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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP2770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERT J. CHAGNON,

Defendant-Appellant.

**ON PRETRIAL APPEAL FROM AN ORDER ENTERED IN
WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE
SCOTT C. WOLDT, CIRCUIT JUDGE, PRESIDING**

**PLAINTIFF-RESPONDENT STATE OF WISCONSIN'S
BRIEF-IN-CHIEF**

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Statement on Oral Argument and Publication

The State doesn't request oral argument. The briefs-in-chief fully address the issues on appeal, and fully develop the relevant theories and legal authorities on each side.

This court should publish its decision and opinion. Proper construction and application of Wis. Stat. § 948.14 are matters of

statewide concern and interest. Wis. Stat. (Rules) §§ 809.23(1)(a)1. and 5.

District III also has facial and as-applied First Amendment challenges to Wis. Stat. § 948.14 pending in *State of Wisconsin v. Christopher J. Oatman*, No. 2014AP2084-CR. The State doesn't oppose consolidating this case with *Oatman*, or holding the decision here in abeyance until District III decides *Oatman*.

Issue Presented

Wisconsin law prohibits registered sex offenders from intentionally *capturing a representation* of a minor without parental consent. Chagnon, a registered sex offender, allegedly clipped photographs of young girls out of print publications, mounted them in a notebook, and added handwritten, graphic sexual comments. He claims this conduct doesn't constitute capturing a representation because he didn't create the original images of children. Is he right?

Relevant Statutes

Wisconsin Stat. § 948.14 (Registered sex offender and photographing minors) provides in pertinent part:

(1) DEFINITIONS. In this section:

(a) "Captures a representation" has the meaning given in s. 942.09 (1) (a).

....

(2) PROHIBITION.

(a) A sex offender may not intentionally capture a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian. The written consent required under this paragraph shall state that the person seeking the consent is required to register as a sex offender with the department of corrections.

Wisconsin Stat. § 942.09 (Representations depicting nudity) provides in pertinent part:

(1) In this section:

(a) "Captures a representation" means 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.

....

(c) "Representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

Argument

I. A registered sex offender who intentionally clips photographs of young girls out of print publications, mounts them in a notebook, and adds handwritten, graphic sexual comments, captures a representation under Wis. Stat. §§ 942.09 and 948.14.

A. Introduction.

Corrections officers inventoried Chagnon's personal property before his scheduled release from Oshkosh Correctional Institution. They found a small notebook containing pictures of young girls, clipped from a newspaper and magazines and mounted on the pages. Chagnon had written graphic, sexual comments on many of the pages (1:11-14; 12; 14:4-8, 11-15).

Chagnon's a registered sex offender from Oneida County (1:14). Law enforcement officers identified some of the young girls as dance students pictured in a Minocqua newspaper (14:8-9, 17-18). The officers confirmed lack of parental consent to Chagnon's conduct (14:6-8, 18). He now faces twenty-three counts of violating Wis. Stat. § 948.14. (9).

Chagnon challenged the sufficiency of the criminal complaint as to those twenty-three charges. He claimed the statute applies only to registered sex offenders who photograph or film children, or who record or store such images digitally (3:1-2). The circuit court disagreed and denied Chagnon's motion to dismiss the charges (7; 15:3-5).

Chagnon successfully petitioned for leave to appeal the circuit court's order (11).

The parties now ask this court to interpret Wis. Stat. § 948.14. Does Chagnon's alleged conduct fall within the scope of the statute?

It does.

"A cardinal rule in interpreting statutes is to favor a construction that will fulfill the purpose of the statute over a construction that defeats the manifest object of the act." *Burlington Graphic Systems, Inc. v. DWD, Equal Rights Division*, 2015 WI App 11, ¶ 8, 359 Wis. 2d 647, 859 N.W.2d 446 (citation and quotation marks omitted). Wis. Stat. § 948.14 addresses four harsh realities.

