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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP002770-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERT J. CHAGNON,

Defendant-Appellant.

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On Review of a Non-Final Order Entered  
in the Winnebago County Circuit Court on  
November 21, 2014, the Honorable Scott C. Woldt Presiding.

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REPLY BRIEF OF DEFENDANT-APPELLANT

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COLLEEN MARION  
Assistant State Public Defender  
State Bar No. 1089028

Office of the State Public Defender  
Post Office Box 7862  
Madison, WI 53707-7862  
(608) 267-5176  
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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## **ARGUMENT**

Possessing Photographs of Clothed Children Taken from Newspapers, Magazines, and Other Publications Does Not Constitute “Capturing” an Image and is Therefore Not a Violation of Wis. Stat. § 948.14.

The narrow issue in this case is, whether clipping out photos from publications, placing them in a notebook, and adding comments, constitutes “capturing a representation” of a child, for purposes of Wis. Stat. § 948.14, which prohibits a person listed on the sex offender registry from photographing a child without the consent of the child’s parents or guardian.

The State concedes that the Legislature likely did not have this scenario in mind when it created Wis. Stat. § 948.14 (State’s brief at 6). Instead, as the title of the statute reflects (“registered sex offender and photographing minors”), the purpose of the statute is to restrict registered sex offenders from taking photos or videos of children. It is undisputed that Mr. Chagnon did not photograph or video-record any children.

The State unpersuasively argues, however, that cutting out and keeping published photographs of clothed children is “fairly included” within the definition of “captures a representation.” (State’s brief at 7). The definition of “captures a representation” is set forth in § 942.09 and incorporated into § 948.14.

### **942.09 Representations depicting nudity.**

(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.

The State’s analysis of the definition of “captures a representation” is simplistic and misleading. The State pulls generic, dictionary definitions of the words “visual,” “representation,” “record,” “store,” “medium,” “data,” and “image.” (State’s brief at 8-9). This court does not need help understanding what the word “visual” means. Instead, the court is tasked with interpreting the statutory language “in the *context* in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (emphasis added).

Moreover, the State relies on a dictionary definition of the term “representation” even though the term is statutorily defined.<sup>1</sup> “Statutory language is “given its common, ordinary, and accepted meaning, *except that technical or specially-defined words or phrases are given their technical or special definitional meaning.*” *Bruno v. Milwaukee County*, 2003 WI 28, ¶8, 260 Wis. 2d 633, 660 N.W.2d 110 (emphasis added). “Representation” is a defined term under § 942.09(1)(c):

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

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<sup>1</sup> The State incorrectly asserts that “the relevant, *undefined* statutory terms—visual, representation, record, store, medium, data, and image—all have common, approved dictionary definitions.” (State’s response at 8) (emphasis added).

The dictionary definition provided by the State reads, “[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[.]”

The statutory definition of “representation” is narrower than the dictionary definition. Under § 942.09(1)(c), a “representation” is not just any depiction or likeness. Instead, it is something of the *same kind* as a picture, videotape, or exposed film. See *Cheatham v. State*, 85 Wis. 2d 112, 270 N.W.2d 194 (1978) (meaning of a general phrase when placed in a string of specific terms is limited to the “same kind, class, character, or nature, as those enumerated.”).

In context, the term “data that represents a visual image” means a digital version of the enumerated examples. For example, exposed film is the tangible image created by traditional photography. “Data that represents a visual image” is the digital equivalent—in other words, a digital photo.

This interpretation of the term “captures a representation” is supported by legislative history. The term was added to § 942.09 in 2001 Wisconsin Act 33. The corresponding assembly bill, 2001 Assembly Bill 60, contains an analysis by the Legislative Reference Bureau. The analysis explains that one of the changes being made by the bill was to expand the category of prohibited representations to include digital images. It states:

The bill expands the categories of representations that a person may not create, reproduce, possess, or distribute by prohibiting creation, reproduction, possession, or distribution of data representations of visual images *including computer programs and the stored memory of an image captured with a digital camera.*

(emphasis added).

In sum, the statutory definitions of “representation” and “captures a representation” do not encompass Mr. Chagnon’s alleged activity in this case. He did not capture an image of a child, and cannot be convicted of violating § 948.14.

