STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2084-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. OATMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE MARC A. HAMMER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because this case presents an issue of first impression in Wisconsin regarding the constitutionality of Wis. Stat. § 948.14, which prohibits a registered sex offender from

intentionally photographing a minor without parental consent.

STATEMENT OF THE CASE

Defendant-appellant Christopher J. Oatman, is a registered sex offender who was convicted in 2002 of first-degree sexual assault of a child (3:1; A-Ap. 101). He was charged in 2013 with sixteen counts of being a registered sex offender who intentionally photographed a minor without the consent of the minor's parent, contrary to Wis. Stat. § 948.14(2)(a), and with one count of burglary (3:1-10; A-Ap. 101-10).

According to the amended criminal complaint, Oatman's parole agent seized a digital camera and a digital video camera from Oatman's apartment (3:7-8; A-Ap. 107-08). A search of those devices revealed images of six children ranging in age from three to sixteen that were taken just outside Oatman's residence (3:1-10; A-Ap. 101-10). Most of the images focused on the children's crotch or buttocks areas (3:8-9; A-Ap. 108-09).

Oatman filed a motion to dismiss the photographing-a-minor charges, arguing that Wis. Stat. § 948.14 is unconstitutional as applied and on its face under the First Amendment and Article I, § 3 of the Wisconsin Constitution (10:1-8). The circuit court denied the motion in a written decision and order (24:1-9; A-Ap. 121-29). The court held that the capturing of an image was not speech or expressive conduct protected by the First Amendment (24:3-4; A-Ap. 123-24).

The court alternatively held that if the First Amendment were implicated, the statute is

content neutral and is therefore subject to intermediate scrutiny (24:5-6; A-Ap. 125-26). The court concluded that the statute survives intermediate scrutiny, finding that the State "has a legitimate, significant interest in shielding its children from these improper sexual deviants" and that the statute is narrowly tailored because it applies "*only* to capturing the representation of minors and *only* when parental consent is not obtained" (24:6; A-Ap. 126). The court added that if the statute were deemed content based, it would survive strict scrutiny because "protecting children from the harmful impulses and advances of convicted sexual offenders is not only a 'significant' interest, but one of the most *compelling* interests a government can have" (24:8; A-Ap. 128).

The circuit court then addressed Oatman's overbreadth challenge. It held that "[t]he restrictions imposed by section 948.14 are far from substantial" because the statute "is not broadly applied to the general population, but narrowly designed to apply only to convicted sex offenders who are required to register" and because "the statute only marginally hinders an offender's ability to engage in image capturing because it only restricts capturing the image of a minor when parental consent is not obtained," leaving unaffected "[a]ll other avenues of photography, and all other modes of expression" (*id.*).

Oatman filed a petition for leave to appeal that order (26:1-11), which the court of appeals denied (28:1). After the denial of his petition, Oatman was convicted pursuant to a "confessional stipulation" of burglary and eight counts of

photographing a minor without parental consent (45:1-2; 55:1).[1]

ARGUMENT

Oatman renews on appeal his as-applied and facial challenges to Wis. Stat. § 948.14 under the First Amendment and article I, section 3, of the Wisconsin Constitution. For the reasons discussed below, this court should conclude that

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[1]Oatman's trial counsel described the proceeding leading to his conviction as "basically a stipulated bench trial based on facts stated in the probable cause portion of the amended criminal complaint" (73:8). The circuit court described that proceeding as a plea pursuant to a "confessional stipulation," which the circuit court noted "has all the markings of a plea" (73:4) and said that it "would treat as a plea of guilty" (73:15).

Oatman was concerned with preserving his constitutional challenge for appellate review (45:1-2; 73:8-10). That concern was partially justified. A guilty plea does not waive a defendant's ability to challenge the facial validity of the statute, but it does waive the right to challenge the constitutionality of a statute as applied. *See State v. Cole*, 2003 WI 112, ¶46, 264 Wis. 2d 520, 665 N.W.2d 328.

