STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP002084-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. OATMAN,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and Sentences Entered in the Circuit Court, Brown County, the Honorable Marc A. Hammer, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The Convictions Entered on Eight Counts of Violating Wis. Stat. § 948.14, Which Prohibits a Registered Sex Offender from Photographing a Minor Without Written Parental Consent, Must be Vacated Because the Statute is Unconstitutional on its Face and as Applied to Mr. Oatman in that it Substantially Restricts and Burdens Protected Expression in Violation of the State and Federal Constitutions

A. Introduction.

The state and Mr. Oatman agree that Wis. Stat. § 948.14 is not content-neutral and not narrowly drawn to serve a compelling government interest, and is thus unconstitutional if it restricts speech. Appellant's Brief at 22-23, 26-31, Respondent's Brief at 12. Indeed the state does not explain how the statute advances *any* government interest, suggesting only that it somehow aids in "protecting children." Respondent's Brief at 12.

The state defends Mr. Oatman's conviction on a single ground: that the taking of photographs receives no First Amendment protection unless the photographs are to be shared with others. From this premise, the state concludes both that Mr. Oatman's conduct was unprotected and that the statute is not overbroad because it does not reach a substantial amount of constitutionally protected conduct.

As this reply will show, the state's starting premise is flawed. Photography is protected by the First Amendment whether or not the photographs are meant to be exhibited. But even were it not so, the statute remains overbroad, because it

outlaws, for every registrant, a broad range of protected First Amendment activities.

B. The First Amendment protects the right to take photographs.

The state cites two federal trial court decisions to argue that photography intended for personal use receives no First Amendment protection: ***Porat v. Lincoln Towers Community Ass'n***, 2005 WL 646093 (S.D.N.Y. 2005), and ***Larsen v. Fort Wayne Police Dep't***, 825 F. Supp. 2d 965 (N.D. Ind. 2010). (The other cited cases, ***McKay v. Federspiel***, 2014 WL 7013574 (E.D. Mich. 2014), and ***Montefusco v. Nassau County***, 39 F.Supp.2d 231 (E.D.N.Y. 1999), also rely on those decisions.) Respondent's Brief at 5-10.

Porat and ***Larsen*** contain substantively identical discussions. These discussions are identically flawed; the cases they rely on do not support the propositions for which they are cited. ***Porat*** cites ***Texas v. Johnson***, 491 U.S. 397, 404 (1989), and ***Bery v. City of New York***, 97 F.3d 689, 694 (2d Cir. 1996), for the statement "[i]t is well established that in order to be protected under the First Amendment, images must communicate some idea." In fact, the cited discussion in ***Johnson*** (a case concerning the burning of the U.S. flag) is about expressive *conduct*, not the creation of images, which are inherently expressive. ***Johnson***, 491 U.S. at 404; SETH F. KREIMER, PERVASIVE IMAGE CAPTURE AND THE FIRST AMENDMENT: MEMORY, DISCOURSE, AND THE RIGHT TO RECORD, 159 U. Pa. L. Rev. 335, 372 (2011) ("[T]he requirement of identifying a 'message conveyed' is generally applied by the Court only to conduct that is not considered 'inherently expressive.'" The cited ***Bery*** language, meanwhile, expressly *rejects* the notion that an image must

convey a "particularized message." 97 F.3d at 694. In fact the opinion goes on to say just the opposite: "[P]aintings, photographs, prints and sculptures … always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." ***Id.*** at 696. ***Larsen*** simply cites ***Porat*** for the same unsupported proposition.

Both ***Larsen*** and ***Porat*** go on to cite ***Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston***, 515 U.S. 557, 568 (1995) for the holding that "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." ***Larsen***, 825 F. Supp. 2d at 979, ***Porat***, 2005 WL 646093, *4. Once again, a search for that proposition in the cited passage comes up empty, revealing only the colorful observation that "a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, 'if a parade or demonstration receives no media coverage, it may as well not have happened.'" ***Hurley***, 515 U.S. at 568. And, once again, the cited case actually undermines the reasoning of ***Larsen*** and ***Porat***, rejecting the contention that the First Amendment only protects images with a message for some particular audience:

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 569 (citation omitted).