Furthermore, the State’s position, if accepted, would render the statute unconstitutional as a violation of due process and the First Amendment. (See brief-in-chief at 10-11). The constitutional issues in this case have not been forfeited. Instead, they are part and parcel of Mr. Chagnon’s statutory construction claim. Under the canon of constitutional avoidance, a statute will be interpreted, if possible, so as not to run afoul of any constitutional protections. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. Moreover, it is in the interest of judicial economy for the court to consider the constitutional dimensions of the case. If this court upholds the circuit court, and if Mr. Chagnon is later convicted for these charges, he will raise his constitutional claims on direct appeal.

As argued in the defendant’s brief-and-chief (10-11), if the State’s position is correct, § 948.14 violates due process because it is so vague that it fails to provide the public with fair notice of what constitutes prohibited conduct. *State v. Smith*, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997). Building on a hypothetical presented in the brief-and-chief on page 11, consider a situation in which a parent who is on the sex offender registry receives a toy catalog in the mail. The parent reads through the catalog and circles a photo of children playing with a Lego set. She cuts out the photo and writes a note on it, “Bobby’s birthday.” She places it a notebook with other photos of children playing with various toys. Has she violated §948.14? The State’s position is that Mr. Chagnon “created something” when he removed the

pictures from their original source, mounted them in a different location, in a different context, and then added his own comments. (State's brief at 6). This is an unreasonable position.

Moreover, the State's interpretation of the statute violates the First Amendment. It is true that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002). However, the published photographs in this case do not fit any of these narrow exceptions. Statutes generally enjoy a presumption of constitutionality. "However, when a statute infringes on rights afforded by the First Amendment...the State shoulders the burden of proving the statute constitutional beyond a reasonable doubt." *State v. Weidner*, 2000 WI 52, ¶7, 235 Wis. 2d 306, 611 N.W.2d 684. The State has not met its burden in this case.

Regardless, if the court agrees that Mr. Chagnon's alleged conduct does not meet the statutory definition of "capturing a representation" the court does not need to decide the constitutionality of § 948.14.

Mr. Chagnon notes that the State's brief is in large part a policy argument about how terrible sex offenders are. (State's brief at 4-5, 11-12). The legislature is the proper venue for policy considerations. *See State ex rel. Cramer v. Schwarz*, 2000 WI 86, 236 Wis. 2d 473, 613 N.W.2d 591 ("Our duty to fulfill legislative intent ensures that we uphold the separation of powers by not substituting judicial policy views for the views of the legislature."). Moreover, a wide range of conduct can lead to sex offender registration in Wisconsin. Some infractions lead to automatic, lifetime

registration. But additionally, in Wisconsin, *any* violation or attempted violation of Ch. 940, 944, or 948 or s. 942.08 (invasion of privacy), 942.09 (representations depicting nudity), 943.01-943.15 (threats and damage to property) may subject a person to sex offender registration for 15 years if the circuit court finds that the conduct was “sexually motivated” and that registration would promote public safety. Wis. Stat. § 973.048(1m)(a).

In sum, § 948.14 concerns photographing and video-recording children. As the Legislative Reference Bureau’s analysis to the bill that created the law, 2005 Assembly Bill 251, states:

This bill prohibits persons who are required to register as sex offenders from intentionally photographing, filming, or videotaping any person under the age of 17 unless the parent, custodian, or guardian of the person under the age of 17 provides written consent.

Mr. Chagnon is not accused of “photographing, filming or videotaping any person under the age of 17.” Therefore, the criminal complaint in this case fails to state probable cause, even accepting the alleged facts as true. The described conduct involves simple possession of published images of clothed children. This conduct does not violate Wis. Stat. § 948.14. The complaint must be dismissed.

## CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Chagnon respectfully asks this Court to reverse the circuit court and remand with directions to dismiss counts 1-23 of the criminal complaint.

Dated this 7<sup>th</sup> day of May, 2015.

Respectfully submitted,

COLLEEN MARION  
Assistant State Public Defender  
State Bar No. 1089028

Office of the State Public Defender  
Post Office Box 7862  
Madison, WI 53707-7862  
(608) 267-5176  
marionc@opd.wi.gov

Attorney for Defendant-Appellant

## **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 1,612 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 7<sup>th</sup> day of May, 2015.

Signed:

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COLLEEN MARION  
Assistant State Public Defender  
State Bar No. 1089028

Office of the State Public Defender  
Post Office Box 7862  
Madison, WI 53707-7862  
(608) 267-5176  
marionc@opd.wi.gov

Attorney for Defendant-Appellant