This court need not decide whether the guilty plea waiver rule bars Oatman's as-applied challenge. The guilty plea waiver rule is a rule of administration and does not involve the court's power to address the issues raised. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. In the "confessional stipulation" signed by the parties, the State agreed not to assert the guilty plea waiver rule on appeal (45:2). Consistent with that agreement, the State does not ask this court to refrain from deciding Oatman's as-applied challenge.

the statute is not unconstitutional either on its face or as applied to Oatman's conduct.[2]

I. THE FIRST AMENDMENT DOES NOT PROTECT PRIVATE, NONCOMMUNICATIVE PHOTOGRAPHY.

As the party challenging the constitutionality of Wis. Stat. § 948.14, Oatman "has the initial burden of showing that the statute regulates protected speech, thus implicating the First Amendment." *State v. Hemmingway*, 2012 WI App 133, ¶12, 345 Wis. 2d 297, 825 N.W.2d 303. He has not carried that burden.

Oatman's challenge to the statute rests on the premise that he has a "First Amendment right to create non-obscene, non-pornographic photographs or videos recording public images of children" because "creating photographic and video images constitutes expressive conduct subject to First Amendment protection." Oatman's brief at 16. That premise is incorrect because "the taking of photographs or videography, without more, is not protected by the First Amendment." *Larsen v. Fort Wayne Police Dep't*, 825 F. Supp. 2d 965, 979 (N.D. Ind. 2010); *accord*, *McKay v. Federspiel*, 2014 WL 7013574, *8 (E.D. Mich. 2014); *Porat v. Lincoln Towers Community Ass'n*, 2005 WL 646093 (S.D.N.Y. 2005), *aff'd*, 464 F.3d

[2]As Oatman correctly notes, *see* Oatman's brief at 9, the Wisconsin Constitution provides the same free speech protections as the First Amendment. *See State v. Robert T.*, 2008 WI App 22, ¶ 6, 307 Wis. 2d 488, 746 N.W.2d 564. The State's arguments below apply equally to both the state and federal constitutions.

274 (2d Cir. 2006); *Montefusco v. Nassau County,* 39 F.Supp.2d 231, 242 n.7 (E.D.N.Y. 1999).

The federal court's decision in *Porat* provides a persuasive explanation for that conclusion. In *Porat*, the plaintiff was a "photo hobbyist" who was taking pictures of a residential complex from the street. *Porat*, 2005 WL 646093, *1. A security guard approached Porat, asked if he was a resident of the complex, and told him that management policy did not permit nonresidents to take pictures of the building. *Id*. (The reason for the prohibition, Porat was later told, was "security concerns after 9/11." *Id*.). Porat then entered the public courtyard of the complex and took more pictures. *Id*. A second guard asked Porat why he was taking the pictures, and Porat responded that he was doing so for "aesthetic and recreational reasons." *Id*. The security guards detained Porat and, after police arrived, Porat was ticketed for trespassing. *Id*. The ticket was later dismissed. *Id*., *2.

Porat filed a civil action alleging a variety of claims against a number of defendants, including the police officers who ticketed him. *Id*., *1. He alleged that the officers violated his First Amendment rights by issuing him a trespass ticket in retaliation for engaging in conduct protected under the First Amendment. *Id*. The court held that Porat's claim failed because, among other reasons, he failed to show that he had an interest protected by the First Amendment. *Id*., *4.

