimate tendency to make any fact that is of consequence to this action any more or less likely." Accordingly, Caminiti seems to be arguing that the expert opinions have no probative value for purposes of the privilege because those opinions are not something Caminiti actually knew at the pertinent times.

¶49 We are uncertain why Caminiti focuses only on what *he* knew and not on what the *parents* knew. Regardless, the pertinent question is not whether the expert opinions are irrelevant because Caminiti or the parents did not know of those opinions. Rather, because the standard the jury was required to apply is a reasonable person standard, the pertinent question is whether the expert opinions are irrelevant to what a reasonable person of ordinary intelligence and prudence would believe

under all of the circumstances. *See* ***Kimberly B.***, 283 Wis. 2d 731, ¶32; WIS JI – CRIMINAL 950. As far as we can tell, Caminiti does not address the question that matters.

¶50 We could, then, end our analysis of the expert testimony here and conclude that Caminiti fails to show that the circuit court erred. However, we will assume, without deciding, that the circuit court erred by admitting the expert testimony that Caminiti complains of. Nonetheless, we conclude that any error in admitting the testimony was harmless because "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty'" even without the expert testimony. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 (quoted source omitted) (stating the harmless error test).

¶51 Our review of the eight-day jury trial shows that the prosecutor relied heavily on damaging fact-witness testimony, including that of investigating officers, parents, and former church attendees. The prosecution also benefitted from Caminiti's own incriminating testimony. The experts' testimony was not the centerpiece of the prosecutor's case.

¶52 In addition, during closing arguments the prosecutor made express reference to the privilege instruction the jury would receive, emphasizing that the jury's duty was to assess the reasonableness of the discipline from an ordinary person's perspective based on all of the circumstances, not to assess

reasonableness from the experts' perspective. The prosecutor said:

> I submit to you we're not here looking at reasonable discipline. You know what it is. You parents know what reasonable discipline is, and then here's the instruction [on reasonable discipline]. Very helpful. Very sensible. A parent can use reasonable force to discipline the child which is a force a reasonable person would believe is necessary. . . . A reasonable person. That's you. . . .
>
> . . . What would an ordinary person, an ordinarily intelligent and prudent person have believed in the parent's position under the circumstances that existed at the time of the alleged discipline. . . .
>
> Let's think about this for a minute. Ordinary, a person of ordinary intelligence and prudence. I think I'm looking at 15 of you right now.

¶53 It is true, as Caminiti points out, that the prosecutor referenced the expert testimony repeatedly during closing arguments. However, the references were for the most part brief. And, while the expert testimony was damaging, it was not nearly as damaging as the prosecutor's fact-witness testimony.

¶54 Simply put, much of the expert testimony only underscored what a person of ordinary intelligence and prudence would have already believed: that infants and young toddlers who cry, despite having been fed and changed, are not necessarily

being "selfish" or otherwise misbehaving, and that a reasonable person would not believe that such behaviors are likely to be corrected by the type of corporal punishment used here.

2. Testimony That Parent Pled Guilty To And Was Convicted Of Child Abuse

¶55 Caminiti argues that the circuit court erred by allowing the prosecutor to elicit testimony from one of the parent witnesses, Caminiti's brother John, that John had pled guilty to and was convicted of child abuse for conduct underlying some of the charges against Caminiti. The State appears to concede error. *See* ***State v. Smith***, 203 Wis. 2d 288, 296-97, 553 N.W.2d 824 (Ct. App. 1996) (when evidence of prior convictions is admitted for impeachment purposes, the "nature of the convictions is not to be discussed by the proffering party"). The State argues, however, that any error was harmless. We agree.

¶56 When we consider the other evidence against Caminiti, the prosecutor's closing arguments, and the jury instructions as already discussed, it remains clear beyond a reasonable doubt that a rational jury would have found Caminiti guilty without the plea-and-conviction evidence. *See* ***Deadwiller***, 350 Wis. 2d 138, ¶41. Moreover, as Caminiti acknowledges, the circuit court gave a limiting instruction explaining that:

> Evidence has been received that one of the witnesses in this trial has been convicted

> of a crime. The evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose.