First, sex offenders can use mundane pictures to fantasize and fuel deviant sexual attractions. "It is commonly believed that pedophiles should not have pictures of children because such pictures fuel their sexual attraction to children and leads to increased attraction." *Tran v. Kriz*, No. 08-C-0228, 2009 WL 5125222 at *6 (E.D. Wis. Dec. 18, 2009). "For example, a catalogue showing pictures of preadolescent children in underwear is arousing to some pedophiles." Georgia Cumming & Maureen Buell, *Supervision of the Sex Offender* 29 (1999).

CCAP records reveal Chagnon's prior conviction for possession of child pornography in Oneida County Circuit Court Case No. 2002CF166.

A registered sex offender sexually attracted to children could easily eroticize mundane pictures. The graphic, handwritten sexual annotations in Chagnon's notebook (12) leave no doubt as to why he

created and kept it. *See also* 14:13-14 (preliminary examination testimony regarding Chagnon's sexual attraction to young girls).

Second, no "cure" exists for sex offenders. Standard treatment focuses on behavior management. That includes separating offenders from situations that could lead to reoffending:

Sexual abuser-specific treatment is designed to assist clients with effectively managing thoughts, fantasies, feelings, attitudes, and behaviors associated with their potential to sexually abuse. In addition to reducing risk for sexual and/or non-sexual recidivism, treatment is designed to assist clients with developing a prosocial lifestyle that is inconsistent with offending.

Association for the Treatment of Sexual Abusers, *ATSA Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sexual Abusers* 29 (2014).

Third, most sex offenders remain in or return to the community. "In light of the rapid growth of civil commitment laws that attempt to significantly delay imprisoned sex offenders from returning to the community, it may come as a surprise to many that most convicted sex offenders remain in or return to the community rather than being held in prison." Kim English, *The Containment Approach to Managing Sex Offenders*, 34 *Seton Hall L. Rev.* 1255, 1256 (2004).

And finally, sex offender treatment sometimes fails.

Wisconsin Stat. § 948.14 responds to these realities. It addresses the type of conduct allegedly committed by Chagnon—conduct with no social utility, and a likely precursor to reoffending. It protects potential victims, and may provide sex offenders with an additional incentive to manage their behavior. "Offenders are expected to assume full responsibility for the damage they inflict and to take measures to prevent future abusive behaviors. The threat of criminal justice consequences helps motivate the non-voluntary clients to engage fully in treatment." English, 34 *Seton Hall L. Rev.* at 1266.

Here, Chagnon distinguishes *creating* an image of a child from *possessing* an image of a child. The statute criminalizes the first, says Chagnon, but not the second. “Under § 948.14, it is the creation, not mere possession, of an image of a child by a registered sex offender that is prohibited.” Chagnon’s brief-in-chief at 9. He asserts that he possessed the pictures in his notebook, and that’s it.

But Chagnon did far more than just possess pictures.

Read in tandem, Wis. Stat. §§ 942.09 and 948.14 say that if a registered sex offender intentionally makes a visual representation of a child, or records or stores, in any medium, data that represents a visual image of a child, he’s captured a representation. He’s created something.

That’s what Chagnon did.

The State’s allegations and preliminary proof support two theories of criminal liability:

- Chagnon made visual representations of twenty-three children by clipping their pictures from various sources—newspapers, magazines, other print publications—and mounting them in his notebook. By removing the pictures from their original source and mounting them in a different location, in a different context, and then adding his own comments, he created new visual representations.
- Chagnon stored data that represented a visual image of a child in a medium. The clipped pictures constituted data that represented a visual image of a child. His notebook? The medium. The operative words—*visual, representation, record, store, medium, data, and image*—all have meaning outside the worlds of photography and digital imagery. They all apply to the fact situation present here.

The State concedes that the legislature probably had sex offenders photographing or filming children in mind when they considered and passed Wis. Stat. § 948.14. It didn’t foresee how a sex offender like Chagnon, imprisoned without access to cameras

and children, might create his own visual representations out of the materials available to him.