The court noted that "although communicative photography is well-protected by the First Amendment," Porat's complaint alleged that he was taking the photographs for his own

personal use. *Id*., *4. The question, therefore, was "whether the First Amendment protects purely private recreational, non-communicative photography." *Id*. The court concluded that it did not, explaining:

> It is well established that in order to be protected under the First Amendment, images must communicate some idea. *See Texas v. Johnson,* 491 U.S. 397, 404 (1989); *Bery* [*v. City of New York*], 97 F.3d [689,] 694 [(2d Cir. 1996)]. To achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 568 (1995); *Montefusco v.. Nassau County,* 39 F.Supp.2d 231, 242 (E.D.N.Y.1999). "Without an element of expression, there is no risk to the speaker or creator of art that his or her ideas or messages will be unlawfully extinguished . . . in contravention of the First Amendment." *Id.* (internal quotations omitted).
>
> Plaintiff's Complaint satisfies neither element of this standard. He effectively disclaims any communicative property of his photography as well as any intended audience by describing himself as a "photo hobbyist," (Compl.¶ 16), and alleging that the photographs were only intended for "aesthetic and recreational" purposes. (Compl., ¶ 26) Although Plaintiff cites a number of cases that protect photography under the First Amendment, each of these cases is distinguishable in that the "speaker" intended to communicate a message to an audience, an intent that is not alleged here.
>
> * * *

> These cases all concerned protected First Amendment conduct not because the plaintiffs used cameras, but because the cameras were used as a means of engaging in protected expressive conduct. They do not, as Plaintiff suggests, stand for the proposition that the taking of photographs, without more, is protected by the First Amendment. Therefore, Plaintiff fails to satisfy the first element of the Section 1983 First Amendment retaliation standard, an interest protected by the First Amendment.

Id., *4-5.

Another federal district court reached the same conclusion in *Larsen*. In *Larsen*, the plaintiff's daughter was performing in a choir performance at public school. *See Larsen*, 825 F.Supp.2d at 968-69. Larsen wished to videotape her performance, but was told by a member of the organizing group and by a police officer that no videotaping was allowed. *Id.* at 969-70. After Larsen became argumentative, officers removed him from the building and arrested him for disorderly conduct and resisting law enforcement. *Id.* at 972-73. Those charges were later dismissed. *Id.* at 973.

Larsen then filed a 42 U.S.C. § 1983 action against the officers and a school official alleging a number of claims, including a claim that the defendants violated his rights under the First Amendment by prohibiting him from videotaping the choir performance. *Id.* at 967-68, 979. The court dismissed that claim, holding that Larsen had no right under the First Amendment to videotape the performance. The court explained:

> "It is well established that in order to be protected under the First Amendment, images must communicate some idea." *Porat*

v. Lincoln Towers Cmty. Ass'n, No. 04 Civ. 3199(LAP), 2005 WL 646093, at *4 (S.D.N.Y. Mar. 21, 2005). More specifically, to achieve protection under the First Amendment, a plaintiff must show that he possessed (1) a message to be communicated, and (2) an audience to receive this message, regardless of the medium in which the message is to be expressed. *Hurley v. Irish–Am. Gay, Lesbian, & Bisexual Group of Boston,* 515 U.S. 557, 568, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Porat,* 2005 WL 646093, at *4. Therefore, the taking of photographs or videography, without more, is not protected by the First Amendment. *Porat,* 2005 WL 646093, at *5; *Gilles v. Davis,* 427 F.3d 197, 212 n. 14 (3rd Cir. 2005) (stating that videotaping does not constitute a protected First Amendment activity unless it "gather[s] information about what public officials do on public property" or "has a communicative or expressive purpose"). The First Amendment is not implicated because a person uses a camera, but rather, when that camera is used "as a means of engaging in protected expressive conduct," *Porat,* 2005 WL 646093, at *5, or, less commonly, to "gather information about what public officials do on public property", *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir.2000).