Caminiti argues that the instruction was not a "proper" one because it was not sufficiently detailed. However, the fact that the instruction was not as detailed as Caminiti might have liked does not change our conclusion that any error regarding the plea-and-conviction testimony was harmless.

C. Whether Trial Counsel Was Ineffective By Failing To Object To Two Alleged Errors In The Jury Instructions

¶57 Caminiti argues that trial counsel was ineffective by failing to object to two aspects of the jury instructions. To succeed based on this argument, Caminiti must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Roberson***, 2006 WI 80, ¶¶24, 28, 292 Wis. 2d 280, 717 N.W.2d 111 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).

¶58 As we shall see, these arguments can be resolved solely with reference to the prejudice prong. We "may decide ineffective assistance claims based on prejudice without considering whether the [defendant's] counsel's performance was deficient." ***Id.***, ¶28. To show prejudice, Caminiti must show that there is "a reasonable probability that, but for counsel's

error(s), the result of the trial would have been different." ***Id.***, ¶29.

¶59 Caminiti's first ineffective assistance argument relates to the jury instruction on Count 1, the only count involving discipline by a non-parent. Caminiti's other argument relates to all counts.

1. Instruction For Count 1

¶60 Count 1 against Caminiti was based on discipline of a child by the child's mother's boyfriend, Kurtis Hahn. There is no dispute that the reasonable discipline privilege under WIS. STAT. § 939.45(5) did not apply to Hahn, and that the jury received no instruction on the statutory privilege with respect to Hahn. Caminiti argues, however, that trial counsel should have objected to the absence of a privilege instruction for Hahn because there is a similar common-law privilege that applies to individuals acting in place of a parent.

¶61 The State argues that counsel was not deficient because the pertinent law is unclear and that, even if counsel was deficient, Caminiti cannot show prejudice because the jury found Caminiti guilty on each of the other counts for which the statutory privilege was raised.

¶62 Caminiti's briefing does not provide a meaningful response to the State's no-prejudice argument. As far as we can tell, Caminiti appears to be arguing that any failure to instruct on an available

affirmative defense is tantamount to a failure to instruct on an element of the crime and, thus, per se prejudicial. However, Caminiti provides no authority that stands for this proposition. *Cf.* ***State v. Gordon***, 2003 WI 69, ¶¶40-41, 262 Wis. 2d 380, 663 N.W.2d 765 (overruling cases establishing a rule of automatic reversal when a jury instruction omits an element of the offense, and "return[ing] this issue to the realm of ***Strickland***'s prejudice analysis"). We consider his prejudice argument undeveloped at best, and reject it on that basis.

2. Instruction For All Counts

¶63 Caminiti's argument that applies to all counts relates to how the elements of conspiracy under WIS. STAT. § 939.31 interact with a privilege such as the reasonable discipline privilege and whether the jury was instructed accordingly. There is no dispute that the elements of conspiracy under § 939.31 and the elements of child abuse under WIS. STAT. § 948.03(2)(b) required the State to prove that Caminiti intended and agreed with another to intentionally cause bodily harm to a child. There is also no dispute that, because the reasonable discipline privilege was at issue, the State had to prove that the discipline was unreasonable.

¶64 Based on these undisputed points, Caminiti argues that the law required the State to prove – and correspondingly required the jury to be instructed – that Caminiti "could be convicted only if he intended

and agreed that the parents discipline their children unreasonably." Caminiti appears to be arguing that, to convict him of conspiracy, the State had to show that Caminiti intended and agreed that the discipline to be imposed would be unreasonable because the unreasonableness of the discipline is an element of the conspiracy crime. According to Caminiti, the jury instructions did not give the jury this information and trial counsel was, therefore, ineffective by failing to object to the instructions.

¶65 We disagree with Caminiti's analysis of the law and, therefore, disagree that there could be prejudice based on counsel's failure to object to the jury instructions for all counts. Although the State had to prove that the discipline was unreasonable, the State's burden on the affirmative defense does not make the unreasonableness of the discipline an element of child abuse or an element of the conspiracy crime.