But that lack of foresight doesn't matter. In the absence of specific limiting language, statutory provisions apply to all situations fairly included within their terms. *State v. Badzmierowski*, 171 Wis. 2d 260, 263-64, 490 N.W.2d 784 (Ct. App. 1992). "If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application." 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* 414-415 (7th ed., 2012) (footnote omitted).

Chagnon's alleged conduct falls well within the scope of the statute, as demonstrated below.

B. The standard of appellate review and the relevant principles of statutory construction.

Statutory construction presents a question of law, reviewed de novo. *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320, ¶12, 856 N.W.2d 811.

"Statutory interpretation begins with the language of the statute, and, if the language is unambiguous, we apply the statute's plain language to the facts at hand." *Id.* at ¶ 13. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted). "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sentence, and with the meaning commonly attributed to them." *Id.* at 485-86.

The legislature's decision not to define specific terms in a statute doesn't render it ambiguous. Reviewing courts will interpret nontechnical words and phrases according to their common, approved usage. *Hemp*, 359 Wis. 2d 320, ¶ 12. Dictionary definitions will suffice. *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, ¶ 17, 850 N.W.2d 66.

The legislature's decision not to exempt certain conduct from operation of the statute gives it broader application. Wisconsin Stat. § 948.14 contains no language limiting the way in which a sex offender may *capture a representation*. In the absence of such limiting language, the provision applies to all situations fairly included within its terms. See *Badzmierowski*, 171 Wis. 2d at 263-64; *Hanson v. Eichstaedt*, 69 Wis. 538, 546, 35 N.W. 30 (1887). This court should not exclude situations or fact scenarios from operation of a statute simply because they may not have been the primary focus of the provision. *State v. Cornelius*, 152 Wis. 2d 272, 278 n.1, 448 N.W.2d 434 (Ct. App. 1989). "It is the spirit or intention of the statute which should govern over the literal meaning of the language used. The object to be accomplished by the statute must be given great weight in determining the legislative intent." *Town of Menominee v. Skubitz*, 53 Wis. 2d 430, 437, 192 N.W.2d 887 (1972) (citations omitted).

C. The relevant, undefined statutory terms—*visual, representation, record, store, medium, data, and image*—all have common, approved dictionary definitions.

The New Oxford American Dictionary (2nd ed., 2005) defines each key term in Wis. Stat. § 942.09:

- *Visual*: "[O]f or relating to seeing or sight . . . [A] picture, piece of film, or display used to illustrate or accompany something."
- *Representation*: "[T]he depiction of someone or something in a picture or other work of art . . . {A} thing, esp. a picture or model, that depicts a likeness or reproduction of someone or something[.]"
- *Record*: "[S]et down in writing or some other permanent form for later reference, esp. officially[.]"
- *Store*: "[K]eep or accumulate (something) for future use[.]"
- *Medium*: "[A] means by which something is communicated or expressed."

- *Data*: “Data was originally the plural of the Latin word *datum*, ‘something (e.g. a piece of information) given.’ Data is now used as a singular where it means ‘information’[.]” See also *The American Heritage Dictionary of the English Language* (3rd ed. 1992) (defining *data* as “[f]actual information, especially information organized for analysis or used to reason or make decisions”).
- *Image*: “[A] representation of the external form of a person or thing in sculpture, painting, etc.”

The key terms now properly defined, this court should conclude that Chagnon’s alleged conduct falls within the scope of Wis. Stat. 948.14.

D. A registered sex offender who intentionally clips photographs of young girls out of print publications, mounts them in a notebook, and adds handwritten, graphic sexual comments, captures a representation under Wis. Stat. §§ 942.09 and 948.14.

The State alleges that Chagnon *captured a representation* in at least two different ways.