Here, Larsen does not argue that he was attempting to express or communicate an idea through his proposed videography of the show choir invitational or that he was gathering information about what public officials do on public property. Rather, he stated that he wanted to videotape the performance simply for his personal archival purposes, that is, "for family documentation of [his daughter's] childhood". (Resp. Br. 11.) The First Amendment, however, does not protect purely private recreational, non-communicative photography. *Porat,* 2005 WL 646093, at *5; *see Dreibelbis v. Scholton,* No. 4:CV 05–2312, 2006 WL 1626623, at *3–4 (M.D. Pa. June 7, 2006); *Montefusco v.*

> *Nassau County,* 39 F.Supp.2d 231, 242 n. 7 (E.D.N.Y.1999). Therefore, Larsen's proposed videography does not qualify for First Amendment protection. *Cf. Davis v. Stratton,* 575 F.Supp.2d 410, 421 (N.D.N.Y.2008) (finding plaintiff's act of videotaping his preaching of the Gospel on a college campus protected by the First Amendment because it communicated a message and he later posted the recordings on the web), *reversed on other grounds by,* 360 Fed. Appx. 182 (2nd Cir. 2010).

Id. at 979-80.

As these cases demonstrate, Oatman's assertion that the First Amendment protects the act of taking a photograph or making a video recording is overly broad. The First Amendment protects photography or videography done with a communicative or expressive purpose, *see Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005), but not the capturing of images done purely for personal purposes.

Oatman argues that in *State v. Stevenson*, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90, the court "implicitly recognized that creating of video or photographic image constitutes expressive conduct protected by the First Amendment." Oatman's brief at 21. This is so, he contends, because the court held in *Stevenson* that the statute that prohibited taking a photograph or video of a person in a state of nudity without the person's consent was facially overboard. *Id*. He argues that "to even consider whether the statute in question was overbroad, the *Stevenson* court had to first conclude that creating video images constituted protected expression." *Id*.

The State reads *Stevenson* differently. The *Stevenson* court held that the defendant's conduct – surreptitiously videotaping his former girlfriend in the nude – "is given no protection under the First Amendment." *Stevenson*, 236 Wis. 2d 86, ¶16. The court concluded that the statute was overbroad because it "not only properly prohibits Stevenson's surreptitious videotaping of his former girlfriend in the nude, but also improperly prohibits all visual expression of nudity without explicit consent, including political satire and newsworthy images." *Id*., ¶21.

The *Stevenson* court held that the statute "does not limit its reach to original depictions of nudity but rather overreaches to all reproductions." *Id*., ¶22. The court found the statute "indiscriminately casts a wide net over expressive conduct protected by the First Amendment" because "[i]t chills the ability to include copies of masterpieces like Michaelangelo's [sic] 'David' in a book devoted to famous sculptures and also prevents the dissemination of materials that may portray nudity for health or educational purposes." *Id*.

Stevenson's holding rests, therefore, not on a holding that the initial act of taking a photograph or making a video recording is protected by the First Amendment but on the court's finding that the statute "overreaches to reproductions" such as art books and health and educational publications. Those activities have a communicative or expressive purpose. It is that communicative or expressive conduct that is constitutionally protected.

If the taking of photographs and video recordings for purely personal use were protected

by the First Amendment, the State would concede that Wis. Stat. § 948.14 is overly broad. The statute is content based, as it applies only to capturing images of children. The statute would be subject to strict scrutiny, requiring the State to demonstrate that the statute is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *State v. Baron*, 2009 WI 58, ¶¶15, 45, 318 Wis. 2d 60, 769 N.W.2d 34. The State does not believe it could satisfy that burden. While the State has a compelling interest in protecting children, the statute is not narrowly drawn because it applies to all registered sex offenders, including those with no history of abusing children.

But for the reasons discussed above, the First Amendment does not protect the capturing of images for purely personal purposes. With that limitation in mind, the State will address Oatman's claims that Wis. Stat. § 948.14 is unconstitutional as applied to his conduct and on its face.