¶66 If Caminiti means to make some other argument regarding how the jury was instructed on the nature of a conspiracy charge or the privilege, his argument is unclear. Suffice it to say that we are satisfied that the instructions adequately informed the jury of the elements of conspiracy and the nature of the privilege. Accordingly, we see nothing in Caminiti's arguments showing that counsel's failure

to object to those instructions was ineffective assistance.[8]

---

[8] In addition to the detailed reasonable discipline privilege instruction we have already described and an instruction on the child abuse elements, the jury received the following instruction on conspiracy:

> The defendant . . . is charged with having conspired to commit physical abuse of a child, intentionally causing bodily harm.
>
> Before you may find the defendant guilty of any count of conspiracy to commit physical abuse of a child, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present with regard to that count. . . .
>
> First, as to each count, that the defendant intended that the crime of physical abuse of a child be committed.
>
> . . . .
>
> . . . [T]he second element of conspiracy is as to each count, the defendant was a member of a conspiracy to commit physical abuse of a child.
>
> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. . . .
>
> . . . .
>
> The third element of conspiracy . . . [is] that one or more of the conspirators performed an act toward the commission of the intended crime. . . .

This instruction largely tracked the pattern jury instruction. *See* WIS JI – CRIMINAL 570.

D. Cumulative Error And Interest Of Justice

¶67 Caminiti agues [sic] that we must consider the cumulative effect of all errors. Consistent with our discussion above, we will assume error in the admission of the expert testimony and take as conceded error in the admission of testimony that a parent pled guilty to and was convicted of child abuse. Considering this assumed and conceded error cumulatively does not change our conclusion that any error was harmless.

¶68 Finally, Caminiti argues that we should exercise our discretionary authority to reverse in the interest of justice. However, Caminiti's argument on this topic adds nothing to arguments that we have already rejected. Accordingly, we decline to reverse in the interest of justice.

Conclusion

¶69 In sum, for all of the reasons stated above, we affirm the judgment convicting Caminiti of the eight counts of conspiracy to commit child abuse. We also affirm the order denying his motion for postconviction relief.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.

APPENDIX B

STATE OF WISCONSIN:	CIRCUIT COURT:	DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

PHILIP B. CAMINITI,

Defendant.

Hon. Maryann Sumi
Case No. 11-CF-479

ORDER

(Filed Mar. 20, 2013)

For the reasons stated on the record on March 20, 2013, Philip B. Caminiti's Motion for Post-Conviction Relief is DENIED.

Dated at Madison, Wisconsin, this 20th day of March, 2013.

BY THE COURT:

/s/ Maryann Sumi
Maryann Sumi
Circuit Court Judge

Order Denying.wpd

APPENDIX C

STATE OF WISCONSIN — CIRCUIT COURT DANE COUNTY Branch 2

STATE OF WISCONSIN,	)	Case No: 11-CF-479
Plaintiff,	)	MOTION HEARING
vs.	)	
PHILIP B. CAMINITI,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings of the above-entitled action held before the HONORABLE MARYANN SUMI, Circuit Court Judge, 215 South Hamilton Street, Madison, Wisconsin, commencing on March 20, 2013.

APPEARANCES

SHELLY J. RUSCH and GREG VENKER, Assistant District Attorneys, 215 South Hamilton Street, Madison, Wisconsin, appearing on behalf of the Plaintiff.

ROBERT R. HENAK and ELLEN HENAK, Attorneys at Law, 316 N. Milwaukee Street, Milwaukee, Wisconsin, appearing on behalf of the defendant, PHILIP B. CAMINITI, appearing in person in custody.

Melanie D. Nelson, RPR
Circuit Court Reporter

[69] THE COURT: Okay. Thank you. Now a year after the trial has occurred, in reviewing the many, many pretrial motions, motions made at trial, and then as you recall we had a posttrial evidentiary hearing that was addressed to whether once again the constitutional issues as developed at trial would change the result, and as you recall we took testimony from, gosh, up to and including a nationally recognized expert on faith based organizations, Mr. Balmer, and following that another decision on the constitutional issues was rendered here.