Relying solely on these shaky authorities, the state refuses to acknowledge the contrary case law cited in Mr. Oatman's opening brief: ***State v. Bonner***, 61 P.3d 611, 612 (Idaho App. 2002) (statute forbidding photography of minor child with intent to arouse lust unconstitutionally overbroad; "it is clear that the creation of photographs, paintings, and other nonverbal productions is expressive activity that ordinarily qualifies for First Amendment protection"); and ***Ex Parte Thompson***, 442 S.W.3d 325, 336 (Tex. Crim. App. 2014) ("photographs and visual recordings are inherently expressive, so there is no need to conduct a case-specific inquiry into whether these forms of expression convey a particularized message"). And it offers an untenable reading of ***State v. Stevenson***, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90. Though the ***Stevenson*** court did indeed note that the statute at issue there would forbid the printing of art and educational books involving nudity, these were not the only examples it gave of protected activity: it also noted the taking of a well-known photograph. ***Id.***, ¶¶18, 21.

In the state's view, the *production* of expressive works is not protected by the First Amendment; to be protected, they must be shared with others. This view, if accepted, would produce some odd results. Would Mr. Oatman's ostensibly illegal photographs become lawful if he posted them on the internet? On the other hand, could the government punish the citizen for thoughts expressed in a private diary? *See* ***Baughman v. Saffle***, 24 F. App'x 845, 848 (10th Cir. 2001) (prisoner's diary received First Amendment protection).

In ***Stanley v. Georgia***, the United States Supreme Court considered a man's conviction for possessing obscene movies in his home. 394 U.S. 557, 558 (1969). Despite prior cases holding that obscene materials receive no

First Amendment protection, and despite recognizing "a valid governmental interest in dealing with the problem of obscenity," the Court threw out the conviction. ***Id.*** at 562-63. In doing so it spoke of the citizen's "right to read or observe what he pleases… in the privacy of his own home." ***Id.*** at 565.

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> …Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Id. at 565-66.

Mr. Stanley's movies received First Amendment protection despite the lack of any intent to share them with others, because he had the right to view what he liked—even obscene material, which is generally not protected—in his own home. Mr. Oatman's photos and movies, concededly not obscene, are entitled to the same, if not greater, protection.

C. Even if private photography receives no First Amendment protection, the statute is overbroad.

The state has conceded that if private photography falls within the First Amendment, the statute is overbroad. Respondent's Brief at 12. But even if private photography is not protected, the statute remains overbroad.

The state's sole argument against overbreadth consists of an attempt to distinguish ***Stevenson*** by noting that the statute at issue there applied to everyone, while Wis. Stat. § 948.14 applies only to registered sex offenders. Respondent's Brief at 14-15. This view must be rejected. A person on the sex offender registry retains full First Amendment rights. ***Doe v. Harris***, 772 F.3d 563, 570-71 (9th Cir. 2014). But by the state's view, *any* restriction of a sex offender's speech (or, for that matter, religion) is permissible, since it does not apply to the general public. Surely the First Amendment does not permit the government to outlaw any speech it likes, so long as it is only outlawed for a small (and unpopular) minority.

Moreover, the state's argument fails to acknowledge the sprawling scope of Wis. Stat. § 948.14. The state seems to assume that only the making of photographs and movies is prohibited, but this is not so. By the statute's terms, a registrant commits a crime if he or she "takes a photograph, makes a motion picture, videotape, or other visual representation*, or records or stores in any medium data that represents a visual image*" of a minor. Wis. Stat. §§ 948.14(1)(a), (2)(a); 942.09(1)(a) (emphasis added). Not, it must be recalled, a *nude* minor—*any* minor. Under the statute as written, it is a felony for a registrant to, for example, record *It's a Wonderful Life* from a television

broadcast or to download the Wisconsin Blue Book (available at http://legis.wisconsin.gov/lrb/bb/13bb/Feature.pdf (*see* p. 140)).

The First Amendment protects not only the right to express ideas, but the right to receive them. ***Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico***, 457 U.S. 853, 867 (1982). The ***Stevenson*** court had no difficulty holding a broad restriction on portrayals of nudity unconstitutional. Wisconsin Stat. § 948.14's sweeping ban on images of those under 17 must likewise be struck down.

CONCLUSION

For the reasons set forth above, Mr. Oatman respectfully requests the Court to declare Wis. Stat. § 948.14(2)(a) unconstitutional and to vacate the convictions and sentences entered on counts 1, 2, 3, 6, 7, 9, 12, and 15, and to remand the case to the trial court with directions to dismiss these charges.

Dated this 11th day of May, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,753 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 11th day of May, 2015.

Signed:

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