II. SECTION 948.14 IS CONSTITUTIONAL AS APPLIED TO OATMAN.

There is nothing in the record that suggests that Oatman was photographing the neighborhood children, focusing on their crotch and buttocks areas, for anything other than his personal gratification. As Oatman acknowledged in his motion to dismiss, the images at issue "were recovered from a cell phone, digital camera, memory card and camcorder found in Oatman's possession" (10:2) following a search of his residence by his probation and parole agent and

an examination of the devices by a detective (3:8-9). Oatman did not assert in his motion to dismiss that he took the pictures of the children for any reason other than his personal use (10:1-8). Because the First Amendment "does not protect purely private recreational, non-communicative photography," *Larsen*, 825 F. Supp. 2d at 980, the statute prohibiting Oatman from photographing the children without their parents' consent is not unconstitutional as applied to Oatman's conduct.

III. SECTION 948.14 IS CONSTITUTIONAL ON ITS FACE.

A. Applicable legal standards.

A statute may be challenged on its face as overbroad even by a party whose conduct is clearly unprotected if the statute infringes on a substantial amount of speech or expressive conduct protected by the First Amendment. *Hemmingway*, 345 Wis. 2d 297, ¶11 (citing *New York v. Ferber,* 458 U.S. 747, 769 (1982)). "However, finding a statute invalid because of overbreadth should not be done lightly." *State v. Robert T.*, 2008 WI App 22, ¶7, 307 Wis. 2d 488, 746 N.W.2d 564. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, the Supreme Court has recognized that the overbreadth doctrine is 'strong medicine' and has employed it with hesitation, and then 'only as a last resort.'" *Id.* (quoting *Ferber*, 458 U.S. at 769) (brackets omitted).

"[T]he Supreme Court 'insist[s] that the overbreadth involved be "substantial" before the

statute involved will be invalidated on its face.'" *Id.* The overbreadth must be substantial "not only in an absolute sense, but as judged in relation to the statute's legitimate sweep." *Hemmingway*, 345 Wis. 2d 297, ¶11 (citing *United States v. Williams,* 553 U.S. 285, 292 (2008)). "Marginal infringement or fanciful hypotheticals of inhibition that are unlikely to occur will not render a statute constitutionally invalid on overbreadth grounds." *Stevenson*, 236 Wis. 2d 86, ¶14.

"The overbreadth claimant bears the burden of demonstrating, 'from the text of the law and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (brackets and quoted source omitted); *see also Hemmingway*, 345 Wis. 2d 297, ¶11 ("The party challenging a statute as overbroad has the burden to show substantial overbreadth.").

B. Oatman has not shown that the statute is facially overbroad.

Oatman's facial overbreadth argument relies on his assertion that the mere act of taking a non-obscene or non-pornographic image of a child is protected by the First Amendment. As discussed above, if the court were to agree with that contention, the State would concede that the statute is overly broad. *See supra*, pp. 11-12. But if, as the State contends, the First Amendment does not protect capturing images for personal use, the statute is not overbroad because Oatman has not shown that the statute prohibits a substantial amount of constitutionally protected communicative conduct.

In *Stevenson*, the court held that the statute prohibiting taking pictures of nude individuals without the person's consent was overly broad because the statute "indiscriminately casts a wide net over expressive conduct protected by the First Amendment," observing that the statute chilled the ability to include copies of Michelangelo's 'David' in a book about sculptures and prevented the dissemination of materials that portrayed images of nudity for health or educational purposes. *See Stevenson*, 236 Wis. 2d 86, ¶22. But unlike the statute at issue in *Stevenson*, which applied to everyone, *see id.*, ¶16, Wis. Stat. § 948.14 applies only to registered sex offenders.

Perhaps there are some registered sex offenders who wish to photograph children for use in artistic, educational, or health related publications or for other communicative or expressive conduct protected by the First Amendment. Such an individual, if charged with violating Wis. Stat. § 948.14, would be free to raise an as-applied challenge to the statute. But Oatman has not argued, much less shown, that a substantial amount of the conduct prohibited by the statute involves anything other than images taken for personal use. He has failed, therefore, to carry his burden of demonstrating that the statute is substantially overbroad.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 22nd day of April, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,501 words.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of April, 2015.

_____
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Assistant Attorney General