All constitutional issues at this point have been thoroughly addressed both pre and post [70] trial, and they have been decided multiple times by this Court. Nothing in the arguments made, including the new argument today on due process changes the result that this prosecution was valid. There was nothing unconstitutional about it. The statute itself is not unconstitutional.

I think at this point all of the constitutional issues are well positioned for appellate review. If an appellate court determines that these are issues that this Court decided wrongly, it is, of course, free to do so. The record is there to support the appellate court going forward, and all arguments, now all factual bases for any argument are part of the record now ready for appeal. So those constitutional issues, motions regarding them are denied once again.

* * *

[73] THE COURT: Well, I take the post-conviction motion just as you are portraying it. It is an opportunity for a Court to revisit given the [74] passage of time whether decisions that were made during trial, pretrial, posttrial, were sound decisions.

For the constitutional issues, I believe I have just stated that nothing in even the new matter in the motion persuades me that these issues have been decided incorrectly, so I'm declining to reconsider earlier rulings and rejecting the new argument made today.

* * *

APPENDIX D

STATE OF WISCONSIN — CIRCUIT COURT DANE COUNTY BRANCH 2

* * * * * * * * * * * * * * * * * *

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 11-CF-479

PHILLIP B. CAMINITI,

Defendant.

* * * * * * * * * * * * * * * * * *

DATE: May 10, 2012

PROCEEDINGS: Motion Hearing

BEFORE: The Honorable **MARYANN SUMI**

APPEARANCES

SHELLY RUSCH and **GREG VENKER**, Dane County Assistant District Attorneys, Dane County Courthouse, Madison, Wisconsin, appearing on behalf of the State

DEFENDANT appearing in person and with Attorney **JEFF SCOTT OLSON** and Attorney **YOLANDA LEHNER**, Madison Wisconsin

Also Present: **SARAH FUREY CRANDALL**

Reported by Geri Holmes
Official Court Reporter

* * *

[88] THE COURT: Okay. Thank you. As we all know from reading the Yoder, Miller, Noesen, a whole host of cases including Peace Lutheran Church, there is a well-known test for determining whether a statute or the application of a statute violates the freedom of conscience, or the freedom of expression clause of the United States Supreme Court. Freedom of conscience clause is a product of the Wisconsin Constitution.

The test is that a challenger must show that he or she has a sincerely held religious belief that is burdened by the application of the State law at issue. And right now we're focusing on those first two points because those are the defendant's burden.

Now, I do accept the proposition that the defendant has a sincerely held religious conviction about the use of the rod as part of obedience to scripture but also as a part of the way one lives a life and has a family.

But it's the religious part of it that I need to focus on. Dr. Balmer's testimony today did, helpfully I think, place the defendant's religious beliefs in a broader context, and also testified I think persuasively that within that context what the defendant believes is not an aberration within that context.

I think between Pastor Caminiti's testimony [89] and as supplemented by Dr. Balmer, I am persuaded that that first part of the test is met and that there is a sincerely and deeply held religious conviction that does require the use of the rod.

That takes us to the second part of the test, which is the defendant's burden, and I hate the multiple use of the word burden here, I'll use it only this one time when I'm talking about burden of proof. The burden of proof here is to show that the application of the child abuse statute to him places a burden on his sincerely held religious belief.

It's helpful to look at *State vs. Miller* in this context. *State vs. Miller* is the Amish vehicle case, and in that case the Amish people who were prosecuted believed that their religion prohibited them from displaying what they called a loud and worldly sign on their vehicles, and that was SMV, slow-moving vehicle. There was testimony in the *Miller* case that the Amish people believed that a loud and worldly display was a violation of deeply held religious beliefs. And in fact, the State conceded that point. So the issue in *Miller* took off only after the State had already conceded meeting the first and second tests.

So there's not much in the *Miller* case about what it means to be burdened. But what is there is the [90] testimony that the people who were going to be required to use this sign, this loud sign, felt so strongly that they would leave the State and would go to a different place rather than having to make the choice to disobey what they regarded was a strong religious proscription.