First, he did it by making visual representations of minors. He found pictures of young girls in a newspaper and other print publications, clipped them out, and mounted them in his notebook. He removed the pictures from their original sources, mounted them in a different location, changed their context dramatically, and added a new visual component to them – his graphic sexual comments.

Chagnon says that “[u]nder § 948.14, it is the creation, not mere possession, of an image of a child by a registered sex offender that it prohibited.” Chagnon’s brief-in-chief at 9. That’s precisely what Chagnon did. That he used pictures taken by others doesn’t make it any less a creation. Artists routinely combine pictures and

images taken from various sources to create photomontages.¹ No one would seriously suggest the end product isn't the artist's creation, even though it includes images made by others.

Chagnon's no artist, but the technique's the same. He made—created—visual representations of minors.

Second, Chagnon captured a representation by storing data that represented visual images of a child in a medium.

He stored the pictures for his future use by mounting them in his notebook.

The data, or information, that represented visual images? The pictures themselves, clipped from the newspaper.

The medium? The notebook.

Chagnon's alleged conduct fits within the language of the statute. Again, the legislature may not have contemplated conduct like Chagnon's when it wrote Wis. Stat. § 948.14. They may have been worried about registered sex offenders taking pictures of children. "But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan v. United States*, 522 U.S. 398, 403 (1998). "[I]t is no bar to interpreting a statute as applicable that the question which is raised on the statute never occurred to the legislature." *Eastern Air Lines, Inc. v. Civil Aeronautics Board*, 354 F.2d 507, 511 (D.C. Cir. 1965) (citation and internal quotation marks omitted).

¹A "[t]echnique by which a composite photographic image is formed by combining images from separate photographic sources." http://www.moma.org/collection/theme.php?theme_id=10158 (last visited April 6, 2015).

Chagnon's alleged conduct falls within the scope of Wis. Stat. § 948.14. The circuit court didn't err in refusing to dismiss the twenty-three charges.

II. Chagnon has forfeited any constitutional objections to Wis. Stat. § 948.14.

Chagnon's original motion to dismiss the twenty-three counts (3) and his supplement (6) raised no constitutional issues or challenges to Wis. Stat. § 948.14. He asserted no constitutional challenges in his petition for leave to appeal.

Now, Chagnon asserts First and Fifth Amendment "constitutional problems" resulting from the State's interpretation of the statute. Chagnon's brief-in-chief at 10-12.

This court normally won't address claims not properly raised and argued in the circuit court. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140, 145 (1980). "This is especially so for a claim that a statute is unconstitutional." *City of Mequon v. Hess*, 158 Wis. 2d 500, 506, 463 N.W.2d 687 (Ct. App. 1990) (citation omitted).

No reason exists to relieve Chagnon from operation of this forfeiture rule. Chagnon didn't challenge Wis. Stat. § 948.14 on Fifth Amendment, void-for-vagueness grounds because he didn't consider the statute vague. He specifically claimed it didn't cover what the State alleged he did (3:1-2).

And as noted at page 2, *supra*, a First Amendment challenge has been properly preserved and briefed in *State of Wisconsin v. Christopher J. Oatman*, No. 2014AP2084-CR., now pending in District III.

Conclusion

"[P]rison does nothing about the fantasy and the planning" undertaken by men sexually fixated on children. "The obsession is maintained by constant masturbation to fantasies of children. The

inmate emerges from incarceration at least as deviant as he went in.”
Anna C. Salter, Ph.D., *Predators: Pedophiles, Rapists, and Other Sex Offenders* 70-71 (2003).

Chagnon proves the point. The State has alleged that he captured representations of young girls even while in prison, and tried to take them along as corrections staff prepared to close the prison gates behind him.

As drafted, Wis. Stat. § 948.14 helps protect society from such intractable sex offenders. This court should conclude that the statute covers Chagnon’s alleged conduct. It should affirm the circuit court order denying his motion to dismiss, and send the matter back to the circuit court so the prosecution may continue.

Dated at Madison, Wisconsin, 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 2,686 words.

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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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