By contrast, the *Peace Lutheran Church* case, that faltered on the first test, whether there was a

sincerely held religious belief. That case involved the use of I think it was smoke detectors or a sprinkler system in the actual worship area of the church. And the court, the reviewing court said well, no, we can't say that there is a sincerely held belief in the Lutheran church that worship areas not have sprinkler systems in it. It sounds overly simplistic and almost silly when I'm saying it now, but the court said no, we cannot find that that is a sincerely held religious belief. So they then denied the challenge.

They did talk a little bit more in *Peace Lutheran* about what it means to burden though, and this is what I want to read you from the case, and I apologize that it's a lengthy quote, but I think it really says more eloquently than anything I could say as to what it means when you're talking about a burden on a religious conviction, even a deeply held religious conviction.

[91] The court says, "Free exercise of religion does not necessarily mean the right to act freely in conformity with a religion. The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. The United States Supreme Court has never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. Nor has the United States Supreme Court ever held that when otherwise prohibitable conduct is accompanied by a religious conviction, not only the convictions but the

conduct itself must be free from governmental regulation."

So here we have our court and above it the United States Supreme Court making that very strong distinction between the right to believe and even the right to profess those beliefs to anyone that you choose and the right to act in conformity with those beliefs when it violates the criminal law.

Now, in this case, unlike the *Miller* case, the practitioners of the Aleitheia Bible Church doctrine are not being told to affirmatively do something that violates belief, as the Amish were being told to do. Instead, the law tells them to refrain from conduct that [92] they believe the religion proscribes. I think that's a little bit of a difference. And what makes it I think even difficult, more difficult in this case to find that there is a burden on that religious conviction is that Pastor Phil Caminiti testified at trial, and I wrote down these exact words, and they were I think repeated again today, "Scripture doesn't specify how and where the rod should be used."

So when you couple that with the fact that the law is not dictating conduct here, it is only saying refrain from this conduct, and then on top of that, Pastor Caminiti has conceded that scripture doesn't specify how and why and when the rod should be used, I come to the conclusion that the defendant has not met his burden to show that the application of the child abuse statute as it was applied here places a burden on his sincerely held religious belief.

Although his belief in the use of a rod is a sincerely held religious belief, his testimony shows that there is not a firmly held religious belief on the how and why and when of the rod.

In addition, Pastor Caminiti has indicated a willingness to modify conduct to fall within the restraints, the proscriptions of the law, and I think by itself – or not by itself, but that creates an [93] additional argument against a burden on the exercise, the free exercise of religion. Again, the State should not, cannot and has not in this case placed any limit on the ability to express and advocate for a particular religious belief. The law does, however, proscribe the conduct that may flow from that expression of belief.

So for those reasons, I do deny the motion to dismiss on that ground, finding that the first prong of the test was met but not the second. We do not need to move to the third and fourth, and I'll simply leave it at that.

MR. OLSON: Your Honor, I want to make a remark because I don't want to be construed to have waived anything. I note the court's emphasis on the aspect of the *Miller* decision in which the adherents of that religion were talking about leaving the State in order that they might be able to freely practice their religion. In Exhibit 7, when Reverend Caminiti wrote to the law enforcement officers in question, and in the context of the temporary hiatus in the use of the rod, he also said that the congregation would have to

consider whether moving to another state would be required.

THE COURT: Understood. And I think that was testimony at trial. But when that is coupled with a [94] willingness to modify behavior so as to fall within the constraints of the law, that is not something that the Amish were willing to do. So – but I appreciate the distinction, and again, it is already of record from the trial. So thank you.

(WHICH CONCLUDED THE PROCEEDINGS)

APPENDIX E

[SEAL]

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August 4, 2014

To:

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Dane County Circuit
Court Judge
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Br. 2, RM. 7105
Madison, WI 53703

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You are hereby notified that the Court has entered the following order:

No. 2013AP730-CR

State v. Caminiti
L.C.#2011CF479

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Philip B. Caminiti, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court